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Culpability and Compensation

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It is almost undeniable that moral culpability is not a necessary condition of liability to compensate in English private law, as the law stands. In so far as we are seeking to articulate general conditions of private law liability to compensate, such liability hinges, at most, on responsibility for an outcome, not moral culpability with respect to it. And yet, moral culpability nonetheless has a significant impact upon the incidence of compensatory liability.[1] Peter Cane's work has greatly illuminated theoretical understanding of both of these facts. In the first section of this chapter, I examine his and other explanations of the fact that moral culpability is not a necessary condition of liability to compensate in private law. I point out a neglected theoretical cost of insisting upon a culpability condition for compensatory liability, and suggest some friendly amendments, or additions, to his account of why compensatory liability is not necessarily contingent upon culpability.

The second, central, section of the chapter turns to consider the role of moral culpability in the current law. Despite the prevalence of culpability-independent liability in private law, I describe various doctrines which nonetheless appear either to require culpability to establish liability or justify an expanded liability by reference to it. The paper offers various explanations of these doctrines. In some cases, they are probably mistaken. In other cases, the appearance that the doctrine makes liability hinge upon culpability is misleading. In still others, culpability justifies an expanded liability in virtue of defeating or diminishing an objection to liability that would otherwise exist. That objection may be one that, as Cane has argued, points to the social interest in conditioning liability upon culpability. But it may also be an objection that an individual defendant could reasonably make to bearing the particular form of liability in the absence of elevated culpability. I conclude with some sceptical observations on views which would elevate moral culpability to a positive sufficient ground of compensatory liability in private law, alongside responsibility.

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[1] It clearly impacts non-compensatory liability, too, but my focus here is on compensation, since the role of culpability in relation to at least punitive, non-compensatory liability seems relatively straightforward to explain.

I. Compensatory Liability in the Absence of Moral Culpability

The claim that the culpability-independent nature of private law liability to compensate is 'almost undeniable' may raise an eyebrow.[2] After all, 'fault' is a major determinant of compensatory liability, and fault perhaps raises a connotation of moral culpability. As is well known, however, the law's understanding of 'fault' includes 'objective fault'. The latter permits liability when a person fails to adhere to a standard of conduct, despite that failure not being traceable to a choice to behave impermissibly or otherwise the result of an insensitivity to the moral reasons that ought to govern their conduct.[3] Thus, a learner driver is required to adhere to standard of care of a reasonably experienced driver.[4] There is no reason to believe that every failure to adhere to this standard on the part of the learner is the result of a culpable choice or another insensitivity to the moral reasons that should govern their conduct. Suppose that A, suffering from a delusion as a result of a schizophrenic episode, believes that B will seriously A and harms B in mistaken self-defence. English law is likely to hold such a person liable to compensate in the tort of negligence on the basis of a failure to take reasonable care.[5] In a decision holding a person liable for harm caused during a schizophrenic episode, the Court of Appeal described liability as blocked only when the defendant's 'condition entirely eliminates responsibility'.[6] This suggests that the boundary of liability in negligence is more akin to 'responsibility' in the sense that one's conduct – one's *agency*, even if one's agency is not capable of functioning in other than a highly defective manner – must be a cause of an outcome.[7]

Even before one turns to cases in which liability is conditioned upon objective fault, however, the scope of compensatory liability regardless of objective fault is striking. This type of liability applies under the rule in *Rylands v Fletcher*,[8] vicarious liability for the tort of another, contractual compensatory liability for breach of a duty to secure an outcome, liability in trespass despite a reasonable belief in consent, liability in defamation, compensatory liability for breach of trust, statutory liability for defective products, damages for innocent misrepresentations,[9] liability for loss

[2] For a piece that seems to assume that tort law must be in the business of culpability-tracking and then takes tort law to task for its 'confused' notions of culpability, see L Alexander and K Ferzan, 'Confused Culpability, Contrived Causation, and the Collapse of Tort Theory' in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford, Oxford University Press, 2014).

[3] Throughout, I assume that moral culpability involves acting impermissibly without excuse. I aim to focus on clear examples in which there would be general agreement that there is no moral culpability, whatever one's account of excuses. The formulation in the text aims to capture, very roughly, (some) volitionist and (some) attributivist accounts of culpability.

[4] *Nettleship v Weston* [1971] 2 QB 691 (CA).

[5] Compare the facts of *Dunnage v Randall* [2015] EWCA Civ 673, [2016] QB 639.

[6] ibid [114] (Rafferty LJ).

[7] If the defendant loses consciousness, then he is not liable, absent prior responsibility: ibid [115]. On this, or a closely related, notion of responsibility, see T Honoré, *Responsibility and Fault* (Oxford, Hart Publishing, 1999) ch 2.

[8] *Rylands v Fletcher* (1868) LR 3 HL 330.

[9] When damages are awarded in lieu of rescission under the Misrepresentation Act 1967, s 2(2) in respect of a non-negligent misrepresentation.

suffered in protecting a person or their property in a situation of necessity, and liability for damage caused to another's person or property in circumstances of necessity.[10] It is true that, once account is taken of the various defences to liability which exist in relation to these rules, liability may sometimes ultimately be conditioned upon objective fault. For instance, a manufacturer of products may avoid liability for a risk upon proof that it was not identifiable based on scientific knowledge at the time of distribution.[11] But in many cases, such as vicarious liability, contractual liability for breach of a duty to secure an outcome, liability in trespass despite a reasonable belief in consent, and breach of certain trust duties, there is no significant weakening of the strict position.

Each of these liabilities is arguably still conditioned upon a person's *responsibility* for an outcome in the sense that the rules require their agency to be implicated in its occurrence. For instance, a person is only liable in trespass for *doing something*, and liability for destroying another's property in a situation of necessity is still liability in respect of the effects of one's agency. It is open to doubt, however, whether all of the rules are conditioned upon responsibility in this sense. If A sells goods to B and fails to deliver them due to an unforeseen heart attack that rendered A unconscious, A is still potentially liable in damages to B, if B suffers actionable loss as a result. A's agency was, of course, implicated in the creation of the duty to deliver the goods, but not in the events which constituted a breach of that duty. In that sense, contractual liability may be independent of responsibility. In German law, §829 of the German Civil Code imposes a 'fairness-based' – and apparently responsibility-independent – liability upon a person who causes damage while in an unconscious state.[12] In assessing the fairness of imposing liability, the courts take into account a wider range of considerations than under the responsibility-based tort provisions, such as the relative resources of each party, so it is recognised the responsibility makes a normative difference.[13] It appears not, however, to be a necessary condition of liability.

It follows, then, that if moral culpability is a necessary condition of justified compensatory liability, the current law is seriously askew. That may be so, of course. But the theoretical cost of insisting upon a culpability requirement for compensatory liability would go beyond rejection of much of contemporary practices of

[10] For a similar list, see S Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford, Oxford University Press, 2019) 225–26. The position may be different in relation to reasonable belief in facts justifying defensive action, which might relieve from liability: *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962. If so, this seems hard to square with compensatory liability for justified harm imposed for one's benefit: see *Vincent v Lake Erie Transportation Co*, 109 Minn 456, 124 NW 221 (1910).

[11] Consumer Protection Act 1987, s 4(1)(e).

[12] *Bürgerliches Gesetzbuch* (BGB) §829, provides: 'A person who, for reasons cited in sections 827 and 828 [being in a state of unconsciousness, a state of pathological mental disturbance or minority] is not responsible for damage he caused in the instances specified in sections 823 to 826 must nonetheless make compensation for the damage, unless damage compensation can be obtained from a third party with a duty of supervision, to the extent that in the circumstances, including without limitation the circumstances of the parties involved, equity requires indemnification and he is not deprived of the resources needed for reasonable maintenance and to discharge his statutory maintenance duties.'

[13] See further F Jürgen Säcker et al (eds), *Münchener Kommentar zum BGB* §829, 7th edn (Munich, CH Beck, 2017) [18]–[21].

compensatory liability.[14] Consider this argument, made by the German natural law theorist, Thomasius, in the early eighteenth century. Why, he asked, if a person is permitted to damage an innocent, non-culpable (and possibly, non-responsible[15]) person – he gave the example of an insane person or a child – in self-defence, is one not also permitted to take that person's resources *ex post* by way of compensation for the damage caused by the innocent?[16] Thomasius and a number of later writers conceived of the right to extract compensation from another as an entailment of one's right to act in defence of one's rights, governed by the same principles.[17] Since liability to defensive damage does not require culpability (or, possibly, responsibility), neither should liability to give up one's resources to pay compensation.[18] An implicit assumption of Thomasius's argument is that compensatory liability has the same moral grounding as defensive liability. This allows him to argue that if defensive liability is independent of culpability, then so too must be compensatory liability. If this assumption is correct, then a culpability requirement for moral compensatory liability would entail a culpability requirement for moral defensive liability. Absent some other justification for harming an attacker, it would then be impermissible to defend oneself against a responsible, but non-culpable threatener. At the very least, this result will strike many as implausible, and it is inconsistent with legal systems' approaches to self-defence.

