

# *Responsibility and the Negligence Standard*

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**Abstract**—I identify a sense of ‘responsibility’ by which X is responsible for  $\Phi$ ing iff X’s  $\Phi$ ing was related to his capacities of rational agency in an appropriate way. I argue that the Guidance Principle (roughly: we are responsible for actions guided by our powers of rational agency when they are performed for, what we believe to be, an adequate reason, and their performance is controlled and guided by our beliefs about what reasons we have) provides a sufficient condition for responsibility, but that responsibility for negligence shows that the Guidance Principle is not necessary for responsibility. Much of the article is devoted to an analysis of negligence, and the associated duties, distinguishing between them and strict liability on the one hand and from liability arising under the Guidance Principle on the other hand. The discussion of negligence leads to a new conception of responsibility, embodied in the Rational Functioning Principle, of which the Guidance Principle is an important, but not the only component. Roughly speaking it holds us (non-derivatively) responsible for conduct which is the result of the functioning, successful or failed, of our powers of rational agency.

It is strange to experience this reversal, standing here talking when for so many years I was sitting on the other side listening, for many years alongside Herbert Hart, who, embarrassed as he was by the honour, took it in his stride.<sup>1</sup> The Hart Lecture was established through the generosity of the Tanner Trust with which Hart had been associated since the foundation of the Tanner Lectures. It marked a new stage in Hart’s contribution to Oxford, and it contributed to the transition from the times when academics in law and the humanities taught and wrote, supported by their salaries, to the new times, when they spend much of their time filing reports, applying for special research grants and special leave, organizing conferences, or giving highly-paid lectures, as I am doing today. Hart transformed legal philosophy in Oxford and beyond in the old times.

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Those who knew him know that it was not only by his writing. His personal example and his personal impact were almost as important. My good fortune in having known a number of inspiring teachers, convinced me of the importance of personal example in the academy. I do not know what Hart thought of that. He certainly did not crave, as so many do, to bind his students or younger colleagues to himself. He would flinch from manifestations of emotional dependence.

But he did know the importance of personal example. His simplicity and directness were made possible by proud recognition of his own worth, and motivated by modesty and an unflagging curiosity about people, by a willingness to be surprised, an openness to new ideas. Not that anything new or old would escape his rigorous scrutiny. But the scrutiny was kindly applied, at least in the first instance. It did not blunt his warmth and kindness towards students. Though the kindness could be obscured by the way in which Hart, a very private person, respected the privacy of others. Still, the curiosity, warmth and support shone through the reticence. He communicated a passionate interest in culture, and in politics, in philosophy and in his own work, mingling humility and self-doubt with conviction of its value and importance. The purity of his engagement with ideas shone above all. I should confess that none of these impressions is based on his private diaries. But then it would be a rash psychologist who takes the anguish a person consigns to the privacy of his diaries to be more revealing than the way one engages with friends, colleagues, students or strangers, or more authentic than what one allows to be seen, and what one betrays in one's conduct.

Chief among the ways Hart transformed the study of legal philosophy in Oxford was his success in reuniting legal philosophy with philosophy. At least from Plato to Hegel the great legal philosophers were the great philosophers. But then came the faculties of American and of English law, and legal philosophy became the preserve of legal scholars, segregated from philosophy by departmental walls. For Hart, a philosopher and a barrister turned legal philosopher, there was never a question: reconnect or not? For him the only way forward was by getting legal philosophy back to its sources in philosophy. Though the battle to keep legal philosophy rooted in philosophy is far from securely won, at least in Oxford Hart's example has been followed by his direct and indirect successors.

### 1. *Preliminaries*

I hesitate to offer the reflections that follow here of all places. It was here, indeed while I was a student, that Hart challenged criminologists, criminal lawyers and philosophers by his teaching and writing on responsibility, especially criminal responsibility.<sup>2</sup> And it was here that another of my teachers,

<sup>2</sup> See *Punishment and Responsibility* (OUP, Oxford 1968).

Tony Honoré, in work which challenged and inspired some of the leading younger writers, shifted attention to the more fundamental and difficult topic of moral responsibility and its manifestation in private law.<sup>3</sup>

I said ‘moral responsibility’, but, doubting that there is a theoretically significant distinction between the moral and the non-moral, I will say nothing about moral responsibility specifically. I will offer some observations, not—I am afraid—a complete account, about the nature of responsibility and about the relevance to its understanding of the Negligence Standard, as I will refer to the doctrine that agents are responsible for their negligent conduct, and for negligently caused harm.

The law is not my topic. The law holds people responsible for various acts, conditions or events. Put differently: people are legally responsible for various acts, conditions or events; they are responsible according to law. Expressions to that effect are to be found in authoritative legal texts, such as court decisions, and in scholarly expositions of the law. This means that the law uses the concepts of responsibility and of negligence and assigns certain consequences to being responsible. Legal responsibility renders one legally liable in certain ways.

Hohfeld<sup>4</sup>, as we all remember, identifies liability with being subject to someone’s (normative) power. Most commonly we refer to liability to indicate being subject to the power of another to impose on one some disadvantage. Typically, unlawfully causing harm places one under a legal obligation to compensate the harmed people. But again, typically, the law makes enforcement of that duty dependent on an enforcement process, often including a judicial decision, and the liability one incurs by so harming another is liability to be subject to those enforcement measures, for example, being liable to be sued for the damages one now owes. In some cases the very existence of a (legal) duty to compensate or to take some other remedial action, and not only its enforcement, is dependent on a court decision. In such cases unlawfully harming another makes one liable to be subjected to such remedial duties. I labour the point to emphasize that responsibility should not be identified with liability. Rather liability is—sometimes—a consequence of responsibility.<sup>5</sup>

Among the various senses of ‘responsibility’, the one basic for normative thought is that which Hart identifies as ‘capacity-responsibility’:

he is responsible for his actions’ is used to assert that a person has certain normal capacities. ... [namely] those of understanding, reasoning, and control of conduct.<sup>6</sup>

<sup>3</sup> Especially in T Honoré, *Responsibility and Fault* (Hart Publishing, Oxford 1999).

