Apologies and Damages:

The Moral Demands of Tort Law as a Reparative Mechanism

Thesis submitted to the Faculty of Law at the University of Oxford for the degree of Doctor of Philosophy by

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Trinity 2015

93,706 Words

Abstract

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This thesis seeks to justify on moral grounds the existence of tort systems. The argument is that corrective justice is necessary but not sufficient to succeed at this task. Corrective justice is necessary because it is the only principle that can adequately justify the bilateral structure of tort litigation between claimants and defendants, and full compensatory damages as the default remedy in most tort systems. However, it is argued that the critiques to corrective justice lead us to the important lesson that tort law is more than just corrective justice. Three gaps of corrective justice are identified: the equivalence between gains and losses, the definition of what counts as a tort, and the diversity of remedies.

The thesis offers a solution to these problems based on the values of restorative and distributive justice. It is argued that restorative justice plays an important role in tort law, providing an apologetic framework for material compensation (the message that money awards communicate), but especially for symbolic remedies, such as apologies, nominal damages, non-pecuniary damages, punitive damages, and gain-based damages, solving the diversity of remedies problem. This restorative framework of tort remedies is compatible with corrective justice. Distributive justice also plays an important role in tort law. Even though corrective and distributive justice are conceptually separate concepts, in the context of tort law they cannot be separated. It is argued that the definition of what counts as a tort involves a distributive task. Following this argument, the thesis argues that there is a distributive uneasiness in tort law, because tort law protects some interests regardless of how they were acquired, and regardless of whether their distribution amounts to an unfair distribution of resources. It is suggested that the distributive mechanism of insurance can solve, or at least ameliorate, this uneasiness.

To Ángeles, Elisa and Lucía

Acknowledgements

The production of this thesis was only possible with the assistance and constant support of my supervisor, Professor John Gardner. He was always a source of inspiration and also motivation to develop my ideas further. Most of the arguments carried out in the thesis were a result of our illuminating discussions. I also want to thank Professor James Goudkamp, Professor Denise Réaume and Professor Sandy Steel, who provided invaluable feedback during transfer and confirmation of status.

In addition, I wish to express my gratitude to my sponsor Conicyt from the Chilean government, for the generous support they provided me with its programme Becas Chile. I also wish to thank the Law Faculty, for the support they provided me to present my work at the Yale Law School Doctoral Scholarship Conference.

Many others contributed to this work with detailed comments, conversations or simply friendship. In this regard, I would particularly like to thank Erik Encarnacion, Elizabeth Howell, and Fred Wilmot-Smith for their comments on earlier drafts. Cristián Banfi, Raquel Barradas de Freitas, Darius Bugailiskis, Gerardo Caffera, Juan Castro, Sebastián Castro, Arturo Ibáñez, Rodrigo Momberg, Daniel Peñailillo and Hugo Rojas deserve a special mention for their willingness to engage in fruitful discussions about my research. I also wish to thank Adelaida Barros, Jodi and Sebastian Gardner, Kiki Garrido, Peter Howell, Ana Labra, Matías Pascuali, Mapi Pinto, Carola Puschel, Cristián Riveros, Manos Stagakis, Marina Topouzi, Flavia Vergara, Rosario Villaseca, Tarek Yusari and Isabel Zuloaga for the friendship and unforgettable conversations, fantasy leagues and barbeques we had in Oxford.

I also wish to express my gratitude to Carlos Pizarro Wilson, who gave me access to an office in Santiago de Chile to work on the final stages of the thesis. Esteban Pereira Fredes deserves a special mention. I will never be able to repay his friendship and dedication.

My final debt of gratitude is to my family. I would never have embarked upon this project without my mother's encouragement and support and my father's example of fine scholarship. And of course, I will always be grateful to my wife Ángeles and my daughter Elisa, to whom the thesis is dedicated. I thank Ángeles for all the encouragement, understanding and sacrifices she made to embark on this project with me, and Elisa for bringing us joy to our life in Oxford.

Contents

Cases Cited

Australia

Canada

England and Wales

France

Germany

United States

Legislation Cited

Chile

England and Wales

France

Germany

Netherlands

Switzerland

Other Primary Sources

Introduction

0.1 The Argument: More than Just Corrective Justice

Many tort scholars have recently shown scepticism regarding the value of corrective justice. The main source of criticism seems to be that corrective justice is unable to explain many important features of tort law.[1] In this context, it has been argued that tort law is better explained by the vindication of rights,[2] or by the notion of civil recourse.[3] These recent tort theories have shown that corrective justice cannot stand alone as an *explanation* of the law of torts as it is in the common law. Following this criticism, the aim of this thesis is to show that a *justificatory* account of tort law cannot either rely exclusively on the value of corrective justice. In one sense, the understanding of tort law as a form of corrective justice will be defended. Accordingly, it will be argued that the law of torts is mainly a reparative mechanism of wrongful losses occasioned by non-contractual transactions. Tort law provides material compensation under the framework of corrective justice to the victims of wrongs so that they can reach the next-best position to the wrong not having occurred in the first place.[4] However, it will also be shown that tort law should do (and actually does) more things than just providing material compensation to the victims of wrongs. In particular, the thesis will argue that tort law's aim of repairing wrongful losses also

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[1] See eg Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 The Georgetown Law Journal 695; John CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917.

[2] Robert Stevens, *Torts and Rights* (OUP 2007) 326.

[3] John CP Goldberg and Benjamin Zipursky, *Torts* (OUP 2011) 47-54.

[4] Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 33; Arthur Ripstein, 'As If It Had Never Happened' (2007) 48 William and Mary Law Review 1957, 1968; Stevens (n 2) 59; John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 37.

demands victims to be *symbolically* compensated for the losses they have suffered. Symbolic compensation will be explained in terms of an apologetic framework based on restorative justice.

Additionally, it will also be argued that corrective justice depends in many relevant senses on distributive justice in the context of tort law. First, distributive justice defines the initial entitlements of rights and duties that tort law protects through corrective justice. Secondly, corrective justice depends on the law's definition of a wrong, establishing which losses should remain where they fell, and which of them should be repaired through the mechanism of tort law. And thirdly, distributive justice establishes a corrective to the operation of corrective justice in tort law, which is the mechanism of insurance. Contrary to what has been traditionally argued by corrective justice theorists,[5] the existence of insurance mechanisms cannot be ignored (and in practice have not been ignored by courts) in the context of tort decisions. Although a situation in which a wrongdoer apologises and provides compensation (by herself or through her insurance company) is morally superior to another in which the wrongdoer relies on her insurance company to do both, it will be argued that the availability of insurance helps to correct some instances of tort law that could lead to distributive injustices. In particular, the thesis will claim that the mechanism of insurance corrects the disproportion that in many cases occurs between the gains obtained by the wrongdoer and the losses suffered by the victim. In other words, insurance introduces an element of distributive justice to the relationship of the parties based on corrective justice, which prevents the operation of tort law from leading to unfair results.

[5] Eg Jules L Coleman, *Risks and Wrongs* (CUP 1992) 208; Ernest J Weinrib, *The Idea of Private Law* (revised edn, OUP 2012) 74.

In sum, the argument of the thesis is that corrective justice is necessary but not sufficient to justify the existence of tort systems. This argument will be developed throughout the thesis with the discussion of two contrasts, namely between corrective and restorative justice, and between corrective and distributive justice. On one hand, restorative justice plays an important role in tort law, providing an apologetic framework for material compensation (the message that money awards communicate), but especially for symbolic remedies (such as apologies, nominal damages, non-pecuniary damages, punitive damages, and gain-based damages). But at the same time, as many scholars have recently suggested,[6] distributive justice also plays an important role in tort law (what Perry once called 'the distributive turn'),[7] defining what is protected by tort law, and correcting the unfair effects of the operation of corrective justice in tort law.

0.2 Justification and Current Scholarship

The idea that tort law (or the core aspects of tort law) can be justified solely by corrective justice is attractive. First, corrective justice justifies the bilateral structure of tort law between a particular claimant and a particular defendant. Though it has been argued that a form of distributive justice is also in place in the bilateral relationship between the parties within tort litigation (Perry's 'localized distributive justice'[8] or

[6] Arthur Ripstein, *Equality, Responsibility and the Law* (CUP 1999); Peter Cane, 'Distributive Justice and Tort Law' (2001) 4 New Zealand Law Review 401; Tsachi Keren-Paz, *Torts, Egalitarianism, and Distributive Justice* (Ashgate 2007); John Gardner, 'What is Tort Law For? Part 2: The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014); Hanoch Sheinman, 'Tort Law and Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

[7] Stephen R Perry, 'The Distributive Turn: Mischief, Misfortune and Tort Law' (1996) 16 QLR 315.

[8] Stephen R Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa Law Review 449.

Gardner's 'justice between the parties'[9]), only corrective justice can explain why no one else than a particular victim can bring a tort action against no one else than a particular injurer. As Perry points out, 'there is no [distributive] basis for limiting the group of potential loss-bearers to the injurer and the victim alone'.[10] The basis must necessarily be corrective justice.[11]

Secondly, Aristotle's notion of corrective justice provides a framework based on arithmetical equality to tort law's remedies, according to which injurers must make their victims whole by compensating the losses caused by the injury. This ideal is formulated in modern theories in terms of a secondary duty that requires injurers to provide their victims with the 'next-best' thing to the wrong not having occurred in the first place. Corrective justice satisfactorily explains why courts in tort litigation do not look into the wealth of the parties before and after the injury; they only look at the wrongful losses caused by the injurer.[12]

However, the principle of corrective justice is unable to satisfactorily justify some features of modern tort systems. Tort scholars have elaborated various solutions to this problem. One of them is to claim that corrective justice can only explain the 'core' features of tort law. Any area of tort law that cannot be explained by corrective justice (such as products liability) would therefore not be part of the core of tort law.[13] While other scholars have suggested that the vindication of rights capture more adequately the practice of the law of torts in England, but without necessarily abandoning the notion of corrective justice understood in normative terms.[14] And

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[9] Gardner (n 6) 346 ff.

[10] Perry (n 8) 471.

[11] Gardner (n 6) 348-9.

[12] See below IV.3 for a discussion of this feature.

[13] Coleman (n 5).

[14] Stevens (n 2).

finally, others have argued that tort law is about civil recourse and not corrective justice.[15] According to this approach, tort law is mainly concerned with providing victims the right to redress for the wrongs they have suffered, making wrongdoers accountable, answerable and taking responsibility for what they have done.

This thesis will suggest an alternative answer to justify the existence of modern tort systems without abandoning the Aristotelian understanding of corrective justice. The starting point is that corrective justice is a necessary but not sufficient justification for the existence of tort law. Corrective justice is necessary because it is the only principle that can adequately justify the bilateral structure of tort litigation between claimants and defendants, explain that full compensation is the default remedy in tort systems of the common law, and explain the reparative rationale of tort law in civil law jurisdictions.[16] However, it will be argued that the critiques to corrective justice lead us to the important lesson that tort law is more than just corrective justice. Aristotle's concept of corrective justice has some important gaps that tort theorists for quite some time have struggled with.[17]

First, Aristotle's notion of corrective justice relies on the equivalence between the gains obtained by the injurer with the commission of the wrong and the losses suffered by the victim caused by the wrong.[18] This equivalence is a matter of importance for Aristotle, because it shows that this form of justice is concerned with

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[15] Zipursky (n 1).

[16] See, for example, the general rule regarding fault liability in article 1382 of the French Civil Code: 'Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it was caused to make reparation for it'. Simon Whittaker, 'The Law of Obligations' in John Bell and others (eds), *Principles of French Law* (2nd edn, OUP 2008) 361.

[17] Of course, these gaps of corrective justice are such only if one endeavours to explain or justify the practice of tort law under this principle. But I am not assuming that these issues are conceptually problematic to the notion of corrective justice. In other words, they are functionalist but not conceptual gaps.

[18] Aristotle, *The Nicomachean Ethics* (D Ross edn and L Brown tr, OUP 2009) V.4 1132a10-14.

re-establishing a pre-existent equality between the injurer and the victim. Under this framework, corrective justice requires nothing more than to take away the wrongful gain from the injurer to the victim, allowing the latter to repair the loss that she has suffered. However, this equivalence between gains and losses materialises only in very rare tort cases. Although we can easily imagine laboratory situations in which the gain equals the loss (especially in the case of intentional torts), most cases of negligence in which injurers cause harm due to momentary carelessness fall out of this scheme. Aristotle himself seems to have been troubled by this formulation, when he said that there is some 'sort of gain' and some 'sort of loss',[19] or when he claimed that 'to have more than one's own *is called* gaining, and to have less than one's original share *is called* losing'.[20] To solve this problem, Weinrib has elaborated a normative understanding of both gains and losses, in which their content is specified by the concepts of right and duty; the right represents the position of the victim and the duty represents the position of the injurer.[21] Under this scheme, the equivalence between gains and losses is always secured, because the breach of a duty will always be equivalent to the violation of the other person's right.[22]

If it is necessary – as I think it is – to conceive the gains and losses of corrective justice in a normative rather than a material sense, it follows that we need some criteria to define the rights and duties that corrective justice protects. Which rights and duties does corrective justice protect? The notion of corrective justice cannot answer this question.[23] As Finnis points out, corrective justice 'leaves untouched a wide range of problems', because it depends 'on some prior determination of what is

[19] ibid V.4 1132b18-19.

[20] ibid V.4 1132b12-14 (emphasis added).

[21] Weinrib 122-3.

[22] ibid 126.

[23] Cane (n 6) 409.

to count as a crime, a tort, a binding agreement, etc.'.[24] A second gap of corrective justice therefore can be found in the definition of what should be protected by the mechanism of tort law. It is the law of torts that determine which wrongs deserve to be recognised as deserving that kind of protection ('the tort law kind of recognition').[25] This does not mean that is impossible to find duties of corrective justice outside a legal context. For instance, it is possible to conceive duties of corrective justice between friends, relatives, colleagues at work, and so on. In these cases, the rights and duties protected by corrective justice are not specified by the law, but rather by the rules of morality that govern each type of relationship (such as 'friends should always be there for you'). Also in these contexts, corrective justice does not determine the content of the primary rights and duties that tort law protects. Furthermore, it is the law of torts and not corrective justice that determines who is a *tort victim*, i.e. who is entitled to make a tort claim (what Zipursky calls the 'substantive standing' rules of tort law),[26] and also who is a *tortfeasor*, i.e. from whom to recover. In sum, corrective justice does not determine what tort law protects, whom it protects, and from whom to recover.

A third gap in the notion of corrective justice is that it cannot satisfactorily explain many features of tort law. Under this rubric, one of the most usual critiques to corrective justice is its failure to explain the diversity of remedies available in tort law.[27] Corrective justice is arguably unable to explain the remedies awarded in tort law other than compensatory damages, such as punitive damages, gain-based damages, aggravated damages, vindicatory damages, non-pecuniary damages, injunctions, apologies, and nominal damages. But again, corrective justice does not

[24] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 178.

[25] Gardner (n 6) 341.

[26] Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1, 4.

[27] Zipursky (n 1) 711.

determine the specific remedy that is required to correct or repair a given injury. This indeterminacy has been specified by tort scholars, arguing that corrective justice demands to provide the victims of wrongs with a remedy that allows them to reach the next-best position to the wrong not having occurred in the first place.[28] Accordingly, tort scholars and courts assume that material compensation (an award of damages) satisfies this requirement, in cases in which a victim has suffered a material loss. The sum that the defendant must pay arguably puts the claimant in the next-best position to the wrong not having occurred.[29]

But the problem is how corrective justice deals with other remedies that are available for some torts. In this sense, punitive damages are used as a common example of a remedy that is left out by corrective justice. For punitive damages – the argument goes – do not seek to put victims in the next-best position to the wrong not having occurred, but rather to sanction the defendant's behaviour based on a retributive or deterrent rationale. Victims granted an award of punitive damages might even be put in a *better* position to the wrong not having occurred. The same could be said furthermore with respect to other remedies, such as the account of profits or aggravated damages. Generally, the law requires wilfulness on behalf of the injurer to award victims with punitive damages or an account of profits. Corrective justice seems to be unable to explain this requirement.[30] It seems from an exclusively corrective perspective that an intentional wrongdoing should have the same

[28] See above n 4.

[29] See below VI.2 for a discussion of this justification for compensatory damages.

[30] In this sense, Zipursky argues that if corrective justice seeks to explain punitive damages in terms of a special form of compensatory damages by another name, it fails because 'it does not explain why the availability of punitive damages is conditioned on whether the defendant's conduct was wanton or willful'. Zipursky (n 1) 712.

consequences as a negligent wrongdoing.[31] The law of torts however does not always operate this way. In some cases, the law requires malice as a requirement to bring a tort action, whereas in other cases wilfulness may allow victims to be awarded with exemplary or aggravated damages.

This inadequacy of the notion of corrective justice has led some tort theorists to suggest that we should abandon the principle, at least in its Aristotelian formulation. For quite some time now Goldberg and Zipursky have been arguing that the notion of civil recourse is superior to corrective justice,[32] whereas others have recently suggested that we should replace the Aristotelian understanding of corrective justice with a framework based on making amends or the reconciliation of the parties.[33] Additionally, other scholars have endeavoured to elaborate theories of tort law compatible with the demands of distributive justice.[34] Furthermore, more radical alternatives to corrective justice have also been advanced, such as Hershovitz' theory of revenge or 'getting even',[35] and Atiyah's famous critique to tort law's compensatory aim, according to which other mechanisms (such as social insurance schemes) are more effective than tort law to provide compensation to the victims of misfortunes.[36]

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[31] In fact, when Aristotle articulated his understanding of corrective justice, he seems to have been thinking precisely on intentional wrongs rather than any form of negligent wrongdoing. See the examples that he gives in Aristotle (n 18) V.4 1132a5-10 (voluntary infliction of a wound and slain). See below I.4 for a more detailed discussion.

[32] Zipursky (n 1); Goldberg and Zipursky (n 3) 47-54.

[33] Erik Encarnacion, 'Corrective Justice as Making Amends' (2014) 62 Buffalo Law Review 451; Linda Radzik, 'Tort Processes and Relational Repair' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

[34] George P Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537; Jules L Coleman and Arthur Ripstein, 'Mischief and Misfortune' (1995) 41 McGill Law Journal 91; Ripstein (n 6); Keren-Paz (n 6).

[35] Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2011) 39 Florida State University Law Review 107; Scott Hershovitz, 'Tort as a Substitute for Revenge' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

[36] PS Atiyah, *The Damages Lottery* (Hart Publishing 1997); Peter Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, CUP 2013).

In contrast with all these suggestions, this thesis will argue that the Aristotelian understanding of corrective justice should not be abandoned. It will be shown that regardless of these gaps, corrective justice still is a necessary but not sufficient condition for any justificatory theory of tort law. This claim will be supported by two distinctions that will be developed throughout the thesis. The first one is between corrective and restorative justice. The aim is to argue that the lesson to be learned from civil recourse and reconciliatory theories is that tort law is not only about providing victims with monetary compensation for material losses, but also to send the right apologetic messages. In this sense, it will be argued that the framework of restorative justice allows explaining and justifying the existence of remedies other than compensatory damages in tort law. Some of tort's remedies, especially compensatory damages, do not have an inherent apologetic meaning. It will be argued however that money damages awarded in a tort process can have an apologetic meaning, and that this restorative feature of damages is compatible with corrective justice, as long as the compensation provided aims at putting the victims in the next best position as to the wrong not having occurred.

The second contrast is between corrective and distributive justice. Following Cane's and Gardner's recent work on the distributive foundations of tort law, it will be argued that in the context of tort law corrective justice depends on distributive justice in a normative sense. Rather than seeking to justify the practice of tort law on a theoretical basis of distributive justice,[37] the thesis will argue that there is a normative connection in the context of tort law between corrective and distributive justice. This does not mean that corrective justice should be simply conceived as a form of

[37] Fletcher (n 34); Ripstein (6).

distributive justice,[38] or that distributive justice should be conceived as a form of corrective justice.[39] It will rather be argued that the two concepts are distinguishable. However, in the context of a justificatory inquiry of tort law, the thesis will elaborate the following normative connections between these two forms of justice: first, distributive justice depends on corrective justice in the sense that the latter protects the initial entitlements defined by the former. Secondly, corrective justice depends on distributive justice when tort law protects proprietary interests defined by distributive justice. Thirdly, distributive justice defines what counts as a tort, treated as such by the law of torts, providing a specific content to the principle of distributive justice. The rules of tort law that determine who is a victim and who is a tortfeasor are also rules based on distributive justice. In this sense, the task of filling the second gap of corrective justice, determining the content of the rights and duties that the principle of corrective justice protects, is to some extent a distributive task. And fourthly, distributive justice corrects the operation of corrective justice in tort law through the mechanism of insurance. It will be suggested that the tension between corrective and distributive justice in tort law (or the regressive nature of tort law, in Keren-Paz's terms)[40] can be solved by conceiving the mechanism of insurance as a morally justified institution to correct how corrective justice operates in the context of tort law. The mechanism of insurance corrects the disproportionate effect that the operation of corrective justice can cause in tort law, particularly when the injury was caused by a momentary lack of care. Accordingly, insurance is not conceived as a problem for

[38] James W Nickel, 'Justice in Compensation' (1976) 18 William and Mary Law Review 379, 388; Larry A Alexander, 'Causation and Corrective Justice: Does Tort Law Make Sense?' (1987) 6 Law and Philosophy 1, 6.

[39] Nozick gets very close to argue this conception of distributive justice. Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 152. See below IV.2 for discussion.

[40] 'Existing tort law is regressive by nature'. Keren-Paz (n 6) 67.

corrective justice, but rather as a justified compliment that helps to reduce its regressive or unfair results.

In sum, the thesis aims to make a contribution to the debate regarding the justification of tort law at two levels. At the first level, it will be argued that tort scholarship should look beyond the rationale of mere material compensation, suggesting a move towards restorative justice. Such movement provides a symbolic and restorative meaning to the remedies available in tort law, not only in the case of the paradigmatic examples of symbolic remedies, such as nominal damages or apologies, but also in the case of material compensation. The thesis will argue that this restorative framework of the remedies available in tort law is compatible with the notion of corrective justice, even in the case of remedies that have been usually considered as incompatible with corrective justice, such as exemplary damages and non-pecuniary damages. It will be claimed that these remedies are justified as long as they seek to put victims in the next best position to the wrong not having occurred in the first place. These remedies therefore cannot put victims in a better position as the wrong not having occurred. As a consequence, disproportionate sums of damages are not justified; reasonable sums of punitive damages however may be justified.

At the second level, the thesis will provide an original insight regarding the relationship between corrective and distributive justice. Although some literature has already suggested that there is a normative connection between these principles in the context of tort law, the thesis will develop further this idea by establishing specific instances in which distributive justice depends on corrective justice, and also corrective justice depends on distributive justice. Within this debate, the thesis will suggest an original approach to deal with the existence of insurance mechanisms in the practice of tort law. Rather than conceiving insurance as a problematic feature for

corrective justice, it will be argued that insurance is a distributive mechanism that allows correcting how corrective justice operates in tort law. The mechanism of insurance corrects the unfairness that could be produced in a tort by the disproportion between the gains obtained by an injurer and the losses suffered by a victim. For insurance distributes the burden of providing full compensation to victims within all the potential wrongdoers for a given activity. Accordingly, it will be claimed that insurance is a morally justified practice for tort law, even though it might be problematic from the perspective of restorative justice.

