THE SPURIOUS RELATIONSHIP BETWEEN MORAL BLAMEWORTHINESS AND LIABILITY FOR NEGLIGENCE

JAMES GOUDKAMP*

[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 blameworthiness.]

CONTENTS

I INTRODUCTION

The prevailing understanding of the tort of negligence is that notions of moral blameworthiness furnish the philosophical foundation for liability. It is thought that blame on the part of tortfeasors justifies allocating the cost of accidents which they cause to them, rather than to the accident victims on whom the cost initially falls. This view has enjoyed resounding judicial endorsement at the highest levels since *Donoghue v Stevenson*, where Lord Atkin stated that

* BSc, LLB (Hons) (Wollongong); Associate Lecturer, Faculty of Law, The University of Wollongong. The author would like to thank Ruth Davis, David Farrier, Scott Grattan, Jayde Rankin, Margaret Scrivenor, Rod Smythe, Rob Sparrow and, in particular, the anonymous referees, for their helpful comments and criticism.

'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';[4] and a fundamental premise which is 'indispensable to the law of negligence.'[5] 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.'[6]

Many academic commentators also view the tort of negligence through the prism of moral blameworthiness. For example, Glanville Williams and William Hepple assert that '[c]ommonsense morality suggests that a man who has been negligent ought to pay compensation to those whom he injures.'[7] Peter Cane argues that negligence is best understood as an ethical system of personal responsibility,[8] whilst David Owen maintains that blameworthiness is the 'basic cement' of negligence.[9]

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 1]*').

3 *Jaensch v Coffey* (1984) 155 CLR 549, 607 (Deane J).

4 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 622 (Kirby J). See also *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, 476–7 (Kirby J); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 264 (Kirby J); *Gifford v Strang Patrick Stevedoring Pty Ltd* (2002) 198 ALR 100, 122–3 (Gummow and Kirby JJ); *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 207 ALR 52, 71 (Kirby J).

5 Justice Roslyn Atkinson, 'Tort Law Reform in Australia' (Speech delivered at the Australian Plaintiff Lawyers Association Queensland State Conference, Sanctuary Cove, 7 February 2003) 7 <http://www.courts.qld.gov.au/publications/articles/speeches/2003/atkin100203.pdf>. See also *Caltex Oil (Australia) Pty Ltd v The Dredge* '*Willemstad*' (1976) 136 CLR 529, 575 (Stephen J); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1005, 1038 (Lord Morris); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 220, 236 (McHugh J), 242–3 (Gummow J), 319 (Callinan J); *Agar v Hyde* (2000) 201 CLR 552, 583 (Gaudron, McHugh, Gummow and Hayne JJ); Sir Anthony Mason, 'Law and Morality' (1995) 4 *Griffith Law Review* 147, 156; Justice David Ipp, 'Negligence — Where Lies the Future?' (Paper presented at the Supreme Court and Federal Court Judges' Conference, Adelaide, 19–23 January 2003) <http://www.agd.nsw.gov.au/sc%5Csc.nsf/pages/ipp_1002032>.

6 Justice Allen Linden, 'The Good Neighbour on Trial: A Fountain of Sparkling Wisdom' (1983) 17 *University of British Columbia Law Review* 67, 67. See also Justice Allen Linden, 'Viva *Donoghue v Stevenson*!' in Peter Burns and Susan Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence*: *The Paisley Papers* (1991) 227, 227; Justice Allen Linden, 'Torts Tomorrow — Empowering the Injured' in Nicholas Mullany and Justice Allen Linden (eds), *Torts Tomorrow*: *A Tribute to John Fleming* (1998) 330.

7 Glanville Williams and William Hepple, *The Foundations of the Law of Tort* (2nd ed, 1984) 136.

8 Peter Cane, *The Anatomy of Tort Law* (1997) 24–5. See also Peter Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations*: *Essays in Celebration of John Fleming* (1998) 141; Peter Cane, 'Fault and Strict Liability for Harm in Tort Law' in Gareth Jones and William Swadling (eds), *The Search for Principle*: *Essays in Honour of Lord Goff of Chieveley* (1999) 171, 172, 197–205; Peter Cane, *Responsibility in Law and Morality* (2002) (Preface). Cf Peter Cane, 'Reforming Tort Law in Australia: A

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]

Personal Perspective' (2003) 27 *Melbourne University Law Review* 649, 659, where Cane discusses the conception of tort law as a form of social security.

9 David Owen, 'Philosophical Foundations of Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 201, 201–2, 223–8. See also David Owen, 'The Fault Pit' (1992) 26 *Georgia Law Review* 703. Other authors have argued along similar lines: see Lewis Klar, 'Downsizing Torts' in Nicholas Mullany and Justice Allen Linden (eds), *Torts Tomorrow*: *A Tribute to John Fleming* (1998) 305, 307; Prue Vines, 'Fault, Responsibility and Negligence in the High Court of Australia' (2000) 8 *Tort Law Review* 130, 130.

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.

11 *Donoghue v Stevenson* [1932] AC 562, 580. Similarly, in an extra-curial speech given shortly before the judgment in *Donoghue v Stevenson* was delivered, Lord Atkin said that 'law and morality do not cover identical fields. … *[M]orality extends beyond the more limited range in which you can lay down the definite prohibitions of law*': Justice Martin Taylor, 'Mrs Donoghue's Journey' in Peter Burns and Susan Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence*: *The Paisley Papers* (1991) 1, 9, citing Geoffrey Lewis, *Lord Atkin* (1983) 57 (emphasis added by Taylor). See also *McHale v Watson* (1966) 115 CLR 199, 225 (Menzies J); *Roberts v Ramsbottom* [1980] 1 WLR 823, 830, 833 (Neill J).