<sup>4</sup> WN Hohfeld, *Fundamental Legal Conceptions* (Yale UP, New Haven 1919) 50ff, esp. 58–9.

<sup>5</sup> Hart was right (see n 1, 215–6) to correct his earlier (see ch 8) mistake in thinking that in one of its senses responsibility is virtually identical with liability, and also right in criticizing other legal writers for taking this view. It is a pity that some writers still attribute to him the view that liability is one ‘type’ of responsibility. See, eg, P Cane, *Responsibility in Law and Morality* (Hart Publishing, Oxford 2002) 29.

<sup>6</sup> Hart (n 1) 227.

These, and the list can be extended, are our capacities for rational agency. The powers of reasoning and understanding are among our rational capacities, whereas the capacity to control our conduct enables us to express our rational capacities in action.<sup>7</sup> We are responsible for our conduct because we are rational agents, and as rational agents. We are not responsible in that way if we lack capacity-responsibility or if the powers of rational agency constituting it are temporarily suspended or disabled, as they are when we are asleep, or under deep hypnosis, or when sensory deprivation denies us the use of our rational capacities.

Now, in this remark ‘responsibility’ did not mean capacity-responsibility. The very point was to draw attention to the fact that we are not always responsible, in the relevant sense, for actions performed even while we possess the capacities possession of which constitutes capacity-responsibility. We need to recognize an additional, though related, sense of responsibility in which saying ‘John was responsible for Ping’ is saying that John’s Ping was related to his capacities of rational agency in an appropriate way. This sense of responsibility is my topic today. The question I will address is what relationship between our conduct, or its consequences, and our capacities of rational agency makes us responsible for them?

Responsibility in this sense should be distinguished from two other ways in which the term is used. We sometimes say ‘He is responsible for X’ to state that he is to blame for X. Responsibility in the sense I am concerned with, while a precondition of being blameworthy, is also a precondition of deserving praise. Besides, we are responsible for many actions which merit neither blame nor praise. More interestingly, ‘being responsible for X’ is sometimes used to assert that one has a duty regarding X: In saying ‘You are responsible for the building tonight’ we typically mean that it is your duty to see to it that nothing goes wrong with the building tonight.<sup>8</sup>

To see how close responsibility as duty is to responsibility in the sense I will talk about remember that only if we have capacity-responsibility are we subject to reasons for action; only then do reasons apply to us. In exploring the notion of responsibility, the one of interest to us, the connection between it and practical reason on the one hand and liability on the other hand is pivotal.

Being responsible for some act or state (such as the damage the act caused) is part of only one kind of liability-generating condition. For example, one can

<sup>7</sup> ‘Control of conduct’ is not strictly part of our rational capacities. It is however, as will be explained below, necessary for these capacities to be manifested in action in all but mental acts. See generally my ‘On the Guise of the Good’, in S Tenenbaum (ed) *Desire, Practical Reason, and the Good* (OUP, Oxford 2010) 190. Capacity-responsibility, as well as the concept of responsibility that I will discuss today, allow of degrees. To simplify I will not consider the implications of that fact. I will assume that below a certain level (probably to be only vaguely identified) one simply lacks capacity responsibility, and as a result is not responsible for one’s actions. Those who possess (that minimum degree of) capacity responsibility are responsible for an action if and only if the conditions of responsibility discussed here apply to them, i.e. if their responsibility for the actions passes a threshold condition.

<sup>8</sup> Hart talks of role-responsibility, but the duty need not depend on any specific role. See Hart (n 1) 212–4.

be liable for jury service; one can incur liability for tax in ways which do not depend on responsibility for any action. Responsibility is a condition of liability that is triggered by what the law takes to be<sup>9</sup> failure to conform to a non-derivative reason.<sup>10</sup> It is a condition of liability which arises in situations in which an action or a state of affairs is one that one should not have performed or allowed to exist and one is responsible for the failure to conduct oneself as one should have done. Liability to punishment or to pay damages, etc arising in such cases is responsibility-based.

Our goal is to establish what relationship between people's capacities of rational agency and their conduct or its consequences makes them responsible for them. A natural suggestion, which I will call the *Guidance* (by reason) *Principle* of responsibility has it that we are responsible for actions which are guided by our powers of rational agency, and for none other. Careful analysis is required to determine the conditions in which actions are so guided. As a rough guideline let me suggest that 'actions are guided by the agents' powers of rational agency when they are performed for, what the agents believe to be, an adequate reason, and their performance is controlled and guided by the agents' beliefs about what reasons they have and what conditions obtain, so that the intended actions, and no action they judge to be on balance undesirable, are performed'. Regarding actions, but not omissions, and given an appropriate understanding of control, it coincides in application with the more familiar Control Principle.<sup>11</sup>

I will argue that while the principle states a sufficient condition for responsibility, it does not set its limits. The *Negligence Standard* alerts us to clear cases of conduct for which we are responsible, even though the Guidance Principle would suggest otherwise. We need supplementary principles of responsibility.

That is why much of what is to follow is about negligence. But not necessarily about negligence law. Negligence is not a legal concept; it is merely borrowed and used by the law. Responsibility for negligent actions is generally recognized in contexts where legal liability is off the horizon. Besides, the law of

<sup>9</sup> For an explanation of my personalization of the law, see *Between Authority and Interpretation* (OUP, Oxford 2009).

<sup>10</sup> Derivative reasons are, typically, instrumental or constitutive reasons. For example, I may have a reason to take the train to Oxford, and also a reason to take the bus there, both deriving from my reason to be there (say because I promised to give a lecture). If I take the bus I no longer have a reason to take the train. Taking the bus was a way of getting there, taking the train an alternative way to the same end. Failing to follow a derivative reason has no consequences, provided one took an alternative (adequate) route to the same goal. But if one fails to get to Oxford then one ought to do something in mitigation or compensation for this failure.