0.3 The Justificatory Aim

The scope of the thesis is the justification of *the practice of tort law*.[41] But why is such justification necessary? For some, perhaps this is not a difficult task.[42] After all, holding wrongdoers responsible and providing compensation to victims seems to be one of our most intuitive moral practices in daily interactions (such as teaching children to apologise or repair the harm caused when they have done something wrong). It seems to me though that a first question we need to ask is whether the practice of tort law reflects these intuitive practices. Is that the case? For instance, should we take children seriously when they seek to excuse themselves by saying that 'the other kid started'? Usually, parents will not take such an excuse seriously. The law however may react differently: it could count as a contributory negligence defence. It seems therefore that

[41] I understand the term *practice* here in Rawls' terms, as 'any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure.' John Rawls, 'Two Concepts of Rules' (1955) 64 The Philosophical Review 3, 3.

[42] See eg Stevens (n 2) 329: 'In order to understand and *justify* the law of torts it is unnecessary to be a profound thinker' (emphasis added).

the connection between these intuitive moral practices and tort law is not as straightforward as one might first think.

But more importantly, a second question is whether the practice of tort law is worth justifying. As Gardner points out, in a loose sense any action, belief, or practice is worth justifying, in terms of establishing that these actions, beliefs or practices are 'answerable to reason'. However, in a more strict sense 'justification is called for only when one has some reason *not* to act, believe, etc. as one does'.[43] Are there any reasons then to eliminate or radically reform the practice of tort law? In my view, there are. As Atiyah famously warns us, tort victims are a privileged group among other victims of misfortunes.[44] According to the Pearson Report, only around 7% of the victims of accidents ended up receiving tort damages, and these victims are even more privileged because many of them received benefits from one or more of the other compensation mechanisms as well.[45] It follows that there are strong reasons to suggest that an expensive system such as tort law should be replaced by different schemes to fully compensate the victims of accidents. We could easily imagine a system based on social insurance or general welfare that compensates all victims of misfortunes without need to have a tort system at all.[46] Hence, the justificatory inquiry

[43] John Gardner, 'Justifications and Reasons' in his *Offences and Defences* (OUP 2007) 95.

[44] Atiyah (n 36) 143.

[45] Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (Cmnd 7054, 1978) (Pearson Report), vol 1, table 4.

[46] And in the case of New Zealand, we can easily understand why tort law was replaced with an insurance-based system to deal with automobile accidents. This however does not mean that one cannot question whether such system is justified or not. See eg Stevens's claim that the system cannot be justified: 'Unless the compensation scheme is artificially limited to one class of person, such as accident victims, it loses what attractions it had because of the cost implications. Even if victims of disease were brought within any scheme, why should the boundary be drawn there? Why not all victims of the vicissitudes of life? Why exclude the elderly, the unemployed, or the educationally disadvantaged?' Stevens (n 2) 324.

of this thesis must face the challenge of providing 'reasons strong enough to prevail' over Atiyah's suggestions.[47]

The project of this thesis is justificatory in these terms. Of course, a justification is connected with an explanation, at least in two senses. First, a justification is always at the same time an explanation. In this sense, corrective justice explains and justifies some important features of tort law. In fact, the thesis will argue that tort law cannot be *justified* without corrective justice; but also that it cannot be *explained* without it either (I.3). Second, a justification needs an explanation of what is to be justified. The thesis will concentrate on justifying the following features that can be found in most tort law systems:

a. A bilateral structure of litigation between injurers and victims.

b. A system that rectifies wrongful losses (the law of torts does not rectify every loss suffered as a consequence of human interactions).

c. Tort law as a reparative mechanism that provides remedies to victims so that they can reach to the next best position to the wrong not having been committed at all.

d. Modern tort systems coexist with insurance mechanisms that allow injurers to fulfil their reparative duties through their insurance companies.

English tort law system will be used as a main example, but other jurisdictions will be used as well. Many features of existing tort systems will be left unexplained by this scheme. However, the aim of the thesis is to justify tort systems according to these basic features. The more features of existing tort law systems that the model is able to explain the better; but the emphasis of the thesis is justificatory. Certainly, an attractive justificatory account of tort law should seek to 'fit' existing law as much as

[47] Gardner (n 43) 95.

possible.[48] However, in a justificatory inquiry fitting is not a primary concern.[49] The point is *justifying* the core features of tort law identified above, a justification that also allows *explaining* these features. It follows that the thesis does not seek to explain every aspect of tort law; some of them will not be justified (and explained) by this thesis. But this fact only means that these features require a different set of principles for their justification.

0.4 Mapping the Argument

Chapter I will explain the Aristotelian understanding of corrective and distributive justice that the thesis will follow. Three gaps of this classic understanding of corrective justice will be described. The first gap is the requirement of equivalence between gains and losses. It will be suggested that a normative framework of gains and losses can solve this problem, a normative framework that the notion of corrective justice alone cannot provide. A second gap of corrective justice is the definition of which interactions deserve to be rectified by the operation of corrective justice, ie which losses should be treated as wrongful losses that demand to be rectified. Again, it will be argued that corrective justice does not provide an answer to this question. The answer must be found in the positive law of torts. Finally, a third gap of corrective justice is that it cannot explain or justify the diversity of remedies available in most tort systems of the common law. Corrective justice satisfactorily justifies full compensation as a default remedy in tort law, but it cannot justify the existence of other remedies different than compensatory awards, such as apologies, nominal damages, or

[48] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 230.

[49] Even though it will be argued that the framework of the thesis is able to explain better many aspects of tort law than other theoretical models. For instance, I will argue below (VI.2) that civil recourse theorists are unable to justify (and explain) the full measure of compensatory damages, a feature endorsed by most tort systems.

exemplary damages. It will be claimed that some of these remedies can be justified by corrective justice, conceived as a principle that seeks to put victims in the next-best position as to the wrong not having occurred in the first place. The chapter will set the basis for the main argument of the thesis, according to which the framework of restorative justice and distributive justice are necessary to accomplish this ideal of corrective justice.

Chapter II will discuss the contrast between restorative and corrective justice, exploring the relationship between apologies and compensation in general terms (in a moral context). It will be argued that restorative justice is the main framework for symbolic reparations, whereas corrective justice is the main framework of non-symbolic reparations. Accordingly, apologies will be conceived as a symbolic reparation mechanism based on restorative justice, while compensation will be conceived as a non-symbolic reparation mechanism based on corrective justice. It will be shown that even in cases of less serious wrongs the duty to apologise is stronger than mere etiquette rules, based on a normative framework of restorative justice that does not necessarily rely on the notion of resentment, as most of the literature on the subject does. It will be argued that restorative justice aims to re-establish the moral equality between the parties involved. The baseline for this moral equality is determined by the normative standard that the wrong in question violated. Additionally, the chapter will claim that it is possible to conceive apologies as a corrective justice mechanism. The role of apologies in the tort of defamation will be provided as an example to support this hypothesis.

Chapter III will follow the discussion related to the contrast between restorative and corrective justice, arguing that the idea of moral reconciliation is connected with tort law's ideal that holds that victims should have satisfaction for the

wrongs they have suffered, providing them compensation to reach the next-best position to the wrong not having occurred. This connection makes possible to endorse the reconciliation of the parties as a goal even from the perspective of a rights-based theory of tort law. However, it will be argued that some limits must be drawn to the idea of moral reconciliation as a goal of tort law. Although it can explain some of its relevant features, it can also mislead us by supporting a legal system dominated by the emotions of the parties. Such system would not only face practical constraints regarding what is feasible for the law to achieve, but would also lead to undesirable consequences. In particular, it would allow victims to hold a prerogative to forgive, leaving the law with no precise criteria to determine when compensation is enough or not. Additionally, it would unfairly require injurers to suffer the consequences of their victims' extra sensitivity. And finally, to determine whether an injurer has a sincere reparative intention would require an intolerable inquiry into people's feelings.

In chapter IV, the contrast between corrective and distributive justice will be discussed, exploring the normative connections that both principles have in the context of tort law. Although it will be held that both notions of justice are conceptually distinguishable, it will be argued that there is a normative connection between them. The chapter will concentrate the discussion on the normative dependency of corrective justice on distributive justice in the context of tort law. It will be shown that, at least in this context, the connection between both principles cannot be denied. This argument will be supported discussing the case of proprietary torts, in which the connection between the principles is more visible. It will be argued that there is a moral uneasiness in tort law: proprietary torts protect possession or proprietary interests regardless of how these rights were acquired, and regardless of whether their distribution amounts to an unfair distribution of resources.

Chapter V will argue that the mechanism of insurance can reduce the distributive moral uneasiness of tort law described in chapter IV. The objective of the chapter is threefold. First, it will be argued that determining who pays (whether the tortfeasor herself or through her insurance company) is a relevant factor for a moral theory of tort law. Tort theorists have understated the importance of this feature. Secondly, the chapter will seek to demonstrate that the mechanism of insurance is able to correct, or at least reduce the distributive uneasiness of tort law. And thirdly, it will be argued that it is possible to correct tort law without threatening the reconciliatory framework of tort law elaborated in chapters II and III. It will be argued that what tort systems morally lose in terms of restorative justice with the existence of insurance corresponds with what tort systems gain in terms of distributive justice. Each legal system needs to make a choice regarding these values. The chapter will suggest that in the case of wrongs that only require material compensation the existence of insurance should be encouraged (as a corrective to the operation of corrective justice), whereas in the case of wrongs that require symbolic compensation the effect of insurance should be reduced.

In chapter VI, the remedies that tort law provides to put victims in the next-best position as to the wrong not having occurred will be analysed. Applying the framework for tort law elaborated in the previous chapters, it will be argued that tort systems should (and usually do) provide both symbolic and non-symbolic reparations for victims of wrongs. The chapter will first examine the paradigmatic case of non-symbolic remedies, namely compensatory damages. The challenge here is to justify the measure of full compensatory damages as the default rule in tort law. The chapter then will discuss the existence of 'unorthodox' remedies. It will be argued that most of these remedies have a symbolic feature. Hence, they can be justified under the

restorative framework of the thesis. Apologies in the tort of defamation and nominal damages will be discussed as the paradigmatic cases of symbolic remedies. The chapter will also discuss non-pecuniary damages. It will be emphasised that these awards deal with immaterial harms that are incommensurable, and that in many cases the compensatory rationale is inadequate. It will be argued that the restorative framework of the thesis can accommodate this symbolic feature of non-pecuniary damages. The chapter will also discuss the existence of aggravated and exemplary damages. It will be argued that these damages can be justified under the restorative framework of the 'next-best' formula of corrective justice, as long as claimants are not put in a *better position* than if the wrong had not occurred. Finally, the chapter will discuss two additional cases. First, regarding gain-based damages, it will be argued that the next-best formula can justify the existence of licence fees damages for proprietary torts. And second, the chapter will discuss injunctions. It will be argued that the remedial structure of corrective justice can justify some injunctions and compensatory damages in lieu of injunctions, but the model cannot justify injunctions that have a prospective nature.

I

The Gaps of Corrective Justice (and How to Fill Them)

I.1 Introduction

The Aristotelian or classic understanding of corrective justice is a philosophically powerful idea, and for some it has been sufficient to elaborate a justificatory theory of tort law, or at least an explanatory account of its main features.[1] Others however have argued that corrective justice is inadequate to explain many salient features of tort law. For some of these scholars, the notions of 'civil recourse'[2] or the 'vindication of rights'[3] are better candidates than corrective justice to explain the practice of tort law, whereas for some others the understanding of corrective justice in Aristotle's terms is what needs to be corrected to deal with the salient features of modern tort systems. Accordingly, it has been suggested that corrective justice should be reformulated as

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[1] See eg Jules L Coleman, *Risks and Wrongs* (CUP 1992); Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2007); Ernest J Weinrib, *The Idea of Private Law* (revised edn, OUP 2012). In Coleman's case though there is no direct reference to Aristotle.

[2] John CP Goldberg and Benjamin Zipursky, *Torts* (OUP 2011) 47-54.

[3] Robert Stevens, *Torts and Rights* (OUP 2007). McBride also provides a similar conception of tort law based on rights: 'Tort law grants us coercive rights that we can assert against other people, free of charge and without us having to contract for them, and it provides us with remedies to assist us when those rights are violated, or threatened with violation, by other people'. Nicholas J McBride, 'Rights and the Basis of Tort Law', in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 351. Keating also shares this view, but he formulates it in different terms. In short, he argues that what is distinctive of tort law is the vindication of primary rights rather than corrective justice, because primary rights have priority over the remedial rights governed by corrective justice. Gregory C Keating, 'The Priority of Respect Over Repair' (2012) 18 Legal Theory 293.

'getting even',[4] as 'making amends',[5] or understood within a reconciliatory framework.[6]

The ambition of this chapter is, first, to determine which aspects of tort law are successfully explained by the classic account of corrective justice, seeking therefore to answer the question of why should we even bother to deal with this Aristotelian understanding of the principle. Secondly, the chapter will aim to establish which aspects of tort law are indeed left unexplained by the classic theory of corrective justice. These aspects of corrective justice will be called 'gaps'. A caveat is necessary here. The use of the term 'gap' throughout this chapter does not imply that Aristotle's notion of corrective justice *conceptually* has unexplained areas that need to be filled in order to be a sound principle of justice. The gaps that will be discussed here are, to put it simply, only for the eyes of a tort theorist. It might be then that a philosopher does not necessarily need to fill these gaps in order to defend a version of corrective justice capable of articulating a sound principle of justice. Similarly, it might be the case that for a legal theorist seeking to explain a different area of the law, Aristotle's corrective justice may be deemed as self-sufficient and lacking these gaps. For instance, it has been argued that corrective justice can justify the law of restitution, even in cases of unjust enrichment in which there is no equivalence between gains and losses.[7]

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[4] Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2011) 39 Florida State University Law Review 107.

[5] Erik Encarnacion, 'Corrective Justice as Making Amends' (2014) 62 Buffalo Law Review 451.

[6] Linda Radzik, 'Tort Processes and Relational Repair', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

[7] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 68-9. A less optimistic view can be found in Zoë Sinel, 'Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment' (2011) 31 Oxford Journal of Legal Studies 551.

Hence, the gaps that will be discussed here are not inherent to the classic notion of corrective justice; they are, in other words, aspects that any tort theorist needs to fill if she wants to succeed at justifying the practice of tort law based on this classic account of corrective justice. Again, one alternative is, of course, to abandon Aristotle's notion of corrective justice or to abandon corrective justice altogether. I will not pursue either of these alternatives here since, in my view, none of these critiques has convincingly shown that it is necessary to elaborate a special or unique notion of corrective justice that *fits* the actual practice of tort law. Why would tort law deserve a special account of corrective justice, while other areas of private law stick with the classic account of corrective justice? This thesis will therefore argue that it is possible to articulate a justificatory theory for the practice of tort law based on the classic notion of corrective justice, which is the same notion that can (potentially) justify other areas of private law such as unjust enrichment and contract law.[8]

However, it seems to me that the widespread criticism to the classic concept of corrective justice leaves us with an important lesson: one cannot expect that Aristotle's account of corrective justice alone will fill all the gaps that need to be filled in order to justify the legal practice. The question then arises: which aspects of tort law can be justified by corrective justice, and which of them cannot? To accomplish this task, the chapter will first determine which aspects of tort law are successfully justified by the classic account of corrective justice. Though I will mostly rely on the literature to

[8] In Keating's terms, this would amount to a 'broader interpretation of corrective justice'. Gregory C Keating, 'Is the Role of Tort to Repair Wrongful Losses?' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 391. I agree therefore when he claims that corrective justice is 'not distinctive to tort', because it is not 'unique' to torts. ibid 392. I disagree however when he argues that corrective justice is not 'characteristic of all torts'. ibid. For reasons that will be clearer later, it seems to me that a broader understanding is characteristic of all torts, even in the case of torts in which claimants do not seem to be seeking a reparative remedy in an orthodox sense.

argue this position,[9] the view that corrective justice is a necessary condition for any justificatory theory of tort law will be defended here. However, corrective justice is not enough. In this sense, the chapter will identify and discuss three features of tort law that cannot be justified solely by corrective justice, which will be called the gaps of corrective justice.

The first gap is Aristotle's requirement of equivalence between gains and losses.[10] It will be suggested that a normative framework of gains and losses can provide a solution to this problem, a normative framework that is not provided by the notion of corrective justice alone. The second gap of corrective justice is the definition of what deserves to be rectified by the operation of corrective justice through tort law, ie what to protect, whom to protect, and from whom to recover. Finally, a third gap of corrective justice is that it cannot explain or justify the diversity of remedies available in most tort systems of the common law. Corrective justice satisfactorily justifies full compensation as a default remedy in tort law, but it cannot alone justify the existence of other remedies, such as apologies, nominal damages, or exemplary damages. The aim of the chapter is to set the basis for the main argument of the thesis, according to which restorative justice and distributive justice can successfully fill these gaps of corrective justice.

I.2 The Aristotelian Understanding of Corrective Justice

I will begin the analysis by clarifying what I mean by the 'classic understanding' of corrective justice. As many would expect, the task involves going back to Aristotle.

[9] Keating (n 3) 298-307.

[10] Perhaps in conceptual terms, this gap could be better described as a *problem* rather than as a *gap*. I will use the term 'gap' however in the sense that this problem needs to be filled with a solution if a legal theorist wishes to succeed at justifying the practice of tort law in terms of Aristotelian corrective justice.

Aristotle introduces the concept of corrective justice in the context of *particular* justice. In Book V of his *Nicomachean Ethics*, Aristotle distinguishes between *general* and *particular* justice. The aim of general justice is 'to produce and preserve happiness and its components for the political society'. Aristotle adds that general justice is a complete virtue only 'in relation to another' virtue,[11] because general justice is not a virtue alongside with bravery or temperance, but rather it is the 'virtue of character as a whole'. In contrast, Aristotle claims that there is a special sense of justice apart from general justice, which he calls particular justice. Aristotle's idea is to identify a virtue of justice as a character alongside with the other virtues. According to him, particular justice 'is concerned with honour or money or safety […] and its motive is the pleasure that arises from gain'.[12]

Aristotle says that particular unjust acts are always motivated by *pleonexia*. *Pleonexia* has been defined as the desire to have more for oneself or more than others.[13] Does this concept of *pleonexia* necessarily involve a comparative notion? In other words, does *pleonexia* require the desire to have more *than others*? Irwin claims that it does, for the element of greed that is characteristic of *pleonexia* is a competitive assessment.[14] However, it is not necessary to conceive *pleonexia* as a comparative notion. According to Curzer, the concept of gain should not be understood as merely the desire for an excessive amount of some good.[15] Curzer's point is that the person who acts with *pleonexia* only desires some good incidentally, because otherwise every action motivated by gain of honour, money or safety could be qualified

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[11] Aristotle, *The Nicomachean Ethics* (David Ross ed and Leslie Brown tr, OUP 2009) V.1 1129b27.

[12] ibid V.2 1130b2-4.

[13] Bernard Williams, *Moral Luck* (CUP 1981) 92.

[14] Terrence Irwin, *Aristotle's First Principles* (OUP 1990) 426.

[15] Howard J Curzer, *Aristotle and the Virtues* (OUP 2012) 227.

simultaneously as some vice (over-ambition, meanness and cowardice, respectively).[16] This interpretation is coherent with Aristotle's claim that 'if a man makes gain, his action is ascribed to no form of wickedness but injustice'.[17] If *pleonexia* is thus understood as the 'desire to get more than one deserves', its distinctive feature is the desire to obtain more goods. It is true that taking what belongs to others can usually be seen as the only way to do that, but still *pleonexia* is not conceptually conceived as taking what belongs to others.[18]

Curzer's interpretation of *pleonexia* opens the possibility of understanding this concept within a normative framework, where the key issue is not the comparison with others, but rather the normative criterion of what one deserves. However, it can still be questioned whether Aristotle correctly conceived *pleonexia* as a necessary condition for injustice. *Pleonexia* seems to work well as a necessary feature of the unjust person's character. Understood in these terms, the unjust person always has a desire to have more than she deserves. Aristotle claims that the virtue of justice must be understood as a mean state, just like any virtue. But what are the corresponding vices of justice as a mean? In the *Eudemian Ethics*, justice is depicted as the mean between the vices of 'gain' and 'loss'.[19] Aristotle explains that a 'greedy' person – therefore the 'gainer' – 'is one who grabs gain from every possible source', whereas the 'loser' 'rejects it from everywhere or almost everywhere'.[20] The normative interpretation of *pleonexia* – understood as 'the desire to get more than one deserves' – adequately captures the vice of gain. This is a matter of importance for the discussion on the gains

[16] ibid.

[17] Aristotle (n 11) V.2 1130a31-33.

[18] Charles M Young, 'Aristotle on Justice' (1989) 27 The Southern Journal of Philosophy 233, 238.

[19] Aristotle, *The Eudemian Ethics* (Anthony Kenny tr, OUP 2011) II.3 1129a.

[20] ibid II.3 1121a23-25.

and losses of corrective justice, since the normative conception of *pleonexia* allows corrective justice to cover much conduct that would be left outside of its scope if a competitive notion of *pleonexia* were employed. In particular, this concept of *pleonexia* is compatible with cases of negligence, in which the injurer does not intentionally inflict an injury to her victim, but rather fails to comply with the proper standard of care. This failure to comply could easily be described in *pleonectic* terms as an excessive desire of anything that the injurer gains. For instance, a driver who speeds and causes an injury must compensate her victim because she had an excessive desire for time (to get earlier to her destination). Accordingly, I shall argue below (I.4) that the normative understanding of *pleonexia* is compatible with the normative conception of the gains and losses of corrective justice.

Conceived as forms of particular justice, Aristotle introduces the concept of corrective justice as opposed to distributive justice. He says that distributive justice is concerned with 'distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution', whereas corrective justice 'plays a rectifying part in transactions between man and man'.[21] For Aristotle, equality plays a defining role to distinguish between corrective and distributive justice.[22] In the case of distributive justice, equality is expressed in the operation of what he calls 'geometrical proportion', which is defined with the following formula: 'the whole is to the whole as either part is to the corresponding part'.[23] The idea is to compare what each person contributes to the common good with what each one obtains from the

[21] Aristotle (n 11) V.2 1130b31-1131a.

[22] Irwin (n 14) 428.

[23] Aristotle (n 11) V.3 1131b13-14.

common goods.[24] Despite the fact that there is some obscurity in this definition, it nevertheless clarifies the specific type of operation that Aristotle identifies with distributive justice, which is contrasted with the arithmetical equality of corrective justice.

Aristotle claims that the criterion for distribution is 'according to merit in some sense'.[25] Is the assignment according to merit a prospective or a retrospective criterion for distribution? The criterion is mainly prospective, but Aristotle does not exclude some retrospective criteria.[26] Since distributive justice is concerned with the happiness and common good of the community, it seems reasonable to adopt a prospective teleological criterion to distribute power and goods among people. Nevertheless, in the *Politics* Aristotle introduces a retrospective criterion, by arguing that those who contribute most to the community should be entitled to have a larger share of goods.[27] This is coherent with the idea of equality of proportion, and therefore it is possible to argue that the criterion of distributive justice has both retrospective and prospective elements.

By contrast, Aristotle claims that corrective justice is connected with arithmetical equality, since 'the law looks only to the distinctive character of the injury, and treats the parties as equal'.[28] In this sense, Aristotle seems to be directing the rules of corrective justice specifically to a judge who must 'equalize' the situation in which the parties are left after the injury, whereas in the case of distributive justice the distributor appears to be an indeterminate person. In this operation, the scope is

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[24] Douglas S Hutchinson, 'Ethics' in Jonathan Barnes (ed), *The Cambridge Companion to Aristotle* (CUP 1995) 222.

[25] Aristotle (n 11) V.3 1131a26.

[26] Irwin (n 14) 427-8.

[27] 1281a4-8, cited in ibid 428.

[28] Aristotle (n 11) V.4 1132a4-5.