One might object to the last argument – that a culpability requirement on compensatory liability entails a culpability requirement on defensive liability – in at least two ways. First, one could reject Thomasius' view that defensive liability and compensatory liability have the same moral basis. Second, one could accept that the two have the same moral basis and nonetheless argue that, when it comes to the legal regulation of compensatory liability, there are reasons for the law to insist upon different principles to those applicable to defensive liability.

Consider the first type of objection. A full defence of the claim that defensive liability and compensatory liability – or at least certain kinds of compensatory liability – have the same or a highly similar moral grounding would take us too far afield.[19] Some of the apparent disanalogies between the two can, however, be dispelled. Most obviously, justified defensive force is aimed at prevention of damage or the infringement of a right, while justified imposition of the cost of compensation is aimed at undoing or

[14] Why is this a theoretical cost at all? One could think that the current law enjoys no presumption of justificatory merit whatsoever. When we find strict liability independently developing in different legal systems, and perhaps even within different compartments of the same legal system, as a result of the reasoned, or intuitive, judgements of officials, it seems to me that there is at least some (defeasible) reason to think that it is not simply a widespread mistake.

[15] It is not entirely clear if Thomasius means to refer to non-responsible, non-culpable threats, or merely non-culpable threats.

[16] C Thomasius (ed M Hewett), *Larva Legis Aquiliae: The Mask of the Lex Aquilia Torn Off the Action for Damage Done*, IX (Oxford, Hart Publishing, 2000) 10–11.

[17] For some of the details, see F Gisawi, *Der Grundsatz der Totalreparation* (Tübingen, Mohr Siebeck, 2015), 69–70; 102–106.

[18] Thomasius used the example of a 'furiosus' – an insane person: '*… furiosus, cum nullum ius habeat, injuriam mihi facit. Igitur cum possim furiosum, etiam cum gravi damno corpori eius illato, repellere, cur non possim petere restitutionem damni dati ex bonis eius?*'.

[19] See G Sela, 'Torts as Self-Defense' (6 August 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433223, accessed 1 July 2021. See also S Steel, 'Defensive and Remedial Liability' in P Miller and J Oberdiek (eds) *Oxford Studies in Private Law Theory* (forthcoming, OUP, 2022).

counterbalancing damage. Some forms of compensation, as awarded by courts, however, are either simply preventative in nature or are conceptually similar to prevention. Damages to provide for pain medication to prevent future pain are an example. More generally, damages which aim to cure a breach by providing means to put a person in the materially identical position they would have been in had the breach not occurred can reasonably be described as preventing the persistence of the breach or the effects of the breach. So, in relation to these forms of compensation, the analogy between defence and compensation is a reasonable one. It is not surprising that, in relation to these forms of compensation, considerations of proportionality are directly assessed by the courts in deciding whether to make the award, just as defensive liability is subject to a proportionality condition.[20]

A further apparently significant difference between defensive damage and imposition of compensatory costs is the mode of agency involved. In taking resources in order to compensate for damage, one uses the other person or their resources for some further end, namely, to prevent, negate, or counterbalance damage. In typical defensive damage cases, one merely eliminates the source of the risk of damage. For instance, if B punches A to prevent A from punching B, B does not use A's body as a means to a further end. Sometimes, however, it is permissible to use a person as a mere means in cases of defensive damage. For instance, if the only means by which I can save my life from a boulder that another person has directed towards me with the intention of killing me is by using that person as a shield, that seems permissible. However, intuitively, this kind of use of a person requires special justification. It is this difference which is sometimes invoked to explain why it is impermissible to throw a large person's body from a bridge to prevent a train from hitting five people further down the track, while it seem permissible to do so in other cases.[21] If all cases of compensatory damage involve this kind of use of a person or their resources, then something extra is required to justify compensation above and beyond what is required to justify defensive damage, all else being equal. It might be argued that the *extra* thing is culpability.

This is not fully satisfying, however. First, the mode of agency involved in extracting compensation for damage and that involved in defensive damage are very similar. In both cases the damaging is done in order to make it the case that the risk created by the other person does not render the victim worse off. It is misleading to describe the imposition of compensatory cost as simply one person deriving benefit from the use of another. Second, the imposition of compensatory costs involves the deprivation or use of a person's property, not their body, in order to protect another person's health or property. Setting aside property which has a direct impact upon a person's bodily resources, such as a pace-maker, it is not clear that the special restrictions against using a *person* as a means extend to their external objects that do not directly impact upon their bodily resources.

The second kind of objection is more persuasive. Even if moral liability to defensive damage has the same moral grounding as moral liability to the imposition of

[20] *Ruxley Electronics v Forsyth* [1996] AC 344 (HL).

[21] See, eg, V Tadros, *The Ends of Harm: Moral Foundations of the Criminal Law* (Oxford, Oxford University Press, 2011) ch 6.

compensatory costs, it does not follow that the two should be legally regulated in the same way. Suppose, for example, that we agreed with Thomasius that it is morally permissible defensively to damage a non-culpable person who poses a risk of damage to one's body. It may nonetheless be undesirable, possibly even wrongful, for the law to provide assistance in enforcing this liability. On Cane's view, tort liability involves a *sanction*.[22] It may be that Cane's conception of sanction is simply any judicial order that imposes a burden of some kind. If so, it provides no special objection to liability for non-responsible damage. But if a sanction inherently communicates disapproval or worse about the defendant's conduct, then it is inappropriate to recognise tortious liability in relation to innocent, non-responsible risks, whose conduct is not justifiably censured in this way.[23] It seems true that tort liability *sometimes* involves a sanction in this sense. The clearest example is exemplary damages. But it is less plausible as a claim about all tort liability when we consider cases in which the defendant behaved entirely non-culpably, but with responsibility.[24] At any rate, this is not a *necessary* feature of compensatory legal liability between individuals, even if it is a necessary feature of tort law.

A different argument for a divergence between compensatory and defensive liability begins with the observation that it is possible legally to prohibit compensatory action being taken without leaving the victims of damage materially worse off. Refusing state assistance to pursue compensation claims does not necessarily involve the refusal of all state assistance. The state could, for example, provide compensation in relation to damage caused by bodily risks for which individuals have no agency responsibility. If liability insurance in relation to such risks would be extremely costly, given their highly unpredictable nature, then there would be good reason to establish such a scheme or, more realistically, provide payments through general welfare provision. This would protect the innocent risk imposer and the victim of the innocent risk from unexpected damage which they had no reasonable opportunity to avoid. A humane legal system could reasonably take the view that it ought to protect people from unexpected risks of catastrophic damage – even damage which another person could permissibly impose upon them – especially when it is difficult for the persons involved to protect themselves against such risks. Given the potentially enormous costs of compensation for bodily injuries, each of us has a reason to protect each other from these costs. Unlike situations in which a risk imposer is culpable, or otherwise had a reasonable opportunity to avoid the harm they cause, third parties cannot reasonably object that they are being required to bear costs for which other people are morally responsible. The expressive and deterrent potential of institutionalising a compensation claim are also non-existent in cases of non-responsible, non-culpable risks. So we can see why the law could be justified in protecting defendants from a liability to bear a cost that, as a matter of morality, it would be permissible to impose upon them. However, this is still some distance from

[22] P Cane, *Responsibility in Law and Morality* (Oxford, Hart Publishing, 2002) 43, referring to 'reparative' sanctions.

[23] For an argument in favour of recognition of an insanity defence in tort which relies upon the claims that: (a) tort liability involves a sanction; and (b) sanctions involve a mark of disapproval, see J Goudkamp, 'Insanity as a Tort Defence' (2011) 31 *OJLS* 727, 746–47.

[24] See the examples given above, text at n 10.

an argument that the law should protect all non-morally-culpable inflictors of damage. If, for example, a person chooses to enter into a strict liability contractual arrangement, against a fair background set of entitlements, it is difficult to understand why the law must protect them from strict compensatory liability for breach of contract.

So far we have seen the considerable costs of insisting upon a culpability requirement of liability to compensate: it would require a re-writing of swathes of private law, and it would sit uneasily with basic understandings about the scope of defensive liability. But the culpability-independence of liability still stands in need of an explanation. Cane's account emphasises, in part, the role of victims in tort law, compared to other domains, such as criminal law: 'Mental fault elements play a smaller role in tort law than in criminal law … This is because tort law is more concerned than criminal law with the interests of victims and, consequently, less concerned with degrees of fault'.[25] Strict or stricter forms of liability are 'in some contexts … seen as essential for giving proper weight to the interests of victims'.[26] By contrast, the criminal law is 'essentially agent-oriented'.[27] These observations seem to me correct in important respects. The criminal law is more defendant-oriented in that it is more concerned with the defendant's moral culpability and victims have less normative control over the course of proceedings – the power to enliven or discontinue proceedings is not fully the victim's. But this re-raises the question of *why* this defendant-centredness is such a central feature of criminal law and whether it is justified. Similarly, it only takes us so far to say that tort law is more in the business of protecting victims and so is less concerned with the defendant's culpability. It doesn't follow from the fact that tort law is concerned to protect victims that it should do so in a culpability-insensitive way. Of course, victims will receive more protection the less the insistence on a culpability requirement. But perhaps victims *ought* only to be legally protected – in the private law way – from culpably inflicted damage. Further, comparisons with the criminal law can only deliver a comparative conclusion: there is less reason, say, for tort law to be culpability-sensitive than the criminal law because the consequences for the defendant are *generally* less severe in tort law: compensatory damages versus punishment. But this is consistent with thinking there is still strong reason for culpability requirements in tort.

