# Negligence as Property Rules

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# I. Introduction

In the current economic analysis of law, negligence has been a standard for behavior at which the sum of the precaution costs incurred respectively by the injurer and the victim and the expected loss would be minimum. This standard for behavior, however, is an *ex ante* regulation while negligence rule in the tort law is an *ex post* liability. In the tort law, negligence should be about recognition of risk. Once damage had been done, the tort law wants to know whether the injurer would have foreseen the damage and therefore could have prevented the damage. Based on human cognition, the more dangerous the activity, the more foreseeable the damage, therefore the more likely the injurer would be negligent. Contrast to the current regulation model, in this tort model, the less (physically or technologically) capable to reduce risk the injurer is, the more dangerous the activity in which he engaging becomes and thus the more likely he will be negligent. To avoid being held negligent, the injurer has incentive to improve his capability to reduce risk to make his activity less dangerous. A deterrence thesis is not required here.

For the regulation model of negligence, it would also cut strict liability off from negligence which otherwise are connected. Strict liability accordingly becomes purposeless in the law. In the current economic analysis of tort law, strict liability has not been seen as a legal doctrine. It has been used to refer the legal consequence that

the injurer is liable for the damage. It does not say anything about why or on what basis the injurer is held liable for the damage. In the real world, the injurer might be liable because he is negligent, or because he takes another's property, or because he makes noise disturbing another's peace, and so on. Without a specific context, it does not make any sense to compare negligence rule with strict liability. The tort model of negligence, however, would provide a connecting point for these two rules. It is hard for a person to deny that he could foresee the damage caused by his extremely dangerous activity. In the extremely dangerous cases, the injurer is strictly liable for the damage because he is certainly negligent.

Furthermore, the tort model of negligence would shed light on the strict liability theory based on property right. The *in rem* characteristic of property rights derives from the fact that the world know that this property owned by somebody. Due to this information, the injurer might be presumed negligent once he caused the damage. The distinction between rights *in rem* and rights *in personam* is also based on the information accessible to the world. It is difficult for any person to foresee the damage if the "rights" concealed from the world. The numbers of kinds of right *in rem* are constrained by the costs of notification, not by the balancing of so-called measurement costs and frustration costs.

It is a foundation of contract law that a person is not required to be a good

Samaritan. The regulation model of negligence, however, would require this because it costs almost nothing for the rescuer to save the victim while in the tort model of negligence, as the foreseeability deriving from dangerousness of activity, a person is not required to be a good Samaritan because it is not his (in)activity that increase the risk of damage. In other words, the person engages no activity which is dangerous. Once in the contract, whether the promisor should be liable will be determined by the agreement which might not be concerned with dangerousness of activity. The contract, however, cannot perfectly expect what will happen in the future. Once it becomes impossible or impractical for the promisor to deliver the performance, the issue whether the promisor should be discharged or liable will be solved by returning to foreseeability and dangerousness of activity.

For the current economic analysis of tort law, it is fatal that it cannot explain why compensatory damages rather than punitive damages are the normal of liability for damage. If the purpose of imposing liability is to deter the injurer, a punitive damages would be the most effective means. Why does not the tort law take this measure? The tort model of negligence would provide this explanation. The dangerousness of activity is objective which would be accepted by everyone. Therefore, whether the damage is foreseeable is a norm. If the damage was foreseeable, why the injurer did not foresee it? Human is fallible. Sometimes he just slips. According to cognitive

psychology, conscious type II thinking sometimes are just too burdensome. To punish negligence would be unnatural or unhuman.

