The Fault of Not Knowing: A Comment

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INTRODUCTION

In common parlance, negligence connotes carelessness — a failure to exercise due care for the safety or security of others. The notion seems simple enough until we probe a bit below the surface. Driver fails to notice pedestrian entering the street at a crosswalk and runs into her, causing her serious injury. If driver simply believed that he could make it through the crosswalk before pedestrian posed an obstacle, the case is easy: garden-variety, overt carelessness. Suppose, instead, however, driver was distracted by a conversation on his car phone and failed to observe pedestrian until too late. Again, the lay view would no doubt be that driver was negligent; but now, of course, the scenario is one of inadvertent, rather than advertent, conduct on driver's part, carelessness in failing to take note of one's surroundings.

Consider another iteration. Driver tried to stop in time, but he is elderly and frail and, as a consequence, has particularly slow reflexes. He tried his best, but it wasn't good enough, although most drivers would have avoided causing injury. Here, the lay view of whether driver's conduct constitutes negligence is far less clear — the answer is probably not, assuming no conscious knowledge of personal debilitation. And finally, imagine that driver believed divine guidance would lead his car to soar above the crosswalk and avoid all injuries. Whatever the lay reaction to assigning liability, in common thought it seems unlikely that this departure from reality would be characterized as negligence.

Do these intuitions about popular conceptions of negligent conduct

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correspond to the legal version that we term "fault" and that serve as a touchstone to liability in tort? Is tort law grounded in a legal conception of negligence that bears a lineage to personal carelessness and consequent blameworthiness, or does negligence, in the realm of tort, rest on external standards of conduct that obscure the boundaries of negligence and faultless (or "strict") liability? This latter question serves as the focal point for George Fletcher's recent essay in these pages, *The Fault of Not Knowing*.[1]

Fletcher views the "great divide" in tort law to be between fault and strict liability.[2] From this starting point, he perceives a surface anomaly in the tort system's adherence to a fault standard (under the banner of negligence) and its correlative refusal to excuse, under ordinary circumstances, the individual who in good faith attempts to exercise reasonable care but simply falls short of the mark.[3] If an actor injures another through inadvertence, Fletcher observes, the situation appears on its face to be one in which tort, in the guise of negligence and contrary to its grounding in fault, is assigning liability in the absence of culpability. The objective standard universally recognized in obeisance to the reasonable person seems to weave a strand of strict liability into the tapestry of negligence.

Not so, however, Fletcher argues. And the burden of his essay is to show how negligence, in the sense of "the fault of not knowing," remains centered on a foundation of personal blameworthiness, despite its surface appearance of adhering to an external standard of conduct that the risk-imposing individual may be incapable of satisfying.

In support of his thesis, Fletcher offers two perspectives: an interpretive reading of a handful of leading cases — the philosophical perspective, as he puts it — in which he finds implicit support for fault, or personal blameworthiness, in the defendant's failure to take self-corrective steps prior to imposing inordinate risk on others; and a reading of Holmes' disquisition

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1 George P. Fletcher, *The Fault of Not Knowing*, 3 Theoretical Inquiries L. 265 (2002).

2 *Id.* at 267. More precisely, he refers to the "great divide" in the first instance as between fault and no-fault liability. But he is not referring to no-fault in the modern sense of administrative compensation schemes, such as workers' compensation and auto no-fault. Rather, he has in mind the more restricted inquiry of counterposing negligence with strict liability in tort. In the last section of this paper, I discuss a broader conception of remedies for accidental harm that would encompass a no-fault option, as conventionally understood, as well as the tortcentric liability systems discussed by Fletcher.

3 But only under ordinary circumstances. As Fletcher indicates, tort has traditionally recognized excuses from the objective "reasonable person" standard for narrowly defined categories, including those he discusses: blindness, minors, and insanity. *Id.* at 274.

on negligence in *The Common Law*,[4] a historical perspective, where once again Fletcher finds a foundation for fault "in the fullest sense of the word."[5]

In this Comment, I will begin by indicating where I find common ground with Fletcher. In fact, I will suggest that his "fault of not knowing" rests on a well-established notion of the role of custom in tort law that he surprisingly fails to discuss. But I will then indicate that his broader thesis — that once acknowledging the fault of not knowing, negligence can be squared with personal blameworthiness — cannot withstand sustained analysis. In a final section, I will open the inquiry still further by briefly commenting on the constraining effect of addressing the problem of remedies for accidental harm exclusively in terms of fault and strict liability. If assigning responsibility for personal harm cannot be associated with culpability in all circumstances, I will suggest, the case for such constraint is substantially undermined.

