

ABSTRACT. The most compelling defense of the standard of reasonable care in negligence law casts itself in terms of equality. This commitment to equality may paradoxically turn out to be flatly inegalitarian. This is because it discriminates against the less capable through ignoring their deficient capabilities (and so against their chances of meeting the standard of reasonable care successfully). A promising, though still unfamiliar, way to revive the egalitarian aspirations of reasonable care would be to show that imposing the standard of reasonable care even on the less competent expresses, rather than inhibits, a true devotion to equality. I seek to make this showing, and thus to reclaim for this standard of care its egalitarian foundations more adequately than has so far been proposed.

I. INTRODUCTION

Playing ball with one’s 12 year old nephew gives rise to a basic question of fairness. Ought we to infantilize our playing performance so as to allow the hopeless nephew to win the game? Or should we stick to our ordinary play, in which case we know we will defeat the youngster? Perhaps surprisingly, it is not uncommon for those preferring the former alternative to experience some negative reaction on the part of the nephew: ‘Don’t fake it, play your best’. The plight of the nephew, that is, is that he wants to be treated as an equal, rather than as an inferior (in the appropriate sense of playing ball against a grown-up). Nevertheless, he is inferior (again, in the appropriate sense).

Precisely the same structure of dilemma occurs beyond the grownup-child interaction and outside the basketball court. In particular, I shall argue that it presents itself in connection with the objective standard of due care in the law of negligence. Moreover, I shall insist that this dilemma gives rise to the most fundamental threat to the integrity and legitimacy of this standard of care.
Importantly, however, this dilemma has never been analyzed, let alone solved, head-on. I shall seek to do both.

To begin with, the standard of reasonable care in negligence law is objective in the negative sense that, all else being equal, it does not take into account idiosyncrasy on the part of a risk-creator. The law conceives of the parties to a tort interaction as equals, since it fixes the contours of reasonableness by reference to what any reasonable person ought to do under the circumstances. This standard functions regardless of what, from the point of view of the actual actor, counts as discharging appropriate – including even best – care toward the other. But all else may not always be equal precisely because not all risk-creators possess the capacities that are pertinent to meeting successfully the standard of reasonable care. Paradoxically, therefore, disregarding idiosyncrasy finds its most appealing defense in an ideal of equality between parties to a tort interaction. At the same time this invites treating some risk-creators (in terms of the duty to exercise reasonable care) as though they could live up to the uniformly objective standard of care, although in fact and through no fault or choice of their own they cannot. Were equality the moral center of gravity of the standard of reasonable care, it would be necessary to dissolve the paradox just mentioned by explaining to what extent this standard takes seriously the plight of those who are less capable of meeting it. After all, negligence law’s commitment to equality is hardly challenged by subjecting the more capable person – the person of ‘ordinary intelligence and prudence’ – to the test of reasonableness.

1 See, e.g., The Germanic, 196 U.S. 589, 595–596 (1905), in which Justice Holmes observed: ‘The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the person concerned’. This doctrine is most famously associated with Vaughan v. Menlove, 132 Eng. Rep. 490 (C.P. 1837). Some (e.g., Richard Epstein) question this reading of Vaughan. It is beyond the scope of this paper to engage in exegesis of this case. At any rate, my focus is on the common law doctrine of the standard of care, rather than on the question of whether or not the origins of this doctrine can be traced back to Vaughan.

2 Throughout, I shall investigate the standard of care in connection with persons whose caring skills are deficient, which is to say the case for (or against) a substandard of reasonable care. I shall not take issue with cases involving super-skilled persons (such as a top-notch brain surgeon), which is the case for (or against) a higher standard of reasonable care. I do that because the principal difficulty for egalitarianism is that of demanding reasonable amount of care from persons whose caring skills are (through no fault or choice of their own) importantly deficient.

3 Surprisingly, tort theorists who emphasize the egalitarian foundations of the objective standard of care pay relatively little attention to this concern. See, e.g., the discussion, in a footnote, of the consistency of corrective justice with certain classes of incompetent defendants in Ernest J. Weinrib, The Idea of Private Law (Cambridge, MA: Harvard University Press, 1995), p. 183, n. 22.