THE SPURIOUS RELATIONSHIP BETWEEN MORAL
BLAMEWORTHINESS AND LIABILITY FOR
NEGLIGENCE

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[Traditional learning maintains that liability for negligence is ultimately premised on notions of
moral blameworthiness. It is thought that the legal principles which define the scope of negligence
loosely conform to such notions. This article challenges that view. While there is a certain amount
of evidence which supports the conventional view, it is argued that this evidence is eclipsed by many
important instances where the tort of negligence is insensitive to considerations of moral blamewor-
thiness.]
liability for negligence … is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.’

1 Since Lord Atkin’s pronouncement, this precept has been extolled as ‘the sovereign principle of negligence’; 2 ‘the general underlying notion of liability in negligence’; 3 ‘a reflection of practicality and common sense’, and a fundamental premise which is ‘indispensable to the law of negligence.’

The most poignant judicial support for this view, however, was given by Canadian judge and torts scholar, Allen Linden, when he equated it with ‘a seed of an oak tree, a source of inspiration, a beacon of hope, a fountain of sparkling wisdom, a skyrocket bursting in the midnight sky.’

Many academic commentators also view the tort of negligence through the prism of moral blameworthiness. For example, Glanville Williams and William Hepple assert that ‘commonsense morality suggests that a man who has been negligent ought to pay compensation to those whom he injures.’

Peter Cane argues that negligence is best understood as an ethical system of personal responsibility, whilst David Owen maintains that blameworthiness is the ‘basic cement’ of negligence.

1 [1932] AC 562, 580. Lord Atkin was not the first to propound this view. Its origins can be traced at least back to Justice Oliver Wendell Holmes, who said that ‘the general foundation of legal liability in blameworthiness, as determined by existing average standards of the community, should always be kept in mind’: Justice Oliver Wendell Holmes, The Common Law (1881) 125. See also at 108–9.

2 Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd [1961] AC 388, 426 (Viscount Simonds) (‘Wagon Mound [No I]’).


Two initial observations regarding this conventional view should be made. First, advocates of this view do not perceive liability for negligence as being wholly consistent with notions of moral blameworthiness. They do not contend that blameworthiness provides an all-inclusive explanation for the tort of negligence. Only the most ardent proponents of the conventional view posit that negligence is (or should be) entirely coextensive with moral blameworthiness.10 Morality and legal liability often fail to coincide. Indeed, Lord Atkin himself observed that ‘acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief.’11 Rather, the position generally adopted is that whilst negligence and morality occupy separate domains, they are ‘inextricably interwoven’12 and enjoy a ‘symbiotic’13 relationship, with the result being that liability for negligence ‘corresponds approximately’14 to moral censure.

Second, there is no consensus amongst supporters of the conventional view as to the conditions that must be satisfied before moral blame can be imputed to a person. Indeed, to a large extent, the conventionalists are content to determine this issue as a matter of commonsense, by reference to shared moral views on acceptable standards of behaviour.15 This approach, which has been employed elsewhere,16 has a certain appeal, considering that conceptions of what constitutes blameworthy behaviour are, at least to some extent, both temporally and geographically relative.17


10 Among these proponents is Justice Allen Linden, who argues that the ‘total implementation [of Donoghue v Stevenson] in law and in life should be our dream and our mission’: Linden, ‘Viva Donoghue v Stevenson!’, above n 6, 228.


13 Cane, Responsibility in Law and Morality, above n 8, 12–16. See esp at 15–16.


15 See, eg, Donoghue v Stevenson [1932] AC 562, 580 (Lord Atkin).

16 See, eg, the High Court’s approach to causation: March v E & M H Stramare Pty Ltd (1991) 171 CLR 506, 515 (Mason CJ), 523 (Deane J); Royall v The Queen (1991) 172 CLR 378, 387 (Mason CJ), 411–12 (Deane and Dawson JJ), 423 (Toohey and Gaudron JJ), 441 (McHugh J), Bennett v Minister of Community Welfare (1992) 176 CLR 408, 412–13 (Mason CJ, Deane and Toohey JJ); Chappell v Hart (1998) 195 CLR 232, 238 (Gaudron J), 242–3 (McHugh J), 268–9 (Kirby J), 290 (Hayne J).

17 However, reliance on the notion of ‘commonsense’ as a justification for a particular conclusion also has limitations: see Cane, Responsibility in Law and Morality, above n 8, 18–19.
This article aims to demonstrate that this conventional view fails to provide an adequate organising principle for the tort of negligence. A review of the arguments in support of the conventional view is presented in Part II. The critique of this view is advanced in Part III. Part IV contains some brief observations regarding the effect of the recent spate of tort reform in all jurisdictions on the veracity of the conventional view.

II EVIDENCE IN SUPPORT OF THE CONVENTIONAL VIEW

The tort of negligence has at least six features which support the conventional view. First, the principles governing negligence import a system of fault liability. As the term ‘negligence’ implies, liability rests upon fault on the part of the defendant in failing to take reasonable care to guard against a foreseeable risk of injury.18 In theory, negligence does not provide a remedy to a victim of pure accident or bad luck, or for loss occasioned entirely as a consequence of the victim’s own doing. Accordingly, when courts hold a defendant liable, they are essentially making a judgement that the defendant should have acted with greater caution. In this sense, negligence identifies with personal moral failings.

Second, the formulation of the duty of care as an obligation to ‘take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour’19 demonstrates a clear endorsement of the moral ideal that people should have reasonable regard for the interests of others.20 Of particular note is the High Court’s flirtation with factors used as indicia for the imposition of duty, such as vulnerability on the part of the plaintiff,21 and the special control22 or knowledge23 enjoyed by the defendant with respect to the

18 Blyth v Birmingham Waterworks Co (1856) 11 Exch 781, 784; 156 ER 1047, 1049 (Alderson B).
19 Donoghue v Stevenson [1932] AC 562, 580 (Lord Atkin).
20 Mason, above n 5, 156–7.
21 Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520, 551 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); Hill v Van Erp (1997) 188 CLR 159, 186 (Dawson J), 216 (McHugh J); Pyrenees Shire Council v Day (1998) 192 CLR 330, 372–3 (McHugh J), 421 (Kirby J); Perre v Apand Pty Ltd (1999) 198 CLR 180, 194–5 (Gleeson CJ); 202 (Gaudron J), 204, 225–30, 236 (McHugh J), 259 (Gummow J), 290 (Kirby J), 328 (Callinan J); Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1, 24–5 (Gaudron J), 40–1 (McHugh J); Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, 576–7 (McHugh J), 597 (Gummow and Hayne JJ), 664 (Callinan J); Dorovo Pty Ltd v Wilkins (2003) 201 ALR 139, 179 (Hayne and Callinan JJ); Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 205 ALR 522, 529–30 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 543, 544–5, 553 (McHugh J), 566–7 (Kirby J), 576, 578, 579, 580 (Callinan J); Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 207 ALR 52, 72–3, 75 (Kirby J); Frost v Warner (2002) 209 CLR 509, 525–6 (Gaudron J). For an endorsement of the High Court’s flirtation with factors used as indicia for the imposition of duty, such as vulnerability on the part of the plaintiff,21 and the special control22 or knowledge23 enjoyed by the defendant with respect to the
situation which culminated in injury to the plaintiff. Whilst none of these criteria are determinative, they may, where relevant, weigh strongly in favour of the imposition of a duty of care. This is important because these considerations resonate strongly in morality. We tend to accept that people should have special regard for others with whom they share a relationship which is characterised by vulnerability, or where others may be harmed as a result of a situation over which they enjoy substantial control or of which they are uniquely apprised.

Third, as a legal construct, negligence shares some similarities with the usage of moral language. When used in its everyday sense, the term ‘negligence’ denotes carelessness. Although the tort of negligence has a more specific meaning than its colloquial counterpart, the differences between the two terms are arguably not as great as legal vernacular would have us think. As a matter of law, the tort of negligence consists of the complex concatenation of the concepts of duty, breach, and consequential non-remote damage. The lay meaning given to the term ‘negligence’ corresponds loosely to the concept of breach. The fact that this correspondence goes to the breach element rather than the duty or damage elements is significant considering that, as a matter of practice, the breach element is by far the most important. The vast majority of tort actions in which liability is contested involve a dispute regarding the breach element. Accordingly, the fact that the lay definition of negligence does not encompass the duty and damage elements is perhaps not of much relevance in working out how closely it resembles the legal definition.

Fourth, liability for negligence is only imposed on defendants who attain a minimum level of mental awareness. For instance, involuntary conduct cannot, by itself, constitute negligence. Similarly, children who are so young that they lack the mental capacity to realise the wrongfulness of their conduct cannot be held liable. As a minimal level of awareness is also a precondition for moral blameworthiness, it seems that, in this respect, the law is in step with morality.

