

# Table of Contents

<i>Foreword</i>	vii
<i>Acknowledgments</i>	xxiii
<b>Negligence and Discretion: A General Evaluation</b>	<b>1</b>
<i>Rules of Negligence and Standards of Liability</i> . . . . .	3
<i>Social Standards, Models of Behavior and the Difficult Paradigm of Fault Liability</i> . . . . .	6
<i>The Single-Rule Approach to Civil Liability</i> . . . . .	11
<i>Principle of Fault and Normative Goals</i> . . . . .	13
<i>The Temporally Distinct Functions of the Rule of Negligence</i> . . . . .	15
<i>In Search of Cryptotypes and Synecdoches in the Principle of Fault</i> . .	19

## PART ONE

### Origins and Growth of the Notion of Liability Based Upon Fault

<b>Communal Responsibility in Ancient Law</b>	<b>25</b>
<i>Irrelevance of Subjective Factors in Early Law and the Notion of Communal Responsibility</i> . . . . .	26
<i>A Pragmatic View</i> . . . . .	33
<b>Original Grounds of Delictual Liability</b>	<b>35</b>
<i>Injurer's Liability as Gratification for the Victim</i> . . . . .	36
<i>Victim's Participation in the Law's Enforcement: From Personal Vindication to Judicial Process</i> . . . . .	37
<i>The Compensatory and Punitive Nature of the Lex Talionis</i> . . . . .	39
<i>Liability Rules and Judicial Discretion in the Early Development of the Law of Wrongs</i> . . . . .	40
<i>Implications of Communal Responsibility in Ancient Law of Wrongs</i> .	42

<i>Contractual Agreements as Early Substitutes for the Punishment for Wrongs</i> .....	44
<i>The Subsequent Role of Custom in the Process of Composition</i> .....	46
<i>The Progressive Harmonization Between Conduct Rules and Decision Rules in the Judicial Process</i> .....	49
<b>The Dichotomy of Culpa in the Roman Heritage</b>	<b>50</b>
<i>Commutative Justice at the Origin of Criminal and Civil Remedies</i> ..	51
<i>Toward a Distinction Between Punishment and Compensation</i> .....	53
<i>The Law of Delicts in the Twelve Tables</i> .....	54
<i>The Lex Aquilia: The Damnum Iniuria Datum</i> .....	57
<i>From Iniuria to Culpa</i> .....	60
<i>The Bonus Paterfamilias</i> .....	64
<i>The Correlated Growth of the Notion of Culpa and of Aims of Compensation</i> .....	66
<i>Aims of Deterrence in the Roman Law of Wrongs</i> .....	68
<i>The Objective Nature of Culpa</i> .....	69
<i>Objective Theory of Culpa: Some Cases</i> .....	72
<i>The Equitable Individualization of Liability</i> .....	76
<i>Fault and Guilt in the Process of Subjectivization</i> .....	79
<i>The Difficulty of a Generalization</i> .....	81
<b>The Medieval Distinctions</b>	<b>84</b>
<i>The Work of the Glossators on the Notion of Culpa</i> .....	87
<i>The Subjectivization of Fault and the Theoretical Unification of Liability</i> .....	90
<i>Diligentia and Negligentia in the System of the Glossa</i> .....	91
<i>Culpa Lata and Diligentia Quam Suis</i> .....	92
<i>Individualization and Objectivity in Accursius' Balancing Approach</i> ..	94
<b>Utrumque Ius: The Two Forces of the Ius Commune</b>	<b>96</b>
<i>The Decretum of Gratian and the Cultural Force of the New Canonical Science</i> .....	97

<i>Utrumque Ius: Canon Law and Civil Law as Formants of the Ius Commune</i> .....	101
<i>The Concept of Fault in Medieval Canon and Civil Law</i> .....	104
<i>The Subsequent Evolution of the Notion of Civil Liability in the Tradition of Canon Law</i> .....	105
<i>Fault and Judicial Discretion: The Subjective Elements of the Wrong</i> .....	108
<b>Scholastic Philosophy and Legal Humanism</b>	<b>111</b>
<i>The Aristotelian and Thomistic Doctrine of Delictual Liability: The Gestating Womb of the Principle of Fault</i> .....	113
<i>The Departure from the System of the Glossa: The Work of the Commentators on the Notion of Culpa</i> .....	117
<i>Bartolus' System</i> .....	118
<i>Legal Humanism and the Reaction Against the Bartolistic Method</i> ..	120
<i>The Crisis of the Mos Italicus</i> .....	122
<i>Discontinuity in the Scuola Culta</i> .....	124
<i>Donellus' Work of Systematization and Rationalization</i> .....	127
<i>Culpa as Foreseeable but Unforeseen Harm</i> .....	128
<i>The Formative Elements of the Principle of Compensation</i> .....	131
<i>Toward the New Era</i> .....	135