The observation that private law is a zero-sum game – that every legal protection given to a defendant cuts back from the victim's legal protection – is also potentially misleading here.[28] The fact that a victim is worse off than they would be if the defendant had less legal protection is not, in itself, normatively significant: everything depends upon what one considers to be the appropriate baseline for protecting victims.[29] The idea that private law compensatory liability is zero-sum in nature, provides us with a useful reminder that any distribution of liability has to be rationally acceptable to both affected parties – it stops too short if it merely points to a good that would be achieved for one party if liability were imposed. Although this is a useful reminder, as yet it

[25] Cane (n 22) 86.
[26] ibid 87.
[27] ibid.
[28] This zero-sum feature of private law compensatory liability is put to justificatory work by John Gardner in *Torts and Other Wrongs* (Oxford, Oxford University Press, 2019) ch 6.
[29] Contrast ibid.

does not provide us with much guidance as to which standards of liability satisfy the criterion of being rationally acceptable to both parties.

A different account of the relatively culpability-insensitive nature of compensatory liability in private law can be brought out by thinking first about contractual liability.[30] Some contractual duties are strict: the duty is a duty to φ, not merely a duty to use reasonable endeavours to φ. If a person has a duty to φ, it follows that they have a reason to φ. If they breach their duty, and thus fail to conform to this reason, this reason or the reason that gave rise to the reason, may require a new action, as a means of imperfect conformity to the original reason. If I promise to build you a house by Monday but fail to do so, then, other things being equal, on Tuesday I am still required to complete the house. My promise gives me reason to build by Monday and, failing that, Tuesday. No mention so far of any moral culpability. It may be that I was non-culpably unable to complete by Monday, but, given the continued rational force of my promise, I am now required to complete by Tuesday.[31]

Although this is a contractual example, the point is a general one. A fundamental, general, reason why compensatory liability is relatively culpability-insensitive is a product of two propositions. The first is that reasons for action are generally culpability-independent. I have a (mandatory) reason not to damage you, not merely a reason not to damage you *culpably*. I may also have a special reason not *culpably* to damage you, but that is a separate matter.[32] The second is that compensation is, at least in a central category of cases, required as a means of conforming to one's initial reason not to damage. Compensation is a means of imperfectly conforming to reasons not to worsen others' positions, after one has failed in some measure to conform to this reason. If the original reason not to injure is culpability-independent, then it follows that there is a reason to compensate that is also culpability-independent. The rational case for a person compensating another is thus often already in existence prior to any consideration of culpability. Hence the title of Gardner's essay: 'The Negligence Standard: Political not Metaphysical'.[33] Gardner's point is that a negligence requirement does not itself fall out of the practical reasons that explain compensation. To that extent, it is not a 'metaphysical' requirement.

If one accepts Gardner's view that reasons to succeed are intelligible, and the further claim that one can be responsible for failure to conform to such reasons even despite reasonable efforts or, more precisely, despite due sensitivity toward those reasons – a proposition about responsibility which seems to be shared by Cane[34] – then there is a (defeasible) moral case for a person compensating another independently of culpability.

[30] The next paragraphs invoke John Gardner's continuity thesis explanation of compensatory duties, which holds that the reason(s) which justified the primary duty also justify the compensatory duty. See Gardner (n 28) ch 2. For a clarification and response to some objections to this kind of view, see S Steel, 'Compensation and Continuity' (2020) 26 *Legal Theory* 250.

[31] Gardner illustrates the continuity thesis with the example of a justified breach of a promise: Gardner (n 28) 55–56.

[32] For inconclusive ruminations on this, see below text after n 92.

[33] Gardner (n 28) ch 7.

[34] Cane accepts that one can be morally responsible for an outcome and have a moral duty to repair it, without blame being apt: Cane (n 22) 108–109.

On this view, legal fault standards are typically cut-backs which, for various reasons, protect a person from being legally required to do that which they have at least moral reason to do. Hence Jansen's description of the fault principle as a liability-*limiting* (rather than liability-*generating*) principle.[35]

Gardner's view may be challenged. Gardner's view of duties and reasons is, in some ways, an unusually demanding one.[36] First, on his view, one can have a duty and a reason to φ, even if, relative to the available evidence, one has no reason to believe that the facts which ground one's duty or reason to φ obtain in the circumstances. In this sense, it is epistemically demanding. Second, one can have a duty and reason to φ even if one has no ability to φ.[37] In this sense, it is practically demanding. If one accepts these views, then there is much scope for non-culpable breaches of duty. Notice, however, that even if one rejects these views about duties and reasons, one could still identify cases in which non-culpable failure to conform to a duty or reason gives rise to a duty or reason to compensate. For instance, if A intentionally damages B's car in order to save A's life, A will normally have a distinctive reason, that is, distinctive from that of a bystander, to compensate B. Here, on any view, A has a reason, or *pro tanto* duty, not to damage B's car. This reason also contributes to the explanation of A's distinctive reason to compensate B. This is true despite A's being justified – and so non-culpable – in damaging B's car.

Perhaps Gardner's view, or a modified version of that view which drops the epistemic and practical demandingness elements, is ultimately not so different from one held by Cane. Another line of argument that comes out in his account of the relative culpability-independence of private law liability is that private law is in the business of protection of rights: '[s]trict liability is a necessary corollary of a system of rights'.[38] For Cane, a right is a strong interest.[39] Given that Cane believes that our strong interests – our rights – are what justify the duties in the tort of negligence, it seems that a right can also justify an objective-fault-based rule. This makes it unclear why there is a particular association in his account between rights-as-strong-interests and strict liability. But perhaps the explanation for this association is that our interests generate basically strict reasons of non-interference. Each of us has a reason simply not to interfere with others' basic interests, not merely a reason to take care not to do so.[40] Objective-fault-based liability has, then, to be justified as a departure from this basic position.

[35] N Jansen (translated by S Steel), *The Structure of Tort Law* (Oxford, Oxford University Press, 2021) ch 9. For Jansen, outcome responsibility is strict and generates a *pro tanto* duty to compensate from which a defendant is sometimes protected by the fault principle or another liability-limiting principle.

[36] The following two sentences could also be said to express the worry that, on Gardner's view, reasons and duties do not serve a 'guidance' function. See NJ McBride, *The Humanity of Private Law Part 1: Explanation* (Oxford, Hart Publishing, 2019) 37–39.

[37] See J Gardner, 'The Wrongdoing that Gets Results' (2004) 18 *Philosophical Perspectives* 53.

[38] Cane (n 22) 198.

[39] ibid 197.

[40] Cane would likely reject this explanation, however, as the connection between rights and strict liability seems much closer on his view: it is *in virtue* of something's being a right that it attracts strict liability (ibid). This is not the case on Gardner's view, which locates strict liability ultimately in the nature of practical reasons generally – regardless of whether those reasons relate to *rights*.

Possibly the discussion so far fails to do justice to Cane's (further) thought that the justifiability of strict liability in private law is in part based on the idea of a *fair balance* of interests. In some contexts, a fair balance between the victim's interest in security and the defendant's interest in liberty will generate liability for interference with the former in the absence of objective fault.[41] This idea is suggestive, but it is at a high level of abstraction, and one might aim to concretise the argument so that it provides a theoretical justification for strict liability in particular; after all, there is a sense in which compensatory liability for *culpable* wrongdoing also achieves a fair balance of the parties' interests. Cane refers to necessity cases in which A damages B's property as exemplifying the kind of balancing he has in mind.[42] Consider A's liability to pay compensation for justified damage to B's property, which A intentionally, and necessarily, causes in order to protect A from death resulting from a risk not created by B.[43] One way in which the fairness argument might be made more precise is as follows. Here B has a strong interest in B's property being undamaged. A has a much stronger interest in A's life. If it were all-things-considered *wrongful* for A to damage B's property, then A would be morally required to sacrifice A's life to protect B's property, which is obviously unacceptable. However, another moral arrangement would permit A to damage B's property, but require A to compensate B. This arrangement gives B's strong interest some residual moral force in relation to B, even though it is permissibly infringed upon. This achieves a fair balance, it might be argued, because it gives each parties' claims due weight in distributing entitlements: B's claim to be undamaged is given some residual force alongside A's claim to preserve A's life.[44] The extent to which this fairness account differs from, or is preferable to, the idea that A's reason not to damage B persists and gives A reason to compensate B is an interesting question which merits further examination.