I. BLAMEWORTHINESS AND NEGLIGENCE: A REASSESSMENT

One underlying theme in Fletcher's essay is the role of awareness in framing legal liability for personal harm and, in particular, the very different weight given to conscious risk-generating behavior in theories of criminal and tort law. For criminal theorists, awareness is a "structural feature" of the law — an "architectonic distinction" lies between conscious and inadvertent conduct.[6] By contrast, for tort theorists, inadvertent conduct is just as legitimate a basis for responsibility as advertent conduct, as long as the conduct fails to satisfy the reasonable person standard. This creates a seeming paradox on the tort side. Along with intentional misconduct, negligence is regarded as a branch of *fault* liability. And yet where is the fault, in the sense of culpable or blameworthy behavior, if a tort defendant can be found liable for nothing more than inattentiveness to the risk he or she has brought to fruition? Where is the fault if the defendant is being held to an external standard of a reasonable person, whose conscientious attentiveness to risk may be beyond the capacity of an information-challenged or congenitally bumbling defendant, however much good faith effort that defendant might put forward?

Fletcher's response is to posit the fault of not knowing. As an illustration, he offers a Holmes opinion for the Massachusetts Supreme Court, in

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4 Oliver W. Holmes, Jr., The Common Law (1881).

5 Fletcher, *supra* note 1, at 273.

6 *Id.* at 266-67.

which a doctor was held responsible for applying kerosene-soaked rags to a patient's skin in a good-faith treatment effort that resulted in death.[7] For Holmes, and for Fletcher, good faith does not absolve defendant of blameworthy misconduct, because an appropriate degree of foresight — of *ex ante* precautionary inquiry — would have revealed the risks inherent in defendant's course of conduct. Inattentiveness is no answer to the culpability, the fault, of not knowing.[8]

At one level, this moral equivalency between knowledge and what is often referred to as constructive knowledge — i.e., what the defendant should have known — seems so unexceptionable as to require little comment. Indeed, it is the foundation for treating deviation from custom as evidence of negligence. As Clarence Morris put it in his classic article on the subject, "Sub-conformity tends to show that the defendant either heedlessly failed to look about for safeguards or consciously refused to take precautions which he knows others think essential."[9] In this passage, one notes, Morris draws no distinction between inadvertent and advertent failure to take account of information about risks that might bear on the standard of reasonable conduct. The early medical malpractice case discussed by Fletcher is simply a special application of the principle in a professional negligence context, where custom sets the standard rather than serving only as some evidence of appropriate conduct.[10]

Fletcher also discusses the famous case of *Vaughn v. Menlove*,[11] in the

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7 Commonwealth v. Pierce, 138 Mass. 165 (1884). In fact, the case involved the unsuccessful appeal of a *criminal* conviction for manslaughter, and not a tort action.

8 By analogy, Fletcher takes the discussion to the realm of current affairs and argues against mitigation for the criminal misconduct of a Timothy McVeigh or Ted Kaczynski, cases in which one can argue a personal failure to recognize the antisocial nature of their conduct. Here, too, Fletcher suggests, the miscreants are at fault (and deserve no diminution in punishment), because they are guilty of a failure to take account of existing social norms that strongly condemn murderous conduct in pursuit of a misbegotten notion of corrupt public values. Fletcher, *supra* note 1, at 281. Curiously, he distinguishes Yigal Amir, the assassin of Israeli Prime Minister Itzhak Rabin, as well as the Palestinian suicide bombers as "cases where everyone in the environment supports the conduct as right, even honorable." Surely, Israeli and Palestinians extremists are just as aware that an outside society condemns their actions as are loners like McVeigh and Kaczynski and, hence, could be held to Fletcher's principle of the fault of not knowing. By doing so, he would not be forced, uneasily by his own admission, to appeal to "universal truth" to establish blameworthiness in the Israeli/Palestinian cases.

9 Clarence Morris, *Custom and Negligence*, 42 Colum. L. Rev. 1147, 1151 (1942).

10 *See* Dan B. Dobbs, The Law of Torts 633 (2000).