In the Calabresi and Melamed's famous framework analyzing the protection of entitlements, it seems natural to put tort liabilities in the category of liability rules. This is superficial. On the one hand, negligence as behavior standard, however, would be more appropriate to be classified as inalienability because it punishes those behaviors below the standard. On the other hand, negligence as actually practiced, i.e., negligence as cognitive failure, should be deemed property rules. The *ex post* paying damages is not sufficient condition for liability rules. The contractual creditor *ex post* claims for damages resulting from debtor's non-intentional breach of contract. Nobody would say this is a liability rule. Rather it is a property rule enforcing what the parties agree. Negligence rule might be seen as a contract burdened with the condition (realized) that the injurer would compensate the damage if it was foreseeable but he did not foresee it.

## II. The Reasonable Man Standard

In the current economic model of negligence, a behavior standard has been set by balancing the precaution costs incurred respectively by the injurer and the victim and

the expected loss.[1] Precaution costs have been based on person's capability to reduce the risk. In this model, the more capable the person is, the less precaution costs he incurs. This leads to absurd result: the less capable the person is, the less likely he will be liable; the more capable the person is, the more likely he will be liable. For example, in the case of driving, a less capable driver, such as near-sighted or the aged, will be less likely than normal driver at the same speed to be held liable. Landes and Posner invoked the additional information costs incurred by the courts to distinguish the less capable and the more capable to justify a higher objective standard – the reasonable man standard.[2] They hit wrong target. In the case of reasonable man standard, the court exactly knows the injurer is less capable and explicitly reject the defense that his less capability allows him to enjoy a lower standard. Shavell argues that the benefits the less capable injurer deriving from engaging in the activity are less than the sum of precaution costs and expected costs and thus he should be deterred by a higher objective standard from engaging in the activity from the beginning.[3] This argument is wide of mark. First of all, if this is true and then all the analysis has to be two-step, not just one – first step determining the benefits of engaging in the activity, second step for behavior standard. Secondly, the benefits the victim engaging in the activity should also be involved and compared with the injurer's. Thirdly, why the

[1] *See* John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. Legal Stud. 323-349 (1973).
[2] William M. Landes and Richard A. Posner, The Economic Structure of Tort Law 123-131 (1987).
[3] Steven Shavell, Economic Analysis of Accident Law 73-77 (1987).

benefits the less capable injurer engaging in the activity are less than that of the more capable injurer? The theory just becomes too complicated to be a theory.

The Hand Rule should be the correct analytical model. The Judge Learned Hand said: when B<PL, in which L means actual loss, P refers to the probability of damage occurred which would be reduced if the injurer takes the considered measure, B stands for the burden for taking that measure, then the injurer should be liable. As we discuss liability *ex post*, the injurer's capability to reduce risk must be fixed (or exogenous) and thus the issue is that is it reasonable for the injurer taking the action under this circumstance. By definition, the less capable a person is, the more risks he will create once he engages in the activity. This implies once a less capable person stop engaging the activity, he would reduce more risks than a more capable person does. In the Hand Rule, this means P is larger for less capable persons and smaller for more capable persons. Therefore, a less capable person will be more likely to be liable than a more capable person is. In the case of driving, this means that a less capable driver will be more likely than a more capable driver to be held liable at the same speed. In the original case of *Carroll Towing*,[4] no guardian on board *per se* is not the reason why the owner of the barge is liable; no guardian on board, however, made the owner of the barge less capable to prevent the damage arising from collision; the

[4] 159 F. 2d 169.

probability of collision increased due to the War and the short day at the time; in the Hand Rule, P is therefore larger and the owner of the barge is liable.

As a legal rule, the Hand Rule has to be formatted in a directive form in which people can follow. This is negligence as cognitive failure. A person will be deemed negligent when he could have foreseen the coming damage but he did not. As a foundation of human cognition, the more dangerous the activity is, the more foreseeable the activity is. In the Hand Rule, PL means the dangerousness of the activity. The larger the PL is, the more dangerous the activity is and then the more foreseeable the damage is.

This understanding also shed light on the relation between negligence and intention. Landes and Posner distinguished negligence and intention based on whether the injurer put actual resources to cause damage.[5] This is incorrect and too narrow. In the Hand Rule, the value of P almost being 1 is intentional. This means that if the injurer had stopped the activity the damage would not have occurred. This would provide a more general guide to decide whether the injurer is intentional or not.

