Tort law answers two of the most fundamental questions faced by any society: 'how should people treat each other?' and 'whose problem is it when things go wrong?' There are many ways in which such questions might be resolved—criminal law and administrative regulation place limits on the ways in which people treat each other, the informal norms of morality still others. Schemes of social insurance and public welfare provide other ways of dealing with losses, private charity others yet again, and simply leaving losses where they fall another.

Tort law is striking because it supposes that the question of how people treat each other and the question of whose problem it is when things go wrong are at bottom the same question. If plaintiff is to recover from defendant, defendant must have breached a norm of conduct that governs the ways in which he may treat her, rather than some other norm concerning the ways in which some other person may be treated. That principle is itself an expression of the way in which tort law subordinates questions about who must deal with some problem to questions about how people treat each other. As Cardozo puts it, plaintiff does not recover as the 'vicarious beneficiary' of a wrong done to another. Instead, she must establish a wrong 'personal to her'.

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1 Palsgraf v Long Island Railroad, 169 NE 99 (NY CA 1928).
Tort liability is not always predicated on a defendant's fault—liability is sometimes 'strict', for example, in the case of using explosives, or keeping wild animals. In such cases, whether defendant exercised reasonable, or even heroic, precautions is irrelevant to liability. But even in these cases, plaintiff can rightly complain of what defendant did to her, because it was something which she was entitled to be free of. The standards of tort law govern the things people do to each other, not simply the ways in which they behave.

The same two questions could be combined in other ways as well. For example, Elisabeth Anscombe, in her essay 'Modern Moral Philosophy', suggests that a person is responsible for the bad consequences of anything bad that he does. Hegel takes a similar view. On this view, a person is responsible for the bad consequences of violating a norm. Tort law combines the questions differently. If you violate the norm that specifies a level of conduct you owe to another person, you are responsible for the injury that the norm told you not to impose. The differences between these two ways of combining the questions are significant: the way in which tort law combines them, but not the Anscombe–Hegel way, builds limits on the scope of responsibility into the basis of responsibility. This difference is important, because the consequences for which tort law holds persons responsible are not unlimited.

The connection between the two questions is mirrored in the structure of a tort action. Tort law articulates norms of conduct and resolves conflicts in the context of disputes between private parties. Plaintiff is entitled to a remedy against defendant only if her injury can be described as a matter of defendant wronging plaintiff. Plaintiff does not come before the court and say 'defendant did something dreadful, and look what happened to me as a result'. Instead, plaintiff's complaint takes the form 'defendant is not allowed to do that to me'. The phrase 'to me' is crucial; the plaintiff is not saying that defendant is not allowed to do something simpliciter, if defendant behaved badly, but plaintiff was not injured, or if her injury is the result of a wrong done to another person, she is not entitled to a remedy.

As between the parties before it, the court must decide whose problem the unwelcome situation is—is the plaintiff simply out of luck that he finds his neighbour's
activities annoying, or is the defendant committing an enjoinable nuisance? Is the plaintiff’s injury hers to deal with, or is it one for which defendant is responsible and so liable in damages? In each case, the question of remedy may be foremost in the minds of the parties. The court addresses the question of remedy—the question of whose problem it is—by asking the seemingly distinct question of the acceptable limits of behaviour. The entire proceeding is structured by questions of whether defendant behaved unacceptably towards plaintiff, and whether plaintiff’s injury is appropriately related to defendant’s mistreatment of her. The structure of a tort action thus expresses the way in which it answers questions about whose problem it is when things go wrong by considering the ways in which people treat each other.

My aim in this chapter is to explain the way tort law brings the two questions together. The main task in doing so is to explain the sense in which tort law predicates liability on responsibility. Defendant must pay plaintiff if, but only if, she is responsible for plaintiff’s injury. The relevant notion of responsibility depends on norms of conduct, and much of the chapter will be taken up with developing that notion and explaining why it has features that are strikingly different from other familiar conceptions. I will focus largely on responsibility in negligence, in large part because I think the relevant conception of responsibility is most striking there. I will explain why questions of foreseeability figure prominently in questions of responsibility, why the standard by which such foreseeability is judged is, with two prominent exceptions, the abilities of a reasonable person of ordinary prudence, and why not all foreseeable injuries attract liability.

Before turning to negligence, however, I should say a few words about its relation to other areas of tort law. As I said above, liability in tort is sometimes ‘strict’, and so does not depend upon the degree of care exercised by defendant. Liability for ‘abnormally dangerous’ activities is strict, as is liability in nuisance, as well as liability for the use of another person’s property. This may seem an odd grouping of areas, and it probably is. That’s because the basis for liability being strict is so different in the three heads of liability. Without going into the details of each, I will simply assert that what they all share is the plaintiff’s entitlement to have defendant act differently. Liability for other torts, such as fraud and battery, is intentional, that is, requires that defendant have intended harm to plaintiff. Here too it is clear that plaintiff’s claim to a remedy depends upon her right that defendant not treat her as he did.

Some have been tempted by the thought that negligence occupies a sort of middle ground between strict liability and intentional torts. I will not pursue that line of thought here. Instead, I want to suggest that negligence is central in a different sense of that term, that it is central because it illustrates the way in which our two questions come together in a particularly clear way. Beginning with negligence will enable us to see how liability could sometimes be strict, and also why liability for intentional wrongdoing—wrongdoing the morality of which is relatively uncontroversial—would be limited in ways strikingly different from the ways in which the Hegel-Anscombe model would suggest.
I also focus on negligence because so many people find it puzzling, both in its general structure and its particular doctrines. Much of this puzzlement comes from a failure to appreciate the way in which its conception of responsibility depends upon norms of conduct, and indeed, perplexity about what those norms of conduct are. One consequence of such puzzlement is close to a century of calls for the replacement of negligence liability (or some part of it) with some other kind of compensation scheme. Many critics of tort liability object that it is arbitrary, because it makes too much depend on luck—either because liability depends on actual harm caused, or because compensation depends upon the defendant's conduct, not that of the victim. And sometimes the charge is that negligence liability is wasteful, because accidents could be reduced more effectively, and victims compensated more cheaply, if talk about responsibility were abandoned. Two decades ago, mandatory social insurance was usually the recommended replacement; the more recent recommendation is that people insure themselves against whatever misfortunes might befall them.

The criticisms of negligence liability sometimes reflect impatience with its distributive consequences, or the belief that tort liability is a particularly inept way of realizing some set of social purposes, such as deterrence, compensation, or retribution. Yet such interpretations of negligence law get much of their currency from the apparent difficulty of understanding it in terms of norms regulating the ways in which people treat each other.

The idea that when one person mistreats another, the injurer must deal with the consequences of that mistreatment is familiar and compelling in other departments of private law. In those areas of the law, the fact that different people fare differently gives rise to neither objection nor perplexity. In cases of intentional wrongdoing, for example, the relation between the relevant norms of conduct and the damages sought is clear—the aggrieved plaintiff wants defendant to pay the costs of the wrong he has inflicted on her. Nobody has seriously entertained the possibility that insurance, either social or private, should replace tort liability for such intentional torts as defamation, battery, or false imprisonment. As a result, nobody has said that people should insure themselves against the prospect of those wrongs. Nor is anyone likely to suggest that it is unfair that victims of those torts recover, while people who suffer similar losses in other ways do not, or that successful batterers pay more in damages than unsuccessful ones. Again, those who suggest that society must help out those who suffer losses through crimes do so supposing that the criminal will lack sufficient resources so that plaintiffs will be left with their losses,

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4 Some people have suggested that completed crimes should not attract more severe punishment than failed attempts. But those arguments are invariably framed in terms of a contrast between punishment and compensation, taking it for granted that compensation should depend on consequences. See e.g. J. C. Smith, 'The Element of Chance in Criminal Liability', Criminal Law Review, 63 (1971).
not that it is unfair or arbitrary to make criminals bear the costs they create if they can afford to.5

The same can be said for other bases of liability in private law. So far as I know, nobody has suggested a scheme of social insurance to protect those who have suffered losses through breach of contract, even where the breach was not intentional. Nor have there been suggestions that people who suffer similar losses in other ways be compensated. Here too, the absence of such suggestions reflects the clarity of the relation between the norms of conduct specified in a contract and the damages sought for its breach. Plaintiff's demand that defendant make her 'whole' is the obvious response to the fact that she is less than whole because of the way in which defendant wronged her. The same applies to liability for conversion of property, for which defendant is liable to plaintiff because the thing taken was hers. Because the relation between the remedy and norms of property are clear, nobody has suggested that those who take property by mistake be allowed to keep that property, and the original owners be left to insure themselves against such a possibility. Instead, the person who takes another's property is expected to set things right by returning the property owner to the situation he was in, and remained entitled to be in. The same point can be made in cases of restitution for mistaken payments. Worries about compensating those who lose through such mistakes do not arise, because there is so obviously an appropriate party to make up the losses.

