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Can Tort Law Be Moral?

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Abstract

According to the established orthodoxy, the law of private wrongs—especially common law torts—fails to map onto our moral universe. Four objections in particular have caught the imagination of skeptics about the moral foundations of tort law: They purport to cast doubt over the moral appeal of the duty of care element; they target the seemingly inegalitarian objective standard of care; they object to the morally arbitrary elements of factual causation and harm; and they complain about the unnecessary extension of liability under the guise of the proximate cause element. Analyzing these four prevailing arguments concerning the a-moral (and, with regard to some interpretations, anti-moral) character of tort law, I shall seek to show that the normative structure of tort law can, nonetheless, be reconstructed so as to reflect, to an important extent, our considered judgments about basic moral principles.

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1. Introduction

Private law has much in common with morality. Its subject matter—the legal obligations of persons inter se—overlaps substantially with the normative sphere demarcated by the moral question of what we owe one another. The obligation to perform contractual promises provides the most striking illustration of the morality-laden character of private law. Other private law departments (such as unjust enrichment and the protection of property rights) follow this pattern, except for one notable case—that of tort, and especially negligence law. The law of private wrongs, according to the established orthodoxy, is flatly inconsistent with vindicating the duties of morally required conduct. This is the case despite the apparently moral vocabulary animating tort law, which includes mention of concepts such as wrong, fault, duty of care, duty of repair, responsibility, and so on. The most troubling consequence of the discontinuity between morality and tort law is that the latter cannot be defended (in a non-consequential fashion, of course) by recourse to its being a public expression of what we morally owe to each other. Unsurprisingly, therefore, tort law is the usual and perhaps the only serious target for constant attacks from advocates of

radical reform. As John Goldberg has bluntly put the point, it is "unloved" (Goldberg 2002, 1501).

In the following, I shall consider four prevailing arguments. In essence, each claims that it is implausible to cast the normative underpinnings of tort law in terms of morality. Even though they are quite regularly mixed together, each presents a freestanding objection to the would-be moral aspirations of tort law. More specifically, I shall show that each corresponds to a different element or elements in the characteristic *prima-facie* case (including, most prominently, that of negligence) and thus should be understood as a moral challenge not only to theoretical articulations of tort law, but also (and, perhaps, more significantly) to the *doctrinal core* of tort law.

Taking each objection in turn, I shall seek to show that the normative structure of tort law can nonetheless be reconstructed so as to reflect, to an important extent, our considered judgments about moral basic principles. Thus the core of tort law, properly understood, need not unsettle a reflective equilibrium between its theory and our moral intuitions about the right ordering of persons' practical affairs (Rawls 1971, 20). It is important to note, however, that nothing in my argument implies that the state *ought* to sanction the common law tort system, including its underlying morality, for this is a question of *political* morality that lies beyond the scope of the present paper. My argument, instead, is that insofar as its normative underpinnings are at stake, the actual tort law is not inconsistent with morality.

2. The Conventional Wisdom

To fix ideas, I commence with a paradigmatic case in the area of contemporary tort law. A motorist A is traveling on the highway slightly below the speed limit. Unfortunately, a two-second lapse of attention on the part of A results in a collision with a slowing motorist B, who is driving in front of A, preparing to take the upcoming exit. Tort law imposes a duty of due care on motorists in A's position. A's failure to discharge this duty renders A liable to B insofar as he suffers legally cognizable injuries.

There are at least four puzzles about tort law captured by this story. First, *A*'s conduct seems not to be a straightforwardly immoral act. As Jeremy Waldron has observed, we all have our moments of carelessness and we are not inclined to think this failing is "such a big deal" (Waldron 1995, 390). It is certainly not the type of failing that registers as problematic on our moral radars, and much less is it conceived of as a moral wrong (e.g., Stone 2001, 169). Nevertheless, the law of torts deems momentary lapses of care by motorists a violation of the duty of due care. Thus, the legal duty of due care might fail to strike a familiar moral chord.



The second puzzle, although granting that the duty of care can in principle be cast in terms of a moral duty, suggests that the content of the duty of care—the standard of the reasonable person—cannot be explained by reference to moral reasons for acting cautiously toward others. The doctrinal nest of this attack is the negligence element of the prima-facie case—the breach of the duty to exercise no less than reasonable care. The trouble with the objective standard of care, the argument goes, lies in its conceptual independence from the question of whether persons can comply with it. Thus, even if A does pay the utmost attention, she may still fail to fulfill the duty. Indeed, A may do her very best to keep out of harm's way but, due to her clumsiness, fail to satisfy the legal standard of due care. Her misfortune of being born this imperfect way renders her compliance with a duty to display the driving skill and judgment of the reasonable person (whose clumsiness is far less serious than A's) unattainable. Unlike the legal duty, a moral duty of care cannot require persons to do the impossible of overcoming their natural deficiencies. And so it is inappropriate to subject the likes of A to the moral criticism characteristically involved in violations of moral duties.

The third puzzle arises with respect to two elements of the prima-facie case: The harm suffered by B and the causation mediating between it and the breach of the duty of care. The same lapse in care displayed by A may sometimes result in harm, but it need not do so. Sheer luck is the crucial link between the breach of the legal duty of due care and its adverse consequences. Accordingly, the same tortious conduct receives an entirely different treatment by the law of torts based exclusively on the happenstance of harm: Whereas harmful carelessness triggers a duty of repair, no-harm cases are simply ignored. Morality, however, cannot tolerate the pervasiveness of luck at the core of tort law. Hence the question for tort law is—why luck? That is, why, of all possible institutions of cost allocation (or any other function served by tort law), design an institution that allows luck to trivialize the seemingly freestanding disvalue of failing to discharge appropriate care? However the answer may turn out, it seems that it would need to forgo morality's traditional insistence on assessing the conduct of agents in favor of the (luck-dependent) outcome of conduct.

The fourth and last puzzle takes stock of the apparent imbalance between the moral shortcomings in the conduct of the careless agent and the extent of liability for this shortcoming—that is, it casts doubts over the moral intelligibility of the proximate cause element. Even if a momentary lapse of care could amount to a violation of a moral duty, it can hardly follow that liability could extend to an almost unlimited extent. This is because a fairly minor moral failing cannot explain why the injurer must be responsible, and therefore liable, for the enormous costs that may befall the injured. After all, the extent of liability can be made more limited so as to reflect the true moral character of the tortious conduct in question. Tort

law, however, makes no such accommodations, and thus a breach of a duty of due care can trigger liability out of proportion to the slightly morally defective conduct of the injurer (Waldron 1995; Zipursky 1998, 77).

