abnormally dangerous
  as test for non-reciprocal risks, 154
  as unreasonable activity level decisions, 158
Abraham, Kenneth S.
  on decision making in Vincent, 189
  on duty to investigate, 165
  on property rights in Vincent, 183
activity-level decisions
  explained, 160
  in analyzing Hammontree, 19
Adams v. Bullock, 137
  as activity level case, 163
affirmative duty, 120
agency relationship
  supplier obligations, 215
Akerlof, George A.
  and product liability, 209
altruism
  as element of social cohesion, 111
  distinguished from self-interest, 8
analytical framework for torts, 242–7
Andrews, Judge
  and duty to world, 115
assault
  and the negligence concept, 228
autonomy
  and intentional torts, 230
  as justification for Vincent, 191
  as limitation on duty, 109
  shaping other-regarding behavior, 112
baby on the tracks
  as “no-duty” paradigm, 105
  problem of ambiguity, 112
backward and forward looking, 72
Baird, Douglas G.
  game theory, 35
battery
  and negligence, 228, 232
  and reasonableness, 232
Batts v. Tow-Motor Forklift Co.
  open and obvious dangers, 203
behavioral science
  law as behavioral science, 239
  role in social cohesion, 15
benefits principle
  as applied to Vincent, 188
Berg v. Reaction Motors Div
  as reasonableness case, 167
Berry v. Sugar Notch Borough, 135, 142
Bethel v. New York City Transit Authority
  and duty to inspect, 166, 202
  decreasing utmost standard of care, 56
Bicchieri, Cristina
  game theory, 35
Binmore, Ken
  distinguishing empathy from sympathy, 42
  on Pareto efficiency, 67
  on social cohesion, 15
  on social morality, 13
blameworthiness
  distinguished from fault, 54
  blasting
    as activity level decision, 164
  Blyth v. Birmingham Waterworks Co., 137
  Bohlen, Francis
    incomplete privileges, 186
  Bolton v. Stone
    and residual risk, 175
    as activity-level decision, 164
bounded rationality
  as justification for proximate cause, 138
  Brown v. Shyne
    as frequency case, 172
  Brudner, Alan
    arguing against strict liability, 176
  burden of precautions
    in Vincent case, 187
  burden of proof
    as alternative to strict liability, 156
  burdens and benefits
    correct matching in Vincent, 184, 188
    in corrective justice, 100
  Byrne v. Boadle
    and compliance errors, 52
  Calabresi, Guido
    and duty to investigate, 166
  Cardi, Jonathan
    duty wars, 106
  Cardozo, Benjamin, 113
  and Palsgraf, 141
  Castro v. QVC Network, Inc.
    and duty to investigate, 210
  categorical imperative
    and other-regarding obligation, 77, 80
    as method of deciding, 77
  cavea emptor
    in development of service liability, 201
    in product liability, 203
  choice
    and duty, 113
    as a poor justification for Vincent, 185
    as measure of responsibility, 109
  Coase, H.R.
    his theorem as veil of ignorance, 66
  Cohen v. Petty, 108
  Coleman, Jules L.
    and justifications, xiii
    justification for Vincent, 185
    on proximate cause, 129
    on reciprocal risks, 133
    proximate cause as responsibility, 134
  Complete Family Care v. Sprinkle, 167
  compliance errors
    analyzed, 47–55
    and manufacturing defects, 48, 212
    manufacturer and physician defects, 213
    concept of law
    as behavioral science, 257
    analyzed, xx–xxii
  conditional privilege
    and Vincent, 186
  control
    as measure of responsibility, 109
  coordination problem
    and veil of ignorance, 92
    as problem of torts, 5–4, 5–6
  corrective justice
    and aggregation, 71
    and law and economics, 70
    indeterminacy of, xiii
    limited responsibility for proximate cause, 139
    nature of interpersonal comparisons, 99
    Ripstein perspective, xiv
  Cover v. Cohen
    and duty to investigate, 210
  Cruz v. Middlekauf Lincoln-Mercury, Inc
    and enabling torts, 121
  Cunis v. Brennan, 157
  Dari-Mattiacci, Giuseppe
    on frequency decisions, 168
  decision making
    and proximate cause, 135
    and reasonable person, 12
    as focus of reasonableness inquiry, 11
    as source of responsibility in Vincent, 189
    as unit of analysis, 239
  Derdiarian v. Felix Contracting, 142
  direct
    as test for proximate cause, 130
  distributive justice
    and enterprise liability, 158
    distinguished from corrective justice, 99
  Dobbs, Dan B.
    and proximate cause, 128
    conditional fault, 186
    misfeasance/nonfeasance, 106
    on reasonable person, 24
    res ipsa loquitur, 175
  Donoghue v. Stevenson
    and other-regarding theory, 5
  Donohue, John J.
    on activity levels, 164
  Doughty v. Turner Manufacturing Co.
    and lesser included expected harm, 148
  Dudley v. Smith
    and utmost care, 202
  duty
    absence of analytical content, 107
    as output not input, xv
Index

