

The Many Faces of Negligence

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Negligence law is built around the paradigmatic case of a person who unreasonably preferred his own interests to those of others and, as a result, caused damage to another person. However, this case is not representative of all instances of negligence. In some cases, the negligent injurer failed in balancing between the interests of the victim alone; in other cases, he failed in balancing between the victim's interests and those of a third party; sometimes the injurer failed in balancing the victim's interests and the interests of the public or of society as a whole; and in yet other instances, he failed in balancing between his own interests.

This article argues that the law should not treat in the same manner the different types of instances of failure in balancing between interests. Both justice and deterrence considerations mandate different treatment for the different types of instances, in accordance with the type of interests that the negligent injurer failed to balance. The article focuses on the typical types of balances of interests that the potential injurer is required to conduct before taking action, with the aim of determining the degree to which it is crucial to impose tort liability in each type of case. The article also examines whether prevailing negligence law is compatible with the thesis developed in the article and proposes tools for achieving such compatibility.

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INTRODUCTION

Under the prevailing legal concept of negligence, an injurer is negligent when his behavior was not in line with a proper balancing of the victim's interests with other interests.

In the economic analysis of law, the Hand Formula is applied to realize the idea of balancing interests. Under this formula, negligence rests on two variables: the risks the injurer created and the precautions he could have taken to reduce those risks. The formula directs courts to determine liability by comparing precaution (B) with expected damages (PL). If $B < PL$, the injurer is found negligent, whereas if $B > PL$, he is found not to be negligent.¹ In the economic analysis of negligence law, it is often presumed that the costs of precaution relate to the injurer, whereas the expected damages relate to potential victims. Accordingly, the Hand Formula is conceived as creating incentive for an efficient balancing between the interests of the injurer and those of potential victims.

A similar presumption with regard to the interests involved in determining negligence can be found in the Kantian account of tort liability. Under this account, the negligent injurer failed in that he immorally preferred his own interests to the interests of the victim. Consequently, he is required to restore the victim to his *status quo ante* and thus remedy the injustice that was caused to him.²

In this article, I seek to demonstrate that both the economic and the Kantian understandings of the law of negligence are overly simplified, since in concentrating on the balancing of interests of the injurer and the victim, they both fail to recognize the characteristics of other types of balancing of interests and the relevance of those balancings to the law of negligence.

The table below presents sixteen instances of different conflicts of interests that in the balancing of which, the injurer is likely to fail and, consequently, be found negligent.³ Apparently, the conflict between the

1 Under the best interpretation, these variables refer to marginal values. Consequently, the injurer is considered negligent when his marginal costs of precaution fall short of the marginal reduction in the expected damages. Robert Cooter & Thomas Ulen, *Law and Economics* 306-08 (3d ed. 2000).

2 Ernest Weinrib, *The Idea of Private Law* 3-21 (1995); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *Iowa L. Rev.* 449 (1992). Compare with Epstein's proposition, which bases a claim for strict liability on a similar mode of argument. Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. Legal Stud.* 151 (1973).

3 Cf. Israel Gilead, *Tort Law and Internalization: The Gap Between Private Loss and Social Cost*, 17 *Int'l Rev. L. & Econ.* 589 (1997); Richard W. Wright, *The Standard*

injurer's interests and the victim's interests is only one possible version of the story of negligence.⁴

	Injurer's Interest (<i>expected damage</i>)	Victim's Interest (<i>expected damage</i>)	Third Party's Interest (<i>expected damage</i>)	Social Interest (<i>expected damage</i>)
Injurer's Interest (<i>costs of precaution</i>)	injurer — injurer	injurer — victim	injurer — third party	injurer — society
Victim's Interest (<i>costs of precaution</i>)	victim — injurer	victim — victim	victim — third party	victim — society
Third Party's Interest (<i>costs of precaution</i>)	third party — injurer	third party — victim	third party — third party	third party — society
Social Interest (<i>costs of precaution</i>)	society — injurer	society — victim	society — third party	society — society

of Care in Negligence Law, in Philosophical Foundations of Tort Law 249 (David G. Owen ed., 1995).

- 4 It is important to stress that the above table does not exhaust all the types of possible balancings of the different interests. It is quite possible to conceive of different combinations of the sixteen possibilities presented in the table, such as a balancing that weighs the interest of the injurer, the social interest in preventing the damage, the social interest in not preventing the damage, and the interest of the victim. It is also important to stress that in all the cases where imposing tort liability for negligence is weighed, the victim's interest is relevant at the time at which the balancing of interests was conducted and should have been weighed (unless it was unforeseen, in which case the injurer will not be held liable). This notwithstanding, it is possible that the injurer's failure to choose the appropriate course of action did not derive, *ex ante*, from a faulty balancing of the victim's interest and another interest, but, rather, from a faulty balancing of other interests. This point will be clarified in the *infra* discussion of Category 5.

This article's thesis is that although an injurer who unreasonably balanced the interests in each of these sixteen instances and acted accordingly is negligent, the necessity of imposing liability on him varies from one instance to another. Focusing on five of the sixteen instances of balancing of interests presented in the table and using the criteria of deterrence and justice, I will show that imposing liability is most crucial when the negligent injurer failed in balancing between his interests and those of the victim, while it is not crucial, and at times even detrimental, when the injurer failed in balancing between the different interests of the victim. Between these two extremes, we find the intermediate instance in which the injurer failed in balancing between the victim's interests and those of a third party and the instance in which the injurer failed in balancing the victim's interests with those of the public or society. In the latter two instances, deterrence considerations and justice considerations tend to diverge, and while imposing liability on the negligent injurer is not as crucial as in the first instance (injurer versus victim), it is still not redundant. Finally, in the fifth instance, also lying between the two poles of the spectrum, the injurer negligently failed to balance between his own interests and, consequently, caused damage to the victim. In such instances, imposing liability is crucial but not to the same extent as in the first instance.⁵

5 At this juncture, there is call to make an observation that relates to situations in which the injurer's negligence does not derive in a typical manner from a faulty balancing of interests, but, rather, from a failure to conduct any balancing of interests whatsoever. Let us assume that a driver in a car was negligent in that in the face of sudden danger, he did not brake in time and caused an accident. In this and similar cases, it would be incorrect to say that the driver failed in balancing interests prior to the accident. His negligence stems from a failure to use any discretion whatsoever. Indeed, in such cases, it could be presumed that negligence law does not influence the injurer's behavior, and the question arises as to whether it is fair or just to impose tort liability for his momentary lapse of attention, from which every driver suffers from time to time. One of the possible answers to the question presented in this paragraph is that imposing liability on a driver influences his behavior prior to the stage at which he is required to apply his brakes, and therefore, imposing liability will lead to efficient deterrence. Sometimes, imposing liability will even be commensurate with the requirements of justice, since the moral fault of the injurer is manifested in the fact that he did not, at an earlier stage, take the proper measures to enable him to brake quickly when he would be required to do so (such would be the case if he had been driving in a state of fatigue and his lack of alertness worked to his disadvantage). This issue is beyond the scope of this article and requires separate discussion. See Robert Cooter, *Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will*, 11 Int'l Rev. L. & Econ. 149 (1991); Robert Cooter, *Self-Control and Self-Improvement for the "Bad Man" of Holmes*, 78 B.U. L. Rev. 903 (1998). The discussion throughout this article presumes that there

These outcomes are important not only on the theoretical level. They are of particular relevance to courts applying negligence law in actual cases. In the rest of this section, I will clarify the significance of the type of balancing of interests to the question faced by courts every day, namely, whether to impose tort liability on a negligent injurer.

One condition for imposing liability on a negligent injurer under prevailing law is that he owes a duty of care to the victim. Absent such a duty of care, no tort liability arises. The duty of care is a filter that sifts out those instances in which imposing tort liability on the negligent person will not appropriately serve tort law's underlying objectives or else will undermine their functioning. This is valid whether the theoretical basis of negligence law is the attainment of justice of one type or another or whether it is instrumental in nature and, in fact, promotes deterrence. Either way, there will always be those cases in which the legal system, for its own reasons, will not seek to impose liability on the negligent injurer.⁶

In the case law, we find a number of considerations for not imposing liability on a negligent injurer that are raised to negate a duty of care. One, the legal rule under which liability would be imposed is likely to have a negative effect on the activity in which the injurer is engaged or on other activities. Two, applying a rule of liability is likely to entail too many administrative costs. Three, the victim is the true cheapest cost avoider or the best insurer.⁷ Four, considerations of justice require releasing the injurer from liability. Five, the damage or the way in which it was caused likely was unforeseeable by the injurer.⁸

Countering these considerations are the traditional considerations that support imposing liability on negligent injurers. Under the deterrence consideration, the potential of liability deters potential injurers from causing damage. Under the justice consideration, imposing liability is justified in that it remedies the wrongdoing perpetrated by the injurer to the victim.

Consequently, in every case in which there is a *prima facie* consideration weighing against imposing liability, the court must consider the pros and

is some stage at which the injurer is required to conduct a balancing of interests and that he fails at doing so or does not act in accordance with that balancing and, as a result, damage is caused.

6 See Richard A. Buckley, *The Modern Law of Negligence* 15-23 (3d ed. 1999).

7 This consideration encompasses, *inter alia*, the anti-social or unlawful behavior of the victim. *Cf. id.* at 20-22.

8 See *id.* at 4-5, 15-23. For other possible reasons for not imposing a duty of care, see Stephen D. Sugarman, *A New Approach to Tort Doctrine: Taking the Best from the Civil Law and Common Law of Canada*, 17 *Supreme Ct. L. Rev.* 375 (2002).

cons and determine accordingly whether the injurer bears a duty of care to the victim. In any event, in order to determine whether a duty of care exists in the particular case under consideration, the court is required to respond to the question of *the extent to which it is crucial to impose tort liability in that given type of case*. Since the argument developed in this article is that the type of balancing of interests in which the negligent injurer failed is a very central consideration in responding to this question, it follows that it should also be a primary consideration for courts in deciding whether to find the injurer as owing a duty of care to the victim and impose tort liability on him.

A survey of the case law reveals that the courts refrain from calling the consideration of the type of balancing of interests by its name. Nonetheless, their rulings are often consistent with this consideration; indeed, I will even go so far as to claim that it influences judicial discretion, even though the judges do not identify it in a precise manner. This consideration can influence the court's discretion at two levels: in the sphere of the duty of care and in the sphere of the standard of behavior. Thus, the court might be led to the conclusion that no duty of care exists in a certain type of case based on the given type of balancing of interests under discussion. Yet, given the existence of a duty of care, the court might also take into account the type of balancing of interests when determining the standard of behavior required of the injurer.