12 *Smith New Court Securities Ltd v Citibank N A* [1997] AC 254, 280 (Lord Steyn).

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

14 Sir Frederick Pollock, *The Law of Torts*: *A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (13th ed, 1929) 10.

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); *Chappel 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 control[22] or knowledge[23] 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); *Dovuro 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 reliance on the notion of vulnerability and a discussion of its possible application in the future, see Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Australian Bar Review* 135, 142–9.

22 *Hawkins v Clayton* (1988) 164 CLR 539, 597 (Gaudron J); *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 551–2 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Hill v Van Erp* (1997) 188 CLR 159, 198–9 (Gaudron J), 234 (Gummow J); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 389 (Gummow J); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 201 (Gaudron J), 326 (Callinan J); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 25 (Gaudron J), 39 (McHugh J), 61 (Gummow J), 82 (Kirby J), 104 (Hayne J), 116 (Callinan J); *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 559 (Gaudron, McHugh and Gummow JJ); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 558 (Gleeson CJ), 577, 579–81 (McHugh J), 597–9 (Gummow and Hayne JJ), 630–2 (Kirby J),

situation which culminated in injury to the plaintiff. Whilst none of these criteria are determinative,[24] 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.[25] 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.[26]

Fourth, liability for negligence is only imposed on defendants who attain a minimum level of mental awareness.[27] For instance, involuntary conduct cannot, by itself, constitute negligence.[28] Similarly, children who are so young that they lack the mental capacity to realise the wrongfulness of their conduct cannot be held liable.[29] 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 JJ); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 205 ALR 522, 579 (Callinan J).

23 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 389 (Gummow J); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 577 (McHugh J), 630–3 (Kirby J); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 25 (Gaudron J), 39, 41–2 (McHugh J); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 205 ALR 522, 543, 545–6 (McHugh J), 567 (Kirby J), 579 (Callinan J).

24 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597 (Gummow and Hayne JJ), 664 (Callinan J).

25 See Justice Michael Kirby, 'Foreword' in Norman Katter, *Duty of Care in Australia* (1999) v.

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.

28 *Roberts v Ramsbottom* [1980] 1 WLR 823, 831 (Neill J); *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263.

29 *McHale v Watson* (1964) 111 CLR 384, 386 (Windeyer J); *Walmsley v Humenick* [1954] 2 DLR 232, 238 (Clyne J); *Hudson's Bay Co v Wyrzykowski* [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.[30] 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.[31] Accordingly, both the law and morality attempt to encourage people to improve their conduct by constructing artificially high standards.[32]

Sixth, it has been suggested that the legal principle of reasonable foreseeability is consistent with the moral infrastructure used to attribute blame.[33] 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.[34]

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',[35] it is so 'dangerously expansive'[36] that it can hardly be said that people are only held

30 Although see below Part III(B).
31 Harold Luntz, 'Reform of the Law of Negligence: Wrong Questions — Wrong Answers' (2002) 25 *University of New South Wales Law Journal* 836, 840.
32 Peter Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed, 1999) 39; Cane, *Responsibility in Law and Morality*, above n 8, 73.
33 See, eg, *Wagon Mound [No 1]* [1961] AC 388, 426 (Viscount Simonds); Stephen Perry, 'Risk, Harm and Responsibility' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 321, 341–2; Michael Moore, *Placing Blame*: *A General Theory of Criminal Law* (1997) 404; John Finnis, 'Intention and Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 229, 243; Holmes, above n 1, 84, 94–5; Samuel Stoljar, *Moral and Legal Reasoning* (1980) 67–9, 121–2. Cf Andrew Simester, 'Can Negligence Be Culpable' in Jeremy Horder (ed), *Oxford Essays on Jurisprudence*: *4th Series* (2000) 88–90.
34 Perry, above n 33, 341–2.
35 *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40, 48 (Mason J).
36 Basil Markesinis, 'Negligence, Nuisance and Affirmative Duties of Action' (1989) 105 *Law Quarterly Review* 104, 117.

liable in negligence for the occurrence of avoidable risks.[37] Indeed, the test has been described as an 'undemanding'[38] and 'comfortable latitudinarian doctrine'[39] which has nothing to do with reasonableness and is more aptly described as a test of 'conceivable foreseeability'.[40] 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 does happen is not foreseeable by a person of sufficient imagination and intelligence.'[41]

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[42] and a risk which was so rare that it was not mentioned in medical textbooks[43] have been held to be foreseeable.[44] 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;[45] the risk of falling from the roof of a coke oven whilst cleaning rubbish;[46] the risk of tripping over a small crack in a footpath;[47] and the risk of running down a pedestrian who spontaneously stepped out onto the road from the median strip.[48] Nevertheless,

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 2003* (Qld) s 9(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.

38 *Inverell Municipal Council v Pennington* [1993] Aust Torts Reports ¶81-234, 62 403 (Clarke JA); *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631, 641 (Glass JA); *Tame v New South Wales* (2002) 211 CLR 317, 352 (McHugh J); *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139, 165 (Kirby J).

39 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 402 (Windeyer J).

40 Chief Justice J J Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432, 441.

41 (1961) 106 CLR 112, 115 (during argument). See also *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40, 53–4 (Wilson J).

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

43 *Chappel v Hart* (1998) 195 CLR 232, 267 (Kirby J).

44 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 *Schiller v Gregory* [1985] Aust Torts Reports ¶80-751.

