Restatement Second of Torts

§ 197. Private Necessity

(1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to

(a) the actor, or his land or chattels, or

(b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.

(2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

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KEETON, "CONDITIONAL FAULT IN THE LAW OF TORTS", 72 HARV. L. REV. 401, 410-11, 414-20 (1959)

III. UNJUST ENRICHMENT AND VINCENT v. LAKE ERIE TRANSP. CO.

It is often suggested that *Vincent v. Lake Erie Transp. Co.*[21] is explainable as a case of unjust enrichment — that is, the shipowner who kept his ship at the dock through the storm rather than risk harm to it in the open water was enriching himself at the expense of the dockowner whose dock was damaged as the ship beat against it.[22] But explaining *Vincent* by a generalization that enrichment through another's loss is a ground for liability may open a door to considerable extensions of "unjust enrichment." Professor Dawson's comment, though made without particular reference to disputes about ships and docks, is peculiarly apt in this context:

> "[A] general principle prohibiting enrichment through another's loss appears first as a convenient explanation of specific results; it is an instrument for quite practical and intelligible purposes. Yet once the idea has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock."[23]

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[21] 109 Minn. 456, 124 N.W. 221 (1910). Defendant's ship was moored to plaintiff's dock for unloading; a storm arose and had grown violent by the time unloading was completed. The lines between the ship and the dock were kept fast, and as soon as one parted or chafed it was replaced. The wind and waves constantly pitched the ship against the dock, causing damage to the dock fixed at $500. Defendant was held liable.

[22] Among the authorities supporting this explanation is RESTATEMENT, RESTITUTION § 122 (1937):

> A person who is privileged to harm the land or chattels of another while acting to preserve himself or a third person or to preserve his own things or those of a third person is under a duty of restitution for the amount of harm done, except where
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> (a) the harm which he seeks to avert is threatened by the things which he destroys or by the tortious conduct or contributory fault of the owner or possessor, or
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> (b) his act reasonably appears to be necessary to avert a public catastrophe, or
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> (c) he is exercising his privilege as a member of the public to enter land adjacent to a highway which has become impassable.

See also Bohlen, *Incomplete Privilege To Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926).

[23] DAWSON, UNJUST ENRICHMENT 8 (1951). The passage continues:

> This temporary intoxication is seldom produced by other general ideas, such as "equity," "good faith," or "justice," for these ideals themselves suggest their own relativity and the complexity of the factors that must enter into judgment. The ideal of preventing enrichment through another's loss has a strong appeal to the sense of equal justice but it also has the delusive appearance of mathematical simplicity. It suggests not merely the need for a remedy but a measure of recovery. It constantly tends to become a "rule," to dictate solutions, to impose itself on the mind.

A. Gain and Loss

The use of "unjust enrichment" to explain liability in cases like *Vincent* presses us to recognize that the term "enrichment" includes not only gain and avoidance of loss, but also avoidance of *risk* of loss.[24] If it is proved at trial that the ship would have been lost had it left the dock, the case presented is avoidance of loss. On the other hand, if it is proved that there was only a chance of its being lost (let us say, a one-in-ten chance) and that probably the ship would have suffered neither damage nor destruction, but that a prudent shipowner would not have taken that chance, the case presented is avoidance of *risk* of loss. If we do not consider the latter a kind of gain, the case for restitution disappears. It is not a satisfactory answer to this argument that the shipowner received the use of the dock. If no special weight is given to the purpose of that use, the measure of the gain should be rental value.[25] If, on the other hand, the purpose of the use is considered, it appears that the value to the shipowner is in the avoidance of risk of loss. Thus we are pressed to recognize avoidance of risk of loss as a kind of gain, or else to deny restitution in such cases while granting it in cases involving avoidance of loss. But realization of advantage or avoidance of disadvantage to the shipowner at the expense of the dockowner is as clear in one case as in the other. Arguably even if the ship is lost despite the reduction of risk by remaining at the dock, the shipowner has avoided a disadvantage at the expense of the dockowner. But if the ship is saved, the avoidance of disadvantage the expense of the dockowner seems beyond dispute.

