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IN DEFENSE OF REASONABLENESS: A CRITICAL ANALYSIS OF MONOLITHIC THEORIES OF TORT LIABILITY

Rice University

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IN DEFENSE OF REASONABLENESS:
A CRITICAL ANALYSIS OF MONOLITHIC
THEORIES OF TORT LIABILITY

by

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ABSTRACT

IN DEFENSE OF REASONABLENESS:
A CRITICAL ANALYSIS OF MONOLITHIC
THEORIES OF TORT LIABILITY

Guy McClung

A number of proposed theories of tort liability are "monolithic" in that they seek to explain tort liability by focusing on a single element or concern of the tort situation.

Four different monolithic theories of tort liability will be discussed in this work: personal moral culpability liability; strict or absolute liability; liability based on utility and, more specifically, economic liability; and liability based on reciprocity of risk between the parties. The narrow scope of each of these theories renders them susceptible to both internal and external criticism -- they are, variously, internally inconsistent and incoherent and they lead to unacceptable results in tort decisions.

Liability based on a standard of reasonableness which permits and requires a consideration of a variety of individual and community interests in making a tort decision is to be preferred to any of these monolithic theories.

A theory of liability based on reasonableness is in accord with and serves to correctly explicate the majority of decisions in reported tort cases. Furthermore, a theory of liability based on reasonableness dispels the supposed antithesis between liability with fault and strict liability.
ACKNOWLEDGMENTS

Thank you, Professor Brody.

Karen, I love you.
# TABLE OF CONTENTS

Abstract ii

Acknowledgement iii

Chapter One -
   The Received View of Tort Liability 1

Chapter Two -
   Epstein's Strict Liability Theory 22

Chapter Three -
   The Economic Theory of Tort Liability 47

Chapter Four -
   Fletcher on Tort Liability 69

Chapter Five -
   Tort Liability Based on Reasonableness 83

Footnotes 138
Chapter One

The Received View of Tort Liability

I. Introduction

In the last half of the nineteenth century and in the early twentieth century a large number of scholars, judges, and members of the legal profession expressed the monolithic view that tort liability should be imposed on a person only if that person is morally at fault. On this view, the imposition of tort liability not based on moral fault was thought to be unmoral. In presenting this position, a number of commentators begin by contrasting the allegedly unmoral and supposedly dominant medieval English doctrine of strict tort liability with the "moral" view of tort liability based on personal blameworthiness.

This chapter will consider both the claims of those who hold this view (henceforth in this paper called the "Received View of Tort Liability") and the basis for those claims. A brief study of representative medieval English cases will be made to demonstrate that there is insufficient evidence to argue that the medieval English tort system looked only to cause and closed its eyes to fault.
II. The Received View of Tort Liability

A. James Barr Ames

In his classic article, *Law and Morals*, Ames presents the Received View of Tort Liability. He states that primitive law regarded "the word and the act of the individual: it searches not his heart . . . As a consequence early law is formal and immoral;" but modern law asked "whether the old rule of strict liability was still in force or must give way to a rule of liability based upon moral culpability." Fletcher describes it, the Received View of Tort Liability is that strict liability was originally the rule and "that the ascendancy of fault in the late nineteenth century reflected the infusion of moral sensibility into the law of torts."

It is not clear what Ames means by "moral." It is clear that by "unmoral" he means a standard of liability that requires simply that the question, "Did the defendant do the physical act complained of that injured the plaintiff?" be answered. However, in saying that the law has become moral since it now asks, "Was the act blameworthy?" it is unclear whether Ames is referring to the blameworthiness of individual moral culpability or some sort of blameworthiness, regardless of the actors state of mind or intent, for failure to measure up to a community standard of conduct.

At one point Ames states that the "ethical standard of reasonable conduct has replaced the unmoral standard of
acting at one's peril" and he also refers to the "moral sense of the community" as an appropriate standard for judging conduct. But then there is a hint that the standard of individual moral culpability is the appropriate standard when he says that it "is obvious that the spirit of reform which during the last six hundred years has been bringing our system of law more and more into harmony with moral principles has not yet achieved its perfect work" and that "it is to the principles of the court of equity acting upon the conscience of the defendants and compelling them by decrees of restitution and specific performance to do what in justice and right they ought to do, that we must look to justify our belief that the English and American systems of law, however imperfect, are further on the road to perfection than those of other countries."  

The uncertainty and unclarity in Ames's position--individual standard or community standard--is evident in his treatment of lunatic tortfeasors on the one hand and, on the other hand, in the importance he accords utilitarian considerations.

Ames argues that if the standard is one of an act's blameworthiness, then even a lunatic who is unable to appreciate the nature or consequences of his acts ought to be held liable in tort for injuries caused by his or her faulty actions. He concludes that it "is not unreasonable to anticipate that the English courts and the American courts, . . .
will sooner or later apply to the lunatic the ethical principle of no liability without fault." Ames's position concerning lunatics indicates that it is his view that the proper standard of tort liability is that of an external fault standard.

In contradistinction to his views on the lunatic cases Ames also holds that there are cases in which "morals" and "public policy" may clash. His views on this subject indicate that his standard of conduct for assessing tort liability can be interpreted as being broader than the standard of individual moral culpability:

In considering the possibility of further improvements of the law we must recognize at the outset that there are some permanent limitations upon the enforcement in the courts of duties whose performance is required in the forum of morals.

On grounds of public policy there are and always will be, one the one hand, many cases in which persons damaged may recover compensation from others whose conduct was morally blameless, and, on the other hand, many cases in which persons damaged cannot obtain compensation even from those whose conduct was morally most reprehensible.

* * *

The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed. That is why, in the cases just considered and others that will occur to you, the innocent suffer and the wicked go unpunished.

But unless exempted from liability by considerations of enlightened public policy,
I can see no reason why he who has by his act wilfully caused damage to another should not in all cases make either specific reparation or pecuniary compensation to his victim. 10

Ames presents no argument for the assumption that the law's aim is the furthering of community interests to the detriment, if need be, of individual interests. Nor does he realize the implications of his apparent thorough-going utilitarianism or the contradiction between possible utilitarian-justified acts on the one hand and moral-principle-justified acts on the other. Such implications can be as unmoral as the results of the primitive law which Ames criticizes. Also, Ames's position is in conflict with numerous decided cases in which individual interests are not sacrificed to a utilitarian interest.

Ames's work is valuable for its insight that there is some connection between the standard of conduct for tort liability, the reasonableness of the conduct, the moral sense of the community, and a sense of fairness. Ames believes that utility considerations have a role to play in tort liability determinations, although he posits for them a role which renders his view liable to the traditional criticisms of utilitarianism. He notes that there are many cases in which a morally blameless defendant is correctly held liable in tort and many in which a morally blameworthy defendant is correctly found to be not liable.
A correct theory for tort liability will explain these results. Ames's primary contribution is his criticism of monolithic theories such as strict liability.

B. Oliver Wendell Holmes, Jr.

Oliver Wendell Holmes, Jr., discusses both the history and the theory of tort liability. He, too, notes the existence of the Received View of Tort Liability:

The law of torts abounds in moral phraseology. It has much to say of wrongs, of malice, fraud, intent, and negligence. Hence it may naturally be supposed that the risk of a man's conduct is thrown upon him as a result of some moral shortcoming. But while this notion has been entertained, the extreme opposite will be found to have been a far more popular opinion; I mean the notion that a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter.

Holmes does realize that there are exceptions to a rule of liability based upon fault: "The argument of this lecture, although opposed to the doctrine that a man acts or exerts force at his peril, is by no means opposed to the doctrine that he does certain particular acts at his peril."

For Holmes, the "business of the law of torts is to fix the dividing line between those cases in which a man is liable for harm which he has done, and those in which he is not." Although Holmes believes that the origins of the standard according to which this line is drawn can be found in morality, his position is that legal standards are not syn-
onymous with moral standards. He explicitly rejects, as did Ames, the view that tort fault or blameworthiness arises from personal moral shortcoming. A corollary of this is that a person can be at fault and yet not be personally morally culpable. Holmes's rejection of the view that fault is based on personal moral shortcoming is founded on his view of what constitutes a proper legal standard. He sees legal standards as standards of general application. He says that "... any legal standard must, in theory, be one which would apply to all men, not specially excepted, under the circumstances." Holmes views these legal standards as different in type from moral standards which look to the state of mind of the individual rather than to the effect of an individual's conduct in a community of individuals. Because a person lives in a society, legal standards must be applied which take into account "a certain average of conduct" deemed reasonable by the community and "necessary to the general welfare." "The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that." Holmes finds two modes of expression for these "existing average standards of the community" -- the statement and application of these standards by a jury; and the codification of these standards in statutory legal rules. Both of these are founded on life experiences in a community.
The question what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experience as to the dangerous character of this or that conduct under these or those circumstances; and as the teachings of experience are matters of fact, it is easy to see why the jury should be consulted with regard to them.21

There are many cases, no doubt, in which the court would lean for aid upon a jury; but there are also many in which the teaching has been formulated in specific rules.22

The "circumstances" to which Holmes refers are the circumstances of community life. A court must look to the experience of the average prudent person in the community in determining the "circumstances necessary to be known in any given case in order to make a man liable for the consequences of his act."23 If the court has a clear view of public policy, it does not need to consult a jury to determine the rule of conduct based on community experience in a particular circumstance since public policy is an embodiment of that rule. But if the court has no such clear view, the community, through the jury, is consulted as to the standard.24

Individual moral culpability does have a role to play in Holmes' theory, but it is not a major role and it is a role which is bound up with the community sense of justice and fairness. "The true explanation of the reference of liability to a moral standard ... is not that it is for the purpose of improving men's hearts, but that it is to give a
man a fair chance to avoid the harm before he is held respon-
sible for it."²⁵

Holmes argues against an identification of moral
standards and legal standards as rules of conduct in a com-
munity on the basis that moral standards do not do what legal
standards do. He sees moral standards as "internal" and
therefore unacceptable as community conduct rules and legal
standards as "external" and therefore acceptable. But nowhere
does Holmes provide a justification for preferring the legal
standard to the moral standard. Nowhere does he say why the
"general foundation of legal liability in blameworthiness"
should "be determined by the existing average standards of the
community."²⁶ He does make passing reference to the "general
welfare"²⁷, the "public good"²⁸ and a "sense of justice"²⁹,
but he does not state or explicate an interpretation of "jus-
tice" which would provide the necessary buttressing arguments
for his theory of tort liability.

This is not to say that Holmes does not present
valuable insights and valuable hints as to how to proceed in
determining the theory of justice that underlies tort lia-
bility. His realization of the community nature of rules of
conduct in a society is particularly valuable.

III. Theories of Tort Liability in Early Cases

In the earlier reported cases of tort liability
there appears to be a preference for strict liability. The
cases are reported in a cursory manner and often the findings of the court are omitted in the report. The early cases presented here have been the subject of many scholarly investigations of the early law of torts and they are a representative sampling which show how the concepts of liability and related concepts were used. They also provide a springboard to and foundation for the study of the later and modern cases.

A. Percy H. Winfield

This author attacks the received view notion that medieval tort liability was absolute rather than based on fault.30 Winfield notes many of the difficulties associated with trying to determine with any accuracy the basis of medieval tort liability. He also questions the accepted use of stating, without qualification, that "a medieval man acted at his peril."

What is meant when it is said that a man acts at his peril? If it signified that everyone must take the risk of any act of his turning out to be an unlawful one because the law says it is so, though when he did the act he knew nothing of the law on that point, it is only another way of saying that ignorance of the law is no excuse. In that sense all men act at their peril. But that is not the usual interpretation of the phrase. Generally, it means that whatever a man does will, if it injures someone else, make the doer guilty of a breach of law. To put it quite plainly, he is liable for every conceivable harm which he inflicts on another. Such a proposition is merely ridiculous. Life would not be worth living on such terms. Life never has been lived on such terms in any age or
in any country. If a man always acted at his peril, the whole community would be in gaol but for three obstacles. No one could legally build the gaol, no one could legally sent people to it, and no one could legally keep them there. This is reasoning a priori, and the barest glimpse of English mediaeval law proves the existence of such a number of qualifications on any theory of absolute liability as to make the maxim little better than a trap to the student. No one has gone the length of stating the rule without adding, expressly or by implication, several exceptions to its application. The trouble is that these are so important as to make it questionable whether what is left of the rule is of much practical use.

Winfield recognizes a danger in describing ancient law with modern concepts: "Here we must anticipate modern technology, but we can do so without importing into ancient law our own scientific ideas." He states that it is "putting the case too strongly to say that, if harm ensued even by pure accident from a distinct voluntary act, the actor, however innocent his intention, is liable, and that the question of negligence is not considered at all."

Winfield considers the example of injury caused by a spear carried over a man's shoulder. This situation is the subject of a number of early legal codes; for example, in King Alfred's laws it was stated:

It is further enacted: if a man has a spear over his shoulder, and anyone is transfixed thereon, he shall pay the wergeld without
the fine. If the man is transfixed before his eyes, he shall pay the wergeld; and if he is accused of deliberate intention in the act, he shall clear himself with an oath equal to the fine, and thereby dismiss the claim for the fine, supposing the point to be higher than the end of the shaft, by the width of three fingers. If they are both on a level, the point and the end of the shaft, the man with the spear shall not be regarded as responsible for causing danger.

Is this a rule of strict liability? Not exactly. The statute does give one circumstance under which an accusation of deliberate intention will fail. This indicates that there were exceptions in this case to absolute liability. As Winfield says:

On the other hand, we find it impossible to deny some such ideas to Anglo-Saxon law, and we respectfully urge that it is putting the case too strongly to say that, if harm ensued even by pure accident from a distinct voluntary act, the actor, however innocent his intention, is liable, and that the question of negligence is not considered at all. It is admitted by the learned authors who support this opinion that, even where a man is engaged in the dangerous business of carrying a deadly weapon, he is not indiscriminately liable for harm which another may suffer from it. Here the law assesses the carrier's duty by reference to the position of the spear at the time the accident occurred, and its assessment is found on an implied recognition of both inevitable accident and negligence.

A study of other laws and cases leads Winfield to this conclusion:

So far our investigation has shown that there were many instances in which a man did not act at his peril; that in theory there was
a tendency to hold a man liable for some (but not all) purely accidental harm; that in practice this harsh rule was made workable by judicial variation of penalties; and that there was a rough appreciation of the distinction between intention, inadvertence, and inevitable accident.  

Winfield concludes his article with a discussion of the cases of damage caused by fire. The general rule was that if a man's fire caused damage, the man was liable to make recompense for that damage. But Winfield shows that even in this case, absolute liability did not prevail.

Students are usually told that at common law... and most writers on the topic seem to consider that, apart from a statute which came late in our law, this has always been so. Yet... and so far as the formal statement of it goes, there was, in the action which was the most usual of the three possible remedies, always a possible loophole... for the defendant who could prove... he had not been negligent.

Winfield mentions the relatively few cases in the reports that deal with fires. He also notes that there were, at least, two exceptions to this rule: (1) if a man's fire was spread by the act of a stranger, the man was not liable; and (2) if a man's fire was spread by inevitable accident, something akin to an Act of God, the man was not liable. Winfield then repeats his view:

... Nor is mediaeval liability for fire satisfactorily explained by saying that a man acts at his peril, and is excused only for misfortune or for the act of a stranger,
because neither of these was his act; for it is by no means certain that he was liable if he lit the fire (unquestionably his act), and a stranger scattered it. In fact, here and elsewhere in the history of our law, such formulae as 'a man acts at his peril,' or 'liability is absolute in mediaeval law,' are rather inaccurate generalizations.

Winfield does not deal with the claim that it is immoral to impose liability not based on fault nor does he attempt to justify or find a moral basis for the many exceptions to the rule of liability based on fault. The value of his work is in noting first, that there were many exceptions to medieval absolute liability; that these exceptions are important to any study of tort liability; and that considerations of negligence in addition to considerations of cause have played an important role in tort liability determinations.

B. Representative Cases

The following cases present tort liability situations as described in the early reports. A number of commentators have discussed these cases as representative of the understanding at that time of the concepts of the law of tort liability. As will be seen, no hard and fast conclusions about the lack of the importance of fault can be drawn from a study of these cases. Certainly the conclusion that the monolithic theory of strict liability adequately explicates the cases is unwarranted.
1. **Pinn v. Brainton**

The case of **Pinn v. Brainton** was decided in the Court of King's Bench in 1290 A.D.:

Devon.

Herbert of Pinn and John his son in mercy for several defaults.

The same Herbert and John were attached to answer Walter de Brainton on the plea why they burnt the houses of that Walter at Holeway and his goods and chattels within them to the value of two hundred pounds, and other outragers, etc., to the grievous loss of that Walter and against the peace, etc. . . . by their foolishness and lack of care and through a badly guarded candle they burned the aforesaid houses, along with all his goods, that is to say, the corn in the barns and grainaries, flesh-meat, fish, wool and linen cloths, silver spoons, gold rings, charters, deeds, household utensils and other goods, to the value of two hundred pounds, whereby he says that he is wronged and has suffered loss to the value of two hundred pounds, and thereof he produces suit, etc.

The initial sentence of the case report sets out the plaintiff's allegation of wrong against the defendant. The crucial phrase "against the peace" ("contra pacem") had to be alleged in order for the plaintiff to invoke the jurisdiction heard of the King's court. The "peace" referred to is the King's peace ("pacem Regis") and any violation of that peace constituted an offense which could be adjudicated in the King's court. This particular writ hints at intentional acts of the defendants. The statement of facts of the case, however, raises an issue of negligence: "by their foolishness and lack of care and through a badly guarded candle." The
defendants raise the defense that the fire was started "by accident and not by any lack of care or wickedness on their part." The defendants are saying that no intentional act of theirs started the fire nor did any negligent act of theirs result in the fire.

The jurors in the case stated their findings of fact. These findings are couched largely in causal terms. The judgment, however, is not recorded; i.e., after the case report states the jury's findings of fact, the report ends without stating the disposition of the case. Was plaintiff successful? Did defendant's plea of no negligence satisfy the jury? There is no answer to these questions. This lack of a statement of the judgment renders any attempt to discern the basis of liability in this case mere surmise. It would be possible, if the judgment were known, to argue for either a strict liability or a liability with fault theory no matter what judgment was rendered.