Critics claim that negligence liability is arbitrary because they fail to see the connection between norms of conduct and liability in negligence. As I will show, it is just as tight as in the other examples I have mentioned. To show that it is, I will explain the sense in which plaintiff's complaint is that her injury properly belongs to defendant because defendant has breached a duty that he owed to her. Tort law articulates distinctive conceptions of responsibility and fairness between persons. Taken together, they provide a way of understanding both how people can interact on grounds of justice, and why those who fail to interact on those terms must answer for the problems that result.

To begin, I will say something about the two basic normative principles that tort law incorporates. They are basic in the sense that more specific norms of conduct and repair provide concrete interpretations of them.6 The first is a basic norm of conduct, or rather a norm about norms of conduct: tort law demands that people accept reciprocal limits on their freedom. Nineteenth-century nuisance cases fill out this idea in terms of the slogan 'live and let live'. I will formulate the same point as the principle

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5 In Lamb v London Borough of Camden [1981] QB 625 (CA) Lord Denning objects to Chomentowski v Red Garter Restaurants (1970) WN (NSW) 1070, in which a crime victim sought to recover from his employer, pointing out that the criminal injuries compensation board is charged with compensating victims of violent crimes. It is difficult to believe that even Denning would point to the existence of the board as a reason against holding the criminal liable for the victim's loss.

6 They are also basic in the sense that they require qualification in cases of special relationships, in which parties are asymmetrically situated, such as those between professionals and their clients. I do not consider those in any detail here.
that one party may not set the terms of interaction unilaterally. However it is formulated, the principle requires filling out if it is to say anything about particular ways in which people might interact; the abstract formulations require only that any standards of conduct apply to all equally, on the basis of interests that all can be supposed to share. But it does not tell us which interests count, nor how they can be counted. None the less, the abstract formulations are illuminating, because they turn out to constrain both the ways in which norms of conduct are formulated, and the ways in which interests are described. The relevant interests in both liberty and security are described in terms of the type of interest that is at stake, rather than its magnitude on a particular occasion. As a result, whether one person needs to take account of another’s interest depends on whether all persons need to take account of the interest of others, not on the importance of the competing interests to the particular parties.

The notion of reciprocity at work here needs some filling out. You might wonder, for example, whether any principle, consistently applied, would generate reciprocal norms of conduct. Although there may be a sense of ‘reciprocity’, in which this is true, that is not the sense intended here. The sort of reciprocity I have in mind grows out of an idea of private persons pursuing their separate ends, and supposes that standards of conduct are reciprocal just in case they enable each person to pursue his or her ends as much as is compatible with others pursuing their own ends. Plaintiff’s complaint about her injury appeals to norms governing how people are allowed to treat each other.

The principle that one party may not set the terms of interaction unilaterally also provides the basis of the second principle, which requires that people bear the costs their conduct imposes on others. That requirement sounds good in the abstract, but can only provide guidance taken together with some way of determining where costs lie. Provided people treat others as they should, any losses that result are simply the problem of those they befall (although public law may provide a way in which some larger group can hold them in common). But if one person wrongs another, the latter’s loss becomes the former’s to deal with.

This connection between wrongdoing and loss, and so between the two principles, can be put in economic terms—one person should not displace the costs of his activities onto others—or in terms of people taking responsibility for their actions. However it is put, if it is to have application in particular cases, it requires some way of determining which messes belong to which people, or which costs accompany which activities, or what people are responsible for. Described in terms of displaced costs, tort law’s norms of conduct determine what counts as a cost of which activity. In the idiom of responsibility, norms of conduct mark the line between what a person has done and what is (merely) a by-product of her action. Tort law combines the principles by letting injuries lie where they fall unless they come about through one person’s wronging another, where wrongdoing consists in setting the terms of interaction unilaterally in the primary sense. The second principle, then, can be thought
of as a special case of the first: to allow one person to place costs on others that they cannot place on her is to let her determine the costs of interaction unilaterally.

I think both principles are attractive, but my purpose here is less to defend them than to articulate their role in tort law. At any rate, a necessary first step towards assessing or defending them is to see how particular institutions might make them determinate. Without institutional embodiment, neither principle has much to say for or against anything anyone might do. A requirement that people treat each other in the same ways that they will be treated tells us that any standards of conduct must protect people equally from each other, but does not, on its own, tell us what losses people should be protected against, or what degree of forbearance on the part of others such protection requires. To guide conduct while protecting people equally, standards must abstract away from some differences between the situations in which people find themselves, focusing on some features of those situations while treating others as irrelevant. Again, the idea that people must bear the costs of their own activities requires some way of assigning particular costs to particular activities; tort law answers that question by considering norms of conduct.7

RISKS AND NORMS

The law of negligence sets limits on the risks that people may impose on each other. Not all risk imposition is inappropriate. As Lord Reid remarked in *Bolton v Stone*, 'In the crowded conditions of modern life, even the most careful person cannot avoid creating some risks and accepting others'.8 Where a risk is inappropriate, the person who imposes it does so at his own risk. That is, should the risk ripen into an injury, the result is the injurer's to deal with. If a risk is not inappropriate, however, its costs

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7 At the same time, the institutions themselves can only be justified by articulating and defending the principles they express. If the pattern of norms and remedies imposed by tort law can be seen to hang together in light virtue of intuitively appealing principles, then that very pattern can be vindicated. There may well be other reasons for keeping an institution of tort law, ranging from the spreading of accident costs or the promotion of economic efficiency to the symbolic importance of allowing individuals a day in court or a taste for decentralized processes. The justification in terms of underlying principles enjoys a certain primacy, if only because it offers reasons for the specific pattern of decisions that is at issue. Because those duties are owed to others, their satisfaction is inherently vulnerable to factors beyond an individual's control. The possibility of this is less puzzling than some seem to suppose. If I owe you $100 dollars, the possibility of my meeting my obligation is vulnerable in the same way. Such vulnerability does not entail that I really only owe you an attempt, or perhaps repeated attempts, to repay you. Instead, it means that I am answerable for consequences not wholly within my control. In the same way, tort duties make me answerable for consequences not wholly in my control.

8 *Bolton v. Stone* [1951] AC 850 (HL) per Lord Reid.
simply lie where they fall; it is one of the risks of ordinary life, as opposed to a risk that one person imposes on another. This point is sometimes made in terms of an idea of risk allocation. It is certainly the effect of negligence law to allocate risks in the sense that it determines who will bear their costs. It is also in some sense its purpose to do so, because it determines which risks people are allowed to impose on each other. Talk of risk allocation is potentially misleading, however, because risks are allocated in a particular principled way, the point of which is to protect people from each other.

The boundary between appropriate and inappropriate risks is set by a system of norms of equal freedom. All are allowed an equal liberty to pursue their ends, subject to the requirement that they not interfere with the ability of others to pursue theirs. The requirement that the class of plaintiffs and type of injuries be foreseeable reflects the law’s role in articulating standards of conduct. Those standards can only guide conduct if they tell people what to do, and no standard can tell a person to avoid an unforeseeable consequence. That those standards are meant to protect people equally from each other explains the objectivity of the standard of care.

The common law’s standard of reasonable care, and the familiar figure of the reasonable person through which that standard is expressed, provide a way of striking the appropriate balance between liberty and security. The reasonable person is neither the typical person nor the rational person who adopts the best means in pursuit of his or her ends. Instead, the reasonable person is the one who exercises appropriate restraint in light of the interests of others. The reasonable person is a construct to strike a balance between different interests. To do so we need to decide how much weight to attach to which interests. Decisions about such matters invariably import substantive judgments about what is important to a person’s ability to lead a self-directing life. Such matters will occasionally be controversial, though most such interests—freedom of action and association on the one hand, and bodily security and security of possession on the other—will not. Still, the point of the reasonable person standard is to balance such interests in a way that is fair to all concerned. Rather than aggregating them across actual persons, so that one person’s loss is made up for by another’s gain, we construct a representative reasonable person, who has interests in both liberty and security. A standard of reasonable care protects people equally from each other, allowing each equal liberty to pursue his or her ends, and equal security against the unwanted effects of others pursuing their ends.

The purpose of appealing to what would be done by a reasonable person is to generate reciprocal norms of conduct. That purpose gives shape to the interests that it can protect. It might be thought, for example, that people have a general interest in security, as opposed to the narrower interest in security against injury by others that the law of negligence protects. But because the law of negligence articulates norms of conduct, it can only take account of interests that can be protected through norms that can guide behaviour. One person could not owe another a duty to prevent another person suffering a particular type of injury (say, property damage) in general, because a particular type of injury can come about in too many different ways.
As a result, there is no course of action that one person could follow to protect another (or herself for that matter) against a type of injury. One person can only owe another a duty to avoid bringing about a particular type of injury in a particular way. As a result, the law of negligence protects those interests against certain kinds of invasions, rather than protecting them per se in the way that, for example, a distributive or social insurance scheme might aim to minister to them. Distributive schemes can, though need not, focus on particular needs apart from any questions about how they came about. Thus a health insurance programme can treat people solely on the basis of their medical need. Tort law cannot take account of need as such. Because it aims to direct people's conduct, it can only look to interests that it can ask people to take account of. The possibility of directing conduct is essential to its central doctrines.

