Reflections on the Theory of Negligence

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The philosophy of our time is moving steadily to the conviction that human rights and human obligations, if they are to be explained rationally or fitted into a consistent pattern, must be based fundamentally on "act." In 1920, Professor Beale believed that liability, or the disadvantageous side of legal relationship, could be imputed to an individual only because of an act.¹ Today we would say that the same is equally true of the advantageous side, and therefore of legal relations generally.

The physical effect of a given act, when described in the most sweeping language, may be said to consist of a change in external nature—a change ordinarily in an object or group of objects. By virtue of the change certain qualities or conditions which would not otherwise exist are brought to being; and certain other qualities, which would exist but for the act, are prevented from existing. The effect of the act, when viewed statically, is the difference between the two conditions and, when viewed dynamically, is the substitution of the one condition for the other.

The act has thus both a creative and a destructive aspect: But the two aspects, creation and destruction, being essentially mere points of view from which the one act is envisioned, are by their very nature inseparable. It is therefore to state one legal principle, rather than two, to say that both aspects, creation and destruction, are attributed by law to the actor. The qualities which are created by the act (i.e., those qualities which would not exist but for the act) are, if of value, placed under the dominion of the actor and become, as we loosely say, his "property." The qualities which are destroyed by the act (i.e., those qualities which would exist but for the act) become, if of value, the subject of a "duty to restore" or reimburse. Put more concisely, the actor has a jural

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¹ "Starting with a human act, we must next find a causal relation between the act and the harmful results: for in our law—and, it is believed, in any civilized law—liability cannot be imputed to a man unless it is in some degree a result of his act. Imposition of liability, even that which seems most extreme, is yet based upon the causation by the defendant's act." Beale, The Proximate Consequences of an Act (1920) 33 Harv. L. Rev. 633, 637.
claim to enjoy the object or qualities he creates and the jural duty to restore the object or qualities he destroys. Thus, if a farmer were to use his neighbor's fertilizer and seed to grow vegetables, he would have a jural claim to enjoy the vegetables he grew, but also a jural duty to make his neighbor whole for the fertilizer and seed. Every act has this double aspect and double consequence; but usually the one phase or the other can be disregarded, because either the object created or the object destroyed is of no value.

All this assumes that the act is "voluntary" in the sense that the actor, at the time of acting, foresees the effect which the act will have; for only in that situation can he be said to choose the effect. As modern psychology would explain it, only when the effect is foreseen is the mental phase of the act complete. Because most acts are motivated by an effect which the actor seeks to accomplish, and would not occur but for the motive, it is true that in the great majority of the important acts of life the effects are foreseen, if not in complete detail, at least substantially so. But this is not always true, and the instances in which it is untrue give rise to serious difficulties in legal theory. The purpose of this article is to consider one of these difficulties.

I

It is easy to say that if the effect is completely foreseen it is attributed to the actor; and that if it is completely unforeseen it is not attributed: But because the effect cannot be partly attributed (without being wholly attributed) it is not easy to say what occurs when the effect is partly (but not wholly) foreseen. The study of this situation, once largely academic, has become of in-

2. "For legal liability the state of mind is as important as the physical movement. An act upon which legal liability is ordinarily based is a movement resulting from volition." Seavey, Principles of Torts (1942) 56 Harv. L. Rev. 72, 83.

3. The philosopher would express the same thought somewhat more profoundly. He would point out that within the last fifty years we have come to look upon space and time as (for most purposes) identical, the two conceptions merely representing separate axes in a space-time continuum. He would therefore explain that to foresee something which will exist at future time is essentially no different than to be presently aware of something which is even now existing at a point distant in space. He would therefore conclude that for the law to hold a man responsible for future effects he did not foresee would be the same as to hold him responsible for a present act or event of which he is not conscious. The immunity, then, for unforeseen consequences is identical with the immunity for acts performed during sleep or coma, all being equally involuntary.

The student of history will note that the rise of the foreseeability doctrine in law follows very closely the rise of the space-time theory in modern physics; and he will conclude that it is unlikely to be dislodged by the contending doctrines which, from time to time, may appear.
creasing importance in the machine age, as it has become more and more difficult to foresee effects in their entirety. In this article we shall consider the situation which exists when the actor, knowing that he can foresee the effect only in part, nevertheless proceeds to perform the act. While the principles governing this situation would be the same whether we contemplate the creative or destructive phase of the act, it is nevertheless true that the problem arises more frequently in connection with the destructive phase; for value, although often destroyed by inadvertence, is seldom created except as the result of careful foresight. Since the discussion is largely philosophical, no effort has been made to marshal the adjudicated cases, or to weigh the conclusions of secondary authorities.