Suppose that the jury would have accepted a plea of defense based on lack of negligence, but that they did not believe the defendants' assertion of lack of negligence. The judgment would be "guilty." Suppose that whether defendants were negligent or not was immaterial to the jury, i.e., the jury was seeking only to determine whether defendants' acts caused the fire, the judgment would also be "guilty." Suppose the jury accepted a strict liability theory, but
applied it only to affirmative actions and that defendants' actions here were construed as acts of omission, not affirmative actions; then, in this case the judgment would be "not guilty."

2. Beaulieu v. Finglam

This case clearly presents the awareness of medieval judges and of attorneys of the two possible bases of tort liability and the tension between the two. Again, this report gives no verdict; but it is clear that the judges thought this was a case in which strict liability principles were applicable. It is "a typically inconclusive case, as it appears in the Year-Book".42

A man brought the following writ: "If William Beaulieu has given you security for pursuing his claim then put Roger Finglam [under gage and safe sureties to be before our Justices at Westminster on a certain day to show] why (since according to the law and customs of our realm of England heretofore in force, everyone in the same realm keeps his fire safe and secure, and is bound so to care for it that no damage accrues in any way to his neighbors through his fire) the aforesaid Roger so negligently cared for his fire at Carli men that for want of due custody of the aforesaid fire, William's goods and chattels being in his houses and worth forty pounds, and the aforesaid houses as well, were then and there consumed by the fire, to William's damage, etc." And the plaintiff counted accordingly.43

The attorney for the defendant here seems to accept the fact that strict liability principles apply. He
argues that: "It would be against all reason to find guilt or fault in a man where there is none in him; for his servants' negligence cannot be said to be his doing." This can be construed as an argument that

(a) strict liability applies;
(b) strict liability is based on causing harm;
(c) here defendant did not cause harm, rather defendant's servant caused harm.
(d) therefore defendant is not guilty.

The judges discuss questions of causation and questions of agency. Judge Thirning (the rest of the Court in agreement with him) summarily dismisses the attorney's argument against the imposition of vicarious liability with the remark that a man is responsible for an accidental killing. The attorney's argument that the defendant will be ruined if it is found that defendant caused the fire falls on deaf ears.

The judges appear to be steadfast in their adherence to the strict liability principle in this case; but it is an error to conclude as did Wigmore, that "any question of blamableness is excluded."44

Although this case appears to, almost certainly, present a strict liability situation, three things indicate that the jury may not have applied a strict liability principle. First, no verdict is reported. The jury may have
reached a finding at odds with the judges' discussions of cause and agency. Second, the writ pleads a lack of care. Finally, the attorney did make an argument that the defendant was without fault since the act was the act of another and that the imposition of strict liability would be unfair in this case. As Isaacs has noted, the "attorney for the defendant seemed to assume the general principle of culpability, and the court did not object to his major premise ..." And "... the idea that ill-doing (male) and liability are somehow connected is by no means repudiated." 45

Another writer has briefly made the point that in the Beaulieu case, there may have been a consideration of whether or not the defendant was "without fault" even though by the common law one had an absolute obligation to keep one's fire safe:

In Beaulier v. Finglam the declaration alleged that every person by the custom of this realm shall keep his fire safely and securely, and is bound so to keep it lest any danger happen to his neighbour in any manner. Yet though the obligation is alleged as absolute, Markham, J., says: "If a man outside my household against my will sets fire to the thatch of my house or does otherwise per quod my house is burned and also the houses of my neighbours, I shall not be held to answer for them because this cannot be said to be ill on my part, but against my will."

*   *   *

Here then in the case of fire is an exact analogy to the case of the keeping of an animal ferae naturae where by the common law an absolute
obligation was yet held to admit of proof that
the defendant was utterly without fault and was
therefore free from liability. 46 (footnotes omitted)

Holmes sees some of these cases as clear cases of
liability based on blame, rather than simply on cause:

But a more exact scrutiny of the early
books will show that liability in general,
then as later, was founded on the opinion
of the tribunal that the defendant ought
to have acted otherwise, or, in other
words, that he was to blame. 47

The tort liability cases discussed here show that:

(1) There are indications that considerations
of fault, negligence, and blame were not
totally ignored by medieval courts;

(2) There is no conclusive evidence that
either supports or refutes the view
of (1) supra; and

(3) Strict liability was the governing prin-
ciple in some types of cases, such as
straying animal cases.

On the Received View of Tort Liability, liability
based on something other than personal moral fault, such as
strict liability, is considered to be immoral and modern law
with its insistence on liability based on fault is considered
as morally preferable to these immoral theories. Many pro-
ponents of this view cite the strict liability cases of the
Middle Ages as examples of immoral impositions of tort lia-
bility. However, it has been shown that there is evidence
that medieval courts did not ignore considerations of blame,
fault and negligence. A number of writers and judges have referred to "public policy," "justice," "utility," and "social justice" without explicating the particular theory of tort liability which they had in mind.

A correct theory of tort liability should be concerned with and should be able to explicate these possibly conflicting considerations; i.e., personal morality, community standards of conduct, social utility, and the general welfare. Both the received view and other earlier traditions stress only one aspect of the tort situation. In the next three chapters three different monolithic theories will be discussed and criticized for their failure to account for relevant and pertinent considerations in tort decisions which they ignore or exclude. In the final chapter it will be shown that a non-monolithic theory based on a standard that permits and requires consideration of all relevant interests, both individual and communal, is preferable to these monolithic theories.
Chapter Two

Epstein's Strict Liability Theory

I. Introduction

The monolithic view of strict or absolute liability in tort attributed by some authors to the medieval jurisprudents has its modern-day champions. As will be shown in this chapter, one such theory of strict liability is confronted with a variety of problems and difficulties.

In a series of essays over the past seven years, Richard Epstein has presented a theory of strict liability and has proposed that the proposition "A caused B harm," when properly understood, provides a suitable justification for the imposition of tort liability. Epstein in doing so has set himself the task of developing a normative theory of torts that takes into account common sense notions of individual responsibility. He has argued that neither a moral account nor an economic account of negligence justifies its dominance in the law of torts. This chapter will discuss his arguments for his views and his rejection of moral and economic theories.

Epstein's last comments in his most recent article give a good insight into the problem under consideration:

A pitfall of my method is that it becomes possible to miss complications that might become evident within a more deductive framework. The first article on strict liability

22.
overemphasized liberty and autonomy because it did not examine either cases with large numbers of parties or those dealing with restitution problems... The law has long been torn between matters of individual equity and overall utility. It does little good to run from these problems or to pretend that notions of justice and fairness do not exist because they are not capable of some mathematical or scientific precision. It is unwise, indeed futile, to attempt to account for the complete structure of a complicated legal system by reference to any single value or principle—be it liberty or efficiency. It is far better to try to capture and systematize the dominant sentiments of the common law and where possible to remove from that law ambiguity, error, and inconsistency. I hope that my writings on tort theory are a step in that direction. 49

It will be shown in this chapter that Epstein has indeed captured and systematized one dominant sentiment of the common law, namely the common law's focus on the notion of "cause;" but that in so doing, he has rejected, ignored, or minimized other dominant sentiments of the common law which must be accounted for by any acceptable theory of tort liability.

II. Epstein's Theory

Epstein's own summary of his premises and conclusions will indicate the areas of his shortcomings. His premises are these:

(a) Initially, a plaintiff must show a reason why a particular defendant should be obligated to the plaintiff. 50
(b) A defendant can provide counter arguments to the plaintiff's initial assertion, but at any stage in the argument, either party to the argument can only allege the very minimum necessary for that party to succeed in achieving all of what that party seeks.\textsuperscript{51}

(c) Since only the plaintiff and the defendant are parties to the suit at hand, only the equities between them should be taken into account in the resolution of the suit.\textsuperscript{52}

(d) The equities considered must show why it is better to place the loss upon one party rather than the other.\textsuperscript{53}

From these premises, Epstein draws the following general conclusions:

1. Prima Facie Case Consists Primarily of Causal Allegation

The plaintiff states a prima facie case whenever the plaintiff can show that the defendant has caused physical harm to the plaintiff's person or property.\textsuperscript{54}

2. Causally Linked Conduct Upsets Status Quo

The plaintiff's causal allegation in the prima facie case shows that the plaintiff's condition is linked as a matter of fact to the defendant's conduct even before tort liability is imposed; thereby permitting the plaintiff to show that the initial balance between the two parties is in need of redress because it has been upset by the defendant's conduct.\textsuperscript{55}

Premise (c) above indicates that Epstein views the tort law as a system of "corrective" justice. This is evident from other comments of his:
This article, then, tries to develop and alternative to the law of negligence within the tradition that views the tort law as a system of corrective justice.\textsuperscript{56}

I will seek . . . to develop a substantive law of nuisance on the assumption that all cases should be decided solely with reference to principles of corrective justice: rendering to each person whatever redress is required because of the violation of his rights by another.\textsuperscript{57}

(1) . . . principles of corrective justice play a major role in the analysis of tort law,

(2) . . . causal principles play a major role in any system of corrective justice . . .

This initial limiting of the sphere of things under consideration explains in part Epstein's failure to consider and his failure to account for many considerations which are typically dealt with by the tort law such as considerations of cost, distributive justice, and social utility. Having thus restricted the ambit of consideration at the outset, a rejection of external, objective standards easily follows:

Each of the defenses considered and rejected in this section illustrates precisely the same problem: Do we look to the comparative equities between the parties or only to the personal condition of the defendant? The treatment that these defenses receive in the law of negligence reflects the tension in a theory which cannot select its basic premise. The theory of strict liability, however, does not seek to respect the second premise of the modern systems—that the defendant's conduct be measured against some external standard of social acceptability—and therefore is alone able to treat all these pleas in a consistent manner . . .

In addition to the restriction of considering only the parties involved in a lawsuit and the equities
between them, Epstein includes the further restriction that the parties to the suit are "strangers" by which he means "individuals who are not bound together by any statutory or consensual bonds." Having thus limited himself to a circumscribed theory of corrective justice and a consideration only of the parties to the suit, who are themselves treated as strangers, Epstein's use and analysis of causal paradigms is in no way unnatural, nor is it surprising that his theory is vulnerable to the criticism that it fails to explain the tort law's fascination with and consideration of elements other than cause, such as social utility interests. Since he views the law as "torn between" matters of individual equity and overall utility it is not surprising that he opts to ignore overall utility.

III. The Causal Paradigms

Epstein presents four causal paradigms:

(1) Force: A hit B.

(2) Fright: A frightened B.

(3) Compulsion: A compelled B to hit C.

(4) Dangerous conditions: A created the dangerous conditions that resulted in harm to B.

A. The Frivolous Suit

Epstein's paradigms will be criticized here on two counts: one, they permit the assertion of a cause of action
on such a minimal basis that frivolous suits will be possible which will tax an already overburdened court system; and two, they either ignore relevant contextual considerations or they implicitly assume them.

The first casual paradigm Epstein presents is "A hit B:"

The combination of force and volition is expressed in the simple transitive sentence, A hit B. It is true that this proposition as stated is consistent with the assertion that A did not harm B. But in many contexts the implication of harm follows fairly from the assertion, as anyone hit by a car will admit. Where the issue is in doubt, the verb can be changed, even as the form of the proposition remains constant, to bring the element of harm more sharply into relief. Thus instead of "A hit B," another proposition of the requisite form could be "A pummeled B," or "A beat B."

Epstein has said he is presenting a prima facie case paradigm; here, it is "A hit B." Anyone who can assert a prima facie case has a cause of action and can file a complaint. Such a complaint cannot be dismissed on a motion to dismiss for failure to state a cause of action. The case must be heard. But "A hit B" does not entail that B suffered any harm. In short, if A in exiting from a crowded bus jostles B unintentionally, B, under Epstein's theory, has a legitimate justiciable claim against A. This means that B can, without fear of a claim of abuse of process for filing frivolous claims, bring an action against A and in so doing engage the judicial machinery in an almost pointless case. A will be forced to make a costly response. It is true that B's damages are slight or nonexistent and that his
recovery if any should accordingly be minimal. Still, on Epstein's view, the case can be filed. In another example if a strong wind or another person C throws A against B, under the criteria of Epstein's prima facie case again B can file a non-frivolous suit against A. It is no reply that in many contexts "A hit B" entails "A harmed B." "A hit B" does not always entail "A harmed B." When "A-hit-B" cases are permitted, the courts will be clogged and the administration of justice will suffer.

In limiting the scope of the prima facie case to cause, Epstein is simply pushing other considerations into the category of defenses or he is dismissing them entirely. Under a standard-of-reasonable-care theory, for example, a prima facie case includes much more: duty, breach of duty, proximate cause, and injury. All of these are determined in the context of the case. Epstein distills cause out of these elements and either pushes remaining elements into the defense category or dismisses them entirely.

In changing the requirements of the prima facie case, Epstein is insuring that a plaintiff can very easily satisfy his or her burden of proof and shift the burden of proof to defendant. In short, in the bus example, B need only allege that A jostled him and them sit back and wait for A to prove (and to go to the expense of proving) all the
elements and circumstances which would constitute defenses. In his first article, Epstein realized that the fright paradigm presented difficulties:

Nonetheless, the paradigm does raise some troublesome issues. Suppose, for example, the defendant frightened the plaintiff when he raised his hand to mop the sweat off his face at a time when the plaintiff was standing about fifty yards away. Do facts such as these disclose a prima facie case of assault? Our first response to the allegation does not address the issue of substantive law at all. Rather, it says that the harm suffered by the plaintiff is so trivial that it is inappropriate to use, at public expense, the legal machinery to resolve the case. Such a role, of course, applies with full force both to theories of strict liability and to those of negligence and intent, and does not help choose between theories when both are applicable. 61a

Epstein presents no justification for his position that the "trivial harm" principle applies to theories of strict liability. Contrary to Epstein, it appears that since, under his theory no harm need be alleged at the prima-facie-case level, the "trivial harm" principle indeed does not apply to his strict liability theory. To establish that the principle does apply to his theory, Epstein will need to appeal to principles beyond the casual principles of his paradigms, principles which permit, require, and justify the consideration of factors other than cause, which leads to another criticism of Epstein's theory.

B. Backdoorring Contextual Considerations

Epstein is incorrect in asserting that "A hit B" serves as a model for such propositions as "A pummeled B" or "A beat B." "Pummeling" and "beating" convey a sense of
intent on the part of the person doing the pummeling or beating. These words also indicate something about the context in which the "hitting" is taking place. Here Epstein is "back dooring" things that are properly and openly considered under other theories. Also, "pummeling" and "beating" convey a sense of caused or inflicted injury or harm, an element of a prima facie case in negligence. Epstein disagrees with this:

But since the specifics of the harm go only to the measure of damages and not to the issue of liability, the proposition "A hit B" will serve as the model of the class of propositions to be considered.\textsuperscript{62}

Epstein ignores the fact that his theory permits cases in which there is no harm or in which the harm is insignificant.

John Borgo makes a similar criticism of Epstein's theory.\textsuperscript{63} In response to Borgo's criticism, Epstein states:

Borgo finds this view wanting because it does not explicate causal language. He argues that I have defined causation in terms of itself when asserting that hitting a thing may "in addition to moving it," "damage" it as well. In this connection, Borgo instances the case in which A striking B upon the nose is not the cause of bleeding owing to a pre-existing hemorrhage. One could instance as well the hitting of a car's fender that had already been dented by some previous blow. In both cases, it is appropriate to affirm that the defendant hit the plaintiff and to deny that he caused him harm. Yet at most the point indicates that in my analysis I should substitute for the verb "hit" the verb "break," "bend," "sever," "cut," etc., in order to distinguish motion from loss of value. Yet let the blow cut the blood vessels in the first instance or dent the fender in the second, and doubts on causation must vanish without any sacrifice to the basic conception. Issues like this are not mysterious in any deep way. They occur daily in litigation,
be it in negligence or strict liability cases. They do not constitute any real challenge to my, or any, causal theory.

Epstein has missed the point. The same criticism with respect to the verb "hit" can be leveled against the four other verbs that Epstein mentions. "A broke B's arm" may or may not be sufficient to establish A's liability. In some cases, A may be perfectly justified in breaking B's arm. In some other cases, B may have requested A to break B's arm. At any rate, these cases will require further definition, further explication, further refinement, and further elaboration; i.e., they will require a discussion of the context of the occurrence, including a variety of relevant individual and social interests. A determination of the theory which correctly explains the imposition of tort liability must necessarily be able to explain and justify the consideration of these other interests.

This same point about context can be made with respect to Epstein's paradigm for fright -- "A frightened B" -- and the case of the extra sensitive plaintiff.

Epstein has said:

But the case can be made more difficult by assuming that the plaintiff has suffered serious injuries as a result of his fright. If anyone could be frightened by that kind of conduct, however, most likely he could not have survived long enough in life's hustle and bustle to be injured by the defendant. Thus in a sense, the initial statement of fact turns out to be simply unbelievable even where it is assumed for the sake of argument. In cases like these, the defendant
should be able to deny the allegation contained in the prima facie case, and be able to claim with some truth that the plaintiff had induced his own fright. 69

Epstein's reply that the case of the extrasensitive plaintiff is simply unbelieveable is a nonresponse. The counterexample, although fantastic, is not logically impossible. Therefore, it is a fault of Epstein's theory if his theory cannot deal with it. The appeal to "surviving in life's hustle and bustle" cannot be grounded on nor find support in Epstein's extremely limited causal paradigm. Appeal to "life's hustle and bustle" has the familiar ring of an external standard which takes into account the context in which the frightening occurs and presumes some sort of explicit or implicit consensual agreement between those involved in the hustle and bustle.