FORESIGHT

It is a commonplace of the law of negligence that a defendant is only liable to plaintiffs who, and for injuries which, are foreseeable. Foreseeability enters into questions of duty—one does not have a duty to avoid unforeseeable injuries—and into questions of proximity and remoteness—as a matter of law, unforeseeable types of injury are too remote, even if they are caused by the breach of a duty. On one plausible understanding of this requirement, foreseeability operates as an independent constraint on liability. The intuitive idea is straightforward: you are only answerable for, and so potentially liable for, the consequences of your acts if it makes sense to include those consequences among your deeds. But any act has indefinitely many consequences, only some of which count as your deeds in any interesting sense. That class is selected by the concept of control: if you could have foreseen, and so could have avoided, an outcome, it counts as something that you have done. Otherwise it counts only as something that happened as a result of something that you did, because control is not exercised with respect to unforeseeable consequences. On this understanding, then, the relation between agents and outcomes is prior to, and independent of, any norms of conduct. Indeed, on this view, the connection goes in the other direction: norms can only apply to outcomes to which agents are directly related, and for which a person is responsible in the pre-normative sense. You can only be liable for foreseeable injuries because you can only be responsible for them. Liability is predicated on responsibility, which can be

9 I don't mean to deny that there are some questions of remoteness that are not addressed by considerations of foreseeability. I say more about this issue below.
ascribed without considering any general norms of conduct. I will call this the ‘independent constraint view’.10

The independent constraint view has considerable moral appeal, because it expresses the idea that a person is only liable for something if he is responsible for it. It does less well as an account of tort liability, because an account of tort liability must not depart too much from settled tort doctrine. Perhaps a legal system that answered to the independent constraint model would be desirable in so far as it would make tort law somewhat more continuous with other aspects of morality. But if we want to understand the way in which tort law conceives of responsibility, and the nature of the moral claim it asserts, the independent constraint model is the wrong place to begin. In particular, it faces two serious difficulties. First, the requirement of control that accounts for its moral appeal is most plausible when the control is actually exercised—when, for example, defendant considered the risk in question, and decided to ignore it. Yet the law of negligence not only does not require that defendant consider the risk, it does not require that the particular defendant be capable of considering that particular risk. Instead, the law asks what account a reasonable person, with ordinary capacities of foresight and prudence, would have taken of the risk. While it is not impossible to claim that this more abstract specification of the requisite capacities serves as an independent constraint on attributions of responsibility, it is rather more difficult to see the motivation for treating it as a constraint. If the particular defendant did not, or could not, foresee the risk, why suppose that the consequence in question is only attributable to her if somebody else would have foreseen it, or if she herself would have foreseen it, had she been less tired, or more attentive?

Part of the difficulty comes from the fact that talk about what a person ‘could’ have done is notoriously slippery. Tony Honore and Stephen Perry have both argued that the relevant notion of ‘could’ should be understood as referring to the agent’s general capacities, whether or not those capacities were exercised on a particular occasion.11 Unfortunately, the notion of general capacity is considerably more opaque than the notion of duty it is supposed to constrain: if I drive carelessly because tired, is the relevant general capacity the one I have while well-rested, or the one I have while tired? Looking at questions of duty provides a straightforward way of deciding what someone should have avoided—he should have avoided the very injury that plaintiff was entitled to be free of. If we eschew questions of duty in favour of some question about what the defendant could have done by exercising his ordinary capacities, we need some principled way of deciding which capacities are to count.

The other difficulty for the independent constraint model comes with the law’s distinction between type and extent of injury. If a defendant is liable for an injury of

a particular type, he is liable for its full extent, even if that extent could not be foreseen. If plaintiff has an 'eggshell skull' and so suffers terribly from what others would have experienced as a minor injury, defendant is liable for his full losses, just as defendant must make up any lost earnings of an injured plaintiff, even if he could not have known that plaintiff would have earned so much. While the distinction is not always easy to draw in particular cases, disagreements about how to draw it presuppose its significance. Yet the independent constraint model makes this distinction puzzling. If avoidability or control serves to connect a person to a consequence, an agent who could not have foreseen a specific consequence cannot be responsible for it, even if he was responsible for another, similar consequence.

The two problems have a common root. Questions about whether someone could have avoided some consequence are clear enough when applied to a particular person avoiding a particular consequence. The law predicates liability on the answer to a different question: could a reasonable person have foreseen this type of injury to persons in plaintiff’s class? The further we abstract from the particular person and the particular injury, the more strained the concept of control becomes. Some of that strain can be relieved by supposing that foreseeability, control, and capacity must all be relativized to a particular description of the risk. Indeed, I will suggest that the duty account explains why a particular description of the risk would be appropriate. But supposing that action takes place 'under a description', merely displaces the problem for the independent constraint model, because we need to decide which

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12 Nor can the foreseeability requirement plausibly be explained as an expression of a more general precondition of agency or responsibility, as is suggested by Jules Coleman in The Practice of Principle (Oxford: Oxford University Press, 2001). Although a being with no capacities for foresight could not be a responsible agent, either agency or responsibility requires the ability to foresee or avoid a particular consequence for which one is responsible. There is a familiar sense in which a careful driver is responsible for running over an unforeseeable pedestrian. The driver regrets the fact that she was the one who ran over the pedestrian, and so wishes that she had taken a different route or started out earlier. Some norms of repair may follow from this sort of responsibility—perhaps she has a special obligation to call for help, or stay with the victim until help arrives, in a way that someone who witnessed the accident does not. But such moral obligations as she has do not arise from the fact that she violated a norm of conduct, because she did not violate any such norm. The pedestrian cannot complain that the driver should have been more careful.

Again, In Dooley v Cammell Laird & Co., Ltd. [1951] 1 Lloyd’s Rep 271, the plaintiff crane operator suffered nervous shock when a negligently inspected cable on the crane he was operating snapped, dropping his load where he thought his fellow workers were standing. (His view was obstructed. As it turns out, nobody was hurt below). Nobody has any difficulty understanding his reaction, and the ways in which it exceeded the reaction we would expect from someone who witnessed the accident. The plaintiff was implicated in the accident, even though he was under no duty to inspect the cable.

The transparency and familiarity of this conception of responsibility goes some way to explaining the law’s periodic attraction to the idea of directness in addressing questions of remoteness. Directness forms part of a familiar and important conception of agency and responsibility. That conception is in tension with the law’s primary interest in guiding conduct. In so far as directness matters to responsibility, it matters independently of any concerns about duties, and cannot be reconciled with an approach that makes them central. Where injury is direct, but not of a kind against which defendant could be asked to take precautions, plaintiff cannot complain that defendant should not be allowed to do that to him, because there is no candidate for a norm that plaintiff might invoke.
description to apply in assessing whether defendant had control in the appropriate sense. Do we apply the description defendant actually had in mind, if any? Or do we choose some other description, perhaps based upon norms that ought to have governed defendant's conduct? The latter course is the one the law has elected to follow. But that is because it accepts a duty conception of responsibility, rather than the independent constraint model. That is, it subordinates questions of responsibility to questions of entitlement.

These criticisms of the independent constraint model are not meant to be conclusive, but rather to set the stage for an alternative account. On what I will call the 'duty account' foreseeability is required for liability in negligence because the norms of negligence law enjoin people to avoid certain consequences. Such norms can only apply to conduct they can govern. That is, they can only proscribe such conduct as they can guide. So a norm cannot say 'do not do x' unless the person to whom it applies has some way of bringing his or her conduct into conformity with the norm. If he or she is to do so, there must be some way of telling whether or not one is doing x, or making x more likely. Where x is unforeseeable, the prospect of it cannot serve to guide conduct, because, being unforeseeable, nothing in particular counts as avoiding it. Because no norms can apply to such injuries, those who suffer them cannot complain of inappropriate treatment by the defendant. The duty account lies at the heart of Cardozo's opinion in the Palsgraf case. As Cardozo puts it, 'A different conclusion will involve us, and swiftly, too, in a maze of contradictions .... Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behaviour must conform.' The contradiction Cardozo speaks of does not concern the central holding in the case, which is that liability requires the breach of a duty owed to plaintiff. It may be unjust, but it is not contradictory to impose liability without the breach of a duty. What would be contradictory is the imposition of a duty to avoid unforeseeable consequences. The plaintiff's case fails because defendant violated no norm of conduct, not because no norm happened to regulate such conduct, but because no norm could regulate the consequence in question. The law could not ask defendant to avoid that sort of conduct, because there was no course of action defendant could have adopted that would count as avoiding it. So nobody could owe anyone else a duty with respect to that consequence. As a result, plaintiff cannot complain that defendant isn't allowed to injure her in that way, because defendant's conduct could not be prohibited. In order for a norm to govern conduct, there must be something that counts as satisfying that norm. The point of the foreseeability requirement, then, is not that an unforeseeable consequence fails to be connected to the defendant's agency in the right way. This may or may not be true; certainly a person can feel implicated in an injury he could have done nothing to avoid.