debates over, 106
of easy rescue, 105
risk created by others, 117
unity of concept, 117
when defendant created risk, 114–15
duty to investigate, 105
duty to rescue
as result avoided in Vincent, 191
Dworkin, Ronald
approach to Hand formula, 26
on comparing well-being, 26
easy rescue
and duty, 105
problem of ambiguity, 112
efficiency
socially constructed, 71
Elgin, Aurora and Southern Traction Co. v. Wilson, 144
empathy
and responsibilities of landlord, 40
and thin-skull rule, 40
as requirement of reasonable person, 38–41
enabling torts
determining duty, 121
enterprise liability
as a rational for strict liability, 157
endorsed in one setting, 215
two meanings, 198
Epstein, Richard A., 150
on no-duty rules, 109
Ergon, Inc. v. Amoco Oil Co., 173
Escola v. Coca Cola Bottling Co.
as activity-level decision, 164
as heightened standard of care, 204
Esper, Dilan A.
on duty, 106
evidentiary theory
for strict liability, 155
externalities
as output not input, xvii
false imprisonment
and negligence, 229, 233
and reasonableness, 233
fault
and obligations of suppliers, 222
First Nat. Bank and Trust Corp. v. American Eurocopter Corp.
on open and obvious dangers, 203
Fletcher, George
and reciprocal risks, 153
justification for Vincent, 189
on frequency of activity, 169
and utmost care, 202
foreseeability
as test for proximate cause, 130
frequency decisions
analyzed, 168
Fried, Charles
approach to welfare economics, 65
Frudkin, Noah E.
on social cohesion, 14
Gardner, John
and strict liability, 176
Geistfeld, Mark A.
and reciprocal risks, 153
disputing risk spreading, 157
justification for Vincent, 185
knowledge in intentional torts, 227
on Escola, 164, 204
on strict product liability, 195
on trade-off in torts, xix
evidentiary rational for strict liability, 155
Gilles, Stephen G.
on activity levels, 170, 171
on valuation, 26
Goldberg, John C.P.
distinguishing wrong from wrongdoing, 134
on duty, xv, 106, 116
Grady, Mark F.
and compliance errors, 47, 49
deterrence and proximate cause, 133
on deterrence, 47, 48, 49
on proximate cause generally, 130
Green, Michael D.
duty wars, 106
Greenman v. Yuba Power Products, Inc.
and shift to defects, 105
Grodley, James
justification for Vincent, 185
Guille v. Swan
as activity-level decision, 162
Hammondree v. Jenner
as example of coordination problem, 4
Hand formula
and compliance errors, 47
and corrective justice, 31
and economic perspective, 31
and other-regarding behavior, 29–31
and responsibility, 108
Hand formula (cont.)
applied, 37–45
as center of debate, 25
as coordinating device, 30
as incomplete justification, 31
in determining duty, 123
in relation to Hammontree, 18
Hardin, Garrett
and coordination problems, 6
Hay v. Cohoes Co., 161
Hayek, F. A.
information and product liability, 209
Heaven v. Pender
and duty to world, 115
Henderson, James A.
duty to investigate, 165
Hentschel v. Baby Bathinette Corp.
limiting manufacturer duty, 203
Hirschoff, John T.
and duty to investigate, 166
Holmes, Oliver Wendell
and morality of law, 55
on strict liability, 175
scope of responsibility, 177
Homac Corp. v. Sun Oil Co.
distinguished from proximate cause, 132
Home Office v. Dorset Yacht Co., 144
Horwitz, Morton
political basis for proximate cause, 132
Hughes v. Lord Advocate
analyzed, 147
Hylton, Keith N.
liability as a tax, 177
on strict liability, 163, 169
Hynes v. New York Central Railroad Co.
analyzed, 148