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

47 *Richmond Valley Council v Standing* [2002] Aust Torts Reports ¶81-679, 69 361–2 (Heydon JA).

48 *O'Brien v N M Rothschild Aust Ltd* (1999) 29 MVR 406, 408 (Fitzgerald JA). Other cases involving unforeseeable risks include: *Van der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204 (Unreported, Meagher and Heydon JJA and Foster AJA, 9 July 2002); *Sutherland Shire Council v Kukovec* [2001] NSWCA 165 (Unreported, Meagher and Hodgson JJA and Ipp AJA, 5 June 2001) [27] (Ipp AJA); *Roads and Traffic Authority (NSW) v Jackson* (2003) 38 MVR 203; *Macpherson v Proprietors of Strata Plan 10857* [2003] NSWCA 96 (Unreported, Sheller and Hodgson JJA and Gzell J, 24 April 2003); *Local Spiritual Assembly of the Baha'is of Parramatta Ltd v Haghighat* [2004] Aust Torts Reports ¶81-729; *Australian Traineeship System v Wafta* [2004] NSWCA 230 (Unreported, Handley, Giles and McColl JJA, 7 July 2004) [10]–[12] (Handley JA).

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]

[49] This article does not attempt to exhaustively address all of the ways in which negligence diverges from moral blameworthiness. Three important divergences are too complex to consider in this article: the problem of attributing moral blame to negligent non-human agents, especially corporations (see, eg, Thomas Donaldson, *Corporations and Morality* (1982) ch 2; Peter French, 'The Corporation as a Moral Person' (1979) 16 *American Philosophical Quarterly* 207; John Ladd, 'Morality and the Ideal of Rationality in Formal Organizations' (1970) 54 *Monist* 488); the reluctance of the common law to countenance liability in negligence for morally blameworthy omissions (see John Glover, *Causing Death and Saving Lives* (1977) ch 7; Francis Bohlen, 'The Moral Duty to Aid Others as a Basis of Tort Liability' (1908) 56 *University of Pennsylvania Law Review* 217; Law Reform Commission of Canada, *Omissions, Negligence and Endangering*, Working Paper No 46 (1985) ch 1; Markesinis, above n 36; Tony Honoré, 'Law, Morals and Rescue' in James Ratcliffe (ed), *The Good Samaritan and the Law* (1966) 225; Heidi Malm, 'Killing, Letting Die and Simple Conflicts' (1989) 18 *Philosophy and Public Affairs* 238); and the fact that the overwhelming majority of negligence actions are settled and thus avoid any formal state-backed attribution of blame (see Richard Abel, 'A Critique of Torts' (1990) 37 *UCLA Law Review* 785, 793).

[50] Sir John Salmond, *Jurisprudence* (7th ed, 1924) 410 (emphasis in original). See also Patrick Fitzgerald, *Salmond on Jurisprudence* (12th ed, 1966) 390; W T S Stallybrass, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries — By John Salmond* (7th ed, 1928) 11–12, 21–4. Note, however, that in the 17th edition of *Salmond on the Law of Torts*, the conduct theory is embraced: 'Actions [for negligence] do not lie for a state of mind. Negligence is con-

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 significance[52] 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

duct, not a state of mind': R F V Heuston, *Salmond on the Law of Torts* (17th ed, 1977) 194–5.

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).

53 Henry Edgerton, 'Negligence, Inadvertence and Indifference: The Relation of Mental States to Negligence' (1926) 39 *Harvard Law Review* 849, 852–3.

54 Ibid 854–9; Peter Cane, '*Mens Rea* in Tort Law' (2000) 20 *Oxford Journal of Legal Studies* 533, 536. For a comparative discussion of the subjectivist and objectivist analyses of law, see Alan White, *Grounds of Liability*: *An Introduction to the Philosophy of the Law* (1985) 99–105, 112.

55 See Edgerton, above n 53, 858–9.

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.

57 See, eg, Jerome Hall, *General Principles of Criminal Law* (2nd ed, 1960) 135–6.

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

[58] H L A Hart, *Punishment and Responsibility*: *Essays in the Philosophy of Law* (1968) 136 (emphasis in original). See also at 150–1; Simester, above n 33, 88–91; Andrew Ashworth, *Principles of Criminal Law* (3rd ed, 1999) 197–8.

[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

Council (1962) 110 CLR 74, 84 (Windeyer J) (emphasis added). See also *Pyrenees Shire Council v Day* (1998) 192 CLR 330, where Brennan CJ stated at 347–8 (emphasis added):

> The care and *diligence* needed to discharge the duty vary according to the circumstances that are known. The measure of the duty owed to members of the relevant class is no greater than the measure of the public law duty to exercise the power. Where, as in the present case, there is a risk of fire that could destroy a large part of a township, the care and *diligence* to be exercised are greater than where the risk is of an escape of a fire that poses a threat only to an isolated structure or to crops, trees or pasture within a confined area.

63 For example:

> Instead … of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of *ordinary prudence* would observe.

Vaughan v Menlove (1837) 3 Bing NC 468, 475; (1837) 132 ER 490, 493 (Tindal CJ) (emphasis added). See also *Cook v Cook* (1986) 162 CLR 376 in which Brennan J stated: 'The standard of care is fixed by reference to the caution which a person of *ordinary prudence* would observe in the particular circumstances': at 391 (emphasis added).

64 For example: 'In considering the extent and nature of the measures that *due care* demands, the first question must be the gravity, frequency and imminence of the danger to be provided against': *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1936) 56 CLR 580, 601 (Dixon J) (emphasis added); 'The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take *due care*, is, of course, indubitably correct': *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, 611 (Viscount Simonds) (emphasis added); 'What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of *due care* according to the circumstances': *Weld-Blundell v Stephens* [1920] AC 956, 984 (Lord Sumner) (emphasis added).