13 Palsgraf v Long Island Railroad 169 NE 99 (NY CA 1928).
The duty account thus offers an independent explanation of the importance of foreseeability. Taken together with the idea that the specific norms of negligence law serve to protect people equally from each other, it also allows us to understand the two features that the independent constraint account was unable to accommodate. First, it explains why the relevant capacity for foresight is that of the reasonable person, rather than that of the particular defendant. It also explains the two exceptions to this rule, namely children and persons with physical disabilities. Secondly, it explains why injuries are categorized by their type rather than their extent.

Unforeseeable injuries set an outer boundary for a norm-based conception of responsibility, because where an injury is unforeseeable, the possibility of that type of injury cannot provide a potential injurer with any reason to take precautions, because avoiding it cannot provide anyone with a reason to do anything. As a result, such injuries will always be deemed too remote for the injured person to recover. Sometimes precautions are impossible because a risk is pervasive, so that nothing in particular counts as taking precautions against it. For example, if one ship carelessly damages another, the owner of the first is liable for both the damage and any profits lost because of the time required for repairs, but not for any further damage that is sustained because, as a result of those delays, the ship encounters a storm it would otherwise have missed. The risk of storms is faced by those who travel by ship, and no course of action was open to the defendant which would change the likelihood of plaintiff being caught in a storm. Although there is one sense of the word 'foreseeable' in which the subsequent storm could be foreseen—that is, it is not a possibility one could rule out—that is not the sense that is of concern here. Instead, a type of injury is foreseeable only if it could provide a reason for pursuing one course of action rather than another. In this latter sense, the storm is not foreseeable, because the initial injury is just as likely to enable the ship to avoid a storm as it is to expose it to one. At other times an injury depends on a 'freakish' concatenation of events, or a risk that depends on a combination of events which is not freakish, but has never been encountered before. In each class of cases, the possibility of the injury could have provided no guidance to the injurer. Plaintiff cannot complain that defendant should have taken account of the hazard, because in each case, thinking of it in advance could not have made any difference to the injurer’s conduct. As a result, the injurer is not responsible for plaintiff’s loss.

14 For the same reason, defendant is not entitled to offset damages owed even if he could show conclusively that plaintiff would have encountered a more severe storm if not for defendant’s negligence.

15 The concept of foreseeability functions slightly differently in addressing some ‘duty’ questions. Ordinarily, if an injury was unforeseeable, there could not have been a duty, and so there could not have been a breach of that duty. In some cases, questions arise whether a specific class of persons owes a duty to some other class of persons, over and above the duties that all persons owe to each other. For example, in Tarasoff v Regents of the University of California 551 P. 2d 334 (1976), the question arose whether a therapist has a duty to warn people who might be attacked by her patients. Foreseeability is among the factors to be considered in deciding whether such a duty is owed, because unless such attacks are foreseeable—that is, unless therapeutic assessments are reliable, psychiatrists cannot be required to act on
Where a peril can be anticipated in advance, it can provide the basis for a norm of conduct, even where its likelihood is small. The chance that a rescuer will intervene to save someone who is endangered provides a reason to take precautions, even where other factors would make the precautions unnecessary. If the primary victim of negligence does not have a cause of action against a tortfeasor, perhaps because the rescuer’s intervention prevented it, a third party who was injured while attempting a rescue can still recover, because the danger to potential rescuers provides an independent reason to take precautions. Where someone has assumed the risk of injury, the danger to third parties who may seek to save him can be considered. Although private law enforces no affirmative duty to aid others, it is not up to the defendant to create a dangerous situation and insist that anyone aiding those in the peril he has created do so at their own risk.\textsuperscript{16}

I suggested that the concept of foreseeability plays a central role in addressing questions of remoteness. I did not mean to suggest that all such questions can be resolved by appeal to it. Where consequences of a single type extend continuously, there may be some point at which a ‘line must be drawn’. The duty conception explains why such line-drawing exercises do not arise in every case: plaintiff’s entitlement to be free of defendant’s in affliction of a particular type of injury in a particular way is prerequisite to liability.

In other cases, however, injuries are alike in type, but different plaintiffs are injured by a single deed which is a wrong against the first plaintiff. The classic example of this is fire. Here some courts have developed tests for limiting the scope of liability, despite the fact that both the type of injury—burning—and the class of plaintiffs—those within the range of the fire’s spread—are foreseeable. In \textit{Ryan v N.Y. Central Railway}, the court drew a bright line—defendant is only liable for the first building that burns. The same court modified the rule in \textit{Rome} to include the first neighbouring property that burned. The first rule seems silly; if a fire consumes several buildings belonging to defendant before spreading to plaintiff’s property, plaintiff is out of luck. But the second acknowledges that defendant owes his neighbours a duty to contain fire on his land. Why draw the line at the first neighbour?

In one sense, the line is arbitrary, and any way of drawing it must depend on something other than the equal rights of the parties. The \textit{Ryan} court remarks on the availability of first-party property insurance in explaining its decision, but those

\textsuperscript{16} \textit{Harrison v British Railways Board} [1981] 3 All E.R. 679. Rescuers of property are not normally protected in the same way. But in some cases they clearly would be, despite the fact that there is no duty to protect one’s own property. I can demolish my house, even if others enjoy its shade. But I must do so in a way such that others will not reasonably believe that they should intervene. If I set fire to it in the night, my act is negligent because of the risk that someone might believe that there are people trapped inside, and so run the risk of injury.
comments do not distinguish the first building burned from any other; the same point might provide the basis for eliminating all liability for property damage. The fact that someone is able to insure against a wrong by another does not relieve the wrongdoer of responsibility; the real question in Ryan concerns who is wronged by a negligently caused fire. On that issue, the court gets closer to the point, suggesting that the spread of fire is always in some sense the result of negligence. While this way of putting it perhaps overstates the matter, there is a key insight underlying it, namely that the risk of fire spreading is one of the ‘background’ risks that we all face, just as the risk of crime is a background risk we all must face (vis-à-vis public authorities). So some line must be drawn between the risk I impose through my action and the risk that others already bear. The Rome court characterized as too remote those consequences which depend upon a concurrence of accidental and varying circumstances, over which the negligent party has no control. To fail to protect anyone from a neighbouring fire is unacceptable; to protect everyone from a neighbouring fire is not even a candidate for a norm of conduct.

In some respects, the example of the spread of fire is distinctive because the question of remoteness is purely quantitative. Any place where the line might be drawn will be numerically distinguishable, but qualitatively indistinguishable from the next possible place where it might be drawn. At some point, whether and how the fire spreads depends in part on the condition of the property of the intermediate property owners, against which the person who caused the fire can normally take no further precautions. Plaintiff cannot complain that she would have taken greater precautions; if a fire spreads through enough intervening properties, plaintiff’s complaint could only be that she should not be left with the cost of a fire that is not her fault. Yet she already faced that risk; were she to say she would have conducted herself differently had she known, the question naturally arises as to how she would have conducted herself, given that the particular defendant’s starting a fire that would endanger her was one of an enormous number of potential sources of the very same risk, not all of which she had even potential indemnity against.

The indeterminacy, if we are to call it that, which arises because there is no principled way of drawing the line at some particular number of injuries, is a familiar but untroubling feature of many line-drawing exercises in the law. To determine whether goods, such as a shipment of wheat, have been received ‘in good condition’ a court faces a similar problem. One bad grain is not a problem, and there is no specific number of grains that marks a clear cut-off between good and bad condition. As a result, the court must draw an arbitrary line. None the less, neither of the parties can complain of injustice, because neither can complain that that precise number was not what he had agreed to.

The Objective Standard

The standard of care in negligence—how careful one has to be in relation to the risk of injury—is objective. That is, it does not depend upon the abilities of the particular defendant. All are expected to rise to a common standard of foresight, even those who have limited abilities. This objectivity follows directly from the law’s aim to protect people equally from each other. If all are entitled to equal liberty and equal security, then neither plaintiffs with special susceptibilities nor defendants with limited abilities can ask for special accommodations from others. The person with unusual susceptibilities cannot impose extra duties on others, because to impose such duties would violate the requirement of reciprocity; one person would be able to bind others more than they were able to bind him. For symmetrical reasons, the person who has difficulty coming up to the standard of conduct he owes to others cannot demand that others simply accept their injuries. To make one person’s good faith efforts at safety the measure of another’s security would be to allow that person to set the terms of interaction unilaterally. Instead, all are held to a common standard. That has been the law at least since Vaughan v Menlove.\textsuperscript{18} As a result, whether a norm applies on a particular occasion need not depend on whether the person could have done otherwise.\textsuperscript{19} The norm applies if it is part of a system of norms that is justified.

The sense in which a person can be answerable for failing to do his duty even though he did his best is familiar in other contexts. Suppose, for example, that I owe you a bicycle, or $100, perhaps because you have performed your part of a contract and I must now perform mine, or because I have borrowed, or found, your bicycle or money and must return it. The difficulty I face in giving it to you may be relevant to what you make of my failure to deliver it in a timely fashion. But such difficulties as I face do not serve to cancel my duty to you. I continue to owe you the bicycle or the money, even if my failure to return either is perfectly understandable. Tort duties are similar, in that they are owed to particular persons, and are not discharged merely by good faith efforts to discharge them. My duty to return your bicycle or money may have been voluntarily undertaken in ways that the duties imposed by tort law are not. Then again, I may have undertaken it without having foreseen the difficulties I now face. None the less, I still owe you the bicycle or the money; I do not get to keep either just because I failed to foresee how circumstances might change. Moreover, how I came to have the duty and whether I am responsible for my failure to satisfy it are separate issues. However I come to have the duty, I am answerable for my failure to comply with it.

