

NEGLIGENCE, INADVERTENCE, AND MORAL RESPONSIBILITY: AN ASSESSMENT OF KING'S 'THE PROBLEM WITH NEGLIGENCE'

ALEJANDRO MOSQUEDA

Universidad Autónoma Metropolitana, Cuajimalpa (UAM-C)

mosquedaesparza.josealejandro@gmail.com

Abstract

This paper is an assessment of the conclusion that negligent agents are not morally responsible for the damages they cause, reached by Matt King in "The Problem with Negligence" (2009). King's argument involves two difficult issues that are often disregarded in discussions about moral responsibility. One is that it is not clear why we usually attribute responsibility in cases of negligence but not in cases of inadvertence even though both phenomena are characterized by the absence of conscious mental elements. The other is that any explanation of the responsibility attributed in cases of negligence and in paradigmatic cases should shed light on the features that both cases share. I will review these issues involved in King's argument in order to avoid his conclusion and to clarify some important matters of our attribution of responsibility in cases of negligence and in cases of inadvertence.

KEY WORDS: Negligence; Inadvertence, Standard of Conduct; Moral Responsibility.

Resumen

Este artículo es una evaluación de la conclusión de que los agentes negligentes no son moralmente responsables por los daños que causan, a la que llega Matt King en "The Problem with Negligence" (2009). El argumento de King involucra dos asuntos difíciles que con frecuencia son ignorados en las discusiones sobre responsabilidad moral. Uno es que no resulta claro por qué usualmente atribuimos responsabilidad en casos de negligencia, pero no en casos de inadvertencia a pesar de que ambos se caracterizan por la ausencia de elementos mentales conscientes. El otro es que cualquier explicación de la responsabilidad atribuida en casos de negligencia y en casos paradigmáticos debería echar luz sobre las características que ambos casos comparten. Revisaré estos asuntos involucrados en el argumento de King para evitar su conclusión y para aclarar algunas cuestiones importantes de nuestras atribuciones de responsabilidad en casos de negligencia y en casos de inadvertencia.

PALABRAS CLAVE: Negligencia, Inadvertencia, Estándar de Conducta, Responsabilidad moral.

1. Introduction

The argument that Matt King develops in "The Problem with Negligence" (2009) involves two difficult issues that are often

disregarded in philosophical discussions about moral responsibility. One is that there seems to be a tension between the attribution of moral responsibility that we usually make in ordinary cases of negligence and in ordinary cases of inadvertence, at least in Western culture. Although both negligence and inadvertence are characterized by the absence of conscious mental elements, we usually attribute moral responsibility only in ordinary cases of negligence. We need an explanation to clarify this point that is present in the first premises of King's argument. The other issue, exposed in the last premise of King's argument, is that any explanation of the moral responsibility attributed in ordinary cases of negligence must be consistent with the explanation of the moral responsibility attributed in ordinary intentional wrongdoing cases, in such a way that it can shed light on the features that both cases share. Intentional wrongdoing cases are paradigmatic cases of responsibility in which the presence of a mental element is important for the attribution of responsibility. And the hallmark of negligence is the lack of a conscious element. What features do these two cases share that make it consistent to attribute responsibility in both? As I will try to show, these two difficult issues play a key role in the argument used by King to conclude that negligent agents are not morally responsible for the damages they cause.

I think it is useful to pay attention to these two issues not only to avoid the conclusion reached by King in his paper, but also to identify some elements that are important to understand our attributions of moral responsibility in cases of negligence and in cases of inadvertence. Regarding the first issue, I argue in this paper that if we distinguish between negligence and inadvertence from what they refer to, we can explain why we usually attribute moral responsibility in ordinary cases of negligence and do not in some ordinary cases of inadvertence. Regarding the second issue, I propose that we can consistently explain our attributions of moral responsibility in ordinary cases of negligence and in paradigmatic cases of intentional wrongdoing based on two features: one is that in both cases what caused damage was an act or omission by the agent, and the other one is that in neither case do the agents meet the expectation of not unjustifiably damaging other people. With these two points, I try to avoid King's conclusion. But these two points also allow us to identify elements that are important in order to understand our attribution of moral responsibility in general, such as standards of conduct and expectations for some degree of consideration from others towards us.