664 (Callinan J); Tame v New South Wales (2002) 211 CLR 317, 379 (Gummow and Kirby J); Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 205 ALR 522, 579 (Callinan J).


26 Cane, Responsibility in Law and Morality, above n 8, 218–19.

27 Cane, ‘Retribution, Proportionality, and Moral Luck in Tort Law’, above n 8, 148–9. See also ibid, 73, for a discussion of the minimum requirement of physical and mental capacity within the law in general.


29 McHale v Watson (1964) 111 CLR 384, 386 (Windeyer J); Walsley v Humenick [1954] 2 DLR 232, 238 (Clyne J); Hudson’s Bay Co v Wyrykowski [1938] SCR 278, 286 (Davis J); Acadia Coal Co Ltd v McNeil [1927] 3 DLR 871, 876 (Newcombe J).
Fifth, it is arguable that the objective standard of care bears some resemblance to morality. Like moral standards, the objective standard is often pitched at a level above how people actually behave and thus it operates as a model for desirable behaviour. Accordingly, both the law and morality attempt to encourage people to improve their conduct by constructing artificially high standards.

Sixth, it has been suggested that the legal principle of reasonable foreseeability is consistent with the moral infrastructure used to attribute blame. The connection between foresight and moral blameworthiness rests on the following three propositions:

1. To be blameworthy, one must have made a choice to engage in conduct which causes an undesirable outcome.
2. The relevant choice only exists if the individual could have conducted themselves so as to avoid the undesirable outcome.
3. An undesirable outcome can only be avoided by way of a choice if the individual foresaw that outcome.

Stephen Perry encapsulates this reasoning:

The capacity to avoid the result … is what gives rise to moral responsibility for harm. …

Given that everyone must be active, no moral consequences can attach to action per se. Something more is therefore required to ground responsibility for causing harm, and that further requirement is … a capacity to avoid the harm. But there can be no such capacity unless the agent is capable of foreseeing the result.

However, it is difficult to see how the principle of reasonable foreseeability ensures that liability only arises in respect of avoidable risks. As the test for reasonable foreseeability is applied objectively, it may be satisfied even where a particular defendant did not advert to the risk which materialised. Furthermore, because the test only excludes risks which are ‘far-fetched or fanciful’, it is so ‘dangerously expansive’ that it can hardly be said that people are only held

30 Although see below Part III(B).
32 Peter Cane, Atiyah’s Accidents, Compensation and the Law (6th ed, 1999) 39; Cane, Responsibility in Law and Morality, above n 8, 73.
34 Perry, above n 33, 341–2.
liable in negligence for the occurrence of avoidable risks. Indeed, the test has been described as an ‘undemanding’ and ‘comfortable latitudinarian doctrine’ which has nothing to do with reasonableness and is more aptly described as a test of ‘conceivable foreseeability’. Dixon CJ in Chapman v Hearse appeared to go so far as to doubt that the test had any content whatsoever, stating that he could not ‘understand why any event which happens is not foreseeable by a person of sufficient imagination and intelligence.’

There are a considerable number of cases in which very obscure risks have been held to be reasonably foreseeable. For instance, in the context of medical negligence, a one in 14 000 risk and a risk which was so rare that it was not mentioned in medical textbooks have been held to be foreseeable. However, it seems that not all risks are foreseeable. Some risks which have been held to be unforeseeable include: the risk of slipping on the edge of a private swimming pool which had been used without incident for 21 years; the risk of falling from the roof of a coke oven whilst cleaning rubbish; the risk of tripping over a small crack in a footpath; and the risk of running down a pedestrian who spontaneously stepped out onto the road from the median strip. Nevertheless, this position may well have changed in jurisdictions which have adopted the recommendation of the Review of the Law of Negligence to alter the test for foreseeability to inquire whether the risk was ‘not insignificant’: Panel of Eminent Persons, Review of the Law of Negligence: Final Report (2002) 103–7. See Civil Law (Wrongs) Act 2002 (ACT) s 43(1); Civil Liability Act 2002 (NSW) s 5B(1); Civil Liability Act 2002 (Tas) s 11(1); Wrongs Act 1958 (Vic) s 48; Civil Liability Act 2002 (WA) s 5B(1). See below Part IV.

37 This position may well have changed in jurisdictions which have adopted the recommendation of the Review of the Law of Negligence to alter the test for foreseeability to inquire whether the risk was ‘not insignificant’: Panel of Eminent Persons, Review of the Law of Negligence: Final Report (2002) 103–7. See Civil Law (Wrongs) Act 2002 (ACT) s 43(1); Civil Liability Act 2002 (NSW) s 5B(1); Civil Liability Act 2002 (Tas) s 11(1); Wrongs Act 1958 (Vic) s 48; Civil Liability Act 2002 (WA) s 5B(1). See below Part IV.


41 Rogers v Whitaker (1992) 175 CLR 479, 482 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).


43 Outside the medical negligence context, some unlikely risks which have been held to be reasonably foreseeable include: the risk of a wheel detaching from a trailer and producing sparks which start a fire (Haileybury College v Emanuelli [1983] VR 323); the risk of drowning in a gutter as a result of a motor vehicle accident (Versic v Connors (1969) 90 WN (NSW) 33); and the risk of running over an intoxicated man lying on a driveway (Mazinski v Bakka (1979) 20 SASR 350).


45 Smith v Broken Hill Pty Co Ltd (1957) 97 CLR 337.


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despite this small collection of cases, there is no doubt that the courts are only rarely prepared to deny a claim on this basis.

III DEPARTURES FROM MORAL BLAMEWORTHINESS

The view that negligence is premised on moral blameworthiness is overstated, as negligence is out of kilter with notions of moral blameworthiness in several significant respects. The following five points of departure between the tort of negligence and blameworthiness will be considered:49 first, that negligence involves a type of conduct while moral blameworthiness typically affixes to states of mind; second, that the objective standard of care in negligence has the capacity to hold liable individuals whose conduct is morally unimpeachable, and to exonerate blameworthy individuals; third, that the tort of negligence often imposes strict liability, even though the latter is insensitive to notions of moral blameworthiness; fourth, that in certain contexts, the standard of care demanded by the reasonable person is pitched at such a high level that people who are not guilty of any moral wrongdoing are often held liable; and fifth, that the principles governing redress for negligence violate the moral axiom that sanctions should be proportionate to the culpability of the transgression in question.

A Negligence Is a Type of Conduct

Historically, there was debate about whether negligence consisted of a state of mind or a type of conduct. The doyen of the mental theory, Sir John Salmond, posited that negligence

essentially consists in the mental attitude of undue indifference with respect to one’s conduct and its consequences. … Negligence … is rightly treated as a form of mens rea, standing side by side with wrongful intention as a formal ground of responsibility.50


Conversely, Sir Frederick Pollock, the main bastion of the conduct theory, stated that the principles governing the standard of care in negligence say … nothing of the [defendant’s] state of mind, and rightly. Jurisprudence is not psychology … The question for judges and juries is not what a man was thinking or not thinking about, expecting or not expecting, but whether his behaviour was or was not such as we demand of a prudent man under the given circumstances.51

The mental theory gained some credence for several reasons. For one thing, judges did, and still do, employ language in the context of negligence which implies consideration of a state of mind. For instance, words such as ‘inattention’ and ‘thoughtlessness’ are often used. Furthermore, the fact that the defendant’s knowledge is often of much significance52 suggests that negligence entails an enquiry into the mental state of the defendant. Finally, the philosophical difficulties involved in separating a person’s conduct from their state of mind led to the view that a person’s conduct was merely a manifestation of their mental processes, and that these processes were therefore the proper objects of assessment.53

However, the mental theory is now regarded as untenable, as it is well-established that liability depends on neither the possession nor the absence of a particular mental state.54 Proof that the defendant’s mind was blank to the possibility that they may cause injury to the plaintiff is not, in itself, evidence of negligence; nor is it a requirement of negligence.55 Similarly, evidence that the defendant was particularly alert, attentive or mindful of a risk that materialised will not preclude a finding that the defendant was negligent. In other words, the tort of negligence judges the doing rather than the doer.

The fact that negligence does not embody any mental element produces an important discrepancy between negligence and morality. This standpoint does not rest on the questionable view that blameworthiness cannot attach to conduct per se, and that some positive mental state is needed.56 Many commentators, particularly those concerned with negligence in the criminal law context, have subscribed to this view.57 They argue that conduct which results in an undesirable outcome is not, by itself, sufficient to warrant the judgement that the actor is to blame because, without a mental element, it cannot be said that the actor


51 Pollock, above n 14, 454.

52 For instance, if the defendant knows that the plaintiff only has vision in one eye, it may be incumbent upon them to take greater precautions than usual to guard against a risk of injury to that eye: Paris v Stepney Borough Council (1951) AC 367; Rogers v Whitaker (1992) 175 CLR 479, 490–1 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).