C. *Justification*

Still another trap awaits us. As already noted, it is not merely enrichment, but rather unjust enrichment, which must be found as a basis for liability. Our daily lives are filled with activities which change the allocation of advantages and disadvantages among us, but do not amount to unjust enrichment. A common example is the nonnegligent driving of one's automobile. It increases risks to others while gaining the benefits of rapid and convenient travel for oneself. It might be said that there is no change in the legal aspect of the allocation of risks in this instance, because we assume as a starting point that each citizen is subject to the legal risk of physical harm from nonnegligent driving. But if we decline to assume this legal conclusion in describing the circumstances under comparison, it is apparent that there is a change in the factual aspect of the risk to each one of us in the vicinity of a nonnegligently operated vehicle. Thus there is a kind of enrichment of oneself to the detriment of others when one operates an automobile nonnegligently; it is not, however, unjust enrichment. It does not give rise to liability.

Another common form of enrichment which is not unjust enrichment is the use of one's own land, for example by building a service station upon it, which interferes with the use and value of adjoining lands but, given all the circumstances, falls short of being an unreasonable interference and thus a nuisance. Substantial changes in land use usually affect the value of other land in the vicinity. But the law of nuisance does relatively little in the way of compensating for this shifting of values, and little more has been done outside the law of nuisance.[28]

Illustrations could be multiplied, but these should serve to make the point that in reaching the conclusion that the shipowner was enriched unjustly at the expense of the dockowner one passes through a debatable step of assertion, explicitly or by assumption, that the new allocation of advantages and disadvantages is legally improper (either because of its nature, or because of the method by which it was brought about, or because of a combination of the two). It is apparent, on reflection, that most and perhaps all activities commonly assumed to be permissible lead to consequences which amount to enrichment to the detriment of another in the broad sense of changes in the allocation of advantages and disadvantages, especially when we regard reduction of risk as an advantage and increase of risk as a disadvantage.

D. *Is Use or Intended Impact Essential to Liability?*

Arguably one may distinguish between enrichment gained by using another's property or causing an intended impact upon it and, on the other hand, enrichment gained by causing a risk of harm to another's property without using it. The same distinction might be made between using another's person or causing an intended impact upon it and, on the other hand, causing a risk of harm to his person without using it. Thus the person who, to protect himself against assailant A's gunshots, takes cover behind bystander B, is using B's person as a shield and might be held liable for resulting harm,[29] whereas the one who shoots back at A in self-defense is merely causing a risk of harm to bystander B and, if not negligent, is not liable even though harm within that risk results.[30]

Such a distinction is implicit in the terms of incomplete privilege as it has developed in tort law,[31] and in a comparison between the treatment in tort law of emergency cases in the area of negligence and those in the area of intentional torts. Defendants A and B, driving down the highway one behind the other, are confronted with a sudden emergency which arises without negligence on the part of either. Defendant A makes a prudent decision to swerve, realizing that there is a risk of his striking the parked and unoccupied car of P, but hoping that he can stop before doing so. The impact of his car upon P's car is neither intended nor negligent, and he is not held liable. Defendant B makes a prudent decision to swerve, realizing that he will certainly strike Q's parked and unoccupied car, but realizing also that the danger to himself and his car will be much greater if he takes any other available choice. He has exercised the incomplete privilege to cause an intended impact on the chattel of another to benefit himself and is held liable for the harm done to Q's car.[32]

Of course, it is a commonplace observation that two fact situations involving small differences fall on opposite sides of a line between liability and nonliability. The criticism that two cases so nearly alike should not be treated so differently could be made as to two cases barely on one side and the other of almost any other line between liability and nonliability.[33] Nevertheless, the similarity between these cases suggests at least that the legal rule which treats them differently, though well entrenched, may not be impregnable.

