The Fault(s) in Negligence Law

Alan Calnan
The Fault(s) in Negligence Law

Alan Calnan
Professor of Law
Southwestern Law School

March 2, 2007
The Fault(s) in Negligence Law

Professor Alan Calnan

ABSTRACT

According to conventional wisdom, negligence is a unique tort. It is different from strict liability because it is based on fault. Although it shares fault with intentional torts, negligence’s version of fault is different because it arises from the objective standard of reasonableness.

This orthodox view has existed for nearly a century and has never been challenged. Even today, no one questions the strength of tort law’s theoretical superstructure or the truth of the assumptions upon which it is based. In fact, the American Law Institute, which currently is in the process of restating tort law’s basic principles, has made no effort to alter or even reexamine this framework.

This article contends that such a reexamination is not only desirable, but necessary. Focusing on the theory of negligence, it exposes the many faults in tort law’s current theoretical paradigm.

The analysis proceeds in four parts. The first part reconsiders and compares the concepts of fault and reasonableness. It argues that the two ideas are not synonymous, and concludes that a classical-liberal conception of reasonableness comes closest to explaining and justifying the modern theory of negligence.

To defend this conclusion, the second part of the article turns to two of negligence’s “hard cases”: the no-duty-to-rescue rule and the standard of care for mental incompetents. It reveals that the fairness-based notion of reasonableness provides a far more satisfying account of these difficult doctrines than the more deontological concept of fault.

With the law’s internal inconsistency resolved, part three explores negligence’s external fit with other tort theories, beginning with intentional torts. It shows that negligence and intentional torts are more alike than different, sharing both a flexible approach to procedure and a substantive commitment to reasonableness.

The last part continues the analysis of fit, this time examining the supposedly more impenetrable barrier between negligence and strict liability. Instead of supporting this divide, however, it shows that negligence already contains many de facto strict liability doctrines, and with its core concept of reasonableness, possesses all it needs to relax or stiffen its requirements in all types of cases, including cases now covered by theories of strict liability.
THE FAULT(S) IN NEGLIGENCE LAW

Alan Calnan

TABLE OF CONTENTS

I. INTRODUCTION ..................................................................................... 1
II. FAULT & REASONABLENESS ............................................................... 4
   A. The Nature of Fault ........................................................................ 5
   B. The Nature of Reasonableness ....................................................... 8
      1. The Source and Values of Reasonable Laws ......................... 9
      2. Legal Limits on the Duty of Reasonableness ...................... 11
      3. Unreasonable Behavior ........................................................ 16
III. NEGLIGENCE’S HARD CASES ............................................................ 17
   A. The No-Duty-To-Rescue Rule ...................................................... 18
      1. The Rule is the Exception ....................................................... 19
      2. The Reasonableness of the Rule .............................................. 22
   B. The Standard of Care for Mental Incompetents ..................... 32
IV. THE SYMMETRY OF NEGLIGENCE AND INTENTIONAL TORTS ............. 35
   A. Procedural Similarities ............................................................. 36
   B. Substantive Sameness ............................................................. 40
V. THE SYMBIOSIS OF NEGLIGENCE AND STRICT LIABILITY ................. 43
   A. The Focus and Scope of Liability ............................................. 44
   B. Standards of Care and Defenses ............................................. 49
   C. Proof ......................................................................................... 54
VI. CONCLUSION ..................................................................................... 60
The Fault(s) in Negligence Law

Alan Calnan*

I. Introduction

Modern tort law has a familiar theoretical structure. That structure has enjoyed formal recognition since the 1930s, when the first Restatement of Torts arranged all torts into three divisions. Division One collects intentional torts1, Division Two addresses negligence2 and Division Three includes theories of absolute or strict liability.3 Although there are an untold number of specific tort actions, every tort is grounded in one of these three concepts.

As the Restatement made plain, the law’s tripartite structure is subject to an additional theoretical distinction. All torts are either fault-based or fault-free. Intentional torts and negligence are actionable because they are wrongful.4 Strict liability activities, by contrast, are actionable irrespective of the actor’s innocence.5

Such line-drawing rests upon, and reinforces, two key assumptions. First, the fault-based theories of negligence and intentional torts are fundamentally different from and mutually exclusive of the theories of strict liability. Second, while both negligence and intentional

---

* Professor of Law, Southwestern Law School. My thanks to Southwestern Law School for funding this project with a summer research grant.

1 See Restatement of Torts §§ 1–280 (1934)(entitled “Intentional Harms to Person, Land and Chattels”).

2 See id. §§ 281–503 (entitled “Negligence”).

3 See Restatement of Torts §§ 504–524 (1938)(entitled “Absolute Liability”).

4 See W. Page Keeton et al., Prosser and Keeton on Torts 21-23 (5th ed. 1984)[hereinafter Prosser](explaining the fault basis of tort law).

5 See id. at 22, 32, 534-38 (explaining the policy basis of the no-fault theory of strict liability).
torts require proof of fault, negligence—which operates on an objective standard of care—is nevertheless inherently distinguishable from the subjective theories of intentional tort law.

Although all of tort’s theories are essential to this structure, the true lynchpin here is the theory of negligence. Negligence sits at the conceptual midpoint of the liability continuum, separating the subjective fault of intentional torts from the no-fault of strict liability. Negligence also identifies the four conceptual elements—of duty, breach, causation and harm—inherent in all torts. Finally, negligence “owns” the standard of evaluation—reasonableness—which often appears in the other torts and always provides the negative benchmark for the theories of strict liability. Thus, if something is wrong within the law of negligence, the entire structure of the tort system would surely be cast into doubt.

Currently, neither negligence law nor the paradigm of which it is a part arouse much suspicion. Indeed, the American Law Institute (ALI), which has begun reconsidering tort law’s “basic principles” and has already revised specific sections of the Restatement (Second) of Torts, has only tinkered with negligence law and has completely refused to review the law’s tripartite structure, seemingly accepting it as indisputable truth. Thus, unless something changes, tort law’s current paradigm soon will be perpetuated for use by future generations of lawyers.

---

6 See KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 2-3 (2d ed. 2002)(describing these elements as the “four elements of any cause of action in tort.”).

7 Strict liability, in essence, is liability that attaches despite the exercise of reasonable care.

8 This portion of the Third Restatement already has gone through several drafts. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (DISCUSSION DRAFT) (1999); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES)(TENTATIVE DRAFT NO. 1) (2001); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES)(TENTATIVE DRAFT NO. 2) (2002).

9 Early debates have centered on specific doctrinal issues, like the role of duty, the definition of reasonableness, and the nature of causation. These issues were addressed in a symposium held at Vanderbilt Law School on September 15-16, 2000. See Symposium, John C.P. Goldberg, Introduction, 54 VAND. L. REV. 639 (2001)(providing a summary of the issues addressed in the symposium).
This, I believe, would be a mistake. Even a general survey of negligence law reveals numerous glaring problems of mischaracterization, misunderstanding and misfit. Ironically, the mischaracterization and misunderstanding problems surround the very concept of tortious fault. Relying on a notion of moral culpability, negligence often seems to condemn some innocents—like the mentally disabled—while exonerating some wrongdoers—like those who refuse to provide easy aid to people in distress.10

The misfit problems are more technical, though no less substantial. They suggest that negligence law is both over- and under-inclusive. On the one hand, negligence contains a number of doctrines—like negligence per se and res ipsa loquitur11—that impose a form of strict liability, or at least liability without affirmative proof of fault. On the other hand, negligence fails to capture many other intentional tort and strict liability doctrines—like mistake, transferred intent and product defectiveness—that clearly turn on the “negligence” concept of reasonableness.12

This article will explore these and other anomalies in an effort to evaluate the remaining strength of the current paradigm and the depths of

10 See Prosser, supra note 4, at 376 (“Such decisions [rejecting a duty to rescue] are revolting to any moral sense.”).

11 In a res ipsa case, the mere happening of the accident provides circumstantial evidence of the defendant’s negligence. See Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967) (holding that the circumstances of a plane crash were enough to sustain a negligence claim against the defendant-airline). In cases of negligence per se, fault is presumed from the violation of a statute or regulation. See Ney v. Yellow Cab Co., 117 N.E.2d 74 (Ill. 1954) (holding that evidence that a taxi driver left the key in the ignition of his taxi, in violation of a statute, was sufficient to hold his employer liable for damages caused when a thief stole the cab and crashed it into the plaintiff’s vehicle).

12 See id. at 249 (“The privilege [of private necessity] can only be invoked when the defendant is threatened, or reasonably appears to be threatened, with serious harm and the response is reasonable in light of the threat.”); id. at 251 (“To invoke the privilege [of public necessity] the actor must show that (a) public rather than private interests are involved, (b) he was reasonable in believing that action was needed, and (c) the action he took was a reasonable response to that need.”).
its structural, theoretical and substantive crises.13 In Part II, I examine the idea of tortious fault, exposing its ambiguities and demonstrating its conceptual and explanatory inferiority to the concept of reasonableness.14 Then, in Part III, I show specifically how a classical-liberal conception of reasonableness better accounts for “hard” negligence cases like those involving mental incapacity and the failure to provide easy aid to others. Having revealed negligence’s substantive dysfunction, I next turn to its theoretical and structural deficiencies. In Part IV, I first take on tort law’s fault matrix, arguing, in dramatic opposition to the modern view, that negligence and intentional torts are essentially indistinguishable in both substance and procedure. Thereafter, in Part V, I look beyond the fault matrix to the concept of strict liability, only to find many of its characteristics comfortably hidden within the law of negligence. I shall conclude by suggesting some of the ramifications of these findings.

II. FAULT & REASONABLENESS

The affinity between negligence and fault is one of the most basic truths in tort law. Indeed, the latest edition of Black’s Law Dictionary includes a cross-reference to “Negligence” in its definition of fault,15 and

13 A paradigm cannot be eliminated unless another stands ready to take its place, and a new paradigm cannot commence without completely destroying its predecessor. As Thomas Kuhn has noted, “[t]he decision to reject one paradigm is always simultaneously the decision to accept another, and the judgment leading to that decision involves the comparison of both paradigms with nature and with each other.” Id. at 77. In other scholarship, I have begun to explore the viability of such an alternative paradigm of tort law. See Alan Calnan, Anomalies in Intentional Tort Law, 1 TENN. J.L. & POL’Y 877 (2005).

14 I have examined the concept of reasonableness, and the related notion of justice, in previous scholarship. See ALAN CALNAN, A REVISIONIST HISTORY OF TORT LAW: FROM HOLMESIAN REALISM TO NEOCLASSICAL RATIONALISM (2005); ALAN CALNAN, JUSTICE AND TORT LAW 2, 7, 23-26, 32, 64 (1997)[hereinafter CALNAN, JUSTICE]; Alan Calnan, Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation, 27 SW. U.L. REV. 577, 586-87 & nn.30, 31, 32 (1998). Since reasonableness is so essential to the theory of negligence, which in turn is so crucial to the field of tort law, a certain amount of repetition is inescapable here. Thus, those already familiar with my work may want to proceed directly to Part III. For all others, Part II provides a lengthy enough summary to make further “outside” reading unnecessary.

15 See BLACK’S LAW DICTIONARY 623 (7th ed. 1999).
at one time listed “Negligence” as fault’s primary connotation.\textsuperscript{16} In many cases, the two concepts do bear a remarkable symmetry. However, contrary to popular belief, they are not coextensive. Negligence is based on reasonableness, not fault. In some cases, unreasonable conduct is not faulty at all; in others, fault implies more than unreasonableness seeks to convey. I will elaborate on this claim in three steps. After discussing the unique nature of fault, I will identify the conceptual essence of reasonableness. Later, in the next Part, I will point out some of the scenarios where the two concepts part company.

\textbf{A. The Nature of Fault}

The term “fault” carries a lot of baggage. The \textit{Oxford English Dictionary}\textsuperscript{17} lists ten separate definitions for fault, many dating back to the sixteenth century. Excluding entries with a specialized connotation, there are at least five meanings which have general application. These are: (1) a deficiency; (2) a default, failing or neglect, (3) a defect or imperfection, (4) something wrongly done, including a misdeed, transgression or offense, and a slip, error or mistake, and (5) the responsibility for an untoward occurrence.\textsuperscript{18} \textit{Webster’s New World College Dictionary}\textsuperscript{19} offers four relevant definitions for fault: (1) “the failure to have or do what is required”—a lack of something, (2) “something that mars the appearance, character or structure”—a defect or failing, (3) “something done wrongly”—a misdeed or offense, or an error or mistake, and (4) “responsibility for something wrong”—blame.

The legal connotations of fault are equally plentiful. The sixth edition of \textit{Black’s Law Dictionary} provides a diverse array of definitions, including the following: (1) “negligence; an error or defect of judgment or of conduct”; (2) “any deviation from prudence, duty, or rectitude”; (3) “any shortcoming, or neglect of care or performance resulting from inattention, incapacity, or perversity”; (4) “a wrong tendency, course, or act”; (5) “bad faith or mismanagement”; (6) “neglect of duty”; (7) “breach of a duty imposed by law or contract”; or (8) “an act to which blame, censure, impropriety, shortcoming or culpability attaches.”\textsuperscript{20}

\textsuperscript{16} See \textit{Black’s Law Dictionary} 608 (6\textsuperscript{th} ed. 1990).

\textsuperscript{17} \textit{Oxford English Dictionary} 508 (1995).

\textsuperscript{18} See id.

\textsuperscript{19} \textit{Webster’s New World College Dictionary} 517 (4\textsuperscript{th} ed. 2001).

Black’s seventh edition condenses these definitions into a couple of information-packed entries. According to this version, fault is either “[a]n error or defect of judgment or conduct,” or “any deviation from prudence or duty resulting from inattention, incapacity, perversity, bad faith, or mismanagement.”

After sorting through the redundancies, and doing some synthesis, a central principle emerges. Fault, in essence, is the deviation from a standard, or at least the conclusion that a standard has been violated. It can apply to people, identifying character flaws or deficiencies in those with sub-standard values. Or it can apply to things, identifying defects or imperfections in objects which fail manufacturing or performance standards. It can describe acts, including mistakes and misdeeds which violate personal and social standards of behavior. Or it can describe omissions, involving defaults, failings or any neglect of an affirmative standard of care. It may even cover choices, identifying defects of judgment or mismanagement that violate a standard of efficacy. Or it can cover motives like perversity or bad faith that transgress moral or religious standards of decency.

Yet despite its broad reach, there is one thing that fault lacks. It provides no intrinsic or uniform standard of evaluation. While fault identifies deviance, it offers no measuring rod of its own. Fault simply declares abnormality wherever it exists; it does not decide what is normal in any given context. Because fault can attach to any standard, it is tied to no standard in particular. From a jurisprudential standpoint, this indeterminacy has several deleterious consequences.