56 For a recent (and in the author’s opinion, overwhelming) critique of these theories, see Cane, Responsibility in Law and Morality, above n 8, 97–105.

aligned themselves with that outcome. This view has long been criticised (correctly in the author’s view) as being at odds with the way in which judgements of blame are actually made. As H L A Hart noted, people often reject the plea, ‘I didn’t mean to do it: I just didn’t think’, as a valid excuse for inadvertently causing harm.58 For example, it seems preposterous to suggest that we would not blame a person who, because they were daydreaming, lost control of their car and caused injury to another user of the road.

Fortunately, however, it is not necessary to commit to the view that conduct per se cannot be blameworthy in order to reach the conclusion that negligence, by reason of being conduct-based, diverges from morality. Rather, the divergence arises because negligence shuns the most reliable indicators of when the attribution of blame is warranted, such as deliberation and choice. And there is no reason to doubt that in deciding whether to attribute blame to a person, we readily have recourse to such factors. Thus, because negligence shies from these factors, the probability is increased that liability will be imposed on a defendant who is not, in fact, deserving of blame. In other words, as liability is determined by conduct, negligence is an inferior litmus test for blameworthiness.

B The Objective Standard of Care

The objective standard of care, which requires the exercise of care that a reasonable person would have exercised in the circumstances,59 constitutes a significant rift between the tort of negligence and morality. At first glance, this divergence may not be apparent. After all, it might seem that when a person harms another through a failure to exercise reasonable care, that person deserves to be blamed. This view has enjoyed some judicial support. For example, in Wooldridge v Sumner, Diplock LJ stated:

What is reasonable care in a particular circumstance is a jury question, and where … there is no direct guidance or hindrance from authority, it may be answered by inquiring whether the ordinary reasonable man would say that, in all the circumstances, the defendant’s conduct was blameworthy.60

However, once one delves beneath the guise of fairness connoted by the epithets normally associated with the objective standard, such as ‘reasonableness’,61 ‘diligence’,62 ‘ordinary prudence’,63 and ‘due care’,64 considerable digressions

59 The classic statement of this principle is found in Blyth v Birmingham Waterworks Co (1856) 11 Ex 781, 784; 156 ER 1047, 1049 (Alderson B).
60 [1962] 2 All ER 978, 988.
61 For example: ‘Clubs, hotels, restaurants and others are held to the standard of care of reasonableness, not mathematical precision’: Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 207 ALR 52, 71 (Kirby J) (emphasis added); ‘The question for the tribunal of fact was what reasonableness required by way of response from the respondent, having regard to the respects in which the respondent was alleged to have been negligent’: Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460, 473 (Gleeson CJ) (emphasis added).
62 For example: ‘He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments’: Voli v Inglewood Shire
from morality are evident. For instance, as a general rule, learner drivers owe the same standard of care as experienced drivers;65 neophyte doctors are judged against those who are old hands;66 and defendants with limited financial resources are expected to perform at the same level as those who are adequately resourced,67 while morality, it seems, would be more willing to measure the adequacy of a person’s conduct in light of their ability, experience and resources.

Of course, the law makes some allowances to take account of the position of the defendant, most obviously by ‘clothing’ the reasonable person with some of the

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64 For example: 'In considering the extent and nature of the measures that are expected to perform at the same level as those who are adequately resourced, it would be more willing to measure the adequacy of a person’s conduct in light of their ability, experience and resources.

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defendant’s characteristics. The law also recognises that the objective standard may be adjusted to take into account the fact that the defendant was forced to make a decision on the spur of the moment. However, the extent of these allowances is ultimately quite limited. Needless to say, this is not to suggest that morality always takes full stock of the capacity of individuals to attain a particular standard of care. Rather, the point being made here is that it seems doubtful that morality pays as little attention to the personal qualities of defendants as the objective standard of care. One reason for thinking this is that the main justification for the objective standard of care in the tort of negligence is that it facilitates the compensation of accident victims. Presumably, however, the use of objective standards in morality cannot be similarly justified.

More importantly, the objective standard can result in an individual being held liable for failing to reach the standard of the reasonable person, despite being incapable of attaining that standard. For instance, an insane person who falls below the standard of the reasonable person cannot avoid legal liability by showing that the standard was impossible for them to achieve, or that they acted to the best of their judgement or ability. However, few would pass adverse moral judgement on such an individual.

In certain circumstances, the doctrine of prior fault provides a moral justification for imposing liability upon those who cannot attain the benchmark set by the reasonable person. Pursuant to this doctrine, a person who is incapable of meeting the objective standard may be blamed if they breach the standard by placing themself in a situation which, to their knowledge, called for the exercise of greater care than that which they were capable of taking. For example, a person who suffers from an epileptic fit and, as a result, crashes their car and causes injury to the plaintiff is neither legally liable, nor morally to blame.
However, that person would be liable in law and also, no doubt, under our moral code, if they had sufficient warning of the onset of the fit to take preventative action, but failed to do so, or if they failed to take medication which would have prevented the fit.

Nevertheless, the doctrine of prior fault falls short of reconciling the application of the objective standard to incapable individuals with moral blameworthiness in two important respects. First, prior fault can only be attributed to a person who engaged in an activity which was beyond that person’s capabilities, where that person was conscious of their ineptitude or disabling infirmity. However, someone who is incapable of meeting the objective standard may often fail to appreciate this fact. For instance, they may have overestimated their ability, or their disabling illness may have been latent and remained undetected.

Second, prior fault may not provide a moral justification for the application of the objective standard to beginners. Moral judgement would generally be suspended with respect to beginners who engage in an activity notwithstanding that they knew that they were incompetent and might cause damage in doing so. This is because beginners are afforded latitude in order to allow them the opportunity to learn and become proficient. Of course, there are limits to the extent to which a beginner can be excused of moral wrongdoing. For instance, a beginner can hardly be forgiven for engaging in an activity without having first received proper tutelage, or for failing to engage an expert where one is obviously needed, or for holding themselves as having experience or abilities that they did not in fact possess.

It is important to note that not only can the objective standard hold morally innocent agents liable, but it can also exonerate from legal liability some individuals who would be morally censured. This occurs where a person who meets the standard of the reasonable person was capable of performing at a much higher level but failed to do so and, as a consequence of that failure, the plaintiff sustained injury. For instance, assume that an exceptionally talented surgeon blundered while operating on a patient and that the patient was injured as a result. Provided that the surgeon performed at the level of the reasonable surgeon, they would not incur liability, even though they were capable of performing much better and, had they done so, the patient would not have been injured. However, a person who is content to ‘live down’ to the standard of the


77 *Derdiarian v Felix Contracting Corporation*, 434 NYS 2d 166, 170 (1980) (Cooke CJ). See also *Stuyvesant Associates v Doe*, 534 A 2d 448, 450 (NJ Super Ct Law Div, 1987) (Fast J), where a man suffering from schizophrenia was held liable for acts of vandalism which he committed during a delusional attack on the ground that he was negligent in failing to take his prescribed medication.

78 Cane, *Atiyah’s Accidents, Compensation and the Law*, above n 32, 150.


80 Support for this proposition may be derived from *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, where the New South Wales Court of Appeal unanimously held that a barrister (now a Justice of the High Court of Australia) who was a leading member of the New South Wales bar in the fields of corporations, commercial and trade practices law was not to be judged by a standard higher
reasonable person rather than exercise their above-average abilities in order to avoid causing harm to others is clearly open to moral reprobation.

C Negligence and Strict Liability

Paradoxically, the tort of negligence often imposes strict liability through the doctrines of vicarious liability and non-delegable duties of care. However, it is obvious that strict liability cannot be justified by reference to notions of moral blameworthiness. As H L A Hart has said, ‘the notion of “strict liability” in morals comes as near to being a contradiction in terms as anything in this sphere’. In order to explain why this is the case, it is necessary to make some observations about strict liability.

Strict liability is often described as a form of liability without fault. However, this is misleading, as there is no form of liability for which an absence of fault is a precondition. Rather, as Cane points out, strict liability is liability regardless of fault; whether or not the defendant is at fault is, in theory, irrelevant. Accordingly, the fact that a defendant has been held strictly liable does not necessarily mean that they are innocent of any wrongdoing. At this stage, the reader may ask: how does the operation of strict liability undermine the conventional view that negligence is premised on blameworthiness if those who are held strictly liable are sometimes blameworthy? There are two responses to this question.