2. The Problem with Negligence according to Matt King

In “The Problem with Negligence” (2009), Matt King argues that “the parallels between negligence and inadvertence suggest that negligent agents are not responsible for the harms they produce” (2009, p. 577). I have reconstructed King’s argument as follows:

- i) There is no satisfactory way to distinguish between ordinary cases of negligence and ordinary cases of inadvertence because both are characterized by the absence of conscious mental elements.
- ii) If there is no difference between cases of negligence and cases of inadvertence, then there should be no distinction in our attribution of moral responsibility in those cases.
- iii) This creates a dilemma: either (a) agents that negligently cause harm are not morally responsible for the harm they cause, or (b) agents that inadvertently cause harm are morally responsible for the harm they cause.
- iv) Since we need a general account of moral responsibility that can explain cases of negligence as well as paradigmatic cases of intentional wrongdoing, holding the second horn of the dilemma is problematic: it faces the significant hurdle of explaining responsibility in paradigmatic cases without appealing to conscious mental elements.

Therefore, negligent agents are not morally responsible for the harms they produce (*i.e.*, the first horn of the dilemma).

The first premise claims that, since both cases of negligence and cases of inadvertence are characterized by the absence of a conscious mental element, there is no satisfactory way to distinguish between them. The cases of negligence in which King is interested are characterized by the absence of certain conscious mental elements: the agent is not aware of the risk generated by his action and therefore does not intend to cause harm. Negligent agents “fail to pay appropriate attention to the possible consequences of their conduct, and thus substantially increase the risk of harm such conduct poses” (King 2009, p. 578). The lack of attention by this kind of negligent agents makes them unaware of the risk involved in what they are doing and consequently they cause damage that was not their intention to cause. King says, “we should consider [this kind of] negligence as characterized by the *failure* to consider the risk. The hallmark of [this kind of] negligence is the lack

of a conscious element” (King 2009, p. 578). King exemplifies this with the following case:

suppose that Nate, tired from waking up early, is backing out of his driveway. His thoughts turn to his meeting that day, and his attention is partially focused on a radio commercial. Due to his inattention, Nate doesn’t see a child walking to school and so hits him, breaking the child’s leg. Nate is negligent: he fails to pay proper attention to what he is doing and so risks harm to others, a risk that is unfortunately realized. Moreover, Nate seems both responsible and blameworthy for his negligent conduct. He is at fault because he didn’t pay attention, and as a result is morally responsible for the child’s injuries (King 2009, p. 578).

According to King, the absence of a conscious mental element that characterizes this kind of cases of negligence and is the result of the agent’s lack of attention in what he does is also what characterizes cases of inadvertence. To illustrate, King uses the following example:

Lenny is at a party where a group of friends are gathered watching a movie. There are more people than seats, and some are comfortable lying on the floor. Lenny gets up to get a soda from the fridge, and in the course of stepping around and over people, he inadvertently steps on his friend’s hand. He didn’t mean to step on his friend’s hand, but he was distracted by the movie, and so he did. Nevertheless, it seems Lenny’s responsibility in this case is undermined due to his inadvertence, which makes his stepping on the hand unintentional (King 2009, p. 588).

In Lenny’s action, the absence of a conscious mental element – that of intention – is also evident. Lenny did not intend to step on his friend’s hand because he did not notice that it was just where he was going to put his foot. But unlike what happened in Nate’s case, the inadvertence of Lenny undermines his moral responsibility to step on his friend’s hand. Lenny’s responsibility is undermined, according to King, because his inadvertence makes his stomping not intentional.

The second premise of King’s argument claims that not having a way to distinguish between cases of negligence and cases of inadvertence is in conflict with our ordinary practice of attributing moral responsibility because we usually deem the agent responsible in cases of negligence but we do not attribute responsibility in cases of inadvertence. The

analysis of the examples of Nate and Lenny seems to show that we “treat negligence as preserving responsibility, whereas inadvertence seems to undermine it. But if this is the case, then there must be a way to distinguish between Nate’s case and Lenny’s in a way that explains why Nate is responsible and Lenny is not” (King 2009, p. 588). According to King, the factor that makes negligence and inadvertence resemble is the lack of a conscious mental element that binds the agent to the result of his action. The negligent agent does not recognize the risk involved in his action while the inadvertent agent does not recognize a relevant fact that causes harm. But if both phenomena share the lack of a conscious mental element, why do they have a different effect on the corresponding attribution of moral responsibility?

