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Fletcher G P. Fairness and utility in tort theory. *Harvard Law Rev.* **85**:537-73, 1972.
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Tort history should be understood as ongoing conflict between two paradigms of liability. The paradigm of reciprocity is based on Kantian principles; the paradigm of reasonableness on utilitarian criteria. [The *Social Sciences Citation Index*® (*SSCI*®) indicates that this paper has been cited in over 170 publications.]

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This article undoubtedly received attention because, along with Epstein,[1] it seeks to defend a noneconomic, nonutilitarian theory of tort liability. (Torts are wrongful acts for which one can seek legal remedies.) It is most cited for the proposition that a large body of decisions on liability for inflicting personal injuries conforms to the paradigm of reciprocity. The principles of this paradigm are (1) liability should be imposed only if the injury results from a nonreciprocal risk that the injurer has imposed on the victim, and (2) there should be no liability if the imposition of the nonreciprocal risk is excused on grounds of faultless accident or mistake. Both of these principles are explicable, it is argued, without appealing to cost/benefit or other forms of utilitarian risk analysis. The theory of adjudication underlying the paradigm of reciprocity is that courts should focus not on the social consequence of their decisions, but on the rights of the parties alone.

The competing paradigm of reasonableness collapses the assessment of risks and excuses into one standard based on cost/benefit analysis. The corresponding theory of adjudication stresses the social consequences of the decision as an aspect of the risk-assessment.

The article triggered replies from the advocates of the economic analysis of law: Calabresi and Hirschoff[2] and Posner.[3] These replies are directed to the coherence and principled soundness of the paradigm of reciprocity. In a recent paper, I explore some of the logical difficulties of the paradigm of reasonableness and particularly of integrating the consequence of decisions into the assessment of risks.[4]

The debate between neo-Kantian and utilitarian theories of law has accelerated since 1972 and these discussions of tort law lie at the center of the inquiry.

Although "Fairness and utility in tort theory" is cited primarily as a piece advocating a Kantian theory of liability, my own conception of the article's contribution lies rather in its analysis of the intellectual history of tort liability. The basic argument is that a paradigmatic shift from reciprocity to reasonableness occurred in the mid-nineteenth century and that this shift brought with it a redefinition of many of the basic concepts used in legal analysis. Despite the ascendancy of reasonableness, more traditional Kantian sensibilities survive in the case law and continue to shape the outcomes of the cases. I argue further that these Kantian sensibilities are more powerful than the literature acknowledges.

I came upon the synthesis reflected in the paradigm of reciprocity as a result of reflecting about several puzzling, leading precedents in the law of torts. These precedents, I argue, stand for the two principles–stated earlier–that define the paradigm of reciprocity. I acknowledge some of the difficulties of my 1972 paper in "The search for synthesis in tort theory."[5]

1. **Epstein R A.** A theory of strict liability. *J. Legal Stud.* **2**:151-204, 1973.
2. **Calabresi G & Hirschoff J T.** Toward a test for strict liability in torts. *Yale Law J.* **81**:1055-85, 1972. (Cited 165 times.)
3. **Posner R A.** Strict liability: a comment. *J. Legal Stud.* **2**:205-21, 1973. (Cited 155 times.)
4. **Fletcher G P.** Paradoxes in legal thought. *Columbia Law Rev.* **85**:1263-92, 1985.
5. ———. The search for synthesis in tort theory. *Law Phil.* **2**:63-88, 1983.

