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Reasonableness and Law

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persons. By supposing that all have the same interests in both liberty and security, the fault system treats parties as equals, by allowing a like liberty and security to all.

The fault system serves to divide risks at two levels. On the one hand, the duty of care—the specification of the interests of others with respect to which one must exercise care—serves to define the equality of the parties. Not all interests are protected from the risk of injury. Only some forms of attachment to particular goods are protected; protecting all economic interests would place too great a burden on the liberty of others (Benson 1995). If I could not act unless I was sure that your financial position would not be adversely effected, I could not act at all. Which interests in liberty and security are protected depend on substantive views of the importance of various interests to the ability to lead a life of one's own. Moreover, not all otherwise protected interests protected from all risks. Instead, one must only take precautions against those risks which are "apparent to the eye of ordinary vigilance."[7] So, although each person has a protected interest in being free of bodily injury, other need only take precautions with respect to certain ways in which bodily injury might come about. From the perspective of the injured party, all injuries are alike. But from the perspective of the reasonable person, injuries are differentiated in part on the basis of the burden to liberty that precautions against them pose. Each person accepts a certain level of risk in return for a measure of liberty; each accepts a restriction on liberty in return for a measure of security.

The standard of care—the amount of care one must exercise so as to avoid injury to protected interests—also expresses a conception of the parties as equals. Even where interests are protected, the risk of harm to them is divided between potential injurers and those who might be injured. The fault system does not require that unlimited efforts be taken to avoid injuring the protected interests of others. Instead, the risks are divided fairly, asking only that people moderate their activities in light of the interests of others.

Most liberty and security interests are utterly uncontroversial. Security from bodily injury is obviously important, as is the liberty to come and go as one pleases. In order to fill out the idea of protecting people equally, though, a more detailed account is required. The amount of care that is required of a person is set in relation to specific risks. In general, the fact that my activity might cause you some injury is not sufficient to require me to take care. Nor is the fact that my liberty is at stake sufficient to require you to bear risks. Instead, the question is whether or not I exercise appropriate care with respect to specific risks.

A fair division of risks requires that particular risks be assigned to particular activities, or, to be more precise, that they be assigned to activities in contexts (Perry 2001). This is a direct consequence of the idea that interaction is reciprocal. The fact that my hammer and your unprotected head meet is the basis of liability on a residential street, but perhaps not on a construction site. In determining where particular risks properly lie, it is important to remember that risks are the product of interactions, not of actions as such. Thus we might treat certain risks associated with driving differently than others, supposing that some are done at the driver's

[7] *Palsgraf v. Long Island R.R.* 162 N.E. 99 (N.Y. 1928).

risk, others at the risk of those who might be injured. In so doing we might think it wise, for example, to assign risks posed to other drivers differently than those posed to pedestrians.

Parties engaging in potentially risky activities must show reasonable care for those who might be injured by those activities, not simply for the persons who turn out to be so injured. The abstraction of defining the standard of care in terms of the category of plaintiffs rather than the actual plaintiff follows directly from the requirement of treating the parties as equals. Each is required to show appropriate regard for the interests of others. Although fairness between the parties is the central issue in apportioning the risk, the relation between the parties is itself a microcosm of the more general relationship of equality in which all are supposed to stand. Sometimes injuries will still occur; allowing liberty its place requires that some risks lie where they fall. Provided that everyone takes only such risks as they are entitled to take, all injuries will properly lie where they fall. Here too the aim is to give expression to the twin ideas of moderating one's claims in light of the legitimate claims of others and of bearing the costs of one's own activities. Those who moderate their activities in light of the interests of others do not create increased risks. The idea of responsibility thus carries with it an idea of responsible agency. In order to be a responsible agent, one must be able both to pursue one's own ends and to moderate one's claims in light of the legitimate claims of others.