Present day thought inclines to the opinion that effects follow causes according to invariant correlations or laws so that, given a proposed act, the effect which will follow is fixed and certain, even to its minutest detail. There is no "chance" whatever that it will fail to occur, or that it will deviate even in the slightest degree. But the effect, fixed and definite though it is, may be unknown or, as we usually say, "unforeseen" by the actor at the time of the act.

Foreknowledge of the effect, like knowledge of any other future event, must be based upon a knowledge of present conditions plus a knowledge of the causal laws of natural science which correlate present conditions to future conditions. If one possessed a complete knowledge of the present, that is, a complete knowledge of all existing conditions and of all natural laws, he could foresee the exact results of a contemplated act. On the other hand, if he knew nothing whatever of present conditions or natural laws, all conceivable results would seem equally possible.

Now every human actor falls somewhere between these two extremes: He knows something but not everything about present conditions; and he knows something about natural laws. These partial and incomplete facts, in the knowledge of the prospective actor, are not sufficient to determine the exact result of the proposed act: They are sufficient only to determine it within certain

4. It is now customary to assume that the Quantum Theory of Max Planck, by pointing out that certain atomic phenomena are in their nature unknowable, has cast a shadow of doubt over this supposedly impregnable assertion. Avoiding any discussion of this highly technical field, we shall simply say that this objection goes to the possibility of complete knowledge, rather than to the consequences which would attend complete knowledge if it were possible.
limits. For this reason the individual actor, instead of foreseeing the precise effect which will result from his act, sees rather a less tangible concept or group of concepts—one or more classes of effects carved (by his experience) out of the whole infinity of effects which otherwise would be conceivable. The number of such classes, their vagueness or definiteness, as well as the extent to which they may be subdivided, depends upon the experience of the actor and his attention to the problem. Each class of effect will appear (to the actor) to have a certain probability of occurrence, i.e., of including within its bounds the effect which will actually occur.

In the ordinary case, when one contemplates a proposed act, a few fairly concrete alternative effects seem to be probable; and all other conceivable effects seem nearly impossible. This becomes more and more true as the knowledge of the individual increases. One who tosses a coin, for example, may indeed conceive of any result whatever. The coin may remain in the air, may disintegrate, or may come to rest on edge. But these results appear to be highly improbable, while one of two specific results (lighting either head or tail) appears to be almost certain. It is because this is true with most of the acts of everyday life that we are sometimes justified, for practical purposes, in speaking as though the precise result of a given action were completely foreseen, or completely unforeseen.6

II

When the court seeks to apply the law to a particular actor, it wants to know what classes of effects he foresees as probable at the time of his act. Obviously the actor himself is the one who

5. "It [Probability] is a name for someone's opinion or guess as to whether a consequence will result. In fact consequences follow causes according to invariable laws. To a sufficiently comprehensive intelligence everything would be certain, nothing merely probable. It is only because we have not knowledge of events, that are in themselves fixed and certain, that we have to consider probabilities." Terry, Proximate Consequences in the Law of Torts (1914) 28 Harv. L. Rev. 10, 17.

6. Of course the mental aspect is never quite complete in the sense that the actor knows with certainty that the injury will occur. He can only attain to a relatively high probability. If the probability is very high we call the act wilful; if it is less high we call it negligent; if it is very low, we call it "unlucky." Very little has been done to draw the line between the wilful and the negligent, most studies of negligence taking the form of an attempt to draw the line between negligence and mischance. Thus we draw the lower boundary of the field of negligence, but leave its upper boundary uncertain. This would be a very sad state of affairs were it not for the fact that the distinction between the wilful and the negligent is much less important than is ordinarily supposed.
knows, better than anyone else, the precise extent of his foresight; for he alone directly experiences it. The best evidence of his foresight would therefore be his own statement; and this would undoubtedly be accepted as conclusive if the court could be sure of its truthfulness, as is the case when it is "against interest." But the question more frequently arises under circumstances in which the court cannot be sure of the truthfulness of the actor's statement; and when it must therefore resort to what we may call "secondary" evidence.