My claim is that the courts tend to impose liability for negligence more readily when the balancing of interests at which the injurer failed is between his own interests and those of the victim, whereas they are more reluctant to impose liability when the injurer's failure relates to a balancing between the victim's interests, between the interests of the victim and those of a third party, or between the interests of the victim and those of society.

The article is comprised of six parts. The first part outlines the considerations to be applied in assessing the necessity of imposing tort liability, with each subsequent part devoted to a different type of balancing of interests in which a negligent injurer could fail. In each part, I first evaluate the extent to which imposing liability on the negligent injurer is crucial from deterrence and justice perspectives in the specific category of cases under discussion. I then proceed to argue that the court decisions in cases belonging to that particular category often correspond with the theory developed in this article, even though the consideration of the type of balancing of interests is usually not referred to at all by the courts.

One counterintuitive conclusion drawn from the discussion of the various categories of cases is that imposing liability on negligent injurers occasionally places them in a conflict of interests with the victim that

could have been avoided had liability not been imposed. This conclusion contradicts the common presumption made by law and economics theorists that imposing liability on a negligent injurer neutralizes his natural incentive to prefer his own interests over those of his victim.⁹

First, however, I will briefly outline the nature of the justice and deterrence considerations that will serve me throughout the article in assessing the degree to which imposing liability is necessary in the different instances of balancing interests.

I. CONSIDERATIONS IN ASSESSING THE NECESSITY OF IMPOSING TORT LIABILITY

Deterrence and justice are the two pillars of tort law. Deterrence usually is identified with economic efficiency. At its foundation lies the assumption that tort law must provide the potential injurer and the potential victim (and, at times, third parties) incentives to behave in a way that will minimize the sum of the cost of accidents and the cost of preventing them and thereby increase social welfare. Accordingly, a legal rule that contributes maximally to reducing that sum is an efficient rule that is justified by the deterrence objective of tort law.¹⁰

Justice is a more complex concept, with a variety of different meanings.

9 Cf. Restatement (Second) of Torts § 283 cmt. e (1965), which states that under the negligence rule, an actor is required to "give an impartial consideration to the harm likely to be done [to] the interests of the others as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor ... to prefer his own interests" Cf. Jules L. Coleman, *Risks and Wrongs* 487-88 (1992): "The Requirement of Collective Rationality ... forces all parties whose behavior is governed by the reasonable-person standard to take the impersonal point of view But agents occupy the personal as well as the impersonal standpoint, and their doing so, moreover, can be reasonable."

10 Guido Calabresi, *The Cost of Accidents* (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972). There are those who maintain that a legal regime of negligence achieves optimal deterrence, while others claim that a legal regime of strict liability is preferable. I assume that there are times at which a regime of negligence is preferable from the standpoint of deterrence, while at other times, a regime of strict liability is preferable. Indeed, we can find a combination of the two regimes in prevailing law. See Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 Ga. L. Rev. 963 (1981); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801 (1997) [hereinafter Schwartz, *Mixed Theories*].

The type of justice commonly referred to by tort theorists is corrective justice. Under corrective justice theory, tort law should rectify the state of affairs that was created due to one person's wrongful injury of another person, so that the latter is restored to his *status quo ante*. Aristotle premised this principle of justice on the presumption that a wrongful injury constitutes a breach of the equality existing between people in their interactions with one another. Restoring matters to their previous state therefore remedies this breach of equality.¹¹ Consensus does not exist amongst scholars who emphasize the centrality of the principle of corrective justice in tort law with regard to the characteristics of the wrongful injury whose rectification is mandated by the principle of corrective justice.¹² What they do all agree on is that the different characteristics of the incident of damage alone should determine whether the injury is wrongful. These scholars consider only the actions of the injurer and the victim and dismiss as irrelevant objectives that are external to the injurer-victim relationship.

Most corrective justice theorists conceive the considerations of corrective justice as considerations based on *ex post* scrutiny. Hence, corrective justice is *ex post* justice. *Ex post* justice means that the victim's entitlement to compensation is determined by considering the nature of the injury to her and the substance of her interest that was harmed by the injurer's behavior. *Ex ante* scrutiny usually is conceived of as relevant to the deterrence objective of tort law, that is, to the objective of guiding the behavior of potential injurers and victims, but not pertinent to considerations of corrective justice. This conception is not accurate, however. Justice to the

11 5 Aristotle, *Nicomachean Ethics* 4 (Martin Oswald trans., Bobbs-Merrill 1962).

12 Epstein, *supra* note 2; George Fletcher, *Fairness and Utility in Tort Theory*, 85 *Harv. L. Rev.* 537 (1972); Jules L. Coleman, *Markets, Morals and the Law* 184 (1987) (Chapter 8: Corrective Justice and Wrongful Gain) [hereinafter Coleman, *Corrective Justice and Wrongful Gain*]; Jules L. Coleman, *Risks and Wrongs* 329-85 (1992) [hereinafter Coleman, *Risks and Wrongs*]; Ernest J. Weinrib, *Understanding Tort Law*, 23 *Val. U. L. Rev.* 485 (1989); Weinrib, *supra* note 2, at 145-70. Epstein maintains that there must be a causation link of a unique kind, which he describes, in order to justify imposing liability on the person who caused the damage; Fletcher claims that imposing liability is justified when the defendant created a non-reciprocal risk for the plaintiff, and the latter was injured as a result. To Fletcher, fault is not an imperative condition for imposing liability. Coleman claims in his article (*Corrective Justice and Wrongful Gain*) that under the principle of corrective justice, it is necessary to cancel wrongful losses and wrongful gains, when in some cases their definition as wrongful is conditional upon fault on the part of the defendant, while in other cases, it is not. In later writings, Coleman retracted the part of his claim that relates to wrongful gains. Weinrib maintains that a legal regime of negligence is justified for reasons of corrective justice.

victim cannot be derived from *ex post* scrutiny alone; *ex ante* scrutiny is no less vital for a "just" determination of the legal dispute between the injurer and the victim and, primarily, for the protection of the victim's interests.¹³ There are circumstances in which *ex ante* and *ex post* considerations of justice converge; but sometimes they work in opposite directions. Thus, it is possible that *ex post* considerations of justice will mandate holding an injurer liable to the victim, while an examination of the victim's *ex ante* interest will indicate that it is preferable for the victim that the injurer not be held liable. In such a case, it will be necessary to decide between the different justice considerations and thus determine whether, in the final tally, justice to the victim requires that liability be imposed or waived. The following example will demonstrate this argument.

A patient is injured during an operation due to the negligent decision of her surgeon. Let us assume that imposing tort liability on the doctor will increase to a significant extent the risk that surgeons will practice defensive medicine in this type of surgery. In our context, this means that their decisions vis-à-vis the treatment of their patients will be influenced by the consideration of lowering their liability risk, rather than the good of the patient. The traditional conception of corrective justice will ignore the consideration of defensive medicine, since it is regarded as not pertinent to the relationship between the injurer and the victim, but, instead, as related to the overall social interest. This conception, however, is problematic. From an *ex ante* perspective, a legal rule that imposes liability on a doctor toward a patient in such an instance is likely to be detrimental to the patient and in clear contradiction of her interests. The *ex ante* interest of the patient is that the only consideration that the surgeon who operates on her takes into account is her good as a patient. Exposing the surgeon to the risk of legal action is likely to influence his *ex ante* considerations and cause him to focus on "saving his own skin" rather than on the good of the patient. A liability rule is likely to lead the surgeon to choose a course of action that is not commensurate with good medicine, but, rather, lowers his liability risk. Accordingly, the patient who, on the one hand, tends to have faith in the professional skills of the doctor and in his desire to ensure the patient's welfare and, on the other hand, is concerned about the behavior of a doctor who is subject to a legal regime that holds him liable for negligent exercising of his discretion is likely to prefer not to make the doctor subject to a liability

13 Cf. Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 Vand. L. Rev. 901, 909-14 (2001).

rule. This will probably be compatible with the patient's *ex ante* interest in receiving good and proper treatment (although alongside this consideration, there might be an additional, contradicting consideration that the risk of liability will cause the doctor to be more cautious in a way that will be to the patient's benefit). Disregard for this interest of the patient and imposing liability on the doctor even in those instances in which the patient's *ex ante* interest is such that the doctor should not be held liable do not achieve justice for the patient and most certainly do not protect her interests in the best way possible. The patient has an interest not only in receiving compensation if she is injured by the doctor's negligence (*ex post* scrutiny), but also in receiving the best treatment from the outset or, at least, in increasing her chances of receiving such treatment (*ex ante* scrutiny). The apprehension with regard to defensive medicine, therefore, is a consideration that relates to the overall social interest as well as having direct ramifications for the relations between the actual injurer and victim.¹⁴

It is important to stress that the above line of argument is a complete divergence from the argument that it is necessary to take into account *ex ante* considerations in order to achieve economic efficiency or social welfare.¹⁵ It also is a departure from the argument that maintains that *ex ante* considerations are important for increasing the overall welfare of the specific injurer and victim (as in the line of argument taken by law and economics theorists in the context of contractual interactions¹⁶). The *ex ante* scrutiny described above focuses on the interests of the specific victim and hers alone. At the foundation of this scrutiny lies the presumption that it is possible to define the *ex ante* interest of the actual victim at the point at which she is identified as a potential victim.¹⁷ However, unlike the traditional approach of corrective justice, which examines the victim's interest after the damage has occurred, the proposed approach is grounded on the presumption that justice to the victim can be achieved if, and only if, her *ex post* interest and *ex ante*

14 See discussion of Example 2 *infra* Section III.

15 Further on, it will be shown that efficiency and *ex ante* justice may work in opposite directions. Such is the case when the consideration for not imposing liability concerns a social interest that does not affect the victim. See *infra* Section V.

16 See, e.g., Cooter & Ulen, *supra* note 1, at 202-05; Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. Legal Stud. 597 (1990); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. Legal Stud. 271 (1992).