As this brief presentation suggests, the fact that each puzzle gives rise to an independent worry about the moral aspiration of tort law means that it is better to consider each in turn. To be sure, the puzzles mentioned above do not span the full range of objections to the moral aspirations of tort law. However, they are commonly taken to pose some of the greatest threats to the view that tort law expresses ideals rooted deep in our moral experience of one another (Schroeder 1995; Postema 2001, 2). Overcoming these threats may not insure tort law against the necessity of undergoing radical reforms, but it would certainly shift the heavy burden of persuasion onto the reformers' shoulders, pressing on them to explain why, even when it is not morally arbitrary, we should abolish or remake tort law.

3. The Wrongness in Carelessness

So why would we say that a momentary lapse of care (say, *A* taking her eyes off the road for just two seconds) seems not to be "such a big deal," morally speaking? After all, as I shall explain in more detail when analyzing the fourth puzzle below, anyone would concede that being careless *could* be a big deal. It all depends on the context. Driving a car is arguably a case in point, for it is common knowledge that in our crowded streets almost any lack of attention can be hazardous to other motorists and pedestrians.¹

A better way to understand the no-big-deal intuition involves uncovering the nature of carelessness. In particular, a comparison to other familiar forms of tortious conduct—intentional and reckless infringement of others' rights and interests—may provide a good sense of how morally significant (or insignificant) cases of carelessness are. This is so because the former undeniably mesh well with the moral universe.² Indeed, the intuition that carelessness, unlike intentional and reckless wrongdoing, does not involve a moral failing at all is best reflected in the prominence of sustained economic analyses of *accident law* (as opposed to *tort law*) (e.g., Calabresi 1970; Shavell 1987). Subjecting tort law to strong constraints of efficiency can be appealing only insofar as the law in question is quite indifferent to the more elementary moral aspects of our social life. And precisely for this reason intentional and reckless wrongdoings usually take the back seat in normative economic analysis of tort law, while calls for reform in the spirit

² The seriously immoral character of intentional and reckless wrongs is well expressed in the normative structure of the criminal law. Negligence captures very limited space in the criminal law arena.



¹ Indeed, I insist on almost any lack of attention because even a 5 mph crash can cause grave injuries to pedestrians and motorists (bikers included).

of efficiency focus almost entirely on negligence and unintentional forms of legal wrongs, more generally.³ It would be odd, or at the very least unattractive, to deploy rigorous economic analysis (with the potential of recommending profound changes) in the area of reckless and intentional wrongs. But, once again, the unmistakable dominance of economic analysis among tort scholars and students shows that there is nothing odd in turning the field of accidental injuries into economics' proving ground.

Certainly, intentional and reckless disregard of other persons seems to involve a more serious form of committing a wrong when compared to careless disregard. Indeed, Jean-Jacques Rousseau hypothesized that from an early stage in the natural development of social life, "any intentional wrong became an affront because, together with the harm resulting from the injury, the offended party saw in it contempt for his person, often more unbearable than the harm itself" (Rousseau 1997, 166). That said, precisely what is the nature of the difference between intentional (and reckless) and careless wrongdoing? I shall seek to show that intentional and reckless failures to moderate one's affairs in the face of others, on the one hand, and a similar careless failure, on the other, do not represent distinct categories of wrongful conduct. In other words, intentional and reckless disregard of others are merely quantitatively, but not qualitatively, different from their careless counterpart.

To disregard the claims of others (either intentionally or recklessly) is to commit a wrong because it involves subordinating others to the pursuit of one's own ends. Subordination, the underlying immoral conduct, should not be understood externally or *ex-post*, namely, as a state of affairs. Instead, the subordination relevant to an act of intentional disregarding (or for that matter reckless disregarding) expresses the *singling out of an object* for mistreatment. Committing assault and battery, for example, involves the implicit or explicit identification of a particular person—the victim—as the object of the misconduct, and thus represents the subordination of one person *by* another.

Carelessness, by contrast, does not entertain the special subordinating character observed a moment ago. An accident is just that—an unfortunate event that might ground (at best) a duty to repair a loss but which involves nothing by way of singling out an object of the careless act. Taking the eyes off the road for a very short time is hardly an act of *turning* any person in particular into a mere instrument against which the actor pursues his interests. Accordingly, a momentary lapse of care does not feature the wrongness characteristic of intentional or reckless disregard of others,

³ More generally, the emphasis of radical reformers on negligence, rather than on intentional torts, is evident beyond the academic circle of law and economics. A notable example is Patrick Atiyah: "In general this book is not concerned with [...] intentional torts, and certainly no proposal will be found here to abolish or reduce the liability of a person who commits an intentional tort" (Atiyah 1997, 7).

identified as the singling out of a person as the object of one's mistreatment. And insofar as the wrongness in intentional or reckless disregard of others captures the core of our moral experience of one another, carelessness by implications falls out of this crucial category, rendering its would-be moral aspirations vulnerable to the reformist movement. Or so the advocates of the first puzzle may say.

The trouble with this argument is that it allows epistemological concerns too decisive a role in making the qualitative distinction between the forms of carelessness, on the one hand, and intentional (and reckless) disregard of the claims placed by others, on the other. Indeed, an activity deemed careless does pick out an object—the particular class of persons falling within the ambit of the risk created by it. This class, in other words, consists of persons whose proximity to the risk generated by the actor exposes them (in a rather anticipated fashion) to certain adverse consequences should the risk of harm materialize. What is missing here (vis-àvis intentional disregard) is not the existence of a particular person(s) as the rational object of the disregard, but rather the actual identity of this person.4 Actual identity, however, is neither logically nor normatively required for an activity to reflect the moral wrongness in carelessness, for we ordinarily do not think that having a specific knowledge of the victim is constitutive of our moral reasons not to impose unreasonable risks of harm on others.5

Another way to put the point is to observe that discharging care (or a failure thereof) can be both impersonal *and* relational. It is impersonal in the true liberal sense that, epistemologically, appropriate care turns on nothing more than the concern for persons *as such*. And care is relational since it necessarily pertains to persons (whoever they are) logically occupying the position of the potential victims—hence the objects—of carelessness. Tort law, it is important to note, adopts *precisely* the view that the duty of due care (and a breach thereof) is relational in the sense that it is owed exclusively to those conceived of by the law as the object of the careless conduct, which is to say those standing within the zone of danger. In the celebrated *Palsgraf* case, the railroad's employee was acting carelessly by assisting a passenger to board a moving train (*Palsgraf v. Long Island Railroad Co*, New York Court of Appeals, 1928). This careless act resulted in the dropping of an unmarked package of the passenger. The falling package, filled with fireworks, exploded, causing some scales to

in the sense used at present need not include specific personal or intimate details.