The accepted procedure then is to disregard the statement of the actor and to call upon experience to reveal objectively what the actor foresees. This is to be learned, rather roughly to be sure but in some fashion, by recalling what others (as nearly as possible like the actor) do in fact foresee in similar circumstances. Now unfortunately the court does not know all about the actor; and therefore cannot apply this policy to the fullest extent. Insofar as it can be sure of the peculiar characteristics of the actor which might be material in deciding the extent of his foresight, it relies upon them. For example, it would take into account his eyesight, his height, his consciousness, et cetera. But insofar as it is not sure of the characteristics of the actor, it assumes that he is similar to a standard man or, in the language of the books, a "reasonably prudent person."

The standard man is an ideal human unit who plays in law a part similar to the part played in natural science by the standard physical units of physics and chemistry. The chemist, for example, analyses the reaction of a standard cubic centimeter of distilled water at 0° centigrade at sea level and, having learned the precise way in which such a unit will react, is thereafter able to predict the reaction of other and different cubic centimeters of water by simply making adjustments in his results to allow for the effect of the differences. In precisely the same way the law has studied the standard man, and having learned what he will foresee when confronted with a given set of circumstances, proceeds to conclude that the particular actor under discussion foresees the same things, except insofar as allowances must be made

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7. Professor Seavey agrees and points out in great detail the facts that are taken into consideration before the standard man test is applied.

"It would appear that there is no standardized man; that there is only in part an objective test; that there is no such thing as reasonable or unreasonable conduct except as viewed with reference to certain qualities of the actor . . . ." Seavey, Negligence—Subjective or Objective? (1927) 41 Harv. L. Rev. 1, 27.
for known variations of the individual such as blindness, deafness, et cetera.\footnote{8}

The foresight of the actor, as we have said, previsions a more or less vague concept which we might call the "field" within which the result must fall. Now the law is not interested in all the characteristics of this field: But it is vitally interested in one particular characteristic. It is interested in calculating the cumulative possibilities\footnote{9} of injuries to the person or property of other persons. It is apparent that of the infinitely large number of ways in which the act may result, many will involve no injury to others, while of the ways which do involve such injury some may involve greater and others lesser injury; the situation being ordinarily so complex that the actor cannot calculate the probability of injury with any great precision. As a mathematician would express it, he cannot calculate it \textit{a priori}, because he cannot divide the conceivable results into a finite number of situations equally likely to occur; and he cannot calculate it \textit{a posteriori} because the precise situation does not occur a sufficiently large number of times. But, while the probability of injury cannot be exactly calculated, it can be roughly estimated by practical men. Lloyds of London, to concur in the popular impression, in insuring against all injury, could set a premium which would come pretty close to representing the mathematical chance of injury resulting.

\textbf{III}

Let us assume that all this has been done, so that the court has determined just what the actor foresaw and just what chance of injury (to other persons) was involved in acting with such prospects. How is the court to decide whether the act should be permitted? Prior to this century, and in many quarters until recently, it was customary to reply that the act should be per-

\footnote{8} "To find risk, we must take the standpoint of some person who has imperfect knowledge, since if one were omniscient there would be certainty and hence no risk. We cannot, therefore, adopt the standpoint of a supposed observer who knows all the facts; we may not even adopt the standpoint of a supposed observer who has standardized information in regard to the existence of events, since as to the happening of particular events there can be no standardized knowledge. What has been done is to create a fictitious entity, the standard man, endowing him with the knowledge of the actor...." Seavey, supra note 7, at 7.

\footnote{9} "Negligence is not gauged by the probability of injuring one in plaintiff's situation alone, but by the cumulative chances of injuring persons or property in various situations." McLaughlin, Proximate Cause (1925) 39 Harv. L. Rev. 149, 166.
mitted if, and only if, the standard man standing in the position of the actor, might conceivably perform it.\(^{10}\)

That answer was based on the assumption that the standard man would react automatically and objectively to a given fact situation in much the same manner as a standard unit in physical science, such as a gram of water, would react; and, to a superficial observer, the assumption would appear to be borne out. If we knew nothing of the statutory speed limitation, but observed our fellow men (i.e., the individual exemplifications of the reasonably prudent man), occasionally driving their motor cars at speeds of 40 miles per hour, we could safely conclude that such speeds were lawful. In the same way, in the absence of statute, if we observed such men occasionally driving at speeds of 40 miles per hour, we could conclude that such speeds were not in violation of common law. But, in spite of this happy situation, it is an illusion to suppose that the standard man is acting automatically or mechanically like a purely physical substance. His reaction is deliberate, and is itself determined in part by the law or, more properly, by his opinion of his obligations under the law. The standard man, therefore, like every man, will restrict his speed primarily to obey an obligation or to avoid a penalty—at least in the “border line” type of case with which the courts are ordinarily confronted.