King believes that it is possible to answer this question from the idea that negligent agents like Nate should pay more attention to what they do. Cases of negligence “involve a failure to do something the agent should have done” (King 2009, p. 589). There are two ways, according to King, to interpret this “should have”. On the first interpretation, it “means simply that it would have been better had Nate done what he failed to do” (King 2009, p. 589). It would have been better if Nate had paid more attention to backing up his car, so he would have noticed a child passing by on the sidewalk. As we assume Nate did not want to hit the boy with his car, in noticing that the child was behind him he would surely have stopped. “The problem with this first interpretation is that, while true of Nate’s case, it is equally true of Lenny’s case” (King 2009, p. 589). It would also have been better if Lenny had paid more attention to where he put his foot to avoid stepping on one of his friends who were sitting on the floor. This interpretation fails then to point out a difference between the cases of Nate and Lenny that could be used to justify that it is fair to ascribe responsibility in cases of negligence while it is not in cases of inadvertence.

On the second interpretation proposed by King “‘should have’ refers to some sort of standard that was violated” (King 2009, p. 589). With his lack of attention, Nate violated the standard of conduct that it would be reasonable to require from him when driving a car and, based on such a breach, he is responsible for the injuries he caused to the child. But, as with the first interpretation, King believes that “(i)f a standing of duty is sufficient for securing responsibility, then Lenny would seem to be responsible as well” (King 2009, p. 589). What King is looking for is an explanation that justifies our different treatment of negligence and inadvertence in our attributions of responsibility. But saying that Lenny also violated a standard of conduct only seems to show that there

really is no difference between these two kinds of phenomena. If both Nate and Lenny fail to meet a reasonable standard of conduct, then why is Nate considered responsible and Lenny not?

The third premise of King's argument is a dilemma that arises from the first two premises. Lacking an explanation of the differences between negligence and inadvertence that justifies the distinction in the attributions of moral responsibility concerning these phenomena, King thinks that "we're forced to conclude either that (a) negligent agents aren't responsible for the harms they cause, or (b) inadvertent agents are responsible for the harms they cause" (King 2009, p. 590). King believes there are good reasons to choose the first option. In favor of (a), he thinks "it is true that inadvertence seems to count as a consideration that undermines responsibility precisely because it involves the lack of a conscious mental element. When one does something only inadvertently, it is an unintentional result, one the individual didn't mean to bring about" (King 2009, p. 590). Since there is no satisfactory way to distinguish between inadvertence and negligence, then negligence should also count as a consideration that nullifies moral responsibility because, as inadvertence, it involves the absence of a conscious mental element.

The fourth and last premise of King's argument claims that it is problematic to hold that we can attribute moral responsibility in cases of negligence as well as in cases of inadvertence. King says that it could be argued that agents who inadvertently cause harm are also responsible for violating a standard of conduct. In this sense, the violation of a standard of conduct by Nate and Lenny suggests that both are responsible. However, King believes that anyone who is willing to defend (b) faces a significant hurdle: "the explanation for such responsibility *still* won't explain responsibility in paradigmatic cases. It is worth remembering that if negligence and inadvertence are indistinguishable from the perspective of responsibility, then both will require exceptional explanations since both are characterized by the absence of a conscious element" (King 2009, p. 591).

Paradigmatic cases of moral responsibility, according to King, require at least some conscious mental element that links the agent with the result of his action (see King 2009, p. 579). King takes paradigmatic cases of responsibility to be cases of intentional wrongdoing. "In such a case, an agent S brings about x by A-ing, and S intended to bring about x by A-ing" (King 2009, n. 4, p. 579). At least in this type of paradigmatic cases the presence of a conscious mental element – that of intention – is necessary to explain the responsibility that S has for x: S is responsible for x because he intentionally caused such a result by doing A. In

contrast, King believes that “negligence is unique in that it does not require consciously entertaining the risk one’s conduct poses. It only has to be the case that one’s conduct is unreasonably risky, not that one acted in the recognition that it was so” (King 2009; p. 578). In this sense, negligence abandons the conscious mental elements often required for attributing moral responsibility.