'restrictive and retrospective', because the judge cannot take into consideration the character of the parties.[29] He must only re-establish the pre-existing condition of equality between the parties.

Aristotle furthermore adds that corrective justice is based on the existence of a gain for the injurer and a loss for the victim. These concepts are introduced in the context of Aristotle's example of the assailant that has inflicted a wound on her victim. He says that the judge must equalize the situation of the parties by 'taking away' the gain from the attacker, compensating for the loss to the victim 'when the suffering has been estimated'.[30] These concepts are problematic for tort law. Maybe they work well in the case of an attacker that gets paid for injuring someone, but in most cases (such as negligence) there is no gain for the injurer. This feature of the theory has led some tort scholars to argue that Aristotle was thinking only of intentional torts when he wrote his corrective justice theory.[31] However, even in the case of some intentional torts (such as assault), Aristotle himself acknowledges that the term 'gain' might not be the most adequate.[32] Even worse, Aristotle's formula of arithmetical equality seems to require gains and losses to be equivalent. However, this equivalence occurs only in rare tort cases. Many tort cases involve only a small amount of gains for the injurer compared with the amount of losses caused to the victim. Coleman acknowledges this fact, claiming that in tort cases '[c]onduct that creates devastating losses can bring small advantage, whereas conduct that creates enormous gains can occasion

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[29] Irwin (n 14) 429. See below IV.3 for a discussion on this characterisation of corrective justice.

[30] Aristotle (n 11) V.4 1132a10-14.

[31] Stephen R Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa Law Review 449, 455; Matthew H Kramer, 'Of Aristotle and Ice Cream Cones: Reflections on Jules Coleman's Theory of Corrective Justice' (1996) 16 Law Quarterly Review 279, 285.

[32] For the term 'gain' is applied generally to such cases – *even if it be not a term appropriate to certain cases*, e.g. to the person who inflicts a wound – and 'loss' to the sufferer. Aristotle (n 11) V.4 1132a10-13, emphasis added.

minuscule losses'.[33] Negligent motoring is a typical example of this. A momentary careless driving may cause a serious accident, in which the small amount of gain secured by the negligent driver is disproportionate with the amount of losses caused to the victim.[34] Tort law will impose on the tortfeasor the duty to compensate all her victim's losses, regardless of whether as a result she received any sort of correlative gains. I will deal with this problem later (I.4). I will first focus on the aspects of tort law that this classic understanding of corrective justice satisfactorily explains and justifies.

I.3 Corrective Justice and Tort Law

The aim of this thesis is not to defend the notion of corrective justice as a single explanatory or justificatory principle for tort law. Accordingly, I will not argue here that the value of corrective justice is what gives unity to tort law, or that the distinctiveness of tort law resides in corrective justice. However, and regardless of all the different strands of criticism against this classical principle that have been developed throughout the recent years, it is my contention that Aristotle's corrective justice is able to explain many (although not all) features of tort law. For this reason I agree with Gardner's view that the lesson to be learned from Coleman's and Weinrib's prolific work is that '[c]onsiderations of corrective justice cannot be reduced out' of any rational explanation of tort law, even if they are not sufficient.[35]

The interest in corrective justice became prominent in tort scholarship with the rise of Law & Economics. As Coleman wrote in 1980, '[t]here is simply no denying that the new law-and-economics has arrived. So it is a fond … farewell to

[33] Coleman (n 1) 371.

[34] This example is discussed at length in Jeremy Waldron, 'Moments of Carelessness and Massive Loss', in David Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1995), 387-408.

[35] John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 5-6.

Rawls and Nozick, and a warm welcome to Coase, Pigou, Calabresi and Posner'.[36] It was clear at that point that the economic analysis of tort law seemed to be dominating tort scholarship, at least in the United States.[37] To some extent, it still is influential. The theories of tort law based on corrective justice were created as a response to this movement. It should not be surprising therefore that many of these corrective justice theorists also criticised the principle of wealth maximization as a normative principle.[38] This becomes more apparent once one reads the works of both Coleman and Weinrib; they clearly identify Law & Economics as their main rival theory to defeat.

In my view, these theories of corrective justice were considerably successful at showing that normative economic theories of torts were unable to explain and (or) justify at least three aspects of the practice of tort law. The first aspect of tort practice that is not adequately accounted for by Law & Economics is the 'bipolarity' or 'correlativity' of tort litigation.[39] Weinrib has convincingly emphasised this aspect of tort law throughout his career.[40] Tort law allows victims to make a claim to hold their tortfeasors responsible for the wrongs they have committed. If the claim is successful in court, usually (though not always) an award of damages will be granted to the victim, an award that will be imposed on the defendant and *only* on the defendant. Of course, this duty to pay damages could be fulfilled by the defendant's insurer. For the moment, let us leave that factor aside. In the simple model, tort law imposes the duty

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[36] Jules L Coleman, 'Efficiency, Auction and Exchange' in his *Markets, Morals, and the Law* (OUP 2002) 67.

[37] Perhaps its most notorious and vivid application in the law of torts is the efficiency-based Hand Test for negligence, in *United States v Carroll Towing Co* 159 F2d 169 (2d Cir 1947).

[38] See eg Ernest J Weinrib, 'Utilitarianism, Economics, and Legal Theory' (1980) 30 The University of Toronto Law Journal 307; Jules L Coleman, 'Efficiency, Utility and Wealth Maximization' in Coleman (n 36) 95 ff.

[39] Stevens (n 3) 327.

[40] Even convincingly enough to make Coleman change his mind in Coleman (n 1).

to repair on a single individual (the tortfeasor), even if such individual is not the 'cheapest cost-avoider'. Any attempt therefore to justify the current practice of most tort systems in terms of welfare maximization or Pareto optimality is destined to fail. The Law & Economics theorist cannot avoid concluding that existing tort systems need to disappear or be radically reformed. It is true that some areas of tort law have been influenced by this call for reform. Products liability and workers' compensation schemes are classic examples in which the 'cheapest cost-avoider' line of reasoning has been highly influential to radical changes in these areas that used to be dominated by the standard rules of tort law.[41] Most areas of tort law however have remained untouched by the 'cheapest cost-avoider' critique, and the bipolar or correlative structure between victims and injurers, or claimants and defendants still dominates the torts of negligence, battery, assault, private nuisance, and so on.

In the same vein, corrective justice adequately captures how tort disputes are adjudicated in court. As was seen above (I.2), corrective justice mandates to look only at the 'distinctive character of the injury' and not the personal characteristics of the parties. It seems that Aristotle was trying to exclude taking into account the virtuous or vicious character of the parties.[42] In this sense, corrective justice does not impose on a tortfeasor the duty to repair because she has a poor character;[43] it imposes the duty

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[41] Products liability is a good example. As Traynor J's concurrent opinion in *Escola v Coca Cola Bottling Co.* 24 Cal 2d 453, 150 P2d 436 (Supreme Court of California 1944) rightly points out, the relationship between consumers and manufacturers demanded rules that the standard rules of tort law could never achieve: 'It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence … The manufacturer's obligation to the consumer must keep pace with the changing relationship between them' (ibid 441, 443 [Traynor J]). Another example is Workers' Compensation regulatory schemes, which at some point were considered 'plainly revolutionary' for the standards of the common law. *Ives v South Buffalo Ry. Co.* 201 NY 271 (Court of Appeals of New York 1910) 285.

[42] I will later deal with this limitation of corrective justice that seems to be the key distinction between corrective and distributive justice in Aristotle. See below IV.3.

[43] It has been argued however that in some cases negligence law imposes the duty to repair to individuals because of their poor (congenital) character, such as weakness of the will (*akrasia*)

on her (and only on her) because she wrongfully caused the injury. Under the same rubric, this feature of corrective justice also explains why in tort adjudication the wealth of the parties is in principle not taken into account. To impose on the rich the duty to pay larger amounts of damages to the poor might be an (even morally) attractive position, but it is a position that tort adjudication generally does not endorse. By looking at the distinctive character of the injury, corrective justice successfully explains why tort adjudication is backward-looking or retrospective, in the sense that it seeks to provide reparation to specific victims of wrongs that have been committed by specific tortfeasors. In contrast, Law & Economics is unable to explain tort adjudication. Law & Economics suggests a forward-looking or prospective approach that seeks to reduce the costs of injuries and the costs of avoiding them.[44] According to this economic formula, tort adjudication should first seek to reduce 'the number and severity of accidents'.[45] And secondly, it should aim at reducing 'the societal costs resulting from accidents', which could be accomplished through the 'loss spreading' and 'deep pockets' methods.[46] It is true that some of these concerns have been recognised by tort systems. For example, tort systems generally do not forbid insurance mechanisms, and they allow spreading the losses caused by torts among all possible tortfeasors. However, tort adjudication is dominated by the retrospective approach. Paradigmatic examples of this feature are the causal inquiries in tort law and compensatory damages that seek to put the victim in the next-best position as to the wrong not having occurred in the first place.

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or defects of character. Heidi M Hurd, 'Finding No Fault with Negligence' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 398-400.

[44] 'I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents'. Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press 1970) 26.

[45] ibid.

[46] ibid 27-8.

Thirdly, corrective justice adequately explains why tort law is a system of rights and duties.[47] For '[t]ort practice looks backward to breach of preexisting obligations and asks tortfeasors to make right the harms they have wrongly done by breaching those obligations'.[48] Corrective justice shows that tort law is not about injurers paying their victims for freedom to wrong them (as economic theories seem to suggest);[49] it is about repairing wrongs. As Ripstein points out, 'rights survive wrongs' because the fact that someone has violated your right does not mean that you no longer have that right; '[i]t only changes your ability to exercise' it.[50] In this sense, any account of tort law that conceives the practice of tort law as an institutional response for a breach of a primary duty needs corrective justice to be justified. It follows that at least some account of corrective justice is a necessary starting point for any justificatory theory of tort law, even for rights-based accounts. In other words, rights-based theorists are also corrective justice theorists.[51] The retrospective feature of secondary rights that provides a remedy for a primary rights' violation can only be justified by corrective justice. I will concentrate now on the features of tort law that seem to be left unexplained by the classic understanding of corrective justice, which I call the gaps of corrective justice.

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[47] This is clearly reflected in Weinrib's theory of corrective justice. Weinrib (n 1).

[48] Keating (n 3) 306.

[49] This view is generally associated with Holmes: 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference'. Oliver Wendell Holmes, 'The Path of the Law' (1997) 110 Harvard Law Review 991, 995.

[50] Arthur Ripstein, 'As If It Had Never Happened' (2007) 48 William and Mary Law Review 1957, 1978-9.

[51] Despite that some rights-theorists explicitly might not want to be labelled as corrective justice theorists (Stevens [n 3] 327: corrective justice 'is inevitably incomplete'), or claim that primary rights have a 'logical' and 'normative' priority over remedial responsibilities of corrective justice (Keating [n 3] 309). It is true though that they do not need to endorse the classic or Aristotelian model of corrective justice.

I.4 First Gap: The Dilemma of Gains and Losses

Aristotle acknowledges that the notion of 'gain' is not the most appropriate term to certain cases, eg in the case of the infliction of a wound. He says that the judge must equalize the situation of the parties by 'taking away' the gain from the attacker, compensating the loss to the victim 'when the suffering has been estimated'.[52] Does the inadequacy of the terms 'gain' and 'loss' pose a problem for any theory of corrective justice? How can we reasonably argue that an injurer has gained something with the infliction of a wound? It has been suggested that Aristotle restricted the application of corrective justice only to intentionally wrongful torts.[53] If that is the case, then corrective justice cannot justify most torts. However, this argument is not conclusive. First of all, Aristotle's examples are not introduced in the text to define the scope of involuntary transactions, but rather to draw the distinction between clandestine and forced transactions. Hence, there is no reason to conclude that Aristotle wanted to restrict the scope of corrective justice only to these situations. Secondly, even if Aristotle was in fact thinking only about intentionally wrongful torts, it is still possible to expand his theory of corrective justice beyond its original scope. And more importantly, if we restrict the theory to intentionally wrongful torts or takings, the problem of the equivalence between gains and losses remains unsolved, because even in those cases there can be situations where gains and losses are not symmetrical. This is precisely the reason why Aristotle thought that both terms gains and losses could not be the most appropriate terms in certain cases. Is it possible then

[52] Aristotle (n 11) V.4 1132a10-14.

[53] See above n 31.

to elaborate an understanding of gains and losses – with or without Aristotle – that does not restrict corrective justice exclusively to intentionally wrongful torts?

This last question relies on whether it is possible to conceive a non-material account of gains and losses for corrective justice. If gains and losses are measured comparing each party's levels of welfare, the scope of corrective justice will likely be restricted to intentionally wrongful torts. When Aristotle deals with corrective justice he seems to be referring to material gains and losses. However, that should not necessarily be the case. As noted before, Aristotle acknowledges that both terms are not appropriate. Following this line of thought, Wright has suggested that Aristotle should not be read literally, and that the whole idea of gains and losses is a metaphor.[54] This interpretation would allow us to abandon the notions of gains and losses in a material sense, and is greatly supported by many of Aristotle's own remarks, such as when he says that there is some 'sort of gain' and some 'sort of loss' (V.4 1132b18-19),[55] or when he claims that 'to have more than one's own *is called* gaining, and to have less than one's original share *is called* losing' (V.4 1132b12-14).[56]

If Wright's interpretation is correct – as I think it is –, it is clear that Aristotle's notions of gains and losses should not be interpreted literally in a material sense. If corrective justice indeed requires a *material* equivalence between the gains obtained by the injurer and the losses suffered by the victim, then corrective justice is at odds with most areas of tort law. For instance, consider the paradigmatic case of an automobile accident. If driver A negligently damaged driver B's car in a collision, A must correct the inequality caused by her negligent driving by compensating B. In what sense did A win something with the accident? It cannot be a material gain. But if it is not about

[54] Richard W Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625, 694.

[55] Aristotle (n 11) V.4 1132b18-19.

[56] ibid V.4 1132b12-14. The emphasis is mine.

material gains and losses, then what is it about? In other words, what is the metaphor of gains and losses representing?

Kramer claims to solve this problem by suggesting that tortfeasors always gain something, even in the momentary-careless-driving type of situations. He seeks to explain how a careless driver could gain something by causing an accident, arguing that

> in deciding whether *D*'s [the careless driver] attainment of the physical power-of-disposition over *V* [the victim] during a certain span of time is a gain, the relevant question is not whether *D* … *would want that specific power*; instead, the relevant question is whether *that power has value* in the sense that its rightful possessor would not have voluntarily relinquished it free of charge. Unless *V* is an out-and-out masochist, she would not have voluntarily ceded her control over her body and assets to *D* gratis. Hence, *D*'s obtention of that control does indeed constitute his gaining of something valuable – his gaining of something that would have cost him dearly if he had sought to purchase it.[57]

Intuitively, it seems clear to me that *D* gained something with her careless driving. In this sense, Kramer's solution can be attractive to solve this type of situations. Indeed, courts have also used this hypothetical bargain approach to calculate damages for breach of contracts.[58] The approach can also solve problematic tort cases such as *Vincent v Lake Erie Transportation Co*[59] In such a case the defendant's conduct was justified (he needed to use the plaintiff's dock in order to save his vessel during a storm), but he was still held liable to repair the harm done to the plaintiff's property. Kramer's hypothetical bargain approach can explain why in this case the defendant gained something by saving his vessel at the expense of the plaintiff's property.

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[57] Kramer (n 31) 287-8. The emphasis is mine.

[58] *Wrotham Park Estates Ltd. v Parkside Homes Ltd.*, [1974] 1 WLR 798 (Chancery Division). However, it is not doctrinally clear whether the amount of '*Wrotham Park* damages' is compensatory, restitutionary, or something else. See Burrows (n 7) 635-6, 649-50; Kit Barker, "Damages Without Loss': Can Hohfeld Help?' (2014) 34 Oxford Journal of Legal Studies 1.

[59] 109 Minn 456, 124 NW 221 (Minn 1910) (Supreme Court of Minnesota).

Accordingly, the award of damages represents nothing more than what the defendant would have to pay for the use of the dock during the storm.

However, Kramer's solution still needs to face some important problems. It is true that *V* would not have 'voluntary relinquished' the power-of-disposition over her body free of charge, and that *D* gained something 'that would have cost him dearly if he had sought to purchase it'. But the problem is that this hypothetical transaction by definition did not occur, and would probably *never* have happened. As Kramer notes, *V* 'would not have voluntarily ceded her control over her body and assets to *D* gratis'. Does this mean that we should assume that *V* would have ceded her control over her body for a price? The assumption seems artificial, first because it is doubtful that *V* would have ceded control over her body at all, even for a price; and secondly, because it assumes that *V* would have ceded the control over her body at the price fixed by the court.[60]

More importantly, Kramer's conception of gains and losses raises another concern for our general aim of justifying the practice of tort law, namely: should we conceive the whole body of tort law as a form of restitution that seeks to rectify compulsory purchases among tortfeasors and victims? As was noted above (I.3), corrective justice indeed establishes that *D* must repair *V*'s wrongful losses because a wrong was committed. It is not that by providing compensation *D* purchases from *V* the right to harm her. *D* must provide compensation because she wronged *V*, but such payment does not erase the fact that she committed a wrong because she breached a duty. It is not only that *D* did not 'want that specific power'; the point is that *D* never

[60] Burrows raises a similar objection to the conception of '*Wrotham Park* damages' as compensatory, in which the loss that is being compensated would arguably be the victim's loss of the opportunity to conclude a bargain aimed at authorising the wrongdoer to breach the contract. He claims that this is unrealistic because 'in many situations the claimant would have not made that bargain; either it would not have made any bargain to release its rights or it would not have done so at the reasonable price fixed by the courts'. Burrows (n 58) 636.

obtained that specific power. The payment of damages does not erase the wrong.[61] The problem is that Kramer's account of gains and losses seems to equate compulsory purchases with voluntary purchases. Surely, something must have gone wrong with corrective justice if we need to understand it in these terms.

Another solution to the problem that runs parallel to Kramer's restitutionary approach is Gordley's conception of gain as the *fulfilment of the will at the victim's expense*. Facing Aristotle's example of the man who commits murder motivated by hatred rather than financial gain, Gordley argues that the man has gained 'in the sense that he had chosen to harm another in order to accomplish an end of his own', and at the victim's expense.[62] As was seen above (I.2), this understanding is coherent with Curzer's normative interpretation of *pleonexia*, which is the distinctive feature of particular justice. Under this framework, the point of corrective justice is not that the injurer has comparatively more than others or her victim; the point is that the injurer has more than she *deserves* and that she has obtained a gain *at the victim's expense*. This formulation of gains and losses is also able to explain in terms of corrective justice cases of restitution and unjust enrichment in which there seems to be no losses for the victim.[63] Again, the solution seems to conflate tort law with the restitution of gains that were obtained *at the victim's expense*.

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[61] Economic theories of torts might disagree, following Holmes' view. See above n 49.

[62] James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP 2006) 183.

[63] 'The requirement that the claimant must have suffered a corresponding loss is a choice which some systems make, thereby giving themselves a narrow law of unjust enrichment'. Peter Birks, *Unjust Enrichment* (OUP 2003) 65. But Gordley's normative formulation of gains and losses can explain many cases of restitution for wrongs in which the defendant obtained a gain at the victim's expense. Lord Shaw gives the following example: 'If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise".' *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* 1914 SC (HL) 18, 31 (Lord Shaw of Dunfermline). In such a case, there is a normative loss for the claimant because the defendant obtained a gain *at her expense* (with the unauthorized use of A's property). Similar

Relatedly, Gordley's conception of gain as the fulfilment of the will is connected with retributive theories of punishment in criminal law. Under this framework, criminal punishment is based on the principle 'Do not allow men to profit from their criminal wrongdoing'.[64] Accordingly, punishment secures that there is no profit in criminal wrongdoing. In a similar way, Finnis claims that the gain for the criminal is the advantage of 'exercising a wider freedom and of acting according to one's tastes'.[65] Could this notion of criminal gain be accommodated with a tortious gain? Gordley's reformulation of gain as the fulfilment of the will at the victim's expense is an effort to accomplish this. Gordley's attempt however seems to work better in the case of criminal law than in the context of private law. For instance, it might seem odd to conceive a negligent conduct as an option to harm another, particularly in momentary careless situations.

The key to solve this problem of gains and losses seems to reside in the connection of corrective justice with rights. If corrective justice is about rights and duties, then the notions of gains and losses must also be understood normatively. It might be argued that understanding losses in this normative sense means 'adopting an artificially expansive definition of loss';[66] however, I do not see why it would not be conceptually possible to do so.[67] This interpretation can even be found in the civil law

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line of reasoning could be used in other restitutionary cases such as *Edwards v Lee's Administrator* 96 SW 2d 1028 (1936) (Court of Appeals of Kentucky) and *Attorney-General v Blake* [2001] 1 AC 268 (HL).

[64] Jeffrey G Murphy, 'Three Mistakes about Retributivism' (1971) 31 Analysis 166, 167.

[65] John Finnis, 'The Restoration of Retribution' (1972) 32 Analysis 131, 132.

[66] Stevens (n 3) 64.

[67] And it has also been argued that this interpretation can be adopted in practice by awarding substantive awards of damages under the heading of 'vindicatory damages' to victims whose rights have been violated, even when no material losses had been caused with the wrong. See *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245. However, the problem is to determine under what conditions should vindicatory damages be available: 'The result of the *Lumba* case was a signal lack of clarity as to when vindicatory damages will

tradition.[68] In this sense, the French jurist Pothier, whose work inspired the drafting of the French Civil Code, defines a delict (or a tort) 'as an act, by which, through fraud or malice, a person occasions *damage or injury* [tort] to another', and a quasi-delict (or quasi-tort) 'as an act by which, without malice, but through inexcusable imprudence, a person occasions *damage or injury* [tort] to another'.[69] Pothier seems to distinguish between two hypotheses that are both covered by the categories of delicts and quasi-delicts, namely those situations in which a person causes damage or harm to another, and those situations in which a person causes an injury or a wrong to another, without necessarily causing a material loss to the person. Accordingly, Descheemaeker concludes that 'Pothier does not make loss an essential element of delict or quasidelict'.[70] The normative understanding of losses therefore is not exclusive of the common law tradition; it is also relevant for the civil law tradition as well, despite the fact that the French Civil Code did not exactly follow Pothier in this matter (Articles 1382-3 require damage).

The leading supporter of the normative account of gains and losses is Weinrib. His argument is that the gains and losses of corrective justice do not compare the levels of welfare of the parties before and after the wrong, but rather that they compare the parties' situation after the transaction according to a normative standard that governs the interaction.[71] Weinrib further argues that the notions of gains and losses are not conditions of liability, but only 'quantitative representations of the doing

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be available in tort'. Roderick Bagshaw and Nicholas J McBride, *Tort Law* (4th edn, Pearson 2012) 827.

[68] I thank Arturo Ibáñez León for bringing this to my attention.

[69] Robert Joseph Pothier, *A Treatise on Obligations, Considered in a Moral and Legal View* (Martin & Ogden 1802) § 116. The emphasis is mine.

[70] Eric Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (OUP 2009) 114.