The conduct of the standard man is therefore a true indication of what the standard man believes the law to be. And because we can learn the belief of a particular actor by assuming that, except as we establish differences, it corresponds to the belief of the standard man, the conduct of the standard man is likewise a true indication of what the actor believes the law to be. When therefore we see the actor acting as the standard man might act, we can safely conclude that he is doing what the standard man considers lawful, and therefore that he is doing

10. At this late date it seems hardly necessary to point out that negligence cannot be defined as the breach of a duty to use care. There is no such duty in the law, care being only one of many devices by which the risk of injury, which is involved in our actions, can be reduced below the prohibited amount. No one can be exculpated simply because he uses care, or penalized simply because he does not use it. It is true that, if one acts without using care, his action will frequently involve an unreasonably high risk of injury to other persons, and may therefore amount to negligence: But the lack of care is only incidental. One can, by good fortune, act very recklessly and yet not be legally negligent: And he may likewise exercise the utmost degree of care and yet be legally negligent—a situation which, for example, when one manufactures explosives or maintains wild animals on his premises.
what he himself considers lawful. So much is true. But, since ignorance of the law excuses no one, we cannot assume that the act is lawful simply because the actor believes it to be so. We must further find that his belief is correct. We must decide what the law actually is.

What reason is there to conclusively presume, as courts do presume, that the law is precisely as the standard man thinks it to be? If a case is reasonably clear the judge is ready to state the law; but if it is a borderline proposition, difficult to decide, he finds it preferable to hand it to a jury with a vague instruction that it should decide as the

11. Seavey long ago expressed the opinion that this must be done; but nowhere is the reason explained.

"If we find that risk exists only in the consciousness of some person, (whom we have found to be the man of ordinary prudence) the same person must determine whether or not the risk is undue." Seavey, supra note 7, at 7.

12. "From saying that we will leave a question to the jury to saying that it is a question of fact is but a step, and the result is that at this day it has come to be widespread doctrine that negligence not only is a question for the jury but is a question of fact. . . .

"Every time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law, and that the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men taken at random from the street. If a man fires a gun over a prairie that looks empty to the horizon, or crosses a railroad which he can see is clear for a thousand yards each way, he is not negligent, that is, he is free from legal liability in the first case, he has not prevented his recovery by his own conduct, if he is run over, in the second, as matter of law. If he fires a gun into a crowded street, or tries to cross a track ten feet in front of an express train in full sight running sixty miles an hour, he is liable, or he cannot recover, again as matter of law, supposing these to be all the facts in the case. What new question of fact is introduced if the place of firing is something half way between a prairie and a crowded street, or if the express train is two hundred, one hundred, or fifty yards away? . . . It is so easy to accept the phrase 'there is no evidence of negligence,' and thence to infer . . . that the question is the same in kind as any other question whether there is evidence of a fact." Holmes, Law in Science and Science in Law (1899) 12 Harv. L. Rev. 443, 457.
standard man would decide.\textsuperscript{13} The standard man is resorted to in negligence cases, not because he is of any more help there than elsewhere, but primarily because negligence cases involve, more frequently than not, border-line issues of great difficulty—probabilities being, in their very nature, more difficult to handle than certainties.

Thus the adjudication of negligence cases under present law is more or less unsatisfactory. The jury is frequently bewildered when it is told that it must be guided, in its view of legality, by a consideration of the way the reasonably prudent man would have acted: For this is only to say that it must be guided, in its view of legality, by what the reasonably prudent man would have considered legal; or, in other words, it must judge the state of the law as a reasonably prudent man would judge it. This is little more than to suggest that the jury be "reasonable," and that it form its judgment in a standard way.\textsuperscript{14} It is therefore not at all surprising that juries quibble and divide under the long and cumbrous instructions which are read to them with so little result and, as some think, with so little reason, in cases involving negligence.