II. Culpability's Influence

Considerations of culpability clearly – as a descriptive matter – play a role in compensatory liability in private law. In the remainder of this central section of the chapter, I describe eight examples of this, some more well-known than others.[45]

[41] ibid 108, 189.

[42] ibid 107–108.

[43] See *Vincent v Lake Erie Transportation Co*, 109 Minn 456, 124 NW 221 (1910).

[44] Sometimes it is said that A's permission to damage is morally 'conditional' upon the actual payment of compensation to B in these necessity cases. This does not seem true, however, in cases in which there is a conflict between a property interest and an interest in retention of life. Even if A knows that A will be unable to compensate B for the property damage caused in saving A's life, it seems permissible, all things considered, for A nonetheless to damage B's property. A may avoid wronging B by payment of compensation, though A's act of damaging may be permissible in the absence of compensation. For further discussion, see S Steel, 'Liability for Permissible Harm' (ms).

[45] For a (largely) different set of examples, see P Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, Clarendon Press, 1998) 159.

My aim is not to provide a comprehensive account of the impact of culpability upon compensatory liability. These examples are chosen partly because some have received relatively little theoretical discussion and partly because they provide useful illustrations of different possible justificatory roles of culpability. Then I turn to whether the influence of culpability upon liability in these ways can be rationally explained. In some cases, I argue that the doctrines may rest upon a mistaken assumption or are not, on closer inspection, truly based upon culpability. In other cases, I suggest that the defendant's culpability defeats or diminishes the weight of reasons against the imposition of liability upon him – these reasons may be defendant-centred, concerned with the impact liability will have on the defendant as an individual, or society-centred, concerned with the impact of stricter forms of liability upon society as a whole. I contrast these explanations with one which understands culpability as evidence of a retributivist impulse within the private law of wrongs. The section concludes with some sceptical observations on theories which understand culpability as an independently sufficient positive ground for compensatory liability.

A. Culpability's Impact Upon Compensatory Liability

(i) Diminishing the Causal Requirement

It is sometimes suggested that high culpability can in certain contexts diminish the causal requirement of liability insisted upon. When A seeks to rescind a contract on the basis of fraud or duress to the person, it has been stated that A is not required to demonstrate on the balance of probabilities that *but for* the duress or fraud, A would not have entered into the contract.[46] As Lord Cranworth put it in relation to fraud: 'Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand'.[47] One possible interpretation of this is that it suffices that the fraudulent misrepresentation made a contribution – even an unnecessary and insufficient one – to the entry into the contract for rescission. However, absent fraud or duress to the person, but-for causation is required for rescission or damages.[48] The law does not appear to be fully consistent here, however. In relation to compensatory damages for fraudulent breach of a fiduciary duty, it is clear that but-for causation is required.[49] Further, in some contexts, an unnecessary, insufficient causal contribution is accepted as sufficient to generate liability without any heightened culpability.[50]

[46] *Barton v Armstrong* [1976] AC 104 (PC). The Privy Council relied upon cases concerning deceit to justify, by analogy, the rule in cases of duress to person (118–19).

[47] *Reynell v Sprye* (1852) 1 De GM & G 660 (Ch) 708. This statement seems to be interpreted in *Barton* (n 46) as merely asserting that the representation need not be the *sole* cause, however (118), and this is the case even in relation to non-fraudulent representations.

[48] See *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 [162], but acknowledging that the position might differ in relation to fraud: [198].

[49] *Swindle v Harrison* [1997] 4 All ER 705 (CA).

[50] *Bailey v Ministry of Defence* [2008] EWCA Civ 883, [2009] 1 WLR 1052. For the explanation of this case as admitting this possibility, see J Stapleton and S Steel, 'Causes and Contributions' (2016) 132 *LQR* 363.

(ii) Defeating Counterfactual Arguments about Loss

Normally, compensatory liability is conditioned on the present or future existence of a loss. A person suffers a loss as a result of a wrong if – and normally only if – the wrong is a cause of their being worse off than they would have been had the wrong not occurred. Sometimes the suggestion is made that the wrongdoer cannot argue 'it would have happened anyway' in relation to *loss* when there is a high degree of culpability. Thus in holding A liable to pay the market value of B's shares at the time of conversion when the shares dropped in the value by the time of judgment, Lord Atkin responded to the argument that this was unjust by referring to the fraudulent nature of the conversion.[51] While compensation for breach of trust generally requires a counterfactual loss, in *AIB v Redler* Lord Toulson noted that different considerations may apply in cases of fraud.[52]

(iii) Altering Proof of Causation Requirements

An alternative interpretation of some of the cases mentioned in (i) is that they reverse the burden of the proof on causation when a high level of culpability is shown. For instance, it may be that, in *Barton v Armstrong*, the Privy Council thought that, by virtue of the defendant's high culpability, the *possibility* that the duress may have made a difference sufficed for liability, even though normally this would have to be shown on the balance of probabilities.[53] German law provides a clear instance of this kind of phenomenon. In cases in which *gross* negligence is shown against a medical professional, the legal burden of proof is shifted to the professional to show that their gross negligence was *not* a cause of the claimant's damage.[54]

(iv) Legal Causation and Remoteness

The general remoteness rule in the tort of negligence is that the type of damage must be a reasonably foreseeable consequence of the breach of a duty of care at the time of breach.[55] A broader rule is said to apply in the 'intentional torts'. This broader rule entails the defendant's liability for all *directly* caused losses, even if of an unforeseeable type or extent. 'Intentional torts' is ambiguous between torts committed with a culpable intention and torts in which a voluntary, but not necessarily culpable, act constitutes the tort

[51] *Solloway v Mclaughlin* [1938] AC 247 (PC) 259: 'no injustice is done if the principal benefits, as he occasionally may, by the superior astuteness of an unjust steward in carrying out a fraud'.

[52] *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 [62]. See also *OMV Petrom SA v Glencore AG* [2016] EWCA Civ 778, [2017] 3 All ER 157, ignoring counterfactual issues in deceit at [57].

[53] *Barton* (n 46). This is suggested by Clarke J in *Raiffeisen* (n 48) at [198]. See also *BHP Billiton Petroleum Ltd & others v Dalmine SpA* [2003] EWCA Civ 170 [36], effectively reversing the burden of proof on 'loss' in deceit.

[54] See S Steel, *Proof of Causation in Tort Law* (Cambridge, Cambridge University Press, 2015) 200–206.

[55] The 'general' rule because the contractual remoteness rules apply in negligence cases in which the duty arises in virtue of a (contractual) assumption of responsibility: *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] Ch 529.

(such as the trespass torts). The broader rule appears to apply to any tort committed with culpability-implying intention – and so it is misleading to describe the rule as applicable to the 'intentional torts': in truth, the rule seems to apply to the non-equivalent category of torts committed with a culpable intention.[56] Although trespass to land requires a voluntary act, it can be committed without any moral culpability due to a reasonable, but mistaken, belief in the permissibility of using another's land. In such a circumstance, a reasonable foreseeability remoteness rule seems to apply. On the broader, directness, rule, if A intentionally destroys B's chair, and B suffers a psychiatric illness because of his unusual emotional attachment to this chair, A is liable to compensate B for this loss.[57]

It is sometimes said that intended consequences are never too remote.[58] If it exists, this is a distinct rule from the one just discussed. The last rule concerns liability for *unforeseeable*, and thus unintended, consequences of an intentionally committed wrong. The rule that intended consequences are never too remote only applies to those consequences that are intended, and so foreseeable at least to the wrongdoer. Suppose A knows that if A negligently injures B, B will be taken to a hospital which has been defectively constructed. A, but no one else, knows of the defective construction of the hospital. A has calculated that the hospital will collapse when B is treated there. It does, and B suffers further severe injuries. It seems that A is liable for those further severe injuries. Although B's injuries in hospital would be considered a coincidence from the epistemic vantage point of anyone else other than A, A is nonetheless liable for them because he intended to produce them.

(v) Culpability-Implying Wrongs

It may seem that certain wrongs, by their nature, cannot be committed without moral culpability. Consider the tort of deceit. This requires a person to make a false statement, knowing it to be false or reckless as to its truth, with the intention of inducing reliance upon it.[59] Whereas the objective standard of care in negligence may often, or at least sometimes, render a person liable without moral culpability, it seems that most persons who satisfy the elements of the tort of deceit will be culpable. Ultimately, though, the connection between deceit and moral culpability is probably contingent: sometimes it is morally justified to deceive and justification defeats moral culpability.[60] Malice-based torts may be different. One cannot justifiably harm another maliciously: if one believes

[56] See *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 [105] (Lord Nicholls). Note, however, Lord Reed's explanation of the directness rule in *AIB* (n 52) [92]. His explanation is that reasonable foreseeability of harm is not what makes deceit wrongful (unlike in, for example, negligence). If that were the complete explanation, however, it would imply that a directness rule should apply to all trespass torts, regardless of the culpability of tortfeasor.