11 132 Eng. Rep. 490 (1837).

same vein as his doctor's case, *Pierce*, discussed above: both illustrate to him "the culpability of... not understanding the dangers latent in their conduct."[12] *Vaughn* involved a defendant who constructed a highly combustible hayrick on his land, immediately adjacent to plaintiff neighbor's cottages; a fire ensued, and plaintiff's property was destroyed. The court was unmoved by defendant's plea that he had used his best judgment, responding that such an approach "would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various."[13] Instead, the court required "a regard to caution such as a man of ordinary prudence would observe"[14] — a holding that seems to blend considerations of administrative feasibility with Fletcher's admonitory note of moral disapproval. Moreover, in the course of the *Vaughn* opinions, it is revealed that defendant had fully insured his property and that he had responded to entreaties to remove the hayrick because of the fire risk by saying that "he would chance it."[15] Willful ignorance of this sort is perhaps the strongest case for Fletcher's fault of not knowing.

But there is a distinction that Fletcher elides, I would suggest, between the individual who is *indifferent* to the need to obtain or act on additional information about risk and the actor who is *unaware* of the need to take account of the risks his incapacity poses. A prototypical instance of the latter situation is *Roberts v. Ramsbottom*,[16] a case involving a seventy-three-year-old defendant who suffered a minor stroke shortly before setting out to drive his car. He had no previous symptoms or warnings and, in fact, apparently was unaware that his cognitive capacity had been diminished. Indeed, the court explicitly noted that he was "at no time aware of the fact that he was unfit to drive; *accordingly no moral blame can be attached to him for continuing to do so.*"[17] Nonetheless, after reviewing the English case law, the court concluded that defendant should be held responsible for the injury he caused: "One cannot accept as exculpation anything less than total loss of consciousness."[18]

Ramsbottom illustrates an extraordinarily important principle, which becomes even more salient as we move into a new century in which increasingly large numbers of elderly drivers are on the road — elderly

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12 Fletcher, *supra* note 1, at 278.
13 132 Eng. Rep. at 493.
14 *Id.*
15 *Id.* at 491, 494.
16 [1980] 1 All E.R. 7 (Q.B. 1979).
17 *Id.* at 13 (emphasis added).
18 *Id.* at 15.

drivers, as well as those engaged in other pursuits without the innate capacity to respond to situations of risk as they once did. In other words, those who suffer from subtle impairments that have diminished their capacity to avoid injury at critical moments and, correspondingly, render them less capable than the "reasonable person." It is pure fiction, in my view, to apply Fletcher's "fault of not knowing" principle in wholesale fashion to these cases. The process of deterioration is too subtle, the creeping incapacitation too gradual, to cast blame for not "educating oneself."

Years ago, in a widely noted law review article, Fleming James offered a still more general exposition of the same point, when he wrote of the disproportionate injury toll associated with the accident-prone.[19] James had in mind those who in many instances have no particular reason to think that they are causing more than their share of injuries (and, consequently, I suggest, cannot be faulted for not knowing) and yet who are held responsible for their injury-generating conduct under an objective standard of negligence. My point, of course, is that negligence in these circumstances is a *de facto* form of strict liability and bears no moral stigma.

Still more deeply embedded in the negligence concept, as a pocket of strict liability, is a phenomenon that Mark Grady identifies as compliance error.[20] Grady illustrates the phenomenon through the example of driving:

> It is impossible to drive a car for any period of time without missing a required precaution. There is evidently a special cost of consistent performance, and people respond to this cost by trying to establish for themselves an efficient rate of error, which is (hopefully) low. Nevertheless, in most situations judges do not recognize the special cost of consistency. They assess a penalty for every miss, even for those that must be efficient, judging from the way reasonable people behave.[21]

The point here is straightforward, yet at the same time somewhat subtle. When engaging in repetitive, risk-related activities, it is impossible for *anyone* to achieve a perfect compliance rate — that is, to achieve a constant state of perfect attentiveness and performance. The reasonable person standard is, in this sense, a fiction, since it stands in direct contradiction to the postulate "to err is human." Viewed in isolation, the momentary

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19 Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 Harv. L. Rev. 769 (1950).

20 Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. Pa. L. Rev. 887 (1994).