First, strict liability, unlike fault-based liability, makes no attempt to differentiate between blameworthy and innocent agents. Strict liability does not inquire into whether the defendant’s behaviour was lacking in some respect. No assessment is made of the mental state of the defendant, no comparison is drawn between the defendant’s conduct and the usual conduct of others, and no cognisance is taken of morally obvious excuses, such as whether the defendant was capable of avoiding the conduct that caused the harm.

Second, strict liability can involve an unwarranted attribution of blame. When an innocent agent is held strictly liable, it may suggest that they are in fact blameworthy, especially if the majority of people who are held strictly liable are actually blameworthy. In other words, in such a situation, it is likely that the
innocent agent will be perceived as guilty by association. Jules Coleman put this argument well when he said that ‘because attributions of liability imply judgments of blameworthiness, strict liability involves making formal, official pronouncements of culpability in a judicial context. It requires us, in short, to impute blame to blameless conduct.’

1 Vicarious Liability

Vicarious liability is a form of strict liability because it involves holding a defendant liable for the negligence of their servant or agent, regardless of any negligence on the part of the defendant. For instance, a defendant cannot avoid being held vicariously liable by showing that they took reasonable precautions to ensure that their servant or agent did not engage in tortious conduct, or that they were unaware that the servant or agent was engaging in the conduct in question. A defendant may even be vicariously liable where they expressly forbade the servant or agent to engage in that conduct.

Several attempts have been made to reconcile vicarious liability with notions of moral blameworthiness. One argument which has been advanced is that a defendant can generally be blamed for their servant’s or agent’s torts on the basis of their poor choice of servant. The obvious difficulty with this argument is that it fails to explain why careful selection of servants is not a defence to vicarious liability. Another argument is that it is appropriate to blame those who cause harm in the course of a profit-making activity even in the absence of negligence on their part. However, this specious line of reasoning cannot account for the fact that vicarious liability attaches to non-profit organisations, such as charities and public bodies.

2 Non-Delegable Duties of Care

The common law imposes a non-delegable duty of care on people who undertake responsibility for others who are in a position of special dependence or vulnerability. A non-delegable duty of care differs from an ordinary duty of care in that while an ordinary duty requires the defendant to take reasonable care, a non-delegable duty requires the defendant to ensure that reasonable care is taken. Thus, a person on whom a non-delegable duty of care is imposed

cannot escape liability by delegating the performance of that duty to a third party.92 Liability arising under a non-delegable duty of care is often said to be strict.93 However, technically speaking, this is not entirely correct, as a person who is under such a duty and who chooses to perform it personally rather than delegating it is only liable if they fail to live up to the standard of the reasonable person.94 In such a situation, a non-delegable duty of care is indistinguishable from an ordinary duty of care. Liability is direct and personal. It is only where the performance of the duty is delegated that liability becomes strict.95 This is because the person who owes the duty is liable for the delegate’s negligence, regardless of any fault on their part.

It is worth noting that to the extent that non-delegable duties of care impose strict liability, they cannot be reconciled with notions of moral blameworthiness on the basis of the defendant’s poor choice of delegate. Just as a defendant cannot escape vicarious liability by showing that they exercised all reasonable care in selecting a servant or agent,96 it is similarly no defence to liability under a non-delegable duty of care to prove that reasonable care was taken in choosing the delegate.97

D  **Exacting Standards of Care and a Decline in the Significance of Fault**

In recent decades, the standard of the reasonable person has, in some contexts, been elevated to such a high level that defendants are frequently held liable for negligence in circumstances which are bereft of any moral blameworthiness on their part.98 This elevation, which has been widely acknowledged both in Australia99 and elsewhere,100 did not result from a change in the relevant legal

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92 *Dalton v Angus & Co* (1881) 6 App Cas 740, 829 (Lord Blackburn).
95 *Pickard v Smith* (1861) 10 CB(NS) 470, 480; 142 ER 535, 539 (Williams J).
96 See above Part III(C)(1).
97 *Wilson & Clyde Coal Co Ltd v English* [1938] AC 57, 86–8 (Lord Maugham); *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542, 557 (Reynolds JA), 547 (Hope JA agreeing), 565 (Hutley JA agreeing); *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906, 919 (Lord Brandon); *Brodribb Sawmilling Co Pty Ltd v Gray* (1985) 160 CLR 16, 32 (Mason J); *Commonwealth v Introvigne* (1981) 150 CLR 258, 269–70 (Mason J).
98 It would be a dramatic overstatement to claim that this elevation has occurred ‘across the board’. For instance, one context where the fault requirement is ostensibly alive and well (at least at the present time) is the liability of local authorities for negligence: see *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 527–8 (Gleeson CJ), 577–82 (Gaudron, McHugh and Gummow JJ), 605–7 (Kirby J), 639 (Callinan J); *Burwood Council v Byrnes* [2002] NSWCA 343 (Unreported, Handley, Beazley and Hodgson JJA, 4 November 2002) [25]–[36] (Handley JA); *RTA v McGuinness* [2003] Aust Torts Reports ¶81-688, 64 543 (Handley JA), 63 547–8 (Foster AJA); *Richmond Valley Council v Standing* (2002) Aust Torts Reports ¶81-679, 69 352–3, 69 361–2 (Heydon JA); *Wilkinson v Law Courts Ltd* [2001] NSWCA 196 (Unreported, Meagher and Heydon JJA and Rolfe AJA, 25 June 2001) [21]–[25], [32]–[33] (Heydon JA).
99 One of the best known statements in this regard is that of McHugh JA in *Banksstown Foundry Pty Ltd v Braustina* [1985] Aust Torts Reports ¶80-713 who said that “[t]hroughout the common law of negligence … the standard of care required of a defendant has moved close to the border of strict liability’: at 69 127. Although McHugh JA’s statement was reproved on appeal to the High
principles. A duty of care is still discharged upon the exercise of reasonable care. Rather, the indeterminate lexicon by which these principles are expressed has allowed the standard of care to slowly rise to the point where it is extremely difficult to satisfy. This gradual whittling away of the concept of fault means that there is often no longer any real attempt to separate those who are blameworthy from those who are innocent of moral wrongdoing. To an extent, the tort of negligence now applies indiscriminately to both the culpable and the blameless alike.

At this point the reader may interject and ask: if this is so, what is the distinction between the tort of negligence operating with extremely high standards of care, and strict liability? It is certainly true that such a liability regime may produce outcomes which might be expected under a system of strict liability. However, it is incorrect to jump from this observation to the conclusion that exacting standards of care and strict liability are analogous phenomena. As Cane has pointed out, there is a fundamental difference between the incidence or pattern of liability and the basis on which liability is imposed. Accordingly, no matter how high the standard of care is set (provided that it is not absolute), questions of fault will necessarily arise and the adequacy of the defendant’s conduct will be called into question. However, such considerations are completely irrelevant when it comes to strict liability, as it does not depend on proof of fault.


102 The High Court has emphasised this on several occasions: see, eg, Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431, 488 (Hayne J); Derrick v Cheung (2001) 181 ALR 301, 305 (Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ).

103 Spigelman, ‘Negligence: The Last Outpost of the Welfare State’, above n 40, 433. For a lucid account of how indeterminate language has permitted this area of law to adapt notwithstanding that the legal principles have remained static, see Mihaljevic v Longyear (Australia) Pty Ltd (1985) 3 NSWLR 1, 8–10 (Kirby P); Urban Transit Authority (NSW) v Hargreaves (1987) 6 MVR 65, 66 (Kirby P); Schellenberg v Tunnel Holdings Pty Ltd (2000) 200 CLR 121, 159–60 (Kirby J).