<sup>11</sup> The Control Principle says that we are morally responsible for X only if X is under our rational control, or if we are responsible only because, and to the extent that X has aspects which are under our rational control. It is often identified implicitly with the Intention Principle namely that one is responsible for one's intentional actions, and for their intended or foreseen consequences. I have argued elsewhere that the two differ in significant respects. Cf my 'Being in The World: The Limits of Responsibility' (RATIO, forthcoming). I should add that advocates of the Control Principle often assume an understanding of control which differs from the one incorporated in the Guidance Principle, and which differs (though I will not argue the point here) from the common understanding of control.

negligence, as commonly demarcated, deals with matters other than liability for negligent conduct, such as vicarious liability, standards for the assessment of damages, the impact of contributory or comparative negligence, issues to do with joint tortfeasors and much else. From time to time new grounds for liability emerge out of negligence law, as happened or is happening with product liability, and the boundary between them can remain obscure for a while. Furthermore, sometimes the courts might mistakenly identify liability as arising out of responsibility for negligent acts, when in fact it is based on some other ground. Such confusions can confuse and sometimes distort the legal analysis of negligence.

Finally, much of the law of negligence concerns the identification of the standard of care people have to observe in their dealings with each other. An appropriate duty of care is essential to the Negligence Standard. As will be explained later, an inappropriately high level of care required by law may invalidate the claim that the liability due to its breach is liability for negligence. Allowing for this point, it is still the case that the law has latitude in determining the standard of care failure to comply with which renders one legally liable to compensate people injured through one's negligence. People may act negligently without being legally liable for harm caused by their negligence. In such cases we say that they are not negligent, meaning not negligent in law. If we were fussy we would say that they are negligent but not liable in law.

In saying that the law has some latitude in determining the standard of care I do not, of course, mean that its determination need not be guided by cogent reasons. I am merely saying that these reasons do not determine whether the action is negligent. They determine when one should be *legally liable* for harm caused by one's negligence. I will have nothing to say about such reasons. Similarly, the fact that negligent conduct is, other things being equal, wrong does not in itself establish the case for legal liability for negligence, and I will say nothing about the desirability of such liability compared with dealing with accidents through some insurance mechanism or in some other way.<sup>12</sup>

These observations make it clear how I avoid one of the dilemmas encountered in explaining common law doctrines. Given the impossibility of reductive non-normative explanations of normative doctrines, like negligence, sound explanations inevitably establish the conditions under which the doctrines would be justified. As a result all too often theorists of negligence law or of other legal doctrines offer justifications of existing law, manifesting the belief which used to be widespread in the legal profession, that the common law is the best of all possible laws. Such heresy cannot be further from my

<sup>12</sup> For example, New Zealand has abolished tort liability for personal injury, but negligently injuring someone is certainly still a moral wrong. There could also be cases of piecemeal rejection of such liability, by raising the standard of care required by law above the moral standard, or by implementing a different regime of liability for some harms (as in the law of strict liability and of product liability).



thoughts. In the first place, while I will attempt to vindicate responsibility for negligence, that is not a foregone conclusion. Second, even though people are responsible for their negligence, it is an open question, and not one addressed here, whether the law should make such responsibility a basis for legal liability. Finally, if it is to be a ground of liability, the law has to comply with additional considerations in determining standards of care, and remedies for their violation. So, vindication of responsibility for negligence is far removed from vindication of the law of negligence as we, or some other countries, have it.

## 2. Negligence

Given that negligence law allocates risk of liability for damages, much writing about negligence law, and there is not much discussion of negligence outside the law, is concerned with the efficiency or fairness of the distribution. But negligence law allocates risk of liability in a special way: by holding people responsible for negligently bringing about certain harms. Other parts of the law distribute risk of liability without attributing responsibility, in the sense I am discussing, to those liable for the harm.

Strict liability, a term I will confine to doctrines which share their basic structure with the rule in *Rylands v. Fletcher*<sup>13</sup>, is a case in point. It imposes an independent duty to compensate for certain harms, 'independent' in not being incurred by violating another duty, in particular not being derived from a duty not to harm.<sup>14</sup> The duty to compensate is justified, to the extent that it is, as a form of compulsory insurance (with special damage-assessment rules) for damage or harm caused, for example, by dangerous things one possesses.

Not everyone takes this view of strict liability. John Gardner, for example, argues that in strict liability the duty to compensate derives from failure to comply with a duty not to harm.<sup>15</sup> This view has its appeal. After all it is not as if the agent may harm others so long as he compensates them later. It seems natural to say that he owes damages because he wronged them by harming them. Yet an argument along these lines is at best inconclusive. Insurance schemes, think for example of state unemployment insurance, are not normally indifferent between the compensable harm not occurring and its occurrence followed by compensation. Typically payment of compensation is the inferior

<sup>13</sup> (1868) LR 3 HL 330.

<sup>14</sup> See eg the explanation that part of the basis for strict liability is 'the ultimate idea of rectifying a wrong and putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the *two innocent parties* whose acts instigated or made the harm possible' *Siegler v Kuhlman* 81 Wash 2d 448 (1972) 455–6 (emphasis added).