## III. Negligence and Rights *in rem*

Rights have been divided into two categories: rights *in rem* and rights *in*

[5] William M. Landes and Richard A. Posner, Intentional Torts and Damages, in The Economic Structure of Tort Law Ch.6 (1987).

*personam*. Rights *in rem* are against world while rights *in personam* are only against specific persons. This means that rights *in rem* will win when these two rights are in conflict. Why is so? Because rights *in rem* have been notified to the world while rights *in personam* have not. In terms of negligence, for third parties to the rights, rights *in personam* are not foreseeable and thus they are not negligent for the damage of the rights.

Richard Epstein put forward a strict liability theory of tort law.[6] This theory, however, could be reconciled with the negligence theory as demonstrated until now in this paper. Firstly, Epstein theory is concerned with the damage to bodily integrity and property which are prototypical rights *in rem*. A *prima facie* strict liability for damage to rights *in rem* could be a good rule in terms of its administrative efficiency resulting from sifting cases. Secondly, the four causal paradigms for *prima facie* strict liability are almost negligent *per se*. They are: (1) A hit B; (2) A frightened B; (3) A Compelled B to hit C; (4) A created the dangerous condition that resulted in harm to B; B did not create the dangerous condition that resulted in harm to A. The first three paradigms could be seen as intentional torts and the fourth dangerous activity. As we said in abovementioned section II, intentional torts are polar cases of negligence. Creating dangerous conditions, of course, is the core of negligence.

[6] Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973); *Toward a General Theory of Tort Law: Strict Liability in Context*, 3 J. Tort L. (1) Art. 6 (2010).

## IV. Negligence and Contractual Liabilities

In the current regulation model of negligence, everyone has to be a good Samaritan because it cost much less for him to prevent the damage. No contract would exist. By contrast, in the tort model of negligence, a person would not be required to be a good Samaritan because the original risk does not arise from his engaging in the activity. To make the risk foreseeable to a person who is not the originator of the risk, the risk has to be transformed into benefits a person would recognize. This is the foundation of contracts. In the contract, the person would get reward if he can prevent the damage or reduce the risk. To reduce the risk becomes the opportunity cost for the person because he would forego the benefits if he cannot make the contract or perform the contract. This is why non-contractual liability has been based on the dangerousness of the activity while contractual liabilities have been based on the benefits of the contract. A person would be less likely to be liable in a gratuitous contract than in a non-gratuitous contract given the same act.[7]

How about if a person is a good Samaritan but the damage not being prevented or even a new damage being caused? In this case, the law has not mimicked the

[7] Art. 220, Taiwan Civil Code Provides: "The debtor shall be responsible for his acts, whether intentional or negligent; The extent of responsibility for one's negligence varies with the particular nature of the affair; but such responsibility shall be lessened, if the affair is not intended to procure interests to the debtor."

market in which the rescuer would get paid by the rescuee to prevent the damage and therefore the rescuer would bear a bargain-based liability of negligence. The law has adopted an approach mimicking gratuitous contract.[8] This approach is sound. On the one hand, a non-gratuitous contractual approach would sometimes put too heavy burden on the rescuee beyond his means to pay. On the other hand, a tortious approach would burden the rescuer too much to be a good Samaritan from the beginning. A gratuitous contractual approach would balance these two disadvantages.