21 *Id.* at 900.

slip in concentration or reaction may appear a departure from the norm of expected conduct; viewed sequentially in the flow of everyday optimally precautionary conduct, it can properly be regarded as a pocket of strict liability — in no sense indicating culpability — built into the concept of negligence.[22]

So, in the end, the lay conception of negligence discussed at the outset is a closer approximation to *true* "fault," in my view, than is the legal conception captured by the objective standard of negligence. The latter standard reflects a social welfare norm that is singularly different from corrective justice notions of personal blameworthiness.[23] Fletcher strains to associate Holmes exclusively with the individualistic position.[24] But Holmes' notion of "blameworthiness" is broader, as I see it, grounded, at least in part, in a utilitarian perspective. As he succinctly put it, "[W]hen men live in society, a certain average of conduct, *a sacrifice of individual peculiarities*

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22 Grady draws an important distinction between compliance rate error, described above, and precaution rate error — the failure to invest adequately in durable goods that would diminish the number of injuries resulting from an activity in its ordinary course, which is the standard inquiry under the Learned Hand formula. *Id.* at 899-903. *See generally* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

23 The objective standard also reflects a major concern about administrative feasibility. Reconsider, by way of illustration, the quote from *Vaughn, supra* text accompanying note 13, dismissing a subjective approach on the grounds that "the degree of judgment belonging to each individual [is] infinitely various." Arguably, Grady's thesis, revealing a pocket of strict liability within the negligence principle, due to the impossibility of constant precautionary behavior, *supra* text accompanying notes 20-21, similarly is anchored in the administrative infeasibility of parsing inattentiveness so finely as to distinguish "inevitable" human error from avoidable inattentiveness.

24 Fletcher says we should "leave aside the reference to the general welfare," which I quote from Holmes later in the text of this paragraph. But he never indicates *why* we should leave it aside, other than by assertion. He next suggests that Holmes' reference to "the man of ordinary intelligence and prudence" is merely a "heuristic device." Fletcher, *supra* note 1, at 273. This could be true, but it does not withstand Holmes' contradictory assertion, just referred to, that individual peculiarities must be sacrificed to the general welfare. Nor does it bear much weight as compared to seven distinct propositions from Holmes in support of the objective standard that Fletcher himself quotes. *Id.* at 271. Finally, he points to Holmes' injunction that "the law presumes or requires a man to possess ordinary capacity to avoid harming his neighbors" and then argues that "requires" can be read as a moral edict (implicitly "ought implies can"). *Id.* at 274. But he ignores the "or" in this phrase, which anchors a *presumption* of ordinary capacity as an alternative basis for assigning liability.

going beyond a certain point, is necessary to the general welfare."[25] From this perspective, social expectations of precautionary conduct toward others, rather than subjective considerations of individual capacity (or carelessness, as we ordinarily conceive it), inform the legal conception of negligence.

This community-expectations conception of negligence still, however, stands in sharp contrast to conventional strict liability: that is why the injury victim of a driver who suffers a heart attack or epileptic seizure without any prior notice cannot recover under the negligence regime.[26] Strict liability, as traditionally conceived in tort law, rests on a corrective justice foundation of avoiding injury to others as a moral dictate, rather than as a norm based on community standards of safe conduct.[27]

II. BEYOND TORTS: A QUESTION OF FRAMING

I would suggest that in an important sense, Fletcher has framed his inquiry in a way that is unduly confining. And by doing so, his inquiry has what he refers to in another context as "a whiff of the conventional" about it.[28] For he postulates at the outset a "paradigm of the opposition of fault and strict liability," which he sees as the "basic dichotomy [that] lies at the foundation of the system" — a dichotomy that in fact provides the underlying structure for his inquiry into the question of whether fault, in the guise of negligence, can be taken to include not just advertent conduct but inadvertent incaution as well.[29] But once blameworthiness turns out to be an inadequate guide to the full range of norms that govern liability for accidental harm

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25 Holmes, *supra* note 4, at 108 (emphasis added).

26 *See, e.g.*, Hammontree v. Jenner, 97 Cal. Rptr. 739 (Cal. Ct. App. 1971) (no recovery for injury victim of driver who suffered totally unexpected epileptic seizure). The *Ramsbottom* court, citing a number of sudden affliction cases, subscribed to the same principle: "The driver will be able to escape liability if his actions at the relevant time were wholly beyond his control. The most obvious case is sudden unconsciousness. But if he retained some control, albeit imperfect control, and his driving, judged objectively, was below the required standard, he remains liable." Roberts v. Ramsbottom, [1980] 1 All E.R. 7, 15 (Q.B. 1979).