First, fault can have unlimited normative bases. Indeed, there is virtually no end to the standards that might be used to judge human events. On a broad philosophical scale, one could base liability on morality or economics. Depending on the prevailing standard, fault might mean violating a social norm or merely failing to act efficiently. Within the realm of morality, several other possibilities remain. In a pluralistic society, fault could be linked to a variety of norms ranging from liberalism to communitarianism. Thus, fault might consist of affirmatively infringing the liberties of others, or simply failing to act benevolently on their behalf. Even here, different standards could be used. One could adopt a purely subjective standard defined by the actor’s own intentions and values. Or, fault could be defined by an external

---


22 Subjective fault determinations are exclusively moral or political. For example, to orthodox Jews, eating non-kosher meat is morally faulty; to
standard, like a social custom, a political platform or a religious commandment.\textsuperscript{23} Because the concept of fault neither prefers nor excludes any of these alternatives, it cannot clarify the legal standard of liability. In fact, to the extent that it carries connotations at odds with the chosen standard, it can actually make that standard less clear.

Second, no matter what standard is used, fault imbues it with a universal character. A faulty act is faulty regardless of its consequences. For example, throwing a rock at a defenseless child would be faulty even if the child were not struck. In fact, such an act would be offensive not just to the intended victim, or to others in the line of fire, but to every law-abiding member of the actor’s community. In this case, and others like it, the judgment of fault is both unilateral in focus and boundless in scope. It is unilateral because it fixates on the actor and her act, and is not dependent upon their impact on the world. It is boundless because it can be made by anyone within the same value system. Fault merely searches for standards violations, not victims, and it places no restrictions on who can do the looking.\textsuperscript{24}

Finally, fault is relentlessly moral and personal. It does not just describe standards violations, it actively condemns them as wrong. In many cases, a judgment of fault carries strong moral overtones. Thus, a faulty actor is not merely a nonconformist, but more of a social deviant.

\textsuperscript{23} These standards are objective. Objective fault assessments transcend moral and political boundaries. They arise from shared, universal values. For example, certain acts, like murder and incest, are condemned everywhere. See Roe v. Butterworth, 958 F. Supp. 1569, 1577 (S.D. Fla. 1997), aff’d, 129 F.3d 1221 (11th Cir. 1997) (“Murder, robbery, extortion, bigamy, incest, theft, and many other crimes have been committed since before histories were recorded. Yet, because societies considered them destructive, immoral, indecent, or generally evil, they have all been prohibited at one time or another.”).

\textsuperscript{24} Because of its universality, fault is a perfect fit for the criminal justice system, where the state, on behalf of the general public, seeks to punish every wrongful act it can find. However, fault’s value is less obvious in tort actions, where private parties seek compensation for specific injuries inflicted upon them by their neighbors. In this context, the concept of fault can both confuse the issue of responsibility, and control the determination of liability.
This instinct is heavily influenced by fault’s usage. While fault identifies deviance of any sort, it openly condemns deviance in human transactions and relationships.

In fact, this moral conception of fault has a long history in tort law. In medieval England, torts were considered both crimes and sins. Many offenders were not tried, but were subject to battles and ordeals. In these rituals, God decided guilt or innocence. Later, as such practices waned, litigants and witnesses swore oaths in religious ceremonies. In colonial America, laws were backed by biblical citations. As late as the seventeenth century, local codes punished moral indiscretions like gaming, idleness, lying, fornication and drunkenness.

Eventually, religion lost its grip on the law. However, the concept of fault did not. To this day, courts, commentators and jurors continue to equate fault with moral indiscretion. This does not mean that fault is a dangerous idea. However, it does mean that “fault” is a loaded term. Thus, if “fault” is to have a place in the lexicon of tort law, we must be careful about how we use it and cognizant of the impact it can have upon determinations of civil liability.

B. The Nature of Reasonableness

Reasonableness suffers from the same sort of definitional

---


26 See id. at 53-63.

27 See id. at 54.


29 See id. at 72-73.

30 See NEAL FEIGENSON, LEGAL BLAME 16-17 (2000)(“[J]urors see doing justice in the accident case as the proper response to a morality play…in which the good guy triumphs precisely to the extent that the bad guy gets his or her comeuppance.”); ERNEST J WEINRIB, THE IDEA OF PRIVATE LAW 1995)(arguing that tort law is founded on Aristotle’s theory of corrective justice and Kant’s theory of abstract right); George P. Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537 (1972)(arguing that much of tort law is based on John Rawls’ first principle of justice).
ambiguity as fault. It can be a deliberative process conducted in accordance with reason, \(^{31}\) a decision-making mindset which strives toward sound judgment, \(^{32}\) or any condition or state of affairs that is fair, logical or moderate. \(^{33}\) Despite it elusiveness, reasonableness, too, can be boiled down to single basic idea. At bottom, reasonableness is a standard of evaluation. It allows us not only to assess and weigh our own choices, but also to judge the choices of others.

As a standard, reasonableness invariably dovetails with fault. Since fault is the deviation from any standard, any deviation from the standard of reasonableness necessarily will be faulty in some sense. But reasonableness is only one of many standards within fault’s domain. An unreasonable act is not automatically faulty in the sense that it is immoral. Nor does it always carry a stigma of personal culpability. Reasonableness has its own unique sources, scope and character, and these features set it apart from all other conceptions of fault.

1. The Source and Values of Reasonable Laws

The ultimate source of reasonableness is reason. Reason is both an intellectual faculty for making decisions, \(^{34}\) and a process by which conclusions are logically drawn from premises. \(^{35}\) Thus, reason is exclusive and prescriptive. On the one hand, reason excludes passion or prejudice as a basis for decision-making. On the other hand, it requires that decision-making be deliberative, informed and logical.

In law, reason has two functions: identifying first principles of justice, and applying these principles in a manner that is just. Each process is governed by norms that arise from values embedded within the legal community and the community-at-large. A law or act is reasonable only if it comports with these values. Obviously, as values change, the concept of reasonableness will change with it. But there is no denying that values dictate reasonableness, and reason dictates that laws protect these values.


\(^{32}\) See id. (entry adj. 1).

\(^{33}\) See id. (various entries).

\(^{34}\) See id. (“reason,” entry n. 3).

\(^{35}\) See id. (n. 1).
In American culture, freedom and equality are the values which inform our sense of right and wrong. Thus, unlike the concept of fault, which can have unlimited normative bases, the American concept of reasonableness is inexorably tied to these foundational values. In earlier works, I explained how these values substantiate American tort law.\textsuperscript{36} Thus, I will not belabor the point here. Nevertheless, to truly appreciate the gaps between reasonableness and fault, a brief synopsis is in order.

Tort law is a mechanism for distributing freedoms to people both before and after their lives intersect.\textsuperscript{37} Freedoms are secured by rights and duties. Rights protect freedom; duties take freedom away. Rights give their holders the power to limit the freedom of others. Duties identify the specific individuals who are subject to these powers.

Tort law distributes rights and duties in accordance with the concept of distributive justice.\textsuperscript{38} Distributive justice does not require absolute equality. Rather, it requires only that benefits or burdens be allocated according to a predetermined ratio.\textsuperscript{39} The ratio allows some parties to receive more freedom than others. Nevertheless, the scheme is reasonable so long as the criteria used to establish the ratio are fair, and the ratio is faithfully observed every time a new distribution is made.

In tort law, need and risk are the criteria by which rights and duties are distributed.\textsuperscript{40} Both criteria derive from the values of freedom and equality. Some people are in great jeopardy of losing their freedom or are incapable of protecting it. Vulnerable parties in imbalanced relationships fit this description. The need criterion gives these parties extra latitude to secure their interests.\textsuperscript{41} Other people exploit their

\textsuperscript{36} See Calnan, Justice, supra note 14, at 2, 7, 23-26, 32, 64; Calnan, supra note 14, at 586-87 & nn. 30, 31, 32.

\textsuperscript{37} See Calnan, supra, note 14, at. 587-88.

\textsuperscript{38} See Calnan, Justice, supra note 14, at 85-98, 127-29, 168-69, 182-87, 208 (discussing the distributive nature of tort law); see also Calnan, supra, note 14, at. 587-601 (elaborating on this idea).


\textsuperscript{40} See Calnan, Justice, supra note 14, at 88-89, 128; Calnan, supra note 14, at 590.

\textsuperscript{41} Specifically, they may force their counterparts to take affirmative
freedom by engaging in extraordinarily risky activities. Drunk drivers and blasters are apt examples. The risk criterion distributes stricter duties (freedom restrictions) to these parties as a means of neutralizing their advantage. While the criteria permit variations in freedoms, their ultimate collective objective is to return all parties to a state of equality. So long as the law abides by this premise, its rules will be considered reasonable, even though they do not always treat everyone the same.

2. Legal Limits on the Duty of Reasonableness

If the law is reasonable, then any act which violates the law is necessarily unreasonable. Unreasonable conduct may come in two forms, depending on the type of law it transgresses. Some acts are presumptively unreasonable. Such behavior typically violates a rule of proscription. Proscriptive rules identify acts or activities that are socially suspect no matter how carefully they are carried out. Intentional tort duties fall into this category. They prohibit behavior which is calculated to inflict harm on others. Because such conduct is inherently blameworthy, these duties are broadly drawn and universal in scope. They apply to all who engage in this behavior, and they protect everyone endangered by it.

Negligent acts are different. They are not automatically unreasonable. Rather, they are unreasonable only because of the circumstances in which they are committed. As a result, tort law does not ban such behavior. It regulates it with a standard of ordinary care.

The duty to follow this is standard is limited in scope. It neither

\[\text{See DAN C. DOBBS, THE LAW OF TORTS 857 (2000)("The Restatement recognizes five kinds of formal relationship that require the defendant to use reasonable care for the plaintiff’s safety, including reasonable affirmative efforts to rescue.").}\]

\[\text{See ARISTOTLE, supra note 39, at 145 ("The law-breaker being...unjust and the law-abiding just, it is clear that whatever is lawful is in some sense just; for such things as are prescribed by legislative authority are lawful, and all such things we call just."); CALNAN, JUSTICE, supra note 14, at 129.}\]

\[\text{CALNAN, JUSTICE, supra note 14, at 165-66.}\]

\[\text{See id. at 167.}\]

\[\text{See id. at 177-78.}\]
condemns every culprit nor protects every victim. Instead, it dispenses responsibilities in a highly personal and episodic manner. It arises when the actions of one party places others in undue danger, or when the relationship among parties gives one an unfair advantage over the others. In short, the duty of reasonable care is a product of risks and relations.

Relationships are formed by consent or by operation of law. In consensual relationships, the parties establish their own unique set of responsibilities, while in legal relationships, the state predetermines the parties’ obligations. In each type of relationship, the duties of care are restrictive. They cover only certain persons and certain things. If one party to the relationship harms a protected interest of another, her breach is both faulty and actionable. However, if she inflicts a loss beyond her relational responsibilities, she is neither negligent nor liable, even if her conduct is morally blameworthy.

Risk implies relation of a different sort. Action breeds risk. When action is self-contained, risk is purely a private matter. However, when action takes place in the outside world, risk becomes a matter of public concern. The actor’s freedom invades the freedom of her victim. The two become tangled in a web of conflict. Here, risk is the thread that ties their lives together.

Because risk is potentially oppressive, every risk-creator is obligated to control it. However, risk does not just create responsibility, it also limits its scope. To control risk, one must have an ability and opportunity to take precautions. The power to control risk, in turn, is determined by knowledge or knowability. One can control risk only if she actually knows about it or is capable of discovering it through reasonable investigation.

Risk also identifies specific duty beneficiaries and activates their rights to protection. Duties and rights are correlative. Every tort duty is connected to someone else’s right to enforce it. These right-holders

---

46 See id. at 179-80. “Legal” relationships include those between parent and child and between state and prisoner.

47 See id. at 48.

48 See id. at 92-93.

49 See id. at 95-96.

50 See CALNAN, JUSTICE, supra note 14, at 62; Calnan, supra note 14, at 594.
remain anonymous until the risky activity begins. At that time, a foreseeable zone of danger is created. Only parties who fall within the danger zone are entitled to care and respect; those outside it are not.

Once the class of duty beneficiaries is known, risk activates their rights to respond. In some cases, they may take preemptive action to stop the threatening conduct.51 In others, they may regulate the manner in which such acts are performed.52 In still others, they must wait and seek compensation if the act later results in injury.53 Though prodigious, these powers are ephemeral and unique. They come and go as circumstances change and can never be enforced by anyone else.

Negligence law is grounded on these principles. The duty to exercise reasonable care is not unlimited. It is owed only to people endangered by the defendant’s conduct. These individuals alone accrue a right to expect protection. If that expectation is violated, they alone enjoy a power to take defensive or remedial action. Should the risk result in injury, they alone may cry foul. For these unfortunate few, the act is faulty. For everyone else in the world, it is a matter of personal indifference.

This is the lesson of Palsgraf v. Long Island Railroad Co.,54 still the best explanation of the duty-risk relationship. In Palsgraf, employees of a railroad attempted to assist a passenger onto a moving train. In doing so, the employees caused the passenger to drop a package onto the rails below. Unbeknownst to the employees, the package contained fireworks. The fireworks exploded when the package hit the ground. The blast knocked over a free-standing scale at the end of the railway station platform. The scale struck the plaintiff, causing her injury. The plaintiff sued the railroad for the negligence of its employees. The trial court entered a judgment for the plaintiff and the Appellate Division

---

51 Preemptive measures generally are reserved for the prospective victims of intentional torts. See CALNAN, JUSTICE, supra note 14, at 24, 168-69.

52 Nuisance claimants can obtain injunctions to force adjacent property owners to change the way that they conduct their activities. See CALNAN, JUSTICE, supra note 14, at 24.

53 This is the conventional “corrective” remedy of tort law. See CALNAN, JUSTICE, supra note 14, at 24-25.

54 162 N.E. 99 (N.Y. 1928).
affirmed.55

The New York Court of Appeals took the case to clarify the railroad’s duty. Judge Andrews, writing in dissent, argued that the railroad’s duty was universal. It extended from the boarding passenger to the plaintiff and even beyond. According to Andrews, if the railroad committed any sort of negligent act, that act would be “a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large.”56

The majority, however, adopted a narrower view. Speaking on their behalf, Judge Cardozo noted that “[n]egligence…is…a term of relation.”57 The concept that establishes this relation is risk. According to Cardozo, the duty of the railroad was limited by the orbit of foreseeable risk created by its employees.58 This zone of danger also determined who was entitled to protection. To sustain her claim, the plaintiff had to prove that she fell within this danger zone. Unfortunately, she could not. Although the employees could have foreseen that they might dislodge the passenger’s package, nobody expected that they would injure a bystander thirty feet away. Thus, concluded Cardozo, even if this conduct was “a wrong in its relation to the holder of the package, [it] was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all.”59

Negligence is not just relational, it is inherently bilateral as well. This truth limits the notion of tortious fault in two additional ways. It means (1) that conduct is not faulty unless it produces wrongful consequences, and (2) that these consequences can be redressed only by the person who created them.