The problem in defending (b), according to King, is “that while negligence is characterized by the lack of a conscious mental element, paradigmatic cases of responsibility seem to require at least some conscious mental element tying the agent to the outcome in question” (King 2009; p. 579). For example, if I decide to steal a wallet, and then steal one intentionally, I am responsible for doing so at least partially because I did so intentionally and with full awareness. So, King says, “if Negligent Nate is responsible for the child’s injuries, but has no conscious mental state tying him to those injuries, we need some special explanation for how this could be so” (King 2009, p. 579).

King identifies an alternative to avoid this hurdle: *tracing*. According to this strategy, “responsibility for some conduct without the conscious mental element can be ‘traced back’ to some previous decision or action that does have the conscious mental element” (King 2009, p. 579). We can explain the responsibility that is attributed to an agent for some damage so long as we can trace the damage back to some prior action that included some relevant conscious mental element. Nevertheless, King points out that tracing will not work in cases of negligence because in such cases it is difficult to demonstrate what the initial choice is. For example, Nate “doesn’t choose to be inattentive, nor does he do anything else for which he is responsible that also obviously creates the condition of his inattentiveness” (King 2009, p. 581). Tracing fails as an explanation of moral responsibility for negligently produced outcomes because it requires tracing responsibility back to some conscious mental element. But, the cases of negligence in which King is interested are characterized “by a *lack* of conscious mental states, an unconscious inattention, and there need be no choices or decisions that contribute to that inattention. Thus, tracing is unable to help us explain responsibility for negligently produced outcomes” (King 2009, p. 587). Therefore, we cannot use tracing to avoid the hurdle that arises in defending (b).

If there is no satisfactory way to distinguish between cases of negligence and cases of inadvertence, then we need to choose between considering the agents that negligently cause harm as not morally responsible for the harm they cause or considering the agents that

inadvertently cause harm as morally responsible for the harm they cause. The hurdle facing anyone who is willing to take the second option is to explain responsibility in paradigmatic cases without appealing to conscious mental elements. And, in favor of the first option, inadvertence seems to count as a consideration that undermines responsibility precisely because it involves the lack of a conscious mental element. Then, it seems that, as King concludes, “negligent agents are not responsible for the harms they produce” (King 2009, p. 577).

In what follows, I will try to show, first, that there is a way of distinguishing between negligence and inadvertence despite both being characterized by the absence of conscious mental elements, against King’s first premise. This way of distinguishing such phenomena also allows us to explain why the lack of a conscious mental element has a different effect on the corresponding attributions of moral responsibility, against the second premise of King’s argument. Secondly, I will propose a general and consistent way to explain moral responsibility in paradigmatic cases without appealing to conscious mental elements, against King’s fourth premise.

3. Inadvertent Negligence and Inadvertence

One of the strategies that King analyzed in order to find a difference that justifies the distinction in our treatment of moral responsibility attributions in cases of negligence and inadvertence was based on the standards of conduct violated by the agent (see King 2009, p. 589). King dismissed this strategy because it did not show any difference between Nate’s negligence case and Lenny’s inadvertence case: “(i)f a standing of duty is sufficient for securing responsibility, then Lenny would seem to be responsible as well” (King 2009, p. 589). What King was looking for was an explanation that may justify our different treatment in the attribution of moral responsibility in these kinds of phenomena. If both Nate and Lenny fail to meet a reasonable standard of conduct, so why do we only attribute responsibility to Nate? I think this is a good strategy but the reason why it does not show the difference King is looking for is that Lenny’s example is also a case of negligence. In order to explain, based on this criterion, why we only attribute responsibility in cases of negligence, we need an example where the inadvertence of the agent does not constitute a violation of a reasonable standard of conduct.

In addition to the absence of risk awareness, the cases of negligence that interest King have another important feature: the agent’s breach of a reasonable standard of conduct. A reasonable standard of conduct

is not a set of clearly established rules that must be met in order to avoid harming others; it is rather a principle of action that demands taking the precautions that any reasonable person would take to avoid harming others. These types of precautions are impossible to codify, but we can usually appeal to a heuristic resource such as the following: a “precaution is required (...) if a *reasonably prudent person in the agent’s circumstances* would have taken it” (Rosen 2004, p. 301). This does not imply that agents are required to take “*every possible step*, no matter how costly, to ensure that no one is harmed by what you do. You are required only to take certain reasonable steps” (Rosen 2004, p. 301).