Professor Borgo makes another criticism of the fright paradigm:

The influence of context on our selection of causes can be further illustrated by imagining variations of the case just put. Suppose the defendant is aware of the plaintiff's susceptibility. He sees him standing in the distance and says to himself, "There is the fellow who is afraid of his own shadow. I'll mop my brow and put a good scare into him." Now the defendant's gesture, rather than the plaintiff's susceptibility, will be chosen as the cause. The natural explanation of the fright's occurrence has changed, despite the fact that the gesture remains the same. In the original example, the gesture lacked explanatory power because of certain contextual features. But when we add to the context the defendant's knowledge and
intention, we are able to see that he is exploiting the plaintiff's condition in order to frighten him. The gesture is now very similar to a deliberately menacing act; the only difference between the two is that the gesture depends for its efficacy upon the plaintiff's condition. Therefore we have no difficulty perceiving it as bringing about the fright. The same change in context deprives the plaintiff's condition of explanatory power. It is now a mere circumstance that the defendant exploited in order to achieve its purpose.

..., ...

In sum, it is impossible to identify some type of conduct (for example, conduct to which a person reacts in fright) and say that whenever an instance of that type is a necessary condition for the production of a harm, it will be selected as its cause. Whether or not it will be selected depends upon the particulars of the context in which the harm is produced. And the context cannot be known in advance of the harm's occurrence. 66

In his reply to Borgo's counterexample, Epstein states: "Thus in the case of an extrasensitive plaintiff, for example, it could be said in ordinary language that the plaintiff caused his own harm." 67 One difficulty with this reply is that it does not respond to the case presented by Borgo where a defendant is aware of the plaintiff's extrasensitivity and takes advantage of it.

In his reply to Borgo, Epstein states that "the point requires a delicate analysis of context, as I indeed noted in my discussion of the point." What Epstein fails to note is that the "delicate analysis of context" which he advocates, does not occur at the level of assertion of a
prima facie case; but rather in a subsequent plea. Borgo deals with this response in two footnotes. In these two footnotes, Borgo makes the convincing argument that a detailed analysis of context in subsequent pleas does not overcome the difficulties of not accounting for the analysis in the prima facie case.

IV. Epstein's Argument Against Liability With Fault

In arguing against a tort system based on fault, Epstein attempts to show that such a system cannot account for the rejection of certain defenses in the law of torts such as insanity and necessity.

Certain defenses like insanity were never accepted as part of the law of negligence, even though an insane person is not regarded as morally responsible for his actions. But if Ames' original premise were correct [that the law asks "Was the act blameworthy?"], then it should follow from the "modern ethical doctrine" that a lunatic unable to appreciate the nature or consequences of his act ought not to be responsible for the damage he has inflicted upon another.

Many commentators enhance the case of the lunatic by adding that the lunatic is an heir to millions and the victim is a poor worker. It would seem unfair for the lunatic not to be held liable; but Epstein is correct in asserting that if one can only be held liable for that for which he is morally responsible or culpable, then a lunatic, by definition, cannot be liable in tort.

In this argument, however, Epstein is ignoring one standard of negligence which he stated only pages earlier--
i.e., according to the law of negligence a plaintiff states a prima facie case to recover from a defendant who has harmed the plaintiff in one of two ways; either by showing that the defendant intended the harm (as is not the case in the lunatic argument) or by showing that the defendant failed to take reasonable steps to avoid inflicting the harm (a possibility not considered in Epstein's argument). From the step that the lunatic is not individually morally culpable, it does not follow that his actions, any of his actions, are not negligent actions.

This reasoning points to a theory of liability which focuses on the act and not on the agent's state of mind. This is the distinction which Holmes was making when he said:

> The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men . . . 1

As far as it goes, a strict liability theory does account for holding liable a lunatic that causes harm, but it would also permit holding the lunatic liable in those tort cases in which the lunatic's conduct could be judged reasonable under a standard of reasonable care.

Ironically, Epstein notes that various economic theories of tort liability are correctly rejected because of their failure to answer "certain questions of 'justice' or 'fairness' rooted in common sense beliefs that cannot be
explicated in terms of economic theory.\textsuperscript{72}

Epstein prefaces his remarks on the rejection of the defense of necessity with these general comments:

But even if the difficulties of application are put to one side, there are still further reasons why both the economic and moral views of negligence provide unsatisfactory bases for the law of tort. Both theories of negligence, for all their purported differences, share the common premise that once conduct is described as reasonable, no legal sanctions ought to attach to it. In any system of common law liability, a court must allocate, explicitly or implicitly, a loss that has already occurred between the parties—usually two—before it. It could turn out that neither of the parties acted in a manner that was unreasonable or improper from either an economic or a moral point of view, but a decision that the conduct of both parties was "proper" under the circumstances does not necessarily decide the legal case; there could well be other reasons why one party should be preferred to another.\textsuperscript{73}

Two ambiguities stand out in these general comments. First, the phrase "described as reasonable" can have various connotations. It can mean, inter alia, described as reasonable in terms of survival; described as reasonable in terms of the standard of care of a prudent person in a community; or described as reasonable in the sense that no harm was intended by an act. Again it is possible to explicate "reasonable" by focusing on either the agent's state of mind or on the agent's act.

Another ambiguous term in Epstein's statement is "moral point of view." "Moral point of view" is ambiguous in
the same way that "reasonable" is ambiguous. If by "moral point of view" Epstein means the point of view of individual moral culpability, he may indeed be correct in stating that there would be cases that are unresolvable because neither party would be morally culpable. But this ignores the possibility of correctly holding a morally innocent actor liable in tort.

As an example of a case of tort liability in which

(a) the parties act reasonably and properly,
(b) from both an economic and moral point of view;
(c) and yet other reasons must be scrutinized to show why one party is preferred to another,

Epstein cites Vincent v. Lake Erie Transport Co. a case in which the defendant asserted a necessity defense.

The point is illustrated by the famous case of Vincent v. Lake Erie Transport Co. During a violent storm, defendant ordered his men to continue to make the ship fast to the dock during the course of the storm in order to protect it from the elements. The wind and waves repeatedly drove it into the dock, damaging it to the extent of $500. Moreover, it was accepted without question that the conduct of the defendant was reasonable in that there was no possible course of action open to the captain of the ship that would have enabled him to reduce the aggregate damage suffered by the ship and dock. On these facts the court concluded that the defendant had to pay the plaintiff for the $500 damage.

The fruits of the ambiguities of Epstein's general remarks are evident in his discussion of the case:
The result in Vincent seems inconsistent with either of the customary explanations, moral or economic, of negligence in the law of tort. There is no argument that the conduct of the defendant was "blameworthy" in any sense. The coercion on him was great, even though not imposed by some human agency. Any person in the position of the defendant's captain would have made the same choice under the circumstances. It is true that he knew that his conduct could damage the dock, but nonetheless the necessity of the situation would serve as an adequate defense against any charge of intentional wrongdoing.\(^6\)

Assuming for the sake of argument that Epstein is correct that the court makes no finding of moral blameworthiness, he is incorrect in asserting that there is no argument that the defendant was blameworthy in any sense. In describing the situation, the court states that:

\[\ldots\] those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.\(^7\)

And also:

This is not a case where life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but it is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.\(^8\)

The defendant acted "prudently," "advisedly," and "delerately" and his actions led to injury to plaintiff. The
"owners are responsible" and the "plaintiffs are entitled to compensation." Clearly the court does find something blame-worthy in the defendant's actions, since they found the defendant liable, despite the fact that they viewed the defendant's captain's actions as exhibiting "good judgment" and "prudent seamanship": "...the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship." 79

The captain's action served as a basis for liability not because he committed an individually morally culpable act, but because he deliberately availed himself of the plaintiffs' property with no intent to recompense plaintiff for the foreseeable damage. Nor could Epstein correctly argue that the reason liability was imposed was simply because the captain caused the damage.

Epstein's discussion of the case of Morris v. Platt 80 indicates that he has misconstrued Vincent. In Morris the defendant hit a bystander while firing a pistol at an assailant. Although the defendant did not know for certain that a bystander would be hit, there was a reasonable risk that that would occur. Epstein states:

Here I wish to concentrate upon only one difference between the two cases. In Morris the only risk the defendant took was that his conduct would harm the plaintiff, while the defendant in Vincent knew that such harm would
result as a matter of course. Regardless of the substantive theory of liability adopted, the cases cannot be distinguished on this ground.\footnote{81}

It is submitted that the distinction does present a principled basis for distinguishing the cases if the reasonable-care theory of negligence is the substantive theory applied to the cases. In \textit{Vincent} since harm was certain, and since the captain knew this, the court concluded that the captain's actions were a proper basis for liability since he did not intend to compensate the plaintiff for the harm knowingly and intentionally inflicted on the plaintiff. No harm to a bystander was intended in the \textit{Morris} case. There was only a risk of harm, not a certainty.

It is precisely this intent aspect of the \textit{Vincent} case upon which the court focuses in its finding of liability. This is made clear by the examples which the court uses to illustrate cases in which the boat could have damaged the dock if it had not been tied up but had been thrown unintentionally into the dock by the storm. This element of intent is crucial to the decision; it is one element that can be considered under other standards of liability, including a reasonableness standard; and it is a consideration which is ignored by a causal theory such as Epstein's.

It is interesting to note that Epstein's theory of strict liability cannot explain the decision of the court in \textit{Morris}:
The court [at the trial level] should have charged as the defendants claimed, that to render them liable in this action there must have been an unlawful intention, or some negligence or fault on their part . . .

It is well settled in this court that a man is not liable, in an action of trespass on the case, for any unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him, and that the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff.

Epstein stresses that any person would have made the choice made by the ship's captain, implying that the captain's conduct could be described as "reasonable." But the conduct is reasonable in the sense that the captain chose tying up to the dock and a probability of safely weathering the storm over remaining unmoored and the probability of almost certain disaster and death. This choice of survival to death is, in one sense, reasonable. However, Epstein does not consider whether the captain's choice is reasonable according to the criteria of the tort standard of reasonable care. In other words, Epstein has again looked solely to a moral culpability standard and ignored a standard of reasonable care in declaring that a theory of negligence cannot account for the rejection of necessity as a defense to tort liability. That Epstein has ignored the standard of reasonable care is evident from his statement that the necessity of the situation would serve as a defense to a charge of "intentional wrongdoing."

The rejection of the necessity defense in Vincent
can be correctly explained by the standard of reasonable care. Under the circumstances any reasonably prudent person had reason to believe that the dock would probably be damaged by a boat moored to it during the storm. A reasonably prudent person under these circumstances would have expected to pay for any such damages. For the captain in Vincent to tie up to the dock without such expectations correctly subjected the defendant to liability.

If the captain had had the intent to pay and then at the time of his actions had forgotten this intent and then had refused to pay, he could still have been properly held liable on the basis that in forgetting under such circumstances he did not exercise ordinary care. Under such circumstances the direct intervention of his deliberate act would still result in the injury to the plaintiff. A court would probably still hold the defendant liable in such circumstances although to do so it might resort to a non-tort theory such as quasi-contract or implied contract based on the captain's intent (since forgotten), the benefit received, and the plaintiff's acquiescence in letting the ship remain moored. A court might hold that the captain could unilaterally enter into a sort of contractual relationship with the plaintiff, but that in return for the safe mooring the defendant pay the costs incurred.

Epstein argues that an explanation of cases like Vincent in terms of the following principle lends support to a
causal theory of liability and points out deficiencies of moral and economic theories:

In the discussion of Vincent the argument proceeded on the assumption that the defendant must bear the costs of those injuries that he inflicts upon others as though they were injuries that he suffered himself. 84

As already noted the court in Vincent based its finding on considerations in addition to cause. But Epstein's argument contains a premise which goes beyond casual considerations and which can only be interpreted in view of an operative notion of fairness. Epstein argues:

If the Transportation Company must bear all the costs in those cases in which it damages its own property, then it should bear those costs when it damages the property of another. 85 (emphasis added)

There is no argument for this proposition. Neither a cost-benefit theory nor a causal theory would require such a conclusion, nor could either theory explain the "should" in the proposition. Also, it does not follow from the fact that a person must bear the costs when he injures himself that he must bear those costs when he injures others.

Epstein's final proposition is as follows:

There is no need to look at the antecedent risk once the harm has come to pass; no need to decide, without guide or reference, which risks are "undue" and which are not. If the defendant harms the plaintiff, then he should pay even if the risk he
took was reasonable just as he should pay in cases of certain harm where the decision to injure was reasonable.

This proposition can be explicated by a causal theory; but Epstein's own criticism of economic theory can be turned against him here: The court in Vincent decided that it would be unfair to make the plaintiff bear the costs incident to the defendant's acts. Epstein's theory does not explain this finding in terms of fairness and therefore, to paraphrase Epstein, "once it is admitted that there are questions of fairness as between the parties that are not answerable in causal terms, the exact role of causal argument in the solution of legal questions becomes impossible to determine."

In his classic article "Conditional Fault in the Law of Torts"\textsuperscript{87}, Professor Robert Keeton discusses the Vincent case at length. Although he posits a theory of "Conditional Privilege" to explain the case, he too notes the importance of the ship owners lack of intention of paying for the damage to the dock. Keeton believes that many would find the ship owner's conduct morally blame-worthy. He argues that if a ship owner in such a situation had an intention to pay for such damage, that there would be nothing morally blameworthy in such conduct.\textsuperscript{88} Keeton finds further that this conduct would violate the "moral sense of the community," a standard of the objective, external type
which Epstein would reject.

The failure of Epstein to achieve his original goal of presenting simple causal paradigms which, if satisfied, establish prima facie a cause of action, points in two different directions. First, further development and definition of his strict liability system can be attempted. As shown in Epstein's series of articles on the subject, such development and definition leads to further problems. Also, it leads to a system which, as it grows, sheds its monolithic character and acquires various characteristics of other systems such as the negligence system.

The second alternative presented by a study of Epstein's theory and its failure to present an account of the correct theory of tort liability, is to scrutinize the premises upon which it is founded; primarily, to determine whether or not his theory of corrective justice can be enlarged, supplemented or changed so that it adequately explains the imposition of tort liability. As already noted, Epstein views the law of torts as having been "torn between matters of individual equity and overall utility."

In the final chapter herein it will be shown that a correct theory of justice for tort liability properly explains the consideration of both individual interests and social utility interests in determining whether to impose tort liability
and that rather than being torn between individual equity and overall utility a correct theory will and must embrace, and accommodate both types of considerations.
Chapter Three
The Economic Theory of Tort Liability

I. Introduction

As has been shown in the two previous chapters, monolithic theories of tort liability that treat only cause or only moral culpability are unsatisfactory. In this chapter another type of monolithic theory of tort liability, economic theory, will be discussed and criticized. It will be shown that a tort system that seeks solely to maximize wealth is also unsatisfactory as the correct theory of tort liability.

The economic theory of tort liability presents another theory of tort liability with a new theoretical framework that appeals to economic theory. Numerous effective attacks have been made on economic theories of law which embrace some version of utilitarianism. In a series of books and articles, Richard A. Posner has put forth an elaborate and sophisticated economic theory of law which is based upon a principle of "wealth maximization" which he distinguishes from principles of utilitarianism. This chapter will present the following criticisms of Posner's theory:

1. The concept of "market" which is essential to Posner's theory is ambiguous, indefinite, and can be the basis of a legitimation of immoral behavior.
2. Posner and others have incorrectly interpreted Judge Learned Hand's theory of tort liability as a purely economic theory.

3. Posner's derivation of a theory of rights and virtues from his wealth maximization principle is in error.

4. Posner's assumption that his economic theory applies to tort law is mistaken.

II. Posner's Economic Theory and its Application to Tort Law

In his earlier works, Posner was careful to draw the distinction between normative economics and positive economics and he realized that the findings of positive economics could not support normative conclusions. Posner has stated that it is not for the economist, qua economist, to say whether efficiency should override other values in the event of a conflict. From his earlier writings, it is clear that Posner believed that economics could not provide a basis for unconditional normative statements such as "because the most efficient method of controlling crime would be to cut off the ears and nose of a convicted felon and brand him on the forehead, society should adopt these penalties." Someone to whom efficiency is an important value may want to change an inefficient social institution. The earlier Posner, however, stated that the economist cannot, and the good economist does
not, tell someone that he should adopt efficiency as an important or paramount value, although the economist could tell someone about the costs of not doing so. Clearly, the earlier Posner realized the strictly limited role of positive economics in explaining law:

Since economics yields no answer to the question whether the existing distribution of income and wealth is good or bad, just or unjust . . . neither does it yield an answer to the ultimate question whether an efficient allocation of resources would be good, just or otherwise socially or ethically desirable. Nor can the economist tell us whether, assuming the existing distribution of income and wealth is just, consumer satisfaction should be the dominant value of society. The economist's competence in a discussion of a legal system thus is strictly limited.

Posner's earlier writings present a curious view of the normative role of the positive economic analysis of law. Considering again the case of the felons who are in danger of losing their ears and noses, Posner states that an economist might be able to say, "By way of normative analysis," a policy such as mutilation of felons increases efficiency. In another example, he says that although an economist cannot tell society whether it should seek to limit theft, he should show that it would be inefficient to allow unlimited theft thereby clarifying a value conflict by showing how much of one value—efficiency—must be sacrificed to achieve another
value. In short," he says, "it would seem that a significant normative role must be conceded to economics even if no attempt is made to derive efficiency from some more basic ethical postulate."

Such a view of what constitutes normative analysis or a normative role is mistaken or at least ambiguous. From the fact that a normative decision-maker considers the results of various positive inquiries, it does not follow that a particular positive inquiry is a normative one. For example, it would be ludicrous to hold that since the laws of physics come into play in a finding of liability in an automobile collision case, that therefore, physics has a normative role in analyzing the law of tort liability or that physics provides a "normative analysis" of the law of tort liability. Also, even if, arguendo, efficiency is accorded value and it is therefore concluded that efficiency to the extent of the value accorded implies some normative consequence, it does not follow that a significant normative role has been established for efficiency as urged by Posner. The "significance" of efficiency could only be established by reference to principles other than efficiency.