17 Accordingly, I am not dealing with a Rawlsian argument, according to which a person cannot see beyond the veil of ignorance whether he will be an injurer or a victim. John Rawls, *A Theory of Justice* 136-42 (1970).

interest are considered together. Accordingly, in this article, "justice to the victim" refers to justice in the broad sense of both *ex post* justice and *ex ante* justice.¹⁸

Another type of justice relevant to tort liability is justice to the injurer. Achieving justice to the injurer means imposing liability in consideration of the nature of his behavior. Corrective justice theorists view the principles of corrective justice as aimed at realizing justice for the victim and injurer concurrently. Justice is served not only for the victim, who is compensated for the wrongful damage she has incurred, but also for the injurer, who is required to compensate the victim and rectify the situation.¹⁹ However, it appears that considerations of justice to the injurer are at times autonomous of the considerations of justice to the victim. This is particularly prominent in cases where the victim was injured by wrongful behavior and therefore justice for her requires granting compensation but, at the same time, there is the sense that the injurer is paying too heavy a price, in excess of what is mandated by the degree to which he was at fault in causing the damage. Indeed, this impression — which stems from the fact that tort law holds injurers liable for the outcomes of their wrongdoings with no consideration of their degree of fault — has troubled various theorists, some of whom have attempted to justify the prevailing law²⁰ and some of whom have criticized it and suggested incorporating changes that will respond to this difficulty.²¹ Regardless, there

18 An alternative approach to the one I propose here is to focus on justice to victims as a *group*, rather than on justice to the *specific* victim. This alternative approach does not, however, address the relations between the specific injurer and his victim, and I would therefore classify it as a distributive justice approach motivated by concerns regarding a weak group in society (the victims of accidents).

19 Weinrib, *supra* note 2; Perry, *supra* note 2.

20 Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 *Law Q. Rev.* 530 (1988). According to Honoré, negligence law is just in that it usually leads to imposing liability on whoever took part in a fair gamble. Whoever operates in the framework of negligence law and is generally familiar with its mode of operation and usually derives benefit from the activity cannot complain about the obligation to compensate that is imposed on him when his gamble fails and causes damage. Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *Philosophical Foundations of Tort Law* 387 (David G. Owen ed., 1995), claims that tort law that leads to the imposition of liability according to the outcome, even on someone whose fault is slight, can be justified by the fact that the injurer is subject, from the outset, to the risk of liability, which is identical in extent to the risk at which the victim is placed from the outset.

21 Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. Rev.* 439 (1990); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 *UCLA L. Rev.* 143 (1990). Schroeder claims that tort liability should be imposed for creating risks regardless of whether actual damage

are instances in which the degree of necessity of imposing liability from the justice perspective must be measured not only by examining the victim's interest (*ex ante* or *ex post*), but also by examining justice to the injurer who bears the tort liability.

Contrary to what is claimed by many tort law theorists, I maintain that one type of consideration does not exclude other types.²² The considerations of deterrence and considerations of justice, in all their many shapes and forms, operate in concert in tort law. The necessity of imposing tort liability in a given instance must be examined in light of considerations of deterrence, justice to the injurer, and justice (*ex ante* or *ex post*) to the victim. In what follows, I will use the different considerations outlined above to assess the degree to which it is necessary to impose tort liability in the various situations discussed in the article.

II. CATEGORY 1: THE INJURER'S INTEREST VERSUS THE VICTIM'S INTEREST

The paradigmatic category upon which negligence law is founded includes those cases in which the injurer failed in the balancing of his own interest with that of another or, more precisely, when he acted in a way that

was caused, and the scope of this liability should be determined according to the expected damages of the wrongful behavior. For a critical comment on Schroeder, see Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. Rev. 113 (1990). Fletcher, *supra* note 12, claims that when the injurer acted in circumstances that gave rise to an excuse defense, the victim should be compensated for reasons of corrective justice, but not at the expense of the injurer. The compensation can be financed by a fund that compensates victims injured by wrongdoers who can make use of the defense of excuse. See also Coleman, *Corrective Justice and Wrongful Gain*, *supra* note 12, who, in the past, claimed that it is possible for a victim to base a claim for compensation on corrective justice, but that the injurer would not have a correlative duty to compensate the victim. This would be the case when the injurer did not derive actual gain from the wrongdoing. Coleman changed his view at a later point, Coleman, Risks and Wrongs, *supra* note 12.

22 The most loyal advocate of the approach according to which only considerations of corrective justice are relevant to the law of torts is Weinrib, *supra* note 2. Others who stress the importance of corrective justice maintain that tort law is based also on considerations of deterrence. See, e.g., Coleman, Risks and Wrongs, *supra* note 12, at 197-211. See also George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 Law & Phil. 63 (1983). Other scholars maintain that justice considerations and considerations of deterrence operate side by side in tort law. Izhak England, *The Philosophy of Tort Law* 85-92 (1992); Schwartz, *Mixed Theories*, *supra* note 10.

improperly favored his own interest over that of another. This failure can stem from a variety of different reasons, detailed below.

Example 1: The Driver. *John is driving in his car at the speed of ninety kilometers per hour. He hits Tony and causes him damage. Had John driven at a lower speed, the damage would have been prevented.*²³

John's liability for negligence will be contingent on whether in choosing to drive at the speed at which he drove, he attributed the proper weight to the interests of the different people using the road in their bodily and property welfare, when weighing them against his own interests in arriving quickly at his destination. In the language of law and economics scholars, John's liability depends on whether his costs of precaution (the wasted time entailed in driving more slowly, which would have prevented the accident) are lower than the decrease in the expected damages (that would have resulted from taking the precaution of driving more slowly). From the perspective of justice, the question to be asked is whether it is just to hold John liable given the risk he created for others.

Let us assume for the moment that John is, indeed, found negligent, whether under the tests of efficiency or under the tests of justice as they are applied in the prevailing law. This negligence could stem from a number of alternative (or, at times, cumulative) reasons: (1) John overestimated his own interest in arriving quickly at his destination; (2) John underestimated the interests of others using the road; and/or (3) John correctly assessed the different interests, but preferred his own interest over the interests of others using the road.²⁴

Prevailing negligence law is completely indifferent to which one of these reasons accounts for John's behavior. It is satisfied by the determination that John acted in an unreasonable manner (or created an unreasonable risk) in order to impose liability on him for Tony's damage. However, it is possible to rank the degree to which it is crucial that liability be imposed according to which reason accounts for John's negligent behavior, in the following descending order: Reason 3, Reason 2, and Reason 1.

If the negligence stemmed from Reason 3, from *the perspective of*

23 For the purposes of simplicity, I will assume that decreasing the driving speed would not affect John's risk to himself. Absent this assumption, it is possible that John's failure derived from a negligent balancing of his own interests. *See infra* Section VI.

24 A fourth possible reason is that John's behavior prior to the accident stemmed from a momentary lapse of attention. I will disregard this possibility. *See discussion supra* note 5.

deterrence, imposing liability on John is crucial in order to induce him to take seriously the interests of others from the outset. The risk of legal sanction is very important here, for without it, John will be indifferent to the interests of others and will tend to increase his personal utility from his behavior as much as possible. His driving will be too fast and economically inefficient. It appears that the moral fault attaching to John's behavior also will usually be severe when his behavior derives from Reason 3, and hence, *considerations of justice to the injurer* will combine with considerations of deterrence to support imposing liability. *Considerations of justice to the victim* will point in the same direction. The nature of the injury and the reason for the injury justify, *ex post*, compensating Tony. Tony's *ex ante* interest is also that John be held liable in order to prevent him from being indifferent to Tony's personal safety.

If the negligence stems from Reasons 1 or 2, *from the perspective of deterrence*, imposing liability will provide John with incentive to assess more carefully the weight of the different interests, his and those of others, before placing others at risk. In the absence of liability, he is unlikely to do so. Nonetheless, it appears that the risk of legal sanction is more crucial when the negligence derives from Reason 2 (underestimation of the interests of another) as opposed to Reason 1 (exaggerated estimation of his own interest).

Hence, in the presence of a risk of legal sanction, John will make a more meticulous assessment of the different interests, and this assessment will likely affect his behavior if he realizes that the interests of others are of a greater value than what he at first thought (Reason 2). In contrast, his evaluation of his own interest will not necessarily change (Reason 1), despite the risk of legal sanction, even if there is a discrepancy between his subjective estimation of his interest and the objective social estimation of that same interest. Such a discrepancy is likely to stem from one of two reasons. The one reason could be pure error: it is possible that John erred in his assessment of the objective factors that affect the value of his interest (for example, he erroneously believed that the time he would save by driving quickly would enable him to derive benefits that in actuality he could not gain). The other reason could be that John made a genuine subjective estimation: it is possible that John did not err as described and his subjective estimation of his own interest is genuinely and truly higher than the objective social value of that interest (for example, the leisure time that accumulates to John as a result of his speeding has a far greater value to him than that assigned it under objective criteria). If it is, indeed, a case of error, the risk of legal sanction is likely to rectify, in certain cases, John's mistake, since the greater attention and thought he will give to his behavior — which

result from the risk of liability — are likely to affect his assessment of the different interests involved. If, however, this is a case of a genuine subjective estimation, the risk of liability might have no effect whatsoever on John's behavior: John might prefer to bear this risk rather than change his behavior at the expense of his own interest, since in his subjective estimation, the cost of such a change is higher than the risk of liability. Moreover, in the case of a genuine subjective estimation, efficiency considerations do not justify a change in John's behavior. His behavior is economically justified since his subjective utility according to his own values is what is important, not the objective utility of his actions. In other words, John is not at all negligent in the real sense of the word if his preference of his own interest derived from the fact that the value of this interest according to his subjective estimation is greater than the risk posed to others. The reason that negligence law will, nonetheless, deem him negligent stems primarily from the practical difficulty involved in ascertaining the real and true value of his interest according to his subjective values.²⁵

The principal difficulty *from the perspective of deterrence* is that it is very difficult to distinguish *ex post* which one of the three reasons was the cause of the injurer's negligence. Accordingly, and mainly due to the concern that Reason 3 lies behind the injurer's negligence, it appears that considerations of deterrence will unequivocally support imposing liability in most cases in which the injurer failed in balancing his own interest with that of the victim, without making the liability contingent upon any given reason for the injurer's negligence.