65 *Nettleship v Weston* [1971] 2 QB 691; *Cook v Cook* (1986) 162 CLR 376. In *Leahy v Beaumont* (1981) 27 SASR 290, 294, White J said (citing *Nettleship v Weston* [1971] 2 QB 691, 699 (Lord Denning MR)):

> Every driver, even a learner driver, an aged and infirm driver, a sick driver, a driver suffering from fear of spiders, bees and moths in the car, a driver suffering a severe coughing fit 'must drive in as good a manner as a driver of skill, experience and care, who is sound in mind and limb, who makes no errors of judgment, has good eyesight and hearing and is free from any infirmity' …

66 *Jones v Manchester Corporation* [1952] 2 QB 852; *Wilsher v Essex Area Health Authority* [1987] QB 730, 750 (Mustill LJ), 774 (Glidewell LJ). The decision in *Wilsher v Essex Area Health Authority* was subsequently reversed on other grounds: *Wilsher v Essex Area Health Authority* [1988] AC 1074. Note, however, that in some jurisdictions, the liability of professionals (except in 'failure to warn' cases) is to be determined in accordance with what their peers regard as competent professional practice: see *Civil Liability Act 2002* (NSW) s 5O; *Civil Liability Act 2003* (Qld) s 22; *Civil Liability Act 2002* (Tas) s 22; *Wrongs Act 1958* (Vic) s 59.

67 *P Q v Australian Red Cross Society* [1992] 1 VR 19, 33 (McGarvie J). Note, however, that the financial resources of the defendant may be taken into consideration in cases where an occupier has had a hazard thrust upon them through no fault of their own: see *Goldman v Hargrave* [1967] 1 AC 645, 663 (Lord Wilberforce), and where the defendant is a statutory authority: see *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 394–5 (Gummow J); *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 559 (Gaudron, McHugh and Gummow JJ); *Civil Law (Wrongs) Act 2002* (ACT) s 110; *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2003* (Qld) s 35; *Civil Liability Act 2002* (Tas) s 38; *Wrongs Act 1958* (Vic) s 83(a); *Civil Liability Act 2002* (WA) s 5W.

defendant's characteristics.[68] 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.[69] 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.[70] 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.[71] 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,[72] or that they acted to the best of their judgement or ability.[73] 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.[74] 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.[75]

68 *Cook v Cook* (1986) 162 CLR 376, 383–4 (Mason, Wilson, Deane and Dawson JJ).

69 *Wooldridge v Sumner* [1962] 2 All ER 978, 989–91 (Diplock LJ).

70 For an argument doubting the common assumption that morality does not use objective standards, see Cane, *Responsibility in Law and Morality*, above n 8, 72–6.

71 See Holmes, above n 1, 108, who famously advanced this argument in the following passage:

> If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

72 *Carrier v Bonham* [2002] 1 Qd R 474, 480 (McMurdo P); *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56. See also Willard Pedrick, 'The Lunatic Driver' (1957) 31 *Australian Law Journal* 354. *Contra A-G (Canada) v Connolly* (1990) 64 DLR (4th) 84; *Buckley v Smith Transport Ltd* [1946] 4 DLR 721.

73 *Vaughan v Menlove* (1837) 3 Bing NC 468, 474; (1837) 132 ER 490, 493 (Tindal CJ).

74 Tony Honoré, *Responsibility and Fault* (1999) 21–3; Warren Seavey, 'Negligence — Subjective or Objective?' (1927) 41 *Harvard Law Review* 1, 23–6.

75 There are a number of cases which establish that if a driver is suddenly incapacitated and without warning, they are not liable in negligence for harm ensuing from their incapacitation: see, eg, *Robinson v Glover* [1952] NZLR 669, 672 (Finlay J) (blackout); *Billy Higgs & Sons Ltd v Baddeley* [1950] NZLR 605, 616 (Gresson J), 616–17 (Hutchinson J) (foreign object entering eye); *Scholz v Standish* [1961] SASR 123, 127–8 (Ross J) (bee sting); *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263, 1268 (Leggatt LJ) (glucose deficiency). Cf *Roberts v Ramsbottom* [1980] 1 WLR 823, 832 (Neill J) (stroke).

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,[76] or if they failed to take medication which would have prevented the fit.[77]

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.[78] 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.[79] 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.[80] However, a person who is content to 'live down' to the standard of the

[76] *Leahy v Beaumont* (1981) 27 SASR 290, 292 (Sangster J), 297 (White J), 299–300 (Legoe J) (coughing fit).

[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.

[79] See James Goudkamp, 'Negligence and Especially Capable Defendants: Does the Objective Standard of Care Cut Both Ways?' (2004) 12 *Tort Law Review* 111, 112–3.

[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'.[81] 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.[82] 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.[83] Accordingly, the fact that a defendant has been held strictly liable does not necessarily mean that they are innocent of any wrongdoing.[84] 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

than that of the ordinary barrister specialising in these areas: at 53 (Malcolm AJA), 117 (McPherson AJA), 236 (Ormiston AJA).

81 H L A Hart, *The Concept of Law* (2nd ed, 1994) 166, 173, 178–9. See also Hart, *Punishment and Responsibility*, above n 58, 35–40, 50, 132, 136, 152, 223, 225–6; James Ames, 'Law and Morals' (1908) 22 *Harvard Law Review* 97, 99; John Wigmore, 'Responsibility for Tortious Acts: Its History' (Pt 3) (1894) 7 *Harvard Law Review* 441, 441; Nathan Isaacs, 'Fault and Liability: Two Views of Legal Development' (1918) 31 *Harvard Law Review* 954, 961; Thomas Nagel, *Mortal Questions* (1979) 31.