Appealing to the image of reasonable agent is not a strange resource, it is used daily and in many legal arguments. George Fletcher notes that one of the hallmarks of legal arguments is the widespread reliance on the use of the term ‘reasonable’:

We routinely refer to reasonable time, reasonable delay, reasonable reliance, and reasonable care. In criminal law, we talk ubiquitously of reasonable provocation, reasonable mistake, reasonable force, and reasonable risk. Within these idioms pulse the sensibilities of the reasonable person. Without this hypothetical figure at the center of the legal debate, we would be hard pressed to mount an argument about responsibility or liability (Fletcher 1996, p. 64).

Although it would be impossible to codify the precautions required by a standard of conduct, its scope is not totally unlimited. Limits are defined by the type of action that is carried out, the role played by the agent, the capabilities of the agent and the conditions under which he acts. Of course, there will be cases where there will be agreement in the precautions that are considered reasonable for the agent to take and there will be cases where there will be discussions. But in each case, it will be possible to determine the degree of conduct that would be reasonable to require from a person among the indicated factors.

We usually attribute moral responsibility in cases of negligence because the agent did not comply with some relevant standard of conduct that it would be reasonable to expect him to take in order to avoid harming others with his action. In Nate’s example, the damage to the child was something predictable that could have been avoided if he had taken reasonable precautions such as not being distracted, paying attention to his rear-view mirror and reversing his car at a speed that allows him to stop in case someone goes through. As Sverdlik points out, one feature of neglect cases is that the agent was able at some point in

the situation to acknowledge that there was a risk in acting in that way (see Sverdlik 1993, pp. 142-146).

H. L. A. Hart raises two questions to determine whether the agent was negligent, which support Sverdlik's statement: "Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken? (...) Could the accused, given his mental and physical capacities, have taken those precautions?" (Hart 2008, p. 154). By responding affirmatively to these two questions one shows that the damage caused by negligence was predictable and preventable. Had the agent complied with the standard of conduct that could be reasonably demanded from him, then he would surely have noticed the risk of his action and he might be expected to have tried to avoid possible harm. Saying 'Nate broke the child's leg with his car due to negligence', refers "to the fact that the agent failed to comply with a standard of conduct with which any ordinary reasonable man *could* and *would* have complied: a standard requiring him to take precautions against harm" (Hart 2008, pp. 147-148).

Damages generated by negligence, unlike those generated by accident (see Baker 1983, pp. 695-708), are predictable and can be avoided if the agent carries out the precautions that are required. If Nate had paid more attention to what was behind his car before safely backing it – assuming he did not have a malicious or indifferent attitude towards the child – he would not have hit the boy with his car. As Fletcher points out, the "basic idea is that a reasonable person would have paid closer attention to the cues of danger under the circumstances" (Fletcher 1998, p. 115). So, we support the attributions of moral responsibility to Nate for breaking the child's leg with his car based not only on the absence of risk awareness but also on the fact that such absence constitutes a breach of the standard of conduct that it would be reasonable to require when driving a car – and in the fact that it was Nate's action that caused the damage.

I think it is a mistake to assume that Lenny is not responsible simply because his inadvertence involves the absence of a conscious mental element, as King did. An important question for attributing moral responsibility in these types of cases is whether the inadvertence of the agents constitutes a violation of a reasonable standard of conduct. To determine whether an agent who inadvertently causes harm is responsible or not, it is necessary to know if such inadvertence constitutes a violation of a reasonable standard of conduct. If it does, then the agent is responsible. If it does not, then she is not responsible. As King suspected, Lenny's inadvertence also constitutes a violation

of a reasonable standard of conduct. Being among a group of people sitting on the floor, it would seem reasonable to require from him to pay attention to where he stepped, in order to avoid harming anyone. So, this example is a case of negligence, because Lenny's inadvertence constitutes a failure to comply with the standard of conduct that it would be reasonable to require. Against what King claimed, we can support the attribution of moral responsibility to Lenny for inadvertently treading on the hand of his friend based on a breach of the standard of conduct.