\textsuperscript{18} (1837) 132 ER 490 (CP).
\textsuperscript{19} Nor does it depend, as another strand in the free will literature would suggest, on whether the act in question expressed the agent’s own reasons. The duty not to injure others applies to the person who does not identify with or endorse the reasons or desires he is acting on.
Despite its clear connection to a norm of reciprocity, the objective standard of care has remained a source of puzzlement and controversy, in a way that the law's indifference to the plight of people with unusual sensitivities has not. The line of thought goes something like this: if a defendant is not liable for an unforeseeable injury because the prospect of it could not guide anyone's conduct, how can he be answerable for injuries the prospect of which could not have guided his conduct in particular? The puzzle is deepened, I think, by the fact that certain defendants, notably children and those with physical disabilities, are held to a lower standard. Holmes famously remarked that the slips of the hasty and awkward person are 'no less troublesome to his neighbours than if they sprang from guilty neglect'. Yet the same could be said of the slips of children and persons with disabilities. Why the difference?

The beginning of an answer can be found by remembering that tort law specifies norms of conduct. Standard treatments of negligence distinguish between duty of care and standard of care, reserving the former for questions of whether the plaintiff is in the class of persons for whose interests one must look out, and the latter the question of whether defendant was sufficiently careful of those interests. But both issues turn on norms of conduct. The 'duty' question turns on whether defendant should have foreseen the possibility of injury to plaintiff. The 'standard' question sharpens that inquiry further, by asking whether defendant should have taken a particular precaution, and answers that question by asking whether the peril to the plaintiff was sufficient to justify taking it. Both questions are objective in the sense that both depend on the degree of care people are entitled to expect from each other. The duty account explains this double objectivity—people are entitled to have others look out for security, and to have them take the necessary steps to protect it.

Consider first the situation of the person of ordinary capacities who fails to foresee a foreseeable injury. Suppose further that he was doing as well as he could in the circumstances. The injured plaintiff can complain that 'he's not allowed to do that to me.' He can also say 'you should have thought of that'. It isn't open to defendant to argue that no norm applied to him because he was trying his best. He cannot so argue because the question of whether or not a norm applies doesn't depend on defendant alone. His efforts may well be relevant to what we make of his failure—the person who fails because indifferent is in important respects worse than the person who fails because clumsy, tired, or confused. But his failure is still a failure in a duty he owed to plaintiff.

When someone fails to take precautions against foreseeable injuries, the injured plaintiff can say 'you should have thought of that'. The person whose attention is diverted is no different than any other person who is negligent—he has failed to accord to others the weight to which their interests are entitled. The person who was too tired to notice the risk, or too unfamiliar with the tools he was using, fails his neighbours, and they can rightly complain that he ought to have been more careful.

20 The Common Law (Boston: Little Brown, 1881), 79.
Again, the person who, like the defendant in *Vaughan v Menlave*, tried his best to avert a risk is best described as mistaken about the consequences of his deeds. Although his mistake may be honest, it is still his mistake.

The real puzzle for the objective standard is the person whose attention is somehow *always* diverted—he either cannot foresee that others might be injured by his conduct, or can foresee it but somehow cannot be guided by that realization. This brings me to the first exception to the objective standard. Very young children certainly fall into the category of persons whose attention is almost always diverted, not in the sense that they can never pay attention to anything, but in the sense that they can easily be distracted from the things to which they should attend. Not surprisingly, they are exempt from liability because they are exempt from any duties to take care. Courts often point to the ways in which children are either impulsive or prone to complete absorption in whatever they are doing. Part of the difficulty is a lack of foresight, which prevents children from appreciating the dangers they pose. Because they cannot foresee certain perils, any duty to take account of them cannot apply to them. Another part is the lack of what courts sometimes call 'prudence', the ability to attach appropriate weight to factors that they are, in some sense, able to grasp. Slightly older children may have no difficulty understanding why, for example, they should not run with scissors—someone might lose an eye. Their difficulty comes in acting on that realization—while excited, they systematically fail to attach appropriate weight to the peril. As children mature, they are held to higher standards, both because they are capable of foreseeing a broader range of risks and because they are capable of conforming their behaviour to a broader range of duties. The ability of children at a particular stage of development to act on particular duties is at bottom a question of fact rather than norm: is it realistic to expect a child at this level of development to conform his or her behaviour to this particular requirement? Like so many factual questions, it is bound to be controversial, and there is a danger that prejudices and stereotypes will shape the answer it receives in any particular case. Such controversy is unfortunate, but probably unavoidable, in addressing questions concerning the limit of the law's ability to direct conduct.

Such a description of the limited capacities of children may seem to restate rather than resolve the puzzle. Why is the person whose capacities for foresight and prudence are no better than those of a child held to the standard of a reasonable adult of ordinary prudence? Such a person, we might imagine, could be treated as having only reached an arrested stage of development. Yet the law is resolute in its refusal to hold such a person to a lower standard.

Some of the leading cases on child defendants, such as *McHale v Watson* (1966) 115 CLR 199 (Aust. HC) seem to me to draw the right line, but in the wrong place. In particular, they take it for granted that boys are more easily allured by risks than girls. The 12-year-old defendant in *McHale* responded to what Kitto, J. called 'the natural affinity between a spike and a piece of wood' and so overlooked the danger his spike posed to the plaintiff. I do not mean to defend such stereotypes. But I do think my account explains why, if they are accepted, they lead to the results they do in ways that are not at odds with the law's underlying structure.
But the puzzle rests on a misunderstanding of the way in which the capacities characteristic of a particular developmental stage are relevant to the standard to which a child is held. The law of negligence does not hold children to a lower standard than adults only because their capacities are limited. Instead, the law must hold them to a lower standard in order to avoid results at odds with its core commitments; once the standard is lowered, it must be graduated on the basis of the capacities characteristic of a child of that developmental stage. A newborn infant or toddler is entirely beyond the law's reach in all respects. No standard of conduct could be guiding its actions. A fully grown adult is presumed to be able to bring his or her behaviour into conformity with the law's requirements. Between these two extremes, there is no sharp dividing line. Instead, once we have the extremes in view, we have no choice but to treat stages intermediate between them as lying along a continuum. Since that is a continuum of ability to conform to the law, various places along that continuum are treated as various degrees to which one can bring one's conduct into conformity with the law. As a result, in dealing with children, the degree of foresight and prudence to be expected of a child at that developmental stage is relevant to any assessment of a particular child's ability to bring his or her conduct into conformity with the law's requirements. The adult who never developed powers of foresight and prudence beyond those characteristic of an adolescent is not held to a lower standard, because no question arises of where to place such a person on that continuum between infants and adults. Such a continuum presupposes the idea that all adults, including this one, belong at one end of that continuum. So we reach the conclusion that capacities are relevant in the case of children not because capacities are always relevant to the duties one person owes another, but because children are an intermediate case between infants who can owe no duties, and adults who owe each other reciprocal duties.

Now consider the second category of people who are exempt from liability, namely those with physical disabilities. Here too, the primary exemption is not from liability, but from duties to avoid injuring others in particular ways, and the reason is the same: certain physical incapacities make it impossible for a person to conform to particular norms. It makes no sense to say 'you should have thought of that earlier' to a person whose physical disability prevents her from doing what the law requires, because thinking of it would not have made a difference to her conduct. Like the person who is physically restrained, the person who is physically disabled is beyond the reach of any norms of conduct. To say to the blind person that she should have seen the danger, is not just insulting, though it is certainly that. It is also pointless, because the advice in question could not have made a difference to her conduct. There are exceptions. If a blind person operates a motor vehicle, it does make sense so say that she should have thought of the peril earlier, because there is a particular thing she should have considered at a particular time, namely, the need for vision in order to avoid endangering others while operating a motor vehicle.

People with specific disabilities are thus exempt from liability because they are exempted from specific duties, the appreciation of which cannot direct their behav-
Adults with limited intelligence or self-control are not so exempt because the law only takes account of the very specific incapacities characteristic of disabilities. The only place a general incapacity is relevant is in the case of children, for whom special treatment is appropriate precisely because adults are held to a common standard. The clumsy person can be told that she should have been more careful on a particular occasion, even if, being clumsy, she has difficulty being more careful in general. And the rash person can be told that he should have thought before acting on a particular occasion, even though he has difficulty resisting his impulses. Supposing that the clumsy person can sometimes take precautions, advice to take particular precautions is always to the point, even if there will be occasions on which he is unable to take them. And it is always to the point to tell the rash person to be more careful. For competent adults, the ability to conduct an activity safely does not usually require self-consciously thinking about safety. Instead, competent drivers drive safely, and are able to recognize circumstances in which extra attention is required. More generally, competent adults conduct themselves safely, that is, they take appropriate precautions when engaged in familiar activities, and are able to recognize when unfamiliar activities require special attention. That is a general ability, which the law supposes that all adults are entitled to expect of each other. The person who is hasty or awkward is expected to recognize his or her own limitations. As a result, the law supposes that, in the case of an adult, there is no difference between defendant's inability to be guided and his simply having failed to be guided on a particular occasion. Because the advice is not pointless in the way that the imagined advice to the blind person was, norms can require the clumsy person to be careful, or the rash person to think before acting.