<sup>15</sup> John Gardner: 'The truth is that when the law imposes strict liability on D for actions of D's that injured P, it asserts that D had (and failed to perform) a straightforward obligation *not to injure P*.' 'Obligations and Outcomes in the Law of Torts' in P Cane and J Gardner (eds) *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart Publishing, Oxford 2001) 113. Alan Brudner also thinks that strict liability to compensate derives from a prior duty: *The Unity of the Common Law* (University of California Press, Berkeley 1995) 190. His variant is effectively criticized by Gardner.

option. The hoped-for result is that the harm does not occur. The trouble with the thought that strict liability to compensate depends on violation of some duty is that we lack an explanation for the duty. My doubt is not that there is no duty to do with avoiding the harm (the one which triggers the strict liability). It seems plausible to think that there is such a moral duty.<sup>16</sup> But what exactly is its content? Gardner argues persuasively that there can be duties to succeed, not only duties to try.<sup>17</sup> I would go further: even duties to try are duties to succeed, to succeed in trying.<sup>18</sup> We do not always try, and we may not succeed in trying to do something even when we set out to try to do it (I may set out to try to assassinate the president but on my way I may badly twist my ankle, spending the rest of the day in hospital, never actually trying to assassinate him).<sup>19</sup>

It is still an open question whether strict liability is a result of failure to comply with a duty to prevent harm (eg from dangerous objects in one's possession).<sup>20</sup> To show that that is the source of the liability we need a reason for the law to impose such a duty regarding dangerous objects, even though it does not impose a similar duty regarding harms covered by liability for negligence. The danger posed by dangerous objects can explain strict liability to compensate for harm they cause. It is less obvious that it can also explain why there should be a duty not to harm other than that covered by negligence law. The standard of care required by the negligence doctrine varies with the risk posed. If this is adequate in the generality of cases why not for cases covered by strict liability? In the absence of an answer, and there may be one which evades me, it seems that strict liability is independent of breach of a duty not to harm. One final, and crucial point: even on Gardner's view, just as on mine, the function of damages under strict liability is analogous to compulsory insurance because damages are not dependent on responsibility. They do not depend on establishing that the defendant is responsible for the harm.

<sup>16</sup> Honoré, in *Making Law Bind* (Clarendon Press, Oxford 1987) 71, doubts that there is in such cases a legal duty of care, and it is natural to think that if he is right there is no legal duty to prevent harm either.

<sup>17</sup> Gardner (n 14) especially at 134–41.

<sup>18</sup> Gardner would perhaps take issue with this characterization of the obligation to try: according to Gardner, it is not correct to think of an obligation to try as another kind of obligation to succeed: 'If some people do not perform their obligation to take care however hard they try, this does not go to show that it is not an obligation to try. It only goes to show that it is an obligation to try harder (more assiduously) than they are capable of trying.' See *ibid* 118.

<sup>19</sup> Though in some cases the difference between trying to  $\phi$  and failing to  $\phi$  and trying to  $\phi$  and failing to try to  $\phi$  disappears, just as on occasion failure to try reduces to 'not trying hard enough', which concedes that one is trying.

<sup>20</sup> One cannot shortcut the argument by claiming that one has a right not to be harmed, or that one's property not be damaged, and therefore there is a duty not to harm or not to damage other people's property. Had there been a general right of that kind it would have made sense to think that strict liability arises when people invade the right but are not responsible for invading it. However, there is no general right not to be harmed. Establishing which rights we have goes hand in hand with establishing what duties we owe. That is the way I consider the matter in the text above.



Negligence is different.<sup>21</sup> Negligent conduct is not careless conduct; it is careless conduct for which one is responsible, and where care was due. It is a conceptual truth that negligent conduct is a *prima facie* wrong for which one is responsible. One can rebut allegations of negligence by establishing that one is not responsible for the conduct, or by establishing that even though the conduct was careless, one had no reason to be careful. Is it possible that one cannot ever be responsible for careless conduct? It would follow that the concept of negligence has no application (in the world—it may have applications in fiction, etc.). My aim is to vindicate responsibility for negligent conduct.

Not all writers on negligence agree that in attaching liability to negligently caused harm the law holds people responsible for such harm.<sup>22</sup> Moreover, I have already mentioned that some parts of negligence law developed into independent doctrines of strict liability. It is possible for negligence law as a whole to undergo such transformation. My brief remarks about strict liability show that, given the legal focus on remedies, it can be difficult to identify the legal reasons for liability for damages. We rely on the structure of legal rules, on reasons stated or implied in legislation or the common law, but also on the presumption that the law remains faithful to non-legal reasons which are recognized in the society.

By such indications liability for harmful negligence in English Law is based on defendants being responsible for the violation of some duty. But what duty? The most promising options are: First, there is a *duty not to harm*, but agents who caused harm are *excused* if they behaved with due care. Second: *there is a duty of care* which makes one liable to damages when its violation causes harm. Third, there are two duties, both a duty of care, and a duty not to harm through carelessness (i.e. through violation of the duty of care).

We can exclude the first option, for it misconceives the role of excuses. Some excuses negate responsibility. Others don't, and in referring to excuses I will have only the latter in mind. When a duty to compensate derives from breach of a primary duty it is typically not subject to excuses. Duties are practical reasons. Practical reasons generally admit the possibility of partial compliance. If I owe you £100, giving you £30 is paying part of my debt. I do not need a special reason to pay the £30. The reason to pay the £100 is also a reason to

<sup>21</sup> It appears that Cane (n 4, 3) really regards liability in negligence as similar in the respects analysed above, to strict liability, though his analysis of responsibility (which neither isolates nor focuses on the sense of responsibility I am investigating) may disguise the fact.