Posner compounds this error in his earlier works by hinting that justice may indeed be synonymous with efficiency. In his more recent writings Posner puts forward a normative theory. The hint has become a premise and Posner argues that
his economic norm of wealth maximization provides a firm basis for a normative theory of law.\textsuperscript{99} "It seems to me," says Posner "that economic analysis has some claim to being regarded as a coherent and attractive basis for ethical judgments."\textsuperscript{100}

Posner's economic theory of law as applied to tort situations is best summarized by Posner's comments on the Hand formula:

This is an economic test. The burden of precautions is the cost of avoiding the accident. The loss multiplied by the probability of the accident is the expected accident cost, i.e., the cost that the precautions would have averted. If a larger cost could have been avoided by incurring a smaller cost, efficiency requires that the smaller cost be incurred.\textsuperscript{101}

In short Posner's view is that tort liability should be assigned on the basis of "transaction costs."

The "engine-spark" case provides a good example of this economic tort theory and its shortcomings. Typically railroad lines run through farmlands and sparks flying from the engines often set fire to crops adjacent to the line. On the economic view this is a reciprocal problem, i.e., the railroad's acts injure the farmer and the farmer's acts injure the railroad. Under the economic tort theory the party to be held liable is the party who failed to incur the smaller cost of precaution. In a properly drawn example, it is often the case that the railroad, therefore, is not liable for crops damaged by engine sparks. Such a view exhibits a fundamental error.
Posner, and other tort economists such as R. H. Coase, view this problem as reciprocal in nature. As Coase says:

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?

Posner states the reciprocal nature of the railroad spark case when he states that "the crop damage...was the result both of farming and of railroading. It could be prevented either by the farmer's changing his behavior or by the railroad's changing its behavior."

Coase proposes an interpretation of harmful effects cases based on this same peculiar notion of cause. He says that if "we are to discuss the problem in terms of causation, both parties cause the damage." Therefore, says Coase, to obtain an optimum allocation of resources both parties should taken the harmful effect into account. An economist to the core, Coase sees the fact of the fall in the value of production being a cost to both parties as one of the "beauties" of a smoothly operating pricing system. So, for Coase, in the ideal world in which the pricing system runs smoothly, i.e., in which market transactions are costless, a business causing damages is not liable for any such damages.
For Coase, in the real world, market transactions do have costs and so the adoption of a liability rule can lead to an inefficient result. For Coase many factors considered by judges in determining liability are simply "irrelevant" to the economist who views the problem in all cases of harmful effects as "how to maximize the value of production." Coase presents no justification for this value, his ultimate value, for production or productive uses of resources. Nor does he present any argument for dismissing such factors as cause and fault as irrelevant.

Epstein has criticized the notion of reciprocal cause advocated by Coase and by Posner:

Although he [Coase] does not work from the "but for" paradigm, he does adopt a model of causation that treats as a cause of a given harm any joint condition necessary for its creation. Since the acts of both parties are "necessary" it follows that the concept of causation provides, in this analysis, no grounds to prefer either person to another.

The fundamental problem from a tort theory standpoint with the economic view of tort situations as being reciprocal in nature is that it ignores or obscures the fact, for example, that it is the railroad's acts that have disturbed the farmer and not vice-versa. The reciprocal view either does not take into account cause or it assumes a confused notion of cause. Also the reciprocal view does not take into account fault or failure to meet a standard of ordinary care. In short, it does not reflect the view that a victim should be compensated for
injuries negligently inflicted, which is one of the touchstones of tort law.

There are further problems with Posner's tort theory. One of the fundamental premises of Posner's economic theory is that persons involved in market transactions act rationally to maximize their own interests:

The basis of an economic approach to law is the assumption that the people involved with the legal system act as rational maximizers of their satisfactions.

*   *   *

... participants in the legal process indeed behave as if they were rational maximizers: criminals, contracting parties, automobile drivers, prosecutors, and others subject to legal constraints or involved in legal proceedings act in their relation to the legal system as intelligent (not omniscient) maximizers of their satisfactions.

Another of Posner's fundamental premises is that persons consummating a market transaction act voluntarily in reaching agreement:

Efficiency is, as we have said, determined by willingness to pay, and the only way in which willingness to pay can be determined with certainty is by actually observing a voluntary transaction. Where resources are shifted pursuant to a voluntary transaction, we can be reasonably confident that the shift involves a net increase in efficiency. The transaction would not have occurred if both parties had not expected it to make them better off.

The typical tort situation does not lend itself to Posner's voluntary rational maximizing rubric. An accident involves involuntary parties one or both of whom may not be acting rationally or intelligently. To explain tort situations,
however, Posner resorts to his notion of "hypothetical market." The unclear and ambiguous scope of Posner's notions of markets will be criticized below. In the tort situation these and other criticisms are applicable.

A tort case involves a forced exchange between the parties. Posner himself admits that cases involving such forced exchanges, based on an after-the-fact legal determination concerning whether the exchange increased or reduced efficiency "constitute a less efficient mechanism for the allocation of resources than market transactions" and that although an actual market may indicate an increase in happiness, "the same cannot be said of a hypothetical market transaction, which by definition is involuntary."

Posner's theory is one of wealth maximization. By his own admission less confidence must be put in the results of hypothetical market studies, such as those involved in tort situations, and, furthermore, such studies may not even yield evidence of whether wealth was maximized or not. If the determination of whether or not wealth was maximized cannot be made, then Posner's theory does not apply to this type of case, namely, tort cases.

Posner sees no "difference in kind" between contract situations and tort situations:

Of course, there are differences of degree between interpreting explicit contracts to
effectuate the (unknown) intentions of the parties and creating tort duties based on purely hypothetical contracts... but they are just that: differences of degree rather than of kind.113

If Posner is correct he should not have to resort to the hypothetical market notion to explain the tort case. The differences between the contract case and the tort case are not differences of degree. In each you do not have parties of varying degrees of voluntariness—in contract you have two parties acting freely to agree to something, while in tort you have at least an involuntary victim. In the typical tort case the parties are strangers to each other before the accident while in the typical contract case the parties know each other with varying degrees of familiarity prior to consummating the agreement. In the contract case the legal decision maker looks to the contract and the circumstances of its coming into being to ascertain the intention of the parties. In the typical tort case, on the other hand, the legal decision maker often is not concerned with determining the parties' intentions.

For Posner the legal decisionmaker acting according to the principles of the economic theory "is not interested in the one question that concerns the victim and his lawyer: who should bear the costs of this accident".114 But that inquiry is precisely why the parties are in court and the legal decisionmaker must answer that question. To ignore that question is to ignore very important interests of the individuals involved as parties in the case.
III. The Concept of Market in Posner's Economic Theory

Posner was led from utilitarianism to wealth maximization because of the many problems with utilitarianism. He rejects classic utilitarianism for a variety of reasons including: its "boundary problem,"--its domain is uncertain with respect to whose happiness counts; its "calculation problem"--it has no method for calculating the effect of a decision or policy on the total happiness of the relevant population; and its "moral monstrousness problem"--it can validate decisions that are morally unacceptable. Posner views economics and his own wealth maximization theory as a theory that avoids the shortcomings of utilitarianism. As will be demonstrated here, he is unsuccessful in this attempt.115

Posner distinguishes himself from the utilitarian by stating that that which is good or right or just is that which maximizes "value" rather than utility or happiness. He defines "value" as "wealth" and states that he uses the term "economic" normatively to mean "wealth enhancing." Preferences that count or matter in a system of wealth maximization are those that are assigned a specific money value in a particular market.

Wealth is the value in dollars or dollar equivalents (an important qualification, as we are about to see) of everything in society. It is measured by what people are willing to pay for something; if they already own it, what they demand in money to give it up. The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money--in other words, that is registered in a market.116
Posner distinguishes explicit markets and non-explicit markets. An explicit market is one in which costs are assigned specific money values; for example, in the world oil market, a barrel of oil is transferred for a certain amount of money.

Posner posits two types of non-explicit markets. The first is a barter market in which even though services are exchanged without any money changing hands, similar services sold in an explicit market would be monetized. Another type of non-explicit market is the hypothetical market. The hypothetical market approach applies to cases such as a typical accident case where market transaction costs preclude the use of a market based on voluntary exchange to allocate resources efficiently. A hypothetical market transaction is by definition involuntary.

Posner criticizes utilitarianism because, he says, its domain is "uncertain" and because it justifies instances of "moral monstrousness." Posner argues that not only can wealth not be equated to happiness, but people are not purely wealth maximizers.117 "Wealth is an important element is most people's preferences (and wealth maximization thus resembles utilitarianism in assigning substantial weight to preferences), but it is not the sum total of those preferences."118

Posner's position on preferences presents him with a dilemma. Due to the broad scope of Posner's definition of market to include both actual and hypothetical markets, any
particular preference can be monetized so that wealth can be construed as the sum total of preferences. But if, as Posner says, this is not the case, then, if there are preferences in addition to the preference for wealth, some principle other than wealth maximization or some other theory must be appealed to account for and to legitimize these other preferences or to legitimize ignoring them. This is similar to Posner's criticism of utilitarianism that a utilitarian can contract the boundary of whose happiness counts only by going outside of utilitarianism.119

Posner sees "moral monstrousness" as a major problem of utilitarianism.120 Due to the all encompassing nature of the actual-hypothetical market framework, Posner's system of wealth maximization can lead to conclusions which are equally morally monstrous. It has been reported, for example, that a hit man can be hired to kill anyone in Houston, Texas, for about $50. The less accessible the target, the higher the price. On Posner's view, this market represents "preferences that count" but they are preferences that are morally unacceptable. Similar examples can be fashioned that are based on prostitution, drug sales, sadism and black market babies. To say that even though such preferences do count but that they are "outweighed" by other preferences would raise the problems regarding the meaning of "outweighed" and how Posner would explain "outweighing" without invoking any premises or principles other than those of his theory.
Posner criticizes utilitarianism because it fails to make a moral distinction among types of pleasure.\textsuperscript{121} As the above examples indicate, he fails to see that any type of pleasure can be the subject of a market, either actual or hypothetical. It appears that Posner's "preferences" are merely the utilitarian's "pleasures" in different guise.

Posner counters by arguing that, for example, the sadist would have to buy his victim's consent and such purchases would soon deplete the wealth of all but the wealthiest sadists.\textsuperscript{122} But this sidesteps the point that the system of wealth maximization legitimizes immoral conduct. Up until the point that the sadist has spent all his money, the wealth maximization principle legitimizes each of his acts of sadism, expensive as they are. This conclusion is not overcome by the fact that the victims may be free to charge whatever price they like. Taken to an extreme, the wealth maximization principle would have to condone a person's decision to let a sadist torture him interminably in return for the sadist's giving the victim's wife and children a million dollars. Posner approvingly gives this last example stark reality. "If Nazi Germany wanted to get rid of the Jews, in a system of wealth maximization, it would have had to buy them out."\textsuperscript{123}

Another implication of the wealth maximization approach is that people who are very poor count only if they are part of the utility function of someone who has wealth. If one rigorously
applies a criterion of wealth maximization, one has no public
duty to support the poor. Or if someone happens to be born
mentally ill and his net social product is negative, "he would
have no right to the means of support though there was nothing
blameworthy in his inability to support himself. This result
grates on modern sensibilities yet I see no escape from it that
is consistent with any of the major ethical systems." This
reasoning satisfies one of Posner's own criteria for rejecting
an ethical theory; namely, "the theory yields precepts sharply
contrary to widely shared ethical intuition." This

IV. The Misinterpretation of Hand's Formula

In the case of *United States v. Carroll Towing Co.* Judge Learned Hand presented a formula in algebraic form which
showed the relation between duty, probability of damage, and
damage itself. Both Posner and Epstein have misinterpreted
this formula. Posner says that Hand ". . . was adumbrating,
perhaps unwittingly, an economic meaning of negligence." Epstein characterizes the Hand formula as "implicitly economic"
and as intended to apply "to the entire law of tort." These
interpretations of the Hand formula are mistaken.

The *Carroll Towing* case dealt with the negligence of
a barge owner who failed to have someone on the barge when it
was cast adrift. Hand presents a summary of fifteen more-or-
less analogous cases and then he states:
It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others, obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be so such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called \( P \); the injury, \( I' \) and the burden, \( B \); liability dependent upon whether \( B \) is less than \( I \) multiplied by \( P \): i.e., whether \( B \) [is less than] \( PL \).

At the locus in quo—especially during the short January days and in the full tide of war activity— barges were being constantly "drilled" in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold—and it is all that we do hold—that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence) during the working hours of daylight.129

Hand uses the formula to indicate the various factors that are considered when assigning liability. The language
used to depict the fifteen analogous cases includes terms such as fault, negligence, gross negligence, actionable negligence, and owner negligence. The language used to describe the situation under consideration includes terms such as excuse, fair requirement, adequate care, and reasonable expectation. In short, Hand here is not positing a purely economic theory. It is even more remarkable that Epstein believes Hand is positing a theory for "the entire law of tort" when Hand makes it clear that he is discussing why there can be no general rule for determining liability in this specific type of barge-ship case.

In Moisan v. Loftus a case decided almost three years after Carroll Towing, Hand clarifies the use of the formula which he stated in Carroll Towing:

It is indeed possible to state an equation for negligence in the form, C = P X D, in which the C is the care required to avoid risk, D, the possible injuries, and P, the probability that the injuries will occur, if the requisite care is not taken. But of these factors care is the only one ever susceptible of quantitative estimate, and often that is not. The injuries are always a variable within limits, which do not admit of even approximate ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries. It follows that all such attempts are illusory, and, if serviceable at all, are so only to center attention upon which one of the factors may be determinative in any given situation. It assists us here to center on the factor of probability, because the difference between
"gross" and "ordinary" negligence consists in the higher risks which the putatively wrongful conduct has imposed upon the injured person. The requisite care to avoid the injuries and the possible injuries themselves are the same. 131

Clearly Hand realized the limitations of his formula. He knew that it could serve the narrow purpose of showing in epigrammatic fashion what general factors are considered in a particular case and what should be focused on if a number of the variables in different situations are equal. It is wrong to force Hand's theory into the economic mold although Posner and Epstein are certainly free to attempt to explicate the Hand theory in economic terms; but then they will face again the problems encountered in attempting to explicate notions of reasonableness in a community in solely economic terms.

V. Posner's Attempt To Derive A Theory of Rights And Virtues From His Wealth Maximization Principle

A. Rights

Posner states that a theory of rights is an "important corollary" of the wealth-maximization principle and that the principle can be "made to yield" the formal elements of an ethical theory or that rights and corrective justice notions can be "derived" from the principle itself. 132 These claims are made in an effort to demonstrate that economic theory can account for all those things which should be accounted for by
an acceptable theory for explaining tort liability. For, if rights need to be postulated or if rights must be justified by some principle other than the wealth maximization principle, then Posner's theory does not provide a comprehensive and complete explanation of the imposition of tort liability.

Ronald Dworkin\textsuperscript{133} and Duncan Kennedy\textsuperscript{134} have argued that the source of the rights exchanged in a market economy is itself external to the wealth-maximization principle. Posner, on the other hand, believes that the wealth maximization principle "ordains the creation of a system of exclusive rights, one that, ideally, will extend to all valued things that are scarce, not only real and personal property but the human body and even ideas."\textsuperscript{135}

Not only does Posner believe that his principle engenders a system of rights; he also holds that it requires the initial vesting of rights in those who are likely to value them the most. The reason for this is not altogether clear. Some premise about personal worth or individual value\textsuperscript{136} must be accepted before Posner can reach his conclusion; but no such premise can be derived from his wealth-maximization principle.

B. Virtue

Posner argues that virtue is "implied by" or can be "derived from" the wealth maximization principle.\textsuperscript{137} His argument is this:
1. Adherence to virtue facilitates transactions and promotes trade and wealth by reducing the costs of policing markets.

2. The wealth-maximization principle encourages and rewards virtues.

If Posner, by these cryptic remarks, is presenting his own definition of logical derivation, and if he realizes its limits, then he cannot be criticized. But if by "derived from" he means "flows logically from" as the term is generally accepted, then he has failed to convincingly argue for the derivation.

Although it may be true that in some cases adherence to virtue facilitates transactions and promotes efficiency, there are instances in which adherence to virtue would inhibit transactions and increase costs. A criticism of Posner's "derivation" is that from the fact that adherence to a particular virtue might promote efficiency, and the fact that the wealth maximization principle promotes efficiency, it does not follow that the practice of virtue is derivable from the principle. All that is derivable from the principle is that those acts which maximize wealth are acts that ought to be done. On this principle a virtuous act which did not maximize wealth or one which decreased wealth is an act which ought not be done. Nor does it follow from Posner's premises that every act that maximizes wealth is virtuous, unless he wants to posit this by definition. Posner admits that virtuous acts do not always maximize wealth: "Sometimes, to be sure, adherence
to moral principles reduces the wealth of society. . . But on balance it would seem that moral principles increase the wealth of society more than they reduce it. . . .\textsuperscript{138}

It should be kept in mind that Posner himself has criticized utilitarianism because rights in a utilitarian system are strictly instrumental goods.\textsuperscript{139} But virtue for Posner is strictly an instrumental good. Virtue brings about an increase in wealth; virtue is a wealth-maximizing element.

In addition to being subject to criticisms similar to criticisms of utilitarianism, Posner's view of the derivability of virtue has another defect. It proves too much in a manner similar to the way in which his concept of "market" validates too much. It may be that some clearly immoral conduct promotes Posnerian efficiency and maximizes wealth; for example, bribing of public officials, kickbacks or neglect of the indigent. Still Posner must conclude that such immoral practices are justified under his instrumental rubric. He cannot reject such practices without going beyond his wealth-maximization principle.

Posner notes that his theory yields "troubling" results in that it appears that it validates:

(a) some sorts of segregation;

(b) forcible limiting of birth rates;

(c) contracts of slavery; and

(d) some forms of racial discrimination.\textsuperscript{140} Such
results are clearly "sharply contrary to wide and shared ethical intuition."