104 Cane, ‘Fault and Strict Liability for Harm in Tort Law’, above n 8, 191.

105 See above Part III(C).
The elevation of the standard of care will now be considered more closely, focusing on two important practical contexts: motor vehicle accidents and workplace accidents.106

1 Motor Vehicle Accidents107

In motor vehicle actions,108 drivers are held to an exceedingly demanding standard of care, especially where the plaintiff is a pedestrian or a passenger. Sir John Barry, speaking extra-curially in 1964, said that motor vehicle cases are ‘dealt with [in litigation] under the guise of an action based on fault liability’.109 Similarly, in 1984, the New South Wales Law Reform Commission stated that the principles which imported fault liability into negligence

[have] lost a great deal of [their] original meaning. A breach of duty in a negligence action involves a departure from the standards of the ordinary and reasonable road user. Yet by those standards, if they were to be applied stringently, relatively few defendants would be held liable. The trend to extend compensation to a wider class of claimants has expanded the notion of ‘fault’ as a criterion of liability in transport accident cases.110

Furthermore, the case law on this subject is replete with dicta noting the exacting standard of care. One oft-cited judgment is that of Stable J in Daly v Liverpool Corporation, in which his Honour stated that:

A motor car has become a lethal weapon. It may be that pedestrians very often feel that it is so. We know that the motor car kills thousands of pedestrians, but I have never heard of a single pedestrian, or of a thousand pedestrians combined, who killed one motor car. The standard of care and skill which the law requires to-day in the driver of a motor vehicle is very high indeed.111

Similarly, in Government Insurance Office of New South Wales v Ergul, Clarke JA observed that ‘the courts have, in substance, elevated the “reasonably prudent driver” to the role of the perfectionist.’112 In Caldwell v Duka, Kirby P stated that ‘[t]he criterion of negligence is the standard required of an ordinarily careful driver in charge of a motor vehicle … Although not absolute, the duty is a high one.’113 In Carrier v Bonham, McGill DCJ stated that ‘a very high...

106 An extremely demanding standard of care has been set in several other contexts, including the liability of educational institutions to their pupils: see New South Wales v Lepore (2003) 212 CLR 511, 624 (Callinan J); David Jones Ltd v Bates [2001] NSWCA 223 (Unreported, Heydon JA, Davies AJA and Young CJ in Eq, 20 July 2001) [15] (Davies AJA).

107 Common law actions in this context have been abolished in the Northern Territory for residents of that territory: Motor Accidents (Compensation) Act 1979 (NT) s 5(1)(a).

108 Actions that arise out of the use of a motor vehicle but which are brought against defendants who are not drivers, such as manufacturers and highway authorities, are not considered here, as such actions raise somewhat different issues.


111 [1939] 2 All ER 142, 144.


113 (Unreported, Supreme Court of New South Wales, Court of Appeal, Kirby P, Clarke and Meagher JJA, 16 June 1993) [4]. See also Clarke v Freund (1999) 29 MVR 361, 363 (Beazley JA); Mitchell v Government Insurance Office (NSW) (1992) 15 MVR 369, 372-3 (Kirby P); Johnson v Johnson (Unreported, Supreme Court of New South Wales, Court of Ap-
standard of care [is] required of drivers of motor vehicles … Indeed, the point may have been reached when most people who drive motor vehicles would be regarded as driving negligently most of the time.114 The lack of concern with finding fault, as opposed to using the driver as a gateway to unlocking insurance funds, is exemplified by the statutory provision for a nominal defendant.115

As a result of this very high standard of care, the courts frequently find drivers liable in circumstances in which there is little or no evidence of moral blameworthiness. For example, in Clarke v Freund, the defendant motorist was found to be negligent in failing to avoid a pedestrian who stepped out from in front of a stationary vehicle.116 The defendant’s speed was not excessive, nor did he have any opportunity to see the plaintiff before the accident. The ‘negligence’ was said to lie in failing to slow down whilst passing stationary vehicles lest a pedestrian suddenly emerge.117

However, this stringent interpretation of the standard of care in motor vehicle cases has been cast into doubt by the important decision of the High Court in Derrick v Cheung.118 In this case, the infant plaintiff was seriously injured when she appeared from between two parked vehicles and was hit by the defendant’s car. The road in question was a busy urban street and was designated as a 60 kilometre per hour zone. The defendant, who was travelling at between 45 and 50 kilometres per hour, attempted to avoid the plaintiff by braking and swerving. There was nothing to indicate that the defendant’s reactions were slow or otherwise substandard. At first instance, Chesterman ADCJ held the defendant liable on the basis that the defendant’s speed was excessive as it did not give her sufficient time to stop if a child suddenly appeared from between parked cars.119 The defendant unsuccessfully appealed to the New South Wales Court of Appeal.120 Notably, in dismissing the appeal, Stein and Fitzgerald JJA observed that ‘the [defendant] does not bear any moral, as distinct from legal, responsibility for what occurred.’121 However, this decision was soon overturned by the appeal, Kirby P, Mahoney and Clarke JJA, 10 September 1991) [28] (Kirby P); Leahy v Beaumont (1981) 27 SASR 290, 294 (White J).

114 [2000] QDC 226 (Unreported, McGill DCJ, 4 August 2000) [73].
115 In each jurisdiction, legislation provides for an insurer (usually selected at random) or a statutory corporation to act as the defendant in personal injury cases where the motor vehicle which is alleged to have caused the accident cannot be identified or is uninsured: see Road Transport (General) Act 1999 (ACT) div 10.6; Motor Accidents Act 1988 (NSW) s 54; Motor Accidents Compensation Act 1999 (NSW) ss 31–41; Motor Vehicles (Third Party Insurance) Act 1942 (NSW) s 14A; Motor Accidents (Compensation) Act 1979 (NT) s 40A; Motor Accident Insurance Act 1994 (Qld) div 4; Motor Vehicles Act 1959 (SA) ss 115–116A, 118A–120; Motor Accidents (Liabilities and Compensation) Act 1973 (Tas) ss 16; Transport Accident Act 1986 (Vic) s 96; Motor Vehicle (Third Party Insurance) Act 1943 (WA) ss 7–8.
118 (2001) 181 ALR 301.
119 Ibid 301.
121 Ibid 353. Judges have often thought it important to stress this in the motor vehicle context: see, eg, Mitchell v Government Insurance Office (NSW) (1992) 15 MVR 369, 375 (Kirby P); Roberts v Ramsbottom [1980] 1 WLR 823, 830, 833 (Neill J).
High Court. In an attempt to reunite the standard of care in this context with moral blameworthiness, the Court, in a single joint judgment, stated that

[t]here was no basis upon which any finding of negligence on the part of the [defendant] could be made. … Even if the inference which the trial judge drew, that if the [defendant’s] speed had been slower by a few kilometres per hour she would have been able to avoid the collision, was more than mere speculation, it is still not an inference upon which a finding of negligence could be based. …

[T]he possibility of a different result [if the defendant had driven more slowly] is not the issue and does not represent the proper test for negligence. That test remains whether the plaintiff has proved that the defendant … has not acted in accordance with reasonable care.122

It is still probably somewhat premature to discern the precise impact of Derrick v Cheung. However, it seems likely that it will be influential.123 To date, it has been applied in eight unanimous decisions of the New South Wales Court of Appeal.124 In each of these cases, the defendant was found to have driven reasonably.

2 Employers’ Liability125

It is widely acknowledged that the duty of care which employers owe to their employees is extremely demanding. In Bankstown Foundry Pty Ltd v Braistina, McHugh JA observed:

The common law requires no more of an employer than that he take reasonable care for the safety of his employee. Reasonable care, however, varies with the circumstances of the case. It varies with the advent of new methods and machines and it varies in accordance with changing ideas of justice and increasing concern with safety in the community.

I think that it is impossible to read recent decisions of the High Court of Australia without realising that employers are required to comply with safety standards which, only twenty years ago, would have been seen as imposing an onerous, even an absurd burden on employers. …

[I]n the employer/employee field, the standard of care required of a defendant has moved close to the border of strict liability.126


125 Common law actions in this context have been abolished in the Northern Territory and South Australia: Work Health Act 1986 (NT) s 52(1); Workers’ Rehabilitation and Compensation Act 1986 (SA) s 54(2).
In the same case, Priestley JA declared that recent decisions of the High Court indicate ‘a deliberate emphasis on the heavy obligation upon an employer in fulfilling his duty to take reasonable care to avoid exposing his employee to an unnecessary risk of injury.’ On appeal to the High Court, Mason, Wilson and Dawson JJ lamented McHugh JA’s reference to strict liability. Nonetheless, their Honours acknowledged that the duty on employers had indeed become increasingly demanding. Likewise, Brennan and Deane JJ affirmed that:

Contemporary decisions about what constitutes reasonable care on the part of an employer towards an employee in the running of a modern factory are in sharp conflict with what would have been considered reasonable care in a nineteenth century workshop and, for that matter, reflect more demanding standards than those of twenty or thirty years ago.

An abundance of dicta since Bankstown Foundry Pty Ltd v Braistina confirms this situation. For instance, the duty on employers was described as imposing heavy obligations by Kirby J in Liftronic Pty Ltd v Unver, and by Hayne J in Schellenberg v Tunnel Holdings Pty Ltd. In Rasic v Cruz, Fitzgerald JA stated that employers ‘have become virtual insurers of those who are injured by their activities.’ Parallel remarks have been made by numerous commentators. Although a recent smattering of dicta has stressed the fault element of negligence, it is doubtful that this will have a significant effect on the approach of the courts in ascertaining the standard of care owed by employers.