PART TWO

**The Principle of Fault in the Modern Codifications**

<b>The Intellectual Formants of the Modern Codifications</b>	<b>139</b>
<i>Elements of Continuity in the Transition to the New Era</i> .....	140
<i>The Schools of Natural Law</i> .....	142
<i>Grotius' Paradigm of Civil Liability</i> .....	143
<i>Fault, Imputability, and Blameworthiness in the Assessment of Liability: Grotius' Principle of Compensation</i> .....	145

<i>The Unstable Coupling of the Principle of Fault and Equitable Decision-Making</i> . . . . .	147
<i>Rights and Remedies in the Law of Negligence</i> . . . . .	149
<i>The Tentative Definition of the Principle of Fault in the Works of Domat and Pothier</i> . . . . .	151
<i>The Modern Codifications</i> . . . . .	154
<b>Neminem Laedere and the French Codification</b>	<b>157</b>
<i>The Ideal of Neminem Laedere at the Basis of the French General Formula of Liability</i> . . . . .	158
<i>Noble Origins and Interpretative Difficulties of Article 1382</i> . . . . .	159
<i>Discontinuity in the French Tradition: German Influence on the Interpretation of Neminem Laedere</i> . . . . .	161
<i>Doctrinal Declamations on Fault Liability: The Return to the Tradition of Domat and Pothier</i> . . . . .	164
<i>Qui Suo Iure Utitur Neminem Laedit</i> . . . . .	165
<i>The Uncertain Boundaries of the Principle of Fault</i> . . . . .	168
<i>Unlawfulness and Culpability in the System of Planiol and Savatier</i> . . . . .	170
<i>Cryptotypes and Synecdoches in the French System: General Formulae and Operational Rules</i> . . . . .	173
<i>The Subjective Element of the Principle of Fault Between Objectivity and Individualization</i> . . . . .	178
<i>Statutes and Case Law in the Formulation of the Rule of Negligence</i> . . . . .	181
<b>Unlawfulness and Culpability in the German Approach</b>	<b>184</b>
<i>Individual Freedom and Liability</i> . . . . .	186
<i>Unlawfulness and Faultiness in the Assessment of Liability</i> . . . . .	189
<i>Practical Problems in Distinguishing Between the Subjective and Objective Elements</i> . . . . .	192
<i>The Doctrine of Culpa in the German Law of Civil Liability</i> . . . . .	194
<i>The Claimed Objectivity of the Notion of Negligence</i> . . . . .	196
<i>Internal and External Care: The Double Path of the German Notion of Negligence</i> . . . . .	198

*Conduct Rules and Decision Rules in the German Standards of Liability* .....200  
*The Criterion of Efficient Behavior in the Evaluation of Negligence* ..204  
*Judicial Discretion and the Safety Valve of the German Negligence Process* .....205

PART THREE

**Judicial Evaluation of Negligence in the Common Law Tradition**

**The Paradigm of the Reasonable Person in the Common Law** ..... 213

*Standards of Conduct and Judicial Assessment of Negligence* ..... 213  
*Objective Versus Individualized Parameters* ..... 216  
*From the First Cases to a General Principle of Liability* ..... 217  
*Specific Activities and Generic Activities: Single Rule with Different Standards?* ..... 221  
*Evolution of the Criteria Used in the Judicial Evaluation of Negligence in the Common Law Tradition* ..... 224  
*Role of Customs in the Evaluation of Negligence* ..... 226  
*The T.J. Hooper Case* ..... 228

**From Reasonableness to Paradigms of Rationality** ..... 232

*The Magnitude of the Risk: The Stochastic Element of the Formula of Liability* ..... 234  
*Social Value of the Risk-Creating Activity: An Unspoken Element of the Paradigm of Liability?* ..... 237  
*The Learned Hand Formula of Negligence* ..... 238  
*Hand Formula and Calculus of Risk* ..... 241  
*The Balancing of Interests: The Utility of the Conduct in the Carroll Towing Case* ..... 243  
*Difficulties in the Enforcement of the Hand Formula* ..... 247