Every tort case involves a clash of interests. The concept of corrective justice both describes the nature of this conflict and determines how it is to be resolved. Corrective justice requires the

56 Id. at 102.
57 Id. at 101.
58 Id. at 100.
59 Id. at 99.
rectification of wrongs.60 A wrong is a disturbance in the moral
equilibrium between two or more people. When such a disturbance
occurs, the perpetrator receives a wrongful gain and the victim incurs a
wrongful loss. Corrective justice loathes this imbalance. It negates the
perpetrator’s gain and redresses the victim’s loss.61 However, it does not
attack each deviation separately. Subjugation is part of the perpetrator’s
gain. Oppression is part of the victim’s loss. One cannot be defined
without reference to the other. Thus, corrective justice cannot come from
outside of the parties’ relationship, but must come from within.62 To
restore balance to this relationship, the perpetrator must surrender to the
victim what she has taken, and the victim must take back from the
perpetrator what she has lost.

Corrective justice gives the concept of reasonableness its
distinctive bilateral dimensions. Because corrective justice requires a
wrongful gain and loss, one cannot characterize conduct as unreasonable
without considering both its culpability and its consequences.63 If A
leaves a roller skate on the sidewalk, her conduct may be antisocial or
even morally culpable, but it is not unreasonable to B ten blocks away.
Since B suffers no loss, A’s conduct is not a personal affront. Even for
her neighbors, A’s oversight is not unreasonable unless and until it
invades one of their legally protected interests. Thus, only a neighbor
who slips on the skate may have an action of negligence. The ones who
step over it will not.

Corrective justice does not just determine whether an act is
unreasonable, it also determines who may be found responsible for that
act. In the above example, the injured neighbor may not sue another
homeowner who happened to leave a skate on a different sidewalk ten
blocks away. Granted, the other homeowner’s behavior may have been
faulty. It may even have injured another passerby. But it would not be
unreasonable to the person bringing the action.64 Because each
transaction is morally unique, rectification for the victim’s loss must
come from the party who caused it. As far as the victim is concerned, no
other person is really a wrongdoer, and no one else can truly repair the

60 See CALNAN, JUSTICE, supra note 14, at 99.

61 See Calnan, supra note 14, at 602-03.

62 See id. at 601-02.

63 See CALNAN, supra note 14, at 62-63.

64 See id. at 62-63.
moral imbalance that results from their encounter.

3. Unreasonable Behavior

Reasonableness does not just impose formal constraints on law and legal duty; it also establishes behavioral guidelines for personal conduct. In this context, fault typically implies a strong sense of moral culpability. However, reasonableness does not necessarily carry either innuendo. In many cases, unreasonableness is a kind of social or political fault. Although such conduct may be wrongful, it need not be damnable. Rather, it is wrongful in the weak moral sense that it is unfair.

The link between reasonableness and fairness is of ancient origin. In his *Nicomachean Ethics*,⁶⁵ Aristotle describes fairness as a mean of equality between two or more persons. Unfairness results when one person receives more, and another less, than she deserves.⁶⁶ Such unfairness might occur in distributions, as where the state unequally allocates civil benefits and burdens. Or, it might occur in transactions, as where one party takes goods from another. In the latter scenario, the resulting deficiency does not itself suggest blame. The taker is responsible for an imbalanced transaction only if she acts unfairly to create it.

For Aristotle, responsibility requires human agency, and agency requires volition. Aristotle defines volition as that which “is in a person’s power, and is performed by him knowingly.”⁶⁷ While power establishes the agent’s ability to impact others, knowledge gives her the opportunity to exercise that ability. Together, power and knowledge create a freedom of choice. Those who abuse that freedom are blamed.⁶⁸ Those who lack that freedom are pitied or pardoned.⁶⁹

Aristotle does not equate volition with deliberation. Even unintentional acts can be unjust if they bring about preventable inequalities. Mistakes fit this description. Although mistakes are always


⁶⁶ *Id.* at 153.

⁶⁷ *Id.* at 169-70.

⁶⁸ See *id.* at 66.

⁶⁹ See *id.*
committed in ignorance,\(^{70}\) ignorance itself can be culpable or excusable.\(^{71}\) As Aristotle notes, “we punish people[] whenever it seems that their ignorance was due to carelessness; for they had it in their power not to be ignorant, as they might have taken the trouble to inform themselves.”\(^{72}\)

Because of its magnitude, fairness cannot be reduced to specific rules. Aristotle does not even try. Instead, he concludes his remarks with two general observations. In the abstract, fairness is justice determined by right reason.\(^{73}\) In practice, fairness is a standard of care determined by a prudent man.\(^{74}\)

These observations form the basis of the modern standard of reasonable care. Although timeless in its dimensions, reasonableness has been adapted to suit liberal sensibilities. As informed by liberalism, reasonableness uses rights and duties to fairly distribute freedoms and freedom restrictions. Thus, anytime a person breaches a duty of reasonable care, she necessarily takes more freedom than she is due. If she causes harm in the process, she also interferes with the freedom of someone else. Such conduct is unfair and unreasonable even if it is not morally reprehensible.

Indeed, every negligent tortfeasor is guilty of a double-cross. She cheats her victim by taking the latter’s interests without consent or compensation. But she also cheats her fellow citizens by doing things that they have restrained themselves from doing. In many cases, these acts are deserving of condemnation. But, as we shall see below, in some hard cases they are simply unfair, and thus unreasonable, without being faulty in the popular sense of that word.

III. NEGLIGENCE’S HARD CASES

Although fault is more pejorative than unreasonableness, most unreasonable conduct displays some form of fault. Reckless acts like drunk driving are certainly both unreasonable and morally offensive.

\(^{70}\) See id. at 171.

\(^{71}\) See id.

\(^{72}\) Id. at 83.

\(^{73}\) See id. at 55, 86.

\(^{74}\) See id. at 55.
Even simple acts of forgetfulness, like leaving a pack of matches in reach of a child, might earn both epithets if tragic consequences result. However, these concepts are not always shades of the same color. Sometimes they are as different as black and white. In fact, their disjunctions underlie some of negligence law’s most important and controversial doctrines.

Two doctrines are especially infamous. The no-duty-to-rescue rule appears to excuse from the reasonableness standard conduct that generally is considered morally repugnant. Conversely, the standard of care for the mentally incompetent seems to condemn as faulty behavior that is uncontrollable, involuntary or even innocent. Yet these doctrines are not unexplainable. While they are irreconcilable within the fault matrix, they are surprisingly coherent within the realm of reasonableness.

A. The No-Duty-To-Rescue Rule

The no-duty-to-rescue rule says that people are not required to rescue others in distress. Therefore, someone who fails to offer aid cannot be held civilly liable if the victim later succumbs to the danger. This liability exemption applies no matter how grave the risk facing the victim, and no matter how simple, easy and safe the rescue opportunity for the bystander.

To most people, the no-duty-to-rescue rule seems clearly at odds with the concept of fault. Instinctively, it feels wrong to stand idly by

---

75 See Dobbs, supra note 41, at 853.

76 The Second Restatement illustrates the point:
A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from doing so by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.
Restatement (Second) of Torts § 314 illus. 1 (1965).

as another human being suffers harm. This instinct could be rooted in a number of possible sources. Most societies embrace values of benevolence and altruism. Most religions preach good samaritanism and denounce selfishness. Whatever their source, our sensibilities tell us that one who fails to rescue others is herself morally deficient.

If moral fault were the appropriate standard of analysis, the no-duty-to-rescue rule would rest on shaky ground. However, it is this standard, not the rule, which is out of kilter. Tort law is based on reasonableness, not fault. Unlike fault, which merely signifies deviance, reasonableness is a standard of evaluation. To be sure, this standard helps us evaluate conduct to determine whether it is worthy of praise or condemnation. However, this is not its only function. It also helps us evaluate the law itself. In judging the law, reasonableness requires that we take a broad view, taking in all of its principles and doctrines. It also requires that we examine the law’s objectives and values. When this is done, two truths become apparent. First, the no-duty-to-rescue rule is not a rule at all. Rather, it is an exception to a broader liability principle. Second, this principle is not unreasonable. In fact, it goes as far as the law’s values will permit.

1. The Rule is the Exception

Although tort law does not impose a duty to rescue, it has long


recognized a duty to aid. This duty is not active, but passive. It allows distressed parties to take property from, or inflict injury upon, unwitting or unwilling bystanders. In turn, it requires bystanders to succumb to such incursions. The duty here is one of cooperation and sacrifice, not affirmative assistance. Yet the effect is the same. Withholding aid is tortious unless excused. Under this perspective, liability is the rule, non-liability the exception.

The duty to aid is evident throughout intentional tort law. In cases of self-defense, the imperiled party is entitled to use whatever force is necessary to stop an aggressor in her tracks.80 However, her entitlement does not stop there. She also may commande emergency the interests of innocent bystanders. For example, a party claiming self-defense may endanger or even injure a passerby. The only limit is that she must act reasonably under the circumstances.81 In this situation, the passerby cannot recover damages for her harm. Instead, she must sacrifice her interests for those of the privilege-holder.

The privileges of public and private necessity are even more demanding. Private necessity allows a party in imminent danger of losing her own property to appropriate, use or destroy the property of someone else, even if the owner contests the taking.82 The public necessity privilege gives similar powers to private citizens who seek to avoid or end public catastrophes.83 In each case, the persons subject to

80 See Dobbs, supra note 41, at 162 (“Many courts…traditionally permit the use of deadly force to counter deadly force without any general requirement of retreat.”).

81 These are cases of “transferred defense.” In essence, the defendant’s privilege of self-defense is transferred from the attacker to an innocent bystander injured by the defendant’s response. See Shaw v. Lord, 137 P. 885, 886 (Okla. 1914) (holding that a person who fires a weapon in self-defense is not liable to a bystander struck by the bullet); Goodrich v. Morgan, 291 S.W.2d 610, 614 (Tenn. Ct. App. 1956) (noting that a person who fires a gun in self-defense is not liable for an injury to a bystander unless she is guilty of negligence).

82 See Commercial Union Assur. Co., Ltd., v. Pac. Gas and Elec. Co., 220 Cal. 515, 520 (Cal. 1934) (holding that a property owner may save his own property at the expense of another’s if she acts reasonably under the circumstances); Restatement (Second) of Torts §197 (1965) (allowing a party to enter or remain on another’s land if she reasonably believes it necessary to prevent serious harm).

83 See Surocco v. Geary, 3 Cal. 69, 70 (Cal. 1853) (holding that a
these privileges cannot resist the intrusion. They are obligated to surrender their goods to alleviate the exigency. Should they fail to do so, their obstinacy may itself be punished as a tort.

The 1908 case of *Ploof v. Putnam* provides an apt illustration of this ancient principle. In *Ploof*, bad weather forced a ship owner to moor his boat to the defendant’s dock without the latter’s permission. Unmoved by the ship owner’s plight, the defendant untied the boat and allowed it to drift into the storm. Ultimately, the boat ran aground, causing it to sustain damage. In the ship owner’s action against the defendant-dock owner, the court upheld the ship owner’s right to moor his vessel to the dock, even in the absence of the dock owner’s consent. In doing so, however, the court also recognized the dock owner’s duty of cooperation. Because of the emergency, the defendant could not resist the encroachment to his dock. Instead, he was obligated to step aside and accede to the ship owner’s wishes. Whether he liked it or not, the dock owner became a cooperative assistant to the ship owner’s plan to save his boat. Although the dock owner did not have to secure the boat himself, he was obliged nevertheless to aid the ship owner by adopting a position of passive non-interference.

The duty to rescue also shows up in negligence law. Its most notable hide-out is the emergency doctrine. Under this doctrine, a person caught in an emergency has great powers. She may take all reasonable measures to secure her safety, including any which may have the unintended effect of harming innocent bystanders. These bystanders, by contrast, have virtually no choice but to submit to the invasion, and no recourse afterwards.

This principle is best illustrated by the casebook classic, *Cordas*

---

84 71 A. 188 (Vt. 1908).

85 Id. at 189.
In *Cordas*, a cab driver was accosted by an armed robber. To save his life, the cabby jumped from his taxi while it continued in motion. The abandoned vehicle eventually rolled onto a crowded sidewalk, where it struck a mother and her two infant children. The mother brought a negligence action against the cab company, but the case was summarily dismissed. The court based its decision on the cabby’s reduced standard of care. Noted the court: “[t]he law in this state does not hold one in an emergency to the exercise of that mature judgment required of him under circumstances where he has an opportunity for deliberate action.”

However, behind the court’s words lay an unstated, correlative principle. Emergencies do not just lower the imperiled party’s responsibilities, they also heighten the duties of those around them. For the *Cordas* plaintiffs, this burden did not require disabling the armed criminal in the cab. But it did require that they sacrifice some of their freedom. Specifically, it forced them to relinquish their security, and even their bodily integrity, for the good of a citizen in distress.

2. The Reasonableness of the Rule

As this discussion demonstrates, the idea of a tort-based duty to aid is not controversial at all. The real controversy is over how that duty is triggered. In the scenarios noted above, the imperiled party triggers the duty through her own defensive action. Under a “good samaritan” rule, that duty would be triggered by risk. Although the risk must pose a clear and present danger to the victim, it may come from any source. It might be created by the victim herself, by some third party, by *force majeure* or by any combination of these factors. However, it need not, and in most cases will not, be tied to the proposed rescuer. The question is whether such an undifferentiated risk, by itself, provides a sufficient basis for assessing legal liability.

Like most of the law’s foundational issues, the answer to this question lies in the concept of reasonableness. Since reasonableness is value-driven, the duty to rescue could not be justified on instinct alone. Rather, it would have to be validated by concepts of distributive and

---

86 27 N.Y.S.2d 198 (N.Y. City Ct. 1941).

87 *Id.* at 201-02.

To date, no one has succeeded in marshaling this support. And for good reason. Instead of promoting the morality of tort law, a duty to rescue actually undermines its sustaining principles.