E Proportionality and Damage

Part III has so far sought to demonstrate that liability for negligence is largely insensitive to considerations of moral blameworthiness, and that, as a result, the conventional view that the tort of negligence is premised on moral blameworthiness is inadequate. The analysis here shifts from an examination of the traditional view in the context of liability for negligence to an assessment of this view

\[\text{References:}\]

130 Ibid 314.
against the principles governing the consequences of incurring liability. It will be argued that although it is a fundamental moral axiom that wrongful conduct should incur a sanction that is proportionate to the culpability of that conduct — this will be referred to as the “proportionality principle” — a constellation of principles ensures that, in most cases, the sanction for negligence bears little or no relationship to the culpability of the defendant’s conduct. While injunctive relief, exemplary damages, and possibly aggravated damages are available in the negligence context, the focus of this analysis will be on compensatory damages, as these other remedies are of minor practical importance in comparison with compensatory damages.

At the outset, it must be conceded that the conventionalists do not explicitly extend their view to the issue of remedies for negligence. However, it would be absurd to advance an account of liability for negligence which brushed aside the important question of remedies. It would make little sense to argue that negligence is based on blameworthiness while not caring whether or not the sanction applied is proportionate to the defendant’s culpability. Any satisfactory account


137. It seems that injunctive relief is unavailable in negligence actions at common law: see Cane, ‘Retribution, Proportionality, and Moral Luck in Tort Law’, above n 8, 161. However, legislation empowers courts in some jurisdictions to grant an injunction in this context: Judiciary Act 1993 (Cth) s 37; Federal Court of Australia Act 1976 (Cth) s 22, Supreme Court Act 1966 (Vic) s 57; Supreme Court Act 1970 (NSW) s 66; Supreme Court Act 1933 (ACT) s 34; Supreme Court Act (NT) s 19; Supreme Court Act 1935 (SA) s 29; Supreme Court Rules 2002 (Tas) r 443(1)(a).


139. There is a paucity of authority as to whether aggravated damages are available for negligence. In Hunter Area Health Service v Marchlewski (2000) 57 NSWLR 268, 288, Mason P expressed ‘serious doubt’ as to whether such damages are available. The Law Commission for England and Wales expressed similar doubts in its report: Law Commission for England and Wales, Aggravated, Restitutionary and Exemplary Damages, Report No 247 (1997) [2.16], [2.26];<http://www.lawcom.gov.uk/239.htm#lcr247>. Contra Harold Luntz, Assessment of Damages for Personal Injury and Death (4th ed, 2002) 82–3. Presumably, however, aggravated damages are available where a claim succeeds in negligence which could have been framed in trespass: Michael Tilbury, Civil Remedies (1990) vol 1, 161.

140. Exemplary and aggravated damages are rarely awarded and have been abolished in some contexts in several jurisdictions: Civil Law (Wrongs) Act 2002 (ACT) s 18(2); Civil Liability Act 2002 (NSW) s 21; Motor Accidents Act 1989 (NSW) s 81A; Motor Accidents Compensation Act 1999 (NSW) s 144; Workers Compensation Act 1987 (NSW) s 151R; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 19; Civil Liability Act 2003 (Qld) s 52; Motor Vehicles Act 1959 (SA) s 113A; Accident Compensation Act 1983 (Vic) ss 134AB(22)(c), 135A(7)(c). Exemplary damages have been abolished by implication by s 93 of the Transport Accident Act 1986 (Vic): see Luntz, Assessment of Damages for Personal Injury and Death, above n 139, 76 fn 477. The author is not aware of any cases in which an injunction has been granted in the negligence context. The apparent absence of cases on this point is unsurprising, considering that it is difficult to envisage a situation in which negligent conduct could be anticipated with sufficient precision to warrant an injunction.
of the tort of negligence will explain not only the imposition of liability but also the legal sanctions that follow, as liability and sanctions are concepts that are very much intertwined.

1 The 100 Per Cent Principle

Unlike the criminal law where the sentence for a crime is supposed to roughly reflect the moral gravity of the transgression,\textsuperscript{141} compensatory damages do not vary with the degree of the defendant’s negligence. Rather, they are assessed solely by reference to the magnitude of the plaintiff’s loss. Accordingly, once a plaintiff establishes liability, they are entitled to have their loss fully compensated. In principle, it makes no difference whether the plaintiff’s loss is relatively minor or catastrophic. This position produces two divergences between negligence and the proportionality principle.\textsuperscript{142} First, a defendant may be held liable to pay an exorbitant amount in compensation as a result of transient and essentially venial inadvertence. For example, if a motorist takes their eyes off the road for a fleeting moment to adjust the air conditioning or radio — something most drivers do — and, as a consequence, runs down and catastrophically injures an infant pedestrian, they may be held liable for millions of dollars. Obviously, however, such a sum of money is utterly disproportionate to the culpability of the motorist’s negligence.

Second, the principle of 100 per cent compensation means that damages awards do not reflect the relative moral culpability of defendants.\textsuperscript{143} Thus, a defendant who is guilty of only minor negligence may be held liable to pay greater damages than a defendant who is guilty of gross negligence. Similarly, where two defendants commit equally culpable acts of negligence, their respective liabilities are not necessarily commensurate.

H L A Hart and Tony Honoré, in their treatise \textit{Causation in the Law}, deny that the 100 per cent principle contradicts the proportionality principle by holding a defendant liable for loss which is well in excess of the culpability of their negligence. They supply the following rationale for this position:

\begin{quote}
The justice of holding me liable, should the harm on … one occasion turn out to be extraordinarily grave, must be judged in the light of the [many other] occasions on which, without deserving such luck, I have incurred no liability.\textsuperscript{144}
\end{quote}

However, their ingenious argument is unconvincing. Hart and Honoré assume that a defendant who is held liable for a loss that is disproportionate to the

\textsuperscript{141} \textit{Veen v The Queen [No 2]} (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).


\textsuperscript{144} H L A Hart and Tony Honoré, \textit{Causation in the Law} (2nd ed, 1985) 268.
culpability of their negligence committed similar (unactionable or unlitigated) negligent acts in the past, and that when the culpability of these antecedent instances of negligence is considered cumulatively it is likely to be roughly proportionate to the defendant’s liability. Three objections may be made to this assumption. First, it is mere speculation to suggest that a defendant’s cumulative culpability will generally be proportionate to a particular liability. Second, while it is probably true that defendants are generally guilty of antecedent negligence (this is especially so where the defendant is a motorist), it is plainly erroneous to contend that this is always the case. A defendant may be a newcomer to a particular profession, and may incur liability which is out of proportion to their culpability on the first day on the job. Third, even if it is permissible to perceive culpable carelessness as cumulative and capable of being ‘saved up’ over a lifetime, it is questionable whether any person’s accrued culpability would be substantial, considering that culpable carelessness is often sanctioned through extra-legal institutions, and thus ‘cancelled out.’ For instance, a P-plate driver who drives carelessly, but without causing any damage, may be punished by being forbidden by their parents from using their car. A reckless golfer who tees off while others are within hitting distance on the fairway may have insults hurled upon them in the clubhouse. A barrister who fails to adequately prepare for a case may be derided by the presiding judge. Hart and Honoré do not account for the fact that people are often blamed, censured and punished for their carelessness by means external to the legal system.

The only time the defendant’s culpability has any relevance to the assessment of damages is when the plaintiff is guilty of contributory negligence, where the defendant’s contribution to the plaintiff’s loss is considered in comparison to the plaintiff’s contribution. However, taking the defendant’s culpability into account in this way does not ameliorate the law’s divergence from the proportionality principle. For instance, assume that a plaintiff’s damages are assessed at $1 million and that this sum is reduced by 40 per cent to $600 000 on account of the plaintiff’s contributory negligence. The fact that the defendant’s contribution to the loss has been taken into account in this way does not mean that the $600 000 for which they are liable is proportionate to the culpability of their negligence. The concern with the defendant’s culpability for the purposes of assessing contributory negligence only relates to an assessment of the relative culpability of the plaintiff and the defendant. No cognisance is taken of the defendant’s actual culpability.

2 Causation and the Requirement of Damage

It is a well-established principle that in order to prove causation, the plaintiff does not have to show that the defendant’s negligence was the cause of the loss. Rather, it is sufficient to demonstrate that the negligence was a cause of the loss in the sense that they materially contributed to it. 145 This rule contradicts the

145 March v E & M Stramare Pty Ltd (1991) 171 CLR 506, 509 (Mason CJ); Medlin v State Government Insurance Commission (1995) 182 CLR 1, 6–7 (Deane, Dawson, Toohey and Gaudron JJ). Note, however, that in most jurisdictions, where the defendant’s negligence cannot be established as a ‘necessary’ condition for the occurrence of the harm, the court is to consider,
proportionality principle because it can result in a defendant being held liable for all of the plaintiff’s loss, even though the defendant’s conduct contributed to that loss in a relatively minor way.

