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Reasonableness and Law

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combustion, he should not be liable for the resultant damage. The court rejected the argument, for reasons that have broad significance. Because of the binary structure of adjudication—because it had to be somebody's bad luck—the court had to decide whose it was. Here nobody could in fact have controlled the outcome, but the bad luck must be borne by someone. If we relieve Menlove of responsibility for something he cannot control, we saddle Vaughan with a cost the origins of which *he* could not control. There is no way to retreat to equating responsibility with control. Yet the decision is not just an administrative one in a situation in which nobody could control the loss.[22] Rather, holding Menlove liable is the only way to treat the parties as equals, by protecting them each from the activities of others, and leaving each with room to pursue his or her own purposes. The only way one can be exempt from the need to bear the costs of one's activities is to not be an agent at all. Had the court relieved Menlove of responsibility, and treated the bad luck as Vaughan's, they would have been treating Menlove himself as a mere natural thing rather than as an agent. At the same time, had they refused to make Menlove bear the costs of his activities to others, they would have been treating Vaughan as less than an equal, making him bear the costs of a broader range of others' activities than they must bear of his own.[23]

Put slightly differently, while we hesitate to blame Menlove for his incapacity, we hold him liable because the risk that he imposed on Vaughan was rightly his. We hold him liable without supposing him to be morally tainted because a fair distribution of risks requires that the risk lie with him. His liability can also be restated in terms of his responsibility to moderate his activities in light of the legitimate claims of others. Those who engage in the activities of ordinary life have a responsibility to take account of the dangers their activities pose. Those who are genuinely incapable of assessing risks and taking precautions—incapable, that is, of moderating their pursuit of their own ends in light of the legitimate claims of others—cannot be held responsible for the consequences of their deeds, but they also can be prevented from exposing others to those risks. Those who have the requisite capacities cannot excuse themselves on those occasions on which they fail—for whatever reason—to exercise them adequately. That is, the general capacity for responsible agency is the capacity both to pursue one's ends and moderate one's claims in light of one's duties to others. In the next chapter I will say more about how that capacity is specified. For now, the crucial point is that those who have the general capacity are required to moderate their behaviour in light of the interests of others. The extent to which that

[22] It is not merely administrative for two reasons: First, it does nothing to prevent future losses, for those in Menlove's situation are *ex hypothesi* incapable of appreciating the risks. Second, it is plainly administratively simpler to let losses lie where they fall, unless there is some pressing reason to do otherwise.

[23] Holding Menlove liable is just the flip side of a principle we have already seen. If you injure me in spite of taking reasonable care, you are not liable, even if I injure easily. To hold you liable in such circumstances would mean that you could only act subject to my idiosyncrasies. In just the same way, Vaughan's interest in security cannot be made to depend on Menlove's lack of intelligence.

capacity must be exercised is given by those terms. In the case of accidents it is thus given by the standard of reasonable care. Menlove cannot both claim incapacity in a particular case, yet also insists on the liberty to engage in risky activities. Insofar as he escapes responsibility, his liberty can be constrained for the safety of others.

The details of *Vaughan* have led some commentators to suggest that it is a misleading example of the principle for which it is supposed to stand. The defendant had been warned of the dangers, and declared that his stock was insured and he was "willing to chance it." This might suggest that he really was in control of the situation and could have avoided the injury, but chose not to.[24] Certainly, if we broaden the time frame, there must be some precautions which he could have taken—selling his land and moving to the city, if nothing else. But the problem of limited foresight recurs even on this broader time frame. His failure to recognize the seriousness of danger prevented would have prevented him from taking further precautions. Moreover, the question of whether he is responsible for the earlier failure to take precautions is objective in just the same way. He did not realize further inquiries were necessary; the question remains of whether or not he should have.

Vaughan v. Menlove is a particularly dramatic example of a far more general principle. The same requirement of treating parties as equals by holding them responsible for the risk they have created regularly plays itself out in more mundane examples. Rather than asking everyone to expend the same degree of effort, thus leaving each person's security dependent on who their neighbours happen to be, the law demands the same degree of care from everyone and protects all to the same degree. If I am tired or distracted, and carelessly injure you as a result, I am not excused because at the time of the accident I could not control its outcome. Nor am I excused because I didn't realize the activity was risky. My inattention may itself be a reflection of my preoccupation with higher things, it may be the result of exhaustion because I busied myself with good works, or it may simply reflect inappropriate priorities on my part. From the point of view of liability, none of these things properly matters, because none of these things entitle me to put you at risk. Likewise, I am not excused if I didn't know of the dangers my activity, but should have, quite apart from any questions of what, if anything, else occupied my mind. In each case, I remain liable even though I was doing my best at the time, for the alternative would be to make your security dependent on what I happened to be capable of. As was the case with *Vaughan v. Menlove*, it is always possible to widen the time frame and ask if I could have taken precautions earlier. To answer that question, though, we must ask about my duties, not my efforts.