[71] Ernest J Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277, 282-3.

and suffering of a wrong'.[72] According to him this idea characterizes the *bipolar* structure of corrective justice, treating the injurer's gain as *correlative* to the plaintiff's loss.[73] Once the material conception of gains and losses is excluded, Weinrib argues that the notion of equality in corrective justice resides not in one's comparison with another, but in 'a comparison between one has and what one should have' according to the 'norms that set the terms of fair interaction'.[74] The next step is to determine an adequate normative standard to establish which are these relevant 'norms that set the terms of fair interaction'. Weinrib claims that Kant's concept of right is the only theory that can solve the problem of Aristotle's formal equality, by consolidating the idea of equality with the correlativity of doing and suffering.[75] Under this framework, the content of gains and losses is specified by the concepts of right and duty; the right represents the position of the victim, whereas the duty represents the position of the injurer.[76] According to Weinrib, this normative conception of gains and losses assures their equivalence when a wrong has been committed, because the breach of a duty will always be equivalent to the violation of the other person's right.[77]

For Weinrib, the content of the rights and duties is specified by a Kantian abstract principle, according to which the action of the injurer must be consistent with the victim's freedom.[78] Weinrib's move here can be (and has been) criticised. For instance, if it is possible to morally provide the content of rights and duties, he does

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[72] ibid 289. Weinrib's idea of the correlativity of doing and suffering a wrong as the basis for corrective justice is also argued in Martin Stone, 'On the Idea of Private Law' (1996) 9 Canadian Journal of Law & Jurisprudence 235, 251.

[73] Weinrib (n 1) 64.

[74] ibid 115.

[75] ibid 81.

[76] ibid 122-3.

[77] ibid 126.

[78] Weinrib (n 71) 290-1.

not conceive the possibility that there could also be a moral loss for the injurer. The classical Socratic formulation of the principle according to which it is worse to commit an injustice than to suffer it illustrates this point.[79] Another source of criticism has been Weinrib's interpretation of Kant's philosophy of private law.[80] I cannot discuss these issues here. But it is important to note for the task at hand that a commitment to a normative understanding of gains and losses does not require a commitment to Kant's abstract formulation of private rights.[81] Regardless of whether one shares Weinrib's abstract formulation of the gains and losses of corrective justice in Kantian terms, it seems to me that he successfully connects rights-based approaches with corrective justice. Under this framework, corrective justice does not require equivalence between the material losses suffered by the victim and the gains obtained by the tortfeasor; what is required is a normative equivalence between the tortfeasor's duty not to cause a wrong to her victim and the victim's right not to be wronged by the tortfeasor.

Finally, I will discuss here Coleman's annulment thesis, which provides another solution to the problem of gains and losses of corrective justice, a solution that is compatible with the normative conception of gains and losses discussed above. According to Coleman's thesis, 'corrective justice demands that wrongful (or unjust) gains and losses be rectified, eliminated, or annulled'.[82] In the context of this framework, he introduces the distinction between the *grounds* of the right to recovery

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[79] Plato, *Gorgias* (T Irwin edn, OUP 1974) 469 ff.

[80] See especially Alan Brudner, 'Private Law and Kantian Right' (2011) 61 University of Toronto Law Journal 279, 308 (arguing that in Kant's philosophy of law private rights acquired in the state of nature are held only provisionally).

[81] Perhaps it is true that 'there is no necessity for an extensive discussion of the works of Kant and Hegel in order to understand and justify the rights recognized by the common law'. Stevens (n 3) 329.

[82] Jules L Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 Indiana Law Journal 349, 357; Coleman (n 1) 306.

and the *scope* of that right. More frequently than not there are differences in the wrongful losses suffered by victims and the wrongful gains secured by injurers. In this sense, if the injurer's gain is less than the loss caused by her conduct and the victim is fully compensated, corrective justice could be imposing an excessive cost to the injurer considering her gain. And similarly, if the victim were compensated only for the amount equivalent to the wrongful gain secured by her injurer, corrective justice would leave a loss without compensation.[83] The distinction between the grounds and the scope of the right to recovery solves this puzzle by claiming that the fact that the injurer has secured a wrongful gain may be a *ground* to support the right to recovery for her victim, but the *scope* of the injurer's liability is determined by other factors. As Coleman puts it, 'the extent of someone's liability does not depend on the extent of the gain'.[84]

The distinction is an adequate mechanism to solve the problem of equivalence between gains and losses, because it shows that corrective justice requires the existence of a gain for the injurer and a loss for the victim to *ground* liability; but it does not require that these gains and losses should be equivalent, since the *scope* of liability is not necessarily determined by the extent of the injurer's gain. Coleman's solution is also compatible with the normative conceptions of gains and losses, because it reinforces the fact that the equivalence between gains and losses cannot be understood in a material sense; rather, the gains and losses that need to be considered as a *ground* to support the right to recovery for the victim must be determined by the fact that the defendant committed a wrong that was suffered by the victim. In other words, the equivalence between gains and losses in the context of *grounding* liability must be

[83] Coleman, 'Tort Law and the Demands of Corrective Justice' (n 82) 353.

[84] ibid 354.

normative: a breach of a duty by the tortfeasor, and a right to demand for a remedy by the victim.

I hope that I have provided sufficient evidence in this section to show that there is a relative consensus to reject conceiving the gains and losses of corrective justice in terms of comparing levels of material welfare. Such interpretation would not only be at odds with many features of tort law, but also would be an unfair reading of Aristotle's original text. Accordingly, the common strategy to avoid this interpretation is to conceive gains and losses in a more abstract sense. Weinrib's formulation of corrective justice based on Kantian private rights is a paradigmatic example of this move. Coleman's distinction between grounds and scope of liability also seeks to formulate the gains and losses of corrective justice in a more abstract sense to ground liability, leaving open for different criteria to determine the scope of liability. But this move does not come gratis; it has costs.

First, abstracting the gains and losses of corrective justice also involves an abstraction of the remedy that corrective justice requires. In the simple model of material gains and losses, full compensation seems to be the appropriate and most natural remedy. However, the result seems different when it comes to a normative account of gains and losses. If the tortfeasor's gain is normative and the victim's loss is also normative, why then is the adequate remedy full (material) compensation? I will deal with this problem later (VI.2). For the purposes of the present discussion, it is enough to note that the abstract formulation of the gains and losses of corrective justice implies an abstract formulation of the remedy that is required. However, the abstraction of the remedy will also need to explain or justify why the remedy awarded will look at the victims' losses and in some cases the tortfeasors' gains.[85] It seems to me

[85] For instance, Stevens argues that '[c]ompensation for the losses suffered as a consequence of the infringement of the right is the most common response, but it does not have a monopoly

that this is an important reason to persuade corrective justice scholars – and also rights-based theorists – that they should not abandon the Aristotelian framework of corrective justice and its emphasis on gains and losses.

But there is also a second difficulty that the normative approach of gains and losses must face. For some, the formulation of corrective justice in an abstract sense might result in a circular argument[86] or in an empty notion of lawfulness.[87] Perhaps we are facing a dilemma here: we can either conceive the gains and losses of corrective justice as a form of restitution in terms of Kramer's hypothetical bargain or Gordley's fulfilment of the will at the victim's expense, at the cost of assimilating tort law to a form of restitution mainly concerned with gains rather than losses, or alternatively we can conceive the gains and losses of corrective justice abstractly in Coleman's or Weinrib's terms, at the cost of emptying the notion of corrective justice. Are we forced then to conclude that corrective justice is an empty idea if we wish to avoid conflating tort law with some form of restitution? I will deal with this question in the next section.

I.5 Second Gap: What to Protect, Whom to Protect, and from Whom to Recover

It has been argued here that corrective justice adequately captures that tort law is about the rights and duties of individuals (I.3), and relatedly that the gains and losses

… Other measures of award, for example, quantified by the gain of the defendant, are also possible'. Stevens (n 3) 60. But he is unable to explain why compensation for losses or restitution of gains is 'the most common response'. Why should we care about the parties' gains and losses if tort law is about vindicating rights? See below VI.2 for a discussion of this problem.

[86] Hershovitz (n 4) 114 (arguing that Weinrib's normative gains and losses are circular, because '[c]orrective justice itself creates the gain needed to offset the victim's loss').

[87] Hans Kelsen, 'Aristotle's Doctrine of Justice' in his *What is Justice?* (University of California Press 1957) 133.

of corrective justice should be understood in a normative sense (I.4). The question then is how can (or should) we define these rights and duties that provide a baseline to corrective justice? It is clear that corrective justice does not mandate to disgorge *all* gains or to repair *all* losses; only *wrongful* gains and losses are subject to corrective justice. Under what conditions then does a gain or a loss become *wrongful*? As Coleman points out, corrective justice 'puts a great burden on the concepts of wrongful gain and wrongful loss'.[88] Coleman refuses to offer a *numerus clausus* of conditions that will determine whether gains and losses are wrongful. He argues that wrongful losses are generally caused by the wrongful conduct of another, but he notes that in some cases even justified (non-wrongful) conduct 'justifies a claim to rectification'.[89] I will not try to solve this issue here. But the fact that even justified conduct can raise a corrective justice duty shows that we need a more sophisticated account of wrongfulness than mere blameworthiness.[90] How can we determine then when corrective justice duties are triggered?

A starting point to answer this question is that corrective justice does not provide a substantive content to determine what is to count as a tort. As Finnis points out, corrective justice 'leaves untouched a wide range of problems', because it depends 'on some prior determination of what is to count as a crime, a tort, a binding agreement, etc.'.[91] In the same vein, Weinrib's theory also seems to agree with Finnis'

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[88] Jules L Coleman, 'Corrective Justice and Wrongful Gain' in Coleman (n 36) 185. Interestingly, the theory of civil recourse also puts a great burden on the notion of wrongfulness. John CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917.

[89] Coleman (n 88) 185. To illustrate this point, Coleman uses Feinberg's example of a backpacker that on a trip to the mountain uses an unoccupied cabin to protect himself from an unexpected blizzard.

[90] See also Allan Beever, *The Law of Private Nuisance* (Hart Publishing 2013) 15 (claiming that 'the tort of nuisance is not *about* wrongful action. Rather, it is about providing a hierarchy of property rights').

[91] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 178.

view on this point, since according to him 'corrective justice presupposes the existence of entitlements'.[92] Hence, corrective justice depends on an independent definition of the primary rights that the positive law of torts protects. This might seem obvious. Corrective justice cannot determine whether a trespass to land has occurred without making a reference to the substantive property rules that positive law provides. Similarly, corrective justice does not establish the standards that a diligent driver must comply with without referring to the rules that the positive law provides. But more importantly, corrective justice and its remedial structure cannot provide the content of the primary rights protected by tort law.[93]

However, this characterisation of corrective justice can be problematic. For instance, Posner argues that Aristotle's idea of corrective justice is 'implicit' in the economic theory of tort law that seeks to bring about efficient allocation of resources:

> If A fails to take precautions that would cost less than their expected benefits in accident avoidance, thus causing an accident in which B is injured, and nothing is done to rectify this wrong, the concept of efficiency as justice will be violated.[94]

In other words, since corrective justice does not have substantive content, the argument goes, it is possible to accommodate an economic theory of torts based on wealth maximization with the demands of corrective justice. Under this framework

[92] Weinrib (n 1) 80. Cane argues that Weinrib should have concluded then that distributive justice is the baseline of corrective justice, since 'in Weinrib's view, these two forms of justice are the only forms of justice. However, Weinrib never quite states this conclusion explicitly'. Peter Cane, 'Distributive Justice and Tort Law' (2001) 4 New Zealand Law Review 401, 409. But Weinrib not only avoids stating this conclusion; he rejects it explicitly: he says that corrective justice 'accepts the distribution as given and *does not incorporate the justification of the distribution into its own structure*'. Weinrib (n 1) 80. Emphasis added.

[93] This might be one reason to think, as Keating suggests, that primary rights and responsibilities have priority over corrective justice. Keating (n 3) 309. Perhaps the elaboration of a moral theory of the primary rights protected by tort law is a gap of corrective justice that this thesis will not fill. Stevens disagrees. He claims that 'it is unnecessary to be a profound thinker' to perform this task. Stevens (n 3) 329.

[94] Richard A Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 The Journal of Legal Studies 187, 201.

thus, wrongfulness is determined by efficiency alone. Posner's theory does not require any blameworthiness on the injurer; it only requires a failure to take cost-efficient precautions to avoid accidents. But surely something must be wrong here. How can corrective justice be compatible with economic theories of tort law? It seems to me that the mistake is to depict corrective justice as an empty shell compatible with any normative account of tort law. As Wright points out, Aristotle's notion of corrective justice does have a substantive ethical content that is incompatible with economic theories. For Aristotle's corrective justice excludes 'all comparative criteria for determining unjust gains and losses … including utilitarian, efficiency, and all other aggregative criteria'.[95] The substantive content of corrective justice therefore is precisely that utilitarian considerations cannot be taken into account in tort adjudication.[96]

Wright's subsequent works however have moved this notion of substantive corrective justice into a different direction. He has suggested that the notion of corrective justice should be replaced with the concept of 'interactive justice'. According to Wright, 'the words "corrective" or "rectificatory" place the focus on *remediation* of the second kind of injustice rather than on the injustice itself'.[97] More recently, Wright still endorses this view, and he adds that it is a mistake to emphasise the remedial aspect of corrective (interactive) justice, because the concept should also include the prevention of wrongs before they occur and the definition of the wrongs

[95] Wright (n 54) 701.

[96] In the same vein, Beever argues that corrective justice's principle of fairness between the parties is not an empty notion, because 'it provides a frame of reference for deciding' specific issues of human concern. Beever (n 90) 23.

[97] Richard W Wright, 'The Principles of Justice' (2000) 75 Notre Dame Law Review 1859, 1883.

that are being corrected.[98] However, in my view it is not a mistake to emphasise the remedial aspect of corrective justice. Preventing the occurrence of wrongs is not a concern of corrective justice. As was noted above, tort adjudication is backward-looking rather than forward-looking (I.3). It is true that tort law is *to some extent* forward-looking; if wrongdoers are not held responsible, then it is likely that they will commit wrongs again. In some sense, when a court rules that a manufacturer is liable for the injuries caused by a snail found in a ginger beer bottle, the court is holding that particular manufacturer responsible for the harms negligently caused to a particular victim. But the court is also setting up a rule according to which any manufacturer who negligently causes harm to any victim will be held liable. This is not however a primary concern of corrective justice. The prevention of wrongs or harms is only an incidental or positive side effect of corrective justice. As will be shown below (VI.7), the remedial structure of corrective justice cannot justify injunctions that seek to prevent the occurrence of wrongs.

But Wright's notion of interactive justice is not limited to suggesting a terminological change; it also aims to provide substantive content to the injustice that corrective justice seeks to correct. He claims that,

> Both distributive justice and interactive justice are based on the same fundamental premise of the absolute equality of human beings with equal dignity and moral worth, who, under the supreme principle of morality, are entitled to be treated with equal concern and respect.[99]

[98] Richard W Wright, 'Private Nuisance Law: A Window on Substantive Justice' in Nolan and Robertson (n 8) 493.

[99] Wright (n 97) 1888.

He later adds that the notion of equality involved in corrective justice is 'the absolute equality or dignity of each human being'.[100] I do not think however that this substantive content for corrective justice is convincing enough. First, it is doubtful that an abstract concept such as 'dignity' will do a better job than corrective justice to determine what should be corrected. The problem is not that the notion of dignity is a particularly vague concept that cannot serve as guidance at all.[101] Rather, the problem is that the notions of 'equal dignity and moral worth' are no more determinate than corrective justice itself. What is the point of bringing out the concept of dignity in the context of corrective justice? The notion of dignity seems to be at the same level of abstractness as the principle of justice between the parties of corrective justice. But secondly and more importantly, in my view corrective justice and tort law is not all about the protection of dignity. I share the view that human dignity can be an interest protected by some torts.[102] However, this does not mean that we should reduce tort law to the exclusive protection of this value. For instance, should we argue that proprietary torts such as trespass to land or nuisance are meant to protect the victim's dignity? The answer could be affirmative only at the cost of conceiving dignity as an empty shell that by definition could cover any interest protected by tort law. While dignity defined in a narrow sense can clearly provide a substantive content to some torts such as battery or defamation, in the case of other torts this operation seems

[100] ibid 1890.

[101] As Waldron points out, many other notions that are frequently used such as 'equality', 'democracy', or 'liberty' are indeterminate or vague as well. Jeremy Waldron, 'Dignity, Rank, and Rights' in Meir Dan-Cohen (ed), *Dignity, Rank, and Rights* (OUP 2012) 16.

[102] Denise G Réaume, 'Indignities: Making a Place for Dignity in Modern Legal Thought' (2002) 28 Queen's Law Journal 61.

artificial.[103] Hence, my suggestion is to keep the content of the rights protected by tort law analytically separated from the notion of corrective justice.

A separate but connected issue is to determine what is to count as a tort after determining the content of the moral rights protected by corrective justice. The discussion of this section has shown that corrective justice itself cannot determine the moral rights that it aims to protect. It is my contention that the same applies to determine what counts as a tort, who is entitled to bring a tort action and from whom the victim can recover. Corrective justice establishes that a victim who suffers a wrongful loss is entitled to make a claim against the injurer who wrongfully caused the wrong. As it was already noted, we need a definition of what is to count as a wrongful loss to determine what is to count as a tort. But we also need a definition of who is to count as a *victim* of a tort (whom to protect) and who is to count as the *tortfeasor* in a tort claim (from whom to recover).

The civil recourse approach partially captures this problem with what Zipursky calls the 'substantive standing' rule,[104] according to which tort systems have specific rules to determine which are the requirements that any victim needs to meet in order to be able to make a tort claim. In other words, it is not enough to have suffered a wrongful loss to be a tort victim: 'A plaintiff may recover against a defendant for a tort only if the defendant's conduct was *tortious relative to the plaintiff*'.[105] Zipursky provides several examples to explain this requirement in different torts.[106] The most important one that he provides is Judge Cardozo's famous decision in

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[103] As Goldberg and Zipursky point out, 'the interests protected by tort law are plural and irreducible'. Goldberg and Zipursky (n 88) 941.

[104] Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1, 4.

[105] Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 The Georgetown Law Journal 695, 714. The emphasis is mine.

[106] Zipursky (n 104) 15-39.

Palsgraf.[107] In *Palsgraf*, a guard of the defendant railroad company negligently pushed a passenger to get onto a moving train. The push caused a wrapped package to fall upon the rails. The package contained fireworks, which exploded with the fall and threw down some scales at the other end of the platform. The falling scale caused injuries to Mrs. Palsgraf, who sued the railroad company for negligence. The problem for the case of Mrs. Palsgraf is that the railroad's negligent act was relative to the person who was pushed and not to her. In Cardozo's words, '[w]hat the plaintiff must show is "a wrong" to herself; i.e., a violation of her own right, and not merely a wrong to some one else'.[108] The result can be surprising from an intuitive point of view: Mrs. Palsgraf does not have a tort claim even though her injuries were caused (at least in a but-for sense) by the guard's negligent act of pushing the passenger to get onto the train. In my view, the example satisfactorily illustrates Zipursky's point, according to which we need some rules to determine which victims of wrongful losses are entitled to make a tort claim, and these rules do not come from corrective justice.[109]

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[107] *Palsgraf v Long Island Railroad R.R. Co*. 162 N.E. 99, 99 (N.Y. 1928). Other examples can be found in English law as well, such as *Bourhill v Young* 1942 SC (HL) 78 (tort claim was rejected because a negligence plaintiff 'can recover damages only if she can show that *in relation to her* [the defendant] acted negligently' [ibid 87 (Lord Macmillan), emphasis added], *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310 (HL), 360 (a victim who suffers a psychiatric illness by watching shocking images of a loved person who was negligently injured by the defendant can only make a tort claim if she can prove 'a sufficient degree of care'), and *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) 717 (a claimant of private nuisance 'must have an interest in the land' affected to be able to make a tort claim).

[108] *Palsgraf* (n 107) 100.

[109] Of course, it is possible to defend the decision of the case from the perspective of a rights-based account: the railroad's guard did not violate Mrs Palsgraf's rights because no wrong was done *to her*. My point is that corrective justice alone cannot provide the content of these rights that establish the substantive standing rules. Weinrib disagrees. He claims that the legal doctrines of duty of care and proximate cause are connected with corrective justice: 'The lesson of *Palsgraf* is that for the defendant to be liable, the wrongfulness of the defendant's risk creation must be correlative to the wrongfulness of the plaintiff's injury'. Weinrib (n 1) 164. I agree with Weinrib that the legal principle of proximate cause involved here is compatible with corrective justice. Similarly, it is also possible to defend the decision of the case from the perspective of a rights-based account: the railroad's guard did not violate Mrs Palsgraf's rights (no wrong was done *to her*). However, my point is that these legal doctrines are analytically

But the substantive standing doctrine only captures the problem partially, because we also need rules to determine from whom the victim can recover. Sometimes this is a straightforward task; but in other cases it is not. Take *Plasgraf* again. Who is the tortfeasor in this case? According to corrective justice, the injurer is the one who (allegedly) caused the wrong, the railroad company's guard. However, the tort claim was brought against the railroad company and not the guard. Why? Weinrib's response is to argue that according to the *respondeat superior* doctrine, the employee's wrong is imputed to the employer. Hence, the argument goes, the doctrine is 'an instantiation of corrective justice'.[110] But some work is required here to get from corrective justice to the *respondeat superior* doctrine. The point is not that the doctrine is incompatible with corrective justice, but rather that the law's fiction of regarding the employee's tortious act as an employer's wrong is not based on corrective justice. And certainly, it is the law that establishes the conditions under which this fiction operates. By the same token, the law also holds an occupier responsible for failing to keep her premises reasonably safe to her visitors,[111] or makes liable the keeper of a dangerous animal for the damage that it causes,[112] or holds responsible an owner of an automobile for the injuries caused by the negligent driving of her vehicle, even if she was not driving.[113] All of these examples show the same truth, according to which determining from whom should a victim recover in a given tort case is not always straightforward.

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separate from the idea of corrective justice. Corrective justice is compatible with proximate cause, but it does not require it. See below IV.2.

[110] ibid 187.

[111] Occupiers' Liability Act 1957, Section 2.

[112] The Animals Act 1971, Section 2(1).

[113] See eg Chilean Traffic Regulations, article 169 of Ley N° 18.290, Ley de Tránsito 1984: 'The driver, the owner of the vehicle and its possessor under any title, are severally liable for the damage caused by the use of the vehicle, unless the owner or the possessor proves that the vehicle was used against his will'.

A promising line of argument to respond to these challenges is to claim that positive law provides a concrete specification of the rights and duties protected by corrective justice.[114] There is some truth in this argument. Wrongfulness is to a great extent made determinate by positive law. For instance, positive law establishes which types of contact with other persons count as the tort of battery and which of them do not, even if a general rule according to which no one should touch another person without his or her consent can be found in morality. In this sense, the law makes determinate the abstract principles of morality.[115] This idea is reinforced by the fact that for some jurisdictions an unlawful touching might not be actionable by tort (if it is harmless). Similarly, it could be argued that legal doctrines such as proximate cause or occupiers' liability are nothing more than doctrines determined by positive law. However, this is not always the case for corrective justice, because some corrective justice duties can also be found outside positive law. MacCormick's famous example illustrates this point:[116] a University teacher promises his children to take them to the beach one afternoon, but later he is not able to keep his promise because he is required to help a student with an apparently suicidal depression. It does not matter whether the teacher's conduct was justified or not. Perhaps the teacher simply forgot that he had promised the trip. In any case, we intuitively think that the children have a corrective justice claim to be compensated. MacCormick suggests that the teacher might take the children to the seaside some other day. But maybe he could buy them some chocolates, or he even might just apologise to them. It might be discussed what

[114] Dennis Klimchuk, 'On the Autonomy of Corrective Justice' (2003) 23 Oxford Journal of Legal Studies 49, 61. Stevens also comes close to this position, when he argues that 'there is no necessity for an extensive discussion of the works of Kant and Hegel in order to understand and justify the rights recognized by the common law'. Stevens (n 3) 329.