Vincent can be sustained without attack upon this distinction, since the shipowner was using the dock. Indeed, the distinction may serve to reconcile cases which have reached the result of nonliability in circumstances rather similar to those of *Vincent*.[34] Nevertheless, the use of the rationale of unjust enrichment to explain *Vincent* suggests that gaining advantage at another's disadvantage is the basis for liability imposed on the user. The fact that advantage has been gained at another's disadvantage is equally clear where there has been no use but rather a reduction in risks of loss to the actor and an increase in risks of loss to the other. The distinction between using another's person or property and increasing risks to his person or property may be useful in expressing a limit in scope of the concept of unjust enrichment as customarily understood today; but it is far from clear that this limit is sound. Perhaps better methods can be found for fixing essential limits upon the generalization that enrichment through another's loss is a ground for liability.

IV. Conditional Fault

A. Definition and Illustration

The broad concept of unjust enrichment implicit in *Vincent* involves us in considerations relevant to the whole range of tort law. Even in the absence of contributory fault, tort law sometimes holds the shifting of advantages and disadvantages permissible. This may be done by saying that there is no prima facie tort, as in the illustration of a service station which interferes with use of adjoining lands short of a nuisance, and also in cases of prudent motoring, prudent construction and use of a railroad grade crossing rather than a more expensive overpass, and permissible puffing of one's wares. At other times this is done by saying that there is a privilege, as in cases of self-defense and cases of defamatory communication in the course of judicial proceedings. What determines whether such enrichment is unjust or permissible? What determines whether conduct which gains advantages for the actor while causing disadvantages to another gives rise to liability?

The answer in most of tort law has been based on fault. Cases such as *Vincent*, on the one hand, and on the other hand cases of strict liability, as for ultrahazardous activities, have been regarded generally as independent diversions from the main theme of fault.[35] But it is useful to view them as closely related aspects of a single concept which, though different from fault as we use it in tort law generally, bears some important similarities. Though there is no magic in the term, "conditional fault" is a convenient way to designate this concept.

Perhaps the concept of conditional fault can best be introduced by some hypothetical cases. As to each case, ask yourself whether the conduct of the actor is blameworthy. "Blameworthy" is being used here in the extra-legal sense of something the actor ought not to do, by some standard of judgment other than a legal standard — *i.e.*, by one of that group of standards ordinarily referred to as moral standards. In view of the ambiguities in the word "blameworthy," it may be helpful to consider these subsidiary questions: Apart from the question whether the actor's conduct falls below standards enforced by legal sanction, does it fall below standards which you would consider appropriate for guiding your own conduct? For evaluating the conduct of another? Does it fall below standards generally accepted in the community as appropriate for guiding and evaluating the conduct of an individual?

Case I–A: The actor is a person engaged in nonnegligent blasting. Before commencing his operations, he posted a bond for payment of damages resulting without negligence, as well as those negligently caused, and in an amount which a prudent observer would consider adequate to cover all injuries of which there is any substantial risk. I assume that substantially all who consider this case will answer that there is nothing morally blameworthy in this conduct.

Case I–B: The situation is the same as in Case I–A, except that the actor has posted only a bond to cover injuries resulting from negligence, and no bond to cover the risk of injuries from nonnegligent blasting, and he is a shoestring operator with no financial assets. He cannot pay for certain injuries which experience with blasting has taught us may well occur. Is his conduct blameworthy? I suggest that most persons will answer "yes." He ought not to engage in blasting operations, even though conducted with great care, if he is unprepared to compensate for resulting harm. It has been man's experience that blasting, even when conducted with great care, involves a severe risk. That risk should not be created, even to gain the benefits of improved, less expensive, socially useful construction, without making provision for compensation of injuries.

Case II–A: The actor is a shipowner, and has no contractual arrangement with the owner of a dock. To avoid the risk of loss of the ship or severe damage in an impending storm, the shipowner brings his ship to the dock and remains there through the storm, knowing that it is likely that damage will be done to the dock.[86] He does so with the intention of paying for such damage,

[86] *Cf.* Ploof v. Putnam, 81 Vt. 471, 71 Atl. 188 (1908). This variation on the fact situation in *Vincent* is used here to avoid distractions incident to the problem of construing the contract between the parties in *Vincent*. See note 26 *supra*.

and in fact does pay for all the damage to the dock which occurs. I assume, again, an answer that there is nothing morally blameworthy in this conduct.