Distributive justice has four requirements. First, there must be an authorized giver. Second, there must be an authorized receiver. Third, there must be something to distribute. And fourth there must be a legitimate reason, like need or risk, for the receiver to receive the distributed item.

In many distributive scenarios, the state is the giver and some group of citizens is the receiver. Welfare programs fit this description. Because of its representative authority, the state possesses inherent power to distribute. As long as the recipient group qualifies for special treatment, the resulting distribution enjoys the stamp of legitimacy.

In a tort case, however, both the giver and the receiver are private parties. Although the state creates the rules, the plaintiff dispenses the burden of liability. And although others may violate the rules, the defendant alone must bear its weight. Here, the status of the parties raises

---

89 Distributive justice controls the state’s relationship to the public. Specifically, it determines how the state may regulate the freedoms of its citizens. Corrective justice, by contrast, applies only to private relationships. In particular, it provides standards for determining when one private party may interfere with the freedom of another. When a tort is committed, these concepts overlap. The state uses tort law to regulate the harmful behavior, but delegates to the victim the power to enforce its regulatory agenda. To prevent overreaching, both distributive and corrective justice place restraints on this power.

90 See Calnan, supra note 14, at 589-98.

91 There is little doubt that the state itself has the authority to force people to act on behalf of others, even complete strangers. Under the social compact theory, citizens expressly or impliedly agree to duties of altruism enacted by their elected representatives. Alternatively, the principle of unjust enrichment suggests that since all citizens theoretically enjoy the benefits of political association, including some limited forms of altruism, all must also bear its burdens, including the burden of occasional social sacrifice. Even the liberal harm principle may favor duties of altruism if the harm to liberty created by those duties is considered less severe than the overall moral, political and personal harm resulting from the acts or omissions of people left indigent and desperate.
special concerns. Because private parties have no inherent regulatory authority, they may not invade the interests of others without a special license to do so. By the same token, people typically are not required to donate money or service to their neighbors. Thus, they need not make such sacrifices unless there are good distributive reasons for requiring their beneficence.

In a typical emergency scenario, the imperiled party is in danger of losing her property, her bodily integrity or her life. Thus, she clearly qualifies for special treatment under the law. Because she is in need of protection, distributive justice permits her to take defensive action. To activate this license, the state grants her regulatory authority. In doing so, it turns a private party into a deputy attorney general. Equipped with privileges of self-defense or necessity, this private regulator has the power to force her peers to sacrifice their interests for her own.

In this situation, the imperiled party determines who will receive the burden of sacrifice. Indeed, by exercising her privilege, she hand-selects her rescuers. In many cases, however, the privilege-holder will have neither the time nor the opportunity to react. Thus, there will be no predetermined helpers. If someone is to bear the burden of rescue, the state must designate the appropriate receiver.

To make the right selection, the state must find some reason for picking certain bystanders over others. Since the rescue duty is obligatory, the selection criterion must comport with common sense notions of responsibility. Obviously, responsibility may mean different things to different people. However, all connotations share at least one common feature: human agency.

92 However, the imperiled party makes this selection at her own risk. Since people lack any inherent coercive authority, the decision to harm is presumptively wrongful. To overcome this presumption, the imperiled party must prove that her conduct was reasonable under the circumstances. We already saw examples of this above. Both the privilege of self-defense and the emergency doctrine excuse harmful conduct that is reasonably calculated to end an imminent threat of serious bodily harm. Here, the risk to the privilege-holder’s interests overrides the competing interests of the bystander. Where the privilege-holder’s stakes are lower, reasonableness adjusts accordingly. In cases of private necessity, the privilege-holder is permitted to take a bystander’s property in order to protect her own. However, this privilege is not absolute. To avoid an unjust enrichment, reasonableness requires that the privilege-holder pay for her power of usurpation.
Generally speaking, agency is an active force which has an impact on the world.\footnote{See \textit{WEBSTER’S NEW WORLD COLLEGE DICTIONARY} 25 (4\textsuperscript{th} ed. 2001)(defining agency as “1 active force; action; power 2 that by which something is done; means; instrumentality”).} In a tort case, agency is conduct that poses a threat to, or has an untoward effect upon, another person or thing. Either way, the concept of agency has normative dimensions. First, it is distinctive. Although everyone acts, each act is a unique combination of motive, movement and circumstance. And while every act has a consequence, no two consequences are ever exactly the same.

Second, agency is relational. Since every act has an effect, agency establishes an unmistakable link between the two. Thus, when an act is directed against another human being, it forges a special bond between the actor and the person acted upon.

Finally, in light of its relational character, agency is both moral and political. Because action is a manifestation and projection of the agent’s will, any harmful act is susceptible to praise or condemnation. And since agency is a power to impose one’s will on another, the agent stands out as a perennial threat to the equality and freedom of her fellow citizens, and to the stability and order of the social system.

In an emergency situation, a bystander does not have to create the original danger to be responsible for the victim’s injuries. It suffices if her conduct has some influence over the victim’s fate. There are basically two ways that this might happen. First, she might enter into a relationship with the victim \textit{before} the emergency develops. Here, she is not a bystander at all; rather, she is part of the problem. By assuming a protective status, she lulls the victim into a false sense of security. In some cases, as in landlord-tenant relationships, she places the victim in a risk environment that she alone controls. In most cases, the landlord induces the tenant to forgo other opportunities for protection. In every case, she becomes the tenant’s caretaker. If the landlord lets down her guard, the building becomes vulnerable to intruders. If the tenant is attacked, the assailant is not the only culprit. The landlord also shares in the blame. Indeed, as the gatekeeper to the tenant’s safety, the landlord is a co-agent in her loss.

The other way a bystander may incur responsibility is by intervening \textit{after} an emergency arises. As a bystander, she is an observer. But once she gets involved, she becomes an active agent in the outcome. This may occur directly—say, by moving the victim’s body and aggravating her injuries. Or, it may occur indirectly—perhaps by
inducing the victim to give up other rescue options or discouraging other rescuers from offering help. Either way, the bystander turned agent leaves her unmistakable imprint on the tragedy.

Not coincidentally, these agency-based circumstances already trigger duties to aid. These duties constitute the only two exceptions to the general rule.94 One exception is for undertakings.95 When someone undertakes to aid another, she incurs an obligation not to make the situation worse. If she breaches this duty, the law holds her responsible for mucking things up.96 The other exception is for special relationships.97 When a special relationship is formed, the caretaker assumes responsibility for the safety of her charge. If she shirks this responsibility, the law makes her pay for the effects of her dereliction.

This is as far as the law may go. Without proof of agency, the duty to rescue would become nothing but a game of chance. Liability would depend not on causal responsibility or fault, but on random factors like proximity, fortuity and physical strength. Those close to an emergency would have to help. However, those farther away could mind their own business. People carrying cell phones might be expected to get involved. However, those unequipped could remain incommunicado. While hearty adults might be drafted into service, the weak, infirm and youthful would be free to walk away. In each case, the assignment of responsibility would be based on circumstances beyond the assignee’s power of control. Misfortune would trigger the need for action, but luck would determine the duty to act.98

94 The defendant also may be held liable if he fails to rescue the plaintiff from a peril that he (the defendant) helped to create. Here, the defendant’s agency is unmistakable. See DOBBS, supra note 41, § 316.

95 See id. §§ 319, 320, 321.

96 A party who undertakes may breach his duty to rescue in three ways. He may increase the danger facing the prospective victim. See id. at 861-62. He may cause the victim to justifiably rely on the undertaking to his detriment. See id. at 862-64. Or, he may discourage assistance by other potential rescuers. See PROSSER, supra note 4, at 381.

97 See DOBBS, supra note 41, § 317.

98 Luck seems to determine the fate of certain bystanders. As noted previously, an imperiled party may take defensive measures to protect her interests. On some occasions, she may accidentally injure an innocent bystander. If the reaction is reasonable, the bystander must bear the loss. Still, this passive duty to sacrifice is far different from an
When the state allocates benefits to the public, luck and need may serve as appropriate distributive criteria. One who, through no act or fault of her own, happens to fall on hard times deserves state largesse. However, when the state distributes burdens to fund such a scheme, it uses criteria other than random chance to identify potential contributors. Typically, all but the most disadvantaged are required to pay into the system. But within the general population, some citizens usually are asked to contribute more than others. In most cases, wealth and ability to pay serve as the distinguishing criteria. Granted, some people may attain this status by sheer luck, but many do not and ultimately the manner in which they become well-off is not the reason they are selected. They are selected because they have a greater ability to bear the burden of giving and their sacrifice limits their freedom less than those with fewer assets.

In the tort system, too, victims may be injured by chance, but their injurers’ liability is never a matter of luck. Instead, the burden of liability is based on the fair distributive criterion of risk. This criterion not only fails to support a duty to rescue, it actively opposes such an obligation. The reason is that bystanders do not create risk. Risk already exists. Nor do bystanders impose risk upon others. Someone or something else does that. Unless the bystander stands in a special relationship with the victim, she does not even influence the victim’s risk environment. In this situation, the risk criterion has nothing to regulate. As long as the bystander remains uninvolved, her inactivity is not a threat to freedom. Rather, it is an appropriate exercise of her own freedoms of self-determination and self-protection.99

affirmative duty to rescue. Unlike the duty to rescue, which imposes a continuous burden of care, the duty to sacrifice is episodic only. It does not follow the bystander wherever she goes. Rather, it arises only when some desperate party forces her to get involved. Moreover, unlike the rescue duty, which is imposed by the state in the abstract, the duty to sacrifice is imposed by private persons responding to real risks and a primal instinct for survival. Finally, unlike the rescue duty, which is non-negotiable, the duty to sacrifice openly recognizes the bystander’s right to protect her own interests. Indeed, if the opportunity permits, the bystander herself may take reasonable steps to deflect the impending encroachment. As a result, the sacrifice here is less fortuitous and more voluntary than the burden of affirmative rescue.

99 This “freedom” can also be a duty. A person who causes, aggravates or fails to mitigate his damages may be held responsible for all or part of his loss. See Restatement (Third) of Torts: Appportionment of Liability §§ 3, 8 (2000). In this sense, the law imposes a duty to protect one’s interests from unreasonable, unnecessary or voluntary risks.
Risk does not just create duties, it also activates rights. Absent a preexisting relationship, people generally have no right to inject themselves into the lives of their neighbors. Freedom, at its core, implies a right of privacy. This right includes the power to keep intruders out. Risk breaks down these barriers. When one party places another in danger, their lives become intertwined. Here, risk establishes an *ad hoc* relation.

By creating risk, the actor ties a jeopardy hook to a responsibility line and latches it onto her potential victim. Once hooked, the victim may seize that line to regulate the actor’s behavior. Because bystanders create no risk, they cast no line of responsibility. Thus, an imperiled party has nothing to grasp. Except for her fortuitous presence at a particular place for a brief moment in time, the bystander is just like any other stranger to the victim’s world. Indeed, the *only* thing the two have in common is their humanity.

This connection, however, is innate, not transactional. Since humanity is a characteristic held by all, the duty to rescue would extend to the public at large. Such a duty would be social, not personal. As such, it could not support a tort action. Unless the parties are linked by risk or relationship, the victim has no right to impair the bystander’s freedom, and the state has no authority to give the victim that power.

If the rule was otherwise, and bystanders were obligated to intervene, the risk criterion would condemn it as unjust and unreasonable. As mentioned above, the risk criterion aims to eliminate excessive risk from social transactions. In so doing, it must balance several interests, including the security interest of each party to the transaction and the state’s interest in maintaining peace and order. Conceivably, a tort-based duty to rescue could compromise all three of these interests.

First of all, by forcing heroic efforts, the rule subjects rescuers to risks that they would not otherwise confront. A rescuer might be entrapped by a criminal feigning distress. If she lends physical assistance, she might sustain physical injuries during the emergency. Or, by immersing herself into a traumatic event, she may suffer a lifetime of psychological trauma. Even if she merely phones 911 or shouts for help, she may become the immediate object of attack. Or, she might become the victim of a later act of retaliation. In any event, she exposes herself to enormous legal jeopardy. Since both emotions and stakes run high in emergencies, the good samaritan may eventually find herself in court,
even if she does the best that she can under the circumstances.

At the same time, the rule may actually increase, rather than alleviate, the risks confronting imperiled parties. In cases of direct assistance, an unskilled, frantic or overzealous rescuer may aggravate the victim’s injuries or cause her to sustain an entirely new harm. Where there is an ongoing altercation, the rescuer’s intervention might enrage or provoke the attacker. As a result, an otherwise controlled aggressor may turn to violence, or an already aggressive attacker may increase her use of force. In any case, the rescuer may simply make a mistake, injecting herself into the lives of those who do not need or want her assistance.

Finally, such a rule jeopardizes the interests of the state. By requiring intervention, the rule increases the number of people who must interact. It also turns up the heat in the pressure cooker in which they are thrown together. In short, a duty to aid does not just change the dynamics of private crises. It threatens to turn simple skirmishes into full-blown breaches of the peace, and minor crises into major catastrophes.

The duty to rescue fares no better under the concept of corrective justice. Corrective justice is a mechanism for undoing private wrongs. It empowers one who has suffered a wrongful loss to take action to redress it. However, it also places limits on this power. It allows recovery only against the person who caused the loss, and only if that party has reaped a wrongful gain from their encounter.

Unfortunately for people in peril, innocent bystanders do not meet either of these criteria. As noted above, proximity is not agency. A witness to an event is no more a cause of that event than those unaware of its occurrence. Unless the witness has precipitated or exacerbated the event, or has inhibited its safe culmination, she is not a player in the victim’s saga. Rather, she is merely part of the stage on which it unfolds.

Given her detachment, the bystander receives no benefit from the victim’s loss. Indeed, for many bystanders, the event will be psychologically damaging. For others, it might be a matter of complete indifference. But it certainly is no advantage. Because the bystander does not act, she takes nothing from the victim. Moreover, because the bystander and victim are unrelated, the bystander owes her no personal debt of service. Thus, her inaction is not a gain in the sense that it is a benefit withheld.

Absent the existence of a wrongful loss and gain, and a causal nexus between the two, corrective justice provides no support for the victim’s call for assistance. In fact, because of the bystander’s neutrality, any attempt to coerce her help might itself amount to a wrongful
infringement of her autonomy.

The no-duty-to-rescue rule is just one part of a larger liability scheme that promotes the values of freedom and equality. Imperiled parties are free to defend their interests, even to the point of injuring bystanders. Bystanders are free to protect their interests, even to the point of ignoring imperiled parties. If an imperiled party chooses to defend herself, she is bound to exercise reasonable care. If a bystander chooses to protect others, she is held to the same level of caution. 100 Should the imperiled party sustain injury, she may sue the person who created the emergency. Should a rescuer succumb to the danger, she may bring a similar action of her own. 101 Together, these rules ensure proportionality and balance. Each party enjoys a right of self-actualization, yet neither party holds a power of oppression.