In re Polenis
and lesser included expected harm, 146
inadvertent errors, 53
Indiana Inner Harbor Belt Railway Co. v. American Cyanamid Co., 162
on dangerousness as a test, 174
information
and analysis of Vincent, 208–11
as justification for internalization, 191
as source of responsibility, 189
distinguishing intent from negligence, 227
information asymmetries
and offensive conduct, 233
Ingalls v. Bills
and utmost care, 202
intentional infliction of emotional distress
as negligence concept, 229, 233
intentional torts
analyzed as other-regarding behavior, 226–34
and reasonableness defenses, 233–4
compared with negligence, 229–31
interpersonal comparisons
and veil of ignorance, 92, 100
as coordinating device, 92
distinguishing welfare comparisons, 99
is and ought
from veil of ignorance, 98
J.I. Case Co. v. Sanderfur
and open and obvious dangers, 203
John T. Arnold Assocs. v. City of Wichita, 174
Jones, William K.
on evidentiary basis for strict liability, 155
on loss-spreading, 157
judge
role in determining duty, 122
role in jury cases, 119
jurisprudence
concepts of law compared, xx–xxiii
jury
instructions in proximate cause, xx–xxiii
justificational analysis
analytical content, xxiii
and human behavior, 238
and product liability, 195–8
and Vincent, 179–93
as hidden by strict liability, 151
conceptual understanding, xxi
defined, xii–xiii, xv
inadequate justification of Vincent, 179–86
Kaczorowski, Robert J.
on common carrier duties, 202
Kant, Immanuel
and consequentialism, 83–5
and humans as ends, 85–90
as extended by Rawls, 92
interpreted, 74–90
related to social cohesion, 101
relation to duty, 107
Kaplow, Louis
and welfare maximization, 70
Index

