Negligence


The degree of an agent’s blameworthiness for unjustified wrong-doing varies with the mental attitude the agent has at the time of the action: other things being equal, the highest degree of blameworthiness attaches to *purposeful* wrong-doing (the agent intends to commit the wrong), but progressively decreases if the agent acts *knowingly* (the agent believes the action is wrong), acts *recklessly* (the agent believes there is a substantial risk of serious wrong), or acts *negligently* (see BLAME; RISK). In all these cases except negligence the agent is aware that the act is or risks being wrong. Most cases of negligence, however, do not involve conscious advertence to the risk of wrong; the agent’s “mental attitude” is lack of awareness. For this reason the common assumption that negligent wrongful action is blameworthy has puzzled many commentators, and sometimes been rejected.

Negligent conduct may include omissions (see OMISSIONS) as well as actions, and may include other kinds of wrongs beyond harms (see HARM). In some actions commonly described as negligent, the agent knowingly acts in a manner than falls below the standard of care applicable to such activities. She is aware of a small risk created by her action, but disregards it. Thus a technician negligently washes the lab glassware, knowing it ought to be washed thoroughly, but working hurriedly and consciously failing to scrub every surface. Because of her negligent work, we hold the technician blameworthy when the unclean glassware contaminates an experiment. No bright line divides such *advertent negligence* from recklessness; the difference depends on the probability and gravity of the harm. Cases of advertent negligence fall easily within the
spectrum of culpable mental states, since they involve the agent’s awareness of the unjustifiable risk she creates. Like cases of recklessness, however, cases of advertent negligence give rise to questions about moral luck (see MORAL LUCK): if two technicians wash glassware with equal negligence, but only one contaminates a later experiment, are they both equally blameworthy?

The more puzzling cases are those of inadvertent negligence: cases in which the agent is not aware at the time that her action unjustifiably risks wrong-doing, but who should have been aware of this risk. Many accounts of responsibility (see RESPONSIBILITY) and blameworthiness require satisfaction of an epistemic condition: they hold that an agent cannot be blamed for causing harm if the agent is unaware that her action either risks or will lead to harm (Sher 2009: Chapter 1; Alexander and Ferzan 2009: 70-71). Ignorance that one’s action will have a harmful upshot is a paradigmatic example of the kind of mental state that excuses unjustifiable action. One reason ignorance excuses is that it seems unfair to hold an agent responsible for failing to meet some requirement when she is unaware the requirement demands something of her in the present case. Since the inadvertent negligent agent is unaware that her action risks some harm, it appears that she has this paradigmatic excuse, so how can she be blameworthy when the harm ensues?

In discussing this issue, it is helpful to distinguish between tracing cases and non-tracing cases of negligence, both of which can be understood as cases of culpable ignorance (King 2009: 579-580). In tracing cases, the relevant episode involves a sequence of two actions: a benighting action and a subsequent unwitting negligent action. The benighting action is an earlier action in which the agent ought to obtain information
relevant to her subsequent choice but culpably fails to do so. Her lack of information subsequently leads her to act unwittingly to cause or risk harm. Consider a doctor who fails to read the most recent issue of his medical journal (his benighting act). If he had read the journal he would have discovered that the traditional treatment for premature infants has been shown to lead to blindness, and should be abandoned. In a later emergency he administers the traditional treatment to a premature infant (the unwitting negligent act), and the infant is blinded. On many accounts, he is blameworthy for administering the traditional treatment, and his blameworthiness for it \textit{traces back} to his culpability for not reading the journal.

Theorists have argued that the epistemic condition for blameworthiness is satisfied, albeit indirectly, in tracing cases. At the time of the unwitting negligent act the agent may be unaware that his action risks harm, but at the time of the earlier benighting act, he was aware that his failure to acquire information would unjustifiably risk his subsequently causing harm. These theorists understand tracing cases as special cases of a broader category of episodes in which an earlier culpable act of an agent prevents subsequent appropriate action. A driver who drinks heavily and then drives, causing an accident, is commonly viewed as blameworthy for the accident. Although at the time of the accident she lacked the degree of physical control normally required for moral responsibility, she is nonetheless judged blameworthy because her drinking culpably caused her later impairment. Her culpability for the earlier act is transmitted to the later act (Rosen 2002: 62 – 63; Zimmerman 1986).