[57] In French law, the intentionality of the breach is relevant in contract, too: see J Gordley, 'Responsibility in Crime, Tort, and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Rule' in Cane and Stapleton (n 45) 202–203. If the English rule is culpability-dependent, rather than wrong-dependent, it is not clear why it should not also apply to breach of contract, unless the view is taken that a certain threshold of wrongfulness is needed, and breach of contract does not meet that threshold.

[58] eg *Reeves v Commissioner of the Police for the Metropolis* [2000] 1 AC 360 (HL) 394 (Lord Hoffmann).

[59] *Pasley v Freeman* (1789) 3 Term Rep 51; 100 ER 450; *Derry v Peek* (1889) 14 App Cas 337 (HL).

[60] It is morally permissible and non-culpable to deceive (and to lie to) Kant's murderer at the door.

that one has a justification for harming, it is difficult to describe one's motive as malicious. Even here, however, we could perhaps imagine defendants acting maliciously due to an excusable lack of self-control, induced by severe, unexpected, mental disturbance.

(vi) Defences

Culpability sometimes blocks the availability of a defence. In relation to justificatory defences, the general trend appears to be that, if the defendant does not act for reasons which legally would justify the conduct, this disapplies the defence.[61] If a parent disciplines their child for the sake of self-gratification, this would fall outside the defence of discipline.[62] Sometimes the non-application of contributory negligence to torts such as deceit has been rationalised on the basis of the defendant's culpable intention to harm, albeit this does not account for the non-application of the defence to other torts even when the defendant has not behaved culpably.[63] Culpability is also relevant to the application of certain defences. For instance, in determining whether the defence of illegality ought to apply, one consideration is whether refusing relief would be 'disproportionate', and the claimant's culpability is relevant to this issue.[64]

(vii) Remedial Rules

Interestingly, the culpability of a breach bears upon the award of remedies, even beyond the obvious context of exemplary damages. Consider, first, injunctive relief, before turning to compensation. A mandatory injunction to take positive steps to cure a breach will generally not be awarded if there is a stark disproportion between the cost of reparative measures to the defendant and the benefit to the right-holder.[65] However, if the defendant has acted wantonly and quite unreasonably … he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff.[66] The disproportionality between the cost to the defendant and benefit to the claimant has diminished force depending on the culpable nature of the breach.

If this is true in relation to mandatory injunctions, it would seem to apply *a fortiori* to monetary awards which are conditional upon the court's assessment of the reasonableness of the award, once it is accepted that proportionality is relevant to the reasonableness of a monetary award.[67] Therefore, if building a wall to protect against

[61] See J Goudkamp, *Tort Law Defences* (Oxford, Hart Publishing, 2016) 99–100.

[62] ibid.

[63] *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2002] UKHL 43, [2003] 1 AC 959 [45] (Lord Rodger). For criticism of this position, see J Murphy, 'Misleading Appearances in the Tort of Deceit' (2016) 75 *CLJ* 301. I agree with Murphy to the extent that contributory negligence could reasonably have application in relation to consequential losses in deceit, but full responsibility for any loss constituted simply by entry in the transaction will virtually always rest with the defendant. For the non-application of the defence to assault and battery, see *Pritchard v Co-operative Group Ltd* [2011] EWCA Civ 329, [2012] QB 320 [32].

[64] *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [107].

[65] *Redland Bricks v Morris* [1970] AC 652 (HL) 666 (Lord Upjohn).

[66] ibid.

[67] See *Ruxley Electronics v Forsyth* [1996] AC 344 (HL).

further landslides onto the right-holder's land would cost an exorbitant amount and only protect the right-holder from very minor damage, the court may decide not to grant compensation to allow for the wall to be built. However, if the defendant has culpably damaged the land, this may alter the position. Conversely, this consideration of the burdensome nature of a monetary order is likely to carry more weight when the breach is wholly innocent. This is most starkly in evidence in German law. Under §829 BGB, which, as we saw, imposes liability even for non-responsible causation of injury, the extent of the defendant's liability is sensitive to their personal resources.[68]

The *SAAMCO* limitation on compensatory damages is also culpability-dependent. The right-holder cannot recover, in cases of negligent misrepresentation, for loss which would have occurred even if the representation had been true.[69] This limitation does not apply in deceit.[70] This stands in contrast to rules such as mitigation, which apply regardless of the wrongdoer's culpability.

(viii) Apportionment of Liability

Moral culpability is relevant to the apportionment of liability. Comparative moral culpability is said to be one factor in determining the reduction made for contributory negligence.[71] Similarly, in contribution proceedings between persons liable for the same damage, an important factor is their comparative moral culpability.[72] Thus, even if each defendant is liable under a strict liability cause of action, say breach of contract, their relative shares of liability are partly determined by their comparative culpability in contributing to the loss caused by the breach.

B. Explaining the Influence of Culpability

(i) Error

Some of these doctrines may simply be mistaken. Consider the cases which might suggest that culpability diminishes the causal requirement of liability by dispensing with the need to satisfy a but-for test. There is reason to be sceptical. It should not always necessary to satisfy the but-for test even with *innocent* misrepresentations. Suppose that A relies upon two innocent misrepresentations made by B, each of which was sufficient to induce A to enter the transaction with B. Clearly, B cannot successfully argue, in relation to a particular misrepresentation, that A would have entered into the transaction because of the other one. Similarly, if B made three innocent or negligent

[68] See above n 12.

[69] *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (HL).

[70] *Smith v New Court Securities* [1997] AC 254 (HL).

[71] *Jackson v Murray* [2015] UKSC 5, [2015] 2 All ER 805 [50]. In negligence, the issue of whether the claimant failed to take reasonable care is, however, determined objectively. Hence it is not entirely clear that the law is truly interested in comparative moral culpability, rather than, for instance, comparative responsibility for risk.

[72] Civil Liability (Contribution) Act 1978, s 1. See, eg, *Carillion JM Ltd v Phi Group Ltd* [2011] EWHC 1379 (TCC) [252].

misrepresentations, none of which individually was necessary or sufficient to induce A to enter the contract, but only collectively necessary, rescission should still be possible.[73] Further, at least in relation to certain kinds of transaction, such as a gift, even if A would have entered into the transaction anyway, the value of the transaction as an expression of A's autonomy may be undermined if A entered into the transaction on a false basis – regardless of B's culpability.[74] If the transaction can be unwound without significant hardship to B, then there is a reason for doing so, independently of whether A is worse off by entering into the transaction. In claims for rescission, there is no general reason for *loss* to be a necessary condition of relief – and this is so regardless of B's culpability. The significance of culpability in claims for rescission is probably best re-rationalised as bearing (only) upon the normative significance of *B* suffering a loss as an objection to granting rescission.[75] B could normally object to rescission on the basis that it will impose a hardship on B. But if B has behaved with significant culpability in producing the situation in which unwinding the transaction will cause such a hardship, B's complaint is diminished.

The idea that culpability defeats counterfactual arguments about *loss* is also open to doubt. A person suffers a loss as a result of an event when the event is a cause of their being worse off. In law, this normally entails a counterfactual: the loss is constituted by the person being worse off than had the event not occurred. If the event is a breach of duty, the counterfactual question supposes that the defendant *conformed* to their duty in the circumstances. What amounts to conformity in the circumstances will generally be unaffected by the fact that the breach was *highly culpable*. If a person behaves with gross negligence, just as with ordinary negligence, the loss question is still: what would have occurred if there had been *no negligence*? If the breach was highly culpable, this, if anything, might suggest that the defendant would do the *very minimum* to conform to their duty in the closest possible world in which the breach does not occur. For a highly culpable person, presumably minimal compliance is a closer possible world than supererogatory conformity. Whether a person behaves with a high degree of culpability seems constitutively independent, then, of whether a person is worse off as a result of the breach. And in so far as culpability has an evidential role in determining the closest possible no breach world, it is likely to disadvantage claimants rather than to benefit them.

(ii) Not Really Based on Culpability

The rule that 'intended consequences are never too remote' can be explained without supposing that heightened culpability impacts liability. If a person knows that a consequence will occur, then the risk of that consequence is reasonably foreseeable to that person. It may be that, as in the example above, no one else could reasonably foresee

[73] See generally J Stapleton, 'Unnecessary Causes' (2013) 129 *LQR* 39.

[74] For a justification of rescission that points to the underlying values of the transaction in question, see NJ McBride, 'Rescission' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge, Cambridge University Press, 2017).

[75] This judgment already underlies the fact that s 2(2) of the Misrepresentation Act 1967 does not apply to fraudulent misrepresentations.

the risk. Nonetheless, the basis of the person's liability in the example is that the risk was reasonably foreseeable and not one that should have been taken. If the person had somehow forgotten their knowledge about the fact that the hospital was about to collapse at that time, they should still be liable: in their circumstances, the risk remained reasonably foreseeable.