IV

It is therefore a long cherished wish, in many quarters, that our system of law may sometime begin to handle negligence cases in the way in which it handles other cases; i.e., by using the device of the standard man to learn the facts (just as the chemist uses his standard cubic centimeter of water for a similar purpose) but disregarding the opinion of the standard man as to the law and deciding the law rather according to the opinion of the wisest and best. In practice this would mean that the courts themselves might undertake to say what risks can or cannot be properly taken or, what is more probable, if they decide to leave to the jury the question as to the legality of a particular risk, they would outline with some particularity the standards which should guide the jury.

\textsuperscript{13} The practice has been described rather accurately, and with rare humor, by A. P. Herbert.

"There has never been a problem, however difficult, which His Majesty's judges have not in the end been able to resolve by asking themselves the simple question, 'Was this or was it not the conduct of a reasonable man?' and leaving that question to be answered by the jury."


\textsuperscript{14} "It is because the jury is supposed to consist of standard men, and therefore to know of their own knowledge how such a man would act in a given situation, that questions of reasonableness and negligence are usually left to the jury." Terry, Negligence (1915) 29 Harv. L. Rev. 40, 47.
A discussion of such standards is now proceeding in American law schools. No better example can be given than the work of Henry T. Terry, who pioneered in this project a generation ago. Terry believed that in deciding whether or not the actor should be permitted to perform the act we should weigh the end to be served by the act against the magnitude of the risk to which others would be subjected. Carrying this principle forward, Terry outlined the factors which should go into our evaluation. In favor of permitting the act, we are to weigh the value of the result which the actor seeks to obtain and the probability that the commission of the act will enable him to obtain it. In favor of prohibiting the act, we are to weigh the value of the object which is exposed to risk of injury, and the probability that the commission of the act will produce the injury.

The reader will observe that this is really to compute, as an actuary would compute, the advantages of the act in terms of human well-being, and to weigh this against the disadvantage, likewise computed in terms of human well-being. This, as has been so ably pointed out, is similar to the "balancing of interest" which has been expounded in other branches of law with so much energy and with such beneficial results to the clarity of legal thinking.

But, while Terry clearly pointed out the two factors which are to be weighed, he did not attempt to state what ratio the advantage must bear to the disadvantage in order for the act to be permitted. Only the uninitiated would suppose that the ratio is 1:1 or that, in other words, the act may be lawfully performed whenever the advantage outweighs the disadvantage by any margin, however slight. For just as the court, for his private advantage, will not permit one man to inflict an injury upon his fellow man, so neither will it ordinarily permit him to inflict a risk of injury. The two situations are identical, and are therefore to be governed by identical considerations.

15. See Terry, supra note 14.
16. "Negligence is a word used to express the value judgment that a certain activity, or in rare cases inactivity, created an undue risk of harm. Negligence may then be said to be a characteristic of conduct which creates an undue risk of harm. What is an undue risk varies with time and place, and involves a value judgment on particular conduct after the risk has materialized in harm. The greater the risk, using "risk" to include both the probability and the magnitude of the harm, and the less the utility—without attempting to refine on "utility" for the moment—of the activity, the greater the departure from the standard of care. There are therefore infinite degrees of negligence ... " MacIntyre, The Rationale of Last Clear Chance (1940) 58 Harv. L. Rev. 1225, 1227.
THEORY OF NEGLIGENCE

When we proceed to inquire whether, under the circumstances, and in view of the advantages involved in the act, a certain amount of disadvantage (or loss) may be inflicted on the other person, it would seem immaterial whether the loss to be inflicted took the form of (1) a high probability of a loss small in amount, or (2) a low probability of a loss great in amount, so long as the actuarial value of the loss remains unchanged. It makes no difference, in other words, whether the act be, on the one hand, certain to inflict a dollar's worth of damage, or whether, on the other hand, it involves one chance in a hundred of inflicting a hundred dollars' worth of damage. In either case the net disadvantage is the same, and Lloyd's of London, according to the popular impression, would charge the same premium to insure against the damage.

In order, therefore, to find the criterion which will reveal whether a small risk of great loss can be properly inflicted (in a given set of circumstances), we should be able to inquire whether (under the same circumstances) a small but certain loss could be inflicted. This is interesting because the law has through the centuries evolved a set of doctrines calculated to determine roughly when such a small loss can be so inflicted. It can be inflicted, say the books, when the advantage of the act outweigh the disadvantages by so great a ratio as to render the commission of the act “necessary.”