The same principle requires that those who do not try their best—those who can see that some accident is possible or even likely—, do not always incur liability. By driving an automobile carefully, I may know that if I drive frequently enough I am likely to injure others. Nonetheless, I can drive and even injure others and escape liability. In such cases, I avoid liability because I exercise the care required of me. It may be that I could have driven even more carefully, and reduced the risk of injury

[24] I am grateful to George Christie for pointing this out to me.

still further. Indeed, in the case of automobiles, this is plainly possible. Driving at 3 miles per hour is very safe, however annoying it might be to other drivers. Yet the person who drives much faster is not liable. In the same way, the person who is just attentive enough avoids liability, even though by being more attentive risks could have been reduced further.

The outcome in *Vaughan* may nonetheless strike some as unfair. If so, it is perhaps because they suppose that the costs of Menlove's lack of intelligence should not be borne by him alone. Though the general idea is surely appealing, it does not lead to the conclusion that Vaughan should not be allowed to recover. If we wish to distribute the costs of Vaughan's misfortune, it is difficult to see why Vaughan in particular should bear a disproportionate share. We might wonder instead whether those costs might be treated as everyone's bad luck. That question is a political one, because the only *kind* of answer it can receive will depend on our view of the importance of various types of activities.

12 A Clarification About Objectivity

Talk about objective standards makes some people uneasy. The idea of objectivity may suggest that such standards are somehow eternal and exist quite apart from questions about which interests people have and how important they are. Any such conception of objectivity might well be suspected of being little more than a smokescreen for interests that are already well-entrenched. But I mean something considerably more modest. Precisely because the fault standard turns on substantive views about the importance of various activities, its contours will always be open to debate. It is objective in a negative sense, inasmuch as it is not subjective, that is, the limits of liability are not fixed by the views, interests, or abilities of either of the parties to a tort action. Instead, it protects the interests in both liberty and security that everyone is assumed to have. On the basis of those interests, it asks whether a reasonable person is entitled to have a particular interest protected. The importance, and even existence, of particular interests is often controversial, and the common law has sometimes been indifferent to what now seem significant interests, and concerned about insignificant ones. Clear examples of such indifference can be found in the absence, until recently, of any legal recognition of the interest that women have in being free of sexual harassment. But the very possibility of identifying the problems shows the way to the appropriate response to them: moving to a more nuanced objective standard.[25]

In cases in which parties are asymmetrically situated with respects to information, power, or vulnerability, risks must be divided accordingly. The law never had conceptual difficulties taking account of such asymmetries in cases of professional

[25] See e.g., Estrich (1991, 842), for an exploration of the possibilities of a reasonableness standard in sexual harassment cases that recognizes the seriousness of women's interests and the limited importance of mens' interests in harassment.

negligence. The fact that a physician exposed patients to risks to which patients do not expose physicians leads to a different sort of division of risks. The law has not always been good at understanding such asymmetries, and there are cases, most notably around issues of gender, in which its misunderstanding of power relations has been appalling. A particular objective standard is always an expression of particular views about the importance of various interests. As a result, in an important sense it is always political, and in principle subject to contest. It is also political in a less appealing sense, inasmuch as it expresses power relations in the society. Yet in this sense, no way of ordering any aspect of social life can be free of such effects.

13 Unusual Sensitivities

The converse of the refusal to make special accommodations for those trying their best is tort law's lack of solicitude for plaintiff's with unusual sensitivities. It too is a direct consequence of the idea of risk ownership. If an interest is not protected, the fact that someone's conduct foreseeably may injure it does not create liability. The law of nuisance is fully explicit on this point. If my singing in the shower gives my neighbour headaches, it may be awful of me to continue, but my neighbour cannot enjoin me to desist. In the extreme and leading case, a church bell which caused a neighbour to suffer seizures was allowed to continue.[26] The example is striking because the injury was extreme and certain. In cases of negligence, the situation is only slightly more complicated. The person who fails to take care when someone may be injured in an unusual way does not incur liability if they are injured. Suppose you get a severe allergic reaction from the plants in my garden. I do not need to compensate you for your injury unless it is a sort against which I ought to have taken precautions.[27] On the other hand, if I keep plants known to be toxic to humans, I may be liable. The basic principle is that the risk of certain idiosyncratic injuries lies with those who are injured. The fact that others cause them is not more relevant than the fact that various acts of careful people may be causal antecedents of an injury. This is, of course, just another application of the general principles of duty and remoteness: one can only become responsible for a particular risk if one has a duty to others to avoid injuring them in some particular way.