Recall again the structure of a tort action: an aggrieved plaintiff comes before a court seeking recourse against a defendant who (she alleges) has wronged her. The plaintiff's complaint takes the form: defendant is not allowed to do that to me. As we've seen, where the plaintiff was unforeseeable, or the injury too remote, defendant can reply that no norm of conduct could prohibit his action. The examples of persons with physical disabilities show that a norm of conduct can also fail to apply to a particular person because consideration of it could not have made a difference to what that person would have done. The blind person, or the person who cannot reach a switch provide examples, as does the person who has a first and unexpected epileptic seizure. Nothing could direct him to behave differently than he did.

The child or disabled person is no less of a bother to his neighbours than is the awkward or hasty adult. But given his limited capacity to conform his behaviour to the law, he is not subject to all of its norms. As a result, the plaintiff's complaint—that defendant is not allowed to do that—fails because no binding norm prohibits it.

Cases in which an adult defendant's lack of foresight or prudence prevent him attaching appropriate weight to dangers to others are different. In those cases, the law supposes that defendant would have been guided if he had thought through the likely consequences of his deeds, or attached appropriate weight to the interests of others.
Of course, he wasn’t so guided, either because he did not consider the risk, or because he didn’t attach sufficient importance to it. But that much is true of the person who is inattentive, tired, or indifferent. In such cases, the law did not make a difference on the particular occasion. But its inability to make a difference on that occasion is the same regardless of why foresight or prudence are limited on that occasion. The law can only impose duties that could guide conduct, assuming that those guided by them take appropriate precautions and have appropriate concern. But it does not condition liability on whether someone was in fact so guided. To so condition it would hold one person’s security hostage to another person’s efforts, and so fail to protect them equally from each other.

To sum up, the law recognizes no difference between the failure to foresee a particular consequence and the inability to foresee it on that occasion, and no difference between the failure to be guided by the prospect of injury one has foreseen and the inability to be so guided on that occasion. If someone were never able to foresee a certain type of injury, they would be treated differently, as people with perceptual disabilities are treated. And if someone were never able to be guided by the prospect of injury, they would be treated differently, as young children and the mentally ill are treated.

It is worth emphasizing that this way of understanding the exceptions to the objective standard do not rest on any idea of the law offering special accommodation to those in difficult circumstances. To be accommodating in this way would violate the basic principle of reciprocity, because it would put the costs of accommodation on the security of others. On grounds of symmetry, such accommodation would also require that special account be taken of the unusual sensitivities of plaintiffs. The rationale for the exceptions lies instead in the fact that the norms of conduct in question cannot be enforced. Of course, they can be enforced in the sense that those who violate them can be made to pay. But they cannot be enforced in the sense that coercion can be used to guarantee or even encourage compliance with them. In this respect, the exceptions occupy a position analogous to the criminal law’s defence of duress, at least on one understanding of that defence. The person who commits a crime in the attempt to save his own life lies beyond the criminal law’s ability to shape his conduct, since as Kant observes, the prospect of future punishment will never be as vivid in his mind as the prospect of immediate death. You can lock such a person up, or hang him, but doing so will fail as a punishment.

In the same way, a child can be fully aware of the danger posed by running with scissors, yet unable to resist temptation when excited. Indeed, that is why children can be allured, and so are not contributorily negligent in circumstances in which an adult would be: a child who can appreciate the danger of fire or swimming pools can be overcome by his curiosity. As a result, the norm cannot direct his conduct.

22 See e.g. Hughes v. Lord Advocate [1963] AC 837 (HL).

23 Are these claims about children true? My purpose in mentioning them is not to defend them, but to show how they operate in carving out the exception. If boys are more easily tempted than girls, that too is relevant to whether they can bring their behaviour into conformity with the law.
cases in which consideration of a norm cannot change the way people behave, the law is incapable of demanding compliance with it. The most it could do is impose liability even though no norms governed defendant’s conduct. That it does not do so reflects the subordination of questions of liability to questions about norms of conduct.

Confusion about the pointlessness of liability in such cases is easy, since any case in which it is pointless to hold someone responsible is also unfair. But the converse does not follow. The difference between these two claims brings the difference between norms of conduct and liability rules into sharper focus. It would not be pointless to make children and people with physical disabilities liable for the harm they cause, that is, to treat them as the insurers of those who others could foresee they might injure, just as it would not be pointless, from the point of view of deterrence, to punish people acting in conditions of necessity. But any such punishment would fail to address the wrong.

**Type and Extent of Injury**

I now turn to the law’s distinction between type and extent of injury. Norms of conduct direct people to look out for dangers their conduct poses for others. As we’ve seen, they can only direct people to look out for types of injury that are foreseeable. If injury is a foreseeable consequence of some action, steps must be taken to make it safer by making it less likely to cause injuries of that type.

I should emphasize that preventing injuries based on their type is not the only possible norm of conduct. That is, the duty account requires that liability in negligence be limited to foreseeable injuries, but it does not, on its own, require the distinction between type and extent of damage. There are other possible norms of conduct that could serve to guide action, but are rejected by the law of negligence because they fail to satisfy our other criterion, that of objectivity, which, as we saw, requires that the relevant norms protect people equally from each other.

One particular candidate for a norm of conduct would have us look not to the types of interests that are at stake, but rather to their extent on a particular occasion. In particular, one could factor in both the expected costs of safety precautions on a particular occasion, and the probable extent of injury if those precautions are not taken, in deciding whether precautions are merited in a particular case. This is not just a hypothetical example offered by way of contrast, but a serious proposal in torts scholarship. Some proponents of economic approaches to negligence law, most
prominently Richard Posner, suggest that questions of liability in negligence are, and should be, answered in just those terms.24

The intuitive idea is familiar from decisions that people make about their own safety. Despite the high priority we attach to safety, any investment in safety requires forgoing other things that are themselves valuable. As a result, there are limits on how much it makes sense to spend. Those limits are arguably a function of three things: the cost or inconvenience of the precaution, the type or seriousness of damage I am seeking to avoid, and the likelihood of that damage occurring. Suppose I am deciding whether or not to purchase a new ladder for changing light bulbs. Whether or not the expenditure makes sense depends on the cost of the ladder, the harm it would help me to avoid, and the likelihood of that harm ensuing. Consider two scenarios.

Perhaps the only alternative to the ladder is for me to stand on tiptoes on the top edge of an old and unstable ladder. The extra expenditure makes sense because of the likelihood and the seriousness of the harm that might result—a broken arm or back if I fall. But if I am unusually agile, perhaps the injury is unlikely, and so the expenditure is unnecessary. Alternatively, perhaps the old ladder is just as stable as the new one, but the new one has a special hole for holding light bulbs, so that I am less likely to drop one if I get the new ladder. Since light bulbs are inexpensive, it does not make sense for me to get the new ladder, because the expected cost it is supposed to avoid is lower than the cost of the precaution. Put in Hand's own terms

[T]he ... duty to provide against resulting injuries is a function of three variables: (1) the probability . . . (2) the gravity of resulting injuries . . . (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability is called P; the injury L; and the burden of precautions B; liability depends on whether B is less than L multiplied by P: i.e. whether B < PL25

As a way of looking out for one's own safety, the Hand test captures an important idea: prudent people will neither overinvest nor underinvest in safety. Instead, they should take such precautions as are appropriate, in light of the importance to them, avoiding injury and avoiding the expense and inconvenience of precautions. In so far as those factors can be monetized, it makes sense to do so, because the extent of precaution that is appropriate is a linear function of the three factors.

But the Hand test is meant to capture more than that, for it is also supposed to show how careful one person should be with the safety of another. The reasoning is the same: what it is reasonable for me to do is what it is rational for me to do, and it is only rational for me to take such precautions as are justified by the balance of benefits over costs. Here its apparent advantages turn out to be illusory. The fact that some sort of cost-benefit analysis is appropriate in deciding what measures to take to promote one's own safety does not, on its own, show that it is appropriate in deciding

24 Posner first made this point in 'A Theory of Negligence', Journal of Legal Studies, 1 (1972), 29, and has defended it, both as a positive and normative account of the law in various places since.

25 United States v Carroll Towing Co. 159 F. 2d 169, 173 (2d Cir. 1947).
what measures are appropriate for another's safety. The point here is analytical as well as normative: in order to understand what tort law is trying to do, we must look to its broad structural features, and explain those features, rather than dismissing them whenever they fail to match one's preferred theory, be it normative or explanatory. The Hand test misses out on important structural features of negligence liability; moreover, it does so because it is at odds with the core idea that one party may not set the terms of interaction unilaterally.