Unfortunately the decided cases do not establish or even discuss the numerical value of that ratio, and a discussion of it at this place is prohibited by consideration of space. But enough has been said to indicate that the ratio is the same in cases of necessity as it is in cases of negligence, the two supposed branches of the law being in reality one. To illustrate this identity let us suppose that Smith is proceeding in his motor car along the highway. If he comes to a place in the highway where a tree has fallen across the road he may drive around it, over the land of Jones, thereby inflicting a small but certain injury. We call this “necessity.” In the same way, if there is no tree but the pavement happens to be slightly wet so that skidding is possible, he may continue to drive thus inflicting a small risk of greater damage to Jones' property. We call this “reasonable conduct” under the circumstances.

When we conclude that the risk involved in the act is sufficiently outweighed by the interest which the act will serve, we are
in a position to conclude that the act should be permitted and should not be prohibited by the law. Heretofore all authorities appear to have assumed, without discussion, that if the act is permitted, so that neither the state nor any individual can lawfully prevent it, then (even though injury results) there can be no damages recovered from the actor. But this view, although unconsciously supported by the highest authority, is open to question. There may be many instances in which the law may find it wise to let the actor proceed, even though a risk of injury be involved, but in which it may likewise insist that the actor himself bear the risk. In the language of the Hohfeld analysis, there may be instances in which the prospective actor, while under a duty to pay damages for an injury, yet has a right not to be prevented from inflicting the injury.

This is ordinarily the case in situations where the law confers a right of necessity. When, for example, it permits travelers upon a storm threatened ship to jettison the cargo of a fellow traveler, it yet compels them to pay proportionate damages out of the cargo thus saved. And where a navigator is permitted from necessity to moor his vessel to a private wharf, he is com-

17. "It may with perfect consistency be held that the interest of the actor which is served by his act may, as compared with that which is necessarily or probably invaded by it, be of such value that he should not be punished, and that resistance should be discouraged by imposing liability upon one who resists, while at the same time recognizing that the actor who commandeers another's interest in and of his own necessities should pay for any damage done thereto. Society has an interest in saving human life and property from destruction, but its only concern with the cost of salvage is that it shall be put upon him who, as between individuals concerned, should bear it. As between the individuals concerned, it is obviously just that he whose interests are advanced by the act should bear the cost of doing it rather than that he should be permitted to impose it upon one who derives no benefit from the act." Bohlen, Incomplete Privilege, to Inflict Intentional Invasions of Interests of Property and Personality. (1926) 39 Harv. L. Rev. 307, 316.


"The rule of the Rhodian law, to which all jurists refer for authority when speaking of jettison is this: If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all, shall be made good by the contribution of all. This rule or example of a rule, is found in all the elementary books and is declared to be, as it obviously is, founded in the highest equity and natural justice. It would be highly inequitable that the property of one man should be voluntarily sacrificed to bring safety to that of others involved in a common peril, without giving to the latter a right to call on the latter to contribute in proportion to the benefit received."


A violent squall threatened to swamp plaintiff's sloop. To prevent destruction of the sloop and danger to life, he moored the sloop to defendant's dock. Defendant unmoored the sloop, destroying it and injuring plaintiff and his family. Held, that defendant had violated a duty by unmooring the sloop.
In instances could be multiplied almost without number. Thus a stowaway on an airplane may not lawfully be dropped off in mid air. He acquires a "claim of necessity" not to be ejected; but he is placed under a duty to pay his passage. Similarly a man accidentally bit by a dog may not lawfully be prevented from having the dog tested for rabies; but he is placed under a duty to pay damage to the dog's owner. Similarly a person taken ill while at dinner at a lonely farmhouse during cold weather may not be summarily ejected; but it is submitted that such a person must pay for lodging.

Since the right to inflict small risks upon other persons (without being prevented by the law) is analogous if not identical with the right of necessity, it is natural to assume that it (any more than the right of necessity) should not imply an immunity from the duty to pay damages. It cannot therefore be too strongly insisted that, if the actor foresees any risk, however microscopic, of injury to another, there is no theoretical reason to refrain from shifting the loss in the rare case where loss actually befalls. The risk is created by the actor, not the actee; and so the actor could justly be required to assume the risk and bear the loss if loss resulted. Such a rule would place the risk where it belongs. For this reason the writer dissents from the prevailing opinion that the ratio of advantage to disadvantage (involved in the commission of the act) should govern the right to collect damages; and believes on the contrary that the advantages involved in performing the act should have nothing whatever to do with the damage issue.