From the perspective of justice, it appears that Reason 1 and Reason 2 mandate, with similar force, imposing liability, albeit less forcefully than Reason 3 does. Let me begin with the consideration of *justice to the injurer*. A person who assesses his own interests in excess of their objective value (Reason 1) has not committed such a terrible crime, certainly not if this stemmed from a subjective estimation of his own interest, but also not if it is the result of error. It should be noted that, here, John's high estimation of his own interest is not due to his preference of himself over others. Indeed, if this were the case, we would be dealing with Reason 3. Here, John ascribes a high value to his leisure time not necessarily because he holds himself in higher regard than he holds others, but, rather, because there is a discrepancy between his valuation of leisure time in general — his own or that of anyone else — and the value assigned it on average by society. Accordingly, even if John himself were exposed to the risk that he

25 Steven Shavell, *Economic Analysis of Accident Law* 73-77 (1987).

created for others, it is possible that he still would have driven at the same speed at which he drove in actuality. Similarly, a person who undervalued the interests of others whom he put at risk through his behavior (Reason 2) — not out of disdain for those interests but due to error or to a low estimation of the interests, when the fact that they are the interests of others has no effect on his estimation — also has not committed such a terrible crime, and therefore justice to the injurer does not require, with particularly great force, holding him liable.²⁶

Considerations of justice to the victim also are affected by the reason accounting for the injurer's negligence. Insofar as *ex ante* justice is concerned, it is obvious that it is the victim's interest that liability be imposed on the injurer in all instances of negligence, whatever the reason for the negligent behavior. This interest will be particularly strong when the negligence is due to Reason 3, but it also will arise when Reason 1 or Reason 2 lies behind the negligent behavior. Moreover, since the victim knows that it is very difficult to know *ex post* which reason led to the negligence and she also knows that the injurer is aware of this, her fear of Reason 3 increases. Consequently, her *ex ante* interest in liability being imposed on the injurer in any event is extremely strong. The *ex post* justice perspective leads to a similar conclusion. Although the injury is of a more severe nature when the negligence derived from Reason 3, the lack of ability to discern the actual reason from among the different reasons justifies imposing liability in all cases of negligence discussed in this section, whatever the reason for that negligence may actually be.

To sum up, it appears that deterrence and justice considerations very strongly support imposing liability when the injurer's negligence derived from a faulty balancing of his own interests with those of others. True, it is possible to distinguish between different reasons for negligence, and were it possible to identify them *ex post*, the necessity of imposing liability would likely vary accordingly. However, because discerning the actual reason *ex post* is particularly difficult and, primarily, because of the apprehension that the injurer's negligence derived from Reason 3,

26 See Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *Stan. L. Rev.* 311, 337-38 (1996), who draws a distinction between two different senses of impartiality that is required of the reasonable person. The one sense is impartiality as "equal consideration"; the other is impartiality as "objective valuation." While the first sense relates to the equal weight one is required to give to one's interests and the interests of others, the second sense relates to the objective evaluation one should make of all interests involved. See also Wright, *supra* note 3, at 258-59.

considerations both of deterrence and justice, to victim and injurer alike, unequivocally mandate imposing liability, regardless of the precise reason for the injurer's negligence.

III. CATEGORY 2: THE DIFFERENT INTERESTS OF THE VICTIM

In many cases of negligence, the injurer failed in balancing the different interests of the victim without taking into account any self-interest at all.

Example 2: The Doctor and the Lone Patient. Jim, a doctor, must decide during the course of an operation how to treat his patient, Stephen. There are two alternative courses of treatment available. Jim has no self-interest in choosing one course of treatment over the other. Stephen suffers injury from the treatment chosen by Jim. Had Jim chosen the other course of treatment, the damage would have been prevented.²⁷

In determining whether Jim was negligent, the court will need to examine both the chances and the risks presented by each one of the alternative courses of treatment as a reasonable doctor in Jim's position would have evaluated them at the point at which he decided on the course of treatment. A balancing of Stephen's different interests is, therefore, what is at discussion here. If Jim is found negligent, it will not be because he preferred his own interest to Stephen's interest. The determination that Jim strove to act in Stephen's best interest in no way stands in contradiction to a determination that Jim was negligent.

Let us now assume that Jim was, in fact, negligent. From the justice and deterrence perspectives the need to impose liability on him is less crucial than the need to hold John liable in Example 1 (the driver). *From the perspective of justice to the injurer*, it appears that the behavior of a person who improperly preferred his own interest to the interest of another, especially if out of disdain for the latter's interest (Example 1, Reason 3), usually is more severely flawed than the behavior of someone who failed in balancing the victim's different interests (Example 2). *Considerations of deterrence* lead to a similar conclusion, that the legal sanction is more crucial in Example 1 than in Example 2: whereas in Example 1, the potential injurer and the victim are in a distinct conflict of interests and without liability, there

²⁷ See, e.g., C.A. 323/89, Koheri v. State of Israel, 45(2) P.D. 142.

is a concrete danger that the injurer will disregard the interests of others and will act in accordance with his own interest alone, this apprehension does not exist in Example 2. Even without being subject to liability for negligence, there are very good reasons to assume that Jim the doctor will seek to act for the good of his patient: his moral duty toward his patient, his concern for his professional reputation, and the fear that he will lose his position usually will constitute suitable incentives to desirable behavior, especially when Jim has no interest that conflicts with the good of the patient.

Using the terms of the Hand Formula, Example 2 can be described as a *private* $B=0$ case, namely, a case in which the *private* (as opposed to the *social*) burden the potential injurer is required to bear in order to reduce the expected damages of his behavior (PL) is zero (or close to zero). In this type of case, even absent a risk of liability, the potential injurer has no economic reason *not* to take the required precautions, and as long as he has some non-legal motivation *not* to cause harm, he will take the precautions. Imposing liability on a negligent injurer who failed to take the necessary precautions in this kind of case seems to be redundant.

However, it would be extreme to claim that imposing liability for negligence in Example 2 is never justified under considerations of deterrence. After all, our assumption is that a reasonable doctor would have chosen the alternative course of treatment and the damage would have been prevented. There is the chance that imposing legal sanction on Jim for negligence would induce him, from the outset, to decrease the chances of his acting negligently. Aware that liability will be imposed on him, he might take greater care in choosing a course of treatment. He perhaps would consult with others and survey the professional literature; perhaps he would expand his knowledge from the outset before taking on a task that he is not able to perform properly. In other words, a certain conflict of interests might, nonetheless, exist between Jim and Stephen: in the absence of liability, the doctor is likely not to expend all the time and effort required for making a correct decision regarding the course of treatment and thus prefer his own interest over his patient's interest. This acquires even greater force when the hospital bears vicarious liability for Jim's actions. Imposing liability on the hospital would induce it to invest effort and resources in choosing suitable doctors, with relatively low probability of negligently exercising their discretion. In the absence of vicarious liability, the hospital is likely to invest too little in this regard.

Despite all that has been argued above and despite the fact that a certain conflict of interests exists between the injurer (Jim or the hospital) and the victim (Stephen), this conflict is significantly less severe than the conflict of interests that is apparent in Example 1, where it is frontal and threatening.

Weighing against the advantages from the perspective of deterrence of imposing liability in Example 2 (where they have less weight than in Example 1, but cannot be totally disregarded) is the tangible apprehension of liability having a negative effect on the behavior of the potential injurer. Although this concern is not unique to Example 2 and cases similar thereto, it appears that it is particularly compelling in cases where the injurer does not have a strong self-interest with regard to the course of treatment he can choose. Jim, aware of the risk of legal action hanging over his head, is likely to opt for defensive medicine. He is likely to prefer his own good over the good of the patient and to choose the course of treatment that reduces the likelihood of his exposure to legal action rather than the best course of treatment for the patient.²⁸ This over-deterrence is created when the injurer internalizes the damage of his behavior but externalizes the benefits derived from that behavior. Why should Jim choose the course of treatment that exposes him to the risk of being sued — even if he believes it to be of greater benefit to the patient — and not the course of treatment that entails a lower risk of legal action, when he derives no personal benefit from either one of the treatments?! As already stated Jim is sometimes motivated by non-legal considerations: his moral duty to the patient, his reputation (which often can be translated into economic values), and so on. However, these albeit important incentives at times are not sufficient to dispel the above-described concern with regard to the negative effect of imposing liability on potential injurers' behavior.

Up until now, we have seen that the need to impose liability on Jim in Example 2 is less crucial than the need to hold John liable in Example 1, from the perspectives both of deterrence and of justice to the injurer. Focusing on *justice to the victim* reinforces this conclusion. In terms of *ex post* justice, it is apparent that the moral claim of a victim who was injured due to the injurer's disdain for her interest or due to the injurer's inappropriate preference of his own interest over her interest (Example 1) is stronger than the moral claim of a victim who was injured during an effort to act for her benefit or to improve her condition (Example 2). The victim's *ex ante* interest in compensation also is stronger in Example 1 than in Example 2. It is doubtful whether Stephen's *ex ante* interest in Example 2 mandates imposing liability on the doctor. Stephen is the one expected to suffer damage from defensive medicine, and the possible advantages that he may derive from the imposition of liability do not always outweigh its disadvantages (such is the case especially when imposing liability also

28 See *supra* discussion accompanying note 14.

raises the costs of medical care — an additional drawback from Stephen’s perspective — which is a phenomenon that undoubtedly will occur in the context of private medicine regimes).²⁹ Such is not the case in Example 1. The distinct *ex ante* interest of Tony, the victim, is that liability be imposed on John, the injurer, if he is negligent and causes damage to Tony. Tony’s interest will not be advanced in any way if John is released from liability in the event of negligent injury to Tony.

It is important to clarify that not all (and perhaps not most) instances of malpractice fall under the category of the cases under discussion here. Example 3 below presents a case in which imposing tort liability on the doctor is no less crucial than holding the driver liable in Example 1, and therefore, it falls under the first category of instances discussed, namely, the conflict between the injurer’s interest and that of the victim.

Example 3: The Frugal Doctor. Stephen is brought to a hospital emergency room suffering from extreme pain in his chest. Jim is the attending doctor and about to end his shift. A comprehensive examination of Stephen will delay Jim at the hospital and also will cost the hospital money (beyond what can be charged to Stephen). Jim sends Stephen home without a full examination, and the next day,

29 One could argue that if the patient has an interest in the doctor not being held liable, she can achieve this by contractually releasing the doctor from liability for negligence. The fact that the patient did not do this can be regarded as indication that releasing the doctor from liability is not compatible with her interests. I offer the following response to this argument. First, it is usually not realistic to expect the patient to be aware, prior to the medical treatment, of the precise legal rules governing her interests vis-à-vis her doctor. Accordingly, the absence of a contractual waiver of liability does not tell us anything about the patient’s interests. Second, in many cases, it is not realistic to expect the creation of a detailed contract between a patient and doctor — for example, when the patient is brought in for treatment in a state of unconsciousness or when, for some other reason, she is unable to express her true will. Third, the claim that the lack of a waiver of liability means that liability must be imposed on the doctor assumes that liability is the default rule. However, it is also possible to claim quite the opposite: the silence in the contract between the patient and doctor regarding the latter’s liability could be interpreted to indicate a desire not to impose liability on the doctor. Actually, this is precisely the question: What should the default rule be? From the perspective of deterrence, the question is what is the efficient default rule. From the perspective of justice to the victim, the question is what is the default rule that will best serve the victim’s interests. Thus, it emerges that the contractual relationship between the doctor and the patient is immaterial to the discussion in the text above.