[115] Tony Honoré, 'The Dependence of Morality On Law' (1993) 13 Oxford Journal of Legal Studies 1.

[116] DN MacCormick, 'The Obligation of Reparation' (1977) 78 Proceedings of the Aristotelian Society 175.

is the appropriate remedy for this case, but the point here is that there is a corrective justice claim, and it does not depend on the positive law. On the contrary, it is possible to argue that the law imposes upon the teacher the duty to be available to attend his students when is necessary (it could be part of the duties imposed by his contract with the University).[117] Again, tort law (and positive law in general) does not exhaust corrective justice.

My argument is that a definition of what is to be protected by tort law (what to protect, whom to protect, and from whom to recover) must be found outside corrective justice. The argument implies that it is possible to separate analytically the duties of repair (based on corrective justice) and the norms of conduct (based on something else). Ripstein claims that this is a mistake.[118] But in my view it is not, even though the duty of repair is a continuation of the primary right that is being protected.[119] This is why the remedy must take the form of providing something equivalent to the wrong not having occurred in the first place, or in other words, the remedy must provide the next-best scenario to the right that should not have been violated in the first place (what I will call 'the next-best' formula [I.6]). This continuity however does not preclude one from analysing separately the duty of repair based on corrective justice and the rights protected by tort law that cannot be based on corrective justice. I will argue that determining what to protect, whom to protect, and from whom to recover in tort law is, at least in part, a task of distributive justice (IV.4).

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[117] I will discuss MacCormick's example again in II.7.

[118] A mistake that according to Ripstein both Coleman and Zipurky fall into. Ripstein (n 50) 1963.

[119] Based on Gardner's 'continuity thesis'. Gardner (n 35) 28-37.

I.6 Third Gap: The Diversity of Remedies

One of the most influential critiques to corrective justice in the context of tort law is that this principle cannot explain the variety of remedies that tort systems usually provide for victims of wrongs. According to this critique, corrective justice holds the false premise that tort systems should *always* provide full compensatory damages as a proper response to a wrong. The premise is false – the argument goes – because there are many remedies awarded in tort systems (both in common law and civil law jurisdictions) that are clearly not compensatory, such as injunctions, punitive damages and nominal damages. Zipursky furthermore argues that there are different types of damages that cannot be easily encapsulated under the rubric of 'compensatory damages', such as non-pecuniary damages for pain and suffering, harm to reputation, emotional trauma, and loss of enjoyment of life.[120] For the purposes of the discussion here, I will label these damages as 'unorthodox damages'.

According to Zipursky, corrective justice theorists may respond to this objection by two ways. The first one is a 'reduction defense', according to which unorthodox damages 'are really compensatory damages by another name'.[121] Zipursky claims that this answer is destined to fail because it cannot explain why, for instance, punitive damages are generally granted only when the wrong was committed wantonly or wilfully. Another response is the 'illegitimacy defense', according to which unorthodox remedies are not part of the main structure of tort law. Both defences seem inadequate. While stretching the concept of compensatory damages in order to capture these remedies seems artificial, to exclude and leave unexplained an

[120] Zipursky (n 105) 711.

[121] ibid 712.

important feature of tort systems makes the idea of corrective justice less attractive as an explanation of the law of torts as it is.

Goldberg and Zipursky's answer to this challenge is the separation of the right to redress (or the right of action) and the remedy that is awarded as a consequence of such right. According to these authors, tort law gives victims of wrongs 'a right of action, the aim of which is to obtain a remedy – usually, but not always, money damages'.[122] Therefore, the question about the remedy is a second issue. Despite the fact that money damages will be awarded on many occasions, for these authors that should not necessarily be the case. There is nothing distinctive about tort law and compensatory damages; what is distinctive about tort law is the right of action or civil recourse.

Separating the right of action (or the right to redress) from the remedies awarded by tort law has many advantages, especially for an explanatory theory of existing tort systems in the common law (and particularly in the United States). Accordingly, the civil recourse model successfully explains why in many tort cases in which a wrongdoer is held liable, the remedy is not money damages but something else. Civil recourse thus provides an explanation of the variety of remedies available in tort law. And as Goldberg and Zipursky ague, civil recourse might explain why tort law in many cases impose duties for tortfeasors that go beyond what 'ordinary morality' would normally require.[123] However, the model becomes less attractive

[122] Goldberg and Zipursky (n 88) 946.

[123] Examples of this, according to Goldberg and Zipursky, are the duty to pay a disproportionately high amount of damages as a consequence of a momentary negligent act, and the objective standard of negligence that does not take into account the fact that some people may never be able to comply with the standard. John CP Goldberg and Benjamin C Zipursky, 'Tort Law and Responsibility' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 30. However, at least in the case of the latter example, it is possible to argue that the objective standard is not at odds with morality. Tony Honoré, 'Responsibility and Luck. The Moral Basis of Strict Liability' in his *Responsibility and Fault* (Hart Publishing

when it faces tort systems that do not belong to common law jurisdictions. For instance, in French Law it would be more difficult to separate the right to bring an action of delictual liability from the remedy that such action is pursuing, simply because as a general rule it is the existence of damage (among other requirements) that entitles a victim to bring a tort action, and such action should bring nothing more and nothing less than reparation for the harm suffered by the victim.[124] This might not be problematic for civil recourse theorists, because we can assume that civil law systems are out of their scope. Perhaps the differences between these systems are such that it is not possible to understand them under the same principles.

However, the civil recourse approach must still deal with features of existing tort systems in common law jurisdictions that are left unexplained by the separation between the right to redress and remedies. The approach has been criticised because it cannot explain the fact that in common law systems of tort law full compensatory damages is the default remedy 'as of right', whereas other remedies (such as punitive damages or disgorgement of profits) are *to some extent* granted at the discretion of courts.[125] Separating the remedy from the wrong comes with the high price of losing

1999) 22-3 (arguing that the objective standard imposes a form of strict liability on the shortcomers who cannot attain it, and that strict liability can be morally justified).

[124] See article 1382 of the French Civil Code: 'Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it was caused to make reparation for it'. Simon Whittaker, 'The Law of Obligations' in John Bell and others (eds), *Principles of French Law* (2nd edn, OUP 2008) 361. It is true that the distinction could still stand conceptually in these jurisdictions, since even when harm is a necessary requirement to bring a tort action we could still theoretically distinguish between the right to redress and the remedy. I thank Frederick Wilmot-Smith for pointing out to me this possibility. However, my point is that the distinction is less attractive and not straightforward in these jurisdictions.

[125] 'A right to reparative damages at common law is a right to some reparative damages … [The court] is legally bound to make a reparative award of some kind if one is sought by the successful plaintiff, because he or she has a right to such an award. By contrast, the court is not legally bound to issue an injunction of any kind, to order any kind of disgorgement of profits, or to award any kind of exemplary or punitive damages (even at common law)'. John Gardner, 'Torts and Other Wrongs' (2011) 39 Florida State University Law Review 43, 55. I added the caveat *to some extent* because I do not share the view according to which courts are *never* legally bound to issue injunctions or to award punitive damages.

explanatory power. As Encarnacion points out, 'increasing the level of generality has costs'.[126] It might indeed be that Goldberg and Zipursky are willing to pay such costs. However, it makes the theory much less attractive from an explanatory point of view. If the advantage of the civil recourse approach is to be able to explain more features of tort law than corrective justice, then this objection should be taken seriously.

Similarly, Ripstein argues that Goldberg and Zipursky's characterisation of full compensatory damages simply as a 'default' remedy is 'baffling': 'Their legal role in harm-based torts is not only as a default, which a court might reject in favor of some other measure. Instead, they provide the basis on which any further heads of damages are built'.[127] The problem seems to be that once we separate the right of action from the remedy it becomes difficult to justify the existence of full compensatory damages.[128] Accordingly, civil recourse seems to suggest that the measure of providing full compensation to victims could be changed to a different standard, such as providing *fair* compensation to victims.[129] But is it possible to elaborate a different answer to the diversity of remedies challenge? Is it necessary to dismiss the idea that tort systems have a good reason to make victims whole?

I want to suggest a different answer to the challenge from the point of view of corrective justice, an answer that cannot be encapsulated by the reduction defence or the illegitimacy defence. I argue that *pace* Goldberg and Zipursky, corrective justice is able to justify most (though not all) of tort law's unorthodox remedies, and that this

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[126] Encarnacion (n 5) 475.

[127] Arthur Ripstein, 'Civil Recourse and Separation of Wrongs and Remedies' (2011) 39 Florida State University Law Review 163, 195-6.

[128] The same problem that rights-based accounts must face when they seek to explain or justify the full measure of compensatory damages. See above n 85 and below VI.2.

[129] A standard that according to Goldberg used to be the usual measure for compensatory damages. John CP Goldberg, 'Two Conceptions of Tort Damages: Fair v. Full Compensation' (2006) 55 DePaul Law Review 435. See below VI.2 for discussion.

task does not require reformulating the Aristotelian understanding of corrective justice, as some have suggested.[130] The starting point is to determine how remedies in tort law should be according to the Aristotelian model of corrective justice. Why has it been assumed that this understanding of corrective justice necessarily mandates that transactions should be rectified or corrected by full compensation? It might be that Aristotle's formulation of corrective justice in terms of arithmetical equality is the source of confusion. For instance, he claims that corrective justice 'consists in having an equal amount before and after the transaction'.[131] It is not clear to me however why we should conclude that according to Aristotle transactions must necessarily be corrected providing material compensation or money to victims. For example, when a claimant demands the specific performance of a contract that has been breached, why should we conclude that corrective justice could not mandate such a remedy? Certainly, the breach of contract is a loss for the claimant; accordingly, the judicial order of specific performance is nothing more than a form of corrective justice's mandate: it repairs the losses caused by the wrong (the breach of contract).[132]

Someone might respond to this by asking why the breach of contract is a loss for the victim? Recall that Aristotle's notions of gains and losses should not be interpreted literally in a material sense; a more abstract understanding of these notions is required (I.4). By the same token, the remedy that corrective justice mandates must also be formulated in a more abstract sense. A careful reading of Aristotle reflects this view. For instance, he says that when a judge administers

[130] Encarnacion (n 5); Hershovitz (n 4).

[131] Aristotle (n 11) V.4 1132b18-19.

[132] Despite the fact that in common law jurisdictions specific performance is an equity remedy, and as such, is exceptional. By contrast, courts in civil law jurisdictions conceive specific performance as a default remedy for breach of contract. See Solène Rowan, *Remedies for Breach for Contract* (OUP 2012) ch 2.

corrective justice, he 'restores equality'.[133] In this sense, I will argue that this formulation of corrective justice in terms of restorative justice accommodates the structure of apologies (II). Hence, Encarnacion and Hershovitz are correct when they argue that corrective justice needs to be formulated more abstractly to answer the challenge of the diversity of remedies; they are wrong however when they argue that this abstract formula must necessarily abandon the Aristotelian understanding of corrective justice in order to be capacious.

Fortunately, tort theorists and courts have already elaborated an abstract formulation of corrective justice's mandate that we are looking for. I will call this formulation 'the next-best' formula. It holds that the remedy for a wrong must put the victim in the next-best position to the wrong not having occurred in the first place.[134] With this formulation, it is made clear that corrective justice restores equality between the parties, and endorsing a normative understanding of gains and losses, what is restored is also a normative equality.[135] But some remaining questions still remain to be answered. How is the 'next-best' formula unpacked? What does it mean to restore the normative equality between the parties? And more importantly, how is this abstract mandate made determinate in specific remedies of tort law, especially in the case of unorthodox remedies? These questions will be answered in subsequent chapters of the thesis. Chapters II and III will seek to unpack the formula, exploring what it means to restore the normative equality between the parties, whereas chapter

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[133] ibid V.4 1132a25.

[134] Gardner (n 35) 37; Stevens (n 3) 59. See also *Livingstone v Rawyards Coal Co* (1880) LR 5 App Cas 25 (House of Lords) 39 (Lord Blackburn).

[135] Despite the fact that Ripstein does not exactly endorse the 'next-best' formula, he shares the view that tort remedies restore a normative equality (rights). Ripstein (n 50) 1986 (arguing that '[d]amages do not restore a prior distribution … Instead, they restore to the aggrieved party the things she had a right to').

VI will show how it is possible for the 'next-best' formula to satisfactorily respond to the diversity of remedies challenge.

I.7 How to Fill the Gaps

I hope to have shown with the discussion of this chapter that the problematic aspects of corrective justice are not impossible to solve. However, the three gaps that were discussed here leave us an important lesson if the corrective justice theorist seeks to succeed at justifying the practice of tort law. In my view, the lesson to be learned from these gaps is that a justificatory account of tort law cannot rely exclusively on corrective justice. Accordingly, in the following chapters I will seek to elaborate a theoretical framework of corrective justice that fills these gaps by relying on distributive and restorative justice. The chapters will be concentrated on filling the second and third gaps.[136] In this sense, in chapter IV I will discuss the connection between distributive justice and tort law filling the second gap, arguing that distributive justice provides a criterion to determine what deserves to be corrected by tort law.[137] It will also be argued that morality demands a distributive correction of the unfair effects that the operation of corrective justice can bring, correction that is materialised through the mechanism of insurance (V). On the other hand, chapters II and III will discuss a framework based on restorative justice that will help us to unpack the abstract mandate of corrective justice expressed in the 'next-best' formula.

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[136] I will not offer an original solution to the problem of gains and losses of corrective justice. However, in V.5 I will argue that the mechanism of insurance considerably ameliorates the problem in terms of reducing the unfairness of tort law when there is no equivalence between gains and losses.

[137] The thesis however will not provide a normative framework to determine the content of the primary rights protected by tort law. The second gap therefore will not be completely filled here. My contribution regarding this aspect will be more modest, seeking to show that this task is, at least to some extent, distributive (IV.4).

In chapter VI it will be shown that corrective justice understood under this framework is able to solve the challenge of the diversity of remedies (the third gap).

II

Corrective Apologies and Restorative Damages

II.1 Introduction

In chapter I we learnt that the principle of corrective justice is not enough to elaborate a justificatory theory of tort law. In chapters II and III, I will fill some of the gaps of corrective justice by exploring the connection between corrective and restorative justice. In particular, I will argue that restorative justice and its ideal of moral reconciliation can provide a framework to fill the third gap of corrective justice (the diversity of remedies problem, I.6). Accordingly, in this chapter I will concentrate on apologies and its framework of restorative justice. I will suggest that this framework is connected with corrective justice, concluding that it is also possible to conceive apologies under a framework of corrective justice (corrective apologies), and tort damages performing a symbolic function under a framework of restorative justice (restorative damages). The discussion in this chapter will be focused on the conceptual basis for apologies and compensation, leaving for chapter III to determine how and to what extent the notion of restorative damages and the ideal of moral reconciliation can justify the practice of tort law.

II.2 Apologies in our Moral Lives

Using the term 'losses' in the broadest sense possible, it could be said that people suffer losses all the time in their daily lives. Some of these losses have severe consequences for people, such as the damages caused by natural disasters, whereas other losses do not have serious consequences, such as when someone arrives late to a meeting with a friend. Yet only a few of these losses are compensated. Some of them

are due to human interaction, but others are not. Some of these are material losses that can easily be compensated (i.e. the restitution of a book that a friend has lost), whereas other losses are nonmaterial and more difficult – or even impossible – to compensate. In some cases, it seems that a simple apology is enough as a response to a loss; in other situations, we would say that compensation or restitution is enough; and finally in other cases it seems that both apologies and compensation are required. Consider the following situation based on a simple daily interaction:

(i) Alfred is at the groceries fair market waiting on the line to pay. Suddenly, Barbara skips the line and puts herself ahead of Alfred. Alfred is very upset and loses time because of Barbara's action.

In this scenario, a basic moral intuition is that Barbara did something wrong to Alfred, and therefore that a remedy from Bernard is required. But what sort of remedy would be appropriate in a case like this? Is it enough if Barbara apologises, or something else is required? It seems that a sincere apology from her would be enough to repair the wrong committed. Probably, if Alfred were still angry with Barbara after a sincere apology was offered, we would think that he is overreacting. But is it appropriate for Barbara to compensate Alfred for what she did to him? We can imagine, for instance, Barbara saying 'I am so sorry, would you allow me to pay for your groceries in compensation?'. Her action here would be risky; though her honest intention of seeking to repair the injury she has caused is praiseworthy, it might be deemed as inappropriate by Alfred. There is a worry therefore regarding the action of compensation as a response to a wrong, namely: in some cases, compensation might be deemed inappropriate to repair injuries by their victims. In some contexts, compensation can even cause a new injury. In our situation, Barbara's offer might be

offensive to Alfred, because he could perceive that she is trying to buy him off. Clearly, this is not a conflict about material redress, and therefore it is perfectly normal in this context to react against an offer of economic redress. It seems to me that the key point here is that if Barbara offers economic redress she might be communicating the wrong message. Anyone could interpret her as saying 'I am wealthy, I can do whatever I want as long as I provide compensation to my potential victims'. Barbara's compensation act would therefore be creating a new injury to Alfred, regardless of Barbara's genuine intention to make amends.

It is possible however to conceive a scenario in which Barbara's offer of compensation could be an adequate mechanism of reparation. Suppose that Barbara, by getting in the line before Alfred, was able to get the last box of strawberries left at the market, and that Alfred wanted to buy strawberries. After realising what she did, Barbara apologises to Alfred, and she also gives the box of strawberries to him. It might be questioned whether this is really a form of compensation or not, especially if Alfred agrees to pay Barbara the price that she paid for the strawberries. But in such a case, it is clear that a simple apology would not be enough, because Alfred lost his opportunity to buy the strawberries (which, we can assume, are the best in town). Perhaps Barbara is only giving back to Alfred this opportunity to buy the strawberries, an opportunity that she had only because she committed a wrong against him. Imagine now that Alfred and Barbara are friends. Barbara feels the need to apologise to Alfred, but she also wants to provide some form of compensation to him. After the incident then, she sends a box of chocolates to Alfred by post. In this case, Barbara's compensation does not seem inappropriate. The fact that they know each other changes the meaning of the compensatory gesture; it does not communicate superiority or indifference regarding Alfred's feelings. On the contrary, Barbara's gift

shows that she really cares about her friend's feelings, and that she regrets what she did.

This short discussion shows that the context is important to determine whether an apology or some form of compensation is required in a given case (or some combination of both). In some contexts, compensation offers might be out of place when they communicate a message of superiority or indifference regarding the victim's feelings. In these cases, a victim might feel that the injurer is getting away too easily; paradoxically, in such cases it might look that compensation is being used to avoid rather than to assume responsibility for the injury. Other contexts however allow injurers to offer compensatory measures without being disrespectful to their victims, such as in our case when there is a previous connection of friendship between Alfred and Barbara.

In situation *(i)* it is clear that Barbara should apologise to Alfred, regardless of whether compensation is also required or not. Let us consider now situation *(i)* with a slight modification:

(ii) Alfred is at the groceries fair market waiting on the line to pay, but he gets distracted for a few seconds choosing some plums that he adds to his basket. While Alfred is looking at the plums, Barbara wants to join the line to pay, and without realising that Alfred is on the line, she puts herself before him. Alfred is very upset and loses time because of Barbara's action.

The situation has changed now, because Barbara did not have the intention to skip the line; she only did it accidentally. Is there a duty to apologise here? It could be argued that Barbara was negligent by not asking Alfred whether he was on the line or not. She should regret what she did, and she should therefore apologise. But is this

apology similar to the apology required in situation *(i)*? In philosophical terms, apologies have been classified as illocutionary expressive speech acts.[1] As illocutionary acts, apologies characteristically have a meaning beyond the mere utterance of the sounds or marks used on their performance (eg 'I am sorry', 'I apologise').[2] It follows that apologies are essentially symbolic: they express or communicate a message.

It is important therefore to analyse which messages are being expressed in both apologies. In the first situation, Barbara could say 'I am sorry, I took a wrong decision', whereas in situation *(ii)* we could expect Barbara to say 'I am sorry, but I did not realise you were on the line'. The utterance of the sound 'sorry' in both apologies could be misleading, but they express different messages. In the apology of situation *(i)*, Barbara is expressing regret for what she did, and is also acknowledging that she was wrong. It could be argued that this is the case of a perfect apology, or as Nick Smith would put it, a 'categorical apology'.[3] Barbara's apology in situation *(ii)*, on the other hand, has a different meaning. For Smith this apology would not be perfect or categorical, because when Barbara claims that she did not realise that Alfred was on the line, she is refusing to accept blame. According to Smith, whenever injurers use the formulation 'I am sorry but…' and make an excuse for what they did, they reveal an uncertainty regarding whether they commit a wrong or not.[4]

It is important to note that Smith does not claim that an apology without an acceptance of blame is not an apology; he only argues that such apologies do not have

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[1] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969) 23.

[2] ibid 42.

[3] According to Smith, a categorical apology is the 'regulative ideal' for apologies. He claims that they 'are demanding ethical acts indicating a kind of transformation that resonates with thick conceptions of repentance within religious traditions'. Nick Smith, *I Was Wrong: The Meaning of Apologies* (CUP 2008) 142.

[4] 'If a legitimate excuse follows the "but", then an apology accepting blame may not be warranted'. ibid 49.

the same meaning that categorical apologies have.[5] I share Smith's view that we should care more about the meaning that different types of apologies have, rather than to determine which are the necessary conditions of apologies.[6] However, it seems to me that a robust account of apologies should include situations like *(ii)*, in which there is some degree of uncertainty regarding who caused the injury. Smith requires that injurers 'parse precisely for what [they are] causally responsible', an operation that 'opens a range of notoriously knotty issues regarding the metaphysics of causation and its relation to moral responsibility'.[7] If determining causation in a given case is a tricky operation, as Smith acknowledges, why then should we demand from injurers to establish precisely for what are they causally responsible? In many situations, we feel responsible for what happened, but we do not think that we should be entirely blamed for it. Consider the following situation:

(iii) David is driving his car while he is tuning a radio looking for a good song. Distracted with the radio, he suddenly realises that Caroline is illegally crossing the street right in front of his car. Caroline sees David's car too late, whereas David tries to do an emergency stop, but unfortunately he runs over Caroline. She suffers severe physical injuries and is very upset with David, because she knows that he would have been able to stop on time were he not distracted with the radio.

It is clear that an apology is required here. But what sort of apology could we demand from David? A categorical apology would require him to establish accurately

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[5] 'Not all injuries call for categorical apologies, and we can seek more or less apologetic meaning depending on the circumstances'. ibid 143.

[6] The latter approach can be found in Kathleen Gill, 'The Moral Functions of an Apology' (2000) 31 The Philosophical Forum 11, 14 and Louis F Kort, 'What is an Apology?' in Rodney C Roberts (ed), *Injustice and Rectification* (Peter Lang 2002) 110.

[7] Smith (n 3) 38.

that he should be blamed entirely for the accident. In this case, David would be blamed because he was negligent in his driving, a negligence that caused (at least in terms of but-for causation) Caroline's injuries. Accidents however are often not caused unilaterally by only one of the parties involved. Particularly in this case, Caroline was also negligent, because she should not have crossed in the middle of the street. Again, in terms of a but-for test of causation, it is clear that her negligence also caused the accident. Lawyers would usually explain this in terms of contributory negligence: David should be liable to redress Caroline's injuries, but he should also be entitled to a reduction of the damages to be paid considering Caroline's recklessness. Why should we not apply the same rule to apologies? Indeed, we could expect David to say 'I am sorry, I got distracted with the radio (acknowledging his negligence), but you appeared out of nowhere in the middle of the street (remarking Caroline's contributory negligence)'. As we have seen, according to Smith such an apology would not be categorical, since he is only partially accepting blame for the accident. But it seems to me that the problem here is not with the apology. In this particular context, David would be satisfying the demands of reparation provided that he apologises to Caroline with an expression such as the aforementioned, and that he compensates the injuries adequately (according to the percentage of his negligence's contribution to the damages).