Consider again the tort of deceit. Here are two doubts as to whether liability really is responsive to culpability as such in this tort. First, the wrongfulness of deceit may be explicable on the basis that it involves one person exercising *intentional* control over another person. There is a special badness about being subject to another's intentional control without one's permission. Consequently, it is not the agent's improper engagement with reason *as such* which explains the wrong, but the fact that this constitutes improper control over the deceived person.[76] Second, suppose that you deceive me into investing in some shares because a third party has threatened to break your arm if you do not. It may be that you are still liable in deceit here, but the deceit is excusable. If that is the case, then liability is not *ultimately* conditioned upon culpability, even in deceit. If duress is not a defence to trespass, it is not clear why it should be to deceit.[77] A third, distinct, point, which relates to the argument in the next section, begins with the observation that it is possible to be negligently deceptive. An advertisement may be deceptive, without the advertiser intending this or being aware of its likelihood. The law also recognises that there is a case for undoing transactions that were entered into because of a false belief induced by a wholly non-culpable misrepresentation. It may then be reasonable to think of *deceit* as an aggravated form of these other cases of causing false beliefs in others. If so, the knowledge of or recklessness as to the falsity of the statement performs a merely ancillary function – it opens up the possibility of a wider range of remedies.[78]

(iii) Culpability and Opportunity to Avoid

A number of authors have drawn attention to the moral significance, in justifying a person's liability to bear a cost, of the quality of a person's opportunity to avoid the act or omission to which that cost is attached.[79] If a person had a reasonable opportunity to avoid the act, their objection to bearing the associated cost is diminished. The ampler the opportunity, the less force the objection. One sense in which it might be thought that a person has a higher quality opportunity to avoid *seriously* culpable wrongs compared to *low* culpability wrongs is that it is, in some sense, easier to avoid committing the former.

[76] See, for this kind of view of deceit, A Beever, *A Theory of Tort Liability* (Oxford, Hart Publishing, 2018) ch 6.

[77] *Gilbert v Stone* (1641) Aleyn 35, 82 ER 902.

[78] The point that intention plays an 'ancillary' role in deceit is made by Cane in '*Mens rea* in Tort Law' (2000) 20 *OJLS* 533, 547–48.

[79] See especially E Voyiakis, *Private Law and the Value of Choice* (Oxford, Hart Publishing, 2017) ch 5; A Slavny, 'Nonreciprocity and the Moral Basis of Liability to Compensate' (2014) 34 *OJLS* 417. The idea is also developed in illuminating ways in M Oliver, 'Liability and Culpability' (DPhil thesis, University of Oxford, 2018) and L Boonzaier, 'Duties in Tort Law and its Theory' (DPhil thesis, University of Oxford, 2020), to which this section is indebted.

Intentional wrongdoing is generally easier to avoid than negligent wrongdoing. Another sense is that the quality of a person's opportunity not to φ is affected by the strength of their reasons against φ-ing. The more powerful the moral reasons against φ-ing, the less that is given up by a person in not φ-ing, and arguably, if it is bad for a person to be a wrongdoer, the more that is gained by the wrongdoer in not φ-ing.

The fact that a person could easily have avoided being a cause of damage (or the conduct constituting the basis of their liability, more generally) seems to have considerable bearing upon liability across private law. The level of protection we can reasonably expect from damage from others intuitively depends, at least in part, upon the extent to which we ourselves could avoid that damage. Indeed, this helps to explain the sense in which a person is partly responsible for their own damage in cases of contributory negligence. It is odd to describe a person who is contributorily negligent as *morally culpable*, because they need not breach any duty to others or to themselves, but to the extent they had good opportunities to avoid the damage, they may be partly responsible for it. Conversely, in rare cases in which the law imposes positive duties upon people to come to others' assistance, when they had no reasonable opportunity to avoid the imposition of the duty, the costs the defendant is expected to bear are more sensitive to the defendant's personal circumstances.[80]

The relevance of the foregoing to the present topic is that when a person behaves with high culpability in φ-ing, they will frequently have had a low-cost opportunity to avoid φ-ing.[81] When liability attaches in such cases, it will be because of the defendant's fully responsible choice. To a defendant's possible complaint that liability is particularly burdensome, a reasonable response is available: you could easily have avoided this situation by not culpably wronging another and (so) are responsible for being in it. Similarly, when a person enters into a contract when they had a range of valuable alternative options, and the contract turns out badly for them, it may not be unfair, up to some limit, to hold the person to the deal.

This helps to justify some of the doctrines above. The clearest example is probably remedies (vii). If a person chooses wrongfully to knock down another's wall, and this exposes them to a considerable liability for cost of repair, the objection they have to bearing it (its burdensomeness) is diminished by the fact that they had ample opportunity to avoid incurring the burden, at least when the size of the burden was reasonably predictable. Of course, there are limits. If paying for the cost of repairing the wall will destroy the defendant's life and give a minimal benefit to the right-holder, then it will still be disproportionate to impose it.[82] The dictum from *Redland Bricks*[83] goes too far

[80] See *Goldman v Hargrave* [1967] 1 AC 645 (PC) 663.

[81] To be clear, the point here is not that the moral significance of the quality of a person's opportunity to avoid a negative outcome is identical to the moral significance of a person's culpability. The fact that a person had an opportunity to avoid the act or activity that grounded their liability has an independent significance. For instance, the fact that a person had adequate options to avoid the activity to which *strict* liability attaches (eg transporting explosives) might have a bearing on the justifiability of the strict liability, but this has nothing to do with culpability. See Gardner (n 28) ch 6.

[82] It may also still be disproportionate in that it would be socially wasteful, even if not disproportionate in relation to the wrongdoer.

[83] Text at n 61 above.

in stating that considerations of proportionality are irrelevant when the defendant is an intentional wrongdoer.

Remoteness is more difficult. Consider again the example of A intentionally destroying B's chair, with the unforeseeable result that B suffers a psychiatric illness. Remoteness is sometimes described as a liability-limiting doctrine.[84] On this view, if taken at its word, a person is responsible even for unforeseeable consequences of their actions in the sense that they have special reason to repair them. The reasonable foreseeability remoteness rule amounts to the law's refusal to require B to compensate A, even though B has a special reason to do so. Why would the law protect defendants in this way?

One answer is that the rule protects defendants from overly burdensome liabilities. If that answer is correct, then, again, we might consider culpability as diminishing the defendant's objection to bearing a higher than usual burden, just as it does in defeating objections to injunctive relief or to a particular mode of compensatory relief. The idea that the reasonable foreseeability remoteness rule protects from overly burdensome liabilities seems only to cover some of the ground of remoteness, however. If the rationale of the rule were only to protect defendants from overly burdensome liabilities, its focus upon the *type* of damage is difficult to understand. Suppose that harm of type C is reasonably foreseeable and would expectably result in a liability of £500, but type D materialises, causing £500 of damage. If the concern is the size of the burden, then B should be liable when a different type of damage occurs, but is no greater in extent than the type reasonably foreseeable. Further, the extent of damage may be enormous, even if the type is reasonably foreseeable.[85]

A different justification is that the reasonable foreseeability rule renders the incidence of liability more predictable by defendants, even if the liability is predictably sizeable. Why is this valuable? Its value is more apparent in the case of strict liabilities which attach to particular activities. Without the assurance which the reasonable foreseeability rule provides, some defendants may decide not to engage in the – potentially valuable – activities to which strict liability attaches because those activities expose them to a wholly unpredictable, and not easily insurable, liability. This case for the rule is less strong in relation to negligence, when the defendant can avoid liability by taking reasonable care. However, given that the objective standard often imposes requirements that many defendants may not be able reliably to meet, the concern is perhaps still present. When the defendant's conduct is clearly wrongful and culpable, as is generally the case in deceit, this concern falls away. There is no valuable activity that the defendant will be deterred from engaging in due to the risk of an unpredictable liability. Furthermore, in so far as the defendant is exposed, in deceit, to the risk of a very extensive liability, this concern is again diminished (though not entirely defeated) by the fact that the defendant can avoid all liability simply by not behaving wrongfully and culpably. So it may be that the pattern of remoteness rules can be partly explained both by the fact that, with highly culpable wrongs, the defendant can easily avoid liability and by the fact that there

[84] A Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th edn (Oxford, Oxford University Press, 2019) ch 7, 'Principles limiting compensatory damages', contains discussion of remoteness.