Case II–B: The situation is the same as in Case II–A, except that the actor has no intention of paying for the damage to the dock, and refuses to do so voluntarily. I suggest that many will answer "yes" — his conduct is morally blameworthy.

Case III–A: The actor is a person engaged in a business — any business involving an ordinary degree of risk to its employees. Let us say he is operating a grocery store. He is a person of very limited assets, but he carries workmen's-compensation insurance, and thus provides scheduled benefits even for the injuries suffered by the employee who negligently slips on a banana peel which the employee himself has dropped. There is nothing morally blameworthy in the employer's conduct.

Case III–B: The situation is the same as in Case III–A, except that the employer does not carry any insurance covering injuries to his workers. I suggest that many persons will answer "yes" — his conduct is morally blameworthy. Moreover, this same answer will be given by many if the facts are changed to the case of an employer with very limited assets who carries only liability insurance and no workmen's-compensation insurance, and whose business is in a jurisdiction where the statutes do not require the carrying of workmen's-compensation insurance, but merely seek strongly to encourage the practice by the statutory withdrawal of common-law defenses. That is, the sense of moral obligation to carry insurance for the protection of workers, though interrelated with the legal obligation, is more fully developed than the latter.[87]

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F. The Moral Element in Conditional Fault

In the controversial writings about the basis of liability for harm caused by nonnegligent, risky activity, the question whether such liability can be brought within a rubric of "fault" has been a point of contention. It has been noted that in part the controversy is one of definition.[64] "Fault" has been used to characterize, first, individual conduct falling short of some set of generally accepted moral standards for individual behavior, second, individual conduct falling short of a legal standard for determining whether some relief should be granted, and third, individual conduct falling short of standards for judging whether conduct is socially desirable or instead is antisocial. These different senses are suggested by the terms "individual fault," "legal fault," and "social fault."

Plainly the concept of "legal fault" is not helpful in explaining the basis of liability. It is a metaphorical appeal to include within "fault" those cases of legal liability which do not involve moral blameworthiness, either individual or social.[65] The term "fault" used in any sense which strips the moral element away and substitutes a purely legal meaning becomes merely another way of saying the actor is subject to legal liability.[66]

Some writers have found a concept of social fault underlying liability for a harm caused by nonnegligent, risky conduct,[67] but most have balked at the notion that there is individual fault in these cases.[68] If the speculations about the illustrative cases given above are sound, however, those actors who made no provision for compensating the victims of their activities were individually blameworthy under moral standards generally accepted today, though the quality of blame is different from that found in most cases of negligent or intentional torts. That difference justifies the use of different sanctions by the courts, but it does not justify the conclusion that the use of any sanction in the cases of conditional fault is a departure from the general principle of tort law that the shifting of loss is based on individual fault.

The moral element in the legal rules based on conditional fault involves more than the mere fact that they do not offend the community's sense of fairness. These types of cases do not present situations of moral indifference to the choice of one or another method of social engineering. Moreover, the moral element is not adequately explained by the suggestion that the conduct of the individual employer or blaster has been antisocial but not blameworthy when no provision has been made for compensation of the expectable injuries from nonnegligent operations. Social morality is an important influence on law, but there is in these cases a sense of blame against the individual as well. Of course the assertion that individual blameworthiness is sensed in these cases is not demonstrable by logic. Rather its validity is dependent upon an observation of the moral views of the community. The appeal for the reader's agreement with this assertion is an appeal for confirmation from his own observations.