27 See Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 Md. L. Rev. 1190, 1194-99 (1996), contrasting the moralistic underpinnings of traditional strict liability with the modern enterprise liability foundations of strict liability based on notions of deterrence and risk-spreading. These latter themes are beyond the scope of this Comment.

28 Fletcher, *supra* note 1, at 267.

29 *Id.* at 265.

in tort, still more fundamental questions arise: Why confine our inquiry to the underlying premises of tort? Why not frame the inquiry more broadly to encompass alternative systems, based on social welfare perspectives, for redressing accidental harm?

I am suggesting that in choosing between competing rules of negligence and strict liability, one must have some extrinsic end in mind. Liability must be analyzed with reference to some purpose; a system must be designed to address some end goal. Putting aside, along with Fletcher, situations of intentional harm, the larger context in which tort rules operate is, indeed, a "system." But it is, more broadly, a system for addressing the problem of accidental harm. And once we recognize "liability," whether grounded in negligence or strict in character, as but competing approaches to addressing the consequences of accidental harm, we are on our way to viewing Fletcher's "fault of not knowing" from a very different perspective.

The heretofore central role of blameworthiness arguably diminishes in prominence in this expanded universe, where the central inquiry can be redefined in terms of alternative reparation models based on principles of corrective justice, utilitarian considerations, or social welfare schemes such as no-fault compensation or universal first-party insurance. Indeed, Fletcher attempts to buttress his point that a fault/strict liability dichotomy is the "basic format" for analyzing liability, by stating that all the leading treatises and casebooks follow that organizing principle (with the addition of intentional harm as a strong version of fault). In fact, every leading torts casebook goes beyond negligence and strict liability and affords prominent coverage to no-fault schemes as an alternative system for addressing the subject matter of torts.[30]

Interestingly, Holmes was perhaps the first commentator to note these broader dimensions of the accidental injury problem, when he famously declared, with his characteristic forthrightness of expression, "The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members."[31] No proponent of such socialistic methods, Holmes returns,

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30 *See, e.g.*, Marc A. Franklin & Robert L. Rabin, Tort Law and Alternatives: Cases and Materials at ch. IX (7th ed. 2001); Dan B. Dobbs & Paul T. Hayden, Torts and Compensation: Personal Accountability and Social Responsibility for Injury at chs. 25-27 (4th ed. 2001); Richard A. Epstein, Cases and Materials on Torts at ch. 12 (7th ed. 2000); Victor E. Schwartz et al., Prosser, Wade and Schwartz's Torts: Cases and Materials at ch. XXIV (10th ed. 2000); James A. Henderson, Jr. et al., The Torts Process at ch. 9 (5th ed. 1999).

31 Holmes, *supra* note 4, at 96.

in the end, to a reparation system keyed to tort principles. But more than a century after *The Common Law*, in an age dominated by insurance coverage for high-volume mishaps from motor vehicle injuries, product defects, professional malpractice, and toxic exposures, there is a serious question whether the tort system should assume the same prominence as was appropriate in an earlier era.

Moreover, even if tort remains our prevailing scheme for addressing accidental harm in certain spheres of activity, it may be miscast in others. Arguably, for example, "the fault of not knowing" might be properly taken into account and regarded as consequential when indicative of personal blameworthiness in the case of professional inadvertence and, at the same time, might yield to systemic insurance considerations — and be treated as of limited or no consequence, apart from criminal sanctions — in the case of high-volume motor vehicle accidents on the highway.[32] Or collectively-based insurance considerations might shape the rules of damages within the domain of an appropriate remaining sphere of tort responsibility, even as blameworthiness continues to be a determining factor on the threshold question of liability.

This is not to suggest that Fletcher's inquiry should necessarily have ventured beyond the tort system as traditionally conceived. The norms underlying tort are of enduring intellectual interest and importance. Rather, I am suggesting that comprehensive analysis of the fault concept leads into byways of allocating responsibility for inadvertently caused harm that cannot be captured within the confines of a blameworthiness principle and that, in turn, raise serious issues about the propriety of grounding responsibility for accidental harm exclusively in tort.

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32 For example, although not entirely replacing tort, the New York no-fault auto system treats the first $50,000 of "basic economic loss" as recoverable under a legislative compensation scheme (and disallows pain and suffering in these cases, as well, except for designated types of serious injury). *See* N.Y. Insurance Law, Art. 51, §§ 5101-08 (McKinney 1995).