Of course, different values might yield different rules. 102 If

100 Once a bystander endeavors to help, she must do so reasonably. If she fails to meet this standard, she may held liable for injuries caused by her negligent assistance. See Malloy v. Fong, 232 P.2d 241, 247 (Cal. 1951); see also United States v. DeVane 306 F.2d 182, 182 (5th Cir. 1962) (holding that the decision to undertake or abandon rescue is discretionary, "[b]ut having undertaken the rescue and engendering reliance thereon, the obligation arose to use reasonable care in carrying out the rescue").

101 This protection is provided by the rescue doctrine. “The basic precept of the ‘rescue doctrine’ is that the person who has created a situation of peril for another will be held in law to have caused peril not only to the victim, but also to his rescuer, and thereby to have caused any injury suffered by the rescuer in the rescue attempt.” New Hampshire Ins. Co. v. Oliver, 730 So.2d 700, 702 ( Fla. Dist. Ct. App. 1999).

102 Those who favor a duty of easy rescue see it as a rather trivial exception to a general rule of responsibility. Although the duty may restrict certain freedoms, it generally complements the standard of reasonable care. See John M. Adler, Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others, 1991 Wis. L. Rev. 867, 914-916. Under this view, the duty requires no wholesale value change. Rather, it is ready for immediate implementation.

This view misunderstands tort law’s essential nature. Tort law is founded on a competitive framework. Under that framework, people are entitled to pursue their own ideals of happiness. To achieve that goal, each person must enjoy a freedom of action. However, as people exercise their freedoms, their paths will often cross, and their interests
Americans lived by an ethic of altruism, the duty to rescue would fit right in. Mutual assistance would be both a legal right and a moral obligation. However, unless and until our values change, balancing freedoms remains the law’s main objective. In some situations, as in cases of emergency, this may make the law seem immoral. Since the law imposes no duty to rescue, it permits bystanders to make bad choices. Yet by extending such deference, tort law does not necessarily sacrifice its morality. Rather, it prioritizes its moral principles, placing the core principle of freedom above all others. Seen in this way, the no-duty-to-rescue rule is not an abhorrent aberration, but rather a model of corrective and distributive justice—and nothing could be more moral, or clash. For example, the freedom of the speeder competes with the freedoms of other motorists who wish to travel in comfort and safety. To level the competition, the law must accord each person the freedom to protect or defend her own interests. In such a system, duty proceeds from action. The actor who creates risks or forms relationships is bound to exercise care. These acts, in turn, forge personal connections between the actor and other freedom-holders. When an actor behaves negligently, she breaks these bonds, and assumes an unfair advantage in the competition. When her negligence causes loss to others, it imposes upon them unfair disadvantages, and activates their rights to redress. Tort law restores the integrity of the competition by returning the parties to the starting line.

The duty to rescue does not fit within this framework. It creates duty without action. It allocates responsibility without risk or relationship. It grants claim-rights without personal connection. It shifts consequences without causation. It assigns blame without overreaching. Instead, it bases duty on inaction. It equates responsibility with humanity. It fashions claim-rights from social ties. It shifts consequences by proximity. And it finds fault in under-loving. Such a scheme does not just alter the rules, it changes the whole nature of the game.

A brief analogy makes this clear. Both football and baseball are competitive sports. Each team goes on the offensive to accomplish an objective. Each team has a chance to defend against its opponent. Both must obey rules designed to keep the match fair. If one changed the rules—say, by adding an extra down or a fourth strike—each game would remain substantially the same. The manner of playing would vary but both sports would continue to be competitive. However, if one changed the objectives—for example, by requiring better teams to affirmatively assist their opponents—each sport would be radically transformed. Rather than being competitive contests, each would become an exhibition of altruism. The change evoked by the duty to rescue is on this same order of magnitude. To accommodate it, tort law would have to do more than simply rearrange its liability principles. It would have to shift from a paradigm of competition to a paradigm of cooperation.
more reasonable, than that.

B. The Standard of Care for Mental Incompetents

Unlike the no-duty-to-rescue rule, the mental incompetent standard’s connection to reasonableness is, in one sense at least, more obvious. According to Black’s Law Dictionary, mental incompetence is a condition marked by “an essential privation of reasoning faculties.” 103 Such a person “is incapable of understanding and acting with discretion in the ordinary affairs of life.” 104 Thus, all deranged conduct is unreasonable per se. Although it may not be depraved, 105 it necessarily lacks the essential attributes of reason. 106

The state can respond to such “unreasonable persons” in one of two ways. It can change the “normal” standard of care to account for their incapacity, or it can leave the standard as is and hold them liable each time they fail to comply. The majority of courts have chosen the latter alternative. 107 The resulting rule is reminiscent of strict liability. It disregards the actor’s inculpability, and dares her to act at her own peril.

In another sense, however, the reasonableness of the mental incompetent’s standard remains in doubt. In fact, to some commentators,


104 Id.

105 In many cases, mental incompetence is congenital. In others, it may arise from a tragic accident or traumatic event. Either way, the disability is not the fault of the person disabled. Moreover, because the incompetent cannot determine what is appropriate, and is unable to behave normally, her conduct also is not morally blameworthy.

106 Obviously, there are many forms of mental incapacity. Some are permanent, others are temporary. Some are totally disabling, others merely diminish cognitive function. Some can be controlled through medication, others are untreatable. By mental incompetence, I mean an uncontrollable condition which renders its sufferer incapable of understanding or appreciating behavioral risks that would be apparent to a reasonable person.

107 See Dobbs, supra note 41, at 284-85 (“The standard of care applied to an adult suffering mental impairment or psychological disturbance remains the standard of the reasonable prudent person of normal intelligence, judgment and rationality.”).
the standard seems downright unfair, especially when contrasted with the child standard which adapts to accommodate the cognitive limitations of youth. In reality, however, the mental incompetent’s rule is just right. Not only is it reconcilable with the child standard, it actually comports with fundamental principles of justice.

Both the child and mental incompetent standards are consistent with the concept of distributive justice. The child standard is based on the distributive criteria of need and risk. The mind of child is like a blank slate. That slate is slowly filled by knowledge and experience. By the time a child reaches adulthood, she is expected to possess enough information to think and act reasonably. In order to acquire this information, however, she must have the freedom to experiment. The need criterion gives her this freedom. Kids can get away with things adults cannot because they need to learn from their mistakes.

The state can afford to extend kids this latitude because they generally are less dangerous than adults. Kids are smaller, weaker and less autonomous than grown-ups. As a result, they pose less of a social threat. Besides causing fewer accidents outside the home, they tend to inflict less serious injuries. Along with this diminished risk comes less responsibility. Under the risk criterion, kids are afforded greater freedom of action because they cannot reciprocate the danger imposed upon them by their elders.

These concepts apply differently to adults with mental incapacities. Like a child, the mental incompetent lacks the ability to act like a mature adult. However, the incompetent’s nonconformity is intrinsic, not developmental. Unlike the child, whose reasoning faculties are merely immature, the incompetent’s faculties are inherently flawed. For whatever reason, the incompetent’s brain cannot analyze risk information like everyone else. This deficiency does not improve over time, nor can it be erased through trial and error. The incompetent does not need, and cannot use, the extra freedom given to children. No matter how much slack she is given, her conduct will remain both illogical and unpredictable. Thus, there is no reason under the need criterion for altering her standard of care.

108 “A minor, even an older one, is not required to conduct himself as a reasonable adult or even as a reasonable child of similar age. The minor is instead required to conduct himself only with the care of a minor of his own age, intelligence, and experience in similar circumstances....” See id. at 293.

109 See CALNAN, JUSTICE, supra note 14, at 183-84.
Even if such a reason existed, the risk criterion would overpower it. Though mentally challenged, an incompetent’s physical development remains unimpeded. Thus, she is just as dangerous as any other able-bodied adult. In fact, because she does not understand the power she wields, and may be incapable of controlling it, she presents an even greater threat to society.

Given that enhanced threat, the law is justified in holding incompetents to a heightened standard of care. Consider what happens to children who engage in inherently dangerous or adult activities. Because such activities are far more risky than childish pastimes, kids who attempt them are subject to a full adult standard of care.\(^{110}\) For mental incompetents, excessive danger is not a choice but an everyday fact of life. Risk follows them wherever they go. In this respect, they are both “inherently and abnormally dangerous” people. Thus, much like overly-adventurous children, they are held to the same standard of “ordinary” care applied to every “normal” adult. Although this standard is beyond their capabilities, it complies with the criterion of risk. If anything, it may be too lenient. An extraordinary risk herself, the mental incompetent could face a duty of extraordinary care.

The child and mental incompetent standards also comport with the tenets of corrective justice. A child who commits a childish act does not gain from her negligence, even if she ends up injuring somebody else. Since the freedom of experimentation is necessary for a child’s development, the exercise of this freedom is neither exploitative nor excessive. Rather, it is a fundamental step in the process of social assimilation which everyone takes early in life.

By contrast, a mental incompetent’s negligence is neither necessary nor normal. Since her incompetence is unaffected by experience, she develops no greater rationality by venturing out into the world. Because her faculties are dysfunctional, she comes no closer to meeting society’s expectation of safety. Indeed, no matter what she does, or where she goes, the incompetent remains incapable of showing due care for the interests of others.

Unlike a child, the incompetent reaps an unfair benefit by exercising unbridled abandon. Granted, her gain may not be calculated.

\(^{110}\) “Most courts…now hold that children engaged in certain activities are held to the adult reasonable person standard of care. Most of the cases have held so when a child was operating a motorized vehicle, boat, plane, snowmobile or machine….” \textit{See id.} at 298 (footnotes omitted).
Indeed, she may not even realize her advantage. But unless she is held liable for her conduct, she stands to gain in several ways. First, she enjoys a freedom of “carelessness” not shared by the more able-minded. Second, she holds a power of subjugation over her victims, converting them into unwilling caretakers who must sacrifice their interests for her own. Finally, she becomes the beneficiary of an obvious double standard, acting according to her own subjective whim while everyone else adheres to an objective rule of law. Corrective justice rejects such favoritism. By calibrating liability to a common standard of reasonable care, corrective justice keeps the scales of justice evenly balanced for all.

The fault matrix hides these truths. It equates negligence liability with moral indiscretion. But if morality were the standard, mental incompetents frequently would be free of blame. However, the purpose of tort law is not to distinguish sinners from saints, but rather to resolve social disputes. To do this, tort implements a social standard of reasonable care. Mental incompetents, by their very nature, fail to meet this standard. When they act, they do not just jeopardize themselves; they endanger the innocents around them. Here, right and wrong are relational, not abstract ideas. The law cannot relax the standards for some without increasing the burdens on everyone else. Nor can it favor the few without disrespecting the rest. By keeping its objectivity, the mental incompetent’s standard strikes the appropriate balance between freedom and security.

The mental incompetent may act without reason. But if her act leads to injury, her victim is protected against the consequences of her irrationality. Here, reasonableness is not a behavioral guide. It is a formula for social accommodation and, in that capacity, an instrument of justice.

III. THE SYMMETRY OF NEGLIGENCE AND INTENTIONAL TORTS

Within the theory of negligence—particularly within the hard cases mentioned above—the modern paradigm of tort law seems incapable of distinguishing between fault and reasonableness. Between the theories of negligence and intentional torts, however, that paradigm adamantly asserts and vigorously defends such a distinction. Intentional torts are premised on the display of a wrongful subjective intent. Negligence, by contrast, is founded on the objective standard of reasonable care.

Although both theories are grounded in fault, the modern paradigm categorizes them as fundamentally different concepts. An intentional tort is never negligent, and a negligent act is never intentional. Of course, there is some truth in this observation. The way
things stand now, unreasonableness and intent part company at the border of substantial certainty. But on a much deeper level, the modern paradigm’s fault dichotomy is both false and misleading. As I will demonstrate below, intentional torts and negligence display symmetry in both procedure and substance.

A. Procedural Similarities

Upon initial examination, negligence and intentional tort theories seem to have little in common. As noted earlier, a negligence claimant must prove the four elements of duty, breach, causation and damage. A plaintiff asserting an intentional tort has different evidentiary obligations. Specifically, she must prove that the defendant acted intentionally to bring about some legally forbidden consequence. Yet despite these discrepancies, the two theories bear three important procedural similarities. They both require proof of facts indicative of wrongdoing. They both shift burdens of proof when facts or policy require. And they both adjust fault and harm requirements in accordance with a principle of inverse proportionality.

The modern paradigm classifies both negligence and intentional torts as fault-based theories of recovery. This classification, however, does not necessarily indicate who bears the burden of proof on the ultimate issue of fault. The plaintiff may have to prove the defendant’s fault, or the defendant may have to establish her faultlessness. Both negligence and intentional torts appear to place this obligation on the plaintiff. A negligence claimant must prove that the defendant owed her a duty of care, and that the defendant’s conduct breached that duty. An intentional tort plaintiff, by contrast, must prove only that the defendant acted with a tortious intent.

In each theory, the plaintiff has the initial burden of coming forward with incriminating facts. In negligence, evidence of breach signals unreasonableness; in intentional torts, proof of intent bespeaks fault. Although these elements of proof may be phrased differently, and may require different types and amounts of evidence, both theories start the procedural ball in the plaintiff’s side of the court.

Once the plaintiff offers evidence of fault, each theory also permits the burden of proof to shift to the defendant. Intentional torts do this as a matter of course. In civilized legal systems, intentionally harmful conduct threatens individual liberty, social stability and the rule of law. Thus, it is automatically suspect. If a claimant can prove that the

111 See Calnan, supra note 13, at 199.
defendant acted with a wrongful intent, tort law presumes that she was at fault. At this point, the burden shifts to the defendant to prove that she was privileged to commit the offending act.

In negligence cases, the shift in evidentiary burdens is more sporadic. Conduct that is self-promoting but unintentionally risky for others is not necessarily wrongful. Indeed, it may be innocent or even desirable. Thus, tort law does not presume fault every time an unintentional act causes someone injury. However, certain unintentional acts are worse than others. For these acts, negligence law operates in almost precisely the same fashion as an intentional tort.

For example, under both res ipsa loquitur and negligence per se, the plaintiff first must prove facts that raise a presumption of wrongdoing. In res ipsa, there are just two predicate facts: (1) the incident probably resulted from negligence, and (2) the defendant probably was the culpable party. In negligence per se, the only triggering facts are that (1) the defendant violated an applicable statute, regulation or ordinance, and (2) that violation caused the plaintiff’s harm. Once the plaintiff satisfies these minimal requirements, the defendant must produce evidence to rebut the inference that she acted negligently. If she fails to do so, the plaintiff often may prevail without presenting any other evidence of fault.