To say that a moral discrimination as to individual blameworthiness underlies the legal discrimination between prudent blasting and prudent motoring is not, however, to say that we can usefully seek or express the requisites of legal liability in terms of the existence or nonexistence of blameworthiness. We do not do so with respect to traditional theories of liability for fault, such as negligence, nor should we hope to do so with respect to this developing area of liability for nonnegligent, risky conduct. For legal standards more rigid content than that of moral standards is needed in order to serve the interests of stability, predictability, and impartiality in the administration of justice. Inevitably the question of blameworthiness, either as it was asked in the illustrative cases in this article or in some other form, will evoke more differences in its responses than would be tolerable for legal standards.

The references in this article to moral standards generally accepted in the community as appropriate for judging the moral quality of an individual's conduct are not intended to suggest that there is a community moral sense which is an existing datum awaiting our discovery and application. Rather, this community moral sense is something in the process of articulation. It is more in the nature of a supposed coincidence, for the time being, of an indeterminate number of potential opinions about the moral quality of certain conduct. It is a supposed rather than certain coincidence of potential rather than actual opinions, because the questions are often of a type as to which few persons have opinions, and fewer still have considered opinions. The number is indeterminate because legal developments are not guided by such a precise rule as, for example, the majority view; rather, as new moral standards develop, either more or less conducive to loss shifting than the old, legal developments often lag until there is overwhelming acceptance of the moral standards. Occasionally, on the other hand, legal developments give sanction to evolving moral standards which would otherwise be unacceptable to the majority.

EPSTEIN, "A THEORY OF STRICT LIABILITY,"
2 J. LEG. STUD. 151, 158-60, 173
(1973)

The result in *Vincent* seems inconsistent with either of the customary explanations, moral or economic, of negligence in the law of tort. There is no argument that the conduct of the defendant was "blameworthy" in any sense. The coercion on him was great, even though not imposed by some human agency. Any person in the position of the defendant's captain would have made the same choice under the circumstances. It is true that he knew that his conduct could damage the dock, but nonetheless the necessity of the situation would serve as an adequate defense against any charge of intentional wrongdoing. Similarly, if the economic conception of negligence is adopted, the same result must be reached once it is admitted that the conduct of the defendant served to minimize the total amount of damage suffered; the expected benefits of further precautions were outweighed by their costs.

Had the Lake Erie Transportation Company owned both the dock and the ship, there could have been no lawsuit as a result of the incident. The Transportation Company, now the sole party involved, would, when faced with the storm, apply some form of cost-benefit analysis in order to decide whether to sacrifice its ship or its dock to the elements. Regardless of the choice made, it would bear the consequences and would have no recourse against anyone else. There is no reason why the company as a defendant in a lawsuit should be able to shift the loss in question because the dock belonged to someone else. The action in tort in effect enables the injured party to require the defendant to treat the loss he has inflicted on another as though it were his own. If the Transportation Company must bear all the costs in those cases in which it damages its own property, then it should bear those costs when it damages the property of another. The necessity may justify the decision to cause the damage, but it cannot justify a refusal to make compensation for the damage so caused.

The argument is not limited to the case where the defendant acts with the certain knowledge that his conduct will cause harm to others. It applies with equal force to cases where the defendant acts when he knows that there is only a *risk* that he will cause harm to others. In *Morris v. Platt*,[19] the plaintiff, 2

requested a jury instruction that the defendant should be found liable where he accidentally shot the plaintiff in an attempt to defend himself against an attack by third persons, even if he acted prudently under the circumstances. The court rejected that request and held instead that the plaintiff, even if an innocent bystander, could not recover for his injuries; the accident had been "inevitable."

Here I wish to concentrate upon only one difference between the two cases.[20] In *Morris* the only risk the defendant took was that his conduct would harm the plaintiff, while the defendant in *Vincent* knew that such harm would result as a matter of course. Regardless of the substantive theory of liability adopted, the cases cannot be distinguished on this ground.[21] . . .