But if unusual types of injury do not create liability, unusual extent of injury does. The idea of risk ownership explains what is called the "eggshell-skull rule." If I injure you through my negligence, and unbeknownst to me, you have an unusual susceptibility so that the extent of your injury far exceeds the ordinary extent, I am nonetheless liable for your entire injury. The parallel with lost income is instructive here: if I injure you and must make up the income you lose as a result, the amount

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[26] *Rogers v. Elliott* 15 N.E. 768 (Mass. 1888).

[27] This extends even to American products liability. An unusual sensitivity, rather than a failure to warn, is treated as the proximate cause of an allergic reaction. *Adelman-Tremblay v. Jewel Cos,* 859 F.2d 517; (7th cir. 1988).

I must make up depends on your earning capacity, whether or not I was aware of it. Having taken a risk with some aspect of your security, I own the full extent of the injuries connected with that aspect. Just as I escape liability if, by good fortune, you are not injured, so I am liable for the extent of the injury that is within the risk that makes my conduct negligent. That is, the thin skull rule only applies if the injurer was behaving unreasonably with respect to the risk in question. At the same time, if I am careless with respect to one aspect of your security and, because of your unusual susceptibility, I injure you in some other respect, the thin-skull rule does not apply. Because liability is tied to the creation of particular risks, my failure to show appropriate care with respect to one risk does not lead to liability any more than it would if different people were involved, as in the *Palsgraf* case.

The idea of risk ownership lets us see that, far from being opposed principles, the thin-skull rule and the ultrasensitive plaintiff rule are actually expressions of a single underlying principle. My liability does not depend only on what happens, but rather on the risks to which I expose you. If you are sensitive in unusual ways, the injuries that come out of that are yours. Were others liable for them, their liberty would be subject to your security, no differently than if your security was limited by the good faith efforts of others. And the boundaries of reasonable care depend on interests in both liberty and security. The problem with making defendants liable for unusual injuries is not that it would create crippling liability—that may or may not be the case—but rather that it would encumber liberty too much, as people seeking to avoid wronging others would need to moderate their activity to too great an extent. By contrast, liability for the full *extent* of injury, no matter how surprising, places no burden on liberty. For no extra precautions are required to avoid injuries severe in extent than are required to avoid less severe injuries. The standard of reasonable care is not a proxy for the price of injury. The relation between the thin-skull rule and ultasensitive-plaintiff rule thus illustrates the difficulties of economic approaches to tort liability, which collapse unreasonable risk imposition into expensive risk imposition. So long as these are kept distinct, the thin-skull rule and ultrasensitive plaintiff rule can be seen as complimentary. From the point of view of the reasonable person, the relevant risks are the risks of injury, not of being out-of-pocket.

In each of these three cases—thin skulls, ultrasensitive plaintiffs, and those who try their best—a fair distribution of risks allows some plaintiffs to collect from a defendant who wasn't morally bad, and bars other plaintiffs from collecting from defendants who were. The result may make tort law seem like a cruel and cold system, a shocking illustration of why Hume described justice as a "jealous virtue." In particular, it allows someone to knowingly expose another to injury, standing narrowly on his or her right to do so, and utterly lacking in compassion. While such concerns are not without force, it is important to remember that the underlying issues are not about blame but about coercion and equality. A kinder, gentler regime of individual responsibility would lead to even less appealing results. To require each person to limit their activities because others might be made worse off by them is to give up on both the idea of individual liberty and the idea of people moderating their activities in light of the legitimate claims of others. If all of a person's vulnerabilities limit the liberty of others, none is free to go about their own affairs.

14 Misfeasance and Nonfeasance

The law's lack of solace for unusually sensitive plaintiffs whose vulnerabilities are known is of a piece with the legal distinction between misfeasance and nonfeasance. The distinction between misfeasance and nonfeasance is not the same as that between acts and omissions, nor even to that between harm and benefit. Tort duties are often breached by omission—the failure to take precautions is the most obvious example—and when people occupy special roles or stand in special relations, liability can follow on the failure to confer a benefit. Instead, the distinction between nonfeasance and misfeasance is the distinction between unreasonable behaviour that injures and reasonable behaviour that does. The most striking consequence of this distinction is the absence of a tort duty to rescue. There is surely a moral duty to rescue in some situations. The failure to fulfill such a moral duty might be enforced through a criminal penalty, but does not provide the basis for tort liability. Now it might be thought that if anything is reasonable in such cases it is to take small easy steps in order to aid another. But although there is a clear sense of the word "reasonable" on which this is true, it is a sense which is foreign to tort law and the idea that particular risks belong to particular people. The fact that you are in peril, and I know of your peril, does not make that risk mine. As a result, if it ripens into an injury, it is not my loss to make up. The idea of risk ownership offers a simple explanation: mere knowledge of another's needs, no matter how pressing, is not enough to shift a risk from one person to another. To shift risk in this way would be unduly burdensome to liberty, because it would always require people to give up what they were doing whenever they had a prospect of aiding others in distress (McCauley 1897, 497). Moreover, those who failed to aid would be responsible for the full extent of the other person's injury.