<sup>22</sup> It can be difficult to establish what writers on the subject think about this question. Many writers argue that individuals are responsible for negligently caused harm, but do not use 'responsible' in the sense I use it. Some writers use it to mean roughly the same thing as 'liable', with no implications for the characterization of the conduct outside the law. For example, Stephen Perry argues that responsibility in tort law hinges on the individual's ability to avoid causing harm. The obligation to compensate is normally triggered by fault (except in cases of strict liability), but responsibility itself is a stricter concept, and we are not always responsible only for harm we could have avoided. See Perry 'Responsibility for Outcomes, Risk, and the Law of Torts' in Gerald J Postema (ed) *Philosophy and the Law of Torts* (CUP, Cambridge 2001) 91.

pay the £30. Similarly having paid £30 by the time payment was due I should still pay the rest (possibly with compensation for the delay), and that again does not depend on there being a special reason. The original debt is still all the reason required. Agents who are responsible for failure to do what they had reason to do should, when possible, do the next best thing, in order to come as close as possible to doing what they had to do. So, if I should have cleaned your car yesterday and did not I should clean it today. The original reason is the reason for partial or second best compliance; no new reason is required. Needless to say one has to act sensibly: giving you one shoe is normally not a way partially to comply with a reason to give you a pair of shoes, nor should I stop you from using your car when you should by cleaning it today.<sup>23</sup>

If the derivative duty to compensate is the duty not to harm transformed by failure to comply into a duty to do the next best thing (restore the victims to where they should have been, or as close as possible), then it is not subject to excuses. Excuses excuse from punishment and more, but are not relevant to compensation.

Therefore the second option I mentioned: that liability for negligent harming arises out of failure to comply with duties of care, is more promising. Whatever the doubts about their precise content, there seems little doubt that we have duties of care, which are recognized in law. Moreover, exposing people to risks they know of has real and mostly undesirable consequences,<sup>24</sup> and so does people's knowledge that the conduct of others may expose them to risks. It affects people's sense of security. Breach of duties whose purpose is to reduce the risk of harm by taking due care would justify liability to damages, and the law may be right to attach liability to damages only when the breach causes actual harm. Yet, it seems that we do not merely have a duty of care, with the purpose of reducing the risk of harm. We have a duty to avoid harm to the extent that that can be done by acting with due care.

Morally speaking we have two (kinds of) duties: a duty of care and a duty not to harm by negligent breach of duties of care. In other words, there is a moral duty whose point, and therefore whose content, is to protect people from negligent harm. This combination of duties (duty of care, and a duty not to harm through negligent carelessness) constitute the Negligence Standard. In the absence of legal indicators to the contrary it would seem that at its core

<sup>23</sup> I discussed this point in 'Numbers, With and Without Contractualism' (2003) 16 *RATIO* 346–67, 348–52, reprinted in P. Stratton-Lake (ed) *On What We Owe to Each Other* (Blackwell Publishing, Oxford 2004), and in 'Personal Practical Conflict' in P. Baumann and M. Betzler (eds) *Practical Conflict* (CUP, Cambridge 2004), where I argued that outside the law the duty to compensate for a wrong one did is nothing more than the duty not to do the wrong. Institutional legal considerations generally make enforcement of such duties subject to judicial decision, and sometimes make the very recognition of their existence as legally binding duties subject to such decisions.

<sup>24</sup> Though sometimes it has desirable consequences as well, and sometimes they predominate.

legal liability for negligence manifests the Negligence Standard. A more formal characterization goes as follows:

Principle of Responsibility in Negligence (PRNeg):

*Part One:* Given any two actions,  $\Phi'$  and  $\Phi''$ , if (a) an agent  $\Phi$ 's, (b) is responsible for  $\Phi'$ ing, (c) has a duty to  $\Phi'$  only if he conforms to some conditions, (d) the rationale of the duty is to avoid performing  $\Phi''$ -type actions by  $\Phi'$ ing, (e) the agent failed to conform to that duty, (e) as a result the agent  $\Phi''$ ed by  $\Phi'$ ing, then that agent is responsible for  $\Phi''$ .

*Part Two:* Given any omission  $\Omega$ , and a state or event  $E$ , if (a) an agent  $\Omega$ s, (b) is responsible for  $\Omega$ ing, (c) has a duty not to  $\Omega$ , (d) the rationale for the duty is to avoid states or events like  $E$ , (e) had the agent not  $\Omega$ ed  $E$  would not have happened, (f)  $E$  has happened, then the agent is responsible for  $E$ .

*Principle of the Duty of Care (PDC):* Conditions (c) and (d) in both parts of *PRNeg* can normally be met without exceptional exertions by the people who are subject to them.

*Principle of Duty in Negligence (PDN):* Agents have a duty not to bring about harms of certain kinds, for which they are responsible in virtue of *PRNeg*.

### 3. Responsibility for Negligence—The Problem

My aim, you will remember, is to use the Negligence Standard in reflecting on responsibility. Negligence entails responsibility: if  $X$ 's  $\phi$ ing was negligent then  $X$  is responsible for  $\phi$ ing. Since, as I suggested earlier, that is a conceptual truth, to deny responsibility for negligent conduct is to deny that people's conduct can be negligent. That is an unlikely conclusion. Our belief that negligence is possible and common seems firm. So the task is to explain responsibility, and a condition on a successful explanation is its ability to explain responsibility for negligence.

That way of stating the task would, however, appear biased to some. It presupposes that belief that we are responsible for negligence is sound. That is not a foregone conclusion. Given how well entrenched it is we can assume that it is likely to be sound. Yet it is possible that it is based on a corrupt or indefensible understanding of responsibility. After all, the Negligence Standard entails that responsibility for negligence is inconsistent with the Guidance (as well as with the Control) Principle. First, failure to comply with the first duty, the duty of care, need not be under the agent's control. It may be due to forgetfulness, momentary loss of control (as when during driving one's foot slips off the brake) or to inexperience. Second, for every occasion on which the second duty is violated and one negligently causes harm it is possible that one would have performed the same action in an equally negligent way without causing harm. When one harmed another by negligent driving one *might* have been driving in an equally negligent way though the victim would not have been there to be harmed. The difference between the case in which negligence

causes harm and the case in which it does not is due to factors beyond the agent's control.<sup>25</sup>

Faced with this challenge some have tried to explain negligence in ways which make it consistent with the Guidance Principle. In particular it has been suggested that any negligent act is the outcome of an intentional wrongful act at an earlier time. These views have been refuted by Honoré and others, and I will not consider them.<sup>26</sup> It is also possible to reject the very idea of responsibility for negligence. To defend it we need an explanation of responsibility which not only explains responsibility for negligence, but can be defended by additional reasons. In other words, given that responsibility for negligence and for negligent harming is so central to our thought and to our attitudes to ourselves and others there is a strong presumption that the Negligence Standard is sound. But we need an account of why we are responsible for negligence which will explain why and how the Guidance Principle falls short. Not only does the Guidance Principle appear reasonable, it does, as I indicated, provide a sufficient condition of responsibility. We are looking to a conception of responsibility which generalizes and incorporates it, thus doing justice to its good sense, as well as explaining its limitations.