Lenny's example prevents finding a satisfactory way to distinguish between cases of negligence and cases of inadvertence by means of reasonable standards of conduct because it is a case of negligence by inadvertence. This does not imply that all cases of inadvertence constitute negligence. There are cases of inadvertence in which we do not attribute responsibility to the agent for the damages she caused; that is, cases where inadvertence does not constitute negligence because what the agent did does not constitute any violation of a reasonable standard of care.

Imagine that when Sybil is walking towards the theater, she inadvertently steps on fresh concrete in the sidewalk that the state government had just fixed. Sybil was distracted thinking about her performance that night, but there was no indication that the cement was still wet. Sybil's action is not intentional under the description 'Sybil stepped on fresh cement', because she did not want to step on it, nor did she know that the cement was fresh since there was no warning sign. A non-misleading description would be 'Sybil inadvertently stepped on fresh cement'. However, unlike Lenny's case, Sybil's inadvertence does not constitute negligence, given that it is not a failure to comply with some relevant standard of conduct. Because there was no warning sign indicating that the cement was fresh, it would not be reasonable to require Sybil to pay more attention to the sidewalk in order to notice where the cement is fresh.

Sybil's example shows that not all cases of inadvertence constitute negligence. This illustrates the distinctions pointed out by H. L. A. Hart about the adverbs 'inadvertently' and 'by negligence'. Hart explains that "(t)he point of the adverb 'inadvertently' is merely to inform us of the agent's psychological state" (Hart 2008, p. 147), whereas if we use 'negligently' or 'by negligence' "we are not merely adding to this an element of blame or reproach, but something quite specific, viz. we are referring to the fact that the agent failed to comply with a standard of conduct with which any ordinary reasonable man *could* and *would* have complied: a standard requiring him to take precautions against

harm” (Hart 2008, pp. 147-148). With ‘negligently’ or ‘by negligence’ we refer to the fact that the agent did not meet the standard of conduct that it would be reasonable to require, but we do not refer directly or necessarily to the psychological state of the agent. On the other hand, by using ‘inadvertently’ we refer to the agent’s psychological state, but we do not make direct or necessary reference to the breach of a standard of conduct on the part of the agent.

Therefore, we can distinguish between inadvertence and negligence from what they refer to: ‘inadvertently’ refers to the psychological aspect of the agent; while ‘negligently’ or ‘by negligence’ refers to the breach of a standard of conduct that it would be reasonable to require from the agent in the type of action that she is carrying out, the role that she plays, her capabilities and abilities, and the conditions under which she acts. It is possible that the same action can be correctly described using both ‘inadvertently’ and ‘by negligence’ – as in Lenny’s case – but the adverbs refer to different aspects. The fact that the same action can be correctly described using two different adverbs shows that there may be intersections between adverbs. An agent may be negligent due to his inadvertence – as Lenny –, but he may also be negligent because of his lack of attention – as Nate. Inadvertence cases will also be cases of negligence when inadvertence constitutes a failure to meet the standard of conduct that it would be reasonable to require from the agent in order to avoid harming others.

Against what King defends in the first premise of his argument, we can distinguish satisfactorily between cases of negligence and cases of inadvertence based on the distinction pointed out by Hart: with ‘negligence’ we refer to the breach of a reasonable standard of conduct, while ‘inadvertence’ refers to the psychological state of the agent. This way of distinguishing them also explains why we usually attribute responsibility in cases of negligence and do not attribute responsibility in some cases of inadvertence. We attribute responsibility in cases of negligence because the agent did not meet a reasonable standard of conduct. We also attribute responsibility in cases where the agent’s inadvertence constitutes a failure to comply with a reasonable standard of conduct. And we do not attribute responsibility in cases where the agent’s inadvertence does not constitute a violation of the reasonable standard of conduct. After all, appealing to the standards of reasonable conduct is a good strategy to justify our different treatments of attributions of responsibility in cases of negligence and in cases of inadvertence.

If this way of distinguishing negligence and inadvertence is correct, then there is no conflict, as King believes, in our practice of

attributing moral responsibility in cases of negligence and not doing so in cases of mere inadvertence (where the agent does not fail to comply with a reasonable standard of conduct), even though both phenomena are characterized by the absence of conscious mental elements. And so, the dilemma proposed in the third premise of King's argument does not arise. However, the hurdle that lurked in the fourth premise survives. It seems that it is still necessary to give a general and consistent explanation of why we attribute moral responsibility in cases of negligence as well as in paradigmatic cases.