Posner is unsuccessful in arguing that since the market is by definition rational and just that, therefore, decisions in tort cases are likewise rational and just. Posner is correct in that he realizes that economic considerations do have some role to play in tort liability determinations, despite the fact that he inflates that role. His monolithic theory which regards only wealth maximization is unacceptable as the correct theory of tort liability.
Chapter Four
Fletcher on Tort Liability

I. Introduction

George Fletcher views tort law as a system for determining the just distribution of accident losses\textsuperscript{141} and he believes that tort law is "a unique repository of intuitions of corrective justice."\textsuperscript{142} He argues that tort liability disputes have historically been settled against the background of one or the other of two competing conceptual frameworks or paradigms. He does not view the struggle as having been between negligence/fault and strict liability, but rather between the two radically different paradigms of "reciprocity" and "reasonableness" which echoes Epstein's view of tort law as being "torn between matters of individual equity and overall utility."\textsuperscript{143}

Fletcher's reciprocity paradigm is similar to Epstein's casual theory in that under the reciprocity paradigm only the parties to a suit are considered. Other considerations, such as utility, are not properly considered under the reciprocity paradigm as, similarly, Epstein refused to permit the consideration of cost and utility under his causal theory. Because of the narrowness of his view, Fletcher goes wrong as have the other proponents of monolithic theories of tort liability, such as Epstein, Austin and Posner.

According to Fletcher's paradigm of reciprocity, the victims entitlement to damages and the defendant's
obligation to pay are distinct issues which can be resolved by looking at the particular case and without considering social costs and utility. According to his paradigm of reasonableness, the community's welfare is the only criterion for establishing who is entitled to receive compensation and who ought to pay compensation. The question to be answered under the paradigm of reasonableness is, "Was the risk unreasonable?" and the question is answered by a straightforward balancing of social costs and benefits that results in the determination of whether or not an act was reasonable. Such theories are the utilitarian theories criticized in Chapter Three.

For Fletcher, these paradigms are very much at odds and they present a judge with a conflict. "The conflict is whether judges should look solely at the claims and interests of the parties before the court, or resolve seemingly private disputes in a way that serves the interests of the community as a whole." This chapter will attempt to explain the valuable insights of Fletcher and to criticize his explication of tort liability. It will be argued that Fletcher's paradigm of reciprocity is not clearly distinct from his paradigm of reasonableness and that he does not present a convincing argument that the test of ordinary care has become a straightforward utilitarian determination.

II. Reciprocity and Reasonableness

Fletcher prefers the paradigm of reciprocity to
the paradigm of reasonableness; that is, he holds that a liability determination made on the basis of reasonableness denigrates or ignores individual autonomy in order to promote social utility. It will be argued here that some of the same elements are considered in making a liability determination under the paradigm of reciprocity as are considered under the paradigm of reasonableness and, furthermore, that instead of pointing to a deep ideological cleavage between the two paradigms, Fletcher's work suggests an explanation of tort liability determinations based upon a synthesis of the two.

According to the paradigm of reciprocity in making a determination of liability, the following questions must be answered:

1. What is the nature of the victim's activity when he was injured?

2. What was the risk created by the defendant, if any?

3. Was the risk-imposing conduct of the defendant excused?

The answers to 1. and 2. determine whether or not the victim is entitled to compensation. The answer to 3. determines whether or not the defendant should compensate the victim.

For Fletcher, a victim has a right to recover if the risk imposed upon the victim by the defendant is a non-
reciprocal risk.\textsuperscript{146} Reciprocal risks are those that ordinary men normally impose on each other.\textsuperscript{147} But Fletcher views the balancing of the risks in terms of "fairness"—"if the defendant creates a risk that exceeds those to which he is reciprocally subject, it seems to be fair to hold him liable for the results of his aberrant indulgence."\textsuperscript{148} But what is a "fair risk" is determined by looking at the "accepted and shared level of risks" in the community.\textsuperscript{149}

Fletcher presents no program for determining either what is a fair risk or what is an accepted and shared risk, nor does he agree that considerations of social utility would be pertinent in making a determination of what is a fair risk. In fact, Fletcher cites with approval the standard of uncommon ultra-hazardous activities that is non-instrumentalist and requires only a consideration of the risk and not of its social utility in determining whether an activity is ultra-hazardous.\textsuperscript{150} But, according to the Restatement (Second) one factor to be considered in determining whether an activity is ultra-hazardous, i.e., one factor to be considered in evaluating the reciprocal nature of the risk, is "the value of the activity to the community."\textsuperscript{151} Similarly, Prosser views negligence as a matter of risk or of recognizable danger of injury, but the "risk" nature of an activity is determined by considering both the probability and gravity of possible injuries and the utility of the type
of conduct in question. "The problem is whether 'the game is worth the candle.' Many risks may reasonably be run, with the full approval of the community."\(^{152}\) Since the utility of a risk-creating activity does bear upon the reciprocal nature of the risk and comes into play when asking Fletcher's "additional question of fairness in holding the risk-creator liable for the loss," the fine distinction which Fletcher sees between reciprocity and reasonableness disappears and it becomes clear that a correct paradigm will include both sorts of considerations.

Fletcher appeals to a specific example, the case of \textit{Rylands v. Fletcher}, to explicate his notions of nonreciprocal risks:

\begin{quote}
The fact was that the defendant sought to use his land for a purpose at odds with the use of land then prevailing in the community. He thereby subjected the neighboring miners to a risk to which they were not accustomed and which they would not regard as a tolerable risk entailed by their way of life. Creating a risk different from the prevailing risks in the community might be what Lord Cairns had in mind in speaking of a non-natural use of the land.\(^{153}\)
\end{quote}

Clearly, contrary to Fletcher, a determination of prevailing risks in the community looks "beyond the case at hand" and beyond the particular effect of the defendant's conduct upon the victim.

Similar problems arise with Fletcher's discussions of background risks. Background risks are by definition
reciprocal risks or "innocuous risks" which are a necessary concomitant of community life. "The paradigm of reciprocity holds that in all communities of reciprocal risks, those who cause damage ought not to be held liable." 154 Fletcher does not say how a background risk is to be distinguished. Clearly, the paradigm of reciprocity itself cannot be used as the criteria for determining what is a background risk and what is a nonreciprocal risk since the paradigm of reciprocity assumes that there is this distinction. Fletcher admits this shortcoming: "Problems in defining communities of risk may account for the attractiveness of the reasonableness paradigm today. The increased complexity and interdependence of modern society renders legal analysis based upon a concept of community that presupposes clear lines of membership, relatively little overlapping, and a fair degree of uniformity in the activities carried on, exceedingly difficult in many cases." 155

Fletcher leaves unanswered many questions about fairness and community considerations. One commentator has noted that:

... Fletcher seems unconsciously to introduce notions of reasonableness into his paradigm of reciprocity. How does one determine when a difference in degree becomes a difference in order? One decides whether the defendant acted negligently, that is, beyond "the bounds of reciprocity." But Fletcher does not say how "negligence" under a reciprocity standard would differ from "negligence" under a reasonableness standard.
The third question posed above with respect to making a determination of liability under the reciprocity paradigm is: Was the risk-imposing conduct the type of conduct that should be excused? In explaining how this question should be answered, Fletcher again relies upon unexplicated notions of fairness, rationality, and community-contextual considerations. Fletcher states:

To find that an act is excused is in effect to say that there is no rational, fair basis for distinguishing between the party causing harm and other people. Whether we can rationally single out the defendant as the loss-bearer depends on our expectations of when people ought to avoid risks.

For the paradigm [of reciprocity] also holds that nonreciprocal risk creation may sometime be excused, and we must inquire further, into the fairness of requiring the defendant to render compensation. We must determine whether there may be factors in a particular situation which would excuse this defendant from paying compensation.

Thus the question of rationally singling out a party to bear liability becomes a question of what we can fairly demand of an individual under unusual circumstances.

Again Fletcher gives no definition of what he means by "fair," "our expectations," and "rational." But again there is a suspicion that his definition of these terms would produce a paradigm of reciprocity that would collapse into a paradigm of reasonableness.
Fletcher does admit that excusability can be understood in terms of social utility considerations. To counter this he states, "Yet one can also think of excuses as expressions of compassion for human failings in times of stress--expressions that are thought proper regardless of the impact on other potential risk-creators." Human compassion is by definition an emotion as opposed to a rationalization. Emotion is specific to the person emoting. It is an inadequate justification for accepting a particular excuse since it can be inconsistent. Acting upon emotion a single person can reach different conclusions in identical cases. Acting upon emotion, different persons can reach different conclusions in identical cases. Human compassion does not provide the rational basis for excuses which Fletcher is purportedly seeking.

According to Fletcher, the new paradigm of reasonableness "challenged the assumption that the issue of liability could be decided on grounds of fairness to both victim and defendant without considering the impact of the decisions on the society at large." Fletcher believes that as the new paradigm of reasonableness emerged, fault became an inquiry about the context and the reasonableness of the defendant's risk-creating conduct. Fletcher does not clarify the distinction, if any, between the consideration of context under the reciprocity paradigm and the consideration of context under the reasonableness paradigm.
III. Excusing and Justifying Conduct

For Fletcher at the heart of the change in paradigm choice from a paradigm of reciprocity to a paradigm of reasonableness was a shift in the meaning of fault. Fletcher believes that as the new paradigm of reasonableness became accepted, fault became an inquiry about the reasonableness of risk-taking rather than an inquiry about excuses. "The essence of the shift is that the claim of faultlessness ceased being an excuse and became a justification."160

For Fletcher, to justify conduct is to hold that similar future conduct will not be regarded as illegal or wrong. To excuse conduct is to leave intact the imperative not to engage in the excused conduct; that is, it is not to acknowledge a right to engage in the excused conduct. "As the inquiry shifts from excusing to justifying risks, the actor and his traits become irrelevant. At the level of justification, the only relevant question is whether the risk, on balance, is socially desirable."161

Fletcher argues that excusing conduct of a tort liability nature is similar to excusing criminal conduct. He sees excuses in the criminal category as permitting the judge to focus on the actor as opposed to the act. Fletcher infers that by shifting the emphasis in tort law from excuses to justification, the judge now focuses on the act rather
than the actor. Fletcher's inference is that relevant and important individual considerations are ignored when the inquiry shifts to justification under the fault standard.

Fletcher fails to see that a fault standard can be employed to filter out traits and circumstances which are irrelevant to a proper and fair determination of a case. It is just this type of filtering that is accomplished by Fletcher's own scheme of reciprocity in which certain traits and circumstances are filtered out under the guise of determining what are "background risks." Also, it should be noted that under the test of reasonableness, it is not the case that every individual trait of the actor is held to be irrelevant. In many cases, the traits of the particular actor have an important bearing upon determining what would be the standard of reasonable care for this type of particular actor in this type of particular circumstances. Since victims and risk creators act in a community, the application of a standard of reasonableness which filters out certain individual traits as irrelevant insures fair treatment of all members of the community. Otherwise, a judge at his or her whim could choose to consider one or another of various individual traits as the basis for excusing otherwise unacceptable conduct. It appears that Fletcher realizes this but is not impressed with it: "The shift to the 'reasonable' man was significant, for it foreshadowed the normative balancing of the interests implicit in the concept of reasonableness as an objective standard." 162
Fletcher rejects the paradigm of reasonableness because it requires the promotion of the general welfare at the expense of a few innocent individuals who must suffer. His argument for this conclusion contains a number of errors. His argument is directed to reasonable men who seek to maximize utility and presupposes that reasonable men do what is justified by a utilitarian calculus:

The reasonable man became a central, almost indispensable figure in the paradigm of reasonableness. By asking what a reasonable man would do under the circumstances, judges could assay the issues both of justifying and excusing risks. Reasonable men, presumably, seek to maximize utility; therefore, to ask what a reasonable man would do is to inquire into the justifiability of the risk. Fletcher nowhere presents an argument that the fault standard's reasonably prudent person exercising ordinary care is seeking solely to maximize utility. If the reasonably prudent person of ordinary care takes into account considerations other than or in addition to considerations of social utility, then another interpretation of the standard is possible and it is an interpretation which Fletcher has not considered. Under the reasonableness standard, in addition to considerations of social utility, considerations of individual interests are taken into account if individual equity and autonomy are given value. For example, in the Restatement (Second) section regarding determinations of whether an activity is
abnormally dangerous many factors are considered, not only utility:

§ 520. Abnormally Dangerous Activities

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;

(b) whether the gravity of the harm which may result of it is likely to be great;

(c) whether the risk cannot be eliminated by the exercise of reasonable care;

(d) whether the activity is not a matter of common usage;

(e) whether the activity is inappropriate to the place where it is carried on; and

(f) the value of the activity to the community. 164

Failure to take into consideration the factors listed in §520 of the Restatement can lead to absurd results. For example, in a case where the individual interest at stake is of minimal value to the individual concerned, but in which social utility, no matter how great, is not considered, the individual interest will be paramount. For example, under Fletcher's reciprocity paradigm in the case of blasting conducted to divert a flooding river around a populated community but which will also certainly damage a corral on a
nearby farm, the farm owner would have a good cause of action since the blaster is subjecting the farm owner to a non-reciprocal risk. Under Fletcher's reciprocity paradigm, the social utility of the blasting would not be considered in a case between the blaster and the farmer. Of course this result is absurd only from the point of view of a theory in which utility is valued. Such a theory will be presented in the final chapter.

Fletcher argues that with the shift from excuse-fault to justification-fault "the threshold of liability became whether, under all circumstances, the defendant acted with ordinary, prudent care."\textsuperscript{162} Fletcher finds this unacceptable and yet he speaks of reciprocity thus: "Notions of 'ordinary' and 'normal' men are compatible with the paradigm of reciprocity; reciprocal risks are those that ordinary men normally impose on each other."\textsuperscript{166}

Having assumed that the only question to be asked under the reasonableness paradigm in determining whether conduct is justified is "Is the conduct socially desirable?" Fletcher's conclusion that the test for justifying risks is a straightforward utilitarian balancing of benefits and costs is not surprising.

Clearly, Fletcher asks too much when he demands that a paradigm of tort liability insure the protection of individual interests to the exclusion of societal interests.
He fails to consider that utility interests may have a legitimate role to play in liability determinations of tort liability, and he fails to provide an explanation for the many tort decisions in which social utility is considered.

By positing the conflict which must be resolved by judges as one between individual interests and public interests, and by opting for a scheme that would insure the protection of individual interests, Fletcher has emphasized that in the development of tort theory both individual and public interests have been considered to be important. Fletcher also realizes that the tort system is something more than an instrumentalist's tool for maximizing utility--it is also a mechanism for determining the just distribution of accident losses and it is a unique repository of intuitions of compensatory justice.

Fletcher has attempted to show that negligence and strict liability are not antithetical rationales of liability by trying to formulate a single paradigm with a related conceptual framework that would provide an explanation of both of these types of liability determinations. Fletcher is also to be credited for establishing that considerations of social utility alone are not sufficient as a basis for establishing tort liability. By following his lead a correct theory of tort liability will be presented in the following chapter.
Chapter Five
Tort Liability Based on Reasonableness

I. Introduction

In the previous chapters the proposed monolithic theories of tort liability have been rejected for a variety of reasons: including their failure to go beyond a single consideration in determining liability, and especially for their treatment of the role of considerations of community interests in making tort liability determinations. In this chapter it will be shown that in the system of tort law, considerations of a variety of both individual and community interests including utility are legitimate. It will also be demonstrated that the proper consideration of utility is accomplished under the standard of reasonableness and that the manner of consideration of utility or its rejection under other standards or theories is in error. Finally it will be shown, contrary to many authors including those whose views have been criticized here in previous chapters, that the rationales for imposing liability with fault and strict liability are more congruent than antithetical.

II. Principles

The legal decisionmaker responsible for making tort liability determinations is guided and governed by a variety
of principles. For example, in United States jurisdictions such principles are embodied in the Constitution, state and federal laws, common law, and rules of evidence and procedure. The Constitution speaks of some most basic principles of promoting "the general welfare" and of respecting and securing a variety of individual rights. Enacted legislation is accordingly directed to both the protection of individual interests and the promotion of utility interests. Such a view of the interests of society and of the interests of the individuals who comprise it is generally reflected in the decided tort cases and in the treatises that deal with them. For example, Justice Earl explicitly presents this view in Losee v. Buchanan:

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such
damage by the general good in which he shares and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neighbor, and I have my compensation for the surrender of this right to use my own as I will have the similar restriction imposed upon my neighbor for my benefit. I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part. Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare.

This view of society is widely accepted and has been expressed in decisions from practically every jurisdiction. In the oft-cited terms of the Restatement of Torts, Second it is stated thus:

Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience, and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or
shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability for damages is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.168

Each individual in the society, by virtue of his or her equality and autonomy, can assert individual interests against other members of the society and can demand respect and consideration of the individual interest asserted. The assertion is made in terms of "rights" which one individual has against another individual or against the entire society. The "interests of others" are the interests or rights of other individuals, not the interests of the society as a whole. That this is so is made evident by the cases in which the conduct in question has no social utility and one individual brings suit against another individual or individuals and the outcome of the suit is determined by looking solely to the individual interests involved and weighing them against each other. This will be illustrated in the section on nuisances in the discussion of the distinction between public and private nuisances.

From this view of society both relevant factors and governing principles can be deduced which answer the question, "How are the various interests weighed and balanced against each other?" In general terms, an analysis of this view of
society leads to the conclusion that both individual and social interests are important and are to be considered in determining liability. These interests may be considered in terms of "individual rights," "individual harm," "risk to individuals," "injury to individual," "risks to society," "social interests," "utility" or some similar concept. Social interests are variously referred to as "the general welfare," "the public good," "social utility," "matters of public policy," or "matters of public right." These are ways of referring to the society's interest in the good of all of its members taken as a whole.

The following principles for governing the weighing of the various interests are deducible from this view of society:

1. Each individual must live with some inconvenience or interference with his or her own personal interests in order to enjoy the advantages of various activities in the society. There will be no liability for interferences with individual interests which do not rise above this level.

2. In some cases the utility of conduct which adversely affects an individual's interests will outweigh the value of the individual interests and the person involved in the conduct will not be liable in tort to the individual.

3. In some cases even though the utility of conduct is considerable an individual's interest will be so important that the conduct in question will result in liability if it is pursued against the individual and the individual will successfully have the conduct abated.
4. In some cases the utility of the conduct will be of such a value that it will be permitted despite the fact that it interferes with individual interests; but the individual interests will be of such value that the individuals involved will be compensated for the interference with their interests.