Stephen dies of a heart attack, which would have been prevented had he been properly examined.

Unlike in Example 2 (the doctor and the lone patient), here considerations of deterrence support imposing liability on Jim (and on the hospital, which bears vicarious liability for Jim's actions). Imposing liability would provide incentive to Jim not to prefer his own interest over the interest of the patient (and would also neutralize the hospital's negative incentive to encourage doctors to refrain from conducting expensive examinations). True, the concern regarding defensive medicine and over-deterrence arises also in cases represented by Example 3, but the opposing deterrence consideration (deterrence of doctors and hospitals from taking sub-optimal precautionary measures), in favor of imposing liability, is far stronger than the similar over-deterrence consideration that operates in Example 2. In Example 3, Jim failed in balancing his own interest and the interest of the patient, and consequently, imposing liability on him is quite crucial. This is not the case in Example 2. Apparently, *considerations of justice* will work in a similar direction and will support making a sharp distinction between Example 2 and Example 3. Hence, in the area of malpractice, in cases of a negligent exercising of discretion when no self-interest of the doctor or the hospital is involved,³⁰ it is less crucial that tort liability be imposed than in instances of negligence manifested in a failure to conduct medical tests or the absence of appropriate follow-up or supervision — omissions that save the doctor and/or the hospital time, effort, and resources.

In sum, both deterrence considerations and considerations of justice, to both injurer and victim, indicate that imposing liability for negligence that resulted from the injurer's faulty balancing of the victim's different interests is not generally crucial and, at times, even detrimental. Thus, this category is fundamentally different from the first category, where the injurer failed at balancing between his own interests and those of others.

Let us consider now whether the way in which courts apply negligence law in the second category of instances is consistent with the theoretical

³⁰ Again I wish to note that also in the cases represented by Example 2, there is a self-interest in saving time in studying, consultation, etc. It is also obvious that hospitals that are not liable for their doctors' negligence in exercising their discretion in the absence of a self-interest are likely to assign doctors duties that are not suited to their skills. In any event, however, in the cases represented by Example 3, the problem of a conflict of interests between the patient and the doctor or the hospital is far more prominent than in those instances represented by Example 2.

arguments presented in this section, namely, whether courts are less willing to impose tort liability in cases falling into that category.

Prevailing Negligence Law

Not infrequently, cases of medical malpractice, represented by Examples 2 and 3, fall into the present category of instances. Israeli courts have a relatively low tendency to impose liability in cases in which the doctor failed in exercising his discretion and made what emerged to be a poor choice in treatment for the patient (the doctor and the lone patient in Example 2). The doctor failed in balancing between the interests of the patient, and as was shown, imposing liability on him for his negligence is not crucial and, at times, even detrimental. Although the courts will never actually state that the doctor owes no duty of care to the patient, it nonetheless appears that they will, on occasion, be inclined toward a finding of no negligence.³¹ Their approach is significantly different when the alleged negligence is in a failure to provide treatment or medicine and in circumstances where there is fear that the hospital in which the doctor works or the doctor himself has an interest not to administer treatment or medicine (the frugal doctor in Example 3). This latter type of case is close to the first category of cases, where imposing liability on the negligent person is very crucial. The tendency of the courts to impose liability on doctors and hospitals increases when as a result of inadequate documentation and sometimes a "conspiracy of silence,"³² it is not possible to ascertain how the patient's damage occurred. Here, as well, there is a clear conflict of interests between the hospital — which sometimes is interested in obscuring the reason for the medical accident — and the patient, who is interested in knowing how she was injured, when this information is likely to facilitate bringing a suit against the doctor who negligently caused the damage.³³

Of course, the second category does not encompass only malpractice instances. Cases that clearly fall under the second category are those instances in which a person acts for the benefit of another, both when he has a preexisting legal duty to do so as well as when no such duty exists, and

31 C.A. 323/89, *Koheri v. State of Israel*, 45(2) P.D. 142.

32 An extreme case in which the fear of a "conspiracy of silence" led an American court to impose liability on the members of a medical team only for the reason that one of them caused damage to the patient through his negligence is *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944).

33 Ariel Porat & Alex Stein, *Tort Liability under Uncertainty* 187-88 (2001).

when he has no clear personal interest with regard to the course of action he chooses.

Hence, included amongst such instances is the case of the rescuer who bore no preexisting duty to rescue and a question arises as to his negligence in attempting the rescue. In the Israeli case law, this question has arisen in two instances, where, in both, the rescuer himself was injured during the rescue attempt and, pursuant to this, sued for compensation for his damage from the creator of the risk. In both cases, the court dismissed the defendant's claim of comparative negligence on the part of the rescuer in creating his own damage.³⁴

Cases in which a parent negligently injured his child are also included in the second category of cases. There is good reason for releasing the parent from liability if he acted in good faith and for the good of the child, and most legal systems follow that solution.³⁵ In fact, this seems to be the best illustration of negligence in which the injurer failed in balancing between the interests of the victim, when his own interest bore no significant weight in the balancing.³⁶ Another example is the case of a teacher who is sued for

34 In C.A. 380/74, *Ackers v. Kalman*, 30(1) P.D. 611, the plaintiff was crushed by a car that rolled down a hill by fault of the defendant, when the plaintiff was trying to save the defendant from being injured by the car. The comparative negligence of the plaintiff had been determined by the trial court to be at a level of 50%. The Supreme Court ascribed the entirety of the liability to the defendant. This ruling was based on the fact that the plaintiff's reaction had been instinctive, natural, and reasonable. For a similar American case, where it was noted that the jurors must determine whether there had been comparative fault on the part of the plaintiff, see *Carney v. Buyea*, 65 N.Y.S.2d 902 (N.Y. 1946). The second Israeli case is C.A. 290/63, *Nachum v. Yisraeli*, 17 P.D. 2657.

35 See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 904-07 (5th ed. 1984).

36 But this is not always the case, as in the following criminal case example. In *State v. Williams*, 484 P.2d 1167 (Wash. 1971), a mother and her husband had failed to bring the woman's ill child to a doctor in time, resulting in the child's death. They claimed that they had not thought the child to be seriously ill. However, there was evidence that they had been afraid that were they to go to a doctor, the doctor would report them to the welfare authorities, who would take the child away from them. If the basis of their fear had been a selfish desire to keep the child, even at some risk to the child's safety, this is a good example of a situation where imposing criminal (or tort) liability on the parents can be justified. (This of course would not be the case if the reason for the defendants' fear was a rational judgment that because they are Native Americans and because of the racial prejudice of the welfare authorities against Native Americans, the child might be unjustifiably taken away, which would not be in the child's best interests.) In fact, the defendants were convicted of negligent manslaughter.

not properly balancing between his pupil's interest in physical safety and in freedom of action, which entailed bodily damage to the pupil. In this type of case, the courts' willingness to impose liability is much greater than in the case of a negligent parent.³⁷ The problems that arise in the context of Example 2 (the doctor and the lone patient) arise in a similar fashion in these cases too, primarily the concern that imposing liability will undermine the interest of the potential injurer to act for the good of the potential victim.

Other instances in which the injurer is required to balance the different interests of the potential victim include the different types of professional malpractice aside from medical malpractice discussed above. Lawyers, accountants, and other professional consultants are sometimes required to balance between the different interests of their clients. In a significant number of these cases, imposing liability for negligence will be crucial in light of the fear that absent such liability, the interest of these professionals in saving time and other resources will cause them to neglect the interests of their clients. This last type of case therefore falls under the first category of instances, although at times, these cases will be a mixture of the first and second categories.

IV. CATEGORY 3: THE INTEREST OF THE VICTIM VERSUS THE INTEREST OF A THIRD PARTY

Sometimes an injurer's negligence is manifested in the fact that he did not balance properly between the victim's interest and the interest of a third party. Here, as well, the injurer's interest is not of much (if any) significance in the set of factors influencing his behavior. Nonetheless, as we will see below, the reasons for imposing liability on the injurer are stronger in the third category than in the second category.

Example 4: The Doctor and Two Patients. Jim is a doctor. Two patients, Stephen and Lisa, are brought to him for treatment at the same time, both in critical condition. Jim is the only doctor present, and he must divide his time between treating Stephen and treating Lisa. He devotes most of his time to Stephen, and as a result, Lisa suffers injury.

Example 5: The Wounded Person. David is wounded. Bill is a driver

³⁷ C.A. 2061/90, Martzelli v. State of Israel, 47(1) P.D. 802.

who picks up David in his car and rushes him to the hospital. Due to David's critical condition and the urgent need to get him to the hospital as quickly as possible, Bill drives at a fast speed. On the way, he hits George, a pedestrian, and causes him injury.

The following discussion will focus on Example 4, but is valid with regard to Example 5 as well. The court, when determining whether Jim was negligent, will examine whether Jim balanced the interests of Stephen and Lisa as a reasonable doctor would have done in Jim's position in light of each patient's chances of recovery and risks. Similar to Example 2 (the doctor and the lone patient), here as well, Jim's own interest is not relevant (except in a very remote and indirect way). From the perspective of *justice to the injurer*, the necessity of imposing liability on Jim is not crucial. The reasons for this are, *prima facie*, the same reasons raised in the context of Example 2. In terms of *considerations of deterrence*, here, as well, in the absence of a self-interest that conflicts with the victim's interest, it is less crucial that the injurer be held liable than in a case where such a conflict of interests does exist (as with the driver in Example 1). While as we saw in the discussion of Example 2, there are likely to be certain advantages to imposing liability (detering potential injurers), these advantages frequently are offset by the disadvantages of imposing liability (defensive medicine in the context under discussion).

The primary difference between Example 2 and Examples 4 and 5 relates to *the ex ante justice to the victim*, as well as to considerations of *deterrence*. As explained above, the victim's *ex ante* interest in Example 2 is likely to be that liability not be imposed on the doctor. In Example 4 (and also in Example 5), however, the victim's interest is otherwise. The doctor is not likely to fail at balancing between the different interests of the victim, but, rather, at balancing between the victim's interest and the interest of a third party. The potential victim's *ex ante* fear that the potential injurer will prefer the interest of another person over the victim's interest is likely to create for her an interest in subjecting the doctor to liability if he is negligent in balancing between these interests. Although from the outset, Lisa could not have known if the liability rule would operate to her advantage or disadvantage, assuming that the data regarding her condition relative to Stephen's condition were known to her, she would have understood that the liability rule is likely to be crucial for her in order to induce the doctor to devote most of his time to treating her. Even if Lisa did not have this information *ex ante*, she has an interest that whoever is in greater need of the doctor will receive treatment: the expected damages to her from not receiving immediate treatment when she needs it more than Stephen does

will usually be greater than the expected benefit to her from immediate treatment when she needs it less than Stephen does. Hence, the social interest (identified here as efficient deterrence) that patients in greater need will be treated before patients in lesser need converges with Lisa's interest in the concrete instance.