82 For instance, statutory compensation schemes which do not require claimants to establish fault on the part of the injurer are ubiquitously styled 'no-fault' schemes: see, eg, 'Symposium: Tort Law — No Fault Insurance' (1989) 26 *San Diego Law Review* 977.

83 See Cane, 'Fault and Strict Liability for Harm in Tort Law', above n 8, 187–9; Cane, *Responsibility in Law and Morality*, above n 8, 82–4.

84 Indeed, there is reason to believe that under the mostly defunct common law species of strict liability, a considerable number of those held strictly liable were in fact at fault, as these instances of strict liability generally operated in situations where defendants had engaged in abnormally dangerous activities: see John Fleming, *The Law of Torts* (9th ed, 1998) 369.

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.'[85]

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.[86]

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.[87] 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[88] and public bodies.[89]

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.[90] 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.[91] Thus, a person on whom a non-delegable duty of care is imposed

85 Jules Coleman, *Markets, Moral and the Law* (1988) 177.

86 See, eg, *Bugge v Brown* (1919) 26 CLR 110; *Canadian Pacific Railway Co v Lockhart* [1942] AC 591; *Phoenix Society Inc v Cavenagh* (1996) 25 MVR 143.

87 Sir Frederick Pollock, *Essays in Jurisprudence and Ethics* (1882) 130. But see Sir Frederick Pollock, 'Liability for Torts of Agents and Servants' (1885) 1 *Law Quarterly Review* 207, 209.

88 See, eg, *Bazley v Curry* [1999] 2 SCR 534.

89 See, eg, *New South Wales v Lepore* (2003) 212 CLR 511.

90 *Kondis v State Transport Authority* (1986) 154 CLR 672, 687 (Mason J). See generally Glanville Williams, 'Liability for Independent Contractors' (1956) 14 *Cambridge Law Journal* 180; J P Swanton, 'Non-Delegable Duties: Liability for the Negligence of Independent Contractors' (Pt 1) (1991) 4 *Journal of Contract Law* 183; J P Swanton, 'Non-Delegable Duties: Liability for the Negligence of Independent Contracts' (Pt 2) (1992) 5 *Journal of Contract Law* 26.

91 *Commonwealth v Introvigne* (1981) 150 CLR 258, 269 (Mason J).

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 Australia[99] and elsewhere,[100] did not result from a change in the relevant legal

92 *Dalton v Angus & Co* (1881) 6 App Cas 740, 829 (Lord Blackburn).

93 See, eg, *Jones v Bartlett* (2000) 205 CLR 166, 221 (Gummow and Hayne JJ); *Scott v Davis* (2000) 204 CLR 333, 417 (Gummow J); *New South Wales v Lepore* (2003) 212 CLR 511, 599 (Gummow and Hayne JJ).

94 See *New South Wales v Lepore* (2003) 212 CLR 511, 553 (Gaudron J).

95 *Pickard v Smith* (1861) 10 CB(NS) 470, 480; 142 ER 535, 539 (Williams J).

96 See above Part III(C)(1).

97 *Wilsons & 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]–[38] (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 *Bankstown Foundry Pty Ltd v Braistina* [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.[101] A duty of care is still discharged upon the exercise of reasonable care.[102] 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.[103] 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.[104] 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.[105]

Court as 'unfortunate because of its tendency to mislead': *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301, 307 (Mason, Wilson and Dawson JJ), it has been endorsed elsewhere on numerous occasions: see, eg, *Inverell Municipal Council v Pennington* [1993] Aust Torts Reports ¶81-234, 62 406, where Clarke JA asserted that McHugh JA's comment accurately reflected the modern law. See also Sir Harry Gibbs, 'Living with Risk in Our Society' (Occasional Paper, Australian Academy of Technological Sciences and Engineering, 2002) <http://www.atse.org.au/index.php?sectionid=615>; Kieran Tapsell, 'Turning the Negligence Juggernaut' (2002) 76 *Australian Law Journal* 581, 583. Note, however, that McHugh J later recanted his statement following the High Court's decision in *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301: *Liftronic Pty Ltd v Unver* (2001) 179 ALR 321, 329–30.

100 For a discussion of the elevation of the standard of care in the United States see, eg, Cornelius Peck, 'Negligence and Liability without Fault in Tort Law' (1971) 46 *Washington Law Review* 225; Albert Ehrenzweig, 'Negligence without Fault' (1966) 54 *California Law Review* 1422; Isaacs, above n 81, 975–6; R W Baker, 'An Eclipse of Fault Liability?' (1954) 40 *Virginia Law Review* 273; Charles Gregory, 'Trespass to Negligence to Absolute Liability' (1951) 37 *Virginia Law Review* 359. In England, see, eg, P S Atiyah, *The Damages Lottery* (1997) 32–8; Peter Birks, 'The Concept of a Civil Wrong' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 45; Sir Patrick Devlin, *The Enforcement of Morals* (1965) 36.

101 See especially *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301, 307 (Mason, Wilson and Dawson JJ).

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 Accidents*[107]

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.

109 Sir John Barry, 'Compensation without Litigation' (1964) 37 *Australian Law Journal* 339, 343.

110 New South Wales Law Reform Commission, *Accident Compensation*: *A Transport Accidents Scheme for New South Wales, Final Report 1* (1984) vol 1 [3.35].