The problem is that apologies in accidents like situation *(iii)* frequently demand injurers to accept blame only partially, as far as they are causally responsible for the damages. Smith acknowledges that in some cases there is uncertainty regarding causation, and that fact explains why we often respond with counter-apologies when someone apologises to us (such as 'do not worry for being late, I was a bit late too'). For Smith, with counter-apologies victims share the burden of the blame

with the injurers, and they 'serve as recognitions of the difficulties of assigning moral responsibility and isolating fault'.[8] However, it seems to me that in situation *(iii)* assigning moral responsibility should not be difficult; it is rather straightforward that both David and Caroline should share the burden of the blame for the accident. David does not need to be a lawyer – nor to have any knowledge of the law whatsoever – to understand that he does not need to accept all the blame for this accident. A sophisticated account of proximate causation is not required here to understand that both negligent acts are causally relevant to the event.

Perhaps Smith is not interested in the study of apologies in accidents. In a previous article, he argued that '[a]pologies for accidents (…) seem to have no more meaning than expressions of sympathy'.[9] If apologies for accidents are left out of the analysis, why then should we care so much about categorical apologies? It is true that it is important to understand apologies in the context of intentional wrongdoing, but I cannot see a reason why should we not be also interested in apologies in the context of unintentional injuries, especially when negligence is involved. In fact, it is more frequent in our moral lives to apologise for unintentional harms than intentional ones. Smith mentions that the study of 'when and how to apologize' is useful to gain a better understanding of daily interactions. He even illustrates this idea with the example of his failure to take the trash out of the house as his spouse requested. According to Smith, with the analysis of apologies it is possible to 'identify the deeper underlying harm (such as not listening to or respecting her)' involved here.[10] But there is another possibility: he could only have forgotten to take the trash out. In such case, Smith would need to apologise to her spouse not because he had disrespected her, but rather

[8] ibid 45.

[9] Nick Smith, 'The Categorical Apology' (2005) 36 Journal of Social Philosophy 473, 479.

[10] Smith (n 3) 12.

for being negligent. Why should he not be able to apologise to his spouse, saying that he did not have the intention to cause any harm?

My point is that an apology that accepts blame in terms of negligence should not be less worthy than Smith's categorical apology, even if a negligent apologiser – such as David in situation *(iii)* – does not acknowledge that he is entirely responsible for the accident. Smith seems to agree with this view, when he claims that 'I can consistently accept blame and apologize for committing a wrong even if I believe that the victim shares some responsibility with me or that I bear no culpability for some portion of the harm'.[11] It is not clear however what does it mean to say that the injurer can 'consistently accept blame and apologize for committing a wrong'. Does it include David's apology in the form 'I am sorry, but…'? It cannot be, because as was seen above, Smith claims that categorical apologies cannot include legitimate excuses. Another possibility is to argue that David should apologise accepting *all* the blame, even if he believes that the burden of the blame should be shared with Caroline.[12] Perhaps David could accept all the blame expecting a counter-apology from Caroline, just like people sometimes make offers without expecting that they will be accepted. That might be the case, but this solution does not save the main objection to categorical apologies: why should David have the obligation to apologise accepting all the blame? As a courtesy, he could do that. But as a courtesy he could do many other things. For instance, he could visit her at the hospital during the following days, or he could buy her a car. But we would never say that David is morally required to do any

[11] ibid 46.

[12] Perhaps this would have fitted the 'traditional attitude' of English common law, in which the courts were reluctant to apply rules of contributory negligence. See Tony Weir, 'ALL or Nothing?' (2004) 78 Tulane Law Review 511. In my view, the fact that this attitude now has changed reflects the unfairness of requiring people to apologise for events that they are not causally responsible for. By contrast, a recent defence of the traditional attitude can be found in Robert Stevens, 'Should Contributory Fault be Analogue or Digital?' in Andrew Dyson and others (eds), *Defences in Tort* (Hart Publishing 2015).

of these things, whereas he is morally required to apologise for his negligent driving that caused (at least partially) Caroline's injuries. How can we solve this problem for apologies? Should we conclude then that apologising for negligent behaviour is only part of a scheme of (morally soft) courtesy or etiquette rules?

I will argue that apologies are morally required in a stronger sense than mere etiquette rules. When injurers do not apologise moral relationships can be seriously harmed, even strong relationships such as marriage. As was noted above, apologies in accidents are problematic for Smith because they are often caused by more than one party's fault. If a given harm was unintentional, argues Smith, then the apology 'gives the victim no reason to believe that it will not happen again'.[13] Of course, if one uses as a perfect model the apology for intentional wrongdoing, apologies for accidents will be problematic. But it makes sense that we apologise for being negligent, despite the fact that we cannot completely guarantee that it will not happen again. Human beings are fragile and make mistakes all the time. This does not mean however that someone like David could not sincerely commit to drive more carefully from now on. There will be always doubts on whether he will be able to meet this commitment or not; but the same doubts could be posed on whether an injurer who caused an intentional harm will do it again or not.[14]

Counter-apologies reflect this fragility of human beings. It is true, as Smith argues, that in some cases counter-apologies share the burden of blame due to the problematic aspects of causation. But as we have seen, in many cases causation is relatively clear. It seems to me that in those cases counter-apologies are used with a different purpose, which is to acknowledge a reciprocity feature on our daily

[13] Smith (n 9) 479.

[14] In fact, according to Smith it is not possible to judge the quality of an apology at the moment it is given: 'we can only judge [the] ultimate quality of the apology over the duration of the offender's life'. ibid 483-4.

interactions.[15] If a friend arrives late to a lunch meeting with me because he was negligent, after apologising to me I might counter-apologise to him as well. The reason I might do this is not because causation is uncertain, but rather because next time the same could happen to me. We are all potentially subject to be involved in accidents caused by our negligence. It is not possible for my friend to reassure me that he will not be late ever again (though he might say that). There is no way to know whether my friend will be able to arrive on time to all of our next meetings. Maybe he will. But he is fragile as a human being, and even if he endeavours to arrive on time, he might still be late.

In sum, apologies in the context of unintentional harms make moral sense when they can be morally attributed or allocated to the person who caused (at least partially) the injury. It is possible to claim that these apologies are imperfect (or not categorical), because injurers cannot guarantee that they will not be negligent again. But as was noted above, apologies for intentional wrongdoing cannot either provide such a guarantee. Additionally, and regardless of the lack of this guarantee, apologies for accidents are often accepted more easily, or they are in some cases received with counter-apologies. The reason for this is that in the context of accidents, there is a reciprocity feature on the interactions among human beings that raise these duties to apologise: a victim who is receiving an apology for an injury today, might be apologising tomorrow for committing the same injury. But I have not shown yet that these duties to apologise are morally stronger than mere etiquette rules. I shall argue this point by exploring throughout the next sections the connection between the duty

[15] This reciprocity feature of our moral practices satisfies what Honoré identifies as a requirement of fairness for an outcome allocation system of liability. Tony Honoré, 'Responsibility and Luck. The Moral Basis of Strict Liability' in his *Responsibility and Fault* (Hart Publishing 1999) 26.

to apologise and the duty to compensate, which is usually identified as a moral duty in a strong sense.[16]

II.3 Apologies and Compensation: A Happy or Unhappy Marriage?

To illustrate the connection between apologies and compensation, let us consider now situation *(iv)*, which introduces a few changes to situation *(iii)*:

(iv) Elizabeth is driving her car while she is tuning a radio looking for a good song. Distracted with the radio, she suddenly realises that Frank's car is ahead of hers waiting for a green light. Elizabeth tries to do an emergency stop, but she crashes into Frank's car anyway. He does not suffer any physical injuries, but his car clearly needs some repairs. Elizabeth is in a hurry, so she quickly gets out of the car and gives Frank a card with the insurance details, saying 'I am in a hurry, call my insurance company', and she leaves. Frank thinks that Elizabeth's conduct is inappropriate, but he eventually calls the insurance company, and they pay him all the repairs that were necessary.

In situation *(iv)*, despite the fact that Elizabeth has clearly wronged Frank with her negligent driving, she did not apologise. In a case like this, intuitive morality seems to require both an apology and compensation. At least, an apology would be the expected behaviour in the context of modern traffic interactions. But what happens when someone does not apologise? Although compensation is secured by Elizabeth's insurance, her reluctance to sincerely apologise with Frank is problematic. It is true

[16] See for instance Lord Atkin's classic formulation of the tort of negligence in *Donoghue v Stevenson*: 'The liability for negligence (…) is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay'. [1932] AC 562, 580 (HL).

that the law of torts does not generally entitle people to claim for apologies.[17] In this sense, from a legal perspective in situation *(iv)* Elizabeth has completely satisfied her duty by repairing – through her insurance – the damage done to Frank's car. But is there something missing here? We can furthermore imagine that situation *(iv)* happens in New Zealand, where compensation for automobile accidents is secured. As Enoch points out, on this simple model of New Zealand there is something missing.[18] According to him, what this scheme misses is that injurers should *take responsibility* for what they have done, and that this taking-responsibility could be accomplished either with an apology or 'just an explanation coupled with some form of dissociation'.[19] For Enoch, this is true even in what he calls the 'penumbral agency' cases, in which individuals are not directly responsible for a given result, although their agency is causally involved.[20]

I am not entirely convinced that we should take the argument that far, including cases in which the agent is not at least in a small portion causally responsible and blameworthy for the injury. It is odd indeed that a diligent driver who severely injures a reckless pedestrian does not make any gesture at all to help her victim. Perhaps we would expect the driver to visit her victim at the hospital and to bring her flowers. I share this view, but it also seems to me that we cannot morally demand these gestures from the diligent driver. Maybe he should make those gestures out of courtesy, but they are not morally required in a strong sense. Or it may be that what

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[17] Offering an apology, however, can be relevant in some legal contexts. See below section II.6.

[18] Enoch claims that this imperfect model might be corrected imposing an obligation to apologise. He calls such a system the *New Zealand plus apology* model. David Enoch, 'Tort Liability and Taking Responsibility' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 253. It is open to question however how a duty to apologise could be enforced to individuals in such system.

[19] ibid 264.

[20] ibid 254-8.

is missing here is an expression of sympathy, as Smith would call it.[21] But the reckless pedestrian could not claim that the negligent driver morally failed to visit her at the hospital; after all, it was her own negligence that mainly caused her injuries.

I want to argue that in the case of both apologies and compensation the demands at stake are different. In situation *(iv)*, there is a legitimate moral demand for an apology, which is stronger than a mere expression of sympathy. Both Enoch and Smith agree that there is no single formula for apologies; the circumstances of each case will determine their content.[22] Indeed, determining whether Elizabeth's apology or justification was enough is a difficult task. Perhaps we need more information. For instance, it would be interesting to know whether she was really in a hurry or she simply said that to avoid her responsibility. But it seems to me that, unless she really had an emergency or a very important appointment, we would not accept the fact of being in a hurry as a legitimate excuse. After all, we all want to reach our destinations as soon as possible while driving. We could argue therefore, with some degree of certainty, that in situation *(iv)* Elizabeth has a duty to apologise and also a duty to compensate Frank. What is then the connection between apologies and damages? In this case, both duties seem to run in the same direction. Is it always like that? In other words, is it a happy or unhappy marriage?

II.3.1 The Happy Marriage Story: Human Interaction

It might be useful to begin establishing what the demands for apologies and damages share. A starting point for this discussion is to claim that human interaction is a

[21] Smith (n 3) 34.

[22] 'Precisely what it is that living up to the responsibility taken will amount to may depend on the details'. Enoch (n 18) 264. See also above n 5.

necessary condition for both apologies and compensation.[23] It follows that no demands for compensation or apologies can be raised against non-human beings, at least in terms of social morality. For instance, there cannot be a compensatory claim against an animal or a natural object. If my dog eats my dinner, it would be absurd for me to demand something from him in return. I can only try to teach him not to do that again, but I cannot demand an apology or compensation from him.[24] Similarly, an individual may have a theological duty to repair a sin against God. But such a duty would not concern social morality; it would rather only concern the relationship between that individual and God. Certainly, many aspects of compensatory claims can be studied through the theological notions of atonement and forgiveness.[25] However, my aim is to answer the questions regarding how to repair actual losses suffered by individuals, leaving aside therefore the discussions that can be raised from a theological point of view.

The human interaction requirement excludes from the scope of both apologies and compensation situations in which no human agency is involved at all. It does not make sense that I apologise for an aerial accident that occurred in Malaysia, because my agency is not in any sense involved in the accident. I might feel sorry for the families of the passengers that were killed, and I can even wish that the accident had never happened. But I have no duty to apologise or compensate the victims. As Smith

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[23] The idea is particularly powerful for Wright, who thinks that corrective justice can be better categorised as 'interactive justice', a form of justice that regulates all voluntary and involuntary human interactions. Richard W Wright, 'The Principles of Justice' (2000) 75 Notre Dame Law Review 1859, 1883. See also Finnis' suggestion to use the term 'commutative justice' instead of corrective justice. John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 177-84.

[24] Interestingly, Smith analyses apologies to animals, claiming that they might have an important meaning for the apologiser. These apologies might indeed be more meaningful than most of the cynical apologies that Smith analyses throughout his book. Smith (n 3) 128.

[25] Linda Radzik's book on atonement is a good example of this kind of analysis. Linda Radzik, *Making Amends. Atonement in Morality, Law and Politics* (OUP 2009).

points out, saying 'I am sorry' to a friend because a close relative has died does not have an apologetic meaning.[26] It only expresses sympathy for my friend's suffering. This does not mean that my expression of condolences lacks moral value. In fact, depending on how close our friendship is the condolences might be morally required. But what is demanded here is clearly not an apology, which is confirmed by the fact that it would be odd that the recipient of my condolences (my friend) responds to me saying 'I accept your apology'.

As was noted above (II.3), even Enoch's idea of taking-responsibility requires some causal intervention of the agent (the 'penumbral agency'), perhaps at least the satisfaction of a but-for test of causation. Similarly, in the case of natural disasters there are no duties to apologise or compensate. If the president of a country says 'I am sorry that the hurricane caused so much damages', he is again expressing sympathy for the victims of the hurricane. However, the scenario would change if the same president says 'I am sorry that we did not take quickly enough the measures that the hurricane required'. In this case, the president is not apologising for the occurrence of a hurricane (which would be meaningless), but he is rather apologising for the government's failure to take the adequate and urgent measures that such a natural disaster required. In this second case thus human interaction is clearly involved, and it is this fact what triggers both duties to apologise and compensate.

II.3.2 The Tensions of the Marriage: Compensation with No Apologies

The story of a happy marriage between apologies and compensation needs to be questioned. In this section, I shall stress three conflicting aspects of both reparative

[26] 'Unless I am confessing to wrongly killing your grandmother and accepting blame for her death, we would not think of a phrase like "I am sorry that your grandmother passed away" as an apology. It offers sympathy rather than contrition'. Smith (n 3) 34.

mechanisms in which compensation is clearly required, but no apology seems necessary.

II.3.2.1 Restitution

(v) George buys his groceries at the supermarket. He does not realise that the cashier made a mistake giving him the change; he received an extra bill of ten pounds. A few hours later, he finds the ten pounds bill in his wallet, wondering how he could have forgotten that he had that bill. So he decides to spend the whole ten pounds buying his favourite chocolates. He eats all of them.

Situation *(v)* is particularly interesting because compensation is still required, even though no wrong has been committed. There is no wrong here because George never realised that the cashier made a mistake; he never had the intention to deceive him. The supermarket though is entitled to bring an action against George to recover the ten pounds. In contrast with our previous situations, this scenario does not raise a claim to demand for an apology. It would be odd to require George to apologise for what he did. Maybe he should have detected the cashier's mistake; but the same could be argued against the supermarket (the employee should have been more careful). Situation *(v)* seems to show that committing a wrong is not a necessary condition to have a compensatory claim. However, the supermarket is not entitled here to obtain 'compensation' in the proper (or at least a legal) sense. The appropriate term to be used in this context is 'restitution' rather than compensation, because the legal action would be focused on the unjust gain obtained by George.[27] This may sound complicated, but if we analyse how the mechanism operates in these cases, we can

[27] '"Restitution" and "compensation" are partners. Compensation is loss-based recovery. Restitution is gain-based recovery'. Peter Birks, *Unjust Enrichment* (OUP 2003) 11.

easily see how the appropriate term is restitution rather than compensation. For instance, if I let my friend use my car for a week, but later he does not want to give it back to me, we would say then that he should give the car back to me. In principle, we would not say that he should provide me with compensation (unless he caused me some harm); the proper remedy is the restitution of my property. Similarly, in situation *(v)* what is required from George is restitution rather than compensation, because the supermarket's claim will require him to give back the ten pounds he received by mistake.

However, the basic structure of restitution and compensation described above can get more complicated. For instance, in the car example it was already noted that I could have a compensatory claim against my friend if I suffered losses as a consequence of the dispossession of my car. In a similar way, in situation *(v)* there might be a compensatory claim if we assume that Edward would not have bought the chocolates that he bought had he received the correct change. The question then would be who should bear the loss in such a case. It is clear though that when cases only involve gains and no losses, the operation that takes place is restitution rather than compensation. Restitution cases do not require the existence of a wrong; they rather require someone to have acquired unjust gains at the expense of another.[28] The key issue then is to determine whether gains were acquired unjustly or not. This work is not concerned with the restitution of unjust gains, but rather with the compensation of wrongful losses. But it is important to stress that since this type of restitution cases are not based on a wrong, it follows that unjust enrichment claims do not include in general a claim for an apology.

[28] This is particularly problematic for theories of corrective justice that are 'tied to the notion of wrongdoing' – such as Weinrib's – if they seek to justify unjust enrichment under this principle. Prince Saprai, 'Weinrib on Unjust Enrichment' (2011) 24 Canadian Journal of Law & Jurisprudence 183, 204.

II.3.2.2 Strict Liability

(vi) Gladys is a waitress at a restaurant. While she is moving several bottles of Coca Cola to the restaurant's refrigerator, she suffers severe injuries caused by the unexpected explosion of one of the bottles.[29] Hans is the managing director of the Coca Cola Bottling Company that produced the bottle that exploded in Gladys' hand. He is well aware that the company must provide compensation for the losses suffered by Gladys, although he is convinced that none of the company's employees were negligent. Hans supervises himself every day the production of the bottles, so he knows the production process very well. He refuses to apologise on behalf of the company to Gladys. An insurance company provides compensation to her.

From a legal point of view, in situation *(vi)* it does not matter whether the bottling company was negligent or not; what matters is that Gladys' injury was in fact caused by a defective product that was manufactured by the bottling company. While the duty to compensate seems to be straightforward in these cases of strict liability, the duty to apologise seems to have a different story. Is it possible for Gladys to morally demand an official apology on behalf of the bottling company? Certainly, companies usually apologise for incidents like this, by saying 'We are sorry, but we took all the necessary precautions'. As was noted above (II.2), such an apology would be a mere expression of sympathy according to Smith's framework of apologies, because the company expresses regret for the accident, but is at the same time justifying or excusing its behaviour. But it might be the case that only an expression of sympathy is what the circumstances of the situation require here.

[29] *Escola v Coca Cola Bottling* 150 P2d 436 (Supreme Court of California 1944).

Certainly, the fact that the insurance company will be paying for the damages to Gladys is an additional difficulty. Should not we demand that the duty to pay damages be necessarily fulfilled by the injurer herself? Does it make a difference if the bottling company pays by itself (at least part of) the damages to Gladys? Perhaps the fact that the Coca Cola Company directly compensates Gladys is a meaningful expressive gesture for her, a meaning that cannot be reached when the insurance company exclusively provides the damages. In this sense, I will later argue (V.5) that in some contexts the payment of damages by an injurer has a symbolic meaning, a meaning that is lost when a third party pays the damages on behalf of the injurer.

II.3.2.3 Compensation Through Insurance

Another source of conflict between apologies and compensation mechanisms may arise as a consequence of the effects of insurance. The question here is whether we should allow injurers to fulfil their duties of justice through third parties. I will later answer this general question regarding the relationship between insurance and corrective justice (V). At this point, I shall only stress that while most corrective justice theorists are not troubled with the fact that insurance companies and not injurers themselves compensate their victims,[30] the duty to apologise seems to operate differently. If a parent apologises for her children's conduct, the apology is acceptable only because the child is unable to understand that an apology is required for what she did. It might also be the case that the parent is apologising for her own conduct, failing to prevent that her child commits the wrong. But an apology from a third party

[30] For instance, for Coleman, the role of the insurance mechanism is restricted to allow individuals to fulfil their duties of justice through a third party. Jules L Coleman, *Risks and Wrongs* (CUP 1992) 206. See below V.2 for discussion.

in general is not appropriate. Is this problematic for the operation of compensatory mechanisms?

It was already suggested (II.2) that the solution might be to establish a 'New Zealand plus apology' system, in which compensation is secured and injurers are required to apologise to their victims.[31] Insurance companies however may disagree with such a system. They usually advise their policyholders not to apologise, because such gesture could imply an assumption of legal responsibility, even when the injurer is not legally liable. Let us go back to situation *(iv)*. Imagine now that Elizabeth wants to apologise for her negligent driving, but she remembers that her insurance company instructed her not to apologise if she gets involved in an accident. Can we still demand her to apologise?

II.4 Restorative Justice and Symbolic Reparations

In the previous sections, it was noted that apologies require the concurrence of some kind of human interaction and a wrong. But why are apologies morally required? Are there any normative aspects of apologies, or are they just a common practice of courtesy like giving thanks to the cashier at a cafeteria? This seems to be matter of degree. On one hand, serious wrongs require serious apologies, just like serious gifts require serious acts of gratitude. On the other hand, less severe wrongs may only require a quick apology, or even a small gesture. My aim is to argue that both apologies and compensation mechanisms are morally required when wrongs occur. I will claim that these moral requirements are stronger than just mere etiquette rules, because they are duties of corrective and restorative justice. This section will deal with

[31] Enoch (n 18) 253.

apologies and their symbolic role to provide reparations for wrongs by restoring moral relationships.

Let me begin the analysis by asking what is the aim of apologies. Following Walker and Marshall, among others, I argue that apologies are expressive speech acts that seek to regain stability in our moral relations.[32] When wrongs occur, moral relations are usually threatened by resentment, which is the 'reactive attitude' we have when someone has wronged us.[33] Restorative justice demands that the injurer make amends to her victim to restore the moral relationship that has been damaged. Resentment is a negative feeling towards the injurer, but it is not a morally wrong emotion. It is rather the adequate response to wrongs.[34] Indeed, as Murphy points out, in many cases lack of resentment can be a symptom of lack of self-respect.[35]

Apologies under the framework of restorative justice seek to restore an adequate moral relationship, and therefore seem to suggest that it only deals with interactions among people that had a previous moral relationship, such as friendship, family, work colleagues, and so on.[36] However, it is not necessary to know previously the person that has been injured to have a duty of restorative justice. It is true that

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[32] Sandra Marshall, 'Noncompensatable Wrongs, or Having to Say You're Sorry' in Matthew Kramer, *Rights, Wrongs and Responsibilities* (Palgrave 2001); Margaret U Walker, *Moral Repair* (CUP 2006) 6.

[33] PF Strawson, 'Freedom and Resentment' in his *Freedom and Resentment and Other Essays* (Routledge 2008) 1-28.

[34] 'The moral emotions of resentment and indignation, as distinguished from simple anger, are responses to wrongs'. Gerald F Gaus, 'Does Compensation Restore Equality?' in Rodney C Roberts (ed), *Injustice and Rectification* (Peter Lang 2002) 101.