[85] Sometimes, however, the description of the type of damage does seem to be influenced by a concern to avoid disproportionate burdens on a contract-breaker: see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA).

is no risk, or a very low risk, of deterring valuable activity. The explanation is still partial, however, as these considerations do not explain the law's insistence, in negligence, upon a matching between the risks which it was unreasonable to impose, and the risk which materialised.[86]

Earlier I offered reasons why the role of heightened culpability in diminishing the causal requirement of liability may be mistaken. However, the idea that 'high' culpability can make up for 'low' causation so as to generate justified liability is one which has been endorsed by some philosophers.[87] Frowe gives the example of a person who is fleeing an attacker, and needs to cross a narrow bridge to reach safety.[88] Unfortunately, but philosophically inevitably, the bridge can only bear the weight of one person. As the person fleeing approaches the bridge, she encounters a selfish pedestrian, who refuses to step aside from the bridge because it will muddy her new shoes. Generally, according to Frowe, the selfish pedestrian could justify not moving out of the way if this involved a significant personal cost. For instance, suppose the only way the pedestrian could move in time to save the fleeing person would be to jump to a lower platform, breaking both legs. This requires too much of her, given her indirect involvement in the situation. But suppose the pedestrian maliciously decides to block the person's path. Now, Frowe says, she is liable to lethal defensive force. The thought is that 'obstructing' is a more indirect form of causal involvement than directly posing a threat and so generally does not generate extensive liability, but things change when obstruction is coupled with high culpability. It seems possible to explain this idea, however, without supposing that culpability is itself the ground of liability. The obstructor's duty of easy rescue (or a similar duty) only requires a relatively minimal burden to be borne (because, perhaps, that duty requires positive use of their resources and is not voluntarily chosen). However the obstructor has less objection, as Frowe points out, to bearing a greater burden *having breached* her duty of easy rescue, because she had an additional opportunity to avoid being subject to *that* greater burden.[89] Nonetheless, the reason for bearing the greater burden is still the same reason as the one that applied prior to the breach: that it will save the life of the pedestrian. It is this reason, in combination with the fact that the burdens of conforming to it have discounted weight in virtue of the culpable breach, which justifies the liability.

Liability in contribution proceedings allots shares of liability in respect of a damage in proportion to each liable person's relative culpability and causal contribution. A comparison between these is said to be a comparison of each person's *responsibility* for the damage.[90] The same factors determine the reduction for contributory negligence. It seems, then, that greater culpability with respect to the damage entails greater responsibility and this greater responsibility justifies the person bearing more of the

[86] See *Tremain v Pike* [1969] 1 WLR 1556 (Exeter Assizes).

[87] S Lazar, *Sparing Civilians* (Oxford, Oxford University Press, 2015) 94; H Frowe, *Defensive Killing* (Oxford, Oxford University Press, 2014) 76. The Austrian legal theorist, Walter Wilburg, endorsed a view of this kind. According to Wilburg, the heightened satisfaction of one element of liability could 'compensate' for the diminished satisfaction of another, at least with respect to some elements. For discussion, see Jansen (n 35) ch 9.

[88] Frowe (n 79) 76.

[89] We need not agree with Frowe that it permits *fatal* damage to accept the basic idea.

[90] Civil Liability (Contribution) Act 1978, s 2(1).

cost of the liability (or, in contributory negligence, in bearing more of the cost of their own loss). A person's outcome-related culpability gives them, then, a positive reason to bear more of the cost, or gives the court a positive reason to allocate more of the cost to that person. Even here, however, it may be that culpability acts so as to diminish the normative weight of the defendant's interest in not bearing a burden, which the defendant has independent reason to bear. By distributing the cost of the liability between the persons liable in proportion to their degree of culpability, the law achieves a morally superior distribution of the burden because it allocates more cost where there is less objection to bearing it. There is some reason to think this is what underpins the law. This is because the basic case for apportionment exists even before any consideration of responsibility or culpability has been made. Suppose each defendant breaches a joint contractual duty entirely non-culpably and without responsibility, and one of the two defendants satisfies the compensatory duty that arises from the breach. The case for that defendant having a claim against the other defendant is a principle of fairness. The principle is this: if a number of persons each has a duty to bear a burden in respect of the same damage, it is, other things being equal, unfair if only one of the duty-bearers bears the burden, when it is possible for more than one of them to do so. It is simply arbitrary for one of two persons who are morally required to bear a burden to be singled out if this can be avoided.[91] This principle of fairness justifies distributing shares of compensatory burden independently of responsibility considerations. Each defendant's culpability is relevant only as a secondary matter, which alters whether 'other things are equal'.

Consider, finally, the German idea that high culpability may justify a reversal of the burden of proof of causation. The basic justification for the orthodox burden of proof is that the disvalue of a false positive and false negative is equal, but since a false positive involves imposing unjust damage rather than failing to alleviate it, the claimant loses when the probabilities are equal or impossible to ascertain. The defendant's *proven* high culpability might be considered to diminish the disvalue of a false positive against the defendant.[92] A false negative would wrongly fail to compensate a person entitled to compensation whereas a false positive would wrongly hold liable a highly culpable person. This alleged justificatory role of the defendant's is slightly different from the role it plays in the earlier examples in this section. The idea there was that a culpable defendant cannot complain too much about bearing a cost which they *in any event* have good reason to bear. In cases in which it is unclear whether the defendant was a cause of the outcome, it is simply unclear whether they have a reason to bear the cost of compensation. If one thought that the defendant was responsible for creating a situation in which proof of causation is uncertain, then perhaps *this* gives the defendant a reason to bear a greater risk of uncertainty in the determination of causation. But this does not correlate with situations in which the defendant behaved with high culpability.

[91] See NJ McBride, *The Humanity of Private Law: Part I: Explanation* (Oxford, Hart Publishing, 2018) 212–13.

[92] In previous work, I prematurely rejected this argument because I associated the lesser disvalue of a false positive with the claim that retributive justice would be done in the event of a false positive.

(iv) Culpability and Protection of Social Interests

As Cane observes, '[w]hen a harm-causing activity has high social value, a requirement of intention for tort liability helps to protect society's interest in the continuance of that activity'.[93] This insight helps to explain the role of malice in some torts.[94] One way in which a normal negligence standard may interfere with the continuance of an activity is its uncertainty. If there were a tort of negligent institution of legal proceedings, this may deter valid, and socially valuable, litigation in part because of uncertainty surrounding the content of what 'reasonableness' will be held to require in the context of bringing litigation. However, a malice-based standard mitigates this problem: an honest prospective litigant only needs to take into account the (likely small) possibility that they will erroneously be found to be dishonest. And this is one way in which the courts have justified the requirement of *malice* in the tort of malicious prosecution – as an answer to the potential chilling effect of liability upon valid claims.[95]

(v) Culpability as a Ground of Liability

In all of the examples discussed so far, the appeal to the defendant's culpability has either (probably) been a mistake, an appeal to something else, constitutive of a form of control over the claimant which is wrongful, or merely operated to defeat or diminish an objection the defendant or society would have to the defendant being held liable. In none of them has culpability been part of the positive case for holding the defendant liable in the first place. In this section, I consider three lines of arguments that would assign a positive role to culpability in generating liability.

(a) Retribution

One might seek to explain some or all of the doctrines on a retributivist basis. Retributivism comes in many forms and the following observations may not apply to all forms. A central strand in retributivist theories of punishment is that there is a reason (or it is apt) to impose a burden upon a person because and to the extent that they *deserve* to bear or suffer this burden. The standard basis for such desert is wrongful and culpable conduct. One might seek to explain the additional burdens the law imposes upon culpable defendants under the doctrines described on the basis that the law considers culpable defendants to deserve to bear those burdens.

A deep difficulty with this view – that desert-as-a-positive reason justifies the additional burdens under these doctrines – is that, looking to this argument alone, there is no rational connection between the defendant's desert and the nature of the additional burden imposed by the law under these doctrines. Consider (iii) – the alteration of the burden of proof on the basis of higher culpability. If a person behaves with gross negligence towards another, it is unclear why their desert provides a reason to impose *this*

[93] Cane (n 71) 554.
[94] ibid; D Nolan, 'Varying the Standard of Care in Negligence' (2013) 72 *CLJ* 651, 686.
[95] *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366 [72].

particular burden – namely, the alteration of the burden of proof. Similarly, in relation to remoteness (iv), a highly culpable wrongdoer may deserve to suffer a burden, but *why this burden*? One could give the defendant what they deserve by fining them (or simply by leaving such matters to the criminal law). And there is no guarantee or even likelihood that the burden will match the defendant's desert. Furthermore, what a person deserves seems to be in large measure luck-insensitive, even if other parts of morality are luck-sensitive. Many of the doctrines above expose the defendant to considerable luck. Whether a person is held liable under the reversal of the burden of proof for gross fault depends upon the happenstance availability of exculpating evidence.