111 [1939] 2 All ER 142, 144.

112 [1993] Aust Torts Reports ¶81-252, 62 640.

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

peal, 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) s 16; *Transport Accident Act 1986* (Vic) s 96; *Motor Vehicle (Third Party Insurance) Act 1943* (WA) ss 7–8.

116 (1999) 29 MVR 361, 363 (Beazley JA).

117 Ibid 362 (Beazley JA). See also *Managrave v Vrazalica* (1999) 29 MVR 419, 422 (Stein JA); *Mitchell v Government Insurance Office (NSW)* (1992) 15 MVR 369; *Shepherd v Zilm* (1976) 14 SASR 257.

118 (2001) 181 ALR 301.

119 Ibid 301.

120 *Derrick v Cheung* (1999) 29 MVR 351.

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' Liability*[125]

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]

[122] *Derrick v Cheung* (2001) 181 ALR 301, 305 (Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ).

[123] See Travis Schultz, 'The Pendulum Swings: Pedestrian Claims in the 21st Century' (Paper presented at the Australian Plaintiff Lawyers Association Conference, Coolum, 18 October 2003) 2.

[124] *Trustees of the Roman Catholic Church, Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (Unreported, Mason P, Giles JA and Ipp AJA, 24 September 2001); *T C (by his tutor Sabatino) v New South Wales* [2001] NSWCA 380 (Unreported, Mason P, Priestley and Beazley JJA, 31 October 2001); *Yi v Service Arena Pty Ltd* [2001] NSWCA 400 (Unreported, Mason P, Heydon JA and Young CJ in Eq, 13 November 2001); *Lieng v Delvers* (2002) 36 MVR 401; *Spanswick v Laguzza* (2002) 35 MVR 501; *Knight v Maclean* [2002] NSWCA 314 (Unreported, Meagher and Heydon JJA and Young CJ in Eq, 14 October 2002); *Dennis v Keep* [2002] NSWCA 227 (Unreported, Heydon JA, Foster AJA and Bergin J, 11 July 2002); *Ma v Keane* (2003) 38 MVR 212.

[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.'[127] On appeal to the High Court, Mason, Wilson and Dawson JJ lamented McHugh JA's reference to strict liability.[128] Nonetheless, their Honours acknowledged that the duty on employers had indeed become increasingly demanding.[129] 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.[130]

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*,[131] and by Hayne J in *Schellenberg v Tunnel Holdings Pty Ltd*.[132] In *Rasic v Cruz*, Fitzgerald JA stated that employers 'have become virtual insurers of those who are injured by their activities.'[133] Parallel remarks have been made by numerous commentators.[134] Although a recent smattering of dicta has stressed the fault element of negligence,[135] 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

126 [1985] Aust Torts Reports ¶80-713, 69 127. McHugh J made similar comments in *Tame v New South Wales* (2002) 211 CLR 317, 352 fn 95.

127 *Bankstown Foundry Pty Ltd v Braistina* [1985] Aust Torts Reports ¶80-713, 69 125.

128 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301, 307.

129 Ibid 308–9.

130 Ibid 314.

131 (2001) 179 ALR 321, 343.

132 (2000) 200 CLR 121, 176.

133 [2000] NSWCA 66 (Unreported, Meagher, Beazley and Fitzgerald JJA, 19 April 2000) [45]. See also *Inverell Municipal Council v Pennington* [1993] Aust Torts Reports ¶81-234, 62 406 (Clarke JA).

134 See, eg, Ian Fagelson, 'The Last Bastion of Fault? Contributory Negligence in Actions for Employers' Liability' (1979) 42 *Modern Law Review* 646, 646, 663; Adrian Brooks, *Guidebook to Australian Occupational Health and Safety Laws* (3rd ed, 1988) 94–6; J A Griffin, 'Accident Litigation — Recent Developments' (1984) 14(2) *Queensland Law Society Journal* 67, 68; Neil Cunningham, *Safeguarding the Worker* (1984) 6, 240, 360.

135 See, eg, *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121, 161 (Kirby J); *Australian Traineeship System v Wafta* [2004] NSWCA 230 (Unreported, Handley, Giles and McColl JJA, 7 July 2004) [17] (Handley JA); *Boyded Industries Pty Ltd v Canuto* [2004] NSWCA 256 (Unreported, Beazley and Santow JJA and Stein AJA, 30 July 2004) [4]–[7] (Beazley JA).

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[136] — 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,[137] exemplary damages,[138] and possibly aggravated damages[139] 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.[140]

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

[136] See John Gardner, 'Crime: In Proportion and Perspective' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory*: *Essays in Honour of Andrew von Hirsch* (1998) 31, 38–41; Abel, above n 49, 791.

[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 1903* (Cth) s 37; *Federal Court of Australia Act 1976* (Cth) s 22; *Supreme Court Act 1986* (Vic) s 37; S*upreme 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).

[138] While the issue is not free from doubt, it seems that exemplary damages are available in respect of negligence. There is guarded dicta supporting their availability in *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9–10 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 28–9 (Kirby J) (for a critique, see Rachael Mulheron, 'The Availability of Exemplary Damages in Negligence' (2000) 4 *Macarthur Law Review* 61), and this view is endorsed by several commentators: see, eg, Fleming, *The Law of Torts*, above n 84, 273–4. The Privy Council recently affirmed that exemplary damages may be awarded for negligence in New Zealand: *A v Bottrill* [2002] 3 WLR 1406 (for a critique, see Rosemary Tobin, 'Exemplary Damages in New Zealand: The End of the Story?' (2003) 11 *Torts Law Journal* 20).