⁵ It is not even entailed by intentional and reckless wrongdoing. An assault can be the upshot of a random pick of a victim from a crowd (say, the first to turn his face in the tortfeasor's direction).



⁴ I use *actual identity* to convey any knowledge beyond the trivial one of the possibility of there being a person out there that could suffer from the careless conduct (for example, knowing that *this* person standing in front of the actor is likely to get injured). Thus, identity in the sense used at present need not include specific personal or intimate details.

strike and injure the plaintiff (Mrs. Palsgraf) who was standing many feet away from the area of the interaction of the employee with the passenger. Against the dissent's broad characterization of the duty as owed to the world at large, the court (*per* Cardozo, C.J.) held that the railroad (the employee's master) had no duty of care toward Mrs. Palsgraf with respect to this incident. The ruling handed down by Cardozo reads: "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away" (ibid., 341). He then concludes that "[r]elatively to [Mrs. Palsgraf] it was not negligence at all," or in other words, carelessness is a wrong "personal" to a particular class of person (i.e., those standing within the zone of danger) (ibid., 339).

Thus, intentional, reckless, and careless disregard of others converge on a similar pattern of wrongness: singling out a human object and failing to respect those who fall under this object as free and equal agents. The disregard of the interests, rights, or actions of others is therefore the crucial property shared, albeit in different intensities, by both intentional and unintentional (and, by implication, reckless) interfering with the activities of others. And while the difference in intensity warrants harsher moral criticism in the case of intentional and reckless infliction of harm than in the case of carelessness (and may thus justify treating the former as criminal in addition to tortious), it need not bear on the more fundamental character of the conduct in question. It is one thing to say, as the fourth puzzle will discuss in some detail, that carelessness is ranked low on the moral scale, as it were; quite another to say, as the first puzzle asserts, that it is not an important matter of the morality of living in a society of others.

The first puzzle about tort law treats carelessness as "no big deal." To the extent that this argument implies that carelessness is not a straightforward subject of moral reflection and criticism, I have just shown, on the contrary, that it involves moral failings of the kind characteristic to intentional and reckless disregard for others. Accordingly, my analysis has shown that a moral theory of the legal duty of care is neither incoherent nor, worse yet, mistaken.

4. The Standard of Reasonable Care: The Requirement of Respectful Recognition

The second puzzle arises in connection with the content of the duty of due care. This duty underwrites an objective standard of conduct, which is to say a requirement to discharge the care a reasonable person would display in the case at hand. In enlisting the hypothetical reasonable person to fix the standard of conduct, tort law secures the conceptual independence of the duty of due care from the idiosyncrasy of those to whom the duty applies. On the one hand, an objective standard of care makes perfect

moral sense. If, as I shall propose in more detail below, discharging due care is an expression of respectful recognition of the intentions of other persons to form and execute their own plans (and, thus, of respectful recognition of persons as free and equal agents), subjective judgment of the required care must be avoided. Respect for others as determined, subjectively, from the respecting person's point of view, is nothing more than respecting them on one's own terms. But to respect others as free and equal agents, one should not set the terms of the respect according to one's own view of what respecting others requires. An objective standard of care, by contrast, transcends the inherently egocentric conception of subjective respect and in this sense appears to be morally sound. Accordingly, treating someone who does not meet the objective standard of care as having acted wrongfully accords with our moral intuitions concerning the respect we owe to our fellow creatures as persons with freestanding claims over their own practical lives.

On the other hand, the objective standard of care, by virtue of being objective, renders the duty of care indifferent to the abilities of persons to meet this standard successfully. Setting to one side the absolute or relative tort immunity of young children, the extremely mentally challenged, and certain physically disabled persons, some persons may suffer from any number of deficiencies that render them practically incapable of satisfying the duty to discharge due care. Nevertheless, they do incur the duty to discharge the same objective level of care. Holmes illustrates this point with a person being "born hasty and awkward [...] always having accidents and hurting himself or his neighbors," and Richard Posner refers to the "clumsier than average" person (Holmes 1881, 108; Posner 1972, 31). Another famous example from the case law is stupidity. This is the case of Vaughan v. Menlove in which the defendant ignored the repeated warnings of others not to place a rick of hay near the border of his close for fear of spontaneous combustion. Predictably, the rick burst into flames, setting the plaintiff's neighboring cottages on fire. The defendant argued that he should not be held responsible for the damage because his failure to discharge reasonable care was the upshot of "the misfortune of not possessing the highest order of intelligence" (Vaughan v. Menlove, 132 Eng. Rep. 490 (C.P. 1837), 492). In other words, the damage reflects his diminished natural capacity to attend to the demands of the plaintiff, rather than any shortcomings in his good faith efforts to be a considerate neighbor. As a matter of law, this argument may be rejected for different, cogent reasons (e.g., Weinrib 1995, 178; Coleman and Ripstein 1995).

However, a duty of due care is *morally* unintelligible insofar as it sets too high a standard of conduct. This would mean that certain of its addressees would faultlessly and systematically fail to meet it even when they *bona fide* do, not merely try to do, their best. How, then, could a moral duty of care seek the compliance of risk-creators if, for reasons such as those mentioned

above, they cannot display the level of risk-moderation specified by the duty? The trouble is not, mind you, one of statistics—the extent to which people find themselves unable to comply with the standard of reasonable care. After all, it may (in principle) be the case that there are no such people within a particular community. Nor is it the trouble of lacking awareness of the demands of reasonable care, for the deficiency of being too awkward, clumsy, or stupid may prevent people from meeting up the standard of reasonableness even when awareness obtains (as was the case in *Vaughan v. Menlove*). Instead, the point is that there can be no meaning to a *moral duty* to discharge due care in the first place insofar as the duty requires a *degree of skill* which, nonetheless, remains beyond certain persons' diminished capacities. As the leading treatise of Prosser and Keeton observes, by imposing a duty to exercise no less than reasonable care, "society may require of a person not to be awkward or a fool" (Keeton et al. 1984, 169).