A similar problem can be seen in the rule that the tort of negligence is complete only if the plaintiff sustains (non-remote) damage. This is morally paradoxical, as it means that an individual who is guilty of the most flagrantly negligent conduct, which fortuitously does not cause any damage to a third party, avoids liability. This situation is diametrically opposed to the proportionality principle as it permits morally reprehensible conduct to go unpunished.

3 Joint and Several Liability

The principle of joint and several liability violates the proportionality principle because it permits a successful plaintiff to recover all of their damages from any one concurrent tortfeasor (or as much of their damage as they desire), regardless of that tortfeasor’s share of responsibility for the plaintiff’s loss. For example, if a passenger in a motor vehicle suffers injury in a crash which occurred due to the negligence of both the driver of the vehicle and the public authority vested with the maintenance of the stretch of road where the crash occurred, the plaintiff can sue and recover all of their damages from either the driver or the...
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authority. It would be irrelevant that the defendant targeted by the plaintiff was guilty of only a scintilla of negligence vis-à-vis the other defendant.149

Plaintiffs may prefer to sue defendants who are marginally culpable instead of those who are more blameworthy for several reasons. For instance, plaintiffs almost invariably target tortfeasors on the basis of their ability to pay (so-called ‘deep-pocket’ defendants).150 Tortfeasors who are impecunious or uninsured are shunned,151 and tortfeasors who cannot be identified or who are immune to liability will obviously not be sued. Defendants may also be nominated in order to take advantage of more generous rules pertaining to the assessment of damages.152

To an extent, the right of concurrent tortfeasors to claim contribution where their payment to the plaintiff exceeds their portion of responsibility153 lessens the degree to which the principle of joint and several liability deviates from the proportionality principle. However, the right to contribution is often illusory, as a concurrent tortfeasor who has been spurned by the plaintiff is likely to be an unsuitable target for a third party action.

4 Evidence of Compliance with the Proportionality Principle?

It is sometimes thought that the judicial aversion to indeterminate liability, the concept of remoteness of damage, and third party insurance go some way towards achieving a rough correlation between the extent of a defendant’s liability and their culpability. However, as this section will attempt to illustrate below, the confidence held in these factors to realise a degree of compliance with the proportionality principle is largely unjustified.

(a) Indeterminate Liability

Courts have long been hesitant to recognise a duty of care where to do so would expose a defendant to the spectre of indeterminate liability.154 Liability is

151 New South Wales Law Reform Commission, Contribution between Persons Liable for the Same Damage, Report No 89 (1999) [2.3].
152 It is usually of great advantage to a plaintiff to sue a so-called ‘common law defendant’ as opposed to a defendant whose liability is limited by statute.
indeterminate when the potential claimants cannot ‘readily be identified’,¹⁵⁵ or where liability ‘cannot be realistically calculated.’¹⁵⁶ Liability is not indeterminate merely because it is ‘extensive’¹⁵⁷ or because there is a large number of potential claimants.¹⁵⁸ The restriction on indeterminate liability exists principally out of a concern that individuals should be in a position to discover, with a reasonable degree of precision, the nature and extent of their obligations under the law in advance.¹⁵⁹ If the law were not discoverable, the capacity of the tort of negligence to deter unreasonable conduct would be diminished, since informed decisions as to how to act could not be made. Furthermore, it would probably be extremely difficult to obtain insurance.¹⁶⁰ The notion of discoverability is a keystone in the common law¹⁶¹ and is manifested in a litany of other legal principles including the presumption that statutes are not intended to operate

¹⁵⁶ Ibid 200 (Gleeson CJ).
¹⁵⁸ The cost of insurance premiums is linked to the accuracy with which insured risks can be predicted. If all other variables remain constant, the greater the certainty regarding the likelihood of an insured risk materialising, the lower the premium: see Alan Mason, ‘Reform of the Law of Negligence: Balancing Costs and Community Expectations’ (2002) 25 University of New South Wales Law Journal 831, 831–2. Accordingly, in the case of liability insurance, if the law governing liability is not readily discoverable, the probability of an insured incurring liability is diminished, and insurance is likely to be difficult to obtain, or will only be obtainable at a hefty price. For an accessible discussion regarding the relationship between the predictability of claims and insurance premiums, see Cane, ‘Reforming Tort Law in Australia’, above n 8, 658–63.
¹⁵⁹ For a discussion of the importance of promulgating laws, see Lon Fuller, The Morality of Law (1969) 49–51; Holmes, above n 1, 111. The importance of discoverability has recently been stressed in Ostrowski v Palmer (2004) 206 ALR 422, 423 (Gleeson CJ and Kirby J).
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retroactively\(^{162}\) and the principle that penal laws should be accessible and intelligible.\(^{163}\) This notion also provides justification for the principle that ignorance of the law is no excuse.\(^{164}\)

It is often thought that the reluctance of the courts to countenance a duty of care in circumstances where there is an apprehension of indeterminate liability is directed at achieving a degree of proportionality between culpability and liability. For instance, in *Caltex Oil (Australia) Pty Ltd v The Dredge ‘Willemstad’*, Gibbs J stated:

> If a person committing an act of negligence were liable for all economic loss foreseeable resulting therefrom, an act of careless inadvertence might expose the person guilty of it to claims unlimited in number and crippling in amount. For example, if, through the momentary inattention of an officer, a ship collided with a bridge, and as a result a large suburban area, which included shops and factories, was deprived of its main means of access to a city, great loss might be suffered by tens of thousands of persons, but to require the wrongdoer to compensate all those who had suffered pecuniary loss would impose upon him a burden out of all proportion to his wrong.\(^{165}\)

However, it is axiomatic that the courts’ reliance on indeterminate liability as a contraindication of the existence of a duty of care is not the result of any allegiance to the proportionality principle. Indeterminacy becomes an issue where there is an inability on the part of the defendant to realistically calculate their liability. The fact that a defendant’s liability is disproportionate to the culpability of their negligence will not, by itself, lead to the conclusion that liability is indeterminate.\(^{166}\) The actual extent of the liability is not to the point. Indeed, it is conceivable that a person’s liability may be indeterminate even though the extent of that liability is quite small relative to their culpability. Similarly, it is possible that the extent of a person’s liability may be known with near or absolute certainty notwithstanding that their liability outweighs their culpability.

(b) Remoteness of Damage

The concept of remoteness of damage limits a defendant’s liability to the kinds of damage which the reasonable person would have foreseen as a possible consequence of the defendant’s negligence.\(^{167}\) Unlike the policy that liability should be determinate, the concept of remoteness attempts to address the

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\(^{163}\) See Ashworth, above n 58, 76–8.


\(^{165}\) *White v Chief Constable of the South Yorkshire Police* [1999] 2 AC 455, 494 (Lord Steyn).

\(^{166}\) See *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 221 (McHugh J).

\(^{167}\) Note, however, that in most jurisdictions, the court is also to consider, amongst other factors, whether liability should be imposed on the defendant when determining the scope of liability: see *Civil Law (Wrongs) Act 2002* (ACT) s 45; *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 2003* (Qld) s 9; *Civil Liability Act 2002* (Tas) s 11; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C.
proportionality principle. This attempt is evident from Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (‘Wagon Mound [No 1]’), where the ‘direct consequences’ test was replaced with the current test of reasonable foreseeability. Viscount Simonds, in delivering the advice of the Privy Council, said that it did not seem consonant with current ideas of justice and morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be ‘direct’.

However, while the substitution of the ‘direct consequences’ test for one based on reasonable foreseeability may have been intended to embrace the proportionality principle, it has proved to be an almost completely ineffectual means of reaching this end. Most notably, reasonable foreseeability has atrophied in the remoteness context, as it has in the contexts of duty and breach, to such an extent that it is rarely invoked to negative liability. The limiting capacity of remoteness is also gravely weakened by the fact that the reasonable foreseeability test is only applied to determine whether the damage sustained pertains to a foreseeable kind of damage. It is irrelevant that the actual extent of the damage or the precise way in which it was caused was not foreseeable.