Hence, the five examples discussed up until now can be ranked according to the degree to which it is crucial from the perspective of deterrence that liability be imposed, in the following descending order: Examples 1 (the driver) and 3 (the frugal doctor); Examples 4 and 5 (the doctor and two patients and the wounded person, respectively); Example 2 (the doctor and the lone patient). In Examples 1, 3, 4, and 5, there is the fear that the potential injurer will discriminate against the interest of the victim in favor of another interest: that of the injurer himself or of a third party. Naturally, this concern is greater in Examples 1 and 3, since the interest of the injurer himself is involved, and less in Examples 4 and 5, where the interests of third parties come into play. In contrast, in Example 2, since the injurer balanced only between the interests of the victim, no fear of discrimination arises at all. Regardless, both the social interest (efficient deterrence) as well as the victim's *ex ante* interest in imposing liability are weaker. The potential victim no longer fears that she will be discriminated against in favor of another person. Her only fear is that the doctor will err in good faith with regard to the course of treatment he chooses for her. Assuming a concern of over-deterrence (which arises mainly in Examples 2, 4, and 5), the victim in Example 2 is likely to have, from the outset, an interest in releasing the injurer from liability due to this concern, whereas the victims in Examples 4 and 5 are likely to have an interest in imposing liability on the injurer, in spite of this concern.

Up until now, we have focused on deterrence and the *ex ante* interest of the victim. However, *considerations of justice relating to the injurer* are likely to lead to similar conclusions with regard to the necessity of imposing liability. A person who preferred himself over another in an improper way and, in so doing, caused damage to the latter has exhibited moral fault, at least if he acted in disdain of the other person's interest (Example 1, Reason 3). A person who favored one person over another in an improper fashion and, in so doing, caused damage to the latter is also likely to be considered morally at fault if this preference was made for improper reasons (such as when one person is wealthy and the other poor or one person attractive and the other unattractive).³⁸ In contrast, when the injurer's negligence manifests

38 To be sure, not every case of negligence deriving from an improper balancing of the victim's interest and the interest of a third party can be explained on the basis

itself in an improper balancing of the victim's interests, the moral flaw in his behavior is significantly lower. *Considerations of ex post justice to the victim*, it would seem, are commensurate with the considerations of justice to the injurer.

Prevailing Negligence Law

The third category of balancing instances includes all those cases in which the injurer caused damage to someone through his negligence, when preventing the damage would have entailed creating a risk for a third party.

The typical case in which a person is required to decide between the interest of one person and the interest of another is that of the judge or the arbitrator who must resolve the conflict between the two parties appearing before him or her. The judge and arbitrator enjoy absolute immunity from tort liability, which extends not only to negligent behavior.³⁹

The instances in Israeli case law that can be classified as falling under the third category are those cases in which a suit was filed against a public authority for negligently exercising its discretion and preferring the interests of others over those of the injured plaintiff. In one such case, the claim was made that the authority in charge of supervising the operations of insurance companies was negligent in omitting to warn the plaintiffs, members of the public, of the threat of the collapse of an insurance company. Had the authority given such warning, the plaintiffs claimed, the damage to them that resulted from the collapse of the particular company would have been prevented. The plaintiffs argued that the authority had failed in balancing between their interests and those of others in their position, on the one hand, and the interests of the insurance company and its other insured clients, on the other hand. The Israeli Supreme Court dismissed the claim, ruling that when an authority has been granted wide discretion, the court is reluctant to find negligence on the part of the authority in exercising that discretion.⁴⁰

In another Israeli case, a suit was filed against a municipality for not placing inspectors in a public park; had it done so, the plaintiff claimed, the inspectors would have prevented criminal injury to her by a cyclist. The Supreme Court refused to impose liability on the municipality, based, *inter alia*, on the argument that imposing liability would be tantamount to ruling

of a conscious and improper preference. However, when it is the reason, the flaw in the injurer's behavior is indisputable.

39 See Keeton et al., *supra* note 35, at 1056-59.

40 C.A. 915/91, *State of Israel v. Levi*, 48(3) P.D. 45.

that the municipality should have removed the inspectors and the protection they provide to other people, for the benefit of those visiting in the park.⁴¹

In a third case, decided by the English House of Lords, the police were not held liable for omitting to hold a person in custody, who, after he was released, murdered the plaintiffs' relative. The House of Lords ruled that the police owe no duty of care in the circumstances under discussion.⁴² Nonetheless, in another matter, the House of Lords ruled that a public authority that operates a rehabilitation camp owed a duty of care to people who were injured by inmates who escaped from custody, since these inmates were under the supervision and control of the authority.⁴³

Because of the type of balancing of interests that each public authority had to make in all the above cases — between the victim's interest and the interests of others — imposing liability on the authority, even if it had been negligent, was not as crucial as in the first category of balancing instances. However, as explained above, imposing liability in the framework of the third category of instances will be crucial when there is the fear that absent such liability, the potential injurer usually will not take an impartial approach and will improperly prefer one person's interest over the interest of another. The concern regarding partiality on the part of a public authority in exercising its discretion warrants a strong tendency to impose liability on the authority when it acts improperly.

In cases that do not involve a negligent balancing between the interests of different people, such as cases in which an authority's negligence is manifested in a faulty exercising of its executory powers, there is increased tendency on the part of the courts to impose liability.⁴⁴ It appears that such cases are closer to the first category of instances than they are to the third.

41 C.A. 343/74, *Grubner v. Haifa Municipality*, 30(1) P.D. 141.

42 *Hill v. Chief Constable*, [1988] 2 All E.R. 238 (H.L.). For additional English judgments following the same trend, see *Clough v. Bussan*, [1990] 1 All E.R. 431; *Hughes v. Nat'l Union of Mineworkers*, [1991] 4 All E.R. 278; *Ancell v. McDermott*, [1992] 137 Sol. LB 36. For an American case in which liability was imposed on the police, see *De Long v. County of Erie*, 457 N.E.2d 717, 718-23 (N.Y. 1983); see also discussion *infra* note 44.

43 *Home Office v. Dorest Yacht Co.*, [1970] 2 All E.R. 294 (H.L.).

44 Indeed, it is possible to thus explain *De Long v. County of Erie*, 457 N.E.2d 717 (N.Y. 1983), where the police were held liable for not arriving in time at the scene of the crime and not preventing a murder. The woman who was murdered had tried to call the police, but the police were delayed in arriving due to an error that was made in inputting the murder victim's address. The victim, it emerged, had made use of an emergency number that the police had publicized, when the reasonable impression was that using this number would ensure the speedy arrival of the police. Compare to the decision handed down by an Israel court, in which the police were

In addition to cases involving public authorities, any case in which the injurer acted to the benefit of one person at the cost of putting another at risk is likely to be included in the third category. It is less crucial to impose liability in this category than in the first category, although the more concrete the fear of partiality is and the greater the personal interest of the injurer, the closer the instance is to the first category and, accordingly, the greater the extent to which it is crucial that liability be imposed.

Thus, the Israeli Supreme Court ruled in one case that a bank is liable under tort law toward a client for causing that client damage by preferring the interest of another client, when the bank itself had its own clear interest in preferring the latter client over the former.⁴⁵ Other cases discussed in the Israeli case law deal with instances of lawyers acting for the good of their clients and, as a result, causing damage to a third party in an allegedly improper way. Because of lawyers' inherent partiality expressed in their absolute preference of their clients' interests over those of third parties, imposing liability on them would be crucial for protecting third-party interests. However, the concern that imposing liability on lawyers would harm the interests of clients, who, to protect their interests, hired a lawyer in the first place, is also a consideration of considerable weight. Therefore, the courts tend to rule in favor of imposing liability on a lawyer toward a third party only in very rare cases.⁴⁶

Another case that falls under the third category of instances came before an American court and involved a therapist who did not warn his patient's ex-girlfriend of the patient's intention to murder her. The court imposed tort liability on the therapist for the murder of the ex-girlfriend and ruled that he had been obligated to warn her, even if this would have constituted a breach of medical confidentiality. It is possible that this judgment, too, can be explained in terms of the therapist's natural tendency, as well his own

held liable after failing to prevent an armed robbery, C.A. 126/85, R.G.M Mart v. State of Israel, 44(4) P.D. 272.

45 C.A. 5893/91, T'fachot Bank Le'Mashkantaot Le Yisrael Ltd. v. Tzabach, 48(2) P.D. 573.

46 Anthony M. Dugdale & K.M. Stanton, *Professional Negligence* 165-69 (3d ed. 1998). *But see* *Lucchese v. San Francisco-Sacramento R. Co.*, 289 P. 188 (Cal. 1930). In *Lucchese*, a train crashed into a truck, and it was claimed that the train engineer had been negligent, since he could have braked the train more quickly than he had done. The Court found that had the engineer in fact acted in this way, he would have endangered the train passengers. Accordingly, the Court concluded that the engineer had not been negligent, while stressing that his duty to the train passengers supersedes his duty to the passengers in the truck.

interest, to prefer not to expose his patients' secrets, while undervaluing the weight of third-party interests.⁴⁷

A second decision handed down by an American court illustrates this latter point even more sharply. In this case, a telephone company subscriber sued the telephone company for the nervous shock he suffered due to a sudden and loud noise from the phone cables, which interrupted his phone conversation. It appeared that had the telephone company taken certain precautions to decrease the risk of this occurrence to its subscribers, the risk of electrocution to people in the street would have increased. The court dismissed the suit, emphasizing the importance of protecting the lives of the people in the street even if at the expense of protecting subscribers.⁴⁸

A case belonging to the third category that was brought before the Israeli Supreme Court involved an employer who instructed one of his workers to assist an injured fellow worker, and in the process of doing so, the former worker suffered injury. The Court ruled that the employer had not been negligent toward the first worker in instructing him to assist the injured worker, and it released the employer from liability.⁴⁹ Indeed, in this type of case, where the concern regarding partiality is almost nonexistent, it is less crucial to impose liability than in the first category of cases.