Not all theorists writing on negligence so much as attempt to explain how it is that people are responsible for negligent harm.<sup>27</sup> The hard law and economics practitioners allow their preoccupation with the misnamed efficiency to mask all problems. Others affirm that liability for negligence is just, because it implements a fair distribution of the risks of being liable.<sup>28</sup> The justice of the distribution of legal liability is indeed crucial for the justification of the negligence law. After all, that I am responsible for an action which harmed you does not in itself establish that I ought to compensate you. Suppose, for example, that I harmed you by employing an applicant who until then was working for you and without whom your business suffers.

<sup>25</sup> The phenomenon adverted to here exists regarding intentional actions as well. I refer here to its application to negligence merely because I am discussing negligence, and not to imply that it is special to negligence.

<sup>26</sup> Honoré, *Responsibility and Fault* (Hart Publishing, Oxford 1999). They have been refuted as explanations of negligence as we understand it. They can be advanced as alternatives to our concept of negligence. But the case for that depends on the failure of explanations of responsibility to deny that the Guidance Principle constitutes a necessary condition for responsibility, a question to be discussed in the rest of this article.

<sup>27</sup> Notable exceptions are Enoch and Marmor, who argue that responsibility for negligence is consistent with the Control Principle, mainly on the ground that liability for negligent harm does not presuppose responsibility for the harm. In their view it only presupposes responsibility for the conduct that caused it. See David Enoch and Andrei Marmor, 'The Case Against Moral Luck' (2007) 26 L & Phil 405–36, 413. John Goldberg and Benjamin Zipursky also see negligence law's apparent insensitivity to luck as an issue that a comprehensive theory of negligence should address, although their primary concern is different from Enoch and Marmor's. For Goldberg and Zipursky, the most troubling area of luck in tort law concerns 'actors who seem not to have behaved wrongfully in a full-blooded sense but nevertheless face liability for injuries they have caused. Often enough, an actor causes harm despite diligent efforts to comply with a standard of conduct.' see JCP Goldberg and BC Zipursky, 'Tort Law and Moral Luck' (2007) 92 Cornell Law Review 1123–76, 1143.

<sup>28</sup> This seems to be the view of Cane (n 4), and also Arthur Ripstein 'Equality, Luck, and Responsibility' (1994) 23 Phil Pub Affairs, 3–23, 13 (though his particular argument that liability in negligence is required if the law is to treat people as equal 'protecting them each from the activities of the others, and leaving each with room to pursue his or her own purposes' is fallacious).

Responsibility is not sufficient for liability. But, nor does the fact that a scheme of co-operation is fair establish either that people have a duty to participate in it, or that if they do their liabilities under it are based on responsibility for harmful conduct. That there is no duty to participate in a scheme of co-operation merely because it is fair, was a matter much discussed by those who tried, to my mind unsuccessfully, to fix the flaws in Rawls's argument claiming that people have such an obligation, and that it may be enforced against them.

However, even if we are bound by a scheme of distributing liability analogous to that implemented in negligence law, it would not establish that the liability so justified is responsibility-based. As I have already mentioned there is liability deriving from fair schemes of social co-operation which does not depend on responsibility, such as liability to jury service, and to most common taxes. The Negligence Standard establishes responsibility-based liability, and we need an explanation of how it is that people are responsible for negligent harm.

Honoré is one of the few squarely to confront the issue of responsibility. But his solution is essentially that liability for negligence is fair, being a species of people's responsibility for the outcome of their actions, which is fair, because they normally win, i.e. when the outcomes are favourable, as well as occasionally lose. Even if this argument is successful (which is by no means clear) it fails, for the reasons just explained, to establish the outcome-responsibility<sup>29</sup> that he aims to establish.

To understand the nature of responsibility-based liability we need to understand the role of responsibility (in the relevant sense of the term) in our life and in our practical thought. Responsibility opens agents and their conduct to a variety of assessments, making various attitudes people may have to themselves and to others appropriate. An account of responsibility would explain both for what kinds of assessment and attitudes is being responsible a condition, and why. Much discussion focuses on responsibility being a condition for moral praise or moral blame. But the preoccupation with praise and blame, natural in our blame society, misses the central role of responsibility. We need to bear in mind the full range of evaluations for which responsibility is a condition. I will not be able to do so. But reflection on liability for negligent harm, being responsibility-based and not being subject to

<sup>29</sup> Honoré does not indicate whether there are any limits to the outcomes for which one is responsible. John Gardner remarked that Honoré does not distinguish between outcomes which are constitutive of the action, being the state it is defined as bringing about, and outcomes which are the consequences of the constitutive outcomes. See Gardner (n 14) 130. von Wright usefully draw this distinction using 'results' and 'consequences' to mark it. See GH von Wright, 'On the Logic of Norms and Actions' in *Philosophical Papers* (Vol. 1 Basil Blackwell, Oxford 1983) 107. Presumably Honoré means results, including the results of actions which are the bringing about of the outcome.

excuses, applies also to cases which do not warrant blame, thus helping to break the mesmerizing fascination with responsibility as a condition of nothing but praise and blame.<sup>30</sup>

A comprehensive account of responsibility distinguishes between basic and derivative responsibility, the latter being responsibility for one thing deriving from responsibility for another. Negligence involves derivative responsibility: People are responsible for negligent harming because they are responsible for breach of a duty of care. For example, having failed to check the condition of my brakes, as was my duty, I accidentally rear-end the car ahead. The accident was due to the omission. I am in breach of my duty of care, and because of that also in breach of the duty not to harm negligently. But, as we know, my liability depends not only on wrongful action, but on wrongful action for which I am responsible. Rear-ending the car ahead was accidental. So why am I responsible for it? This is where a derivative principle comes in. It has the form: If one is responsible for action A, and if by doing A one does B (which is the bringing about of some consequence), then one is responsible for B provided the actions meet certain conditions. This derivative principle extends responsibility beyond the reach of the Guidance Principle. Can that be justified? It all depends on the condition which extends agents' responsibility for the first action to the second one.