(c) Third Party Insurance

It is sometimes asserted that third party insurance, through its capacity to spread losses throughout the premium-paying population, ensures that liability loosely conforms to the proportionality principle. Honoré contended that insurance helps to ensure that tort damages are in most cases not grossly disproportionate to the fault of the defendant who has caused the harm. ... It serves to cushion

173 There is no better example of this than Meah v McCreamer [1985] 1 All ER 367. The plaintiff in this case had suffered a severe brain injury in a motor vehicle accident caused by the negligence of the defendant. Approximately four years after the accident, the plaintiff was sentenced to life imprisonment for brutal sexual assaults which he committed against three women. The plaintiff then successfully sued the defendant for damages for the loss sustained as a consequence of his imprisonment on the ground that the brain injury had robbed him of his ability to suppress underlying but previously dormant tendencies towards sexual violence, and that but for this, he would not have committed the sexual assaults. The defendant did not contest that the plaintiff’s imprisonment was a non-remote consequence of the defendant’s negligent failure to exercise proper control over the motor vehicle. See also Prestland v Hunter Area Health Service [2003] NSWSC 754 (Unreported, Adams J, 19 August 2003), where the plaintiff, having been detained in a psychiatric institution after killing a woman, successfully recovered $300 000 from a hospital which had failed to hold him as an involuntary patient prior to the murder. Cf Meah v McCreamer [No 2] [1986] 1 All ER 943.
174 Hughes v Lord Advocate [1963] AC 837, 845 (Lord Reid), 852–3 (Lord Morris), 856 (Lord Guest), 857–8 (Lord Pearce).
losses which … are out of scale with the gravity of [the defendant’s] conduct.  

However, this claim is problematic for several reasons. First, the appropriateness of the assumption that defendants are always safeguarded by an impenetrable bubble-like barrier of insurance is questionable. It is now recognised that it is dangerous to assume that insurance is readily obtainable and that defendants invariably avail themselves of it. In any case, even if a defendant is insured, the policy may not cover the full amount of liability, or the policy may be defeasible as a result of a violation of its terms. Second, Honoré does not acknowledge the fact that an increase in a defendant’s insurance premium as a result of being liable may, in itself, be disproportionate to their moral culpability.

Finally, Honoré’s claim gives no weight to the bilateral nature of the proportionality principle. The proportionality principle requires the imposition of a sanction which is roughly commensurate with culpability: the sanction should be neither excessive nor lenient. While insurance may, in certain cases, provide some protection against excessive sanctions, it does nothing to correct a violation of the proportionality principle which results from a sanction being too small in comparison with culpability. For instance, if a defendant incurs liability as a result of engaging in egregiously negligent conduct, an increase in the premium in the order of, for example, $100, may well be disproportionate to the defendant’s culpability.

IV IMPACT OF RECENT TORT LAW REFORMS

While it is obviously impossible to provide a detailed analysis of the recent bouts of tort law reform which accompanied the Review of the Law of Negligence: Final Report in this article, it is observed that these reforms have not clearly steered the tort of negligence towards or away from considerations of moral blameworthiness. On one hand, the tightening of the test for foreseeability ought to narrow the divide between negligence and moral blameworthiness, as it will increase the probability that defendants who are held liable

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176 Honoré, Responsibility and Fault, above n 74, 87.
179 Panel of Eminent Persons, above n 37.
180 See above n 37.
possessed the capacity to avoid causing injury to the plaintiff.\textsuperscript{181} Similarly, the introduction of proportionate liability should, in theory, put an end to the infringement of the proportionality principle by the regime of joint and several liability.\textsuperscript{182}

On the other hand, there are a number of ways in which the legislative intervention has exacerbated the existing divide between negligence and moral blameworthiness. An important practical illustration of this widening fissure is the attempt to limit litigation by imposing thresholds on damages that render worthless many actions which would have previously been viable,\textsuperscript{183} as this means that there will be no liability in many instances of culpable wrongdoing. The broad immunity now afforded to good Samaritans\textsuperscript{184} and to those who voluntarily perform community work\textsuperscript{185} has the same effect. In consideration of the social utility of their conduct, such individuals are unlikely to be blamed if they cause injury. However, if they were guilty of gross negligence, it is not inconceivable that they would be open to moral censure.\textsuperscript{186} Finally, the restrictions imposed on liability for injuries sustained in the course of recreational activities in some jurisdictions defy considerations of culpability.\textsuperscript{187} Providers of recreational services involving a significant risk of physical harm are now immune to liability in relation to injuries sustained as a consequence of the materialisation of obvious risks. Presumably, therefore, a bungee jump operator will not incur liability even if they do not bother to check if the bungee cord is secured to the jumping platform, and a person who provides a scuba diving service who accidentally fills the air tanks near open paint tins is safe from liability.

\textsuperscript{181} See above Part II.

\textsuperscript{182} See above n 148.

\textsuperscript{183} For example, thresholds have been introduced with respect to general damages in some jurisdictions: Civil Law (Wrongs) (Thresholds) Amendment Bill 2003 (ACT) cl 4; Civil Liability Act 2002 (NSW) s 16(1); Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 27(2); Civil Liability Act 1936 (SA) s 52(1); Civil Liability Act 2002 (Tas) s 27(1); Civil Liability Act 2002 (WA) s 9(1).

\textsuperscript{184} Commonwealth Volunteers Protection Act 2003 (Cth) s 6(1); Civil Law (Wrongs) Act 2002 (ACT) ch 2 pt 2.1; Civil Liability Act 2002 (NSW) pt 8; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 7; Civil Liability Act 1936 (SA) s 74; Wrongs Act 1958 (Vic) pt VIA; Civil Liability Act 2002 (WA) pt 1D.

\textsuperscript{185} Note, however, that the good Samaritan immunity does not apply where the good Samaritan acts recklessly in the Australian Capital Territory, the Northern Territory, South Australia or Western Australia: Civil Law (Wrongs) Act 2002 (ACT) s 5(1); Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 8(1); Volunteers Protection Act 2001 (SA) s 74(2); Civil Liability Act 2002 (WA) s 5AD(1). The volunteer immunity does not extend to situations involving recklessness in the Australian Capital Territory, the Northern Territory or South Australia: Civil Law (Wrongs) Act 2002 (ACT) s 8(1); Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 7(1); Volunteers Protection Act 2001 (SA) s 4.

\textsuperscript{186} See, eg, Civil Law (Wrongs) Act 2002 (ACT) ss 8(2); Civil Liability Act 2002 (NSW) ss 62–6; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 7(2); Civil Liability Act 2003 (Qld) ss 40–4; Volunteers Protection Act 2001 (SA) s 4; Civil Liability Act 2002 (Tas) s 47(2), (3); Wrongs Act 1958 (Vic) s 38; Volunteers (Protection from Liability) Act 2002 (WA) s 6(2), (3).

\textsuperscript{187} This immunity exists in New South Wales, Queensland, Tasmania and Western Australia: Civil Liability Act 2002 (NSW) ss 51–5N; Civil Liability Act 2003 (Qld) ss 17–19; Civil Liability Act 2002 (Tas) ss 18–20; Civil Liability Act 2002 (WA) ss 5E–5H. Note, however, that the sphere of immunity is arguably significantly smaller in Queensland than in the other jurisdiction due to a narrower definition of ‘obvious risk’: Civil Liability Act 2003 (Qld) s 13(5).
V Conclusion

Throughout the modern history of the tort of negligence, the belief has persisted that liability is premised on notions of moral blameworthiness. The tort of negligence has several features which support this view. Foremost amongst these features is probably the principle of reasonable foreseeability, which implies that liability is only sheeted home to those who were aware that a particular course of conduct carried a risk of damage but decided to carry on with that conduct regardless.

However, notwithstanding the evidence in favour of the conventional view, this article has attempted to show that this view is misguided by demonstrating that the tort of negligence eschews blameworthiness as a hallmark of liability in a multitude of significant ways. While it has not been possible to catalogue all of the points of departure between negligence and blameworthiness in this article, most of the more important departures have been noted. These are: (1) that the tort of negligence picks a second-rate indicator of blameworthiness by turning on conduct rather than a mental state; (2) that by utilising an objective standard of liability, morally good excuses for conduct which causes harm are ignored and some individuals who are open to blame are exonerated; (3) that by imposing strict liability via the doctrines of vicarious liability and non-delegable duties of care, the tort of negligence makes no effort to separate morally innocent agents from blameworthy agents; (4) that by setting exacting standards of care, agents are often held liable notwithstanding an absence of evidence that they were blameworthy; and (5) that the principles governing the assessment of damages defy the moral principle that sanctions for wrongful conduct should be proportionate to the culpability of that conduct. In light of these discrepancies between liability and moral blameworthiness, it seems that the conventional view fails to provide an adequate account of the tort of negligence. As Viscount Simonds succinctly put it, the evidence ‘show[s] how shadowy [the line is] between so-called culpability and compensation.’

188 Wagon Mound [No 1] [1961] AC 388, 418.