In all the above-described instances, imposing tort liability is more crucial than in the second category of instances, but less so than in the first category. Nonetheless, when there is a relatively significant fear that the potential injurer will prefer the interests of another over those of the victim because the injurer has his own interest to do so, the necessity of imposing liability increases and sometimes the case should even be classified as falling under the first category of instances. The case of the lawyer who, through negligence, caused damage to the opposing party is an example of just such an instance: if, indeed, the lawyer's behavior toward the opposing party was negligent and undesirable from a social perspective,⁵⁰ not imposing liability on the lawyer will lead him to prefer definitively his client's interest — which,

47 *Tarasof v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

48 *Cooley v. Pub. Serv. Co.*, 10 A.2d 673 (N.H. 1940). The Court reasoned as follows: The defendant's duty cannot, in the circumstances, be to both. If that were so, performance of one duty would mean non-performing to the other. If it be negligent to save the life of the highway traveler at the expense of bodily injury resulting from fright and neurosis of a telephone subscriber, it must be equally negligent to avoid the fright at the risk of another's life. The law could tolerate no such theory of "be liable if you do and liable if you don't."

49 C.A. 660/80, *Lechder v. State of Israel*, 36(2) P.D. 836.

50 It is possible to claim that imposing liability would impair the lawyer's ability to serve his client (over-deterrence). My assumption is that this argument notwithstanding,

to a large extent, is his own interest — and to completely ignore any interest of the opposing party.

V. CATEGORY 4: THE VICTIM'S INTEREST VERSUS THE SOCIAL INTEREST

The fourth category includes those cases in which the injurer's negligence is the result of an improper balancing between the interest of the victim and the social interest. In contrast to the cases discussed in the framework of the third category, here we are not dealing with a third party (or a defined group of people), but with society at large.

Example 6: Freedom of Speech. The police refrain from arresting John, who is engaging in political protest activity that includes incitement against a particular group in society. The incitement induces Tony to cause damage to Jim's property.

The question of John's and/or Tony's liability toward Jim is not relevant to our discussion. What is of interest to us is whether liability should be imposed on the police for negligence manifested in its failure to protect Jim. Apparently the court would examine whether the police properly balanced between the interest of Jim and the members of the group targeted by the incitement and the social interest in freedom of speech. The latter interest is not only a social interest; it is John's personal interest. However it should be assumed that the police, when deciding on how to proceed, would assign the majority of the weight to the social aspect of freedom of speech and less to the personal aspect.

Let us now assume that the police were negligent in balancing the two sets of interests. To what degree is it crucial that the police be held liable toward Jim? Just as in Example 2 (the doctor and the lone patient) and Example 4 (the doctor and two patients), in Example 6, the injurer's interest is not a factor, at least not directly.⁵¹ From the perspective of *deterrence*, imposing liability is not crucial. On the contrary, imposing liability is likely

a lawyer can engage in certain types of behavior toward a third party that are undesirable and that should be prevented.

51 The police are the injurer, and I am assuming an absence of identification between the police and the society in whose name and to whose benefit the police operate. In stating that the police's interest is not involved, I mean that the police, as an entity, have no interest. Society, by definition, has an interest that the police will act in the best way for society.

to cause over-deterrence and, therefore, inefficiency. If the police are forced to compensate the victims of acts of violence resulting from incitement, its incentives to restrict freedom of speech will increase: the risk of bearing liability for acts of violence that result from free speech will be more tangible to the police than the risk of bearing liability for restricting freedom of speech. In other words, in this case as well, the injurer (the police) externalizes the benefit derived from unrestricted freedom of speech while internalizing the damage likely to result from a lack of restriction.⁵² In any event, the injurer's incentive to restrict freedom of speech will increase. This problem, it seems, is more acute in Example 6 (freedom of speech) than in Example 4 (the doctor and two patients) where the balancing is between the victim's interests and those of a third party. Imposing liability in Example 4 exposes the doctor to the risk of liability, whether he chooses to treat one patient (and is negligently inattentive to the other patient) or the other (and is negligently inattentive to the first patient). Hence, there is a certain balance that is likely to mitigate the risk of defensive medicine and cause the doctor to take proper precaution measures. This is not the case in Example 6 (freedom of speech). The asymmetry in the injurer's risk of liability is most prominent. Harm to the social interest usually will not be accompanied by a legal sanction as in the case of harm to the private interest. Hence, in this example, the most certain way to induce the police not to neglect the social interest in freedom of speech is to not impose liability on the police if it is found to be overprotecting this interest at the expense of the private individual who is injured. Of course, there are situations in which this conclusion is completely invalid. Sometimes, making a public authority liable toward the victim is the most certain means of ensuring that that authority does not disregard the danger of injury to potential victims and does not prefer other interests. In such cases, imposing liability is most crucial.⁵³

The *justice perspective* is far more complex. On the one hand, less moral fault is usually attached to an *injurer* who errs in overprotecting a social interest than that attributed to an injurer who prefers to further his own interest out of disdain for the interests of others (the driver, Example 1,

52 If the police's interest is identified absolutely with the social interest, then this externalization does not exist. I am assuming that no such identity exists. See *supra* note 51.

53 Such is the case when there is apprehension that the authority, as an entity, has interests that conflict with the victim's protection, such as its aim for order, to stay within its budget, etc. Such instances appear to be closer to the first category (balancing the interests of the injurer and the victim) than to the one under discussion here. But see discussion of Example 3 (the frugal doctor) *supra* Section III.

Reason 3). At times, the former type of injurer is also deserving of more forgiving treatment than the injurer who prefers the interest of a third party over the victim's interest for improper reasons, as in Example 4 (the doctor and two patients). On the other hand, the *victim's* interest in imposing liability is particularly compelling here. A person who is injured due to another person's promoting society's interests should be compensated for her damage, even in the absence of negligence, for otherwise, she is in fact the sacrificial lamb on society's altar. In any event, when the injurer has been negligent and has attributed too much weight to the social interest and as a result has injured the victim, the justification for imposing liability, insofar as the victim's interest is concerned, is self-evident, first and foremost, from the perspective of the victim's *ex post* interest, but also in terms of her *ex ante* interest. The victim's *ex ante* interest is that liability be imposed on the injurer so that the victim's interest will not be neglected in order to promote the social interest.

How do we balance between the considerations of justice relating to the injurer and those relating to the victim? It appears that when the injurer is a public authority, as in Example 6 (freedom of speech), imposing liability is the preferred solution from the perspective of justice. The reason for this is that the compensation to the victim is financed by society, whose interest was being served when the damage was caused. Just as a person bears the risk that if he is negligent and overprotects his interest at the expense of others, he will have to bear the damage caused to the latter, so it should be (and even more so) when the injurer is society or a body acting in its name and funded by public monies. Even if considerations of deterrence somewhat call into doubt the need to impose liability, it appears that in the overall balancing of justice and deterrence, imposing liability is crucial.

If, in contrast, it is a private injurer who is seeking to promote the social interest, and in ascribing too much weight to this interest, he causes damage to another person, imposing liability on the injurer is less crucial from the perspective of justice. Considerations of deterrence reinforce this conclusion. This type of case is demonstrated in the following example.

Example 7: The Excursion. *Dan is a tour guide. He leads a group of people on an excursion through the Judean Desert and at a certain stage is required to choose one of two paths: one crossing territory where people tracking through are likely to cause harm to the landscape and nature; the second passing through territory where such harm is not a real risk, but is more dangerous to the excursionists. Dan chooses the second path. Jacob, one of the excursionists, falls*

from a cliff and suffers bodily injury while walking along the path chosen by Dan.

The determination as to whether Dan was negligent depends on the question of whether he properly balanced between the social value of preserving the landscape and nature and the risk that this created for the excursionists. The mere fact that the path that he chose was riskier than the other path is not indication in itself of negligence on his part. However, even if he was negligent, holding him liable is less crucial from the *perspective of deterrence* than imposing liability on the police in Example 6 (freedom of speech). The fear that imposing liability will prevent him from considering preservation of the landscape and nature is very significant, perhaps even greater than the correlating apprehension in Example 6. From the *perspective of justice to the injurer*, as well, the necessity of imposing liability in Example 7 is not great. Dan, we must remember, acted in the interest of society, and now he is being required to pay the price of protecting that interest. This is not a case, as in Example 6, of the compensation being financed by society, whose interest has been protected by the injurer.

On the other hand, Jacob will justifiably claim that he should not have to pay the price of protecting this social interest and definitely not when this protection involves negligence (*ex post justice to the victim*). Jacob's *ex ante* interest is also that liability be imposed on Dan in the circumstances of Example 7 (*ex ante justice to the victim*). The considerations of justice in this instance are not, therefore, as clear-cut as in Example 6, and the considerations of deterrence raise strong doubts as to whether imposing liability is beneficial or detrimental.⁵⁴

Prevailing Negligence Law

In cases in which the defendant's alleged negligence is manifested in a faulty balancing between the victim's interest and a social interest, the courts have less of a tendency to impose liability than in the framework of the first category of cases. A well-known American case from the nineteenth century illustrates this well.⁵⁵ In this matter, in attempting to break up a dogfight, the defendant caused injury to the plaintiff, who was standing nearby, with his

⁵⁴ Example 7 is reminiscent, to a certain extent, of the situation discussed in Cr.A. 364/78, *Tzur v. State of Israel*, 33(3) P.D. 626, 632. See discussion *infra* text accompanying note 60.

⁵⁵ *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, reprinted in *Torts — Cases and Materials* 34 (Harry Shulman et al. eds., 3d ed. 1976).

stick. The court dismissed the plaintiff's claim, stressing the social interest in separating the dogs. Another example illustrative of courts' reluctance to impose liability on an injurer who weighs the interest of the victim against the social interest is the English rule (recently abolished by the House of Lords) that a lawyer not be held liable toward his or her client for negligent mismanagement of court proceedings. One of the reasons behind this rule was the concern that the risk of liability would place lawyers in a conflict of interests between their clients' interests, on the one hand, and the social interest, as expressed in lawyers' serving as officers of the court, on the other hand.⁵⁶

Israeli decisions illustrative of the fourth category of cases have dealt both with situations in which the defendant was a public authority as well as with cases in which the defendant was a private individual. In one such case, a suit was brought by an employee of the Ministry of Defense who was attacked and wounded by terrorists. His claim, which was eventually dismissed, was that the Ministry of Defense had been negligent in that it had not provided him with a weapon for self-protection, for had it done so, the damage would have been prevented. The Supreme Court dismissed the hypothetical claim that it would have been possible to refrain from the security work for which the plaintiff was hired and thereby prevent the damage. In the Court's opinion, the Ministry's balancing of Israel's security needs against the plaintiff's safety was not a matter for the Court to deliberate.⁵⁷ In another case, the question arose as to whether the State had been negligent in enlisting into military service a person with a criminal record who later committed murder with the weapon he had received from the army. The Court dismissed this suit as well, and it appears that a central reason for the dismissal was the weight of the social value in enlisting every able man into the army relative to the danger created for the public by enlisting a person with a criminal record.⁵⁸

This approach — which out-and-out excludes the possibility of a person being negligent in balancing between a national security interest and the victim's interest in her personal safety — emerges in yet another judgment handed down by the Israeli Supreme Court, but in this case, the defendant was not a public authority. An employer sent one of her workers to cultivate land along the Syrian border with Israel, and the worker was injured from

56 *Saif Ali v. Sydney Mitchel & Co.*, [1978] 3 All E.R. 1033 (H.L.). As mentioned, this rule was recently abolished by the House of Lords, *Arthur J.S. Hall & Co. v. Simons*, [2000] 3 All E.R. 673 (H.L.).