5. In making the balancing of the various interests, all important interests and all relevant circumstances will be considered.

A discussion of the possible cases and their resolution will show how these factors and principles are used to make a determination when there is a question of tort liability. Simplified cases will be presented involving two individuals, "A" and "B," and the interest of society, "C," if any.

In the simplest case A does acts which harm B, the acts having no social utility. The value of the interests of A in performing the acts are considered and the value of the interests of B which are harmed are considered. Since the act has no social utility, the determination of whether A should be permitted to act with (or without) compensating B is done by weighing A's interests against B's interests. Either A will win, B will win, or there will be a stalemate.

In the cases in which A's act has utility C this too must be thrown into the balance. In the cases in which A's interests are of more value than B's, the utility C added to the value of A's interests merely makes the balancing that much easier. In another case A's interests may be of less value than B's interests, but by adding the utility value C of A's
act to the balance, ceteris paribus, the value of A's interests plus C may be greater than the value of B's interests or the value of A's interests plus C may still be less than the value of B's interests. If B's interest have a utility value D this too must be considered and could similarly affect the outcome.

In those cases in which the value of A's interests equal the value of B's interests, the utility value of A's acts and interests, if any, will tip the scale one way or the other. Such a case illustrates clearly the distinction between the interests of others and the interests of society as a whole.

A correct theory of tort liability must account for this variety of considerations and their balancing.

III. The Various Theories of Tort Liability

Three of the possible theories of justice underlying tort liability are compensatory justice theories. A fourth theory is utilitarian. Compensatory justice requires that if A's actions have resulted in injury to B, that B be compensated by A for that injury. Each of the three possible theories--strict liability, personal moral culpability liability, and liability based on a standard of reasonableness can be expressed in terms of compensation:

1. **Personal Moral Culpability Liability**—A is liable for B's loss if A's action causes B's loss and A is personally morally blameworthy in
so acting. (This is the type of theory criticized by Holmes and attributed to Austin as noted in Chapter One, footnote 15).

2. **Strict Liability**—A is liable for B's loss if A's action causes B's loss. (This is the type of theory as proposed by Epstein as discussed in Chapter Two).

3. **Liability Based On A Reasonableness Standard**—A is liable for B's loss if A's faulty action causes B's loss. A's action is faulty if it is unreasonable under the circumstances. (Holmes' theory is of this type as discussed in Chapter One).

Liability based on a utilitarian maximization of social utility might in a particular case validate the compensation of an injured person. But such compensation is not the goal of a system of tort law based on utilitarianism. The goal of such a system is to maximize utility and a theory of justice for tort liability based thereon can be expressed thus:

4. **Utilitarian liability**—A is liable for B's loss if A's being held liable to B will increase utility. (Posner's theory discussed in Chapter Three is this type of theory).
The question to be addressed in this chapter is which of these four candidates for a theory of tort liability is
(a) consistent with the view of society previously presented;
(b) consistent with the actual decisions; and
(c) able to withstand the criticisms levelled at the theories of the tort theorists already discussed.
It will be argued here that liability based on a standard of reasonableness is the correct theory.

A. Personal Moral Culpability Liability

As already noted, it has been proposed that tort liability be based solely on personal morality. Morality looks to an individual's personal intent in determining whether or not moral blame should attach to an action. In the typical tort situation, then, a determination of liability would turn on whether or not a particular individual used his or her best judgment in doing an act that resulted in harm to another. On moral principles the particular characteristics of each individual and what that individual personally intended weigh heavily on the balance when liability determinations are made.

In a famous passage Holmes criticizes the standard of personal morality and sets out criteria for a proper standard:
Supposing it now to be conceded that the general notion upon which liability to an action is founded is fault or blameworthiness in some sense, the question arises, whether it is so in the sense of personal moral shortcoming, as would practically result from Austin's teaching. The language of Rede, J., which has been quoted from the Year Book, gives a sufficient answer. "In trespass the intent" (we may say more broadly, the defendant's state of mind) "cannot be construed." Suppose that a defendant were allowed to testify that, before acting, he considered carefully what would be the conduct of a prudent man under the circumstances, and, having formed the best judgment he could, acted accordingly. If the story was believed, it would be conclusive against the defendant's negligence judged by a moral standard which would take his personal characteristics into account. But supposing any such evidence to have got before the jury, it is very clear that the court would say, Gentlemen, the question is not whether the defendant thought his conduct was that of a prudent man, but whether you think it was.

Some middle point must be found between the horns of this dilemma.

The standards of the law are standards of general application. The law takes not account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accident 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.

The rule that the law does, in general, determine liability by blameworthiness is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune; so much as that we must have at our peril, for the reasons just given. But he who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences. 169

(footnotes omitted)

But Holmes then proceeds to make, what appears to be, a contradictory argument. He argues that an insane person should be excused for acts leading to injury. A theory of liability must correctly explain the many cases in which an insane defendant is held liable in tort.

One criticism of the personal moral culpability theory is that it emphasizes particular individual's characteristics and judgments and that this emphasis can lead to unfair results. It follows then that a correct theory will not
concentrate on the particular individual but will have a standard based on what could be expected from an average man of prudence, in Holmes' words "a certain average of conduct."

Personal moral culpability theory has a further shortcoming in that it does not square with the decided reported cases of tort liability. In fact, the decided cases hold generally that (a) a person can be liable in tort despite the fact that he is not personally morally blameworthy for an act and conversely that (b) a morally blameworthy person may be held not to be liable in tort. For example, there was a case in which an expert swimmer with easy access to a boat and rope, saw a person drowning nearby but refused to help him. Instead, he sat down on the dock, smoked a cigarette, and watched the man drown. 170 Although the expert swimmer's conduct can be viewed as immoral, he was not found liable in tort.

There are also numerous cases in which, although there is no personal guilt or moral blameworthiness, a person is found liable in tort: "one who trespasses upon the land of another in the honest reasonable belief that it is his own, or buys stolen chattels in good faith, or innocently publishes a statement which proves to be a libel of another, is held liable without any personal guilt . . ." (footnotes omitted). 171

An appropriate theory for tort liability must explain these results. It must present a standard not coincident with personal morality.
B. Strict Liability

Epstein's theory of strict liability has been criticized previously for both its internal inconsistencies and for its unacceptable results. Epstein presents a paradigm for a prima facie case of liability with the assurance that any other considerations can be considered in "subsequent pleas." As already noted, there are many difficulties with his views.

Clearly, Epstein is not interested in dealing with or accounting for considerations of social utility and general welfare: "As only the plaintiff and the defendant are parties to the suit at hand, only the equities between them should be taken into account in its resolution,"172 and "... in the ordinary case the physical facts of the accident are normally sufficient to allocate liability between the drivers."173 Epstein does permit a "backdoor" consideration of social interests:

... rights of way should, of course, be established on rational and efficient grounds, for the state in the exercise of its proprietary powers should set standards that tend to advance the common welfare.174

Epstein does realize the limited nature of his own inquiry, but in his wholehearted rejection of an economic approach to tort liability he fails to give any role to considerations of social utility:

The first demand of that inquiry is to identify the class of interests, be they of
liberty or property, that are entitled to public protection. . . . The first of the particular tasks of the tort law is developing a workable account of the concept of "causing harm" which identifies the means of invasion of the individual interests already defined. . . . I have given my view of the legal results that are required once these premises are accepted, and it is quite clear that they conflict, often in result and always in manner, with those results that are required by utilitarian principles. . . . [I]t is, I believe, a grave mistake to suppose that tort questions can be argued only in utilitarian terms. There is an irreducible ethical base to the tort law, one that compels us to recognize that hard choices and unpleasant results cannot be avoided by arguing that further empirical research is needed to resolve the traditional conflicts within the law of tort in a principled matter. Most of the positions which I have defended rest upon belief in the importance of individual autonomy within the social order. Those conclusions are, of course, subject to attack, but only within the framework of an alternative theory of corrective justice, and not by an economic theory of social control.\textsuperscript{175}

In so narrowly defining the publicly protectible interests, Epstein ignores the role of social utility interests and is therefore at odds with the accepted view of society in tort law. For Epstein there are only two alternatives—strict liability or utilitarianism—no compromise is possible and no consideration of utility is proper. As already noted, Epstein's theory is found wanting when confronted with actual decisions in which a determination of tort liability is made.
C. Utilitarianism

Both utilitarianism in general and Posner's views in particular have been criticized previously for their possible unjust results. Posner's theory of tort liability is also at odds with the tort law view of society since, in Posner's view, the interests of individuals have value only insofar as they are related to net social utility.

Posner's theory was also shown to be susceptible to the criticism that in most of the decided cases individual interests play an important, and often major, role in determinations of tort liability. It must be granted that Posner's theory does present an external standard and that it does recognize a role, albeit an inflated one, for considerations of social utility.

D. Liability Based On A Reasonableness Standard

According to the theory of liability based on a standard of reasonableness, a person is to be held liable if his or her "faulty" actions cause injury to another. In the typical negligence case in which fault is determined, a prima facie case of negligence includes proof of a legal duty of the person acting, a breach of that duty, and injury caused by that breach. The existence of a duty and its breach are determined by referring the act in question to a standard of reasonableness which has come to be called "the reasonable man" standard.
Prosser notes that this "fictitious person has never existed on land or sea" and that he has been variously described as "a reasonable man, or a prudent man, or a man of average prudence, or a man of ordinary sense using ordinary skill." The "reasonable man" is an ideal member of the society:

The actor is required to do what such an ideal individual would be supposed to do in his place.

... The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical person. He is not to be identified with any ordinary individual who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard. Nor is it proper to identify him with any member of the very jury who are to apply the standard; he is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment. And:

He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen.

The reasonableness standard is a standard by which to judge an actor's act, rather than a standard for judging an actor's intent or purpose. It is an external and objective standard for scrutinizing the act, not the agent, and so liability determinations utilizing this
standard are not susceptible to the criticisms of theories adhering to internal standards such as the standard of personal morality.

The reasonableness standard applies to each member of society and by it everyone's actions are required to measure up to a certain standard of average prudent careful conduct. Acceptance of the standard thus implies that members of society are equal and should be treated accordingly.

This standard is also in accord with the accepted tort law view of society. A society member such as the reasonable man will consider the consequences of his acts for the interests of himself, of others, and of society as a whole. "In deciding the issue of negligence all these factors must be weighed, and they must be weighed in the scale of prophecy or foresight of the reasonable man."179

Application of the reasonableness standard does not automatically result in a predomination of any of the interests considered, but it does permit and require consideration and balancing of the various interests. The reasonable man does not seek to maximize only one of the important interests, social utility, nor does he ignore other important interests, but utility interests do have a legitimate role to play under this theory of tort liability.
E. Application of The Reasonableness Standard

In order to assess, evaluate, and weigh the various pertinent interests in a particular case, the legal decisionmaker looks to the nature of the activity which resulted in the injury in terms of risk to the variety of interests involved. Many activities in society create risks for those involved in the activities and for innocent bystanders. On Fletcher's view, whether a victim injured as a result of such activities is entitled to receive compensation in tort "depends exclusively on the nature of the victim's activity when he was injured and on the risk created by the defendant. **The social cost and utility of the risk are irrelevant...**"180 Clearly on such a view of risk consideration, balancing of utility interests, inter alia, is not legitimate.

Fletcher's view of risk is in opposition to the accepted principles of the legal system which provide that both individual and utility interests are to be protected and promoted. Fletcher's view is in opposition to the accepted tort law view of society. Also, the decided cases and treatises thereon have explicitly rejected Fletcher's interpretation of degree of risk as not depending in part on the utility of the risk-creating act. For example, in the Restatement's section on Abnormally Dangerous Activities one of the factors to be considered in determining
whether or not an activity is abnormally dangerous is "the value of the activity to the community." 181

The concept of risk properly construed provides the legal decisionmaker with a scheme for weighing and considering the various interests. The risks created by the activity are considered in terms of risk to others involved in the same activity; risk to others not involved in the activity; and risk to society in allowing this and similar activity. These risks are in turn evaluated by determining the shared level of risk, if any, in the community and the benefits to individuals and to society from sharing in this activity and its concomitant risks.

Properly corrected and construed, Fletcher's notions of risk, background level of risk, and reciprocity/reasonableness of risk provide the conceptual framework for balancing the various interests against each other. In effect a combination of reciprocity of risk (which Fletcher prefers) with reasonableness of risk (which Fletcher rejects) is precisely the notion of risk that is consonant with the accepted tort view of society. In accordance with the reciprocity principle the interests of the individuals are pertinent — both the interest of the actor in engaging in the risk-creating activity and the interest of the victim in not being harmed thereby or in receiving compensation for his injuries. In accordance
with the reasonableness principle (not as limited by Fletcher) the utility interests with respect to the risk-creating activity have a bearing on whether or not the activity will be permitted; on whether or not the activity will be subject to strict liability; and on whether or not the victim will be compensated. In Prosser's terms:

It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expediency of the course pursued. For this reason, it is seldom possible to reduce negligence to any definite rules; it is "relative to the need and the occasion," and conduct which would be proper under some circumstances becomes negligence under others.\textsuperscript{182}

Under the risk framework, the legal decisionmaker considers factors such as

1. Apparent nature or recognizability of danger, if any.
2. Substantiation, if any, of expectancy that harm may follow.
3. Possible alternatives apparent at the time.
4. Community expectations regarding such conduct.
5. Possibility/probability of harm.
6. Seriousness of harm.
7. Possible precautions.
8. Required precautions.
9. Utility of conduct (including social value of
interest actor is seeking to promote.)

10. Risks to society in deciding case one way or another (since future similar cases demand similar decisions).

Having determined and evaluated such factors, the judge decides whether the conduct in question involved an unreasonably great risk of injury to the victim; i.e., whether the conduct was unreasonable under the circumstances. If the conduct was unreasonable, a determination that the actor is liable in tort will be correct. The case of *Delta Air Corp.* *et al. v. Kersey*¹⁸³ provides an example of a tort liability determination in which the legal decisionmaker considers and balances this variety of interests. It also illustrates the application of the five principles cited in part II, above, for weighing the various interests against each other. In this case the City of Atlanta built an airport on land adjoining Mr. Kersey's home. Mr. Kersey brought suit on the basis that the city and certain airlines had injured his person and his property by reason of the maintenance and operation of the airport. Specifically he alleged that the noise, dust, and low flying of airplanes over his land had injured and would continue to injure his person and property.

In its opinion the court considers both the public interest in the airport and Mr. Kersey's personal interests in preserving his life and health. The court notes "that
aviation is a lawful business affected with a public interest,\textsuperscript{184} but also that the city has a duty to so construct an airport "as not to create a condition dangerous to life and health."\textsuperscript{185}

In balancing the individual and community interests the court distinguishes two causes of the noise and dust complained of -- one, the ordinary and necessary operation of the airport and two, low flying airplanes. With respect to the operation of the airport itself, the court finds that "the noise and dust complained of may be deemed to be incidental to the proper operation of an airport, and as such they cannot be said to constitute a nuisance."\textsuperscript{186} Here the court has weighed the public interest in the operation of the airport and Mr. Kersey's interest in living undisturbed and have found that the public interest is more important that Mr. Kersey's interest. The Court's finding with respect to low flying airplanes, however, is in Mr. Kersey's favor.

The court notes, with respect to low flying airplanes "that the repeated low flights, with their accompanying noises and dust-laden gusts of air, are dangerous to the health and life of petitioner and his family and thus constitute a continuing nuisance."\textsuperscript{187} The court found that Mr. Kersey's individual interest was paramount in this situation to the community interest. The court deemed the low flights are "unreasonable interference with his use"\textsuperscript{188} of his land and stated:
For the sake of public convenience adjoining property owners must suffer such inconvenience from noise and dust as result from the usual and proper operation of an airport, but their private rights are entitled to preference in the eyes of the law where the inconvenience is not one demanded by a properly constructed and operated airport.\textsuperscript{189}

The court analogizes the airport situations to cases involving sewerage and drainage systems:

\ldots this court has several times held that a city cannot lawfully create in connection therewith a nuisance dangerous to life and health; and that where such a nuisance is created and its effect is specially injurious to an individual by reason of its proximity to his home, he has a cause of action for damages, and may enjoin the same.\textsuperscript{190}

The court's balancing of the various individual and community interests reflects the view of society presented so often in tort decisions as discussed herein.

IV. Nuisance

Illustrative cases of nuisances will serve as examples of the weighing of the various important interests that are to be considered in determining tort liability and of the applicable principles that govern the weighing. The principles of tort liability for nuisance and cases decided thereunder illustrate and substantiate the claims made here for a theory of tort liability based on the view of society presented above and on its standard of reasonable conduct.

The previously cited view of society taken from the Restatement of Torts, Second is from the section on nuisance
and it is repeated again and again in the decided cases involving nuisance. The principles of tort liability for nuisance and the cases decided thereunder will be used here to show:

1. The accepted view of society is reflected in the decided cases.

2. The interests of individuals, of others, and of society as a whole are significantly different.

3. The various interests can and must be balanced and weighed against each other to properly determine liability in tort.

In very general terms, a "nuisance" is the invasion of the interests of others. The word originated with the French word which means "to harm." As used in tort law two types of nuisance have been distinguished, public and private, and the distinction serves to show the difference between individual interests, the interests of others, and the interests of society as a whole. Public or common nuisance "covers the invasion of public rights, which is to say, rights common to all members of the public, such as for example the right to the free and safe use of the public highway." Public nuisances are those which interfere with the public health, safety, morals, peace, comfort, convenience, or any other public right.

A private nuisance, on the other hand, is the invasion of or interference with the interest in land of an individual or of individuals by another individual:
Uses of land are either private or public. The uses that members of the public are privileged to make of public highways, parks, rivers, and lakes are "public" as distinguished from "private." By private use is meant a use of land that a person is privileged to make as an individual, and not as a member of the public.¹⁹²

Generally speaking a private individual cannot sue on the basis of a public nuisance and, on the other hand, the community cannot sue on the basis of a private nuisance. These principles of public and private nuisances raise some problems:

a. Are there not cases of public nuisance which result in harm to individuals and therefore which violate their autonomy interests? And is it not a denial of individual autonomy to deny them a right of action in such cases?

b. How is the line drawn in cases of nuisances which affect several or a considerable number of "others?" That is, is not the distinction between public and private nuisance fatally blurred?

