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Stephen R. Perry

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Cost-Benefit Analysis and the Negligence Standard

Stephen R. Perry*

In his commentary on the proposed *Restatement (Third) of Torts: General Principles* (Discussion Draft) ("Discussion Draft"),¹ Stephen Gilles does an excellent job of analyzing the role of cost-benefit analysis in the characterization of reasonable care in previous restatements, and also of tracing the relationship between that characterization and contemporaneous scholarly work.² This is a necessary prelude to any attempt to reformulate the content of the negligence standard in a *Restatement (Third)*, and I think that Gilles' work will prove to be exceptionally helpful in that regard. Given the limited space I have available for my own comments, however, I intend to focus, somewhat more narrowly, on the Discussion Draft itself, and on Gilles' direct critique of some of its provisions.

Let me begin with the proposed definition of negligence in Section 4 of the Discussion Draft. An actor is negligent, we are told, if he or she "does not exercise reasonable care under all the circumstances."³ The Section then goes on to state the following:

Primary factors to consider in ascertaining whether conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the actor and

* John J. O'Brien Professor of Law and Professor of Philosophy, University of Pennsylvania, and Visiting Professor of Law, New York University School of Law.

1. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft].

2. Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813 (2001).

3. Discussion Draft, *supra* note 1, § 4.

others if the actor takes precautions that eliminate or reduce the possibility of harm.⁴

As Gilles points out, these are essentially the factors that figure in the Learned Hand formula⁵ and, indeed, in the understanding of reasonable care that informs the *Restatements (First)* and *(Second)*.⁶ As Gilles further points out, the Discussion Draft differs from the first two *Restatements* in that it does not make either the Hand factors, or the Learned Hand formula itself, subordinate in any way to the traditional concept of the reasonable person. Rather, the Discussion Draft drops the reasonable person from the main text and mentions the idea only in passing, in the comments.⁷

I will return to the reasonable person later. For the moment, I wish to focus on the Discussion Draft's explanation for what it variously terms a cost-benefit test, a risk-benefit test, and a balancing approach.⁸ In Comment d on Section 4, the Discussion Draft states that the balancing approach rests on "the simple idea" that "[c]onduct is negligent if its disadvantages exceed its advantages, while [it] is not negligent if its advantages exceed its disadvantages."⁹ The comment then explains that this means that conduct is negligent if the magnitude of the associated risk exceeds the burden of risk precaution, where the magnitude of the risk is understood as including both the likelihood and foreseeable severity of harm.

This, of course, sounds very much like the Learned Hand formula without the algebra. More generally, it sounds like a straightforward consequentialist understanding of the standard of reasonable care, which is certainly how Gilles seems to understand it.¹⁰ As Gilles points out, however, there are various versions of a consequentialist approach—one can ask, for example, whether the appropriate metric is utility or wealth—and he makes the point that if the Discussion Draft is going to go the consequentialist route, there is something to be said for making clear which version it takes to be the best one.¹¹ The point I wish to emphasize is a dif-

4. *Id.*

5. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) ("[I]f the probability [of an accident] be called P; the injury [occasioned by the accident], L; and the burden [of preventing the accident], B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.")

6. RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1965); RESTATEMENT (FIRST) OF TORTS §§ 291-93 (1934).

7. Discussion Draft, *supra* note 1, § 4 cmt. a.

8. *Id.* § 4 cmt. d.

9. *Id.*

10. Gilles, *supra* note 2, at 820-21.

11. *See id.* at 819, 820-21.

ferent one, however. It concerns the propriety of adopting a cost-benefit or balancing approach as the primary understanding of the standard of reasonable care in the first place. There are a number of aspects to this more general question. First, from a positive point of view, it is not obvious that a *pure* cost-benefit approach corresponds very well to the law. As Gilles observes,¹² even the *Restatements (First)* and *(Second)*, despite a heavy emphasis on risk-utility reasoning, still gave ultimate pride of place to the reasonable person.¹³ Furthermore, Bohlen's apparent attempt to nudge courts towards more explicit Learned-Hand-type jury charges¹⁴ has not been particularly successful. So far as case law is concerned, there are many appellate opinions stating that the magnitude of the risk and the cost of preventative precautions are factors that are *relevant* to the determination of whether or not the actor was negligent. But the number of opinions which explicitly state that negligence just is a matter of costs exceeding benefits are relatively few.