That is, the fault standard defines a situation of equality between the parties, and the payment of damages restores that equality.[8] The defendant is selected to pay the costs because it is the defendant's deeds which have violated equality. That violation of equality is a problem because of its effects, and the appropriate remedy is to undo those effects. Provided that the more general relation of equality is preserved through each person's exercise of appropriate care, there is no need for any party to restore the losses of another. Again, if someone fails to exercise appropriate care, but no injury results, there is no need to compensate, because the failure does no effect anyone's holdings. The need for compensation only arises if an injury results from one party's failure to show appropriate care. In such circumstances, compensation serves, as far as possible, to undo the effects of that failure.

6 Risks and Outcomes

An account of the fault standard must do two things: first, it must offer a principled account of the kinds of behaviour that are unreasonable. Second, it must explain why liability for damages is the appropriate remedy. In this section I offer an account of both in terms of the idea that the person who exposes another to a risk "owns" the risk, and if the risk ripens into an injury, that person owns the injury. The basic idea is simple: in assigning liability, the fault system determines whose problem a certain loss is. When a risk ripens into an injury, the injury belongs to the person to

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[8] Much of my account of the structure of negligence law follows Ernest Weinrib's important work on Private Law (1995).

whom the risk in question belongs. Reasonable risks—those risks the imposition of which is compatible with appropriate regard for the interests of others—lie where they fall. Unreasonable risks belong to those who create them; as a result the injuries that result from unreasonable risk imposition belong to the injurers. Since they are the injurer's problem, the injurer must make them up. Hence damages provide the remedy.

As I said at the end of the previous chapter, the vocabulary of ownership is potentially misleading here; my use of it is meant to draw attention to a familiar point. When confronted with an accidental injury, tort law asks whose problem it is. Just as we can say that an injury is one person's problem, and not another's, so we can say that a risk is one person's risk, and not another's. When a warning on an unattended beach says "swim at your own risk," no puzzling claims are being made about property rights in risks. When I speak of one person owning a risk, I mean nothing more puzzling.

The allocation of risks can be thought of as part of the specification of fair terms of interactions. The fault system has two roles in filling out this idea of fair interactions from fair starting points. First, it gives content to the idea that people should moderate their claims in light of the interests of others. People should not, and cannot, avoid imposing some risks on others; the fault system serves to distinguish acceptable from unacceptable risks. Second, it also provides the grounds for undoing the injuries that result from unacceptable risks.

Now imagine that as well as assigning rights and resources, we have also somehow determined where various familiar risks lie. As we saw in the last chapter, no assignment of rights and resources is possible except against the background of an assignment of risks. That is, in order to specify which interests are protected, we must also specify the risks against which they are protected. The risks that are assigned in this way are specific risks of particular injuries, rather than either total amounts of risk across a lifetime, or some general schedule of benefits and burdens, discounted for their likelihood. The risk of bodily injury through negligence, or of damage to one's property as a result of particular acts of others are assigned. The risk of having one's life go well or badly is not.

Any such assignment of risks must not be understood as the provision of a certain level of security to everyone in the society. Whatever might be said for such an approach to risk, and whatever might be done to make it workable, this is not the suggestion I am making. While everyone does enjoy the same protected liberty and security interests, their actual level of security may vary. Nor is it a matter of the libertarian's provision of a certain level of liberty to all. Nor is security protected only in cases where risk-imposition is non-reciprocal (Fletcher 1972). Taken alone, the idea of reciprocity has no necessary upper bound, and might in principle allow important security interests to give way to unimportant liberties, provided that all are free to take them.[9] Instead, specific liberty interests and security interests are

[9] For example, driving at high speeds might threaten security without violating reciprocity, provided that people all expose each other to the same unreasonable risk.

protected, based on a conception of their importance to leading an autonomous life. Thus risks are distributed in light of the interests that all have in both liberty and security. Risks that result from the acceptable exercise of liberty lie where they fall; risks beyond that lie with those who create them.