Keating, Gregory C.
and justifications, xiv
enterprise liability, 215
on duty, 106, 118
on enterprise liability, 157
on justification for Vincent, 184
on Kant, 75
on reasonable and rational, 8
on reciprocal risks, 154
reasonable person example, 32
theory compared with Ripstein’s, 158
Keeton, Robert
conditional fault, 186
Klar, Lewis N.
justification for Vincent, 185
Kluckhorn, Clyde
on social value formation, 13
Kraus, Jody S.
on determinacy, xiii
Landes, William M.
on frequency decisions, 168
on proximate cause, 153
on transactions costs, 66
law and economics
and proximate cause, 133, 139
and the Vincent case, 181
and value formation, 66
as behavioral science, 70
integrating other disciplines, 71
justification for strict liability, 159
lack of theory for strict liability, 152
relationship to corrective justice, 66
unspecified values, xvi–xvii
Leff, Arthur, xvi
lesser-included expected harm
as justification for Polemis, 147
Levmore, Saul
on misfeasance/nonfeasance, 105
liability
distinguished from responsibility, 134
Lombardo v. Hoag
as enabling tort, 121
Longneid v. Holiday
as no-duty, not privity case, 197
Lopez v. Winchell’s Donut House
and reasonable restraint, 233
loss spreading
as inadequate justification for Vincent, 182
as rationale for strict liability, 157
Lubin v. Iowa City
as strict or enterprise liability, 214
MacPherson v. Buick Motor Co.,
and duty to investigate, 165, 198
Mahone v. Birmingham Electric Co., 142
manufacturing defects
and physician defects, 213
compared with medical malpractice, 167
market failure
and customer decisions, 216
as justification for intervention, 206
McDonald's Hot Coffee Case
analyzed, 218–22
as strict liability case, 214
McDougald v. Perry
on duty to inspect, 166
McLaughlin v. Mine Safety Appliances Co.
as a no-breach case, 143
Mclean v. Burbank
and utmost care, 202
medical malpractice
compared with manufacturing defects, 167
Meier, Stephan
on causes of other-regarding behavior, 10
Miller v. Civil Constructors, Inc., 173
Mitchell v. United States, 167
Moch Co. v. Renselaer Water Co.
as related to duty, 113
moral agency
and but-for test, 136
and intentional torts, 231
and reasonable person standard, 137
and responsibility, 136
Moren v. Samuel M. Langston Co.
and duty to investigate, 210
Natural Justice, 15
negligence
actors who create risk, 114–15
and activity-level decisions, 162
and frequency decisions, 172
and intentional torts, 232
and reciprocal risks, 153
as alternative to strict liability, 151
for violations of standards, 167
incorporating strict liability, 159
risk created by others, 116–17
two kinds of cases, 114–18
negligence regime
  as inadequate for activity levels, 152
norms
  as reflections of values, 34
other-regarding behavior
  and Hand formula, 29–31
  and intentional torts, 226–34
  and reasonable person, 10
  and veil of ignorance, 45
  as central requirement, 5
  as justification for Vincent, 187
by the victim, 109
explained, 7–10
of customers, 218
of customers to customers, 217
of suppliers, 216
relationship to social cohesion, 16
ought and is
from veil of ignorance, 98
outputs and inputs
summary of, 239
Overseas Tankship (U.K.) Ltd. v. Mort’s Dock
& Engineering Co.
and foreseeability, 131
Overseas Tankship (U.K.) Ltd. v. The Miller
Steamship Co.
and foreseeability, 131
Owen, David G.
duty to investigate, 165
and duty to world, 115
analyzed, 140–1
compared with Polemis, 148
on negligence in the air, 36
Pareto efficiency, 67
Parisi, Francesco
on frequency decision, 168
Parrott v. Wells-Fargo, 137
Perry, Stephen R.
  and other-regarding theory, 5
  relating Rawls to tort theory, 92
Petition of Kinsman Transit Co. distinguished
from proximate cause, 132
philosophy
  role in social cohesion, 14
Pittsburg Reduction Co., v. Horton, 144
Proof v. Putnam
  and doctrine of necessity, 180
Porat, Ariel
  and other-regarding theory, 4
Posecai v. Wal-Mart Stores Inc.,
  and duty, 123
Posner, Richard A.
  on frequency decisions, 168
  on proximate cause, 133
  on transactions costs, 66
Powers Jr., William
  on identity of services and products, 200
  preexisting condition
  and proximate cause, 128
principles
  inadequate as sources of wisdom, 239
private law
  and distributive justice, 158
  as institutionalized social
  coordination, 237
characteristics, 241
privilege
  invoked in Vincent, 180
privity
  as proxy for no-duty, 198
  in development of service liability, 201
product liability
  and agency relationships, 206–8
  and caveat emptor, 203
  and information asymmetries, 208–11
  as analog to service liability, 200
  manufacturing defects, 213
  summary of argument, 198–200
Products Liability Restatement
and duty to investigate, 210
on frequency decisions, 171
on manufacturing defects, 167, 211
products and services
  identical as to responsibility, 200
  projects and preferences
  comparative ranking, 41
  defined, 7
property rights
  and Vincent, 182
proporionality principle
  as justification for Vincent, 188
  as unexplained justification for
  Vincent, 184
Prosser, Willaim L.
  and the citadel, 105
  on proximate cause, 132
proximate cause
  and comparative negligence, 144
  central question, 135
  relationship to duty, 136
  unjustified approaches, 133
punitive damages
and settlement values, 222