---

112 See Dobbs, supra note 41, at 371.

113 See id. at 315-16.

114 In some cases, proof of a statutory violation provides mere evidence of negligence. Stewart v. Van Deventer Carpet Co., 50 S.E. 562, 564-565 (N.C. 1905) (“The fact of the accident furnishes merely some evidence to go to the jury, which requires the defendant ‘to go forward with his proof.’”). In others, it creates a rebuttable presumption. See Zeni v. Anderson, 243 N.W.2d 270, 276 (Mich. 1976)(“[V]iolation of the statute which has been found to apply to a particular set of facts establishes only a prima facie case of negligence, a presumption which may be rebutted by a showing on the part of the party violating the statute of an adequate excuse under the facts and circumstances of the case.”). In still others, it completely shifts the burden of proof on the issue of negligence. See Jones v. Blair, 387 N.W.2d 349, 352 (Iowa 1986) (once the plaintiff proves a statutory violation, the burden then shifts to the defendant to prove that his conduct was legally excused). The same three approaches also apply to res ipsa loquitur. See Sullivan v. Crabtree, 258 S.W.2d 782, 785 (Tenn. Ct. App. 1953)(listing and discussing the approaches).

115 See Dobbs, supra note 41, at 315 (“In the absence of a valid excuse,
The procedural similarities between negligence and intentional torts are not limited to how the burden of proof is allocated between the parties. Procedural adjustments also take place within the elements of each theory. Both negligence and intentional torts coordinate evidentiary burdens in relation to degrees of fault and harm. In general, the greater the defendant’s fault, the lesser the plaintiff’s proof of harm will be. Conversely, the greater the plaintiff’s harm, the lesser her fault burden will be.

This inverse relationship is especially noticeable in intentional torts. Because tortious intent is so wrongful, an intentional tort plaintiff normally is not required to prove any actual damage. Instead, the law presumes dignitary or political harm from the mere commission of the act. Thus, even if the plaintiff was not injured, she is entitled to at least an award of nominal damages.

In certain intentional torts, however, the configuration of fault and harm is quite different. For example, a plaintiff who asserts intentional infliction of emotional distress bears a heightened burden on the issue of fault. Given the speculative nature of psychic injuries, the plaintiff must do more than prove intent or recklessness. She also must show that the defendant’s conduct was extreme and outrageous. On the other hand, if the defendant’s conduct is less serious, the plaintiff is required to substantiate her claim of harm. For instance, in a trespass to chattel claim, the defendant merely interferes with the plaintiff’s personal property. Thus, to warrant the state’s attention, she also must prove the interference caused her some actual damage.

Negligence displays this same kind of symmetry. Generally speaking, unintentional or negligent behavior is less blameworthy than intentional misconduct. Thus, unlike an intentional tort plaintiff, a negligence claimant must, as a matter of course, offer proof of her damages. If successful, the negligence claimant may only receive compensation for her actual loss; she may not recover punitive damages.

However, things change when the fault-harm balance is tilted too far in either direction. For example, when the defendant is reckless, the

---


117 See DOBBS, supra note 41, at 124 (“To establish liability for trespass to chattels, the possessor must show legally recognizable harm.”).
plaintiff’s damage requirements adjust in one of two ways. In an ordinary tort case, punitive damages become available. In a defamation action, damages are presumed. Where damages are speculative, the plaintiff’s fault burden increases accordingly. For instance, if the plaintiff sustains only economic loss, she must prove more than the mere foreseeability of the harm—she must show that the loss was a highly probable or particularly foreseeable consequence of the defendant’s act. The same is true in bystander emotional distress cases. Because the loss is hard to ascertain, the plaintiff may not rely on proof of negligence alone. She must demonstrate, in addition, a strong probability that such harm would occur.

These procedural similarities are not coincidental, but are driven by the law’s strong liberal value system. Liberty means that people have both the right to act and the right to be free from the harmful acts of others. Tort cases pit one group of right-holders against another. Tort law is the instrument used by one group—victims suffering harm—to inhibit the acts of and to take money from people in the other group. Where it is not clear that an actor has exceeded her rights, the plaintiff cannot

118 See Johnson v. Rogers, 763 P.2d 771, 773 (Utah 1988)(allowing punitive damages where the defendant displayed a knowing and reckless disregard for the rights of others); Philip Morris, Inc. v. Emerson, 368 S.E.2d 268, 283 (1988)(noting that punitive damages apply to willful and wanton conduct).

119 See DOBBS, supra note 41, at 1192 (“When the plaintiff proves a knowing or reckless falsehood, punitive damages are constitutionally permissible.”).

120 See People’s Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 116 (N.J. 1985)(holding that mere foreseeability was not enough; instead the plaintiff must prove that he belonged to “[a]n identifiable class of plaintiffs” who were “particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted.”).

121 See Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989)(rejecting a mere foreseeability test and requiring proof of the following three elements: (1) the plaintiff is closely related to the victim, (2) the plaintiff was present at the scene of the event and was contemporaneously aware that the victim was being harmed, and (3) the plaintiff suffered severe emotional distress from the event); see also DOBBS, supra note 41, at 841 n.14 (listing cases).
abridge her freedom without first proving that she did something wrong. However, where the actor’s conduct seems inherently excessive, she bears the burden of correcting this misimpression and demonstrating that she acted within her rights. No matter what her activity, the actor’s rights will depend on the consequences of her behavior. As acts and consequences vary, the law’s evidentiary burdens constantly adapt to strike the appropriate balance between liberty and safety.

B. Substantive Sameness

The fact that negligence and intentional torts are so similar in the procedural realm admittedly is not enough to reverse the modern paradigm’s determination to keep them apart. After all, many different theories display like tendencies, and these tendencies are constantly changing to suit the needs of the time. The more important consideration is whether the theories are really different in substance.

Unfortunately, the modern paradigm fails here as well, perhaps to an even greater extent. As it turns out, intentional torts and negligence are not different in kind, only in degree. Both theories seek out duty violations. Both theories base duties on distributive justice. Both theories use risk and agency to activate duties in specific cases. And while intent is the marquee concept of intentional torts, both theories premise liability on the transtheoretical concept of reasonableness.

In negligence, duty is a prominent player. It is the first element in the plaintiff’s cause of action, and the primary vehicle for determining the defendant’s responsibility. In intentional torts, duty is nowhere to be seen. Intentional torts do not require proof of a duty, nor do they solicit evidence of breach. Instead, they focus on the defendant’s intent.

However, the fact that intentional torts eschew the language of duty does not mean that they are substantively distinct from negligence. It merely means that in intentional torts, the question of duty is already decided by, and its resolution is entirely encapsulated within, the element of intent.

Unlike acts of negligence, intentional misdeeds appear to demonstrate both a disregard for human dignity and a contempt for the rule of law. Thus, unless otherwise indicated, everyone always bears a duty to refrain from intentionally harming others.\(^{122}\) Unlike negligence duties, which are limited by zones of danger, intentional tort duties are

\(^{122}\) See CALNAN, JUSTICE, supra note 14, at 165-66.
virtually absolute, immutable and universal. Consequently, the intentional tort plaintiff never needs to prove that the defendant was duty-bound to desist from intentional mischief. The duty is subsumed within the element of intent.

For that matter, so is the notion of breach. If the defendant is forbidden from deliberately encroaching upon the interests of others, but does so anyway, the mere fact that she committed the act with the requisite intent is presumptive evidence of her duty violation. To the extent that negligence and intentional torts each premise liability on breaches of behavioral duties, both theories display a significant substantive likeness.

This likeness is intensified by their common philosophical foundation. Earlier, we saw how the principles of distributive justice underlie the doctrines of negligence law, including some doctrines that are particularly controversial. Generally speaking, negligence duties conform to the criteria of need and risk. The more freedom one needs, the more negligence law tends to lighten her duty of care. By contrast, the more risk one imposes on others, the more the law seeks to regulate her behavior.

Intentional torts adhere to the same set of principles. The distributive criterion of risk determines the elementary structure of each intentional tort. From both a social and personal standpoint, nothing is as risky as intentionally other-directed conduct. Because the intentional actor either desires the consequences of her conduct, or knows to a virtual certainty what those consequences will be, very little is left to chance. Unless the actor changes her mind, common sense suggests that someone somewhere will suffer the effects of her behavior. Such a high degree of risk warrants a particularly onerous duty of care. Intentional torts internalize this reasoning by presuming duty and breach from proof of act and intent.

While the risk criterion substantiates the defendant’s duty of care, the need criterion affords her a number of possible defenses. Under the need criterion, a person threatened with serious bodily harm may take extraordinary measures, including killing her perceived attacker, in order to protect herself. The same principle supports the privileges of defense of others, defense of property and public and private necessity. In each

---

123 See id. at 167.

124 See id. at 168-69.

125 See id. at 169.
case, intentional tort law gives to people in need the freedom to safeguard their interests from those bold enough to challenge them.

The duties of negligence and intentional torts are not just similarly constituted; they also respond to the same substantive catalysts. In negligence, duties of care normally arise from risk and agency. An actor who creates risk becomes duty-bound to protect those within the danger zone. The duties of intentional torts are activated in the same manner. Although intent is necessary to establish a duty in the abstract, it is not sufficient to enforce a duty against any particular individual.

For example, a person who devises a plan to kill her enemy commits no tort simply by harboring that intent. During the planning stage, her intent poses no immediate threat to her proposed victim. However, as the schemer begins to implement her plan, the risk to her victim increases. When that risk becomes imminent, the schemer becomes vulnerable to her victim’s privilege of self-defense. The victim may then respond with proportionate force to protect her interests. Or, if the victim fails to curb the threat, she may demand compensation for her injuries. Here, as in negligence, the schemer’s mental state merely signifies her moral perversity. Unless and until she acts on that intent, she remains free from any civil responsibility.  

Whether one acts intentionally or negligently, the applicable liability standard remains the same. At first, this sounds anathema. According to the modern paradigm, negligence rests on the flexible standard of ordinary care. Intentional torts, on the other hand, employ more rigid rules, like the rule against contacting someone in a harmful or offensive fashion or the rule which prohibits entries onto real property without the possessor’s consent. No matter how the duty is phrased, however, the breach never changes. The failure to obey a reasonable law is always unreasonable and unfair.

From the negligence side of things, this proposition is

\[126\] See id. at 61.

\[127\] This rule is implemented by the action of battery. See RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965)(prohibiting harmful or offensive contacts).

\[128\] This rule is implemented by the action of trespass to land. See RESTATEMENT (SECOND) OF TORTS § 158 (1965)(prohibiting unauthorized entries onto real property).
unremarkable. Since reasonableness is the foundation of the ordinary care standard, all negligent acts must necessarily be unreasonable. However, in intentional torts, the reasonableness standard is conspicuously absent. Thus, if this statement is to be proven correct, the proof must come from the doctrines of intentional tort law.

The best proof comes from the concepts of intent and privilege. Since reasonableness requires respect for the interests of others, proof of an intentionally invasive act creates a presumption of unreasonableness. If the defendant has an explanation for her behavior, she may offer it to rebut this presumption. To succeed, however, she generally must show that her conduct was reasonable under the circumstances. Of course, her defenses are not so simply stated. Instead, they are cast as privileges like self-defense, defense of others, defense of property, necessity and so on. Nevertheless, at the core of each defense are long-standing reasonableness principles that excuse or justify her behavior.\textsuperscript{129}

When the plaintiff’s proof of intent conflicts with the defendant’s proof of reasonableness, reasonableness always wins. Indeed, the implicit finding of reasonableness that accompanies a successful privilege is enough to completely exonerate her of all responsibility. The fact that she happened to act intentionally becomes immaterial. Conversely, should the defendant fail to excuse her behavior, the presumption of unreasonableness created by her intentional mental state remains unsullied. In this situation, the lingering inference of fault is powerful enough to hold her liable. Either way, the operative feature of any intentional tort is not the element of intent, but the universal concept of reasonableness. The only difference is one of prominence. In negligence, reasonableness is openly embraced. But in intentional torts, reasonableness remains hidden in the shadows, still waiting for its day in the sun.

IV. THE SYMBIOSIS OF NEGLIGENCE AND STRICT LIABILITY

Because the modern paradigm already groups negligence and intentional torts into the same fault matrix, the overlap between these theories may not seem particularly alarming. However, this is not the full extent of the paradigm’s conceptual osmosis. Negligence does not just bleed into intentional torts, it also absorbs the characteristics of strict liability. Granted, the crossover is not permanent or complete. But it is clear that, when circumstances warrant, negligence can be just as strict as strict liability.

\textsuperscript{129} See Dobbs, supra note 41, at 156-57.
Both literally and conceptually, negligence is the theoretical norm of tort law. Intentional torts, which display extreme culpability, lie at the far end of the fault spectrum. Strict liability, which requires no fault at all, falls at the other end. Negligence sits right in the middle of this scheme, separating intentional torts and strict liability with its standard of reasonableness.

A negligence cause of action has its own state of normalcy. Generally speaking, negligence applies to specific acts, not general activities. It imposes a standard of ordinary care and places on the plaintiff the initial burden of proof. It permits the defendant to plead and prove defenses like comparative fault and assumption of risk that may reduce or preclude her liability.

This state of normalcy is not intractable. Where the plaintiff requires special protection, or the defendant requires special regulation, negligence can make the appropriate adjustments. Activities may be condemned, duties can be expanded, standards can be increased, defenses can be limited and procedural burdens can be relaxed. With each adjustment, the law deviates from the norm by becoming easier on plaintiffs and harder on defendants. As these adjustments accumulate, the law gets stricter and stricter. In some cases, it may require little or no actual proof of fault. When this point is reached, it is hard to tell where negligence ends and strict liability begins.

A. The Focus and Scope of Liability

According to the modern paradigm, one of strict liability’s distinctive characteristics is the breadth of its focus and scope. It is broad in focus because it examines entire activities. If an activity is abnormally dangerous, one who engages in it may be held liable even though she acts in a reasonable manner.\(^\text{130}\) It is broad in scope because it protects a larger group of victims and regulates a larger group of tortfeasors. To do this, it must expand the definition of duty, and extend the reach of proximate cause.\(^\text{131}\)

\(^\text{130}\) See Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) (Tentative Draft No. 1) § 20 (b)(1) (2001) (“An activity is abnormally dangerous if...the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors....”).