The specification of important liberty and security interests and a fair division of risks generates a conception of the reasonable person. The reasonable person is, as always, the person who moderates his or her actions in light of the legitimate claims of others. Applied to circumstances of risk, the reasonable person does not expose others to more risk than is reasonable in light of fair terms of cooperation. The basic strategy is the one I outlined in chapter 1: we look to the liberty and security interests of representative persons—the reasonable person—and protect all equally with respect to those interests. To protect all equally requires weighing liberty against security, but any weighing that is done in done within the representative reasonable person, rather than across persons. The point of weighing interests within a representative person is to avoid allowing the particularities of one person's situation to set the limits of another's liberty or security. Each of us is presumed to have the same interests in both liberty and security. To be sure people, may disagree about the importance of various liberties and security interests. Those disagreements are about particular interests in liberty and security, not about the relative importance of liberty or security in general. The law does not, and could not protect a general interest in liberty (understood as doing as one pleases) or security (understood as being free of the unwanted effects by others.) Instead, certain specific interests are protected.

A fair distribution of risk is a general matter, while courts are called on to decide liability in specific cases. The reasonable person provides the standpoint from which the general distribution of risks can be applied in particular circumstances. Just as the background distribution of risk is tied to the importance of protected interests in both liberty and security, so the reasonable person moderates his or her behaviour in light of the importance of those interests. Thus in deciding liability, courts must decide whether or not a person showing appropriate regard would have taken a particular risk into account.

Suppose that given a background distribution of risks, one person behaves unreasonably by exposing another to some further risk. In such a situation, the person who imposes the risk can be thought of as doing so at his or her own risk. Just as I am responsible for my own injury if I take risks with my own safety, so your injury becomes my problem if I take undue risks with your safety. Either way, if an injury occurs, the costs of the injury properly lie with the person who created the risk. If no injury results, the risk-imposer is just lucky, for there is no injury to make up. It is because the injury is the injurer's problem that the injured party has a right to repair. Should the injured party fail to seek damages, the loss will not be returned to the person to whom it belongs. This poses no problems from the point of view of risk ownership; the injured party need not exercise the right to be relieved of the loss (any more than anyone else need enforce their private rights against another person.) The idea of risk ownership explains why their is a right the injured person may enforce, not why the injured person must enforce it.

Particular liberty and security interests are protected. As a result, only particular risks are distributed. As a result, only some consequences of risk imposition will be significant. If one person exposes another to a risk, and that risk ripens into an injury, the injurer is responsible for the injury, even if the injured party turns out on balance to gain some other benefit as a result. If the plaintiff meets a future spouse while hospitalized as a result of an injury, the benefit that the defendant accidentally conferred on her is irrelevant to the assessment of damages. Again, if a negligent driver causes someone to miss a plane, and the plane crashes, leaving no survivors, the negligent driver cannot claim to have conferred a benefit (a saved life) rather than caused an injury (a missed flight).[10] The risk of a plane crash was the ticket holder's risk, not the driver's, and the fact that the driver eliminated that risk is of no more significance to questions of liability than if the driver had made a large gift to the passenger some time before the accident.[11] The readiness to sue in such cases may reflect badly on the plaintiff's character, but from the point of view of liability, such matters questions are irrelevant.

The idea that those who fail to exercise appropriate care own the risks they create accounts for the fault system's characteristic approach to questions about the duty of care, the standard of care, and the measure of damages. The duty of care is given by the fair background division of risks—our interests in both liberty and security determine where various types of risks lie. Some interests are not protected against injury, others are. The standard of care is set in the same way: interests in both liberty and security serve to set the degree of care required in various interactions. When someone fails to take appropriate precautions, the new risk created belongs to them, so the measure of damages is set by the extent of the injury that results from the wrongful risk creation.

Understanding tort law in terms the ownership of risks and injuries lets us see why money damages would be an appropriate remedy to a wide range of injuries. Commentators have puzzled over how a sum of money can really serve to make up a bodily injury, emotional loss, or pain and suffering (see for example, Radin 1994). The person who is injured and unable to work is entitled to money damages to make up lost income. Missing work may have other social and emotional costs which do not fall under the head of lost income, and which are at best very difficult to make up in monetary terms. As a result, money is an imperfect means of making it as though an injury had never happened. In that sense, though, nothing could make it as though the injury had never happened. Insofar as the costs of injury cannot be made up, money damages are problematic. But insofar as they enable a plaintiff to adapt to his or her situation, money damages are an appropriate way of transferring the loss so that it becomes the injurer's problem to decide how to deal with what is properly his or her loss. The idea that people should bear the costs of their choices requires that the defendant bear the costs of such adjustments as must be made.