Rabin, Robert L.
enabling torts as agency relations, 200
on enabling torts, 121

Randi W. v. Muroc Joint Unified School District
reliance as duty, 121

rational and reasonable
why it is rational to be reasonable, 8

Rawls, John
as extension of Kant, 92
distinction between rational and reasonable, 8
on the categorical imperative, 77
related to social cohesion, 103
veil of ignorance applied to torts, 91–9
reasonableness
and intentional torts, 231
reciprocity
and the veil of ignorance, 95
as basic issue, 104
in norm formation, 35
of burdens, 42
reliance
as determinate of duty, 121
res ipsa loquitur
and manufacturing defects, 211
and manufacturer’s duties, 203
and residual risk, 175
as substitute for utmost standard, 203
relation to intentional torts, 234
showing flexibility of negligence, 167
used to test defendant’s veracity, 21
residual risk
defined, 159
measuring it, 172–7
responsibility for, 175–7
responsibility
and circumstances, 140
distinguished from liability, 154
Restatement Second
and theories of harms, 175
on activity-level negligence, 163
on frequency decisions, 170
Restatement Third
and liability for residual risk, 175
and proximate cause, 127
justifications for proximate cause, 131
on duty, 114
on loss spreading, 157

on water main breaks, 174
reasonable person standard, 25
risk rule, 129
Resteiner v. Sturm Ruger & Co., 173
Reter v. Talent Irrigation Dist., 174
Richter v. Limex Int’l., Inc.
and duty to inspect, 166
and duty to investigate, 210
Ripstein, Arthur
and other-regarding theory, xiv
arguing against strict liability, 176
corrective justice theory, xiv
on justification for Vincent, 183
on non-reciprocal risks, 154
on proximate cause, 131, 133
on risk ownership, 106
skepticism about veil of ignorance, 93
theory compared with Keating’s, 158
weak support for strict liability, 152
risk
and ambiguity, 112
determinate of duty, 120
distinction between reciprocal and non-reciprocal, 153
measuring residual risk, 172–7
residual risk analyzed, 172–7
responsibility for residual, 175–7
Robins Dry Dock and Repair Co. v. Flint, 197
Rosenberg, David
approach to welfare economics, 65
Rousseau, Jean-Jacques
version of the categorical imperative, 88
Rylands v. Fletcher
and reciprocal risks, 155
as activity-level decision, 161
Holmes’s view, 156
Scanlon, T. M., xiv
scope of the duty
as question for judge, 119
scope of the risk
as determinate of duty, 122
Seavey, Warren
on proximate cause, 128
Seith v. Commonwealth Electric Co., 144, 145
self-interest
as other-regarding, 9
distinguished from selfish, 9
Sen, Amartya
capabilities approach, 27
Index