Other theorists have questioned whether blameworthiness for an earlier act is transmitted to a subsequent act in the manner claimed (Smith 1983: 543 – 571). A long
tradition holds that we judge someone blameworthy when we find fault with that person because of the reprehensible motives with which she performed the act in question. In negligent acts, however, the agent’s motives may be unimpeachable. When the doctor unknowingly chooses a harmful treatment, he is motivated by a laudable desire to save the infant’s life. There is, of course, fault to be found in his earlier motives when he failed to read his medical journal -- perhaps from laziness, or lack of concern for his patients, or a stronger desire to play golf than to update his medical knowledge. Such motives give us reason to find him very blameworthy for failing to read his journal. It is unclear, however, that they also give us reason to find him blameworthy for the subsequent well-motivated act to which his failure leads. We believe that the doctor’s failing to read his journal renders him blameworthy for the infant’s blindness, since he could foresee that his failure to read the journal might have some such consequence. But should we also hold him blameworthy for his later treatment of the infant? This would require holding the doctor blameworthy twice for the infant’s blindness – once for his benighting act, and once for his negligent act. However, it is far from clear that the doctor is more blameworthy for this sequence of acts than he would be for a single act the resulted in the same harm. Consider a situation in which the doctor’s benighting act led to a similarly harmful act on the part of a colleague. The colleague, working for a medical charity in a war zone, depends on the doctor for updates on medical advances. When the doctor fails to read his journal and so fails to alert his overseas colleague, the colleague blinds a premature infant by using the traditional treatment. In such a case the stateside doctor is blameworthy for the harm to the war zone infant. Having culpably failed to read the journal, he failed to alert his colleague to the dangers of the standard
treatment, and this failure led to the colleague’s acting in a way that harmed the infant. Is the doctor in the original case (in which he performs both the benighting act and the unwittingly harmful act) more blameworthy than he is in the second case, in which he performs only a benighting act, and his colleague performs the resultant unwittingly harmful act? If we hold that in the original case the doctor performs two culpable acts, it appears that he must be more blameworthy for this sequence of acts than he is in the second case, in which he performs only one culpable act. But it is hardly clear that he is more blameworthy in the original case than in the second case. If not, then the doctor’s culpability must accrue in virtue of the benighting act alone, and no additional blame accrues to him in virtue of the negligent act itself. This suggests that, contrary to the tracing account we are considering, blameworthiness for earlier acts is not transmitted to subsequent acts.

Some commentators might reply by claiming that we fault wrong-doers, not just for their flawed motives, but also for their flawed cognitive states. On this view, the doctor’s belief, at the time of the negligent act, that the traditional treatment is best counts as a flawed cognitive state, and grounds his blameworthiness for choosing the traditional treatment. But it is difficult to see how to pursue this argument successfully. What makes a cognitive state – a belief, for example – morally flawed? It does not appear to be the content of the belief, since a week earlier a belief with the same content would not have been morally flawed. It does not appear to be the falsity of the belief, since false beliefs often excuse rather than inculpate agents. It does not appear to be the consequences of the belief, since many beliefs lead to bad consequences but still excuse the agent for his action. Perhaps the claim is that the belief’s history renders it morally
flawed: it is the product of a culpable act. But many beliefs are the products of culpable acts, and yet are not themselves morally flawed (I steal a book and read it; my resulting beliefs are the product of a culpable act, but those beliefs are not morally flawed in themselves). And if it is claimed that the history of the belief grounds the agent’s blameworthiness, this claim seems subject to the counterargument of the previous paragraph.

Some authors who invoke the tracing explanation for why inadvertent negligent acts are culpable have claimed that we can never, or at best rarely, have enough knowledge to be certain that a given negligent act actually resulted from some past culpable failure to acquire information (Rosen 2002; Rosen 2004). Perhaps the doctor overheard someone remark that the current journal had no important articles, so he inferred that there was no hurry to read it. Should he have relied on this remark, or should he have known that the “informant” was untrustworthy on such matters? If he believed the informant to be trustworthy, was this belief based on some earlier failure to adequately investigate the informant’s judgment? Such chains of possibly negligent acts trail off into the distant past, and it may be difficult to know whether the agent was really culpable for the original act in such a chain. If so, it can be argued that we are rarely, perhaps never, in a position to ascribe blame for present negligence.

The issues in non-tracing cases are somewhat different. In tracing cases, the relevant episode involves two actions: an earlier benighting action and a subsequent inadvertent negligent action whose culpability arguably traces back to the benighting act. In non-tracing cases of negligence, there does not seem to be an earlier benighting act – there is simply the agent’s failure to advert to the potential harm at the time of action
(King 2009; Sher 2009: Chapter 2). Consider a mother who leaves her dog in the car on a hot day while picking up her child at school. Unexpectedly distracted by a dispute with the teachers, she forgets the dog and fails to return until it is too late (Sher 2009: 24).