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[10] See the discussion of this issue in Weinrib (1989) and Chapman (1995).

[11] Someone who would turn around and sue someone who has conferred a benefit in that way may not be an admirable character, but that is a separate issue.

Once we understand the fault system as an expression of fair terms of interaction in a world of risks, we can see why it imposes a general requirement on agents that they take into account the costs their actions may impose on others. The questions is not whether I am being careful by the standards of what I am doing, but whether I am being appropriately careful in light of my neighbour's interests in security and mine in liberty. The importance of my particular activity enters into defining the appropriate degree of care, by fixing the degree of liberty appropriate to those engaged in that sort of activity. Only this conception of fault can provide an objective measure of the costs of my activity that will enable us to honour the principle that one should bear the costs of one's own activities.

7 Some Contrasts: The Learned Hand Test

This understanding of the fault system is importantly different from Judge Learned Hand's influential test for liability, or at least the standard reading of that test. Hand emphasised the need to balance the costs of accident avoidance against the likelihood and extent of injury. In a case concerning a barge that had broken loose while unsupervised, he offered the following formula for balancing them "[T]he owner's duty [...] to provide against resulting injuries is a result of three variables: (1) the probability that she will break away (2) the gravity of the resulting injury, if she does (3) the burden of adequate precautions [...] if the probability be called P, the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P:"[12] Although the test is often translated into monetary terms, it need not be—costs on both sides of the "equation" can include non-monetary factors.

So understood, Hand might be thought of as pointing to the importance of both liberty and security interests. The dominant reading of Hand's test is at odds with the idea of a fair division of risks, though. On this economic reading, the standard of reasonable care is a standard of individual rationality, which justifies outcomes by their beneficial consequences for the decision maker. So long as compensating would be cheaper than taking precautions, the injurer is free to regard the costs to others as acceptable side effects of his activities. If it is cheaper to compensate, though, no compensation is needed, because the injurer has taken all of the precautions that *would be* justified by their costs. Those who fail to take more generous precautions are not liable if someone is injured as a result of that failure. This has two consequences at odds with the idea of fair division of risks. First, the costs of precautions to the particular tortfeasor are relevant to setting the standard of care he must meet. Thus if a precaution is particularly difficult in the circumstances, that potentially counts as a reason not to take it. As a result, the security of others is subject to the costs precautions pose for particular injurers. Second, the anticipated extent of damages enters into setting the standard of care. If those who might be injured have smaller incomes to replace, for example, correspondingly less by way

[12] *United States v. Carroll Towing Co*, 159 F.2d 169, at 173 (2d Cir. 1947).

of precautions are justified by their costs. On the Hand test, care for the interests of others is only justified when the costs of taking care are less than the costs of compensating injured parties.

On the risk-ownership conception, by contrast, fundamental interests in both liberty and security are protected even in cases where compensation would be cheaper than precautions.[13] The idea of the reasonable person allows us to define both the duty of care and standard of care without reference to the extent of damages in any particular case. As a result, reasonable care is defined in terms of fair terms of interaction *in general*. If a security interest is protected against a certain type of risk, that protection is not lost because precautions would be more expensive than compensation on a particular occasion; if a liberty interest is protected, it does not need to be compromised, even if it could be at low cost. If injuring someone with a small income to replace would be cheaper than taking precautions, no liability would lie on the economic test, but it would on the reasonableness test. Conversely, my liberty interest in driving my car is protected even in those cases where driving it probably does not make my life any easier or less expensive. And if a security interest is not protected, no questions can even arise about the costs of protecting it.