We have already encountered one example of negligence law's objectivity, in its refusal to consider a particular defendant's abilities to comply with a norm. The law's refusal to take account of the special needs of ultrasensitive plaintiffs provides another example. In each of those cases, one party's liberty or security is entirely hostage to idiosyncratic features of the other. The Hand test might be thought to provide an alternative approach, since the equation \( B < PL \) takes account of the interests of both plaintiff and defendant. But although it takes account of both, it does so in a way that treats both as idiosyncratic, and so cannot explain important features of tort doctrine.

First consider the situation of a potential defendant deciding how much care to take in order to avoid an injury of a certain probability and magnitude. Whether or not an extra investment in care is justified depends on the cost (Hand's 'B'). But the size of B will in turn depend on its opportunity cost: the advantage defendant will have to forgo in order to make the extra investment in safety. Thinking of precautions in terms of opportunity cost is necessary to avoid overinvestment in safety. To return to the example of the ladder, if I will need to store it somewhere and thus leave myself with insufficient room to store something else of value, that needs to be factored into my decision. Again, if I am transporting something valuable but perishable—perhaps I need to get sushi-quality tuna to the airport before today's flight leaves, or else it will be worthless—it makes sense for me to be less careful with the safety of my other property than if I am transporting something that will retain its value, and the only cost of delay is the time I lose.

The Hand test transplants this sort of reasoning to the case in which someone else's safety is at stake. So if I am transporting something expensive and perishable, it makes sense to take more risks with the safety of others than if I am transporting something less valuable. That is, the burden of precautions (Hand's 'B') depends on what else is at stake for me. I set the terms of interaction unilaterally in so far as the security of others is hostage to the amount I stand to gain by forgoing precautions.\(^{26}\)

\(^{26}\) Strictly speaking, if the Hand test is to be economically efficient, it also requires defendants to take account of the perils to them that result from failing to take precautions. In our sushi example, the risk of losing the cargo in a road accident needs to be factored into calculating Hand's 'I'. In a recent article Robert Cooter and Ariel Porat have emphasized this dimension of the Hand test. See Cooter and Porat, 'Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict', Journal of Legal Studies, 24 (2000), 19. Cooter and Porat argue that considerations of self-injury would make the test more defensible; in my view it makes the concern about unilateral setting of terms of interaction more, rather than less, serious.
Now consider the situation of the plaintiff. In deciding how much care is required, defendant needs to weigh against potential avoidance costs to him the costs the injury is likely to impose on plaintiff. We’ve already seen that this means that he must consider the particular costs he will face. He must also consider the particular costs that will be faced by the plaintiff. Whether particular precautions are justified by their costs depends on who is likely to be injured, because some people are more expensive to injure than others. Among the standard heads of damages are loss of income. So the defendant must consider the likely income of those who might be injured by his action. Should the class of potential plaintiffs be high income earners, then, other things being equal, Hand’s ‘L’ will be larger, and defendant must take additional precautions. Should they be low income earners, the result is different. To take an example, someone driving through a retirement community would, other things being equal, need to exercise less by way of precautions than someone driving through an area where the people who might be injured were young or gainfully employed. Perhaps residents of retirement communities are less able to avoid injuries because of their decreased mobility. But if so, that comes under Hand’s ‘P’ rather than ‘L’, and so does not change the fact that, other things being equal, those who can be injured inexpensively are entitled to less by way of precautions. Driving examples make the point vividly, but other examples are no more difficult to construct. Less care is required in the discharging of toxic wastes near poor neighbourhoods than near rich ones. Press reports suggest, depressingly, that less care is likely to be exercised when poor people are likely to be injured than wealthy ones. The Hand test suggests, surprisingly, that they are entitled to less care. Thus on the Hand test potential plaintiffs, as well as potential defendants, are able to set the standard of care to which they are entitled unilaterally.

If both parties can set the terms of interaction unilaterally, why doesn’t this count as a version of reciprocity on the grounds that two unilateral acts cancel each other out, so to speak? The difficulty is that the degree of care to which each person is entitled is a function of the assets and priorities of the particular people with whom they happen to be interacting. It might be thought that a person would just as soon have the degree of care to which he is entitled depend on the features of those with whom he is interacting as to have it depend on the protected interests of a hypothetical reasonable person. But the law does not give people whatever level of care they would most wish for. Instead, it seeks to protect them equally from each other. To do so requires that my interest in bodily security, or security of property, counts the same as yours, regardless of their relative economic value.

The law does not use the Hand standard to assess liability. Rather, the three factors that Hand mentions are all relevant to setting the standard of care. But all are set
in terms of the representative reasonable person—that is, the importance of particular interests in both liberty and security. Those interests matter, because all people have an interest in being able to pursue their ends free from the interference of others, and all have an interest in security in their persons and property. Protecting those interests does not lead to an efficient level of safety—protected interests can be important enough to justify precautions that exceed their dollar value in a particular case. 28

Even if the law does not use the Hand test, some might suppose that this is a failure that should be remedied. 29 Although I said at the outset that my aim was to articulate the organizing principles of tort law rather than to defend them, I will permit myself a few words of defence here: the idea of reciprocity at work in tort law captures an important understanding of fairness, one that both requires that people interact on fair terms and demands that wrongs be righted when they fail to so interact. My aim in developing and explicating them is, as I said, to explain tort doctrine. But if explaining a practice in terms of normative ideas that are familiar and powerful is not sufficient to justify it, it goes some way towards doing so. In particular, it shows that the practice is not arbitrary, and so that its failures to comport with some competing normative standards—say of economic efficiency—need not be taken to show it to be irrational or immoral.

28 It might be thought that the Hand test can be reformulated so that it does not incorporate these idiosyncrasies. Rather than looking at the specific defendant's potential gains and actual class of plaintiffs put at risk, we might look instead to the gains and losses that typically follow from the failure to take a particular precaution. The difficulty with such a proposal is that it would undermine the putative rationale of the Hand test, namely economic efficiency. Consider the example in which injurer and victim are the same person in this light. In deciding whether to take a precaution with my own safety, it is rational for me to consider the costs and benefit to me, not whether that precaution would be worthwhile for some other person with different assets and priorities. Again, in deciding whether or not to invest in something for the sake of something other than safety—an automatic espresso maker for convenience, say, or a bottle of champagne to consume—I need to consider the details of my own budget and the benefits I expect, what Wilfredo Pareto called my 'tastes and obstacles'. I choose irrationally if I decide based on what someone else, with tastes and means different from my own, would choose. As a result, a system that required people to exercise care based on the average gains and losses would lead to overinvestment in safety in some cases, and underinvestment in others. There is no reason to think that these over- and underinvestments would average out, any more than there is reason to think that efficient outcomes can be achieved in the economy as a whole by distributing a bundle of goods based on what most people want, rather than allowing people to make their own choices based on their own priorities. Overinvestment amounts to a deadweight loss in terms of efficiency, and underinvestment will, over the long run, lead to injuries greater than it would have cost to prevent them. This sort of composite Hand test does come close to the standard that courts enforce. But it fails the test of efficiency that putatively rationalizes liability.

29 In recent years, prominent defenders of economic analysis have shifted the focus of their inquiry from explaining tort doctrine to outlining what it should be. See e.g. Louis Kaplow and Steven Shavell, 'Principles of Fairness versus Human Welfare: On the Evaluation of Legal Policy' (http://www.law.harvard.edu/programs/olin_center/). Such a shift in focus is a clear testament to its explanatory failures. The attempt to revive it as a normative enterprise strikes me as a classic case of what economists sometimes call the strategy of 'too much invested to quit'—an attempt to redeem all of the work that has gone into it by using it for some other purpose.
Negligence law's requirement of foreseeability and the exceptions to the objective standard of care can both be explained solely in terms of the ability of norms to govern conduct. No norm of conduct could ask people to take account of things of which no account can be taken, and no norm can require a person to do things that she is unable to do. The objectivity of the standard of care, and its focus on type rather than extent of injury, are both explained in terms of the idea of reciprocity. A subjective standard would allow one person to set the terms of interaction unilaterally; a standard that considered competing interests quantitatively would hold each person's liberty and security hostage to the particular wealth and priorities of those with whom they happened to interact.

Other features of negligence law rest on more specific assessments of the importance of particular interests in liberty and security. Standards of conduct could be limited to foreseeable consequences, thereby honouring the requirement that they guide conduct, and imposed uniformly, thus honouring the reciprocity constraint, but would burden either liberty or security too greatly. Examples of standards that are too lax because they place too great a burden on security are easy to think of: everyone could be allowed to engage in a dangerous activity, such as high-speed driving. Provided that all were able to engage in them, allowing such activities would not violate reciprocity, but it would put an important security risk in peril for the sake of a comparatively unimportant liberty interest.

Examples of standards that could apply to all, but which burden liberty too much are also easy to construct: requiring people to drive at 2 m.p.h. would make automobiles much safer, but would place too great a burden on people's ability to come and go as they pleased.