Some theorists maintain that cases such as this are best understood as ones in which there is no earlier benighting act: the agent’s only failure is simply the failure to remember the dog. If this failure to remember can’t be traced to some earlier culpable act, how can the mother be blameworthy for her dog’s death? Failure to remember some fact, per se, is hardly the source of blameworthiness, since we non-culpably fail to remember many facts we once knew. A common strategy is to say that the mother is blameworthy for the dog’s death if a reasonable person in her situation would have remembered the dog in time. But this strategy must spell out what characterizes “a reasonable person in the agent’s situation.” Would a reasonable person have believed all the morally relevant facts about the world? Surely this standard is too demanding. Would a reasonable person have believed exactly what the agent herself believed? This standard is too lax, since the mother wouldn’t qualify as negligent. Would a reasonable person have had a better memory than the mother? But one can’t help having the type of memory one does.

Some authors argue that there is no non-arbitrary and fair way to specify what a “reasonable person” would have remembered in such a case, and hence that we cannot use the “reasonable person” standard to fix when an agent counts as culpably negligent (Alexander and Ferzan 2009: Chapter 3; Zimmerman 1986: 207; but see Westen 2009). Others have argued that even if we can characterize the “reasonable person,” requiring the agent to act as such an agent would have done makes an impossible demand on her, since she often cannot know, or at this point perform, what the reasonable person would
have done (Smith forthcoming). These considerations raise serious doubts whether negligence can be a ground for blameworthiness.

Another strategy for explaining why the mother’s inadvertent negligence is blameworthy is to say that her failure to remember the dog shows a flawed quality of will – had she cared sufficiently about the dog’s welfare, she would have remembered, so we can infer that her quality of will (or her attitude or character) is faulty on the occasion of the negligence (see CHARACTER). However, pursuing this strategy is difficult. In some cases it may be legitimate to infer the negligent agent has a flawed quality of will, but the character trait in question may be one which she has not been (or would not be) able to improve or circumvent. If so, can we fairly blame the agent for a personality flaw that she could not help having? In other cases it may not be clear that we can legitimately infer the negligent agent has a flawed quality of will. Suppose the mother has repeatedly shown marked concern for the dog’s welfare, taking costly steps to ensure its health and safety. From this one tragic instance of forgetfulness, it seems illegitimate to infer that she is not appropriately concerned for her dog (King 2009: 583 – 587).

Negligence is invoked as a consideration supporting blameworthiness in morality, but also as a consideration supporting liability for legal sanctions. In Anglo-American law, negligent conduct is widely construed as a ground for liability in tort or civil law, and even for a limited number of crimes (see TORTS, CRIMINAL LAW). Given this, and the assumption that in general a person should not be liable for legal sanctions unless he or she is morally blameworthy, the question of whether a person is genuinely blameworthy for negligence is a pressing one, since severe penalties may ride on it. In the legal context practical considerations in favor of holding a negligent person liable are
often invoked: for example, it is often argued that making people liable for negligence gives them an additional motive for taking greater care in the field of action, and so ensures that they perform fewer harmful actions. Others have maintained, however, that holding the negligent person liable cannot have any deterrent value, since the person is quite unaware that his prospective action risks harm and so cannot respond to the threat of a penalty.

The greater prevalence of liability for negligent conduct in tort law than in criminal law may be explained partly by the fact that the objective of tort law is somewhat different from that of criminal law. In the case of tort law, a chief aim is to determine which party should bear the cost of a harm, the party who suffers the harm or the party who causes the harm. Since, in Anglo-American law, there is usually an effort to impose the cost on the party who has fault in the matter (see STRICT LIABILITY), the fact that the agent who negligently caused the harm often shows some defective conduct – either at an earlier time, when she culpably failed to ascertain the risks of her action, or at the time of the negligent conduct, when she failed to advert to the risk -- it is not surprising that tort law should hold negligence a ground for liability. However, the notion of “defective conduct” appealed to in such reasoning may not require a finding of blameworthiness per se, or blameworthiness for the negligent conduct itself, as opposed to its benighting precursor.

The question of whether – and if so, why – negligent conduct is blameworthy remains under active philosophical and legal dispute.
Cross References

BLAME; CHARACTER; CRIMINAL LAW; HARM; MORAL LUCK; OMISSIONS; RESPONSIBILITY; RISK; STRICT LIABILITY; TORTS

References


Suggested Readings