The fault system thus provides a way of *measuring* costs across persons without *aggregating* them. On the economic test, tort liability serves two distinct purposes. First, it serves as an incentive to take appropriate precautions. Second, it serves to compensate those who are injured so as to provide them with an incentive to sue—thus underwriting the first incentive. Neither incentive is needed when injurers already take such precautions as are justified by their overall costs. Both are needed when the failure to take precautions increases overall accident costs. There is much that is puzzling about such a picture, notably its readiness to leave costs where they lie in just those cases where it would have been more expensive for *the injurer* to take precautions than for *the victim* to bear them. The risk-ownership conception avoids these difficulties because it ties liability to particular risks. Those who create wrongful risks are liable if those risks ripen, even if injuring others was less expensive than being careful would have been.

8 Insurance

For related reasons, the fault system's conception of risk treats considerations of insurance as secondary to questions of liability. Just as first-person insurance enables people to protect themselves against any losses that they might suffer, so liability insurance allows parties to protect themselves against losses they might be left with as a result of their negligence. Injuries occasioned by wrongful risk imposition belong to the people who wrongfully cause them. If others contract to assume those

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[13] The incentive effects of such an imbalance of costs might lead some to decide to injure and pay rather than take precautions, thus substituting private rationality for public standards of reasonableness.

risks, such contracts and their terms are a matter between the defendant and those with whom such agreements are made, in which the law takes no interest. Conversely, if an insurer has indemnified a plaintiff against a certain loss, the insurer has a right of subrogation against those who negligently injure the plaintiff. Because the insurance contract passes the risk of injury onto the insurer, the insurer can collect from the person to whom the risk properly belongs. If, as if often the case, both plaintiff and defendant have made prior arrangements, litigation will involve the two insurers. That this should be so reflects the way in which the tort system supposes that risks can be owned and traded.

In part because so many suits directly involve insurers rather than the parties to an injury, insurance is sometimes thought to play a more fundamental role in tort liability. Judgments of liability are sometimes thought to rest on questions of which party was in a better position to insure against a category of loss. For example, the law's unwillingness to compensate for the sentimental value a plaintiff attaches to some injured object is sometimes explained in light of the fact that the plaintiff was in a better position to insure against such losses than was the defendant.[14] The idea of fair terms of interaction stands in the way of arguments of this sort on the same two grounds as it rejects the economic interpretation of the Hand test. Just as the Hand test makes judgments of liability depend on whether it would be rational for *this* defendant to avoid injuring *this* plaintiff, rather than asking about the importance of the liberty and security interests to reasonable persons, so insurance arguments look to whether it would be rational for plaintiff or defendant to insure against his kind of loss. The resulting inquiry looks to questions about both plaintiff and defendant that are both too idiosyncratic and too general. They are too idiosyncratic, because the extent to which the plaintiff's security is protected depends on the particular interests of the defendant who has caused the injury, and the extent of the defendant's liberty is fixed by the particular sensitivities of the plaintiff. Each party is limited in this way precisely because insurance allows parties to protect idiosyncratic interests. At the same time, they are too general, because whether or not it is rational for a particular person to insure depends on that person's general pattern of activities. Whether or not a defendant will insure against injuring a certain class of plaintiff depends on the overall likelihood of that defendant causing that type of injury. Those who repeatedly expose others to a similar risk of injury will insure; those who are repeatedly exposed to those risks will insure themselves against injury. Thus both liberty and security are hostage to the overall patterns of activity of particular plaintiffs and defendants. Making liability turn on which of the parties is in the best position to insure rests on the idea that the loss is the common problem of both parties. Once the loss is thought of in this way, the liberty and security of each depends on the particular situation of the other.[15]

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[14] See for example, Alan Schwartz's (1992, 820, 832–40) argument that American products liability law leads consumers to purchase more insurance then they want.