4. A General Account of Responsibility for Negligence Cases and Paradigmatic Cases

King demands a general account of responsibility that can explain both the cases of negligence and the paradigmatic cases of intentional wrongdoing. Not two accounts, one for each. We cannot say, according to King, that an agent is responsible for some wrong action when he meets some set of conditions like doing so intentionally and with full awareness (in paradigmatic cases) *or* when he meets some different set of conditions like failing to comply with a standard of conduct with which any ordinary reasonable man could and would have complied (in cases of negligence). King points out two problems with this kind of disjunctive account. First, disjunctive accounts are *ad hoc* clauses to our theories that explain negligence responsibility as a special case. Second, this kind of disjunctive accounts

ignores the fact that in both cases the agent involved is supposed to be responsible for *x*. So if there's something interesting to the notion that both are responsible, that both deserve certain treatment *because* they are responsible, we should want our theory to explain why this is so in a way that sheds light on this shared feature of the cases. We should want a general explanation (King 2009; 587).

I think that such hurdle can be overcome. There are two important features of our attributions of responsibility that are present both in paradigmatic cases and in cases of negligence. The first, perhaps obvious, is that in both cases it was an act or omission of the agent that caused damage. The element of cause helps to solve King's concern to have an element that links the agent with the result in question. In the paradigmatic case mentioned by King (see 2009; 579), it was the agent's stabbing action that caused damage in another person. In the

case of Nate, it was his action to reverse his car that caused damage to the child. In both cases, what binds the agent to the result is that it was an action of the agent that caused the damage. No doubt the element of cause is not a sufficient condition to attribute responsibility, but it is sufficient to bind the agent with the result.

The second, perhaps less obvious, feature is that in both cases the agents do not meet the expectation of not unjustifiably damaging other people. I have pointed out that an important feature of negligence cases, in addition to the absence of intention and conscious mental elements, is that the agent does not meet the standards of conduct that it would be reasonable to demand. I have explained such standards as principles of action that suggest taking precautions that any reasonable person could and would take to avoid unjustifiably harming others. What seems to be behind such principles of action is a set of expectations of a certain degree of consideration that we demand from others and from ourselves. One of the expectations that is not met in cases of negligence is that of not unjustifiably damaging others with our actions or omissions. Nate did not meet the standard of behavior that it would be reasonable to demand from him when he did not pay attention to his rear-view mirror when reversing his car. Such a failure exhibits Nate's breach to meet the expectation of not unjustifiably damaging others. Similarly, the person who intentionally stabs another does not meet the expectation of not unjustifiably damaging others.

Perhaps, as Strawson pointed out in "Freedom and Resentment" (1974), our attributions of responsibility rest on, and reflect, an expectation and a demand for some degree of consideration from others towards us. This expectation is not met either in the paradigmatic cases of intentional wrongdoing or in cases of negligence. Failure to meet the expectation of not unjustifiably damaging others is then the feature that these two cases share and that allows us to explain consistently why we attribute responsibility in both cases. In paradigmatic cases, the agent does not meet this expectation because he intentionally causes unjustified harm to another person. In cases of negligence, the flaw is due to a failure to meet the standards of conduct that it would be reasonable to require from the agent.

5. Conclusions

I reviewed two difficult issues in King's argument that played a key role in concluding that negligent agents are not morally responsible for the damages they cause. The first was: why do we usually

attribute moral responsibility in cases of negligence but not in cases of inadvertence even though both phenomena are characterized by the absence of conscious mental elements. I said that we can explain our different treatment if we distinguish between cases of negligence and cases of inadvertence from what they refer to, as Hart pointed out. With 'negligence' we refer to the breach of a reasonable standard of conduct, and with 'inadvertence' we refer to the psychological aspect of the agent. This way of distinguishing them allows to explain that we attribute responsibility in cases of negligence because the agent did not meet a reasonable standard of conduct; we also attribute responsibility in cases where the agent's inadvertence constitutes a failure to comply with a reasonable standard of conduct; and we do not attribute responsibility in cases where the agent's inadvertence does not constitute a violation of the reasonable standard of conduct.

