The Idea of Enterprise Liability

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Enterprise liability is often thought of as both peculiarly American and as a rejection of common law tort liability. These ideas are not wrong, but they are unbalanced and therefore misleading. To be sure, enterprise liability is an alternative to traditional fault liability, and it is often embodied in administrative alternatives to the private law of torts. It is also true that enterprise liability owes something to peculiarities of the American context—to the comparative underdevelopment of social insurance in America, for example. Yet, in America, enterprise liability was also the most important common law innovation of the twentieth century. And it was important: the significance of enterprise liability for American private law has been justifiably compared to the significance of the Warren Court for American public law. Enterprise liability was, and is, also common law. Vicarious liability in the law of torts is one of its two principal fonts, the common law of products liability is one of its principal incarnations and, in full flower, enterprise liability represents the fullest development of the idea of responsibility found in common law strict liability.

My aim in this paper is to offer an account of the enterprise liability idea, explain why enterprise liability is an oak sprung from the acorn of more traditional common law strict liabilities, and suggest why enterprise liability is both vindication of the common law’s enduring, enormous vitality and criticism of the common law. Even though enterprise liability is something of a peculiar America institution and a twentieth century institution at that, it is also an invaluable part of the common law’s stock of ideas and institutions. The emergence of enterprise liability in American tort law vividly illustrates two contradictory qualities of the common law of torts. First, the common law of torts embodies a small number of seemingly fixed ideas about responsibility for avoiding and repairing harm wrongly done. Second, the common law of torts is astonishingly plastic. Paradoxically, enterprise liability is both the fullest flowering of traditional tort ideas of strict responsibility for unavoidable injury and modern tort law’s most distinctive and original response to the emergence of a world in which harm is the routinized byproduct of indispensable activities. Enterprise liability has much, therefore, to teach us about the relevance and the limits of the common law of torts. On the one hand, enterprise liability bears witness to the common law’s enormous—and precious—capacity to remake itself in response to changed circumstances. The common law of torts is an inexhaustible wellspring of deep, powerful and adaptable ideas about responsibility for harm done. On the other hand, enterprise liability’s tendency towards embodiment in administrative regimes challenges the adequacy of the private law of torts. It suggests that tort law requires both reconstruction and partial replacement to address distinctively modern forms of risk.