[15] Insurance arguments sometimes take another form, which faces additional difficulties as well. Courts sometimes appeal to the availability of standard types of insurance in determining who should bear the costs of and injury. In *Lamb v. Camden London Borough Council,* (1981) QB 625

9 The Disproportion Test

But if the fault system does not reduce reasonableness to overall rationality by aggregating injury and avoidance costs across persons, it also does not require the "disproportion test" sometimes enunciated by English courts. That test supposes that security enjoys a special priority, and so looks only to the danger posed by various acts, and assigns a lesser weight to liberty interests. In *Bolton v. Stone,* Lord Reid, after conceding the importance of the likelihood and severity of injury to fixing the standard of care, said that he did "not think it would be right to take into account the difficulty of remedial measures."[16] Reid later qualified the test, acknowledging that precaution costs could be taken into account if the costs were large and the danger small.[17]

No such disproportion is appropriate when we consider that both liberty and security interests are always involved in setting the standard of care. While we might agree with Lord Reid's sentiment that if cricket cannot be played safely, it should not be played at all,[18] other liberty interests may be important enough to justify exposing others to risks. Driving a car safely almost certainly creates greater risks than does cricket. So too do countless other activities. To be fair to Lord Reid, he concedes this, noting that "in the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others."[19] He also couches the disproportion test in terms of the risks a reasonable man would think it right to neglect. A reasonable man, or better, a reasonable person, would not think in the terms suggested by the Learned Hand test, weighing precaution costs against compensation costs. Instead, the reasonable person thinks from the perspective of equality, and takes such care as is required by a like liberty and security for all. Because the only way of increasing the sphere of liberty of defendants is to increase it for all, some genuine and avoidable risks may be disregarded by the test, not because they are mere possibilities or cost-justified, but because the liberty interest at stake is so important.[20]

(C.A.) Lord Denning pointed to the availability of homeowner's insurance to spread the costs of the damage to the plaintiff's home caused when squatters moved in after the defendant's negligence rendered it uninhabitable. Yet in order for such considerations to arise, the regime of legal rights needs to be determined. Insurance contracts ordinarily include a right of subrogation against tortfeasors; pointing to the availability of an insurance policy presumes the absence of liability.

[16] *Bolton v. Stone*, (1951) App. Cas. 850, 867 (H. L.) (Per Lord Reid) I presume "remedial" here means "risk reducing," rather than the cost of damages.

[17] *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Pty. Ltd* (*The Wagon Mound n. 2),* (1967) 1 App. Cas. 617, at 641 (P.C.) On appeal from Australia.

[18] *Bolton v. Stone* at 867

[19] *Bolton v. Stone* at 807.

[20] Both the Hand test and the disproportion test are potentially misleading, because both talk about the risks that may be disregarded, as though negligence is a matter of consciously considering a risk and deciding whether or not to ignore it. But the standard of care in negligence law is not centrally concerned with the injurer's state of mind, only with outward behaviour. Whether or not one exposes others to risks through ones voluntary actions is not in the first instance a matter of whether or not one pays attention to those risks. Instead, it is a matter of the risks one poses.

10 Explaining Tort Doctrine

In the remainder of this chapter I show how the ideas of risk ownership and the reasonable person serve to make sense of three important features of tort law. The first three are respects in which liability is limited. First, tort law combines an "eggshell skull rule" according to which an injurer is liable for the full *extent* of injuries, no matter how unusual such injuries are, with a "ultrasensitive plaintiff rule" according to which an injurer is not liable for unusual *types* of injury, no matter how severe those injuries are. Second, the standard of care in tort is objective, so that due diligence is not a defence to a tort action. Third, tort doctrine draws a sharp line between nonfeasance and misfeasance, as a result of which there is no tort duty to rescue. My discussion aims to show the sense in which these tort doctrines reflect an attractive underlying conception of fairness even when they at first seem cold and unfeeling. Looked at from the perspective of binary adjudication between two parties, that conception of fairness may appear to leave too many misfortunes where they lie, but, as I explain in chapter 9, a fuller application of the same conception of risk leads to the conclusion that some of those misfortunes should be held in common as part of a larger pool.