That this worry has critical bite in the area of tort law is easily noticeable through the insistence of leading philosophers of torts, who ordinarily purport to defend the moral underpinnings of tort law against the spread of consequential accounts, on the *normative*, not just conceptual, separation of the category of legal wrong from its moral counterpart (Goldberg and Zipursky 2007, 1127). Indeed, moral wrongs involving deviations from the objective standard of due care cannot be attributed to persons whose deviations are a feature of their insufficient abilities to respond properly to this standard—that is, to exercise the appropriate degree of skill in moderating their risk-generating affairs. Thus, the grounds of discharging objective due care must seek explanation outside the moral center of what we owe one another. Or so the argument from the objective standard of care would have us believe.

By contrast, I shall insist that the standard of due care, when properly understood, need not pose a challenge to the moral aspirations of tort law. My argument seeks critically to investigate the alleged inconsistency of the objective standard with a moral duty of due care. I shall maintain that an objective standard of due care expresses an ideal of respectful recognition that requires that all persons (with the exceptions of very small children and the severely mentally challenged) ought and, indeed, can conform their practical affairs to the demands placed on them by others. My argument will identify the source of the difficulty attributed to the objective standard in the familiar distinction between two modes of discharging care: moderating risky activity and moderating the very choice of activity. Unlike the conventional view, I believe that discharging reasonable care need not be associated exclusively with the former mode. In making conceptual space for the latter, alongside the former, I shall seek to cast the moral foundations of the objective standard of due care into sharp relief. More specifically, I shall respond to the conventional view, according to which there can be no moral duty of care insofar as it requires persons (such as the awkward) to do *more than their best*, by arguing for a better interpretation of what counts as "to do their best" in the context of meeting the standard of due care. According to the proposed interpretation, the duty of care does not, after all, call for doing more than the best one can in terms of caring.

Following the familiar thesis of Steven Shavell (1980), the practical influence distinctive of the duty of care in torts of strict liability is often associated with moderating the very *choice* of activity (or the levels thereof), and not just the activity itself. Negligence liability, by contrast, involves only the latter form of caring. Accordingly, it is rational to reduce or even avoid entirely risky activities (and not just to engage in them vigilantly) *only insofar* as this activity is subject to strict tort liability. Indeed, Shavell concludes his thesis, saying that "[f]rom the logic of the arguments presented here, it can be seen that [...] the variable 'level of activity' [...] is not included in the due care standard" (Shavell 1980, 23).

This widely accepted characterization, however, does not succeed in driving a wedge between strict and negligence liability, except perhaps in the idiosyncratic case of ultrahazardous activities. Put simply, moderating the choice of activity is a means of discharging the duty of care available to the two categories of tort liability. Indeed, it is not clear why the tort of negligence cannot exert rational pressure on actors to moderate their choice of activities (including, if necessary, to refrain entirely from pursuing a given course of action)—it can certainly be the case that one abandons a plan because one has come to believe, or has most reason to believe, it would be too costly for one to meet the standard of reasonable care.

Consider, for example, the following pedestrian cases of persons failing to meet the standard of reasonable care due to deficiencies that would not—or would likely not—justify the kind of concern raised with respect to the likes of Menlove. Certainly, not every failure to comply with the standard of care warrants the conclusion that this standard cannot reflect genuine moral requirements of action. A voluntary intoxicated person who decides, after several rounds in the pub, to drive her way home cannot display the level of reasonable care. An English illiterate, unable to read the warning signs, cannot meet the standard of the reasonable person by stepping on an unsafe bridge in Iowa, which then breaks down (Weirs v. Jones County, 86 Iowa 625 [1892]). A medical student desiring to become a brain surgeon, though slightly suffering from trembling hands, will also find the standard of reasonable care appropriate for a person in the surgeon's shoes unattainable, not just temporally (as with the intoxicated driver and, perhaps, the English illiterate) but permanently since she lacks the unique precision characteristic of any competent brain surgeon.

The deficiencies picked out by these examples may not offend our moral intuitions concerning the intelligibility of an objective standard of care. One

possible way to see that is to suppose that the persons concerned can, in principle, overcome their diminished capacities: Quit drinking, learn basic English, and take medicine. Thus, in contrast to the awkward or the stupid, their deficiencies are contingent and, to an important extent, amendable.

But there is (at least) another way to explain these cases, and this explanation is natural to our everyday informal practices of interpersonal encounters, as sociologist Erving Goffman has observed (Goffman 1967, 15). Furthermore, it sustains the moral intelligibility of the standard of due care in the face of the incompetent person (the stupid included) because it does not turn on whether this person overcomes, for purposes of discharging care, her incompetency. Nor does it turn on whether the incompetency is a feature of one's choice (as in the voluntary intoxicated driver) or is in one's control (as in the brain surgeon case). Indeed, the intoxicated driver can simply find another method of getting home other than driving, regardless of whether or not her intoxication was voluntary. The illiterate, facing the unreadable signs before the bridge, can make a detour; and the med student can choose to practice another field of specialty within medicine, irrespective of the curability of her pathology.

More generally, there is nothing in a requirement to act as the reasonable person would that automatically rules out discharging care by moderating the choice of activity.6 Quite the contrary, it may be perfectly rational to discharge the duty of due care by refraining from adopting a given course of conduct, as in the cases just mentioned, or in the case of a criminal lawyer being asked to represent her client in a highly sophisticated business transaction (such as a transnational merger between giant corporations). Furthermore, it may also be required as a matter of duty entirely or partially to withdraw from engaging in a course of action, for "one who knows that he [...] is about to fall asleep may be negligent in driving a car" (Keeton et al. 1984, 176). And, indeed, there can be found cases acknowledging that the standard of reasonable care may require that persons would either pursue their affairs with reasonable caution or, when it is impossible for them to do that, not pursue these affairs as they initially planned (Restatement [Third] of Torts §3 cmt. j [Proposed Final Draft, 2005]).

Thus, the hasty and awkward man of Holmes may be unable to deploy all the precautions needed to achieve the level of reasonable care, say, upon riding his bike on a crowded park. But his misfortune (of being born the way he was) does not stand in the way of complying with the obligation to respect and recognize others through discharging reasonable care. He

⁶ This point is already implicit in an observation made by Warren Seavey, saying that "[t]here is, however, an element of coercion in an objective standard of intelligence since the general tendency is to *restrain action by those of sub-normal mentality* or, at least, to induce them to use greater efforts to prevent harm to others"; Seavey 1927, 12.

can get off the bike or pick an alternative route (to mention two possible solutions), and thus avoid violating the duty of due care. Likewise, the low intelligence of Menlove may fail him as far as exercising appropriate care toward others is concerned while placing the stack of hay next to the neighbor's close. However, even a stupid person can display a sufficient amount of care toward his neighbors. Rather than answering (as he actually did) to his neighbor's repeated warnings that he would chance the risk of his rick catching fire, the defendant could have taken the rick down (as suggested to him by the neighbor) or, perhaps, located it away from the extremity of his land.