Although the general rule is that an individual cannot sue to abate a public nuisance, the law does recognize that a particular individual may be suffering harm that differs significantly from the harm suffered by the average member of the public due to a certain public nuisance:

The private individual can recover in tort for a public nuisance only if he has suffered harm of a different kind from that suffered by other persons exercising the same public right. It is not enough that he has suffered the same kind of harm or interference but to
a greater extent or degree. Thus when a public highway is obstructed and all who make use of it are compelled to detour a mile, no distinction is to be made between those who travel the highway only once in the course of a month and the man who travels it twice a day over that entire period. For both there has been only interference with the public right of travel and resulting inconvenience, even though the interference and the inconvenience have been much greater in the one case than in the other. The explanation of the refusal of the courts to take into account these differences in extent undoubtedly lies in the difficulty or impossibility of drawing any satisfactory line for each public nuisance at some point in the varying gradations of degree, together with the belief that to avoid multiplicity of actions invasions of rights common to all of the public should be left to be remedied by action by public officials.

Difference in degree of interference cannot, however, be entirely disregarded in determining whether there has been difference in kind. Normally there may be no difference in the kind of interference with one who travels a road once a week and one who travels it every day. But if the plaintiff traverses the road a dozen times a day he nearly always has some special reason to do so, and that reason will almost invariably be based upon some special interest of his own, not common to the community. Significant interference with that interest may be particular damage, sufficient to support the action in tort. Deprivation of immediate access to land..., which is clearly a special kind of harm, shades off by imperceptible degrees into the remote obstruction of a highway, which is just as clearly not. Thus in determining whether there is a difference in the kind of harm, the degree of interference may be a factor of importance that must be considered.  

This allowance for an individual to sue on the basis of a public nuisance shows the tort law's respect for
individual autonomy. The decided cases reflect this view. Especially in instances of personal injury, the law has found that there is the required "difference in kind of damage" to permit an individual to bring suit because of a public nuisance. Prosser cites numerous cases of this type in which even though a public nuisance was involved individual autonomy interests were recognized and protected:

Where the plaintiff suffers personal injury, or harm to his health, or even mental distress, there is no difficulty in finding a different kind of damage. The same is true as to physical harm to his chattels, or interference with the physical condition of land, as by flooding it; or silting up irrigation ditches. It is likewise true where there is any substantial interference with the plaintiff's use and enjoyment of his own land, as where a bawdy house, which disturbs the public morals, also makes life disagreeable in the house next door. This makes the nuisance a private as well as a public one ... 195

No court has formulated a rule regarding an exact number of individuals who must be affected in order to establish a nuisance as a public nuisance:

Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If,
however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.

* * *

It is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large. The obstruction of a public highway is a public nuisance, although no one is travelling upon the highway or wishes to travel on it at the time. In many cases the interests of the entire community may be affected by a danger to even one individual. Thus the threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic; and a fire hazard to one adjoining landowner may be a public nuisance because of the danger of a conflagration. In any case in which a private nuisance affects a large number of persons in their use and enjoyment of land it will normally be accompanied by some interference with the rights of the public as well. Thus the spread of smoke, dust or fumes over a considerable area filled with private residences may interfere also with the use of the public streets or affect the health of so many persons as to involve the interests of the public at large.

Whether a nuisance is public or private, the standard for scrutinizing the interference is the standard of reasonableness. Whether the interference is intentional or accidental, the reasonableness of the conduct is the basis of liability:
Where the basis of the nuisance is negligence, the reasonableness of the defendant's conduct is obviously in issue, and is determined by the familiar process of weighing the gravity and probability of the risk against the utility of his course. But the same balance of interests is called into play when the interference is an intentional one. Each defendant is privileged, within reasonable limits, to make use of his own property or to conduct his own affairs at the expense of some harm to his neighbors. He may operate a factory whose noise and smoke cause some discomfort to others, so long as he keeps within reasonable bounds. It is only when his conduct is unreasonable, in the light of its utility and the harm which results that it becomes a nuisance.

A determination of reasonableness of the conduct requires a weighing and balancing of the interests of the individuals involved and of society. In the Restatement's terms an intentional interference is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct." The definitions of "gravity of harm" and "utility of conduct" clearly show that both the interests of individuals and the interests of society are to be considered:

§ 826. Unreasonableness of Intentional Invasion

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.
§ 827. Gravity of Harm—Factors Involved

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

(a) The extent of the harm involved;

(b) the character of the harm involved;

(c) the social value that the law attaches to the type of use or enjoyment invaded;

(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and

(e) the burden on the person harmed of avoiding the harm.

§ 828 Utility of Conduct—Factors Involved

In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

(a) the social value that the law attaches to the primary purpose of the conduct;

(b) the suitability of the conduct to the character of the locality; and

(c) the impracticability of preventing or avoiding the invasion.

The unreasonableness of an intentional invasion is determined from an objective point of view. The question is not whether the plain-
tiff or the defendant would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Consideration must be given not only to the interests of the person harmed but also for the interests of the actor and to the interests of the community as a whole. Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards. 201

The terms "gravity" and "utility" are used in this Restatement to express the legal evaluation of harm and conduct. The gravity of harm is its seriousness from the objective, legal standpoint, and the utility of conduct is its meritoriousness from the same standpoint. 202

The unreasonableness of an intentional invasion of another's interest in the use and enjoyment of land is ordinarily determined in each individual case on the particular facts of that case, and the decision of whether the utility of the conduct outweighs the gravity of the harm is normally made by the trier of fact upon a thorough consideration of the factors stated in §§ 827 and 828. Even though the noise and smoke from a factory cannot feasibly be eliminated, the utility of the factory is not weighed in the abstract. In a suit for damages, the legal utility of the activity may also be greatly reduced by the fact that the actor is operating the factory and producing the noise and smoke without compensating his neighbors for the harm done to them. The conduct for which the utility is being weighed includes both the general activity and what is done about its consequences. 203

No exact value can be assigned to a particular factor considered in balancing the various interests; rather, each case must be studied individually and all the relevant circumstances must be considered:
Since the gravity of harm is its seriousness from an objective standpoint (§ 826, Comment d), it is the product of all relevant factors. There is no general rule as to the relative weight of the particular factors in all the ever-varying cases. In some cases one factor may be decisive as to the seriousness of the harm, while in other cases its seriousness will depend upon a combination of factors, no one of which can be said to have more weight than the others in the final judgment. The list of factors here stated is not intended to be exhaustive. In some cases other factors may have a bearing on the gravity of the particular harm involved. It should be especially noted that the gravity of harm depends not only upon the amount of harm suffered but also upon the nature of the harm and the circumstances under which it occurs. The gravity of the harm from noises that disturb a person's sleep, for example, is ordinarily much greater when the noises occur at night than it is when the noises occur in the daytime.

The first example which illustrates the principles governing the balancing of interests is as follows:

A and his friends customarily play croquet on A's front lawn, making a moderate amount of noise by conversation and the impact of croquet balls, which the normal individual in the community would not find to be objectionable. B, a nervous invalid who lives next door, is driven to distraction by the noise and made seriously ill.

Assuming that A's and his friends conduct has little or no utility or that its utility is equal to the utility interest in keeping B calm, B has no right to require A to cease playing croquet. B is suffering no significant harm. A and his friends are simply engaging in accepted
recreation. A's conduct is reasonable. B has no case.

This first example shows the application of the principle that each member of society must put up with a certain amount of interference with his interests to secure the mutual advantages of communal life.

The second example is as follows:

A's factory produces severe vibrations that reach B's house 100 feet away. The vibrations shake window panes loose, cause ceilings to fall and produce cracks in the plaster. A's invasion is unreasonable.  

This example shows the application of the principle that certain individual interests grounded in the individual's autonomy outweigh the utility of various acts and that the individual interest cannot be violated, at least not without compensation.

The principle that the utility value of conduct can outweigh individual interests is aptly illustrated by the case of Antonik v. Chamerlain 207 in which the court found that the utility value of an airport outweighed the harm to the interests of an adjacent landowner. This case also presents a classic statement of the accepted tort law view of society:

The law of nuisance plys between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor. For generations, courts, in their tasks of
judging, have ruled on these extremes according to the wisdom of the day, and many have recognized that the contemporary view of public policy shifts from generation to generation.

In our business of judging in this case, while sitting as a court of equity, we must not only weigh the conflict of interests between the airport owner and the nearby landowners, but we must further recognize the public policy of the generation in which we live. We must recognize that the establishment of an airport of the kind contemplated is of great concern to the public, and if such an airport is abated, or its establishment prevented, the consequences will be not only a serious injury to the owner of the port property but may be a serious loss of valuable asset to the entire community.

The necessities of a social state, especially in a great industrial community, compel the rule that no one has absolute freedom in the use of his property, because he must be restrained in his use by the existence of equal rights in his neighbor to the use of his property. This rule has sometimes been erroneously interpreted as a prohibition of all use of one's property which annoys or disturbs his neighbor in the enjoyment of his property. The question for decision is not simply whether the neighbor is annoyed or disturbed, but is whether there is an injury to a legal right of the neighbor. The law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances, and whether there is "an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort, and not merely a tendency to injure. It must be real and not fanciful or imaginary, or such as results merely in a trifling annoyance, inconvenience, or discomfort."

"It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although it brings annoyance, discomfort, or injury to his neighbor, which are damnun absque infuria."

"The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property? having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy." Booth v. Rome., W. & O. Terminal R. Co., 140 N.Y. 267, 35 N.E. 592, 594, 24 L.R.A. 105, 37 Am. St. Rep. 552.

All systems of jurisprudence recognizes the requirement of compromises in the social state. Members of society must submit to annoyances consequent upon the reasonable use of property. "Sic utere tuo ut alienum non laedas" is an old maxim which has a broad application. If such rule were held to mean that one must never use his own property in such a way as to do any injury to his neighbor or his property, it could not be enforced in civilized communities must of necessity suffer some damage, inconvenience and annoyance from their neighbors. For these annoyances, inconveniences and damages, they are generally compensated by the advantages incident to living in a civilized state.

V. Insanity and Negligence in Design

A. Insanity Cases

In numerous tort cases, an insane defendant has
been held liable for damages and injuries caused by his or her acts. According to criminal standards, such a defendant cannot be held guilty of a crime, since the requisite intent is lacking. Also, according to a tort liability standard of personal moral culpability, an insane defendant cannot be held liable in tort since he or she is not personally morally blameworthy. But, under both strict liability, economic liability and liability with fault, the holding of such a defendant liable can be the correct finding. It will be argued here that that finding is correct according to liability based on a standard of reasonableness.

As already noted, the standard of reasonableness requires a scrutiny of the act rather than of the actor's state of mind. The standard is an external objective standard and it rules out a consideration of the defendant's insanity. Just as a defendant cannot defend on the basis that he exercised his best judgment (invoking a personal moral culpability standard), so he cannot defend on the basis of exercising no judgment since he was temporarily or permanently insane.

The standard of reasonable care requires that the reasonableness of an act be determined in light of what it means to be reasonable in a society in which society members regard their own interests, the interests of others and the interests of society as a whole. Insane individuals are members of the society and, since the reasonableness of the
act does not depend on their state of mind, it is not inconsistent to find an insane individual's act unreasonable. Conversely, it is possible to find that the act of an insane person was reasonable according to the tort liability standard of reasonableness.

In *Leary v. Oates*, the court was presented with a case in which a defendant driver entered a plea of temporary insanity to the extent that "he did not know what had happened until after the accident." Despite this plea he was found liable and the trial court's decision was upheld on appeal.

The appellate court cited a number of cases and other authorities for the general proposition that tort law is concerned with the act of the individual and its consequences rather than with the actor's mental condition:

The law looks to the person damaged by another, and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage . . . and if he caused . . . destruction by what, in some persons, would be called willful or negligent conduct, the law holds him responsible.

The court says that "the question of liability in these cases, as well as in others, is a question of policy, and is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate" and
goes on to say that "the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case [negligence] as the other [tresspass]."

The court in Leary clearly held that the standard of reasonableness is applicable, in tort, to the acts of an insane defendant and under this standard the court considered the interests of the insane person, of the injured person, and of society as a whole. Strict liability does not entail a consideration of anything other than cause. Utilitarian liability entails only a consideration of the general welfare. Only liability based on a standard of reasonableness provides a justification for the court's choice of standard and for its consideration of the enumerated interests.

The Leary court cites with approval a New York case, Sforza v. Green Bus Line, in which a bus driver suddenly became insane, lost control of the bus, collided with a parked ice truck, and injured a person in the ice truck. The defendant was found liable on a negligence theory.

B. Negligence in Design Cases

In the case of Larsen v. General Motors Corporation, the driver of an automobile claimed injury as a result of negligent design of the steering assembly of the automobile. The alleged design defect was not the cause of the accident and the manufacturer asserted that the law imposed on it no duty of
care in the design of an automobile to make it more safe to occupy during a collision. The trial court agreed with the defendant manufacturer and rendered summary judgment for it. On appeal the Eighth Circuit court reversed.

The driver did not contend that the design caused the accident but that because of the design he received injuries which he would not have otherwise received and that the injuries would not have been as serious as they were. General Motors conceded that it had a duty of care to design and construct an automobile that was reasonably safe for its intended use of being driven on the roads and one that would not have latent or hidden defects.

The Eighth Circuit court accepted the view espoused by General Motors, but then scrutinized "intended use" and found that the "manufacturer should not be heard to say that it does not intend its product to be involved in any accident when it can easily foresee and when it knows that the probability over the life of its product is high, that it will be involved in some type of injury-producing accident."\(^{215}\)

As noted earlier, in a typical negligence case, a determination of fault is based on a determination of duty, breach of duty, injury, and proximate cause. The duty is the duty to exercise reasonable care. In finding that General Motors had this duty in this case, the court took into consideration:

a. the interests of the individual user
b. the interests of other automobile users

c. the interests of possible injured parties who are non-users, and

d. the interests of society.

The court stated:

We think the duty of the use of reasonable care in design to protect against foreseeable injury to the user of a product and perhaps others injured as an incident of that use should be and is equally applicable to all manufacturers with the customary limitations now applied to protect the manufacturer in case of unintended and unforeseeable use.  

This duty of reasonable care in design rests on common law negligence... (emphasis added)

The common law is not sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time. The common law standard of a duty to use reasonable care in light of all the circumstances can at least serve the needs of our society until the legislature imposes higher standards or the courts expand the doctrine of strict liability for tort.

Legal acceptance or imposition of this duty would go far in protecting the user from unreasonable risks. The normal risk of driving must be accepted by the user but there is no need to further penalize the user by subjecting him to an unreasonable risk of injury due to negligence in design.

The Eighth Circuit court reversed the trial court decision and remanded the case to the trial court for proceed-
ings not inconsistent with the appellate opinion. In other words, the appellate court was instructing the trial court that the defendant did indeed have the duty of reasonable care which the trial court had found it did not have.

The Court of Appeals for the District of Columbia accepted and followed the Larsen court's principles in Knippen v. Ford Motor Co..\textsuperscript{220} In Knippen a motorcyclist was struck by a Ford stationwagon and he alleged that due to negligent design of a turn signal cover on the station wagon his injuries were made worse or, in the alternative, he received injuries which he would not otherwise have received.

Ford made a response similar to the response of General Motors in the Larsen case, but the Knippen court rejected Ford's argument. In doing so, it stated that whether a duty of reasonable care exists is not simply a question of foreseeability but is a question of fairness which must be determined by balancing the interests of the parties, the type of risk, and the societal interest in the way the dispute is resolved.\textsuperscript{221} Knippen cites Yetter v. Rajeski which states:

> Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.

Again here fault was determined by balancing the interests of the manufacturer, of users, of others and the interests of the community at large.
The court in *Dreisonstok v. Volkswagenwerk, A.G.*, takes a similar position:

Liability for negligent design thus "is imposed only when an unreasonable danger is created. Whether or not this has occurred should be determined by general negligence principles, which involve a balancing of the likelihood of harm, and the gravity of harm if it happens against the burden of the precautions which would be effective to avoid the harm." 223

In summary, every case such as this involves a delicate balancing of many factors in order to determine whether the manufacturer has used ordinary care in designing a car, which, giving consideration to the market purposes and utility of the vehicle, did not involve unreasonable risk of injury to occupants within the range of its "intended use." 224

The *Dreisonstok* court notes another court's definition of "unreasonable risk" in design as:

one which is dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchases the vehicle with the ordinary knowledge common to the community as to the characteristics of a product of the type purchased. 225

The courts, in deciding whether or not a duty of reasonable care exists, look to the individual interests of the persons involved and to the interests of society in determining what is reasonable. For example, in the negligent design cases the courts considered the interests of users, non-users, and the general public and concluded that the manufacturers did have a duty to design an automobile
reasonably fit for its intended use so as to minimize the
effect of accidents and to protect against foreseeable
injury. The duty or obligation established here is owed to
users, non-users, and to the general public—those whose
interests are at stake. It follows then that disregard for
the interests of either users, non-users, or the general
public will constitute a breach of the duty.

This view of duty of reasonable care and breach of
the duty is expressed in Passwaters v. General Motors Corp.,
which cites Larsen, supra, with approval:

The law is well established that the
manufacturer of a vehicle has a duty to
use reasonable care in the design of
the vehicle . . . This court long ago
observed: "The rule is now established
that a manufacturer owes to the public
a duty, irrespective of contract, to
use reasonable care in the manufacture
of an automobile . . . We conclude that
although the specific injury and the
manner in which it occurred may have
been difficult to foresee, nevertheless
the unshielded operation of propeller-
like blades on the four wheels of an
automobile created a high risk of
foreseeable harm to the general public.
(emphasis added)\textsuperscript{226}

Having concluded in agreement with the trial court that
there was a duty, the appellate court further concludes that
it was proper to submit the issue of breach of the duty to
the jury.