The fact that the law is unclear in this area is not by itself a bar to adopting cost-benefit analysis as the fundamental characteristic of the negligence standard, since it is sometimes appropriate for restatements to take a normative stand. But one would expect the rationale for any such normative move to be clearly articulated in the proposed *Restatement (Third)*'s comments, particularly when the issue is as controversial as this one. Unfortunately, that is not true of the Discussion Draft.

I said earlier that the text of Section 4 of the Discussion Draft, together with its elaboration in Comment d, *appears* to adopt a thoroughgoing consequentialist approach to defining negligence. In fact it is not possible to conclude that a norm calling for, say, the maximization of wealth or utility is in fact best understood as consequentialist in character, without first examining the justification that is being offered for that norm. This point is well-illustrated by Gilles' list of various interpretations of the Learned Hand test,¹⁵ which includes, among others, Ronald Dworkin's egalitarian approach.¹⁶ Dworkin's account of the negligence standard is meant to be a refinement of a non-consequentialist, abstractly egalitarian theory of distributive justice. The mere fact that this refinement

12. *Id.* at 821-22.

13. RESTATEMENT (SECOND) OF TORTS §§ 283, 285 (1965); RESTATEMENT (FIRST) OF TORTS §§ 291-93 (1934).

14. See Gilles, *supra* note 2, at 838-39 (discussing Bohlen's Commentary on RESTATEMENT (FIRST) OF TORTS § 172 (Tentative Draft No. 4 1929)).

15. See *id.* at 819-20.

16. RONALD DWORKIN, LAW'S EMPIRE 276-312 (1986).

adopts a comparative-harm test, which, in Dworkin's elaboration of it, amounts to a wealth-maximizing version of Learned Hand, does not show that the theory is not best understood as non-consequentialist in character.

The Discussion Draft seems to have absorbed this lesson in Comment j on Section 4, entitled "Rationales for negligence liability."¹⁷ The first rationale that it offers for the claim that the negligence standard should be understood solely in cost-benefit terms is said to be "fairness," and, in the Reporter's Note, this is further characterized as a "corrective justice approach."¹⁸ The heart of the argument in Comment j then runs as follows:

The defendant who permits conduct to impose on others a risk of harm that exceeds the burden the defendant would bear in avoiding that risk is evidently a party who ranks personal interests or welfare ahead of the interests or welfare of others. This conduct violates the ethical norm of equal consideration, and a tort award seeks to remedy this violation.¹⁹

While I think the proposed Discussion Draft is right to attempt to justify the negligence standard in non-consequentialist terms, this particular argument is weak. Arguments along similar lines have been offered by corrective justice theorists in the past, and they have almost always been abandoned.²⁰ The argument is subject to a number of difficulties, not the least of which is the problematic idea that treating *interests* equally amounts to treating *persons* equally. After all, if you impose a cost-justified risk on someone else, you get to keep the benefits of the action while the other person incurs the costs. That does not look very much like the application of a norm of equal consideration. Perhaps fairness—and I use that term, rather than a term such as equal treatment, advisedly—requires that an agent take *at least* the same precautions with respect to another's interest as she would take with respect to her own, but it hardly follows that she need take *no more* than that level of precaution.

The argument in comment j thus does not justify an understanding of reasonable care that is spelled out solely in cost-benefit

17. Discussion Draft, *supra* note 1, § 4 cmt. j.

18. *Id.* § 4 Reporter's Note.

19. *Id.* § 4 cmt. j.