## V. Negligence and the Compensation of Damage

For the current deterrence-based economic theories of tort law, it is fatal that it cannot explain why a compensatory rather than punitive damages is the normal remedy for civil liabilities. Criminal punishments are usually for intentional wrongs, rarely for negligence. The measure of punitive damages would have much improved the deterrence effects. It is not a good argument that an imperfect enforcement of tort law leading to decision errors in which punitive damages would magnify the errors. If the imperfect enforcement of tort law is the assumption of punitive damages, this

[8] Art. 175, Taiwan Civil Code provides:" If the undertaking of the management of the affair is in order to avert an imminent danger which threatens the life, body or property of the principal, the manager is not responsible for any injury derived from his management, except in case of bad faith or gross negligence." Art. 2:103 PEL Ben Int. provides: "The intervener is liable to make reparation to the principal for damage caused by breach of a duty set out in this book if the damage resulted from a risk which the intervener created, increased or intentionally perpetuated; The intervener's liability is reduced or excluded in so far as this is fair and reasonable, having regard to, among other things, the intervener's reasons for acting."

assumption should also apply to compensatory damages and then it would require a under-compensatory damages. This process would go on and on, no stopping point.

Negligence as cognitive failure might solve the puzzle. A psychological explanation would be that the law should not punish the person who did not foresee he would break the rule because this sanction would not channel the person's behavior. This argument, however, has a flaw. An *ex ante* comprehensive punitive damages would boost the person's alertness to the rule. The level of foreseeability would be lowered and the person would be difficult to claim he did not foresee the damage. An Austrian perspective might help. O'Driscoll and Rizzo said that "rule-governed behavior is the *unintended* outcome of trial and error procedure."(Italicized in original)[9] The rule-governed behavior should be equivalent to the type I (fast) thinking in cognitive psychology.[10] A person to be held negligent means that the person unconsciously adopted a wrong rule to guide his behavior. As said, this is a process of trial and error. The error should not be punished otherwise the learning would cease. The error, however, should be corrected to signify it is an error. A compensation for the damage is the corrective measure.

[9] Gerald P. O'Driscoll, Jr. and Mario J. Rizzo, The Economics of Time and Ignorance 121 (1996).
[10] *See* Daniel Kahneman, Thinking, Fast and Slow (2012).

# VI. Conclusion

As Stephen Smith pointed out that people usually do what the law requires without taking into account the sanctions.[11] This is so, particularly in private law, because the law is reasonable to and thus accepted by people. In the regulation model of negligence, this connection has been missed. The courts would *ex post* encounter the negligence issue case by case purely on discretion which would not *ex ante* give any guide to people taking action.[12] This cannot be the characteristic of the private law, the representative of rule of law. By contrast, in the tort model of negligence based on the foreseeability to people taking action, the law is necessarily reasonable to and accepted by people. Guido Calabresi has suggested that economic analysis of law could be reconciled with corrective justice.[13] It cannot be more agreed with.

[11] Stephen A. Smith, *The Normativity of Private Law*, 31 Oxford J. L. Stud. 215-242 (2011).

[12] In Taiwan, this would be unconstitutional even in administrative sanctions for violating regulations. Interpretation no. 275 provides: "Where an act violates a statutory duty and is thus subject to administrative penalty, and where the law does not specify otherwise, then although intent may not necessarily be an essential condition for establishing the offender's liability, negligence would be one such condition. An act subject to administrative penalties, however, need not cause damage or danger, but need merely violate a prohibitive regulation or a legal duty to act. Such an act must be presumed negligent, and the offender shall be penalized if he/she cannot produce evidence proving a lack of negligence. The Administrative Court's Precedent P.T. No. 30 (Ad. Ct., 1973) states, "Neither intent nor negligence is essential to conditions for establishing liability for the imposition of administrative penalties." Precedent P.T. No. 350 of the same Court in the same year states, "The establishment of acts constituting an administrative offence does not rely on intent as a condition for liability. The cause of the false declarations regarding the degrees of quality and the value of the goods therefore, is not a matter of concern." Those parts of the above precedents that fail to conform to the meaning of the above are contrary to the spirit of the constitutional purpose of protecting people's rights, and shall subsequently cease to apply."

[13] Guido Calabresi, *Toward A Unified Theory of Torts*, 1 Journal of Tort Law, Iss. 3, Art. 1. (2007).