\(^\text{131}\) The Second Restatement holds the strict liability actor responsible for nearly all intervening causes, including innocent, negligent and reckless acts of human beings, acts of animals and acts of God. See Restatement (Second) of Torts § 522 (a), (b), (c) (1977). Under
However, negligence law also gravitates to the same extremes. Although negligence usually condemns specific courses of action, nothing prevents it from condemning the more general activities of which they are a part. Of course, there are political constraints. Courts are not supposed to legislate. And if they do, they are not supposed to contradict the will of the legislature. As a result, instances of categorical fault are somewhat rare. Nevertheless, where public policy permits, negligence law has demonstrated the ability to paint fault with a broad brush.

Most findings of activity-based negligence spring from state statutes. Here, public policy is no problem. By enacting the statute, the state expresses its distaste for the subject activity. Drunk driving is a good example. Most, if not all, states have passed laws prohibiting such conduct. Negligence turns this criminal prohibition into an absolute civil responsibility. Under the doctrine of negligence per se, drunk driving becomes an unreasonable activity. Thus, anyone who drives while drunk is negligent as a matter of law. It makes no difference how or why that activity was performed. If the driver causes an accident, she is deemed responsible unless and until she justifies her behavior.

Other activities are regulated on an ad hoc basis. Often, these regulations are phrased as bright-line rules of law. In most cases, these rules are based on experience and common sense. For example, experience shows that epileptics are prone to unexpected convulsions. Thus, common sense says that they should not operate automobiles without appropriate medication. Likewise, experience shows that children are rash and irresponsible. Thus, common sense says that they

certain circumstances, he may even be responsible for an intentional act of a third party. See id. (caveat following the section).

132 See Hasson v. Hale, 555 So.2d 1014, 1016 (Miss. 1990)(holding that truck driver’s intoxication was negligence per se); Davis v. Rigsby, 136 S.E.2d 33, 35 (N.C. 1964) (holding that drunk driving is negligence per se); Cook by and through Uithoven v. Spinnaker’s Rivergate, Inc., 878 S.W.2d 934, 938 (Tenn. 1994)(holding that driving while intoxicated is negligence per se).

133 See Storjohn v. Fay, 519 N.W.2d 521, 530 (Neb. 1994)(holding that epileptic who drove despite knowledge of infirmity was negligent as a matter of law); Eleason v. Western Cas. & Sur. Co., 35 N.W.2d 301, 302-03 (Wis. 1949)(finding negligence by epileptic who drove with knowledge that he could pass out).
should not operate dangerous equipment.\textsuperscript{134} For both groups, negligence places certain activities off-limits. Those folks who mind these restrictions are reasonable; those who do not act at their own risk.

Rules of this sort are not merely vestiges of the past. Rather, they have continuing vitality. Indeed, the \textit{Restatement (Third) of Torts} openly acknowledges the possibility of inherently negligent activities.

The idea first emerged in the recent restatement of products liability law. Specifically, section 2, comment e of the \textit{Restatement (Third) of Torts: Products Liability} provides that some products may be categorically defective because their designs are “manifestly unreasonable.”\textsuperscript{135} In this situation, the manufacturer is liable for any harm the product may cause, even though it could not be made any safer. The problem with the product lies not in its construction, packaging or labeling, but rather in its very conception. In essence, the manufacturer is faulted for ever coming up with the idea of the product, and punished for ever making and selling it to the public.

The same concept appears in the \textit{Third Restatement’s} new chapter on negligence. In section 3, comment j, the Reporters concede that sometimes the mere “decision to engage in a particular activity [may] create[] an unreasonable risk of harm.”\textsuperscript{136} Although these claims are “uncommon,” they are not prohibited by any “general rule.”\textsuperscript{137} In fact, they can arise in a variety of circumstances. According to the comment, “when a person’s vision has been impaired by disease, or when the person needs to take medication that produces continuing grogginess, the person can be found negligent for engaging in the

\textsuperscript{134} See Robinson v. Lindsay, 598 P.2d 392, 394 (Wash. 1979) (applying an adult standard of care to a thirteen-year-old boy who operated a thirty-horsepower snowmobile); Perricone v. DiBartolo, 302 N.E.2d 637, 641 (Ill. App. Ct. 1973) (applying adult standard to a minor who operated a mini-bike on the sidewalk at speeds of up to twenty-five miles per hour); Huebner v. Koelfgren, 519 N.W.2d 488, 490 (Minn. Ct. App. 1994) (applying an adult standard of care to a teenager who handled a gun).

\textsuperscript{135} See \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY} § 2 cmt. e. (1998).

\textsuperscript{136} See \textit{RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES)(TENTATIVE DRAFT NO. 1)} § 3 cmt. j (2001).

\textsuperscript{137} See \textit{id.}
activity of driving a car.”

In all of these situations, the plaintiff is free from having to demonstrate exactly what aspect of the defendant’s conduct is blameworthy. She need only establish that the activity is wrongful in itself, either because it is categorically unreasonable, or because it is always unreasonable when performed by a particular group of people. Here, the spotlight is not on the ethically ambivalent details of the activity, but on its intrinsic risk characteristics. Any way you look at it, this is a strict liability perspective, even if it is filtered through the lens of negligence.

As broad as negligence’s focus may be, its approach to duty and proximate cause are even more ambitious. In theory, strict liability is supposed to provide the greatest amount of protection to the most people for the largest range of risks. However, negligence is no slouch in these areas either. In fact, the history of negligence law in the twentieth century has mostly been a movement from lesser to greater responsibility.

Early negligence law was replete with duty limitations and immunities. However, since the latter half of the nineteenth century, these obstacles have steadily fallen. Gone are the charitable, spousal, parental and sovereign immunities. Gone, too, are the privity limitation and limits on recovery for wrongful death and

---

138 See id.

139 See DOBBS, supra note 41, at 763.

140 See id. at 752.

141 See id. at 754-55.

142 See id. at 695, 716.

143 The privity limitation limited the defendant’s duty to parties with whom he had a direct contractual relationship. Although it still survives in actions against utilities, see H.R. Moch Co. v. Rensselear Water Co., 159 N.E. 896 (N.Y. 1928)(upholding the privity limitation in an action against a water company), it has been eliminated in product liability actions, see RESTATEMENT (SECOND) OF TORTS § 402A (2)(b) (1965)(products liability applies even though “the user or consumer has not bought the product from or entered into any contractual relation with the seller.”).
emotional distress. The entrant classification system of premises liability is in decline. Even proximate cause limits like unforeseeable consequences and superseding cause are rapidly disappearing and in jeopardy of extinction.

In each case, the defunct or near-defunct rule has been replaced or eroded by the more flexible concept of foreseeability. Unlike duty rules, foreseeability knows no bounds. It is unlimited by time, protecting people months or years after the completion of a tortious act. It is unlimited by space, protecting people in the most distant and remote places. It also is unlimited by theory, protecting both negligence victims and the victims of strict liability activities. In each case, foreseeability can stretch as far as justice requires. As one Court has noted, “there are clear judicial days on which a court can foresee

\[144\] See DOBBS, supra note 41, at 803-04.

\[145\] See id. at 836.

\[146\] See id. at 615-16, 619-20.

\[147\] See Michael D. Green, The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond, 53 S.C. L. REV. 1103 (2002)(noting that comparative fault has caused a decrease in superseding cause arguments which cut off the defendant’s responsibility).

\[148\] See Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980)(drug manufacturer held liable to the daughter of a consumer who ingested the drug decades earlier); Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976)(psychologist held liable for murder committed two months after his last consultation with the perpetrator).

\[149\] See Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964)(transit company held liable for damage to a bridge located nearly three miles downstream from the place where the company improperly moored a ship); Atchison, T. & S.F.R. Co. v. Stanford, 12 Kan. 354 (1874)(railroad held liable for fire damage to a barn located four miles away from the place where the railroad started the fire).

On these days, the duties of negligence law can reach the limits of strict liability and even go beyond.

B. Standards of Care and Defenses

Duty and proximate cause determine who can sue and who can be sued. They do not determine what the parties must prove in order to prevail. To establish negligence, the plaintiff must show that the defendant violated a standard of care. To make out a defense, the defendant must demonstrate that the plaintiff assumed the risk of injury or negligently brought it about. However, these substantive requirements are not set in stone. Though negligible in some cases, they are especially onerous in others. Indeed, where justice requires, negligence law can make the defendant’s standard strict and can take away her affirmative defenses.

For over a century now, negligence has employed a standard of reasonable care. This standard has two components: a norm and a medium. Reasonableness is the norm. It represents society’s expectations about how people should act. Reason is the medium. It is the means by which such expectations are discovered. In negligence law, the medium never changes. No matter who the parties are, or what the circumstances of their encounter, reason always judges their behavior. However, the norm used to evaluate the parties and their conduct can vary from case to case. While in some situations reasonableness might require little thought of safety, in others it may seem to demand the world.

The level of rigor is determined by distributive justice. Social expectations rise and fall in accordance with the distributive criteria of need and risk. Reasonableness tracks these expectations. Where need or risk are low, a standard of ordinary care suffices. However, where need or risk are great, reasonableness is not reluctant to raise the bar. Such heightened standards tend to appear in two types of cases: those


153 See Dobbs, supra note 41, at 277 (“The standard for determining negligence purports to apply invariantly to all negligence cases.”).

154 See Prosser, supra note 4, at 175 (“The conduct of the reasonable person will vary with the situation with which he is confronted.”).
involving special relationships, where the need for protection is paramount;\textsuperscript{155} and those involving dangerous activities, where the risk of harm is prodigious.\textsuperscript{156}

In every special relationship, one party has the power to exploit the other. Negligence law harnesses this power by enhancing the dominant party’s standard of care.\textsuperscript{157} For each relationship, the standard corresponds to the power differential separating the parties. The greater the disparity in power, the stricter the standard of care will be. As relationships change, the standard adapts with them and keeps on adjusting until duty off-sets dominance.

Such relational standards come in a variety of forms. Professionals are “held to a higher standard of care than that of the ordinary prudent person when the alleged negligence involves the defendant’s area of expertise.”\textsuperscript{158} Product manufacturers are expected to be “experts” in their respective fields.\textsuperscript{159} Although innkeepers normally owe their guests “a high degree of care,”\textsuperscript{160} in some cases they bear “the highest standard of care—strict liability—for the safekeeping of the

\begin{itemize}
  \item \textsuperscript{155} See CALNAN, JUSTICE, \textit{supra} note 14, at 182-83, 184-85.
  \item \textsuperscript{156} See \textit{id.} at 182-83, 185.
  \item \textsuperscript{157} See \textit{id.} at 182-83, 184-85.
  \item \textsuperscript{159} See O’Hare v. Merck & Co., 381 F.2d 286, 291 (8\textsuperscript{th} Cir. 1967)(“A manufacturer is held to the skill of an expert in its particular field of endeavor, and is obligated to keep informed of scientific knowledge and discoveries concerning that field.”); Guffie v. Erie Strayer Co., 350 F.2d 378, 381 (3\textsuperscript{rd} Cir. 1965)(“While a manufacturer is not required to be clairvoyant he is rightly held to the standard of an expert in regard to his own product.”); McEwen v. Ortho Pharm. Corp., 528 P.2d 522, 528 (Or. 1974)(holding a drug manufacturer to an expert standard); Lopez v. Chicago Bridge and Iron Co., 546 So. 2d 291, 294 (La. Ct. App. 1989)(“The standard of knowledge, skill, and care in regard to the failure to use alternative products or designs is that of an expert, including the duty to test, inspect, research, and experiment commensurate with the danger.”).
  \item \textsuperscript{160} Kraaz v. La Quinta Motor Inns, Inc., 410 So. 2d 1048, 1053 (La. 1982).
\end{itemize}
personal property of a guest." Likewise, common carriers must exercise “the utmost care” toward their passengers, a duty that extends “as far as human care and foresight will go.” And anyone dealing with children must use “extraordinary care” to protect “infants too young to take care of themselves.”

Similar standards apply to people engaged in hazardous activities. Here, too, duty is a relative concept. For every degree of risk the defendant creates, the law imposes an added degree of responsibility. Thus, one who carries a loaded weapon “is bound to exercise extraordinary care.” Likewise, those who handle gasoline are held to “a very high duty of care.” People who maintain high voltage equipment “must exercise the highest degree of care to avoid injuries.” Manufacturers and sellers of natural gas owe “a higher duty of care” than others. Indeed, anyone who uses “substances or instrumentalities”

---


165 See Winfrey v. Rocket Research Co., 794 P.2d 1300, 1303 (Wash. Ct. App. 1990) (“[T]he amount of care necessary varies with the danger which is incurred by negligence, for a prudent and reasonable man increases his care with the increase of danger.”).


168 Winfrey, 794 P.2d at 1303.

that “might endanger persons or property [is] held to a high degree or an extraordinary degree of care.”

Increasing the standard of care is not the only way to expand responsibility. Because responsibility is a bilateral concept, every duty of care is connected to someone else’s duty of self-protection. Once linked, these duties fluctuate according to an inverse proportion. The greater the actor’s duty of care, the lesser the potential victim’s duty of self-protection will be. Because the balance can be altered from either side of the relational axis, there are two ways to increase someone’s responsibility: by heightening her duty of care, or by diminishing her counterpart’s duty of self-protection.

In negligence law, the plaintiff’s duty of self-protection appears in the doctrines of comparative fault and assumption of risk. This duty can be reduced to a simple maxim: Those who unreasonably, or who reasonably but voluntarily, expose themselves to risk must accept responsibility for all or part of the consequences. Normally, the defendant may rely on this maxim to limit her own liability. Sometimes, however, she cannot. Where public policy is compelling, negligence law reduces or even extinguishes the plaintiff’s duty of self-protection, securing her against her own bad choices. To provide this security, however, the law must also increase the defendant’s duty of care by limiting or eliminating her defenses.

Such drastic measures are fairly common in negligence per se actions. Although a defendant accused of a statutory violation usually is permitted to offer an excuse or justification for her behavior, this is not always true. Certain statutes are enacted to protect a class of people who cannot protect themselves. Statutes prohibiting child labor, or the sale of firearms to minors, fall into this category. Such statutes have two clear policy objectives: to impose absolute duties on those they regulate,

170 *Waters*, 212 So. 2d at 490.

171 *See* CALNAN, JUSTICE, *supra* note 14, at 125-27.

172 *See* RESTATEMENT (SECOND) OF TORTS § 483 cmt. c (1965)(“There are…exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves.”).

173 *See* id. cmts. c, e.
and to bestow absolute security on those they protect. To promote these objectives, the law denies the defendant some or all of her affirmative defenses. When this restriction is imposed, negligence liability becomes anything but ordinary. Instead, it establishes, in the words of one court, “a standard of duty akin to strict liability.”