The condition is that avoiding that consequence was the rationale of the duty not to perform A (which is therefore 'a duty of care').<sup>31</sup> Moreover, the rationale of the duty of care was obvious to those subject to the duty. I do not mean that they either knew or could readily know its precise content, or that they accepted it as sound. I mean that given the circumstances they could have easily known that they were subject to a duty of care, i.e. one designed to protect against some outcomes. I will shortly explain why in such circumstances if agents are responsible when they know of the duty they are also responsible if they could easily know about it.

This principle, which is relied upon by the Negligence Standard, is a moderate extension of the Guidance Principle by which people are responsible for the foreseen consequences of their actions. Here the foreseen consequence is the breach of duty not to negligently harm. The principle is extended to cover responsibility for the breach even if it was not foreseen (because the agent was not aware of the duty) provided it could easily have been foreseen, and to consequences of that breach which the duty was meant to prevent. There is much to say about the justification of this extension, but I will leave matters here. For an unresolved question awaits us: by the derivative principle I am

<sup>30</sup> I consider some aspects of blameworthiness in 'Agency and Luck' Unpublished, available on SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1487552](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487552)> last accessed 22 January 2010.

<sup>31</sup> A couple of points to note: (1) If this principle is sound then principles of derivative responsibility can make responsibility depend on a duty or other normative condition, while basic principles cannot. (2) The example assumes that B (causing an accident) involves actions subsequent to A (driving), but the principle applies more generally to cases in which that is not so.



responsible for the accident only if I am responsible for the breach of duty of care. My breach consisted in an omission, in the failure to check the brakes. Why am I responsible for that? The derivative principle does not help us here.

Nor, as there is no common understanding of what it is to control one's omissions, can the Control Principle help. I have suggested elsewhere<sup>32</sup> a couple of ways of understanding such control, but neither helps with our problem. Finally, the Guidance Principle too fails us. It establishes responsibility for intentional omissions, for they are guided by our powers of rational agency. But assume that the omission was unintentional. Assume that I just forgot. Are we responsible for all our unintentional omissions? That seems implausible. Think, for example, of a parent whose baby, unbeknown to him, becomes sick during the night, and dies, though he would have been saved had the parent attended to him. The parent did not, and is not responsible for the omission because he did not know, and had no reason to suspect that the baby was sick. So when are we responsible for our omissions?<sup>33</sup>

Can we keep faith with the rationale behind the Guidance Principle by relaxing it to say that one is responsible for omissions which are either guided by one's powers of rational agency (as intentional omissions are), or can be guided by them? Should the test of 'can be guided' replace that of guidance for actions as well? To apply this test to actions is to hold one responsible for any accidental action provided it could have been done intentionally. It is just about the same as dispensing with responsibility. But if this is a mistaken characterization of responsibility for actions how could it be correct when applied to omissions? It would have a similar result. The parent would be responsible for not treating the baby. Making responsibility for omissions turn not on the ability to omit intentionally, but on ability intentionally to perform the omitted action would have the same result. Besides, it is not clear why responsibility should attach to acts and omissions which could be guided by the capacities for rational agency but were not.

#### 4. *A New Conception of Responsibility*

Let us return to the Guidance Principle, and ask why it appears to fail to cover all acts and omissions for which we are responsible. The reason, it seems to me, is that it fails to capture conduct for which we are responsible and in which our rational capacities *would have guided our conduct, but for the fact that they malfunctioned*.

Does it mean that we are responsible for all actions we could and should have taken? No, for not all failures to do what we should have done are due to

<sup>32</sup> See 'Being in the World' (n 10).

<sup>33</sup> For lack of a better term, I use 'omitting to A' to mean 'not doing A'.

the malfunctioning of our capacities for rational agency. Think again of the case of the parents who did not save their baby.

Typical malfunction occurs when we intend to do something and then it slips our mind and we do not. Or, when someone fails to pick up his child from school, as he should have done, and you say to him: but you knew that they finish school early today, and he replies: yes but it did not occur to me, or I did not think of it at the time. These failures to connect, failures to do what we intended, or to intend what we would have intended had our background intentions and beliefs surfaced in consciousness at the right time, are typical of the ways in which our powers of rational agency sometimes malfunction. And, my suggestion is, we are responsible for omissions due to the malfunctioning of our powers of rational agency.

I have instanced the malfunction of some of our mental capacities to explain which unintended omissions we are responsible for. Naturally our ability physically to guide our movements can also fail us. We intentionally set out to perform actions of which we are masters, actions falling, as I put it, within our domain of secure competence, and fail to complete them as intended. For example, my foot may slip off the brake while driving. As Honoré reminded us, we are responsible for such actions, and for some of their consequences.

My suggestion differs, however, from his outcome responsibility. The only outcomes for which we are non-derivatively responsible are either (a) intended or foreseen ones or, (b) ones which result from failure, due to the malfunctioning of our capacities of agency, to complete as intended an action within our domain of secure competence. All these are united by being the outcomes of actions guided by our powers of rational agency, successfully or unsuccessfully. Non-derivative responsibility for omissions displays the same feature: intentional omissions are guided by those capacities of ours, and we are responsible for those unintended omissions which result from the malfunctioning of our powers of rational agency. In sum: conduct for which we are (non-derivatively) responsible is conduct which is the result of the functioning, successful or failed, of our powers of rational agency. I will call this the Rational Functioning Principle.