[35] Jeffrie G Murphy, 'Forgiveness and Resentment' (1982) 7 Midwest Studies in Philosophy 503, 505.

[36] Both Encarnacion and Hershovitz seem to endorse this view, arguing that the ideal of reconciliation works better in the case of interactions among people who know each other previously. Erik Encarnacion, 'Corrective Justice as Making Amends' (2014) 62 Buffalo Law Review 451, 503; Scott Hershovitz, 'Patching Things Up', Jotwell (May 13, 2014) (reviewing Linda Radzik, 'Tort Processes and Relational Repair' in John Oberdiek [ed], *Philosophical Foundations of the Law of Torts* [OUP 2014]), http://torts.jotwell.com/patching-things-up/.

usually it is more difficult to forgive the persons who we love most when they have wronged us. Certainly, when there is a pre-existent relationship between the injurer and the victim, it makes more sense to seek the restitution of a previous moral relationship. But what happens in the case of people who do not previously know each other? In these cases there is still a moral relationship to be restored, which is the relationship among anonymous citizens. Wrongs can damage relationships even between strangers, because wrongs usually violate general rules of conduct that precisely describe the duties that every citizen should comply with. Marshall correctly points out that apologies restore mutual respect. She is also right when she claims that the context in which a wrong occurs determines the content of the apology.[37] For instance, if I wronged a friend, my apology will be different than if I wrong a colleague at work or a complete stranger.

It seems to me though that apologies have a normative aspect involved that is not necessarily covered by Marshall's idea of mutual respect. Apologies usually do restore a condition of mutual respect; if I make an embarrassing joke about a colleague at work, I must indeed apologise to re-establish our mutual respect as colleagues. However, the point I want to stress here is that my apology also restores my respect to the rules of conduct I have infringed when I committed the wrong. In this case, the rules of conduct among colleagues have been clearly infringed. Usually these rules are not written (unless the company has a sort of manual for employees' good behaviour), but every employee knows them and expects others to comply with them. In this sense, nobody needs to tell me that making an embarrassing joke about a colleague is not an acceptable behaviour in the workplace. It is true that my apology

[37] Marshall (n 32) 220. And as Encarnacion points out, the nature of the wrong is also important: 'making amends might require a broad range of appropriate responses, which are sensitive to, among other things, the nature of the wrong'. Encarnacion (n 36) 496.

restores mutual respect, but it also restores my respect to the rules of conduct that have been infringed.[38]

It is true that resentment is usually triggered by *demeaning* acts that are disrespectful to the victim's 'individual's worth'.[39] In this sense, the normative aspect of apologies might be blurred in the case of serious wrongs, where the restitution of mutual respect is more visible. But in less serious wrongs, the element of mutual respect tends to disappear, while the respect to the rules of conduct involved becomes more relevant.[40] For instance, in our situation *(i)*, it seems to me that it would be slightly exaggerated to claim that Barbara must apologise to Alfred because she did not treat him with the respect or dignity that he deserves. In this sense, the normative approach of apologies explains the problem more accurately: there are rules of behaviour applicable to people buying at the groceries fair market (let us call them 'rules for groceries markets'), according to which consumers grab all the vegetables and fruits they want and then wait on the line to pay. Barbara's apology may reinstate mutual respect among strangers at the groceries fair market; but with more precision, it restores the respect to the rules for groceries markets. By apologising, Barbara is

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[38] I am fully aware that according to some moral frameworks, such as Kant's or Waldron's notion of human dignity, morality requires equal respect among human beings. Jeremy Waldron, 'Lecture 1: Dignity and Rank' in Meir Dan-Cohen (ed), *Dignity, Rank, and Rights* (OUP 2012) 30-6. But my normative framework for apologies is compatible with these theories, because if it indeed were true that we generally share (or should share) a notion of human dignity as a high-ranking status that should be assigned to everyone, then this would be the normative framework that apologies restore. However, my approach is broader, because it allows including situations in which high values, such as human dignity, are not necessarily at stake.

[39] Jean Hampton, 'Forgiveness, Resentment and Hatred' in Jeffrie G Murphy and Jean Hampton (eds), *Forgiveness and Mercy* (CUP 1988) 53.

[40] Smith also emphasises this normative aspect of apologies, requiring injurers to endorse the moral principles that underlie in the harm caused. Smith (n 3) 60-3. However, Smith's theoretical framework is narrower than mine, because he also argues that injurers should recognise their victims as 'moral interlocutors', which involves the abandonment of 'viewing the victim as a mere means subordinated to the offender's ends'. ibid 65. The reference to Kant's framework of equal respect or dignity is clear.

expressing regret for what she did, showing that she understands that she should not have violated the rules for groceries markets, and communicating an egalitarian message: no one is beyond the rules.[41]

The normative framework of apologies therefore allows explaining more accurately how they operate in the case of less serious wrongs. It also explains why the context in which the wrong occurs is important, because only looking at the context it is possible to understand which rules of behaviour are involved. Furthermore, the framework also explains why it could be argued that apologies restore moral equality.[42] In this sense, the rules of behaviour that have been infringed by the wrong are the baseline for the equality that needs to be restored with the apology. Moral equality then is restored only when respect to the infringed rules of conduct is reinstated through a proper apology. Finally, it is important to stress that there are other symbolic mechanisms besides apologies that can also restore moral relationships. I will explore this last point in the next sections.

II.5 Corrective Justice and Non-symbolic Reparations

The basic framework of this discussion conceives apologies as a symbolic mechanism that is connected with restorative justice, and compensation as a non-symbolic mechanism that is connected with corrective justice. In this section I shall discuss the latter connection, leaving for the next sections to explore whether it is also possible to connect apologies with corrective justice, and similarly to connect compensation with restorative justice.

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[41] Goldberg and Zipursky have also suggested that tort damages communicate this egalitarian message. John CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917, 982. See below III.4 for discussion.

[42] This argument can be found in Gaus (n 34).

At the core of all conceptions of corrective justice is the idea of re-establishing a state of affairs prior to the injury. Corrective justice then corrects or rectifies the situation that arise as a result of an injury. The task of corrective justice is to re-establish the pre-existent condition of equality between the parties. The classic Aristotelian model of corrective justice holds that the gains should be taken out from the injurer to cover the victim's losses (I.2). Corrective justice also requires human interaction as a necessary condition to operate. This fact explains why there are no corrective justice duties when someone has suffered losses as a consequence of a natural disaster.[43] Corrective justice also shares with restorative justice that they both seek to re-establish or restore an acceptable condition between the parties involved. Whereas in the case of corrective justice what is restored is a condition of equality prior to the injury, in the case of restorative justice what is restored is an acceptable moral relationship between the parties involved.

It has been argued that restorative and corrective justice do not share the same purpose. Boxill claims that compensation programs are essentially 'forward looking', seeking to alleviate disabilities regardless of their origin, whereas reparation programs are 'backward looking'.[44] Boxill seems to be using the term 'compensation' broadly. In this sense, compensation indeed covers many aspects that are not covered by neither corrective nor restorative justice. For instance, there might be reasons of distributive justice to compensate a person (eg for being a least advantaged member of society). And there might be other reasons as well, such as solidarity or social welfare. In the case of distributive justice, compensation is indeed forward looking, because it does not look backward to determine how the inequalities or disadvantages came from; it

[43] Other duties of justice however might be involved here (eg distributive justice duties). And even other moral duties might be involved, such as charity, gratitude, and so on.

[44] Bernard R Boxill, 'The Morality of Reparation' (1972) 2 Social Theory and Practice 113, 117.

rather seeks to establish a new distribution of resources that comes closer to an ideal distributive scheme. But if we understand compensation in the context of restorative and corrective justice mechanisms, Boxill's contrast seems out of place, because compensation under this framework must necessarily look backwards to the injury. Furthermore, as was noted above (I.3), corrective justice is essentially backward looking, because it seeks to re-establish a previous condition. Compensation therefore is forward looking and opposed to restorative justice – as Boxill suggests – only when a compensation mechanism operates outside the spheres of either restorative or corrective justice; however, when compensation operates under these spheres, it is necessarily backward looking.

The backward looking feature makes sense in both cases of restorative and corrective justice. The compensation or amend required must look inevitably to the injury that was caused by the wrong. For instance, a friend of mine buys me a book to repair a wrong. Her duty to repair the damage is only satisfied if, for example, she destroyed one of my books; but the compensation will be clearly insufficient if she destroyed my car. Similarly, I might be satisfied if my wife buys me a box of chocolates to apologise for forgetting our anniversary; but the compensation will be far from satisfactory if she had an affair.

Although restorative and corrective justice share a restorative purpose, they seem to have radically different objectives. As was noted above, the task of corrective justice is to re-establish a pre-existent condition of equality among the parties. According to Walker, this framework of corrective justice may be inadequate to deal with some cases of serious wrongs. Walker argues that

> corrective justice may be at least artificial and perhaps incoherent in addressing histories, acts, or forms of injustice that consist in radical denial of moral standing or in relentless enforcement of degraded

> moral status of individuals, especially when these are systemic conditions and persist over extended periods of time.[45]

She claims that the framework of restorative justice is more adequate to deal with these cases in which serious and systematic wrongs have been done. According to this argument, the mechanism of corrective justice fails because it is not designed to 'deal with either a massive scale of serious mayhem or a protracted and brutal subjugation and mutually ramifying indignities and atrocities that characterize oppressive and violently repressive systems'.[46] To face these problems, Walker claims that the framework of restorative justice is more adequate because it moves moral relationships 'in the direction of becoming morally adequate, without assuming a morally adequate status quo ante'.[47] I disagree with this conclusion. First, it is true that in some contexts – particularly when serious wrongs have been committed – the framework of corrective justice is not enough to repair the damage done. The mechanisms of restorative justice indeed may be helpful to the process of reconciliation between victims and injurers, but this does not mean that even in these cases of serious wrongfulness corrective justice cannot play a role. And secondly, corrective justice does not assume that the pre-existent status quo between the parties is morally adequate; it rather assumes a prior equality between the parties. But this equality does not need to be morally adequate.

Let me deal with these two points in more detail. The challenge that Walker poses to the notion of corrective justice is serious wrongfulness. How could the mechanism of corrective justice repair the damage done to an individual who was, for instance, tortured several times? Perhaps the damage done is irreparable; an

[45] Margaret U Walker, 'Restorative Justice and Reparations' (2006) 37 Journal of Social Philosophy 377, 378.

[46] ibid 380.

[47] ibid 384.

individual who has been treated with such acts of cruelty may never forgive her injurers for what they did. However, as Radzik points out, 'although some wrongs cannot be fully repaired, wrongdoers and their relationships can be made better'.[48] In this sense, it seems that punishment plays a crucial role in such severe wrongs. Certainly, the punishment of the injurer is an important part of the reparative mechanism.[49] Even truth telling can be considered a reparative measure as well.[50] But none of these reparative measures exhausts individually the duties of justice, especially when serious wrongs have occurred. They are necessary but not sufficient reparative measures. Victims deserve, in the first place, to know the truth about their injurers; it is not enough to receive monetary compensation. Under these circumstances, mere payment of damages without acknowledging the occurrence and seriousness of the wrong committed could make the matters even worse; the victim could see it as a disrespectful act. In this scenario, the injurer seems to be paying her victims off to keep them quiet.[51] Similarly, if an injurer pays damages to her victims, but the authorities fail to punish her criminally, the demands for reparation are not fully satisfied. Punishment therefore is an important part of the reparative process. It does not however exhaust by itself the demands of justice, especially when serious wrongs occur.

Restorative justice can also be part of the reparative process. In this sense, Walker correctly points out that many restorative initiatives are important reparative measures. These initiatives include truth commissions, compensation programs, scholarships, and even the symbolical reopening of murder cases that remained

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[48] Radzik (n 25) 151.

[49] Encarnacion (n 36) 496 (arguing that 'sometimes, for particularly heinous wrongdoings, making amends requires submitting to punishment').

[50] Margaret U Walker, 'Truth Telling as Reparations' (2010) 41 Metaphilosophy 525.

[51] As was noted above (I.3), this problematic view is associated with Law & Economics.

without convictions.[52] These initiatives are important symbolic gestures. However, just like punishment, it seems to me that these gestures by themselves do not satisfy completely the demands of justice. In this sense, my point is that corrective justice still plays a role even in these cases of serious wrongs. Walker herself includes 'compensation programs' among these gestures required by restorative justice. It seems to me though that these compensation programs also have a non-symbolic aspect. In this sense, these programs inevitably will use the framework of corrective justice, seeking to re-establish a condition in which the injury is hypothetically removed.[53]

Walker's second point is that the framework of corrective justice may be inadequate to deal with systematic wrongs that have degraded people for an extended period of time, because there is no morally adequate status quo to restore in such cases. However, corrective justice does not re-establish a morally adequate previous condition. It is even possible that corrective justice restores a morally inadequate situation. This fact is illustrated by simply conceiving a poor person who negligently injures a rich one; corrective justice demands that the poor person compensates the rich one, regardless of the fact that the previous situation between the parties was morally inadequate from a distributive justice point of view. I will deal later with this problem (IV.6). But the point here is that corrective justice does not assume a morally adequate prior status quo to re-establish; it only re-establishes the condition in which the victim would have been had the injury not occur.

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[52] The examples are detailed in Walker (n 45) 390.

[53] This point about the connection between compensation and other reparative measures is also stressed by Hershovitz: 'an offer of compensation helps to establish the sincerity of an apology because it shows that the wrongdoer is willing to make all the amends warranted by his action, not just those that come cheaply or are faked easily'. Scott Hershovitz, 'Harry Potter and the Trouble with Tort Theory' (2010) 63 Stanford Law Review 67, 96.

I will deal in chapter IV with the connection between corrective justice and equality. But for our present task it is enough to claim that according to the basic Aristotelian framework, both corrective and distributive justice are connected with equality, which is arithmetical in the case of corrective justice, and geometrical in the case of distributive justice.[54] I will argue that restorative justice also re-establishes equality. As was noted above (II.4), restorative justice seeks to repair wrongs to regain stability in our moral relationships. Does restorative justice re-establish some previous condition between the parties involved? The answer is that restorative justice re-establishes – or at least moves towards re-establishing – the moral equality between the parties. It was argued that the baseline for this moral equality is determined by the normative standard involved. Under this framework, wrongs disturb the condition of equal respect to the rules of behaviour involved in the context of the wrong.

Accordingly, apologies are important remedies for restorative justice because they seek to reassure the respect for the rules of behaviour that govern each particular moral relationship. If I insult a friend by making a harmful joke about him being too short, restorative justice requires an apology because the insult has damaged our relationship as friends. More specifically, the insult has interrupted the balance of mutual respect that we had prior to the insult. Walker points out that this approach of equality that arises from the framework of corrective justice could be problematic in some cases of serious wrongs. For instance, it may be that I have always treated my friend disrespectfully by laughing at him. My friend may even not feel any resentment against me, because I have always degraded him. Clearly, in this case I have never treated my friend respectfully, as he deserves. Therefore, it could be argued that in

[54] Aristotle, *The Nicomachean Ethics* (D Ross ed and L Brown tr, OUP 2009) V.3 1131b13-14, V.4 1132a4-5. See above I.2.

this case there never was moral equality between the parties; no moral equality could be re-established then.

However, if restorative justice is understood under a normative framework, it follows that even in these cases of wrongs committed during extended periods of time the notion of equality still plays a relevant role. First, under a normative conception of restorative justice, resentment is not a necessary condition for a duty to apologise. Many authors such as Hampton, Murphy, Radzik, and Walker establish a necessary connection between the duty to apologise for an injurer and resentment from the victim.[55] Let me call these theories 'resentment-based' conceptions.[56] The normative framework of restorative justice is broader than these conceptions of apologies, because it covers also cases in which there is no resentment. Secondly, the normative conception of restorative justice does not seek to find a previous condition of moral equality; it rather seeks to move the relationship towards a moral equality that is determined by the rules of behaviour that have been infringed. Perhaps I never treated my friend respectfully from the beginning of our relationship. Even under these circumstances, it is possible to argue that restorative justice demands a gesture that moves our friendship towards moral equality.

Whether it is possible or not to re-establish moral equality is a different question. Maybe in such a case this is not possible; my friend could decide to permanently cut our friendship because I have degraded him too much throughout many years. But if I seek to satisfy the demands of restorative justice by genuinely apologising with him, the gesture seeks to re-establish the respect that I owe him as a friend, according to the rules of behaviour that govern our friendship. Again, the

[55] Murphy (n 35); Hampton (n 39); Walker (n 32); Radzik (n 25).

[56] These conceptions of apologies are connected with theories of tort law that are also based on placating feelings of anger or resentment. See below III.4.

content of these rules will depend on the context of the relationship. For instance, we could have agreed at the beginning of our friendship that we could freely make demeaning jokes about each other. As long as the conditions are reciprocal (I make jokes about him, he makes jokes about me) the agreement should not be problematic. But it usually happens that the rules of friendship are not clear enough, and in that context a demeaning joke could be very harmful to someone. In such a case, there is a duty to apologise because the general rule is that friends should not make demeaning jokes on each other.

Certainly, resentment-based theories of restorative justice are able to explain better the reparative mechanisms that are required in cases of serious wrongs extended through a large period of time, such as in the case of racial discrimination. Resentment still is an important element under a normative framework of restorative justice, because it is the normal response when serious wrongs occur. Resentment-based theories however are unable to explain the duty to apologise for less serious wrongs in which victims do not feel any kind of resentment. In these cases, the normal practice of apologising for these less serious wrongs only makes moral sense if the centre of our attention to study restorative justice is removed from the victim's resentment to the rules of behaviour that were violated by committing a wrong to the victim.

II.6 Corrective Apologies

The basic model described in the previous sections conceives apologies under the framework of restorative justice and the payment of damages under the framework of corrective justice. My aim in this section is to determine whether it is also possible to conceive apologies as a corrective justice mechanism.

Radzik has recently argued that apologies are a form of a 'reconciliation theory of corrective justice'.[57] She claims that material compensation frequently helps to repair moral relationships, but in many cases it is not enough. Other reparative measures are required, such as apologies, explanations about what happened, and so on.[58] According to Radzik, these actions 'are all matters of corrective justice in the sense that they are things that the wrongdoer *owes to* the victim – and things that the victim can *demand from* the wrongdoer – in virtue of the wrongdoer's responsibility for the misdeed'.[59] Furthermore, Radzik argues that apologies – and we can assume that the other reparative measures she mentions as well – could be classified as a type of compensation. But following her previous work, she concludes that compensation can only be a metaphor here, just like the concept of 'moral debts'.[60] She argues therefore that all reparative measures can be labelled under the notion of a reconciliation theory of corrective justice. I shall leave for the next chapter the discussion regarding this reconciliatory aim of the law of torts, concentrating the attention here to determine whether it is possible or not to conceive apologies as a compensation mechanism under the framework of corrective justice.

So far, it has been argued above that the framework of apologies is restorative justice, where the goal is to restore moral relationships. However, in some cases it is possible to claim that apologies perform a corrective justice function. In this sense, the

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[57] Linda Radzik, 'Tort Processes and Relational Repair', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 240.

[58] Encarnacion also agrees: 'An apology is almost always a reasonable response to a wrongdoing'. Encarnacion (n 36) 496. Hershovitz also shares this view, but he leaves open the question of whether apologies and explanation are duties of corrective justice or not. Hershovitz (n 53) 96 (arguing that 'apart from law, explanation and apology are at least as central to our practice of making amends as monetary compensation is. The question we need to answer, however, is whether explanation and apology are also matters of corrective justice').

[59] Radzik (n 57) 240.

[60] Radzik (n 25) ch 2.

law of torts has a specific example of corrective apologies, namely: the role of apologies in the tort of defamation. In this tort, the defendant is able to mitigate the damages to be paid if an apology has been made or offered.[61] I argue that in the context of the tort of defamation, apologies perform a double function. There is a restorative justice function, which seeks to restore the moral relationship between the parties. According to resentment-based theories, the injurer has demeaned the victim of the defamation, and therefore an apology would seek to reconcile the victim with the tortfeasor. On the other hand, under a normative framework of restorative justice, an apology would seek to restore the equal respect to the rules according to which one should not publish defamatory statements. Accordingly, if the injurer says 'I am sorry for publishing this false statement', what she really means is 'I am sorry for infringing the rules of defamation'. Whether one accepts a resentment-based account of restorative justice or a normative one, it is clear that apologies perform a restorative justice function. In this case however apologies also perform a corrective justice function. By allowing the injurer to mitigate the damages that she is required to pay, the apology is in fact replacing some of the amount that corrective justice requires the injurer to pay. In this context, the apology is not only restoring the moral relationship, but it is also compensating the losses suffered by the victim as a consequence of the wrong (the act of defamation). Hence, there is conceptual space for corrective apologies, and the law of torts provides a specific example of this possibility.

II.7 Restorative Damages

Many tort scholars have argued that the law of torts encompasses the principle of corrective justice, regardless of their disagreement about the content of that

[61] Defamation Act 1996 s 3(5).

principle.[62] But the question that needs to be explored here is whether it is possible to argue that it also endorses a notion of restorative justice.

Situation (*vi*) is clearly a case in which compensation is not performing the symbolic function of restorative justice. There are though other cases in which compensation does perform this function:

(vii) Neil, a professor of an important university, promises his children to take them to the beach the weekend to follow. But he is unable to keep his promise, because he forgets that he needs to mark some papers for next week. Neil feels so bad for this that he takes his children to Disneyland the weekend after.[63]

As was noted above (I.5), in MacCormick's original example the professor is unable to keep his promise because he is required to help a student with an apparently suicidal depression. This might be a case in which 'penumbral agency' is involved: Neil did not commit a wrong when he broke his promise, because he had the obligation to attend the student's urgent situation.[64] But in situation *(vii)* I have cleared out the entire penumbra doubts on agency. It is Neil's negligence that makes him liable here. The question that needs to be answered then is the following: does Neil satisfy his duty of justice by taking his children to Disneyland? To determine which specific reparative measures are required will depend on the circumstances of the case. But it seems to me that what is interesting in situation *(vii)* is that it shows that corrective justice may impose the duty to symbolically repair the harm done. The trip

[62] Eg Coleman (n 30); Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2007); Ernest J Weinrib, *The Idea of Private Law* (revised edn, OUP 2012).

[63] This is a slightly modified version of MacCormick's famous example: DN MacCormick, 'The Obligation of Reparation' (1977) 78 Proceedings of the Aristotelian Society 175.

[64] MacCormick's example is, in my view, a particularly interesting example for Enoch's theory, because it emphasises his parallel between taking responsibility for some 'penumbral agency' case and making a promise. Enoch (n 18) 259.

to Disneyland is not a mere payment of damages (though Neil will obviously have to pay for the trip), but it is an expression of Neil's regret for failing to keep his promise. It is possible therefore for corrective justice to have a symbolic meaning that potentially restores moral relationships.

There is however always a worry with damages: in many cases, they could be insulting and demeaning. Radzik warns us that the mere payment of damages may sometimes deteriorate moral relationships:

> [P]ayments are objectionable when they are represented as a form of restitution, which suggests that the value damaged and the value offered in response are fungible and that the latter could be exchanged for the former without the loss. To suggest that money is a suitable restitution for pain and suffering is an insult to the victim.[65]

But she also argues that it is possible for material redress to assume a symbolic function. To perform this function, she claims that 'reparation payments must either be accompanied by other, perhaps verbal, forms of communication or else take place within a social institution or tradition of reparation payments that constructs such an acceptable meaning'.[66] Is it possible then to argue that the law of torts provides the institutional background that Radzik requires for compensation to perform a symbolic function? It seems to me that the basic structure of tort law based on the interaction between injurers and victims allows performing this restorative function in most of the cases. My aim is not to claim that all existing tort systems successfully perform this symbolic function. Many aspects of tort litigation, for instance, do not help to restore moral relationships; they sometimes increase disagreements and resentment between

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[65] Radzik (n 25) 98.