The second issue was that any explanation of the responsibility attributed in cases of negligence and in paradigmatic cases of intentional wrongdoing should shed light on the features that both cases share. To overcome this hurdle, I pointed out two important features that both cases have in common. The first feature is that in both cases it was an act or omission of the agent what caused damage. The second feature is that in both cases the agents do not meet the expectation of not unjustifiably damaging other people. We can use these two characteristics to explain consistently our attributions of moral responsibility in cases of negligence and in paradigmatic cases of intentional wrongdoing.

Clarifying the issues involved in the premises of King's argument was useful to avoid its conclusion. If we distinguish between negligence and inadvertence from what they refer to, then there is no conflict, as stated in the second premise of King's argument, in our practice of attributing responsibility in cases of negligence and not doing so in cases of mere inadvertence (where the agent does not fail to comply with a reasonable standard of conduct), even though both phenomena are characterized by the absence of conscious mental elements. And so, the dilemma proposed in the third premise of King's argument does not arise. In turn, the hurdle pointed out in the fourth premise can be overcome if we explain our attributions of responsibility in cases of negligence and in paradigmatic cases from the fact that it was an act or omission of the agent what caused the damage in question, and the fact that the agent did not meet the expectation of not unjustifiably damaging others.

Paying attention to these issues also helped to identify some elements that are important to understand our attributions of responsibility beyond the conscious mental elements, such as

the standards of conduct and the expectations for some degree of consideration that we demand from others and from ourselves. These elements have been key to explain why we attribute moral responsibility in cases of negligence and in some, but not all, cases of inadvertence. In paradigmatic cases of intentional wrongdoing, these elements can be ignored because we tend to focus on conscious mental elements (such as intention) to support and explain the attributions of corresponding responsibility; but we cannot deny their presence and significance even in such cases.

If we acknowledge that ‘negligence’ refers to the breach of a reasonable standard of conduct, then it is a little clearer why it is not unjust or unjustified to attribute responsibility in these cases. The important question about the agent’s responsibility in cases where we do not have the relevant conscious mental elements is whether the agent meets a reasonable standard of conduct that demands taking precautions that any reasonable person would take to avoid harming others. In cases of negligence, the agent in some way or another does not comply with such standard of conduct. For that reason, we are justified in attributing responsibility to people for damages that they negligently caused. In cases of negligence, the absence of relevant conscious mental states is not a proof against the corresponding attribution of responsibility but in favor of it since it shows that the agent did not meet a standard of conduct that it would be reasonable to demand.

Acknowledgements I would like to thank the anonymous referees for their careful reading and useful comments. Versions of this paper were presented at the Seminario POLETH (Political, Ethical, and Legal Theory) held at Instituto de Investigaciones Filosóficas at UNAM in May 2017; and at workshop “Excusas y atribuciones de responsabilidad moral” held at Universidad Autónoma de Aguascalientes (UAA) in May 2017. My thanks to the audience members at each of these meetings for pressing insightful criticisms, with special thanks to Itzel Mayans, Enrique Camacho, Mario Gensollen and Marc Jiménez Rolland.

References

- Baker, B. (1983), “The Excuse of Accident”, *Ethics*, 93 (4), pp. 695-708.
Fletcher, G. (1996), *Basic Concepts of Legal Thought*, New York, Oxford University Press.
Fletcher, G. (1998), *Basic Concepts of Criminal Law*, New York, Oxford University Press.

- Hart, H. L. A. (2008), *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford, Oxford University Press, 2nd ed.
- King, M. (2009), "The Problem with Negligence", *Social Theory and Practice*, 35 (4), pp. 577-595.
- Rosen, G. (2004), "Skepticism about Moral Responsibility", *Philosophical Perspectives*, 18, pp. 295-313.
- Strawson, P. F. (1974), "Freedom and Resentment", in Strawson, P. F. *Freedom and Resentment and Other Essays*, London, Methuen.
- Sverdlik, S. (1993), "Pure Negligence", *American Philosophical Quarterly*, 30, pp. 137-149.

Received 2nd August 2018; revised 6th March 2019; accepted 28th March 2019.