This unified account of basic responsibility meets the condition any such account must meet: it explains how capacity-responsibility is related to responsibility for conduct, in the sense we are exploring. But we need more. We need an explanation of why this, rather than some alternative, relationship between powers of rational agency and actions determines responsibility. In part the answer is in the fact that this account matches the concept of responsibility, in particular it explains responsibility for negligence. But the argument to that effect cannot be conclusive, given the multiplicity of senses and variations of senses in which 'responsibility' is used. The account has to, and can, be bolstered by an explanation of the significance of the actions for

which we are responsible in our life, a significance which depends on responsibility having this sense.

Responsibility is crucial to our sense of being in the world. That is, probably, what Honoré and others had in mind when they asserted, without explanation, that responsibility for outcomes is necessary for the constitution of our identity. An explanation can start by noticing that our sense of who we are is shaped in part by our competence in using our capacities of rational agency. While as rational agents we share certain abilities, we also differ greatly in the range of capacities of rational agency which we master, regarding which we have secure competence. The abilities which we securely command determine the range of actions which fall within our domain of secure competence (and needless to say our abilities and the domain of secure competence vary over time, partly due to our deliberate efforts). The way we feel about ourselves, our self-esteem, our self-respect, the degree to which we are content to be what we are, or what we perceive ourselves to be, our pride in ourselves, our shame in how we are, or in how we conduct ourselves—all these and various other self-directed attitudes and emotions depend in part on competence in using our faculties of rational agency. Actions due to malfunction of our capacities of rational agency result from failure to perform acts of which we are masters. In acknowledging our responsibility for these unintentional acts and omissions we affirm our mastery of these abilities, deny that we are disabled in the relevant regards. When others attribute to us responsibilities for such actions they acknowledge our mastery of those abilities, and hold us responsible for these results of their use.

Much more needs to be said to do justice to this thought and to vindicate my suggestion that it underpins the concept of responsibility. Others have written well on this, and I have added to it elsewhere.<sup>34</sup> Here I have to wrap up by examining the way in which this suggestion helps establish that liability for negligence is responsibility-based.

Take a simplified example: a driver who causes an accident. If he is a competent driver who caused the accident through momentary inattention he is responsible because one is responsible for actions within one's domain of competence even when, due to the malfunctioning of one's powers of agency, they accidentally go wrong. If he is not a competent driver then he should not have driven, and his responsibility for the accident derives from his responsibility for driving intentionally when he should not have done. A company which is liable to compensate workers injured at work because it failed to implement adequate safety measures, is derivatively responsible for the injury because it is directly responsible for the omission, if it had the information which indicated that the workplace is dangerous. Alternatively, the company is indirectly responsible for the omission, if it lacked this information,

<sup>34</sup> B Williams, 'Moral Luck' in *Moral Luck* (CUP, Cambridge 1982) 20–39; R Adams, 'Involuntary Sins' (1985) 94 *Phil Rev* 3–31; J Raz, 'Agency and Luck' (n 29) and 'Being in the World' (n 10).

because it is responsible for failing in its duty to attend to the need to secure the safety of the workplace, a duty which required it to find out which safety measures are needed.<sup>35</sup>

In brief: The content of the duties of care we are subject to is a matter of substantive principles. It is, as writers on the subject suggest, a matter of fair distribution of the risk of liability to damages. It is wrong to think that there are *a priori* principles of justice dictating the right distribution of the risk, or that some measure of economic efficiency dictates them. Both efficiency and abstract precepts of fairness need much assistance from prevailing practices to yield definite results. But that was not my topic. Furthermore, when it comes to legal duties of care the constraints of bureaucratized legal actions bring with them their own inevitable modification of the moral duties prevailing.

But none of this was my topic. Rather, I set out to explain how the very existence of moral duties which have the structure displayed by the Negligence Standard forces us to abandon some misguided ways of understanding responsibility, and lends support to the conception of responsibility as vested in conduct which results from the functioning, good or faulty, of our capacities of rational agency, and in whatever else one is responsible for in virtue of principles of derivative responsibility. I did not try to detail fully the content of the principles of responsibility, basic or derivative. My aim was to explain and partly defend the basic idea which animates those principles, and in the light of which we can proceed to establish their precise content. So long as we do not lose sight of the basic idea we are unlikely to go far wrong.

<sup>35</sup> An important aspect of the explanation of responsibility offered here is that one may have to look closely at the background of an action for which the agent is responsible to establish the grounds of the responsibility: Suppose one fails to act as one has a duty to do (let us say to check that one's baby child is sleeping safely) through momentary lapse of memory. In that case one is responsible for the omission because it is due to a malfunction of one's power of rational agency. Imagine, however, that one fails in one's duty because of feelings of hate and resentment towards the baby. In that case one's omission is not due to a malfunctioning of one's rational faculties. It is, however, intentional, and one is responsible for it according to the Guidance Principle, which is an aspect of the Principle of Rational Functioning. Suppose, however, that the parent is merely ignorant of a duty to check on the baby. In that case the omission is neither due to a malfunction of the parent's powers, nor is it intentional. Is he not responsible? That would depend on whether not being aware of the duty is due to a malfunction of the parent's powers of agency. If the parent has normal competence and he lives in a society in which such duty is widely understood then he would be responsible (derivatively) for not checking on the baby's condition. He will be responsible for the ignorance (which is due to a malfunction of his rational powers) and derivatively responsible for the omission which arises out of that malfunction. If, however, the parent is disabled (has limited mental powers) then he will not be responsible, for the omission will not be due to a malfunction of *his* powers. The same is true if he lives in an environment in which the duty is not generally understood and recognized. I am grateful to Jane Stapleton for bringing the example to my attention.