11 Reasonableness and Objectivity

The idea that those who create unreasonable risks are responsible for them shows why the idea of fault must be objective in a strong sense of that term. The fact that someone was trying their best does not excuse them from liability. The classic illustration of this point is the 19th century case of *Vaughan v. Menlove*.[21] Menlove, who had limited mental abilities, left a rick of hay on the edge of his property, close to Vaughan's barn. The hay spontaneously combusted, taking the barn with it. Vaughan sued for damages. Menlove's lawyers argued that because he was not intelligent enough to understand that hay was susceptible of spontaneous

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Avoiding risks to others is my problem, but I need not adopt any particular solution to it. If we think of liability in terms of the economic conception of the Learned Hand test, the difficulties attendant on paying attention would seem to be among the costs to be taken into account in determining the optimal level of precaution. Paying attention is a cost, and like other accident avoidance costs, its expenditure must be justified. However, if we think of liability in terms of a fair distribution of risk, the level of compliance is always incorporated into the standard of reasonableness. The fact that on some particular occasion someone has difficulty complying with a fair standard is not more significant than the fact that someone has difficulty repaying their debts. In each case, it is not up to the particular others with whom they interact to bear the costs of that difficulty. Fault liability is not a sort of queer hybrid between strict liability and recklessness—as suggested by Larry Alexander (1992). While it is trivially true that all cases of risk imposition involve agents who either did or did not avert to the risk, it is the risk, rather than the advertence or nonadvertence to it, that provides the basis for the liability. Negligence liability is defined in terms of the appropriate distribution of risk, and as such is prior to questions about the tortfeasor's mental state.

[21] *Vaughan v. Menlove* (1837) 132 E.R. 490 (C.P.)

combustion, he should not be liable for the resultant damage. The court rejected the argument, for reasons that have broad significance. Because of the binary structure of adjudication—because it had to be somebody's bad luck—the court had to decide whose it was. Here nobody could in fact have controlled the outcome, but the bad luck must be borne by someone. If we relieve Menlove of responsibility for something he cannot control, we saddle Vaughan with a cost the origins of which *he* could not control. There is no way to retreat to equating responsibility with control. Yet the decision is not just an administrative one in a situation in which nobody could control the loss.[22] Rather, holding Menlove liable is the only way to treat the parties as equals, by protecting them each from the activities of others, and leaving each with room to pursue his or her own purposes. The only way one can be exempt from the need to bear the costs of one's activities is to not be an agent at all. Had the court relieved Menlove of responsibility, and treated the bad luck as Vaughan's, they would have been treating Menlove himself as a mere natural thing rather than as an agent. At the same time, had they refused to make Menlove bear the costs of his activities to others, they would have been treating Vaughan as less than an equal, making him bear the costs of a broader range of others' activities than they must bear of his own.[23]

Put slightly differently, while we hesitate to blame Menlove for his incapacity, we hold him liable because the risk that he imposed on Vaughan was rightly his. We hold him liable without supposing him to be morally tainted because a fair distribution of risks requires that the risk lie with him. His liability can also be restated in terms of his responsibility to moderate his activities in light of the legitimate claims of others. Those who engage in the activities of ordinary life have a responsibility to take account of the dangers their activities pose. Those who are genuinely incapable of assessing risks and taking precautions—incapable, that is, of moderating their pursuit of their own ends in light of the legitimate claims of others—cannot be held responsible for the consequences of their deeds, but they also can be prevented from exposing others to those risks. Those who have the requisite capacities cannot excuse themselves on those occasions on which they fail—for whatever reason—to exercise them adequately. That is, the general capacity for responsible agency is the capacity both to pursue one's ends and moderate one's claims in light of one's duties to others. In the next chapter I will say more about how that capacity is specified. For now, the crucial point is that those who have the general capacity are required to moderate their behaviour in light of the interests of others. The extent to which that

[22] It is not merely administrative for two reasons: First, it does nothing to prevent future losses, for those in Menlove's situation are *ex hypothesi* incapable of appreciating the risks. Second, it is plainly administratively simpler to let losses lie where they fall, unless there is some pressing reason to do otherwise.

[23] Holding Menlove liable is just the flip side of a principle we have already seen. If you injure me in spite of taking reasonable care, you are not liable, even if I injure easily. To hold you liable in such circumstances would mean that you could only act subject to my idiosyncrasies. In just the same way, Vaughan's interest in security cannot be made to depend on Menlove's lack of intelligence.