Here we can anticipate a strenuous objection which, stated most forcibly, will assume this form: Every act involves some small possibility of injury to others and, if the actor is of average intelligence, he realizes that this is true. Therefore, if injury actually occurs, how can we ever say that the actor need not respond in damages? The classical view of negligence answers this


Defendant's steamship was moored to plaintiff's dock discharging cargo. A violent storm arose, and the vessel was constantly pounding against the dock. It appeared that if unmoored the vessel would drift away and be lost, but if moored it would injure the dock. The master kept it moored. Held, that while "the situation was one in which the ordinary rules regulating property were suspended by forces beyond human control," the defendant must answer in damages "to the extent of the injury inflicted."

21. See Depue v. Flatau, 100 Minn. 299, 111 N.W. 1 (1907) and Vincent v. Lake Erie Transportation Co., 109 Minn. 456, 124 N.W. 211 (1910).
question by saying that the actor need not respond in damages if the act was permissible: But if that answer be ruled out, what possible answer remains?

The solution of this difficulty is suggested by our general premise that the imposition of a risk is equivalent to the infliction of a small injury. The reader will recall that if very small (but certain) injuries are deliberately inflicted the law refuses to award damages, usually referring to the maxim "De minimis non curat lex." The formalizing influence of the centuries has left the old maxim without any very definite content but, as nearly as can be rationalized, it seems to mean this. In deciding whether or not to award damages, the law weighs the advantage of awarding damages against the disadvantage. The advantage of awarding of damages lies in the fact that the injured party is made whole; and it is therefore in some way proportional to the gravity of the injury which had been inflicted. The disadvantage is solely the time and energy, on the part of the court, which must be spent in handling the case—a quantity which is always substantial. When the injury inflicted is minute in fact it is always minute in relation to the time and energy which the court would have to expend to handle the matter; so we say, as a general maxim, that minute injuries will not be redressed. Risks, like definite injuries, can be minute; and when they are extremely minute there is very little social advantage in penalizing the individual who imposes the risk upon his neighbor.

In the interest of practicality, therefore, and in order to preserve their energies for more important work, courts have ignored these exceedingly small risks of substantial injury, just as they would ignore a certain, but exceedingly small, injury. The phrase "de minimis non curat lex," with which courts dismiss very small injuries, may never have been expressly applied to very small risks: But a little reflection will show that it is equally applicable; and that when the courts say that an injury is "remote," or is not a "natural consequence," or is "speculative," they usually mean that, if the risk of inflicting the injury was foreseen at all, it was de minimis. We refrain from shifting the loss, not because it would do any harm to shift it, but rather because the investigation would tax the energy of the court, would detract

22. The reader will observe the symmetry of this procedure. To decide whether an act may be committed we are to weigh the advantages of its commission against the disadvantages. To decide whether an act may be redressed, we are to weigh the advantage of its redress against the disadvantage (in this case the court's time and energy).
from its effectiveness in handling other cases, and would therefore do (practically) no good.

This truth would have been established long ago except for an interesting historical development in the law of damages. In the field of risks, unlike every other field of law, the wrong done by the actor is not equivalent to the injury suffered by the other person. One may impose a great risk, and by good fortune, the other party may suffer no injury at all: And, on the other hand, one may impose no risk and, by ill fortune, the other party may ("accidentally," as we say) suffer grave injury. The law could logically award damages in the amount of the risk (i.e., what it costs to insure against the loss) whether or not loss actually befell. Such a course would measure the damage in accordance with the wrongfulness of the act. Our law prefers, however, to measure the damage by the gravity of the injury except in the extreme case where there is no risk imposed (i.e., "accidents" caused by the act).

If, taking the former alternative, we had decided to measure the damages by the amount of the risk imposed, we could readily have seen that, from a practical standpoint, very minute risks ought not to be redressed. In cases involving such risks our law still wisely refrains from affording a remedy even though the damage rule we have adopted would make the award, if one were given, substantial.

To state the matter in another way, we may say that if the loss were entirely unforeseen, the law would not shift it, however great it might be: And it accordingly refuses to shift it when the loss is for all practical purposes unforeseen. The loss is left to "lie where it has fallen" because the parties are, for all practical purposes, equally innocent.