As I have insisted above, the conceptual independence of the standard of due care from the peculiar judgments of individuals as to what caring requires is essential to the ideal of respectful recognition, understood as the commitment to attend to others simply by virtue of their absolute worth as persons. So far I have sought to show that, as regards certain kinds of incompetency, this ideal does not render the compliance with the duty of due care impossible. Observing that the standard of the reasonable person is conceptually susceptible to reasons for moderating the choice of activity (rather than just the activity itself), I have argued for the practical intelligibility of the duty of due care with respect to those whose capacities fall short (but not radically short) of that of the reasonable person. Bluntly put, the duty of due care, to play on Prosser and Keeton, does not require these persons not to be awkward or a fool. Instead, it requires them to adjust their practical affairs in ways that conform to the plans and acts of others. They are not asked to do that which is impossible given their unfortunate capabilities; only to display, with whatever means of moderation they can furnish, the respectful recognition due, objectively, to their fellow humans.

In reaching the final stage of the argument concerning the moral underpinnings of the objective standard of care, it is important to pause and reflect, very briefly, on the consequences of respecting others on nonsubjective (and, therefore, non-egocentric) terms. Certainly, meeting the standard of due care might be quite burdensome for the likes of the awkward insofar as it demands substantive moderation of certain of his plans of action, to the extreme point of abandoning a particular plan altogether. These inevitable consequences of being governed by an objectively-fixed standard of conduct may give rise to skepticism concerning the egalitarian commitments of the duty of due care in tort law. In requiring persons to meet the standard of care at the possible cost of moderating their choice of activities, the argument runs, tort law seems to impose, in effect, greater burdens on a particular class of person (namely, the awkward or stupid class), and thus illegitimately to discriminate against that class.

But this argument proves, if anything, the opposite and this objection should, therefore, be put to rest. It is only by virtue of imposing a duty to

exercise reasonable care on the awkward and stupid that their moral equality can be vindicated, not the other way around. Treating persons as free and equal agents cannot be made consistent with a relativized standard of care. This is precisely the reason tort law is reluctant to require infants and the severely mentally disadvantaged to exercise due care; only agents can violate duties and be the proper object of reactive attitudes such as resentment and indignation. By imposing on persons with deficiencies such as awkwardness and stupidity a duty of due care, the law of torts aims to judge (and, therefore, to treat) this class as equal in all relevant respects to the rest of society. Whether or not this judgment is mistaken on empirical grounds is a different question than the one concerning the very commitment to the moral equality of persons, for a mistaken judgment may count as a reason to redraw more accurately the line between duty-holders and the immune, not to reject its importance.

5. Tort Law and the Virtue of Acknowledgment

As I have asserted above, luck figures prominently at the core of tort law. Indeed, the *prima-facie* case is influenced at almost every turn by the mere happenstance of events, namely, the harm befalling others and its causal connection to the breach of the duty of care. Persons with the exact same moral failing—a breach of a duty of due care—can be treated in diametrically opposite ways, depending on whether fortune has smiled (and no-harm results) or not (and harm ensues). The salience of luck may therefore raise the worry that tort law may not conform to the general principles of equality and fairness to which all morality-based practices commonly aspire.

The trouble is not so much that the harmed person has a morally justified right to demand compensation from her injurer, but rather with the failure to respect *all* those subject to the duty of due care as equal agents. Accordingly, the question posed above does not take issue with the inner morality of tort—that is, fairness as between the injurer and the victim. Instead, it casts doubt on the institution's very ambition to restrict its concern for fairness and equality in the way it does, to the exclusion of those equally criticizeable for their moral failure to discharge appropriate care toward their fellow creatures. Simply put, it is not clear why we should create an institution (such as tort law) that incorporates luck at the expense of the *freestanding* value of discharging care toward others.

Were these observations persuasive, the moral aspirations of tort law would suffer a serious hit. For, turning away from morality's traditional preference for holding agents responsible for their conduct forces defenders of tort law to grapple with the moral implications of incorporating luck into tort law—that is, to explain why luck is not morally arbitrary.

Unsurprisingly, leading tort scholars have sought to make sense of tort law understood as a normative institution organized around the notion of responsibility for outcome, rather than for action (Honoré 1988; Perry 1992, 496–514).

Explicating tort law, especially its principle of liability, in terms of the moral significance of the result of conduct—viz., states of affairs, such as harm, causally connected (in the appropriate sense) to the conduct of persons—may appear attractive because it compensates for tort law's seeming neglect of the independent value (disvalue) of conduct (misconduct). Moreover, its commonsensical appeal renders the interpretation of tort law along these lines powerful, normatively speaking. Indeed, the basic intuition underlying this approach to the morality of tort law reminds us that many of our achievements in life are, for better or for worse, inseparable from who we are. Thus, success and failure in our projects (say, in work, school, or family) are constitutive of the way we, and our peers, understand and evaluate ourselves. The sphere of action which tort law maps on, according to this account, shares this orientation toward the end-results of persons' conduct. Thus, holding agents morally responsible for the outcomes of their risk-creating activities expresses tort law's commitment to assessing persons by reference to their effects on the world. On this view, luck poses no threat to the principles of fairness or egalitarianism, for there is built into our achievements and failures a factor of luck. Luck does not operate on outcomes (as it does on activities), but rather becomes an integral component thereof. Whereas luck exacerbates the distinction between otherwise identical activities on the basis of the happenstance of harm, it performs no such role where outcomes are concerned. In other words, it does not exert pressure toward arbitrary judgments of legal responsibility because these judgments, unlike judgments of responsibility for activities resulting in harm, do not involve luck-dependent distinctions between possible bearers of responsibility for outcomes.7

The transition from conduct- to outcome-responsibility may shield tort law from attacks on the pervasiveness of luck within the core of the institution of tort law. That said, it is not entirely clear how desirable this transition is for two different reasons: the merits of an account of moral responsibility for outcome; and its implications for the moral aspirations of tort law. To begin with, the argument suffers from a serious gap. From the