[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) [2.10], [2.26]–[2.36] <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 16(2); *Civil Liability Act 2002* (NSW) s 21; *Motor Accidents Act 1988* (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 1985* (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,[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.[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.[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 *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:

> 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.[144]

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

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

142 The dissonance between the culpability of a negligent act or omission and the 100 per cent principle is considered in detail in Jeremy Waldron, 'Moments of Carelessness and Massive Loss' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 387. See also Justice Keith Mason, 'Fault, Causation and Responsibility: Is Tort Law Just an Instrument of Corrective Justice?' (2000) 19 *Australian Bar Review* 201, 207–8; Peter Cane, 'Justice and Justifications for Tort Liability' (1982) 2 *Oxford Journal of Legal Studies* 30, 33; David Owen, 'Deterrence and Desert in Tort: A Comment' (1985) 73 *University of California Law Review* 665, 668–9.

143 Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law', above n 8, 142–3, 163–4; Hart, *Punishment and Responsibility*, above n 58, 134–5.

144 H L A Hart and Tony Honoré, *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 H 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.[146] 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.[147]

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.[148] 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

amongst other relevant factors, whether liability should be imposed on the defendant: see *Civil Law (Wrongs) Act 2002* (ACT) s 45; *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 2003* (Qld) s 11; *Civil Liability Act 2002* (Tas) s 13; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C.

146 For a discussion of the requirement of damage in negligence, see *Hawkins v Clayton* (1988) 164 CLR 539, 587 (Deane J), 599 (Gaudron J); *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 486–7 (Brennan J); Jane Stapleton, 'The Gist of Negligence' (Pt 1) (1988) 104 *Law Quarterly Review* 213; Jane Stapleton, 'The Gist of Negligence' (Pt 2) (1988) 104 *Law Quarterly Review* 389.

147 Unless of course that conduct happens to constitute trespass, which is actionable per se: Tilbury, above n 139, 160–1.

148 An alternative to joint and several liability is proportionate liability. The liability of concurrent tortfeasors who are proportionately liable is limited to their respective shares of responsibility for the plaintiff's loss. So, if, for example, three tortfeasors (D1, D2 and D3) negligently cause damage to the plaintiff to the tune of $100 000, and D1, D2, and D3 are 50 per cent, 30 per cent and 20 per cent responsible for that loss respectively, the plaintiff can recover up to $50 000 from D1, up to $30 000 from D2, and up to $20 000 from D3. Accordingly, the difference between proportionate liability and joint and several liability lies in the party that carries the risk of one or more of the concurrent tortfeasors being unable to satisfy a judgment. In the case of proportionate liability, the plaintiff bears this risk. However, under joint and several liability, this risk falls on the concurrent tortfeasors. Needless to say, proportionate liability, unlike joint and several liability, does not involve any departure from the proportionality principle.

Joint and several liability has been ousted in Queensland in favour of proportionate liability in all cases in excess of $500 000 other than personal injury cases (*Civil Liability Act 2003* (Qld) ss 28–33), in building cases in the Northern Territory and South Australia (*Building Act 1993* (NT) s 155; *Development Act 1993* (SA) s 72), and in pure economic loss or property damage cases which are based on negligent conduct (certain actions are excluded in Victoria: *Wrongs Act 1958* (Vic) pt IVAA). Proportionate liability regimes covering pure economic loss and property damages are provided for in the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 pt 4, amending *Civil Liability Act 2002* (NSW), and in the *Civil Liability Amendment Act 2003* (WA) pt 1F, amending *Civil Liability Act 2002* (WA). These Parts have not yet commenced. A Bill to introduce proportionate liability in the Australian Capital Territory is presently before the Australian Capital Territory Parliament: Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Bill 2004 (ACT).

authority. It would be irrelevant that the defendant targeted by the plaintiff was guilty of only a scintilla of negligence vis-a-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 responsibility[153] 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

149 Panel of Eminent Persons, above n 37, 176; Jane Swanton and Barbara McDonald, 'Reforms to the Law of Joint and Several Liability — Introduction of Proportionate Liability' (1997) 5 *Torts Law Journal* 109, 109; *AWA Ltd v Daniels* (1992) 7 ACSR 759, 876–7 (Rogers CJ).

150 J L R Davis, 'Inquiry into the Law of Joint and Several Liability' (1994) 37 *Australian Construction Law Newsletter* 36, 38.

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.

153 *Civil Law (Wrongs) Act 2002* (ACT) s 18; *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 5; *Law Reform (Miscellaneous Provisions) Act 1956* (NT) ss 12–13; *Law Reform Act 1995* (Qld) ss 6–7; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ss 6–7; *Wrongs Act 1954* (Tas) s 3; *Wrongs Act 1958* (Vic) ss 23B, 24; *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) s 7.