I now want to suggest that other familiar features of tort doctrine can be explained in the same way. Consider the bar to recovery in negligence for pure economic loss. The prospect of economic loss to others provides the basis for a possible norm of conduct: someone towing a barge in fog can take account of the fact that a variety of people rely on the bridge that he might hit; someone leaving a fire unattended can take account of the losses faced by people who depend in various ways on the buildings that might burn down. Moreover, such a norm need not violate the condition of reciprocity, because a norm requiring that each person take account of all possible effects on others could be applied to all equally. But although such a norm is possible, it would be too demanding. That is why the law supposes that the fact that people depend on other people, and on the continued availability of things in various ways, provides no reason to take extra precautions.

If we focus on the plaintiff's complaint about the defendant's conduct, the reason for excluding pure economic loss becomes clear. To bring it into focus, consider an
analogy with the duty owed to rescuers. A rescuer is entitled to recover from the person who created the peril, even if the primary victim of that peril is barred from recovery, on some grounds such as assumption of risk or contributory negligence. The rescuer can also recover if he acts pre-emptively, for example, by pushing someone out of the path of an oncoming train, and is injured although the person rescued was not. In these cases, the rescuer recovers because she can complain because the initial injurer drew her into the situation. This is evident where the defendant has put herself in the peril to which the rescuer responds, but it is just as true in other cases as well.

Contrast this with the case of pure economic loss. If my restaurant thrives because of customers from your nearby hotel, I cannot recover my lost profits from you if you close it, or from the arsonist who burns it down. If my factory closes down because your barge destroys the public bridge that provides the only access to the island on which it is located, I cannot recover my losses from you, even though you could have foreseen the harm that befell me, and even though you would have been liable for those losses had I owned the bridge you destroyed. The reason you escape liability is that, although the possibility of my losing something on which I have come to rely could be the basis of a norm of conduct, it would place too great a burden on your liberty to be asked to take account of such things. The possibility of others relying on things going a certain way is so pervasive that to require people to take account of it would narrow the range of freedom to almost nothing. Instead, those who depend on the availability of things they do not own do so at their own risk.30

These examples may seem to be an incoherent grouping: destroying a bridge is an unreasonable act with the foreseeable consequences that third parties will be inconvenienced. Closing my hotel, by contrast, has foreseeable consequences, but is not unreasonable. In fact, that is the very issue: the foreseeable impact of one’s deeds on others only gives rise to a duty in cases in which persons more generally could owe such a duty to each other. If you do not have a right to the continued presence of my hotel, you have no such right, whether you lose the hotel’s presence through my decision to demolish it, through an arsonist’s intentional deed, or through someone’s carelessness. Nobody has a duty to take account of your use of it, even if they are prohibited on independent grounds from doing the very same deed that deprives you of it. You still cannot say ‘he’s not allowed to do that to me’, even if he is not allowed to do that. The law cannot require people to take account of all of the ways in which their actions might affect others. Because it does not require them to take account of those

30 Where someone relies on the continued availability of their spouse, or a family member, they do have a cause of action for wrongful death. In such cases, their rights in relation to that person are what Kant calls ‘a right to a person akin to a right to a thing’, in the sense that it is a right against the entire world, rather than a contractual right against a particular person. The law can protect certain relationships in that way. Which relationships it so protects depends on substantive views about social life. In Kant’s example, and through the nineteenth century in the common law, domestic servants were so regarded.
effects, it also cannot hold them answerable if they bring about those effects, even if they do so through conduct that is prohibited on other grounds.

There are two points here. The first is that although a norm requiring people to take account of all of the foreseeable ways in which one person depends on another provides the basis of a possible norm of conduct, such a norm would be too demanding, because almost anything one does runs the risk of disappointing the expectations of others. If I own a hotel and you own a nearby restaurant that draws customers from among my guests, you have no cause of action against me in tort if I close my hotel or open a competing restaurant. To impose such a duty on me would burden my liberty too greatly. For just the same reason, imposing a duty on third parties to protect your dependence on the availability of my hotel would place too great a burden on their liberty. The damage to the hotel itself provides a basis for a duty owed to me to avoid burning it down. Although a further duty for your benefit would not constrain his conduct any more than it is already constrained in the particular instance, to make your vulnerabilities the basis of a duty would limit his freedom, for what he was allowed to do would always depend on its effects on you.

Again, the important point here is that negligence law subordinates questions of liability to norms of conduct. The person who damages the bridge could be made to pay for the damage he causes to the businesses stranded as a result, but he could not have a duty to see to it that those businesses retain access to the bridge. Such a duty could only be spelled out in ways that are so expansive as to make everyone responsible for the impacts of their conduct on others. To impose liability without the breach of a norm would be at odds with the overall structure of negligence law; to enforce a norm requiring so much would leave people no freedom.

Secondly, it might be thought instead, that the appropriate norm should only prohibit such interferences where the loss was likely to be severe or substantial; it would fail to protect people equally from each other, because it would make the care to which people are entitled depend on the extent, rather than type, of injury that they might suffer. But such a norm would face all of the difficulties we already saw with the Learned Hand test.

The fact that other people depend on the availability of various objects that they do not own, and various persons with whom they have no special legal relationships, cannot provide a reason to limit one's activities because if it did, one's activities would be eliminated. Almost anything anyone might do can run the risk of disappointing the settled expectations of third parties. The problem is that the only non-negligent act would be sitting quietly in one's room. A norm of conduct that says 'do not do anything that will foreseeably deprive others of persons or objects upon which they rely' precludes almost anything anyone might do. Nor can the same purported duty be saved by stating it more narrowly, saying, for example, 'do not damage bridges because people cross them'. To see why, consider another example: suppose that defendant has an independent defence to a negligence action for damaging the
bridge—perhaps it is his own bridge, or perhaps the bridge was made vulnerable by its owner's negligence in constructing it, so that exposing it to the risk is the only way in which defendant can safely navigate the river. Or perhaps the bridge suffers no real damage from the collision, but is closed for inspection. Defendant does not owe bridge users a duty of care when he does not owe one to the bridge owner. As a result, he does not owe a duty of care to the bridge users. The situation is thus very different from those situations in which a defendant is answerable for the injuries of rescuers. In such cases, the duty owed is direct.

Commentators sometimes suggest that the reason there is no liability in negligence for pure economic loss is that to allow it would lead to liability out of all proportion to the seriousness of wrongdoing. Courts frequently acknowledge the financial implications of their judgments, but just as frequently refuse to be guided by them. Moreover, as we have seen, the distinction between type and extent of liability means that a small wrong can lead to massive liability if it leads to massive loss. So one needs to be cautious in supposing that such factors are pivotal. Instead, the real difficulty with liability in such cases is that the only possible norm of conduct on which it would depend would either be so demanding as to leave almost nothing outside its reach, or else limited in ways that made norms of conduct depend upon the magnitude of the interests at stake. So the core problem is not one of unlimited liability, but of liability that is not tied to the violation of a defensible norm of conduct.

Conclusion

I said at the outset that my main examples would be drawn from the tort of negligence. I also suggested that negligence provided a clear illustration of the ways in which tort law subordinates questions of liability to questions about norms of conduct, and sought to explain some of the broad structural features of the norms of conduct imposed by the law of negligence. In this closing section, I will, too briefly, gesture in the direction of one other area of tort liability, and explain how the analysis developed here can be extended to it. In particular, I want to suggest that such an analysis can be extended to explain the role of norms of conduct which can be invoked in cases in which liability is strict.

In cases in which liability is strict, such as the use of explosives, or the keeping of wild animals, it might be thought that no norms are at work, since the dangerous activity in question is legal, even though the person engaged in this is liable for the

31 A property owner does not owe a duty to third parties to protect his own property against damage (unless he accepted such a duty via contract). Moorgate Mercantile v Twitchings [1977] A.C. 890.
harm it causes. But as our discussion of negligence indicates, carelessness as such is not prohibited. Instead, defendant’s duty is to avoid injuring plaintiff in the ways that plaintiff is entitled to be free of. So I may not cause you to break your leg through my carelessness. In the same way, I must not knock down your house through my blasting, or allow my elephant to trample your garden. The ease or difficulty, or indeed, the near impossibility, of my discharging this duty while blasting or keeping wild animals does not undermine your entitlement to be free of those injuries, anymore then your entitlement to be free of negligent injuries depends upon the ease or difficulty I have in driving safely while tired. The law does not prohibit driving while tired; nor does it say ‘you are free to do so provided you pay for any harm you cause’. Instead, it says ‘don’t injure others through careless driving’, and empowers those who are injured through the violation of that norm to recover damages because they have been wronged. In just the same way, the law neither prohibits blasting nor conditions its legality on readiness to pay for harm caused. Instead, it says ‘don’t injure others through your blasting’ and empowers those who have been injured through the violation of that norm to recover damages because they have been wronged. The duty to avoid injuring others through blasting provides a genuine guide to conduct, even though it does not tell someone how to blast without liability.

In all such cases—whether liability is conditioned on intention, negligence, or is strict—plaintiff can recover damages just in case she can establish that defendant was not allowed to do that to her. Tort law decides whose problem something is by looking at how people are allowed to treat each other.