<i>The Hand Formula: Between Individualized and Abstract Standards</i>	.248
<b>The Average Standard in Non-Average Situations</b>	<b>253</b>
<i>The Abstraction of the Initial Definitions</i>	.254
<i>Towards More Individualized Evaluations</i>	.257
<i>Mental Ability of the Tortfeasor</i>	.258
<i>Relevance of Physical Handicaps in the Judicial Evaluation of Negligence</i>	.265
<i>Relevance of the Tortfeasor's Age in the Judicial Evaluation of Negligence</i>	.271
<i>Ignorance and False Knowledge of Facts in the Judicial Evaluation of Negligence</i>	.277
<i>Skills and Above-Average Knowledge in the Evaluation of Negligence</i>	.280
<i>Further Refinement of the Learned Hand Formula of Negligence:</i>	
<i>Awareness of the Risk and Cost of Discovery</i>	.287
<i>An Overview</i>	.289
<b>Negligence Liability in the Louisiana Civil Law Tradition</b>	<b>290</b>
<i>Origins of the Code: A Mixed Ancestry</i>	.291
<i>The Fight for Codification</i>	.294
<i>From the Digest of 1808 to the Present Civil Code</i>	.298
<i>The Evolution of Liability Rules in the Codifications of Louisiana: The Core Principle of Fault</i>	.303
<i>The Evolution of Vicarious Liability in Louisiana: A Paradigm of Fault Without Culpability</i>	.306
<i>The Balancing of Risk and Prevention: The Principle of Fault in Louisiana</i>	.319
<i>The Sphere of Duty: Protected and Unprotected Interests</i>	.323
<i>Unspoken Elements of the Principle of Fault in Louisiana</i>	.328
<i>Louisiana Law of Torts: A Case Law Approach in a Mixed Jurisdiction</i>	.331

PART FOUR

**Principle of Fault and the Judicial Enforcement of the Rule of Negligence**

<b>Negligence and Individuality</b>	<b>341</b>
<i>Subjective versus Objective Negligence</i> . . . . .	343
<i>The Difficult Task of Judicial Decision-Making</i> . . . . .	353
<i>A Dramatic Choice?</i> . . . . .	355
<i>The Subjective Elements of the Rule of Negligence</i> . . . . .	357
<i>Individuality in the Enforcement of the Rule of Negligence</i> . . . . .	359
<i>The Objectivity of the Standard</i> . . . . .	361
<i>Objective Fault, Imputability, and Foreseeability</i> . . . . .	363
<i>Imputability and Free Will</i> . . . . .	365
<i>Objective Fault and Foreseeability</i> . . . . .	366
<i>The Foreseeability Test: One More Word on the Latent Gaps of Negligence Rules</i> . . . . .	368
<i>Uses and Limits of the Notion of Rational Behavior</i> . . . . .	370
<b>Legalism and Formalism in the Law of Negligence</b>	<b>373</b>
<i>The Rules that Guide Decision-Making in Negligence Cases</i> . . . . .	375
<i>Legalism and Formalism in the Process of Conceptualization of Liability</i> . . . . .	379
<i>Judicial Interpretation and the Doctrine of Precedent: The Separation-of-Powers Folklore</i> . . . . .	381
<i>Judicial Discretion and the Dogma of Certainty in the Law of Negligence</i> . . . . .	386
<i>Significance of Case Law and Doctrines of Precedent in the Law of Negligence</i> . . . . .	394
<i>Deductive Reasoning and Discretion</i> . . . . .	396
<i>Rules and Equitable Concerns in Judicial Interpretation</i> . . . . .	400
<i>The Limits of Deductive Reasoning in the Tort Process</i> . . . . .	402

<b>Differentiated Temporal Effects of the Rule of Negligence</b>	<b>406</b>
<i>The Unstable Link Between Negligence Rules and Paradigms for Their Implementation</i> .....	407
<i>The Latent Side of Legal Uncertainty</i> .....	410
<i>The Principle of Fault and the Unpredictability of Judicial Outcomes</i> .....	413
<i>The Natural Elasticity of the Rule of Negligence</i> .....	416
<i>An Impossible Reconciliation?</i> .....	421
<i>The Tension Between Discretion and Certainty: The Case of Non-Average Individuals</i> .....	424
<i>Internal Inaccessibility and Patterns of Judicial Adjudication in the Law of Negligence</i> .....	430
<i>Unveiling the Dichotomies of the Negligence Process</i> .....	434
<i>A Postscript on the Notion of Negligence in the Comparative Fault Analysis</i> .....	437
<b>Conclusion: The Difficult Balance</b>	<b>441</b>
<i>Index of Authors</i> .....	445
<i>Note on the Author</i>	459