quoted, and there is a case in Vermont which tends in the
same direction.¹

Supposing it now to be conceded that the general no-
tion upon which liability to an action is founded is fault
or blameworthiness in some sense, the question arises,
whether it is so in the sense of personal moral short-
coming, as would practically result from Austin’s teach-
ing. The language of Rede, J., which has been quoted
from the Year Book, gives a sufficient answer. “In
trespass the intent” (we may say more broadly, the de-
fendant’s state of mind) “cannot be construed.” Suppose that
a defendant were allowed to testify that, before acting, he
considered carefully what would be the conduct of a pru-
dent man under the circumstances, and, having formed
the best judgment he could, acted accordingly. If the
story was believed, it would be conclusive against the de-
fendant’s negligence judged by a moral standard which
would take his personal characteristics into account. But
supposing any such evidence to have got before the jury,
it is very clear that the court would say, Gentlemen, the
question is not whether the defendant thought his conduct
was that of a prudent man, but whether you think it
was.²

Some middle point must be found between the horns of
this dilemma.

¹ Vincent v. Stinchour, 7 Vt. 62. See farther, Clayton, 22, pl. 38;
Holt, C. J., in Cole v. Turner, 6 Mol. 149; Lord Hardwicke, in Williams
v. Jones, Cas. temp. Hardw. 298; Hall v. Farnley, 3 Q. B. 919; Martin,
B., in Coward v. Daddeley, 4 H. & N. 478; Holmes v. Mather, L. R. 10
Ex. 261; Bizzell v. Booker, 16 Ark. 308; Brown v. Collins, 53 N. H.
442.

² Blyth v. Birmingham Waterworks Co., 11 Exch. 781, 784; Smith v.
London & South-Western Ry. Co., L. R. 5 C. P. 98, 102. Compare Camp-
bell, Negligence, § 1 (2d ed.), for Austin’s point of view.
The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune; so much as that we must have at our peril, for the reasons just given. But he who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is
only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences.

There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbors, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another. So it is held that, in cases where he is the plaintiff, an infant of very tender years is only bound to take the precautions of which an infant is capable; the same principle may be cautiously applied where he is defendant. Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.

Taking the qualification last established in connection with the general proposition previously laid down, it will

now be assumed that, on the one hand, the law presumes or requires a man to possess ordinary capacity to avoid harming his neighbors, unless a clear and manifest incapacity be shown; but that, on the other, it does not in general hold him liable for unintentional injury, unless, possessing such capacity, he might and ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did. The next question is, whether this vague test is all that the law has to say upon the matter, and the same question in another form, by whom this test is to be applied.

Notwithstanding the fact that the grounds of legal liability are moral to the extent above explained, it must be borne in mind that law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blame-worthy or otherwise.

Again, any legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, or at the whim of any body of men. The standard, that is,