20. Consider, for example, Ernest Weinrib's early claim that a person whose actions affected only himself would apply the Learned Hand test to his own interests, and "[i]t would be a violation of equality for the the defendant to refuse to extend to the plaintiff the consideration that he would have extended to himself." Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 53 (1983). Weinrib criticizes the Learned Hand test (albeit without acknowledging his early championing of it) in ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 147-48 (1995).

terms. Ronald Dworkin, as I noted earlier, has also advanced a non-consequentialist argument in support of a cost-benefit approach to negligence, and while it is not a matter I can pursue here, there are good reasons for thinking that that argument is not ultimately successful either.²¹ In any event, Dworkin does not advocate an understanding of negligence that is delineated *purely* in cost-benefit terms. He places various restrictions on his comparative harm test, such as that it should not encroach on individual rights that protect fundamental interests.²²

The "equal consideration" argument that the Discussion Draft deploys in support of a thoroughgoing cost-benefit characterization of negligence thus cannot do the work that is being asked of it, and, so far as I am aware, there is no other non-consequentialist argument that can. This does not mean, however, that a non-consequentialist understanding of the negligence standard would never countenance Hand-style balancing. It seems to me that a plausible non-consequentialist account would, for reasons having to do with autonomy and reciprocity among persons, call for a weighing of costs and benefits in a large range of circumstances, as, for example, when the relevant risks are common and/or relatively low in magnitude.²³ But an understanding of negligence that permitted one person unilaterally to impose substantial risks on others simply because the costs of prevention were too high is very unlikely to be acceptable from a non-consequentialist perspective.²⁴

Of course, the Discussion Draft also offers a second rationale for its characterization of reasonable care in thoroughgoing cost-benefit terms: adopting such a characterization gives people safety incentives that will improve social welfare and advance economic goals.²⁵ This is a standard consequentialist understanding of negligence law, and the associated economic model is a familiar one. This is not the time to review the many powerful critiques that have been offered of that model, so it will have to suffice for present purposes to say that there are good reasons to think that, at the very least, the economic picture of negligence law is not a complete

21. See Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237, 247-53 (Jeremy Horder ed., Series No. 4, 2000).

22. DWORKIN, *supra* note 16, at 307, 309.

23. For additional discussion, see Stephen R. Perry, *The Distributive Turn: Mischief, Misfortune and Tort Law*, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 141, 157-61 (Brian Bix ed., 1998); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND TORT LAW (Gerald Postema ed., forthcoming) [hereinafter Perry, *Responsibility*].

24. See Perry, *Responsibility*, *supra* note 23.

25. Discussion Draft, *supra* note 1, § 4 cmt. j.

one and that the Discussion Draft is correct to view the negligence standard at least partly in non-consequentialist terms. But there is no reason to think that an appropriate non-consequentialist understanding of negligence law will converge with the economic understanding. Appealing as such an outcome would surely be, it is unfortunately not available.

In light of this, there are a number of courses that a new *Restatement* could take. One would simply be to bite the bullet and embrace a particular, detailed, theoretical approach to negligence law. It would be all too easy to go the economic route, but, as I have suggested, that would be true neither to the case law nor to the underlying normative principles. It would be extremely daring to take a purely non-consequentialist approach, and while, in my view, truth lies more in that direction than in the other, in the end I think that that, too, would be a mistake. The views of corrective justice theorists diverge quite widely on the issue of how properly to formulate the standard of care, and it is not the job of a restatement to embrace highly controversial theoretical views.

There is another possibility, however, and that is to retain the reasonable person idea as the primary expression of the negligence standard. This is, after all, one of the most deeply entrenched concepts in negligence law. Here I agree with Gilles, although for quite different reasons from the ones he gives. Reasonableness is the most general expression of the fundamental idea that we have certain moral obligations to others that do not depend on consequentialist calculations, but derive, rather, from independent principles of reciprocity and cooperation.²⁶ It is therefore no accident, in my view, that the concept is as deeply embedded in tort law as it is.

That having been said, it is of course true that the reasonable person idea has been given consequentialist as well as non-consequentialist interpretations. It would be appropriate to discuss these differing interpretations in a new *Restatement*, particularly in the comments. It is to the credit of the Discussion Draft that it does not ignore the existence of fundamentally different theoretical views about the nature of tort law in general, and the content of the negligence standard in particular. But the Discussion Draft goes wrong in assuming that those different views all converge on a cost-benefit understanding of reasonable care. They do not. They do, however, have a common starting-point, and that is the notion of

26. See JOHN RAWLS, *POLITICAL LIBERALISM* 300, 305-06 (The John Dewey Essays in Philosophy No. 4, 1993).

the reasonable person. It is that notion, and not cost-benefit analysis, that should be at the core of the new *Restatement's* characterization of the negligence standard.