Now it might be thought a more moderate tort duty to rescue is appropriate, such as a duty that was limited to *easy* rescues only. As morally attractive as such a proposal might be, it would sit uneasily with the rest of tort doctrine. For in cases of misfeasance, the existence of duty of care does not depend on the ease with which it can be discharged in the particular instance. Instead, it depends on the significance of the relevant interests in liberty and security. Once account has been taken of those, the costs of care to the defendant counts for nothing. Put differently, rights in tort law are not defined in terms of prices or welfare. That is also why the frequency with which someone engages in an activity is irrelevant to questions of reasonable care. The same point applies to any imaginable duty to rescue: if the existence of the duty depends on the ease with which it is discharged, it would fail to express the idea of reciprocity, because it would make the security of those in peril depend on considerations about the welfare of those positioned to rescue them. Conversely, it would make the liberty of those in a position to rescue others depend on the welfare of others. The point is not just that this would import an element of chance into the situation. That much is inevitable, since the opportunity to rescue is largely a matter of being in the right place at the right time. From the point of view of risk ownership, the real problem is that who owned which risks would be tied to shifting welfare considerations. Here again we see the difference between a conception of

tort law that focuses on fair terms of interaction and one that focuses on costs. From the point of view of costs, the costs of discharging a duty on a particular occasion might well be relevant to whether there was such a duty. From the point of view of fair terms of interaction, they are not.

While the absence of a duty to rescue may seem yet another example of a cruel and unfeeling doctrine, it is important to recognize that it does not stand in the way of considerable mandatory redistribution. Many misfortunes can and should be held in common. The distinction between misfeasance and nonfeasance is simply the requirement that a particular misfortune not be shifted from one person to another.[28]

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[28] Still, if a tort duty to rescue is difficult to justify, criminal sanctions for failure to make easy rescues is not. Joel Feinberg offers the example of a statutory duty to report fires to the fire department (Feinberg 1992). Such a duty would appropriately be limited to easy reports, and failure to report might be punishable by a fine. Feinberg's example is illuminating in this context because the penalty that would appropriately attach to such a crime would be nowhere near that attached to arson, quite apart from the magnitude of the fire. Instead, the duty to report could be thought of as part of a more general obligation to contribute to a scheme of public cooperation. With this model in hand, Feinberg suggests a parallel duty of easy rescue in emergency situations. Such a duty would fall randomly, though presumably not in an unfair way, and its burden would be small. I take up this topic in more detail in Ripstein (2000, 2004).

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The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices

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In *The Oxford Companion to Law*, Walker defines the legal concept of a reasonable man with this closing remark:

> It has been observed that Lord Bramwell occasionally attributed to the reasonable man, the agility of an acrobat and the foresight of a Hebrew prophet, but the reasonable man has not the courage of Achilles, the wisdom of Hercules, nor has he the prophetic vision of a clairvoyant. In truth the reasonable man is a personification of the court of jury's social judgement. There is, however, apparently no "reasonable woman" known to common law (Walker 1980, 1038).

In what follows, I will present my own view of the reasonable man as consumer, a view to some extent different from that which Walker presents in *The* Oxford Companion to Law.

I will start with the EU Directive 2005/29, which amended the EU directive on misleading advertising by introducing a general prohibition against unfair business-to-consumer commercial practices. This means that misleading advertising can henceforth be construed as an unfair commercial practice, and it is on this last topic that I focus here.

Unfair business-to-consumer commercial practices are defined in the directive in a general clause:

> A commercial practice shall be unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour of the average consumer whom it reaches or to whom it is addressed, or of the average member of a group when a commercial practice is directed to a particular group of consumers (Article 5(2)(a)(b) of Directive 2005/29/EC).

1 What Does "Contrary to the Requirements of Professional Diligence" Mean?

The directive explains that professional diligence is connected to the duty of good faith and describes the "standard of special skill and care which a trader may reasonably be expected to exercise towards consumers" (Article (2)(h)).