57 C.A. 559/77, *Lampert v. State of Israel*, 33(3) P.D. 649, 651.

58 C.A. 796/80, *Ohana v. Avraham*, 37(4) P.D. 337, 343.

shots that were fired at him by the Syrians. The Supreme Court dismissed his claim against his employer. The Court ruled that when the public, in its entirety or a significant proportion thereof, is exposed to imminent public danger and the public nonetheless continues in its ordinary way of life despite this danger, the Court will not tend to find employers at fault for a lack of concern for their workers' safety.⁵⁹

In another case, similar to the facts in Example 7, the question arose as to the negligence of tour guides who took a group of youngsters on an excursion, and some were killed as a result of floods. The Israeli Supreme Court ascribed no liability to the tour guides, stressing the value of teaching a love for nature, which sometimes clashes with the value of the personal safety of excursionists.⁶⁰

It is not easy to agree with all of the above-described decisions of the Israeli Supreme Court. Some date back many years, when the security consideration still worked its magic over the Israeli judiciary. In any event, these cases reveal the tension that exists on occasion when the allegedly negligent balancing is between the victim's interest and the social interest. On the one hand, there is the very strong argument that it is unjust that the individual pay the price of promoting the social interest, however important it may be, and certainly not when the person who advanced this interest behaved negligently. This argument is especially strong when the injurer is a public authority. On the other hand, from the perspective of deterrence, imposing liability on an injurer who negligently preferred the social interest over the victim's interest is not particularly crucial, certainly not as crucial as in the first category of cases. Hence, the tension between deterrence and justice to the victim is particularly acute in this context.

VI. CATEGORY 5: DIFFERENT INTERESTS OF THE INJURER

Upon seeing the title of this category of instances, the reader may perhaps wonder whether a mistake has been made: What does the balancing of the different interests of the injurer have to do with negligence toward others? As we will see below, at times, the two are inextricably connected.

Example 8: The Stairs. Lisa slipped on the steep stairs in Bill's house and suffered bodily injury. Bill could have decreased the risk of

59 C.A. 491/73, G'dolei HaCholeh Ltd. v. Machroz, 29(2) P.D. 32, 38.

60 Cr.A. 364/78, Tzur v. State of Israel, 33(3) P.D. 626.

slipping on the stairs had he installed a safety railing, but he refrained from doing so. Had there been a railing, the damage would have been prevented.

The case presented in Example 8 represents, *prima facie*, the type of balancing of interests illustrated by Example 1 (the driver): the injurer's interest, on the one hand, against the victim's interest, on the other hand. If Bill was negligent, this is merely a case of preference of his own interest over those of his guests, and for the reasons indicated, imposing liability on him will usually be crucial. This is, indeed, a possible scenario. However, another possibility exists, namely, that Bill failed in balancing between his own interests alone. This matter requires explanation.

The courts, in determining whether an injurer was negligent, systematically disregard the fact that frequently the precautionary measures that the injurer could have taken would have decreased his own risk as well and not just the risk to others. Robert Cooter and I have claimed elsewhere⁶¹ that in taking this approach, courts achieve an inefficient outcome that leads the injurer to make a less than optimal investment in precautionary measures. Our claim is that in instances of "joint risks" — that is, risks to which both the injurer and the victim are exposed jointly and the precautionary measures that can be taken affect both the injurer and the victim simultaneously — it is imperative to take into account both the risks to the injurer and the risks to others when determining the required standard of care.

Let us assume that the risk of the stairs for Bill's guests is 75 and that this risk can be prevented completely by investing 100 in a safety railing. The court, following the Hand Formula in its traditional application, will conclude that Bill was not negligent. The reasonable man does not invest 100 in order to prevent a risk of 75. Let us now make the very reasonable assumption that Bill, too, is exposed to the risk of the steep stairs. Let us assume that installing a safety railing will decrease his risk as well, by 75. It is clear that the efficient outcome will be achieved if Bill installs a safety railing at a cost of 100 and decreases the overall risk — to him and to others — by 150. However, because the courts ignore Bill's self-risk, this efficient outcome will not be achieved. Bill knows in advance that the court will find that he was not negligent and will, therefore, release him from liability for the damage to others. Accordingly, Bill will disregard from the outset the

⁶¹ Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economic in Conflict*, 29 J. Legal Stud. 19 (2000). For a similar argument in the context of contributory negligence, see Simons, *supra* note 13, at 1713-18.

risk to others, which, as noted, is 75. His self-risk, also 75 and which will decrease to 0 if he installs a safety railing, will not persuade him, of course, to invest 100 in the railing.

If, in contrast, the court, in determining whether Bill was negligent, compares the costs of precaution (100), on the one hand, to the overall risk to Bill and others (150), on the other hand, it will come to the conclusion that Bill was negligent in not installing a safety railing. Knowing this in advance, Bill will understand that if he does not install a safety railing at the cost of 100, he will eventually bear an overall risk of 150. Accordingly, Bill will install a safety railing, and the efficient outcome will be achieved.

For anyone who does not find overly compelling the deterrence and efficiency objectives of tort law, it is possible to present the above argument in the following way. When determining whether a person has been negligent, it is important that the court examine the burden placed on that person or the effort required of him to prevent or diminish the risk to others. If the burden is heavy, the court will not rush to conclude that he was negligent; if the burden is light, the conclusion of negligence will be self-evident. Robert Cooter and I have argued that the relevant burden is the net burden, not the gross burden. In other words, if Bill was required to invest a great deal of effort to prevent the risk to others (installing a safety railing), but he too would have derived benefit from this in the form of a decrease in his own risk, then in defining the extent of the burden he must bear, it is necessary to take into account not just his investment but also his benefit. Consequently, the benefit that Bill would have derived from his investment in a safety railing must be subtracted from the burden he is required to bear to do so. The numerical example demonstrates this well: the real burden Bill is required to bear in order to prevent the risk to his guests is not 100 (the gross burden), but rather 25 (the net burden — 100 minus 75). Bill was negligent, therefore, because he did not make the relatively small effort (25) to prevent a large risk to others (75).

From here onward, I assume that Bill's negligence is contingent on whether at the time that he refrained from installing a safety railing, he properly balanced between three interests: his own interest in not spending his financial resources (installing a safety railing); his own interest in safety; and the interest of his guests in safety. It is possible that his negligence derives from disdain for the interests of others, in which case, imposing liability on him is most crucial (the driver in Category 1, Example 1, Reason 3). However, it is also possible that his negligence is the result of an improper balancing of his own interests. Let us return to the numbers in Example 8: self-risk = 75; risk to others = 75; cost of prevention = 100. It is possible that Bill was convinced, erroneously, that his self-risk was only 5. Had this

belief been correct, Bill would not have been negligent in not installing a safety railing: his failure to invest 100 in preventing an overall risk of 80 (75 to others and 5 to himself) was not negligent. Accordingly, if, in fact, his low estimation of his own interest is the only cause of his negligence, it is at the balancing between his own interests that he failed. Bill failed to realize that installing a safety railing would very much decrease his own risks. A risk of liability in this case would not necessarily cause him to install a safety railing. If he really was of the belief that the benefit he would derive from the railing would be only 5, he would prefer not to invest 100 and would rather bear the risk that, in his opinion, was only 80 (75 to others and 5 to himself). Moreover, his behavior is not morally deficient, since at the very most, he was disdainful of his own safety and not of that of others. Hence, *considerations of justice relating to the injurer* do not require that Bill be held liable.

The principal difficulty, of course, is in ascertaining why Bill did not install a safety railing. Therefore, a risk of liability will increase the likelihood that he will not improperly prefer his own interest over the interests of others. Accordingly, the concern that Bill failed in balancing his own interest with the interests of others and that this case in fact falls under the scope of the first category of cases is likely to warrant imposing liability on him, for all the same reasons that liability should be imposed on someone who improperly preferred his own interest over the interests of others.

SUMMARY AND CONCLUDING REMARKS

Negligent behavior can be evaluated according to different criteria such as: the degree of danger inherent to the behavior; the extent to which the behavior deviates from the standard of behavior of the reasonable person; the identity of the injurer or of the victim; and the injurer's mental state. The purpose of this article is to propose a different way of looking at the law of negligence and, thus, a new way of evaluating negligent behavior.

The central argument of this article is that the type of balancing of interests at which the negligent injurer failed is a central consideration in determining the degree to which it is crucial to impose liability on him, both from the perspective of deterrence and the perspective of justice. The article has sought to base this claim from a normative perspective as well as to demonstrate how it is possible to apply this claim in the framework of prevailing tort law. One observation that this article makes is that under certain circumstances, which the article identifies, imposing liability on negligent injurers distorts their incentives to act in the best interests of

their potential victims, whereas releasing them from liability restores those incentives.

The table below summarizes the extent to which imposing tort liability is crucial in the five categories of cases discussed in this article, according to the types of considerations characteristic to tort law.

	DETERRENCE	JUSTICE TO THE INJURER	<i>EX POST</i> JUSTICE TO THE VICTIM	<i>EX ANTE</i> JUSTICE TO THE VICTIM
1. injurer — victim	very crucial	very crucial	very crucial	very crucial
2. victim — victim	not crucial, at times detrimental	not crucial	not crucial	not crucial, at times detrimental
3. victim — third party	crucial	crucial	crucial	crucial
4. victim — social interest	at times crucial, at times not crucial, at times detrimental	society finances — crucial; the individual finances — not crucial	very crucial	crucial
5. injurer — injurer	crucial	crucial	crucial	crucial

Using a few examples taken from the case law, the article has shown how the consideration of the type of the balancing of interests has operated in different court decisions, usually without being explicitly referred to as such. As in many other instances, judicial intuition completes what the legal theory has omitted.