⁷ To illustrate, A and B breach the duty of due care in an almost identical fashion. A's breach results in harm; B's doesn't. An account of tort law that emphasizes responsibility for conduct makes a morally arbitrary distinction between A and B for purposes of liability imposition. But, when tort law is cashed out in terms of outcome responsibility, B is not even a candidate for liability imposition. Only A and anyone else (the victim included) who is causally connected to a given harmful outcome can be considered as possible candidate for responsibility and liability imposition.



fact that many aspects of our lives are evaluated by reference to our achievements or failures, it does not follow that this view should be extended to moral evaluation of our practical affairs. Not all judgments of crediting and debiting must, or even can, be made on the ground of our achievements and failures. Morality is perhaps among the straightforward counterexamples to the tendency to view the world of action through the lens of outcomes, focusing on the will, intentions, and actions of agents quite apart from success and failure in bringing about ends. (A good indication can be seen in a usual résumé, which is a concentrated effort to present oneself in terms of achievements. Although morality might figure, in some measure, in a résumé, it normally would not be categorized as one of the achievements detailed therein.) Achievements and failures, moreover, capture the more personal part of our practical lives; morality is, first and foremost, impersonal by nature. Thus evaluation of success and failure in many areas (such as one's career, finance, and political life) can be made from a subjective point of view and is susceptible to contextual parameters (such as culture). The point of view of morality is objective and a-contextual in important ways.⁸ Now, these observations are sufficient to give a rough sense of the gulf between the intuitive appeal of assessing persons' lives by reference to their achievements and failures, on the one hand, and the notion of moral responsibility for outcomes, on the other.

But even if this gulf can be bridged, which may well be the case, the transition to outcome responsibility comes at a heavy cost: crowding out the *freestanding* concern with appropriate conduct. More specifically, responsibility for outcome is the organizing theme of a tort theory that fails to give expression—any expression—to the moral significance of the injurer's conduct as such (i.e., quite apart from its outcomes, whatever they are). According to the idea of responsibility for outcome, even if the breach of the duty of due care constitutes a moral wrong, tort law (on this interpretation) remains indifferent. The moral character of the injurer's conduct prior to causing these harms may figure in the process of deciding what failures are properly hers, to be sure; for instance, it may serve the epistemological function of identifying, as regards the outcome in question, whose costs of activity it is, the injurer's or the victim's. But (once again) it assumes no morally necessary, let alone foundational role in this process.

The theory of responsibility for outcome in tort law concedes, even if implicitly, the force of the challenge posed by the third puzzle, namely, the difficulty of explaining the pervasiveness of luck in mediating between carelessness and harm. It attempts to overcome this challenge by changing the focus from the morality of conduct to that of outcome. This move

⁸ Essentially the same point has been made in Ripstein 2001.

⁹ It need not, of course, deny the independent value of discharging care but, nonetheless, it leaves no conceptual space for such intuition in its account of the morality of tort law.

invites important suspicions mentioned (very briefly) above. By contrast, I shall seek to defeat this challenge on its own grounds, rejecting its basic thought, namely, that luck overshadows the moral significance of behavior. Tort law, I shall argue, does insist on the basis of the freestanding value of conduct (and especially the discharge of appropriate care). Thus insisting, moreover, is perfectly compatible with our commitment to equality or fairness in tort law and elsewhere.

Because, as I have argued above, a failure to discharge appropriate care consists in the wrong of (carelessly) disregarding the legitimate claims of certain others, there must be a second-order duty in morality seeking to right the wrong. Otherwise, the duty of due care could have been discharged simply (and paradoxically) by its own breach. Moreover, because the wrongness of carelessness is, first and foremost, a wrong to *certain* others—i.e., the class of persons falling within the ambit of the risk of harm generated by the careless conduct—it seems natural that the human object of the careless conduct should have a claim in *morality* against the wrongdoer with the content of righting the wrong *to them*. This conviction is grounded in an ideal of respect for and recognition of other persons as free and equal agents.

Pursuing these intuitions a step further, the moral requirement to right the wrong warrants the re-establishment of the relation of respectful recognition (between the careless actor and the logical, human object of her carelessness) that could have been established had the careless actor discharged appropriate care. Thus, the second-order duty demands that those violating the duty of due care would put the wronged persons where they should have been placed, post the breach, save for the breach.

Nothing I have said thus far makes reference to the causal upshots of carelessness. This is appropriate given the moral concern with the value of discharging care toward others—the value of taking, in some measure, the activities (and, therefore, the intentions and plans) of persons as freestanding constraints on one's own conduct. The causal upshots of caring do not, therefore, serve to ground moral reasons for righting the wrong. Instead, they provide a *context* within which the reasons for righting the wrong apply. This context can range from the complete absence of consequences to many different kinds of harm. Accordingly, whether or not it results in harm to others, carelessness picks out the *exact same* failing, morally speaking. However, the concrete application of the second-order duty (to right the wrong) to the facts of the case would be partly determined by the relevant context.

A rough sketch of this thought may be outlined in the following way. At its generic level, the secondary duty pertaining to righting the wrong of carelessness requires some sort of an *acknowledgment* (on the part of the careless actor) of the initial wrong in order to reestablish, successfully, respectful recognition of others falling within the ambit of the risk-creating

activity. Once again, whereas the reason that grounds this remedial duty remains constant, the precise mode of reestablishing the care must be sensitive to the consequences that may flow from the breach of the duty of due care. For the mode of remedying an unsuccessful formation of respectful recognition must account for the difference between breaches of the base-line that result in no consequences at all and breaches that do result in loss; moreover, it must account for different kinds of loss, including, inter alia, psychological, dignitary, physical, and economic losses, insofar as they have different bearings on the possibility of reestablishing relations of respect and recognition among persons. Thus, the precise content of the acknowledgement must be fixed by reference to the question of what "acknowledging" requires in a given case. There seem to be (at least) three non-exclusive modes of discharging the remedial duty; each of them can be understood as expressing a judgment as to what "acknowledging" requires in the case at stake. These three are mere acknowledgment, apology, and compensation. They may not span the full range of extensions of "acknowledging" the breach of the duty of due care, but they do figure prominently in our social and moral experience of one another as persons living in a society of others.