VI. Negligence vs. Strict Liability

It has generally been assumed that negligence and
strict liability are antithetical rationales of liability.\textsuperscript{227}
For example, for Ames, the reliance on a fault standard in the late 1800's indicated that the law of torts reflected a new-found ethical and moral basis which strict liability, the supposed basis of the earlier cases, did not exhibit.\textsuperscript{228}

Fletcher attempts to provide an explanatory framework that accounts for both negligence and strict liability and he attempts to show that there is no antithesis between the two since they both express the same rationale, reciprocity of risk on his theory, for the imposition of liability.\textsuperscript{229} It has already been shown that there are serious difficulties with Fletcher's program; but, following his lead, it will be shown here that negligence and strict liability do express the same rationale for the imposition of liability, although it is not Fletcher's rationale of unexcused, nonreciprocal risk-taking but rather the rationale explicated earlier in this chapter of a particular view of society and liability based on the consideration, inter alia, of social interests which is often expressed in terms of "risk" although not "risk" as understood by Fletcher.

In order to demonstrate the similarity in rationale between strict liability and negligence, Fletcher chooses a case as an example of each type of theory—\textit{Rylands v. Fletcher},\textsuperscript{230} (strict liability), and \textit{Vincent v. Lake Erie Trans. Co.}, liability with fault (negligence).

In the \textit{Rylands} case, the defendants built a water reservoir to provide water for their mill. The reservoir
was built on a tract of land adjacent to another tract with the permission of the owner of an adjacent tract. During construction of the reservoir, the contractors who had been hired by the defendants discovered some abandoned mine shafts that had been filled in. The contractors did not notify the defendants about the presence of these shafts.

The plaintiffs were lessees of a mine which was under some nearby land which was not immediately adjoining the land upon which the new reservoir was located. Although the reservoir contractors were not aware of the fact, the old mine shafts which they discovered had been worked into by plaintiffs in their operation of their mine. When the reservoir was partially filled, the old shafts gave way and the water flowed through the old shafts and flooded the plaintiffs' mine.

An action for damages was brought by the plaintiffs against the defendants for the damage to plaintiffs' flooded property. Plaintiffs' case was based on two points: (1) Defendants were liable for the contractors' negligence, whether defendants were personally liable or not; and (2) Defendants were liable whether any negligence of anyone were proved, on a strict liability theory.

The case was heard at the trial level, the Court of Exchequer, and then appealed twice -- to the Exchequer Chamber and then to the House of Lords. The Court of Exchequer would not grant plaintiffs relief on their first
point, supra, and that point, the question of defendants' vicarious liability for the negligence of an independent contractor, was not discussed on appeal. On the second point, the strict liability point, the Court of Exchequer held that the defendants were not liable. The Court of Exchequer did note that there were cases in which mere proof of damage caused by defendant was a sufficient basis for recovery.

The Court of Exchequer Chamber reversed the Court of Exchequer and found the defendants liable. In the opinion of the court, Justice Blackburn said:

We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage, which is the natural consequence of its escape. 231

In the opinion of the House of Lords upholding Blackburn and the Court of Exchequer Chamber, Lord Cairns said:

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owner or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural uses of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off
into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have been lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

* * *

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable.232

The Vincent case has already been discussed in Chapter II.

In the Rylands case both Blackburn and Cairns explain the nonreciprocal nature of the risk involved in terms of expected risk in the particular community. Also, both judges go beyond Fletcher's consideration of nonreciprocal risks between the individual parties to considerations of what is reasonable.
Blackburn speaks in terms of a duty to one's neighbors and responsibility to them for the natural consequences of an act:

It is agreed on all hands that he [a landowner] must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors . . .

... it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. 233

Blackburn notes that in the earlier common law cases, the determination has already been made that a person should know that beasts, filth and stenches have some "natural and anticipated" consequences should they escape, and that water is no different. Although this is a strict liability case, there is a prior determination concerning what a prudent and reasonable landowner should know about the consequences of escaping water.

Cairns speaks in terms of natural and nonnatural uses of the land and whether a use is one or the other is determined against the background of the particular community in which the use occurs.

Fletcher argues that:

The fact was that the defendant sought to use his land for a purpose at odds with the
use of land then prevailing in the community. He thereby subjected the neighboring miners to a risk to which they were not accustomed and which they would not regard as a tolerable risk entailed by their way of life. 234

Clearly the rationale of Rylands and of Vincent is more than Fletcher allows. Each case included considerations under both of Fletcher's paradigms and they were not limited to the consideration of a single factor or type of interest. In addition in Rylands there is a consideration with respect to reasonableness in the community. In short, the supposed antithesis between strict liability and negligence does not exist if the rationales for the imposition of each are scrutinized. Liability is imposed under each following a consideration of similar interests and circumstances, although the determination of the negligent nature of an act occurs at different points in the process.

The so-called "products liability" cases present a striking example of the similarity of rationale between strict liability and negligence liability. Also the rationale of each of these types of liability indicates that no monolithic theory is adequate to explain them. Traditional negligence has been the basis for causes of action concerning the liability of a manufacturer for injuries associated with the use of the manufacturer's product. "Products liability" on the other hand, is a form of strict liability
imposed on a manufacturer which is based on the condition of the product which causes an injury rather than upon the negligence of the manufacturer. At first glance it appears that no two bases of liability could be further apart, but an analysis of the two rationales will show that they are not so disparate and that monolithic theories do not explain them.

Although there is no need for an injured person to prove that the manufacturer was negligent in a products liability case, it still must be proved that the manufacturer sold a dangerously unsafe product. The plaintiff must establish that the product was unsafe, but he need not establish: (a) that the manufacturer was at fault in producing the product with the unsafe characteristic; (b) that the manufacturer was at fault in failing to find the unsafe characteristic; or (c) that the manufacturer was at fault for failing to correct the unsafe condition.

This does not mean, however, that a single factor such as cause or reciprocity of risk provides an adequate explanation of products liability cases or that utility considerations have had no role in the imposition of strict liability. On the contrary, at some point some authoritative body, representative of the community, has determined that there is a presumption that it is faulty to sell an unsafe chattel. "Thus, a court which appears to be taking the radical step of changing from negligence to strict liability
for products is really doing nothing more than adopting a rule that selling a dangerously unsafe chattel is negligence within itself."235

Products liability is not imposed simply on the basis of nonreciprocal risk, but is also based on a consideration of risk of injury to public community interests. The Restatement of Torts (Second) section on products liability reads as follows:

§ 402A. Special Liability of Seller of Product to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The comments on this section of the Restatement indicate that the liability imposed is the result of a consideration of a variety of interests including the interests of consumers,
of those who may be injured, and the interests of the community as a whole rather than on the basis of a particular single factor under any of the monolithic theories:

On whatever theory, the justification for strict products liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption he placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products. 236

One commentator has recognized these negligence implications in strict products liability: "Left unarticulated is the implied premise that all manufacturers can and should make safer products and that their failure to do so is a social or moral failing—in short, a return to a muted fault system of jurisprudence." 237

Fletcher argued that his narrow paradigm of reciprocity provided a rationale for negligence, strict liability, and liability for ultra-hazardous activities:

Expressing the standard of strict liability as unexcused, non-reciprocal risk-taking provides an account not only of the Rylands and Vincent decisions, but
of strict liability in general. It is apparent, for example, that the uncommon, ultra-hazardous activities pinpointed by the Restatement are readily subsumed under the rationale of nonreciprocal risk-taking. If uncommon activities are those with few participants, they are likely to be activities generating nonreciprocal risks. Similarly, dangerous activities like blasting, fumigating, and crop dusting stand out as distinct, nonreciprocal risks in the community. They represent threats of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares.

But a synopsis of the pertinent factors which are considered under each type of liability shows both that Fletcher is wrong and that an interpretation of liability such as that presented earlier in this chapter shows that these forms of liability are not antithetical.

The factors considered with respect to negligence and abnormally dangerous activities are similar to the factors considered in strict products liability:

1. The usefulness and desirability of the product—its utility to the user and to the public as a whole.

2. The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

3. The availability of a substitute product which would meet the same need and not be as unsafe.

4. The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

The factors to be weighed or considered under negligence, under strict liability for ultrahazardous activities, and under strict products liability include factors in the general categories of individual interests, the interests of others such as non-user bystanders, and the interests of the community or social utility. A theory having as its basis a view of society as presented earlier in this chapter legitimates and requires consideration of all of these interests.

In conclusion under the view of society that an autonomous individual person receives certain benefits and advantages by virtue of his membership in the society, a variety of interests, both individual and social, are of value. The correct theory of tort liability accounts for the consideration and balancing of both sorts of interests. The various monolithic theories such as Austin's, Epstein's, and Posner's, in their narrow approaches may exhibit attractive simplicity of form or of application, but they fail to capture
the important aspects of a tort situation and they fail to provide the legal decisionmaker with an adequate basis for determining liability. Liability determined with a standard of reasonableness permits and requires consideration of all of the important interests and provides the legal decisionmaker with a framework for balancing the various interests and making the correct determination.
Footnotes

Footnotes are in accordance with A UNIFORM SYSTEM OF CITATION for legal scholarship published by The Harvard Law Review Association, 1976.


2. Id. at 97, 99.


5. Id. at 98, 101.

6. Id. at 105.

7. Id. at 108-109.

8. Id. at 99. No effort is made in this work to provide a definition of lunacy or insanity. These concepts are accepted as used by the authors to be discussed.

9. Id. at 100.

10. Id. at 109-110.


12. Id. at 79-80.

13. Id. at 112.

14. Id. at 79.

15. Id. at 107; Holmes notes that since the law of tort uses moral phraseology it might be concluded that tort liability is imposed for some moral shortcoming. Holmes states that John Austin espouses the view that tort liability should only be imposed if a person is personally morally at fault. Id. at pp. 8182.

16. Id. at 108.

17. Id. at 109.

18. Id. at 108.
19. Id.
20. Id. at 125.
21. Id. at 150.
22. Id. at 152.
23. Id. at 147.
24. Id. at 123.
25. Id. at 144.
26. Id. at 125.
27. Id. at 108.
28. Id. at 95.
29. Id. at 96.
31. Id. at 38.
32. Id. at 40.
33. Id.
35. Winfield, supra.
36. Id. at 42.
37. Id. at 46.
38. Id. at 48-49.
39. Id. at 49.
40. Id. at 50.
42. Winfield, supra, at 47.

43. YEAR BOOK 2 HENRY IV, f. 18, pl. 6 (1401).


47. HOLMES, supra, at 102103.

Chapter Two


49. Causation at 503-504.

50. Defenses at 167.

51. Defenses at 167, 181; Pleadings at 577.

52. Defenses at 167.

53. Id.

54. Id.
55. Id. at 167-168.
56. Id. at 166.
58. Causation at 478.
60. Causation at 481.
61. Defenses at 167.
61a. Strict Liability at 172.
64. Causation at 481.
65. Strict Liability at 172.
66. Borgo, supra, at 443, 444.
67. Causation at 481.
68. Borgo, supra, at 442, n. 39; 443, n. 40.
69. "... Since the causation issue is addressed in the prima facie case, contextual elements introduced into the analysis by subsequent pleas cannot affect causal status. The point has practical significance, since cases may arise in which the plaintiff cannot make out his prima facie case because the defendant's causal status depends upon a contextual element that can be raised only in a subsequent plea.

Readers familiar with Epstein's substantive theory of liability will note that, according to his analysis, the plaintiff would not have a prima facie case even though the defendants intended to frighten him. Intention becomes relevant only at the third stage of the pleadings, as a reply to a valid defense. See Epstein, Intentional Harms, supra, Note 1 at 402-408. Since the paradigms require that the causal issue be decided without reference to the defendant's intention, the plaintiff will be unable to show that the defendant caused his fright. This reinforces the point made at Note 39 supra, that Epstein cannot cure the defects of his causal analysis by introducing contextual elements into subsequent pleas." Id.
70. Strict Liability at 153.


72. Strict Liability at 152.

73. Id. at 157.

74. 100 Minn. 456, 124 N.W. 221.

75. Strict Liability at 157-158.

76. Id. at 158.

77. 124 N.W. 221, 222.

78. Id.

79. Id. at 22.

80. Morris v. Platt, 32 Conn. 75 (1864).

81. Strict Liability at 159.

82. Morris, 35, supra, at 79-80.

83. Id. at 84.

84. Strict Liability at 159.

85. Id. at 158.

86. Id. at 160.


88. Id. at 419-420, 428-429.

Chapter Three


92. Id. at 773.

93. Id. at 776.


96. Posner ANALYSIS at 17.

97. Id. at 18.


100. Id. at 110.


102a. Posner, ANALYSIS at 139.

103. Id. at 13.

104. Id.

105. Id.

106. Id. at 6.

107. Id. at 15.

108. Epstein, Strict Liability, at 164.

111. Id.
112. Posner, Utilitarianism, 120.
116. Id.
117. Id. at 122.
118. Id.
119. Id. at 113.
120. Id. at 116.
121. Id.
122. Id. at 131.
123. Id. at 133.
124. Id. at 128.
125. Id. at 110.
126. 159 F.2d 169 (2nd Cir. 1947).
129. 159 F.2d 173-174.
131. Id. at 149.
132. Posner, Utilitarianism at 109, 122, 126.

135. Posner, Utilitarianism at 125.

136. The following premise from Rawls is of the type referred to: "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override." John Rawls, A THEORY OF JUSTICE (1971).

137. Id. at 123, 124, 136.


139. Id. at 116.


Chapter Four


142. Id. at 538. This view is strikingly similar to Epstein's as discussed at page 4, Chapter Two and footnotes 56, 57, and 58.

143. Id. at 540; footnote 49, Chapter Two.


145. Fletcher, supra, at 564.

146. Id. at 542.

147. Id. at 560, n. 82.

148. Id. at 548.

149. Id.

150. Id. at 541.

151. RESTATEMENT (SECOND) OF TORTS, § 520 (f).

153. Fletcher, supra, at 545.

154. Id. at 549.

155. Id.

156. Marchall, in 5. supra, at 1073.

157. Fletcher, supra, at 541, 551 and 553.

158. Id.

159. Id. at 556.

160. Id. at 557.

161. Id. at 559.

162. Id. at 560.

163. Id.

164. RESTATEMENT (SECOND), supra.

165. Id. at 563.

166. Id. at 560.

Chapter Five

167. 51 N.Y. 476 (1973).

168. Restatement of Torts, Second, § 822, p. 112. A similar view is presented in Corpus Juris Secundum and in American Jurisprudence, Second with citations to numerous cases from jurisdictions throughout the fifty states. See 66 C.J.S., Nuisances, § 13 and 58 Am. Jur. 2d, Nuisances, § 37.


171. Prosser, supra, at § 3.

172. Epstein, Defenses at 167.

173. Epstein, Theory at 189.
174. Id. at 177.
175. Epstein, Intentional Harms at 441-442.
176. Prosser, supra, at § 32.
177. Id.
178. HERBERT, MISLEADING CASES IN THE COMMON LAW at 12.
180. Fletcher at 540.
181. Restatement of Torts, Second [hereinafter "Rest."], §520.
182. Prosser at §31, p. 149.
183. Delta Air Corp. v. Kersey, 20 S.E.2d 245 (Ga. 1942)
184. Id. at 248.
185. Id. at 250.
186. Id. at 248-49.
187. Id. at 249.
188. Id. at 250
189. Id.
190. Id.
191. Rest., Nuisances at 84.
192. Id. at § 821D.
193. Id. at § 821C, note b.
194. Id. at note c.
196. Rest., Nuisances, § 821B, note g.
197. Prosser, supra, at § 87.
198. Rest., Nuisances, § 826.
199. Id. § 827.
200. Id. § 828.
201. Id. at § 826, note c.
202. Id. at note d.
203. Id. at note e.
204. Id. at § 827, note b.
205. Id. at § 821F.
206. Id. at § 829A.
207. 78 N.E.2d 752 (Court of Appeals, Ohio, 1947).
208. Id. at 758-60.
210. Id. at 489 quoting Williams v. Hays, 38 N.E. 449 (1894).
211. Id. at 488.
212. Id.
213. 268 N.Y.S. 446 (1934).
214. 391 F.2d 495 (8th Cir. 1968).
215. Id. at 502.
216. Id. at 504.
217. Id. at 503.
218. Id. at 506.
219. Id. at 505.
220. 546 F.2d 993 (D.C. Cir. 1976).
221. Id. at 1000.
223. 489 F.2d 1066, 1071 (4th Cir. 1974) (citing Larsen).
224. Id. at 1073.
225. Id. at 1072.
226. 454 F.2d 1270, 1274-75 (8th Cir. 1972).
227. Fletcher, supra at 539.
228. Ames, supra at 110.
229. Fletcher supra at 519.
230. Court of Exchequer, 1865, 3 Hurl. & C. 774; Court of Exchequer Chamber, 1966, L.R. 1 Exch. 265; House of Lords, 1868, L.R. 3 H.L. 330.
231. Id. at 266, 267.
232. Id. at
233. Id. at
234. Fletcher at 545.
236. Rest. § 402A, note c.
238. Fletcher at 547.
239. Pertinent sections of the Restatement of Torts (Second) present the factors considered in determining negligence:

§ 282. Negligence Defined

In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest of others.

§ 284. Negligent Conduct; Act or Failure to Act

Negligent conduct may be either:

(a) an act which the actor as a reasonable man should recognize as in-
volving an unreasonable risk of causing an invasion of an interest of another, or

(b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

§ 292. Factors Considered in Determining Utility of Actor's Conduct

In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:

(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;

(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;

(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

§ 293. Factors Considered in Determining Magnitude of Risk

In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:

(a) the social value which the law attaches to the interests which are imperiled;

(b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;

(c) the extent of the harm likely to be caused to the interests imperiled;
(d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.

Pertinent sections of the Restatement concerning liability for abnormally dangerous activities are as follows:

§520. Abnormally Dangerous Activities

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;

(b) whether the gravity of the harm which may result from it is likely to be great;

(c) whether the risk cannot be eliminated by the exercise of reasonable care;

(d) whether the activity is not a matter of common usage;

(e) whether the activity is inappropriate to the place where it is carried on; and

(f) the value of the activity to the community. (Note 68).