An appreciation of these principles, while enabling us to attain a better understanding of most problems of negligence, will not ordinarily change our decision in any particular case. But there are certain situations in which the principles are determinative. The following hypothetical case, for example, would be decided for the defendant by the ordinary exponent of the "reasonably prudent man" doctrine; but it would probably be decided for the plaintiff by one who agrees with the view here expounded. Suppose that a motorist, Smith, accidentally severs an artery and, while stopping the flow of blood with one hand, begins to drive furiously to the nearest hospital and, while so driving, swerves close to the side of the road and runs over Jones' flower bed. If
we adopt the "reasonably prudent man" rule we must say that
Smith is doing precisely what a reasonably prudent man would
do; and that he is therefore not liable in damages to Jones. Simi-
larly, if we adopt Terry's view of the balance of interest, we must
conclude that the vital interest which Smith has in getting to the
hospital heavily outweighs the risk, which he knowingly took, of
injury to property along the way. Those who believe in the prin-
ciple set forth in this article will agree that the law should not
have prevented Smith from driving as he did. But, looking at the
matter also from the standpoint of Jones, they would say that,
inasmuch as Smith has voluntarily imposed an injury upon him,
Jones must be made whole.

Unhappily, and perhaps unavoidably, we find that we do not
greatly facilitate the solution of negligence problems by demon-
strating their identity with problems of "necessity" and "de mini-
mis"; for the principles which control the law both of "necessity"
and "de minimis" are themselves meagerly developed and ill un-
derstood. Because they are believed to apply only to unusual and
exceptional situations they were not considered important enough
to merit any serious research, and thus they were abandoned to a
state of intellectual neglect which could never have developed
had their far-reaching application been fully realized. If, as some
of our present-day philosophers assume, the coming century de-
votes itself to advancement in the social as distinguished from
the natural sciences, may we not hope that legal scholars will be
able to put all of these principles on a satisfactory plane by, first,
developing a technique through which the magnitude of interests
(i.e., the quantum of human well-being) can be numerically in-
dicated and, second, by undertaking to calculate the ratio of ad-
vantage to disadvantage which suffices to establish an act as
"necessary" or an injury as "de minimis."

The lack of such a technique must justify, if anything can,
the present state of our law of negligence. If it were not a bad
practice to attempt to rationalize our policy in this field, the writ-
er would suggest that it could best be explained as follows. We
realize that, in formulating a law as to the imposition of risks,
we ought to employ two rules, one to define which risks we will
permit the actor to impose, and another to decide how loss shall
be shifted if loss occurs. Because we have no technique for ac-
curately measuring human well-being we find ourselves unable
to apply either rule very accurately and we therefore conclude
that, since we cannot discriminate so nicely, there is no particular
utility in having two rules. We can simplify by having one. The one which we keep, in most jurisdictions, appears to be Terry's rule that we must balance the advantage, involved in the commission of the act, against the disadvantage: But even for the application of this rule our technique is inadequate. Accordingly, despairing of our ability to apply the rule, we instruct the jury that it may apply whatever rule a standard man would apply.

It may well be that, in the normal case, this policy yields results which are substantially correct. But, in so proceeding, it is well to know what we are doing and why we are doing it; for nothing but a complete understanding of the subject will enable us to recognize the abnormal case and to decide it in a manner consistent with our fundamental theories of justice.

VI

To sum up, negligence is the commission of an act which appears to involve an unreasonably high risk of injury to other persons. It is not the failure to exercise due care; although the exercise of such care would ordinarily eliminate the apparent risk and would therefore eliminate the negligence.

In order to decide whether a given risk be "unreasonable," we must weigh the interest served by the act against the risk of injury which is involved. It is considered reasonable only if the interest served by the act outweighs the risk of injury by that overwhelming ratio which, in another branch of law, would be said to create a "right of necessity." If reasonable by this standard, the act is permitted in the sense that the law will not prevent it and will not allow the threatened party to prevent it.

If the injury actually befalls, it must in every case be borne by the actor (even though the risk was reasonable and the act was permitted by law) unless the risk of loss which he inflicted was so small as to be classified "de minimis." The usual standards which we apply when we say that an act was not negligent, or that its effect was not proximate, are in reality convenient devices by which we seek to mark the boundary between the minute and the substantial risk.