154 *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529, 555 (Gibbs J), 593 (Mason J); *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340, 353–4 (Gibbs CJ, Mason, Wilson and Dawson JJ); *Bryan v Maloney* (1995) 182 CLR 609, 618–19 (Mason CJ, Deane and Gaudron JJ); *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 272 (McHugh J), 302 (Gummow J); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 195 (Gleeson CJ), 199–200 (Gaudron J), 219–23, 233–5 (McHugh J), 289 (Kirby J), 303–5 (Hayne J), 324, 326 (Callinan J); *Agar v Hyde* (2000) 201 CLR 552, 563–4 (Gleeson CJ); *Sullivan v Moody* (2001) 207 CLR 562, 582 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Woolcock Street Investments Pty*

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 law[161] and is manifested in a litany of other legal principles including the presumption that statutes are not intended to operate

Ltd v CDG Pty Ltd (2004) 205 ALR 522, 528–9 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 534–5, 543 (McHugh J), 562, 565, 566 (Kirby J). Indeterminate liability is often erroneously referred to as, or perceived as related to, the floodgates argument. The validity of the floodgates argument has generally been treated with great scepticism: see *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 557–8 (Murphy J); *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 575, 614 (Kirby J); *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, 422 (Cooke J); *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, 202–4 (Thomas J); *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27, 38 (Lord Denning MR); *McLoughlin v O'Brian* [1983] 1 AC 410, 425 (Lord Edmund-Davies), 441–2 (Lord Bridge); *Tame v New South Wales* (2002) 211 CLR 317, 399–400 (Hayne J); *Hancock v Nominal Defendant* [2002] 1 Qd R 578, 603 (Davies JA). The floodgates argument is sometimes employed by the courts to deny relief where a 'flood' of litigants is apprehended if relief were granted: see, eg, *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1, 7–8 (Latham CJ), 11 (Rich J); *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, 198–9 (Gault, Henry, Keith and Blanchard JJ); *Page v Smith* [1996] 1 AC 155, 197 (Lord Lloyd); *White v Chief Constable of the South Yorkshire Police* [1999] 2 AC 455, 493–4 (Lord Steyn), 503 (Lord Hoffmann); Law Commission for England and Wales, *Liability for Psychiatric Illness*, Report No 249 (1998) [6.6] fn 9 <http://www.lawcom.gov.uk/239.htm#lcr249>. It plays on the fear that if the net of liability is cast too widely, the courts will be overwhelmed by a proliferation of claims and become congested, thereby diminishing their ability to dispense justice. This argument is therefore directed at safeguarding the efficient administration of justice. The restriction on indeterminate liability has, as we will see, an entirely different objective; namely, ensuring that the liabilities are discoverable in advance: see *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] Aust Torts Reports ¶81-692, 63 676 (Gillard J).

155 *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 303 (Hayne J).

156 Ibid 221 (McHugh J).

157 Ibid 303 (Hayne J).

158 Ibid 200 (Gleeson CJ), 221, 233 (McHugh J).

159 Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations*: *Essays in Celebration of John Fleming* (1998) 76.

160 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 ability of insurers to predict 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.

161 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).

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 foreseeably 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

[162] *Rodway v The Queen* (1990) 169 CLR 515, 518–19 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

[163] See Ashworth, above n 58, 76–8.

[164] See *Ostrowski v Palmer* (2004) 206 ALR 422, 423–4 (Gleeson CJ and Kirby J).

[165] (1976) 136 CLR 529, 551 (emphasis added). See also *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.[168] This attempt is evident from *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* ('*Wagon Mound [No 1]*'),[169] where the 'direct consequences' test[170] was replaced with the current test of reasonable foreseeability.[171] 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.'[172]

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.[173] 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[174] or the precise way in which it was caused was not foreseeable.[175]

(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

168 Fleming, *The Law of Torts*, above n 84, 232–3, 237–9.

169 [1961] AC 388.

170 *Re Polemis v Furness, Withy & Co Ltd* [1921] 3 KB 560.

171 *Wagon Mound [No 1]* [1961] AC 388, 422–7 (Viscount Simonds).

172 Ibid 422. Cf John Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 *Canadian Bar Review* 471, 482.

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 *Presland 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).

175 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 402 (Windeyer J).

> losses which … are out of scale with the gravity of [the defendant's] conduct.[176]

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.[177] 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[178] which accompanied the *Review of the Law of Negligence*: *Final Report*[179] 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[180] ought to narrow the divide between negligence and moral blameworthiness, as it will increase the probability that defendants who are held liable

176 Honoré, *Responsibility and Fault*, above n 74, 87.

177 See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 282 (McHugh J); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 230 (McHugh J).

178 See, eg, *Trade Practices Amendment (Liability for Recreational Services) Act 2002* (Cth), amending *Trade Practices Act 1974* (Cth); *Commonwealth Volunteers Protection Act 2003* (Cth); *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Civil Liability (Personal Responsibility) Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Personal Injuries (Civil Claims) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Personal Injuries Proceedings Act 2002* (Qld); *Recreational Services (Limitation of Liability) Act 2002* (SA); *Volunteers Protection Act 2001* (SA); *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA), amending *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic); *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic); *Civil Liability Act 2002* (WA); *Volunteers (Protection from Liability) Act 2002* (WA). For further analysis of these reforms, see Justice Peter Underwood, 'Is Ms Donoghue's Snail in Mortal Peril?' (2004) 12 *Torts Law Journal* 39; Chief Justice J J Spigelman, 'Negligence and Insurance Premiums: Recent Changes in Australian Law' (2003) 11 *Torts Law Journal* 291.

179 Panel of Eminent Persons, above n 37.

180 See above n 37.

possessed the capacity to avoid causing injury to the plaintiff.[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.[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,[183] as this means that there will be no liability in many instances of culpable wrongdoing. The broad immunity now afforded to good Samaritans[184] and to those who voluntarily perform community work[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.[186] Finally, the restrictions imposed on liability for injuries sustained in the course of recreational activities in some jurisdictions defy considerations of culpability.[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.

181 See above Part II.

182 See above n 148.

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).

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.

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.

186 See, eg, *Civil Law (Wrongs) Act 2002* (ACT) s 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).

187 This immunity exists in New South Wales, Queensland, Tasmania and Western Australia: *Civil Liability Act 2002* (NSW) ss 5J–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]

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