Public policy defeats defenses in other ways as well. For example, corporate defendants often draft contractual provisions to limit their liability. When the plaintiff signs such a waiver, the defendant may assert the defense of express assumption of risk. However, public policy sometimes renders such clauses unenforceable. For example, if the contract is one of adhesion, or if it concerns an essential service, the plaintiff may lack the bargaining power to make an informed decision. Likewise, if the defendant exempts herself from intentional tort liability, society may lose its ability to maintain law and order. Either way, society’s need to enforce the defendant’s duty of care far exceeds the defendant’s right to enforce the plaintiff’s duty of self-protection. In these situations, negligence law bans the defendant’s assumption of risk defense by invalidating her contractual waiver.

Even where such defenses are permitted, they are on a steady road of decline. In most jurisdictions, the defense of assumption of risk is disfavored. In many others, it has been split into pieces and merged

---


176 See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. e & Reporters’ Note to cmt. e (2000)(listing circumstances where exculpatory clauses violate public policy and collecting cases supporting the list).

177 See id.

178 See PROSSER, supra note 4, at 484 (exculpatory agreements “generally are not construed to cover the more extreme forms of negligence, described as willful, wanton, reckless or gross, or to any conduct which constitutes an intentional tort.”).

179 See DOBBS, supra note 41, at 534 (“Assumed risk today is increasingly discarded as a separate defense.”).
into other doctrines, like duty or comparative fault. In still others, it has been completely absorbed into the prevailing comparative fault system. As this trend continues, negligence liability becomes harder and harder to escape. Indeed, it begins to look a lot like strict liability. No matter what this scheme is called, one thing is clear. It is not determined solely by the plaintiff’s liability theory, but is defined as well by the number and variety of defenses afforded to the defendant.

C. Proof

In most cases, the plaintiff and the defendant have the burden of proving each other’s fault. For the plaintiff, this burden has two dimensions. First, she must show that the defendant breached the applicable standard of care; and second, she must show that this breach caused her loss. In certain situations, however, negligence law alters this procedural scheme. Sometimes, it lowers the plaintiff’s burden of proving breach. Other times, it shifts to the defendant the burden of proving her innocence. On occasion, it relaxes the plaintiff’s causation requirements or assigns them to the defense. Individually, each modification has a substantive effect. As such changes accumulate, they move the cause of action away from a theory of ordinary fault and closer to a form of strict liability.

In negligence per se actions, proof of fault turns on just a few facts. The plaintiff does not have to present expert testimony to establish the defendant’s standard of care. Nor must she present cost-benefit evidence to prove the defendant’s breach. Instead, she need only show three things: (1) the defendant violated the terms of a statute, regulation or ordinance; (2) the statute, regulation or statute was designed to protect her from the type of harm she actually sustained; and (3) the violation caused her injuries. In most cases, such proof will come from public

---

180 See id. at 538-41 (discussing the different approaches).


182 See Capolungo v. Bondi, 224 Cal. Rptr. 326, 328 (Cal. Dist. Ct. App. 1986) (requiring proof of four elements: (1) the defendant violated an ordinance of a public entity; (2) the violation proximately caused injury to person or property; (3) the injury resulted from an occurrence of the nature which the ordinance was designed to prevent; and (4) the person suffering the injury to his person or property was one of the class of
records, lay witnesses and the jury’s own common sense. Thus, the plaintiff does not so much prove fault as she describes events that create a compelling inference of fault.

Rules of law work in much the same way. Unlike positive law enactments, rules of law are created by judges. Nevertheless, both create bright-line behavioral requirements. For example, many courts have ruled that drivers who approach railroad crossings must stop, look and listen before proceeding. Others have adopted the “range of vision” rule, which requires motorists to drive at speeds that allow them to stop short of visible obstructions. Since only the stipulated conduct is reasonable, everything else is unreasonable as a matter of law. Here, the plaintiff does not have to prove fault; fault is predetermined by the rule itself. All the plaintiff has to do is point out the defendant’s noncompliance.

The evidentiary requirements of res ipsa loquitur are even more lax. To establish res ipsa, the plaintiff need only demonstrate three facts: (1) there was an accident, (2) the accident normally would not happen without negligence, and (3) the defendant exclusively controlled the instrumentality that brought it about. There are no standards or rules to worry about. The plaintiff merely explains how the incident occurred and lets the circumstances speak for themselves. When the designated facts are all present, they create an automatic inference of fault. When they are convincing, they may preclude any other conclusion.

183 See Dobbs, supra note 41, at 310 (“A rule of law…forbids any assessment of the evidence to determine whether it was negligent in the particular circumstances or not.”).


187 See Imig v. Beck, 503 N.E.2d 324, 329-30 (Ill. 1986)(“In exceptional cases the plaintiff may be entitled either to a directed verdict...”)
Indeed, doctrines like these often have two effects. Besides alleviating the plaintiff’s evidentiary burden, they enhance the burden facing the defendant. The latter effect typically results from a legal presumption. Presumptions remove the issue of fault from the plaintiff’s case-in-chief and transfer that issue to the defendant. Such a transfer can be temporary or permanent. If temporary, the plaintiff maintains the ultimate burden of proof on that issue, \(^{188}\) but the defendant bears the burden of producing evidence to negate the inference of fault. \(^{189}\) If permanent, the entire burden of proof on that issue stays with the defendant. \(^{190}\) Either way, the plaintiff’s position is better, and the defendant’s position worse, than her counterpart in an ordinary negligence action.

Presumptions can be doctrine-wide or case-specific. As previously noted, the doctrines of negligence \textit{per se} and \textit{res ipsa loquitur} apply presumptions as a matter of course. \(^{191}\) Other presumptions apply only in specific factual circumstances. For example, one presumption establishes negligence against bailees who return property in a damaged condition. \(^{192}\) Another faults carriers who lose or destroy the goods of

\(^{188}\) See \citeauthor{dobbs}, \citeyear{supra} note 41, at 368 (terming these “minimum power presumptions”).

\(^{189}\) See id.

\(^{190}\) See id. at 367 (terming these “maximum power presumptions”).

\(^{191}\) See \citeauthor{supra} notes 112-115 and accompanying text.

\(^{192}\) See Aronette Mfg. Co. v. Capitol Piece Dye Works Inc., 160 N.E.2d 842, 845 (N.Y. 1959) (“[I]f the bailor can prove the condition of the goods when delivered, the nature of the subsequent injuries and that they were not the result of ordinary wear and tear, the burden of going forward with the evidence is shifted to the bailee who had the goods exclusively under his control and who should be able to show the manner in which he discharged his contract obligations.”); \citeauthor{polack} v. \citeauthor{o'brien},
their customers. Some presumptions blame employers for the negligent driving of their employees. Still others hold car owners responsible for the carelessness of their permittees.

The law’s procedural favoritism is not limited to the element of breach, but appears in the element of causation as well. Occasionally, the plaintiff cannot determine who caused her harm. In such cases, the law helps her find the culprit.

Two scenarios recur with some frequency. In one, two or more tortfeasors act negligently towards the plaintiff. However, only one actually causes the plaintiff’s injury. Through no fault of her own, the

100 N.Y.S. 385, 387 (N.Y. App. Div. 1906) (“As a general rule, when a bailee fails on demand to deliver to the bailor property which the latter is entitled, the presumption of liability arises.”); Tidewater Stevedore Co. v. Lindsay, 116 S.E. 377, 380 (Va. 1923) (recognizing a presumption of negligence where a bailee returned property in damaged condition).

193 See Hornsby v. Logaras, 49 So. 2d 837 (Miss. 1951) (“[W]hen a bailor shows that goods are delivered to his bailee in good condition and are lost or destroyed or returned in a damaged condition, this fact creates a prima facie presumption of negligence; and it thereupon devolves upon the bailee to absolve himself from negligence.”); Gore Prods., Inc. v. Texas & N.O.R. Co., 34 So. 2d 418, 421 (La. Ct. App. 1948) (requiring plaintiff to prove only (1) that the carrier received the shipment in good condition, (2) that the shipment arrived at its destination in a damaged condition, and (3) the amount of the loss.).

194 See Cofield v. Burgdorf, 115 So. 2d 357 (La. 1959) (recognizing a “presumption that where one is in the possession of...a vehicle of another and is using it in the service of such other, he is the servant or agent of the owner.”).

195 See Nationwide Mutual Ins. Co. v. Stroh, 550 A.2d 373, 375 (Md. 1988) (“[W]here an automobile owner-passenger grants permission to another to drive his car, and the permissive operator drives negligently, the owner has presumptively consented to the negligence...”); Ross v. Burgan 126 N.E.2d 592, 596 (Ohio 1955) (“[W]here an owner is present in his automobile, there is a rebuttable presumption that he has control and direction over it.”).

196 See Summers v. Tice, 199 P.2d 1 (Cal. 1948) (two defendants fired their weapons at plaintiff; however, plaintiff was struck by shot from only one gun).
plaintiff cannot identify the true wrongdoer. The doctrine of alternative liability eases her burden. Specifically, it shifts to each defendant the burden of disproving causation. Any defendant who satisfies this burden is relieved of responsibility, while those who cannot are held jointly and severally liable.

The other scenario arises primarily in products liability cases. Here, a large number of manufacturers produce the same defective product. The plaintiff is injured by one of these goods, but cannot identify the offending item. Under the doctrine of market share liability, she need not prove factual causation. She need only prove that the named defendants held a substantial share of the market for that product. At that point, the defendants take the hot seat. Either they prove that they did not make the injurious item, or they pay damages as if they had.

---

197 This doctrine is set forth in section 433B of the Second Restatement of Torts. See Restatement (Second) of Torts § 433B (3) (1965).

198 See id. (“Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.”).

199 See Summers, 199 P.2d at 5 (“Each defendant is liable for the whole damage whether they [sic] are deemed to be acting in concert or independently.”).

200 See Sindell v. Abbott Labs, 607 P.2d 924 (Cal. 1980)(plaintiff’s mother ingested DES produced by one of 200 manufacturers; plaintiff could not determine which manufacturer made the offending pills).

201 See id. (creating the theory of market share liability).

202 See id. at 145 (“If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished.”).

203 See id. at (“Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff’s injuries.”).
Sometimes the problem is not who caused the loss, but whether the loss resulted from negligence at all. This problem arises most often in medical malpractice cases. The plaintiff suffers from a serious illness. By the time she sees a doctor, her chance of surviving the malady is less than fifty percent. The doctor performs a negligent diagnosis. Because of the misdiagnosis, the plaintiff does not discover the condition until sometime later on. The delay further reduces her chance of survival. Under a normal factual cause analysis, the plaintiff cannot recover. Since the plaintiff was destined to die anyway, the doctor’s negligence is not a “but for” cause of that outcome.

Nevertheless, negligence law is quick to come to her aid. Sometimes, it lowers the plaintiff’s burden of proof. Instead of demanding proof of causation by a preponderance of the evidence, it requires only a “substantial possibility” of that connection. Other times, it changes the proof requirement altogether. Under the “lost chance” doctrine, the plaintiff need not satisfy the “but for” test at all. If the doctor significantly reduces her chance of survival, she can recover for her loss just the same.

According to the modern paradigm, such procedural stratagems are supposed to be unique to strict liability. Indeed, strict liability is defined by two important procedural characteristics: the elimination of the plaintiff’s burden of proving fault, and an increase in the defendant’s burden of defense. Yet, as we saw above, both of these distinctions are false. Where policy permits, negligence reduces the plaintiff’s fault burden, sometimes to the point of elimination. Conversely, where fairness dictates, the law raises the defendant’s burden of proof, sometimes to the point of insuperability. Of course, this does not prove that the modern paradigm is wrong. However, it does raise doubts about its accuracy. If negligence and strict liability work the same way, then

---

204 See Hicks v. United States, 368 F.2d 626, 632 (4th Cir. 1966)(“When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable.”); Thomas v. Corso, 288 A.2d 379, 390 (Md. 1972)(applying “substantial possibility” standard).

they may be more alike than different. And if they share a procedural likeness, then it may be better to bring these theories together than to keep them so far apart.

V. CONCLUSION

The modern paradigm of tort law recognizes three separate theories of tort liability: intent, negligence and strict liability. It further characterizes these theories as either fault-based or fault-free. The fault matrix consists of negligence and intentional torts. These theories are similar in that both require plaintiffs to plead and prove wrongdoing. Yet they remain fundamentally different. Whereas intentional torts require subjective knowledge, negligence involves the breach of an objective standard of care. Threaded through this tripartite structure is a continuum of fault. Intentional torts are the faultiest. Strict liability requires no fault at all. And negligence, the law’s normative reference point, falls somewhere in between.

Upon closer analysis, it appears that the modern paradigm rests on many false assumptions and distinctions. First, intentional torts and strict liability do not fall on opposite ends of the liability spectrum. Rather, they are on the same side. In an intentional tort, the plaintiff does not have to prove the defendant’s fault. Fault is presumed from the element of intent. To rebut this presumption, the defendant must come forward with an excuse or justification. If he fails to do so, he may be held liable even though he committed no wrong. In this sense, every intentional tortfeasor is like his strict liability counterpart: if he acts and injures, he does so at his own peril.

Second, intentional torts and negligence are not inherently distinguishable. Indeed, they are more alike than different. Both torts impose a behavioral duty. Both torts punish mistakes. Both torts violate an objective community norm. And, most importantly, both torts base liability on the common concept of reasonableness.

Finally, the theories of negligence and strict liability are not mutually exclusive. Rather, each often overlaps the other. On a procedural level, negligence may lower the plaintiff’s evidentiary burdens or shift them entirely to the defendant. On a substantive level, negligence sometimes assumes a broad focus and scope. On occasion, it requires no proof of fault. And periodically, it limits the defendant’s affirmative defenses.

In summary, the relationships among these theories may be described as follows. Some negligence doctrines apply strict liability, while others apply a standard of ordinary reasonableness. Thus, the
theories of negligence and strict liability partially intersect. All intentional torts are based on reasonableness. Thus, they are completely subsumed within the theory of negligence. Conversely, all intentional torts impose strict liability. Thus, they are completely subsumed within that theory as well.

From these observations, it appears that the modern paradigm of tort law is not just ill; it suffers from a deep intrinsic infirmity. This problem is not susceptible to some quick-fix solution. We cannot restore the law’s integrity by changing a few words in a statute, reinterpreting a few common law doctrines or rewriting a few sections of the Restatement. Rather, we must alter the way we think about and analyze liability issues. In short, we must begin to shift toward a brand new paradigm of tort law. Obviously, such a course will not be easy, but at least we have the time-tested notion of reasonableness to help us find our way.