Morris, moreover, is not distinguishable from *Vincent* on any principled ground even if the *Carroll Towing* formula is rejected as the rule of substantive liability. In the discussion of *Vincent* the argument proceeded on the assumption that the defendant must bear the costs of those injuries that he inflicts upon others as though they were injuries that he suffered himself. The argument applies equally to cases where there is only the risk of harm. If the defendant in cases like *Morris* took the risk of injury to his own person or property, he would bear all the costs and enjoy all the benefits of that decision whether or not it was correct. That same result should apply where a person "only" takes risks with the person or property of other individuals.[22] There is

[20] See p. 175, *infra,* for a discussion of the relationship between the plea of compulsion by a third person and the plea of necessity.

[21] Seavey appears to take the opposite view in his discussion of the risk principle in negligence cases. Thus, he argues that some of the elements to be balanced in negligence cases

> . . . are not considered when the actor knows or desires that his conduct will result in interference with the plaintiff or his property. Thus if, to save his life, A intentionally destroys ten cents worth of B's property A must pay; if, however, he takes a ten per cent chance of killing B in an effort to save his own life, his conduct might not be found wrongful, although obviously B would much prefer, antecedently, to lose ten cents worth of property than to submit to a ten per cent chance of being killed.

Warren A. Seavey, Negligence—Subjective or Objective? 41 Harv. L. Rev. 1, 8, n. 7 (1927).

[22] "But so long as it is an element of imposed liability that the wrongdoer shall in some degree disregard the sufferer's interests, it can only be an anomaly, and indeed vindictive, to make him responsible to those whose interests he has not disregarded." Sinram v. Penn. R.R., 61 F.2d 767, 770 (2d Cir. 1932) (Judge Hand). The hard question is why one man should ever be permitted to "disregard the sufferer's interests."

no need to look at the antecedent risk once the harm has come to pass; no need to decide, without guide or reference, which risks are "undue" and which are not. If the defendant harms the plaintiff, then he should pay even if the risk he took was reasonable just as he should pay in cases of certain harm where the decision to injure was reasonable.[23]

[23] Bohlen argues that the defense of necessity should be admitted when the defendant seeks to protect not only his own interests but those of society, on the ground that "one who acts as a champion of the public should be required to pay for the privilege of so doing." Francis H. Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality, 39 Harv. L. Rev. 307, 317-18 (1926). But there is no reason why the plaintiff should be required to bear that loss either. It is true, as Bohlen suggests, that the ideal solution may be to have the society as a whole bear those costs, but that prospect does not help in the resolution of the case as between these two parties to the suit.

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But even after these odd cases are put to one side, the paradigm of assault does raise problems of proof that are not present in trespass cases since the allegation "*A* frightened *B*," unlike the allegation "*A* hit *B*," can be proved in the given case only after the responses of *B* are taken into account. *Courvoisier v. Raymond*[86] puts the issue well, even though it is the *defendant* who raises the issue of assault as an affirmative defense. The plaintiff was a plainclothesman who was sent to investigate at the scene of a riot in a small frontier town; the defendant was the owner of a store which had already been robbed several times during the course of the evening. When the defendant saw the plaintiff, he thought that he intended to rob the store and shot him. Under a theory of strict liability, the statement of the prima facie case is evident: the defendant shot the plaintiff. The only difficult question concerns the existence of a defense which takes the form, the plaintiff assaulted the defendant. That question is a question of fact, and the jury found in effect that the plaintiff did not frighten the defendant into shooting him. Rather, the defendant either made the judgment to shoot the plaintiff in light of all that he knew about the situation or was frightened by the activities of third persons. One could, perhaps, quarrel with that determination, but at least the answer put is to the right question, a question that does not arise where physical invasions are in issue.

The result in *Courvoisier* was much less satisfactory when the case was taken on appeal. The court reverted to the traditional models that predicate responsibility on negligence or intent, and the choice of theories again affected the outcome of the case. The court held that the defendant should be given an opportunity to prove in justification of his act that he acted reasonably and in apparent self-defense given the riot, even though he intended to hurt the plaintiff. Unlike the court in *Vincent*, it allowed the defendant to shift his problems to the plaintiff.