Thus, when no harm follows the breach of the moral duty of due care, the requirement to right the wrong of careless disregard of others may warrant a mere acknowledgment of the care one owed the disregarded others. Such a simple or mere acknowledgment may be illustrated in a sentence like "I should have been more attentive to the demands of care placed on me by certain others."10 An acknowledgment of the appropriate kind places the parties in the unsuccessful relation of respectful recognition where they should have been placed, post the breach, save for the breach. Indeed, the only obstacle that stands between reestablishing a sense of interpersonal respect and the absence thereof is, until acknowledgment is given, the shortcoming on the part of the careless actor to recognize the value of adjusting her conduct to the demands of certain others, which is to say, a failure to acquire and act on the practical attitude associated with the discharge of the duty of due care. Therefore, acknowledging the value of what was lost upon failing to engage properly with other persons represents the consummation of the (missing) respectful recognition associated with discharging appropriate care.

This loose observation concerning our social practices has received theoretical reflection, especially by Erving Goffman, who has elaborated the notion of acknowledgment as a remedial activity most famously in his discussion of apology, which is a species of the genus acknowledgment. To

¹⁰ This is not to deny, of course, that *society*, rather than the immediate victim of carelessness, can demand more than this, by subjecting the careless actor to criminal, administrative, or social sanctions.

play on Goffman, an acknowledgment offered by the wrongdoer involves a "splitting" of his subjectivity into the part that failed to give due care and respect and the part that "stands back" and recognizes this shortcoming (Goffman 1971, 113–4, 120, 183).

Still, within the context of failure to discharge due care that results in no harm, mere acknowledgment may not always succeed in the reestablishment of respectful recognition among the relevant parties. Consider, for example, a nearly reckless disregard of the activity of another that happens to inflict no harm. Our moral intuitions seem to suggest that the acknowledgment needed here may often take a stronger version than the mere acknowledgment; namely, apology. An apology, then, adds a component of self-abasement to the act of acknowledgment. Thus, the careless actor recognizes that he should have cared for another, supplemented by feelings of remorse and possibly shame. At this stage of theoretical development, I do not so much worry about when precisely a remedial activity calls for apology, rather than mere acknowledgment. I have only observed what may be seen as a paradigmatic case, according to which the thicker notion of acknowledgment, apology, is warranted. After all, the purpose of introducing the concept of apology is to suggest that the activity of discharging the second-order duty, while grounded in the rationale of reinstating respectful recognition among persons, admits different remedial modes and that these modes can be cast in the context-dependent idea of acknowledging the breach of the primary duty.

As these two modes of reestablishing the relation of care and respect make sincere acknowledgment and authentic apology the defining principle of the actions prescribed by the remedial, second-order duty, there is nothing in particular that the coercive force of the law can or should do about them. For, just like norms of politeness (to give one example), legal enforcement of sincere acknowledgment and apology is just a contradiction in terms. Accordingly, the wronged person qua plaintiff cannot be put in his post-breach position (save for the breach) by resorting to the force of the law to compel the careless actor qua defendant to place him in such position. In the absence of any sort of harm to the cared-for (including even the absence of a setback to the property rights of the plaintiff), the remedial duty remains outside the margins of the law. Indeed, this is where the informal social practice of care and respect steps in to fill the gap by enlisting its enforcement mechanisms (such as the display of reactive attitudes, like resentment, against the careless actor or the resort to social pressure) in the service of inducing persons to include sincere acknowledgement or apology in their practical life, and thus to fulfill their moral duties to right the wrongs they have done others.

When they stand alone, the remedial modes of mere acknowledgment and apology are much less adequate for repairing a violation of respectful recognition of others that results in consequences such as (but not limited

to) physical harm. For neither mere acknowledgment nor apology will be capable of placing the interacting persons where, but for the failure to discharge due care, they could and should have stood—in a relation characteristic of a successful discharge of care. Indeed, the normal or right progress of the relation between the risk-taker and the victim should have resulted in respectful recognition (of the latter by the former), not in a breach of this ideal. And to rectify this wrong, the victim must be presented (by the careless actor) with a "replacement" that reflects the right kind of transformation—from ex-ante separateness to membership in a respectful society of others. Accordingly, to be put where the two should have been, the wrongdoer must adjust her plans (whatever they are) so as to reestablish this respectful position. In the case of the loss accompanying the failure to discharge the primary duty, the kind of "acknowledging" required involves rectifying the loss—making the victim whole—in addition to apologizing sincerely. Failing to repair the loss, the careless actor and her victim could not return to their respective ex-ante positions of treating and being treated on terms of respect and recognition. This is because these prior positions involved (and, indeed, presupposed) the absence of the loss occasioned by the injurer's careless disregard of the injured person.

Repairing the external and adverse consequences of the wrong, in contrast to rendering mere acknowledgement or apology, is a remedial activity perfectly compatible with the category of legality, rather than just with morality. And the legal enforcement of a moral duty to rectify such loss does not result in any logical and normative contradictions such as those occasioned by the legal enforcement of mere acknowledgement and apology. Indeed, the operation of the *legal* obligation to make reparation does not turn on its success in generating a change of heart on the part of either party to a tort.

Against this backdrop, the objection according to which tort law embraces a morally arbitrary distinction between similar acts of carelessness whose difference is a feature of sheer fortuity loses momentum. As I have just shown, tort law need not draw *any* distinction of this sort. Insisting on the conceptual and normative priority of the duty of due care over the duty of repair, tort law possesses the necessary normative materials to reject the argument from moral arbitrariness. The difference in treating harmful and harmless consequences of carelessness is a feature of a secondary question: what acknowledging requires in the case at hand. Since this question involves the application of an abstract moral duty (of righting the wrong) to the facts of the matter, an adequate answer must take into account the context within which this duty purports to operate. Mere acknowledging, apology, and compensation are three (among other) familiar modes of construing the content of the moral duty (partly) by reference to the consequences accompanying the wrong of careless disre-

gard of other persons. Rather than being flatly inconsistent with morality, this view of the place of tort law within our broader normative landscape reclaims the potency of the reasons for structuring the legal duty to right wrongs in the precise way that tort law does.

6. The Moral Integration of Conduct and Consequence

The analysis of the first puzzle focused on whether or not the legal duty of due care is necessarily shot through with moral underpinnings. I have shown that a violation of this duty, carelessness, is a moral wrong similar in its structure to the wrongs committed by intentional and reckless breaches of the duty. But although this showing achieves greater conformity between tort law and morality, it leaves unaddressed the possibility that carelessness is quantitatively, though not qualitatively, very different to intentional and reckless disregard of others. Indeed, I have explicitly acknowledged this worry, saying that it is still an open question (and one that certainly plagues my argument) whether the wrongness in carelessness passes the threshold of triviality. Surely, careless disregard of others is much less severe, morally speaking, than reckless and intentional disregard. And the question is whether carelessness reaches the point at which morality ceases to claim its otherwise effective hold.