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This means that it will not suffice for traders (tradespeople and merchants) to act honestly in carrying out their trade or to comply with commercial standards of fair dealing. They are also required to make their business interests secondary to the consumer's whenever it is reasonable to expect this in the context of the case at hand.

For Italian scholars, this reasonable expectation expands the concept of good faith and professional diligence in the consumer's favour, because it might require traders to undertake further activities beyond those they are normally required to carry out in fulfilling a duty of good faith.

Therefore, it seems to me that, according to the directive, the term *reasonable* does not mean "normal" nor "statistical". In fact, it is not sufficient that the trader acts diligently according to the *id quod plerumque accidit* rule. In my opinion the use of the word *reasonable* in the directive should be interpreted as meaning correspondent to an expectation which is adequate in the context of the individual case concerned.

2 Whose Reasonable Expectation is it that Counts as a Measure of the Trader's Fairness and Diligence?

The directive does not answer this fundamental question for it is cast in the passive voice and so omits to identify a party whose expectation is relevant. We just see this definition: "professional diligence means the standard of special skill and care, which a trader may reasonably be expected to exercise towards consumers". Hence the question, reasonably expected by whom? The general public? The judiciary? Lawmakers?

Italian law, by contrast, clearly states (in implementing the EU directive) whose reasonable expectation it is that the trader should take into account, and so who it is that can expect diligence and care from the trader: the consumer. Under Article 18 (h) of the Italian Consumer Protection Code, professional diligence is "the standard of special skill and care that *consumers* may reasonably expect a trader to exercise toward them commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity".

The directive was open to interpretation, and so the Italian legislator had to decide how to read it. Whether the legislature's decision was itself legitimate or reasonable is a matter for discussion, but I believe it to be in keeping with the purpose of the directive and it protects the interests the directive is designed to safeguard.

The purpose (as set forth in Article 1 of Directive 2005/29/CE) is to help the European internal market function properly and to provide a high level of consumer protection within this market by harmonizing the member states' laws, regulations, and administrative provisions on unfair commercial practices harmful to the economic interests of consumers.

Among these interests is the consumer's interest in maintaining an ability to make an informed transactional decision. Indeed, a practice is unfair if it "is likely to

materially distort the economic behaviour" of the consumer (Article 5 of Directive 2005/29/CE).

Therefore, a consumer can seek an injunction against a trader even if there is only a risk that an unfair commercial practice could appreciably curtail the consumer's freedom of choice, "thereby causing the consumer to take a transactional decision that he would not have taken otherwise" (Article 2(e) of the Directive 2005/29/CE). This option is extremely relevant to consumer protection. Indeed, Article 11 (2) of the directive allows member states to prohibit unfair practices "even without proof of actual loss or damage or of intention or negligence on the part of the trader."

To seek an injunction it is not necessary for a consumer to have actually entered into a contract. In the event that a misled consumer has entered into a contract, it may not even be valid. In addition, the consumer may be able to successfully sue the trader for damages under applicable national law on the invalidity of contracts and on pre-contractual liability. (As is stated in Article 3(2), the "Directive is without prejudice to contract law and, in particular, to the rules on the invalidity, formation or effect of a contract").

Consumers can also seek an injunction even if they have not been harmed and have not suffered any loss through their use of an advertised product, and even if they have not purchased the product. In addition consumers who do get harmed or do suffer a loss are further entitled to sue the product's manufacturer or the trader, or both, on the grounds of product liability for defective products (as is stated in Article 3(3), "the Directive is without prejudice to Community or national rules relating to the health and safety aspects of products").

In conclusion, commercial practices are deemed unfair and are accordingly prohibited if they threaten the consumer's freedom of choice. This freedom is protected by the directive on the theory that an informed choice is an efficient one (see the directive's 14th whereas).

It seems to me consistent with the directive's purpose, and with the interests protected, that the trader's professional diligence toward consumers should be measured by reference not just to market standards but also to the consumer's reasonable expectation.

3 To Understand What a *Consumer's Reasonable Expectation* Means, We Need Also Clarify the Meaning of *Reasonable Man,* or, More to *the* Point, of *Reasonable Consumer*

There are a few questions that need to be asked in working toward an adequate definition of a consumer's reasonable expectation: How do consumers see the world? What do they think? What do they want? How do they feel? What is their understanding? What do they know? What is their experience? What is their history?

To answer these questions, we need to decide whether the consumer's reasonable expectation corresponds to the average man's normal—and perhaps optimistic—expectation, or to the many individual cases where consumers are anything but average and have to deal with possibly dubious business practice.