service liability
   as analog to product liability, 200
services and products
   as identical as to responsibility, 200
Shapo, Marshall, S.
   on culture and law, 6
Shavell, Steven
   activity-level negligence, 180
   and welfare maximization, 70
   on duty to investigate, 165
   on frequency decisions, 168
   on loss spreading, 158
Sibley, W.M.
   distinction between rational and reasonable, 9
Simon, Herbert A.
   on bounded rationality, 138
Singel, Josef William
   on economic analysis, xvi
Sirnav v. Pennsylvania Ry Co., 135, 145
Smith v. Edwards
   as exception to thin-skull rule, 145
Smith v. Rogers Group, Inc.
   heeding presumption, 211
social cohesion
   and choice, 109
   and economic analysis, 64
   and individual decisions, 61
   and intentional torts, 229–31
   and moral agency, 138
   and proximate cause, 155
   and ranking of projects and preferences, 42
   and social morality, 12
   as a moral concept, 62
   as goal of law, 14
   as internal to the law, 17
   combining deterrence and correction, 17
   conceptual requirements, 15
   related to moral theory, 101
   relationship to other-regarding behavior, 16
social index
   and veil of ignorance, 43, 44
   combining efficiency and fairness, 67
   development of, 46
   of relative values, 42
   related to interpersonal comparisons, 100
social ranking
   described, 68
   see also social index
special relationship
   as determining duty, 120
St. Peter v. Denison, 161
Stapleton, Jane
   on proximate cause, 150
Stiglitz, Joseph
   information and product liability, 209
Stone v. Boston & Albany Ry., 144
Strauss v. Belle Realty Co.
   and cutting off liability, 115
   distinguished from proximate cause, 131
strict liability
   and activity level decisions, 19
   and compliance errors, 55
   and justificational analysis, 54
   and product liability, 205
   and supplier responsibility, 222
   applied in Hammontree, 19
   as misnomer with product liability, 194
   awkwardness in negligence regime, 151
   coherent as applied to all accidents, 150
   enterprise liability theory, 157
   in Vincent, 179
   loss-spreading rationale, 157
   restatement compared with economic approach, 159
thin justifications for, 152
Sugarman, Robert D.
   economic justification for Vincent, 181
   inadequate justifications for Vincent, 180
Sullivan v. Dunham, 162
   as activity-level decision, 162
   as reasonableness case, 167
   supplier liability
   and compliance errors, 48
Tarasoff v. Regents of University of California
   and special relationships, 120
   heeding presumption, 211
Texas and Pacific Ry. v. McCleery, 142
The Death of Strict Liability, 150
Thibault v. Sears, Roebuck & Co.
   duty for open and obvious dangers, 211
thin-skull rule
   and proximate cause, 128
   justified, 142
Traynor, Roger
   on manufacturer responsibility, 207
Tremain v. Cohoes Co., 161
trespass
   as poor justification for Vincent, 185
Trimarco v. Klein
   and duty to warn, 202
   and empathy requirement, 40
Index

**Uhr v. East Greenbush Central School District**
- and duty, 123
- unjust enrichment
  - and the Vincent case, 185
- utmost standard of care
  - analyzed, 57
  - and dimensions of duty, 57

**value formation**
- described, 33
  - in comparing projects and preferences, 32
  - values
    - as inputs, not outputs, 33

**Van Skike v. Zussman**, 137
**Vandermark v. Ford Motor Co.**, 195
**Vaughn v. Menlove**, 48

**veil of ignorance**
- and deontology, 93
- and distributive justice, 95
- and informational requirements, 98
- and "no duty" rules, 111
- and social interest, 95
- applied to Hammontree, 20, 42
- as allowing comparisons of well-being, 43
- as consequential device, 93
- as device people would choose, 96
- described, 94–9
- developed for distributive justice, 92

**Vincent v. Lake Erie Transportation Co.**
- analyzed, 179–93
- and McDonald’s hot coffee case, 219
- and obligations of suppliers, 221
  - as a fault case, 186–92
  - as reciprocal risk, 153

**Wagner v. Int’l Ry. Co.**, 145
**Wagon Mound**
- and foreseeability, 131
**Weinrib, Ernest**
- and duty, xiii
- and other-regarding theory, 4
- case against strict liability, 152, 176
- interpreting Kant, 74–90
- on Bolton v. Stone, 165
- on misfeasance/nonfeasance, 114
- Weirum v. RKO General Inc., 145
- welfare maximization
  - and social cohesion, 65
- Welfare versus Fairness, 15
- Wells, Michael, L.
  - on proximate cause, 132
- Williams v. Bright
  - avoidable consequences as proximate cause, 145
  - Williams, Glenville
    - justification for Vincent, 181
- Winterbottom v. Wright
  - standard understanding disputed, 196
- Wishnatsky v. Dailey
  - and reasonable contact, 232
- Wooderson v. Ortho Pharm. Corp.
  - duty to inspect, 166
- Wright, Richard W.
  - and other-regarding behavior, 26
  - on ends and means, 86
  - on Hand formula, 25
  - on reasonableness standard, 26
  - proximate cause as responsibility, 134

**Zaza v. Marques & Nell, Inc.**
- on proximate cause, 132

**Zipurksy, Benjamin C.**
- and compliance errors, 53
- and inadvertent error, 53
- and justifications, xiii
- and other-regarding theory, 5
- approaches to reasonable person, 24
- civil competency approach to reasonable person, 28
- on duty, xv, 106, 116