To make this critique even more challenging, the triviality of carelessness stands in stark opposition to the remarkable duty to rectify even enormous losses resulting from such an insubstantial failing. Thus, a momentary lapse of care (say, taking one's eyes off the road) can nonetheless bring about massive loss to victims (say, millions of dollars). Upon satisfying the prima-facie case, the injurer might incur an obligation to make these victims whole. This gulf between the slightly immoral conduct and the strict legal response to it (i.e., the duty of repair) seems troubling not so much because it offends our intuitions about retributive justice. Tort law, after all, is not criminal law. The trouble, instead, is that it renders a moral explanation of the *relationship* between the respective duties of care and repair redundant. An extraordinary duty to repair a harmful violation of the duty of care implies that the moral wrongness of carelessness, because it consists of trivial fault, cannot explain and, indeed, underwrite the grounds of the duty to repair huge losses. There must be another explanation that serves to ground the latter duty and, in particular, its scope of application; it could be anything but the triviality of breaching the former duty.

It is perhaps most illuminating to understand and investigate this challenge to the moral aspirations of tort law in the light of the *prima-facie* case element of proximate cause. This element demarcates the *scope* of liability for breaches of the duty of due care resulting (as a matter of cause-in-fact) in harm. It would be appropriate to expect that judgments of proximate causation would reflect a reasonable sense of proportion



between faulty behavior and the extent of liability for that fault. In other words, the extent of liability for the harm proximately caused by minimal faulty conduct must be capped at the level above which the duty of repair fails to make sense as an obligation to right a moral wrong. And, indeed, advocates of radical reform emphasize the incredible imbalance between the character of the tortious conduct and the extent of the obligation to compensate for the consequences of this conduct (e.g., Waldron 1995).

This puzzle about tort law, however, is mistaken and therefore should be rejected. The original source of the mistake lies in the strict separation between the character of the conduct and its consequences (or at least certain consequences). To begin with, the results of disregarding the claims of others, insofar as they are reasonably foreseeable, are not foreign to persons' deliberations toward acting and, therefore, discharging care. Any course of action entails a potential change in the external world (including the change from sitting on this chair to sitting on that chair). Even when the probable or actual change does not represent an end self-consciously adopted by the actor, it is nonetheless a change causally connected to her agency. And insofar as this change can be foreseen at the time of deliberating toward action, the moral assessment of conduct must account for probable consequences.

More concretely, the moral seriousness of a given act of carelessness is partly fixed by the reasonably foreseeable consequences of the conduct. Taking one's eyes off the road for a moment while driving on a busy and speedy highway and doing the same act while slowly riding a bicycle at the park feature the same structure of moral shortcoming—careless disregard of the claims of passers-by. However, the former activity warrants harsher moral criticism because the (foreseeable) stakes are much higher than in the latter case. Or so the reactive and self-reactive attitudes normally displayed once the disregard materializes to a foreseeable harm suggest. Indeed, feelings of resentment (on the part of the victim), indignation (on the part of society), and shame and blame (on the part of the careless actor) can be anticipated to arise in different intensities in these two cases, reflecting our moral sensitivity to the degree of faultiness, rather than just to being at fault, tout court. On this view, it is implausible, let alone appropriate, to eliminate future, foreseeable consequences of conduct from judgments concerning the faulty character of this very conduct.

Against this backdrop, there is a reason to believe that the alleged disproportion between the trivial moral character of conduct and the far-reaching duty to repair harms resulting from this conduct is unsound. Indeed, attributions of fault-in-the-conduct are not indifferent to the severity of foreseeable harm. On the contrary, as I have just proposed, they incorporate consequences into the moral assessment of misconduct, implicating the degree of the faulty behavior. The *prima-facie* element of proximate cause is tort law's doctrinal reflection of this approach to first-order

ethics. Insisting on predicating the scope of the duty of repair upon *foreseeable* harms, proximate cause requires that liability would not grow out of proportion to the injurer's faulty behavior, properly understood. Thus, it establishes a necessary condition for a successful explanation, in moral terms, of the connection between misconduct *as such* and the duty to rectify the possibly massive loss befalling the victim of this conduct.

7. Conclusion

Against the backdrop of growing concerns over its moral grounds, these pages have presented an outline of a moral case for the law of torts. I have analyzed four widely acknowledged puzzles concerning the alleged inconsistency between our moral universe and torts. Each puzzle, I have shown, is no mere challenge to theoretical articulations of tort law. Instead, it also seeks the repudiation on moral grounds of the doctrinal core of tort law. Whereas theories of torts can be abandoned or adopted without necessarily affecting the actual law, the rejection of the doctrinal core of torts means the end of tort law as we think we know it. Accordingly, I have identified the precise location of each puzzle in the doctrinal architecture of tort law expressed by the five elements of the *prima-facie* case: the duty, its breach, the cause-in-fact and harm, and the proximate (or legal) cause element. The law of torts, it is argued in each of these puzzles, exemplifies everything but sound moral judgment about the appropriate way of ordering the practical affairs of members of society.

In my rejoinder, I have insisted that tort law, at least insofar as the puzzles at stake are concerned, maps on to the moral sphere of what we owe one another. First, the duty element governs a particular type of behavior—carelessness—that exhibits the same character of wrongness found in intentional and reckless forms of disregarding the claims of others. Second, I have defended the moral underpinnings of the objective standard of reasonable care against the commonly held view that this standard cannot be grounded in a moral requirement on our conduct. Third, harms and their causal linkages to prior breaches of the duty of care do not give rise to an arbitrary distinction between breaches of the duty that (luckily) do not result in harm and breaches that do. The distinction, rather, is a feature of the different contexts within which the reasons for righting the *same* wrong (of breaching the duty of care) may operate. And finally, the extraordinary scope of the duty of repair, rather than imposing liability out of proportion to the character of the tortious conduct, reflects

¹¹ This is not to say that proximate cause consists of a requirement of foreseeability only. There can be other criteria (such as different public policy considerations) needed to establish the proper scope of liability for harm. For the present purpose, however, foreseeability is the key aspect within proximate cause that bears on the connection between faulty behavior and the scope of the duty to make reparation.



the non-arbitrary interplay between conduct and its foreseeable consequences. In particular, I have insisted that morality requires taking fully into account, as tort law's duty of repair does, such upshots in passing judgments (from an *ex-ante* perspective) over the conduct *as such*.

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