It might be objected that, even if desert cannot be a standalone justification of the doctrines in question, it can be part of the justification. It might be asserted that it is a person's moral desert which removes their objection to bearing a more extensive cost under some of these doctrines. This seems doubtful in relation, for instance, to a person's contributory fault, which is not necessarily morally culpable. More generally, however, the difficulty with this objection is that moral desert is independent of the person's relationship to the particular outcome to which these doctrines apply. A person could be morally deserving – if one believes in moral desert – in virtue of some previous culpable wrong that the person committed prior to the events to which these doctrines apply; this has no bearing, however, on their private law liability to compensate.[96]

(b) Culpability Sufficientism

Some have argued that culpability itself, independently of causation of damage, is a sufficient ground of both liability to defensive damage and to being required to compensate.[97] Let's call this culpability sufficientism (CS). To illustrate, consider this example:

> *Shooters.* D1 and D2 are independently both about to fire their guns at C, each aiming to kill C. C notices that, unbeknownst to D2, D2's gun has a lock which will prevent D2 firing. C is only able to protect himself from D1's shot by pulling D2 in front of D1.

D1 and D2 are equally culpable. Both aim to kill an innocent person without justification. CS holds that C is permitted to harm D2 in virtue of D2's culpability, despite the fact that D2 is not causally responsible for the risk to C's life. This is supported by an appeal to intuition – some think it is intuitive that C is permitted to kill D2 in *Shooters.* There is also a theoretical argument. It is that D2 has no reasonable complaint against a moral rule which permits C to kill D2 in such circumstances. Such a rule benefits everyone, including D2, in providing each person with more opportunities to avoid undeserved harm. Further, to D2's complaint that D2 is being harmed, an answer is: 'you could easily have avoided being harmed by simply not choosing to try to do serious

[96] Here I am not necessarily in disagreement with Cane's conclusion that retributive justice justifies aspects of tort law: Cane's conception of retributive justice is responsibility-centred, and not exclusively desert-based: see P Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in P Cane and J Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, Clarendon Press, 1998).

[97] See, eg, in the context of defensive harm, L Christie, 'Causation and Liability to Defensive Harm' (2020) 37 *Journal of Applied Philosophy* 378, and V Tadros, *To Do, To Die, To Reason Why* (Oxford, Oxford University Press, 2020) ch 10.

wrong'. Although such a rule widens the circumstances in which D2 is liable to harm, D2 is only liable to the same level of harm as D2 would be in relation to a risk which D2 culpably created: their liability is subject to the same proportionality limit.[98]

One could in principle accept CS without thinking that culpability provides a positive reason for liability. If culpability merely diminishes the normative significance of a person's interest in not suffering a burden, then it still acts merely negatively. The positive justification of liability is benefit that will – or is expected to – occur to another person if the culpable person or their resources are damaged. If so, then the truth of CS (if it is true) is unlikely to have much bearing on tort liability, unlike defensive liability. This is because, in cases like *Shooters*, it is necessary, in the factual circumstances of that case, to damage culpable D2 to protect a particular person, C, from damage. The factual circumstances make it such that it is necessary to single out D2 and C. But these factual circumstances do not obtain in tort liability, unless there is already a reason to single out D2 and C, such as a causal link between D2's culpable risk imposition and C's damage.[99] Although highly culpable people would be normatively open to having their resources taken to compensate others for harms for which they are not causally responsible in tort law, if CS were true, this is only one possible way in which their liability to harm could be realised. Their resources could be used to improve disability welfare schemes or more generous compensation funds than currently exist, if their contributions are necessary to achieve this.[100] It seems arbitrary, without more, for the persons whom they have culpably risked, but not caused harm to, to benefit in particular.

(c) Culpability as an Enhancer

A third possible positive normative role for culpability is that it *enhances* the case for taking compensatory action by adding weight to the reasons for it, but without forming an independent reason itself to compensate a particular individual. To explore this, it may be helpful to consider this example:

> *Drugs.* A drug company, D, creates three batches of drugs. The first batch was distributed when the risk of an extremely serious side-effect S was not reasonably discoverable. The

[98] For what it is worth, my intuitions are somewhat unsettled in *Shooters* and related examples. If we vary the facts of *Shooters*, such that D2 has tried to fire and is now standing near C not posing any danger, or if D2 is trying to harm C2, a different victim, my intuition is against it being permissible to harm D2 to protect C. As the defenders of this type of view realise, it leads to what many would regard as highly counterintuitive implications. If the basis of the idea that culpability grounds liability is that a person's normative protection from harm diminishes in some relation to their culpability with respect to harm, in principle, *any* culpable person is open to being used to protect others from harm – be it wrongful harm or otherwise. If a well-known serial killer, D3, is on the loose nearby in *Shooters*, having just killed his latest victim, then C is apparently permitted to kill D3 too, on this view.

[99] For a similar point, see Gardner (n 28) ch 3, 96–99.

[100] It is also not clear, if *culpability sufficientism* is true, how a culpability basis for compensatory liability interacts with liability to punishment. When a person is liable to punitive and compensatory harm, there are two grounds of liability in play, if CS is true, and responsibility for failure to conform to a strict duty/reason is an independently sufficient basis of liability: a responsibility ground and the CS-provided culpability ground. But if the culpability ground of liability is the only one in play, then it would seem particularly necessary to co-ordinate the criminal law and tort law in relation to that ground. If tort law has imposed compensatory liability upon a person on the culpability ground, then this should have a direct impact on their punitive liability. It is also far from obvious why any particular victim of harm should get the full benefit of the defendant's culpability-based liability.

> second batch was distributed when the risk of S was reasonably knowable, but not known by D. The third batch was distributed when D knew about S, but D continued to distribute the drug because of its profitability. There are five victims of each batch, each of whom suffers the same degree of damage, but D only has sufficient funds to provide effective medical treatment for S to a total of five victims.

If culpability provides an additional reason for compensation, then D ought to provide compensation to the batch 3 victims. Further, if the strength of the reason varies in proportion to the degree of culpability, then there is stronger reason to compensate batch 3 victims than batch 2 victims. D's culpability and degree of culpability provide various new reasons for action and render apt certain responses. It makes blame *pro tanto* apt. It gives D a reason to feel certain emotions – guilt, perhaps – that would not be apt in relation to batch 1, or potentially batch 2. Possibly the batch 3 victims will feel dehumanised because of the attitude shown to them by D's conduct. This might give a reason to favour compensating batch 3: it will do more good because the victims will understand the compensation as a recognition of their moral importance. But suppose that the victims will always remain unaware of the fact that D behaved culpably in relation to batch 2 and batch 3. I'm uncertain here, but it is not clear to me why D's defective attitude towards and engagement with reasons itself gives rise to a new reason to *compensate* or otherwise enhances the case for compensating the batch 2 or 3 victims. This makes sense if we think that culpability's normative effect is primarily to allow a kind of moral discounting of the defendant's objection to bearing a burden. This normative effect gives the defendant less complaint to bearing a burden, but it does not give them a new reason to bear it. The law seems to agree with this: in insolvency, all tort victims of the insolvent will have equal priority, regardless of the culpability with which the tort was committed.[101]

A possible argument is that D has reasons not only not to damage the victims, but reasons of *respect* towards the victims. Respect for others requires correctly taking into account their moral status in one's deliberation. Given that there was no evidence-relative reason against damaging with respect to batch 1, D did not fail to deliberate properly in relation to the batch 1 victims. The damage is not disrespectful. But this is different with batch 2 and batch 3. By compensating batch 2 or batch 3, it may be that D (imperfectly) conforms to those reasons of respect by giving a greater priority to those reasons in his deliberation. In other words, we have reasons to have certain attitudes to our reasons for action. There is something morally problematic, for example, about a person who adopts an intention to conform to their promises only in so far as it serves their self-interest. This is not an appropriate attitude to one's duties. In relation to the batch 2 and 3 victims, D fails to adopt the appropriate attitude to D's duties. What would be the appropriate attitude toward the reason not to damage, now, having undervalued or overlooked the reason in the past? Tentatively, it is not clear (to me) that one's reason to have an appropriate attitude towards one's reasons for action requires *additional* weight to be given to a reason in respect of which one adopted an inappropriate attitude.

[101] The Insolvency Act 1986, s 382, permits tort claims (except claims based on fraud: s 281(3)) to constitute a 'bankruptcy debt'. This permits tort claimants to recover to the same extent as the bankrupt's other creditors.

In the promise example, it would be odd if merely adopting a stance of 'perform one's promise if it is in one's self-interest' could give an additional rational force to one's promise. More plausibly, one ought simply to recognise the force of the reason, now, and to give the reason its proper weight in one's deliberation. If that is right, then we still lack an argument for culpability as an enhancer.

III. Conclusion

To recap, in this chapter I have aimed to explain both why moral culpability is not a necessary condition of private law compensatory liability, and yet why it continues to play a role in determining its scope. The connection between compensatory and defensive liability puts an account of compensatory liability that makes moral culpability a necessary condition on the back foot, and the intelligibility of culpability-independent duties and reasons not to damage explains why fault principles generally operate so as to cut-back, rather than generate, liability. While in some cases I have sought to argue that culpability's role in determining liability is mistaken or only apparent, in other cases, I have defended its value, with Cane, as a protective device, which defeats or diminishes individual or societal objections to liability that would otherwise arise.