[66] ibid. Walker also suggests that it is possible for the classical account of corrective justice to perform this function; however, she argues that this will only be possible if corrective justice consolidates 'a more varied and complex process of historical accounting, acknowledgment, cultivating trust and making amends for which restorative justice provides the rationale'. Margaret U Walker, 'Restorative Justice and Reparations' (2006) 37 Journal of Social Philosophy 377, 391-2.

the parties. As was noted above (II.3.2.3), insurance mechanisms are also problematic for this function. However, the claim according to which in some cases tort law is able to perform a symbolic function opens the debate to many questions that have not been discussed by legal scholars, who have focused the debate mainly on the notion of corrective justice. To claim that it is possible to understand the law of torts in terms of a symbolic practice that seeks to restore moral relationships allows questioning which of its features contribute to this aim, and which of them do not. It provides thus a moral criterion to evaluate existent tort systems. But more importantly, it also shows that tort systems could encompass the demands of both corrective and restorative justice. It follows that if someone wants to discuss substantial reform of tort law or its abandonment, this symbolic function of tort law should also be considered.

III

Moral Reconciliation and the Goals of Tort Law

III.1 Introduction

In chapter II, it was argued that the practice of tort law embodies other moral principles besides corrective justice. In particular, the chapter discussed the moral duty to apologise based on a framework of restorative justice, and the connections of that duty with the moral duty to compensate based on a framework of corrective justice. The conclusion was that it is possible to claim that the practice of tort law has a symbolic or expressive function that moves the parties involved towards moral reconciliation. Tort law can facilitate moral reconciliation between the parties in many different ways. For instance, the litigation process can put an offender directly facing her victim in a courtroom, forcing her to publicly acknowledge that she has wronged her victim. It is my contention to argue that in many cases this is all that victims genuinely want with their tort claims. This would explain the 'it is not only about the money' discourse that some tort victims use. Leaving aside those cases in which this discourse is hypocritically or strategically used, we should take into account the fact that for some victims the importance of tort litigation does not reside in obtaining compensation for their injuries, but rather in the restoration of the moral values in play.

My aim in this chapter is to argue that the idea of moral reconciliation is connected with tort law's ideal that holds that victims should get satisfaction for the wrongs they have suffered, providing them compensation to reach the next-best position to the wrong not having occurred. The questions I shall answer here are the following: if it indeed were true that the practice of tort law enhances the

reconciliation of the parties, should we conclude then that the value of moral reconciliation is a goal of tort law? Does it mean that tort systems should always aim to reconcile the parties? I shall argue that the notion of moral reconciliation is connected with tort's ideal of satisfying victims of wrongs, providing them compensation to reach the next-best position to the wrong not having occurred. This connection even makes it possible to endorse the reconciliation of the parties as a goal from the perspective of a rights-based theory of tort law. However, I shall claim that the ideal of moral reconciliation should be limited. The priority of the parties' emotions suggested by the reconciliatory literature is problematic for a tort system. On one hand, it would face practical constraints regarding what is feasible for the law to achieve; on the other, it would lead to undesirable consequences. In particular, it would allow victims to hold a prerogative to forgive, leaving the law with no precise criteria to determine when compensation is enough or not. And finally, determining whether an injurer has a sincere reparative intention would require an intolerable inquiry into people's feelings. But first, to claim that moral reconciliation is a goal of tort law, we need to determine whether it is possible to argue that tort law has any goals at all, and what it means to regard a given value as a goal.[1]

III.2 Should the Law of Torts Have any Goals at all?

The question of which goals the law of torts seeks to achieve assumes in the first place that this body of law has at least one goal to pursue. This assumption however has been questioned. Many authors, especially Stevens and Weinrib, have been reluctant

[1] Despite that this issue might belong to a more general or methodological part of the thesis, I will address the problem here because a burden of this chapter is to show that moral reconciliation can be regarded as a goal of tort law, whereas the rest of the chapters will not discuss the issue of goals in tort law.

to conceive of tort law as a purposeful legal practice. This reluctance arises from their commitments to their *explanatory* accounts of tort law that seek to identify the most salient features of the system with one single principle or ideal. For these authors, it follows that we should avoid the language of goals within the academic discussion of tort law. For instance, according to Stevens '[i]t is meaningless to talk of the law of torts having a function or goal at all'.[2] He argues that it is meaningless because these goals, which he calls 'external criteria', fail 'to explain key features of the law as we find it'.[3] Stevens relies on Weinrib's conception of the goals as 'external criteria', understanding them as purposes that lie *outside* the practice of tort law. For both of these authors, an explanatory account needs to disregard the language of goals in the context of tort law (the *explanatory-non instrumental* combination).

But even if one only seeks to explain tort law or understand its basic structure, one does not need to disregard the existence of goals. In other words, it is possible for an explanatory account to claim that the practice of tort law has goals (the *explanatory-instrumental* combination). This unorthodox approach can be found in Cane's work.[4] He argues that the relationship between the structure of tort law (which needs an explanatory theory) and its goals is twofold: on one hand, a proper understanding of the structure of tort law requires a reference to its goals, because 'tort law is a human artefact which exists not for its own sake but for the service of human goals and aspirations'; and on the other hand, the structure of tort law constrains its ability to achieve its goals.[5] Which of these comes first? It seems to me that under this approach

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[2] Robert Stevens, *Torts and Rights* (OUP 2007) 327.

[3] ibid.

[4] I am not arguing that Cane is not concerned with the justification of tort law (indeed, he is concerned with justificatory questions); my point is only that his conception of the goals and the structure of tort law shows that it is plausible to combine an explanatory inquiry with a purposeful account of tort law.

[5] Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 212.

one must make a choice: either the goals of tort law define first the basic structure of tort law, or the basic structure comes first setting boundaries for the goals. It is not clear in Cane's theory which one comes first.

In principle, I share Weinrib's view according to which a purely (or 'internal') explanatory theory of tort law as a 'self-understanding enterprise' should not be based on external ideals that cannot explain many of its main or salient features.[6] In these terms, Weinrib's critique of instrumentalist accounts of private law (especially but not exclusively, Law & Economics) is sound because these accounts fail to explain many important aspects of the practice. For instance, if the principle of efficiency is used to explain tort law, then the complete structure of the system based on individual claimants and defendants (which Weinrib calls the 'correlativity' feature of private law) should be replaced by a scheme that allows allocating the risks of suffering losses among all the relevant parties. This argument will be sound as long as one is looking for an explanation of the existing practice of tort law ('as we find it'). It seems to me, however, that the argument has not yet shown that there is something inherently wrong with instrumentalism.

One could say, along the lines of Bagshaw's conception of goals, that my justificatory inquiry questions whether but-for the existence of tort law systems the world is a better place to live.[7] Of course, this *justificatory-instrumental* inquiry would still require a definition of the measure that should be used to compare a world that has tort law with a world that does not have such a system. For some, the criterion to measure this would be allocative efficiency, and therefore as long as a world with tort law is more efficient than a world without it, the practice is justified. The intuition that

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[6] Ernest J Weinrib, *The Idea of Private Law* (revised edn, OUP 2012) 14.

[7] Roderick Bagshaw, 'Tort Law, Concepts and What Really Matters', in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing 2009) 249.

the world with tort law is not a better place in terms of efficiency has led most corrective justice theorists to find the evaluative criterion somewhere else. In this sense, we might conclude that even *explanatory-non instrumental* theories of tort law can endorse the view according to which the world with tort law is a better place. For instance, it could be argued that both Coleman and Weinrib – though they never say it explicitly – aim to show that the world is a better place with tort law because these systems express the moral value of corrective justice. Similarly, we could argue, along the lines of civil recourse theorists, that a world with tort systems is a better place because they provide victims with 'redress' for the wrongs they have suffered.[8] Under this broad conception of the goals of tort law, it is even possible to argue that a world with tort law is a better place because only with the law of torts our rights are 'vindicated'.[9]

What then is the relationship between an explanation and goals? Should the basic structure of tort law be determined by its goals (as economic theories would suggest), or is it the other way around, i.e. the goals of tort law are determined by tort law's structure? Following Cane's *explanatory-instrumental* approach that was mentioned above, a dilemma might be posed to the legal theorist: it seems that we can evaluate the basic structure of tort law in terms of the goals that the system seeks to pursue; but at the same time, the goals are limited by the structure of tort law, leaving no space for criticism at all, or at least, no space to criticise its basic structure. Certainly, some explanation of what is going to be justified is required before one looks for a justification. As was noted above (0.3), my aim is to justify the existence of modern tort

[8] John CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917, 953-71.

[9] '[T]he law of torts is concerned with the vindication of our rights'. Stevens (n 2) 326.

systems understood as mechanisms that repair wrongful losses based on a bilateral structure of tort litigation between claimants and defendants.

Since my aim is to discuss a *justificatory-instrumental* framework of tort law, it is necessary to determine which moral values are important for the justification of the practice of tort law. It is my contention that the values of corrective justice, distributive justice and moral reconciliation play an important role in this sort of inquiry. But such pluralism of values needs to deal with the existence of a legal practice that has different – and in some cases contradictory – goals or purposes. Are we forced to conclude that my justificatory account presents an incoherent picture of tort law? Certainly, coherence is a value worth pursuing for a legal practice. Hence, a justificatory version of tort law that presents such a body of law as an inherently contradictory practice should be troubling. It would be a clear example of having defective or unjust laws.[10] If that is the case, then such justification is problematic. *Pace* Weinrib however, it seems to me that this should not worry us too much, or at least, it should not concern us as much as he suggests. For coherence is one of the *desiderata* of the law, but it should not be considered as an indefeasible value. There might be good reasons to sacrifice some coherence in the law for the sake of a different moral value, such as fairness or justice.[11] The challenge therefore is to establish how these moral principles can play an important role for the justification of tort law without presenting an absolutely incoherent picture of such legal practice. In this work in particular, I will concentrate on the value of moral reconciliation, discussing whether it is possible to argue that the value of moral reconciliation plays a role in an

[10] It is indeed one of Fuller's eight ways of failing to make law. Lon L Fuller, *The Morality of Law* (revised edn, Yale UP 1969) 36.

[11] The same argument could be made regarding other *desiderata* of the law as well. For instance, Endicott argues that there are good reasons to violate the restriction on retroactive decision making (an important requirement of the rule of law) for the sake of justice. Timothy Endicott, 'Adjudication and the Law' (2007) 27 Oxford Journal of Legal Studies 311.

evaluative analysis of the law of torts without raising unavoidable logical contradictions with the other moral values that justify the practice.

III.3 Moral Reconciliation and Rights

Following the argument of chapter II, we should conclude that providing material compensation to victims is not the exclusive goal of tort law. Tort scholars usually agree with this conclusion, adding that compensation per se is not a goal of tort law (mainly because tort law does not compensate all types of losses).[12] In this sense, someone like Keating or Stevens would probably point out here that of course tort law is not about compensating losses; it is rather about vindicating the primary rights of the parties.[13] And we can also imagine Weinrib agreeing with this claim, because according to him private law 'protects rights, not welfare'.[14] This rights-based approach is a remarkable explanation of tort law that covers many aspects of the victim's claims. For instance, a victim of a trespass to land might be satisfied with the court's ruling, which establishes that the defendant indeed committed a wrong, even with an award of only nominal damages. The rights theorist would probably argue that this is a clear example of a vindication of rights, in which the landowner's primary right not to have people trespassing on her property is vindicated.[15] This

[12] Jules L Coleman, *Risks and Wrongs* (CUP 1992) 209; Weinrib (n 6) 40.

[13] 'Tort law is a law of wrongs, not just a law of redress for wrongs. In the first instance, it enjoins respect for people's rights. Remedial responsibilities in tort are subordinate, not fundamental'. Gregory C Keating, 'The Priority of Respect Over Repair' (2012) 18 Legal Theory 293, 297. 'The law of torts is concerned with the secondary obligations generated by the infringement of primary rights. The infringement of rights, not the infliction of loss, is the gist of the law of torts'. Stevens (n 2) 2.

[14] Weinrib (n 6) 131.

[15] A rights-theorist could even suggest that in some of these cases, victims whose rights have been seriously violated should be entitled to recover a substantive award of damages under the heading of 'vindicatory damages'. This position initially received some judicial support.

might be important for a victim, as it provides the public acknowledgement that a wrong has been committed, and also at least some (although not an absolute) reassurance that the defendant will not commit that wrong again.

Stevens and Weinrib might be on our side then. They might agree that even though tort law must be explained in terms of the vindication of primary rights or Kantian rights through corrective justice, this legal practice might enhance as a positive side effect other values as well.[16] For instance, by providing compensation for a victim of a wrong, tort law might help to achieve or move towards moral reconciliation. Hence, even if one does not want to argue that moral reconciliation is a goal of tort law (or that tort law has any purpose at all), one might still share the view that in many tort cases the legal system helps to achieve or move towards the moral reconciliation of the parties. However, in a justificatory inquiry it is plausible to argue that moral reconciliation is a goal of tort law, because the fact that tort systems help to achieve or move closer to the reconciliation of the parties provides a reason to think that the world is indeed a better place with tort law. Recall (0.4) that in a justificatory inquiry the relevant question is not to determine whether a given moral value is able to *explain* every salient aspect of tort law, but rather to determine whether a given moral value is able to *justify* the practice of tort law understood as a mechanism that rectifies wrongs through a system of litigation between claimants and defendants.

What would be the reply from a rights-based theorist? It was already noted that a rights-based account could accept moral reconciliation and other values as a positive side effect. But it is also possible to conceive a rights-based theorist agreeing

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See eg *Attorney General of Trinidad and Tobago v Ramacoop* [2006] 1 AC 268 (Privy Council). However, the Supreme Court later refused to endorse this head of damages in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

[16] Stevens acknowledges this possibility: '[A]lthough the protection of these [primary] rights may have a number of incidental effects, these should not be confused with what the law of torts is "about".' Stevens (n 2) 326.

with the conception of moral reconciliation between the parties as a goal of tort law. This might be surprising, given both Stevens' and Weinrib's reluctance to instrumentalism. However, if moral reconciliation is conceived as part of the vindication of rights process, then moral reconciliation could be regarded as a goal of tort law. Let us see how. According to the rights-based theory, tort law is solely concerned with the vindication of primary rights, and victims who suffer a wrong are entitled to a secondary right to obtain a remedy for the violation of their primary rights. For Stevens, the remedy, which usually takes the form of material compensation, is 'the closest response the law can give to the wrong not having been committed in the first place'.[17] In a similar way, Weinrib claims that an award of damages 'undoes the injustice' of what the plaintiff has suffered.[18] Both of these authors therefore share the view that when tort law provides material compensation to victims, the wrong (or the injustice) is somehow erased, by putting the victim in the next-best position to the wrong not having been committed. This is coherent with Gardner's continuity thesis, in which the award of damages seek to restore things 'to where they would have been had one not occasioned their loss'.[19] It is also coherent with what legal scholars normally say with regards to the aim of compensatory damages: 'the aim of compensatory damages is to put the claimant into as good a position as it would have been in if no tort had been committed'.[20]

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[17] Stevens (n 2) 59.

[18] Weinrib (n 6) 143.

[19] John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 37.

[20] Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 33. See also Arthur Ripstein, 'As If It Had Never Happened' (2007) 48 William and Mary Law Review 1957, 1968 (arguing that damages in tort are awarded 'to make it as if the persons had the means that they would have had if others had not wrongfully deprived them of them').

It follows that the compensation materialised by tort law as a remedy for the commission of a wrong is, at least in some sense, restorative. For compensation 'undoes the injustice' committed against the victim by restoring the position that she would have been in had the injury not occurred. The same could be said about apologies: they seek to restore the moral relationship between the parties as if the injury had never happened ('I wish I had not done this' is a common apology). The ideal of moral reconciliation therefore is not extraneous to rights-based accounts. I have suggested above (II.4) that a normative framework is more adequate to understand the rationale of apologies. Under such a framework, apologies are required when someone violates a moral (and eventually, legal) rule of behaviour that governs the particular relationship. We can easily fit this rationale with a rights-based approach: the injurer violates a primary right of the victim, which is defined by the rules of behaviour that govern the particular relationship. Therefore, there is a secondary right for the victim to demand an apology, understood as a mechanism seeking to undo the violation of the primary right, as if it had never happened.

But how does tort law put the victim in the next-best position to the wrong having not been committed? The operation seems to require satisfying victims in order to fully erase or undo the wrong that they have suffered. But does it matter for a rights-based approach whether victims are satisfied with the remedy provided for the violation of their primary rights? For those who hold that there is no general duty to pay tort damages until a court orders so, the answer might be negative.[21] Following this approach, the satisfaction of the victim is irrelevant because there is no duty to

[21] 'First, there is no general duty to pay damages. Damages orders are creative orders. Second, because damages orders are creative, attempts to explain damages orders which suppose that they give effect to inchoate rule-based duties or that they are otherwise grounded in moral duties should be rejected'. Stephen Smith, 'Why Courts Make Orders (And What This Tells us About Damages)' (2011) 64 Current Legal Problems 51, 71.

repair until the court determines the award of damages that is required to vindicate the victim's primary rights. However, this approach seems difficult to reconcile with the fact that victims are allowed to accept or reject settlements in tort cases, and systems usually allow this to happen, even in cases where victims reject generous offers or accept unfair settlements. In these cases, satisfying victims seems to be the aim of the secondary rights the law provides to victims of wrongs. The question then is what it means to satisfy victims?

From an economic point of view, the answer is simple: the remedies provided should ensure that victims are put in a position in which they are indifferent on whether suffering the injury or being granted with a remedy. As was noted above (I.3), this approach is problematic because it holds that tortfeasors can buy off their victims to violate their rights. Moreover, this economic approach ignores the fact that in many cases this will not be possible. Some injuries, such as the loss of a loved one, are irreparable and victims could never be indifferent on choosing to suffer them or not (VI.4). The point is that tort law almost always arrives late; it acts when rights have already been infringed.[22] In most cases, it is no longer possible to go back to how things were before. In chapter VI I will discuss how tort systems can face this challenge providing adequate remedies. In the next sections of this chapter, I will concentrate on what it means to satisfy the victims of wrongs. Does it mean that tort law needs to wholly satisfy victims? Is it necessary that tort law put victims in a position such as willingness to forgive their injurers? Should we establish any limits to the demands that this satisfaction of the victim requires?

[22] Exceptions can be found in the cases of *quia timet* and prohibitory injunctions. See below VI.7.

III.4 Moral Reconciliation and Satisfying Victims

What does satisfying tort victims mean? A promising response can be found in Goldberg and Zipursky's theory of civil recourse. They argue that tort law provides remedies to victims as a 'form of redress'.[23] Accordingly, the remedy usually takes the form of compensatory damages that allow the victim 'to exact some money from the defendant because of what the defendant did to her'.[24] Goldberg and Zipursky claim that this account of tort remedies as a form of redress also accommodates other responses such as punitive damages and injunctive relief. As was seen above (I.6), it is necessary to accommodate these remedies in our justificatory inquiry. In this sense, the notion of redress is a promising idea to begin unpacking what it means to satisfy victims. Indeed, more recent developments of the civil recourse theory of torts run in the same line of moral reconciliation, holding that tort law's primary purpose is to make wrongdoers *accountable* for the wrongs they have committed and to hold them *responsible* to their victims.[25] Goldberg and Zipursky argue that this notion of accountability for tortfeasors enforces 'a notion of democratic equality', in which no class of persons is entitled to mistreat another 'lower' class.[26] The approach therefore shares the restorative framework of corrective justice outlined in chapter II, in terms of arguing that holding wrongdoers responsible involves restoring some sense of moral equality among the parties. This truth is adequately captured by the civil recourse theory, demanding (especially in the case of serious wrongs) more than just material compensation for victims. Under this framework, holding wrongdoers accountable

[23] Goldberg and Zipursky (n 8) 962.

[24] ibid. However, Goldberg and Zipursky add in a footnote that there might be other default conceptions of recourse, such as the demand of prison time for tortfeasors. ibid n 223.

[25] John CP Goldberg and Benjamin C Zipursky, 'Tort Law and Responsibility' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 19.

[26] Goldberg and Zipursky (n 8) 982.

might be an important part of the symbolic reparation that is required. As Duff points out, in cases of serious wrongs, the civil recourse theory would demand a remedy that 'should have an apologetic dimension: if it is a monetary award, it must be understood to constitute an apologetic payment'.[27]

However, Goldberg and Zipursky hold that the right of action provided by tort law does not arise from a moral duty of repair; rather, it 'arises from the defendant's responsibility for having injured the plaintiff'.[28] I argue that separating the victim's redress from the reparative aim is misleading. First, as Duff has pointed out, if tort law's primary purpose is to hold tortfeasors responsible and accountable, then many characteristic features of tort law are problematic.[29] For instance, take settlement. Many tort suits are settled, and tort systems usually allow this to happen with very few restrictions. When the claim is settled, it is not clear whether the defendant is accepting responsibility or not; she might have agreed to settle for strategic reasons, to avoid bad publicity, or simply because it is too expensive to continue litigating. Goldberg and Zipursky could reply that the enforcement of criminal law is also discretionary.[30] This counterargument however would assume that the same type of discretion is involved in the contexts of criminal and private law, an assumption that is questionable.

Insurance is another example. Insurance is generally not allowed for criminal liability.[31] That is not the case in tort law, where insurance is almost always available,

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[27] RA Duff, 'Repairing Harms and Answering Wrongs' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 226.

[28] Goldberg and Zipursky (n 25) 31.

[29] Duff (n 27) 222-8.

[30] Goldberg and Zipursky (n 8) 974.

[31] 'I unhesitatingly accept the principle that a person cannot insure against a liability consequent on the commission of a crime, whether of deliberate violence or otherwise'.

and in some cases even mandatory. This feature is difficult to reconcile with civil recourse and holding wrongdoers accountable. Certainly, if simply calling an insurance company on the phone satisfies the accountability required by civil recourse, the theory seems to lose its initial attractiveness. I will deal fully with the influence of insurance within tort law in chapter V. But it is worth mentioning here that Goldberg and Zipursky's account is unable to explain this important feature of tort law.

Moreover, I argue that disentangling tort law from a reparative aim also obscures the notion of redress when it comes to determine the remedies required. Indeed, civil recourse has been criticised because it is unable to explain why full compensatory damages is the default remedy in tort law as of right.[32] As was noted above, Goldberg and Zipursky argue that the notion of redress accommodates the full measure of compensatory damages.[33] However, they immediately add that the remedy could also take different forms, such as demanding prison time for tortfeasors.[34] Similarly, Goldberg suggests that tort law should endorse a '*fair*' rather than a *full* measure of compensatory awards.[35] Certainly, civil recourse theory succeeds at abstracting the formulation of remedies, accommodating well the existence of non-compensatory remedies. However, the price to pay may be too high. The result is a lack of clarity regarding the remedy that is required in a given case.

Lancashire County Council v Municipal Mutual Insurance Ltd, [1997] QB 897 (CA), 907 (Simon Brown LJ).

[32] John Gardner, 'Torts and Other Wrongs' (2011) 39 Florida State University Law Review 43, 54 (arguing that 'it is not a matter of any significant debate among judges and lawyers … that torts do attract a particular remedy as of right and that such remedy is an award of reparative damages').

[33] Goldberg and Zipursky (n 8) 962.

[34] ibid n 223.

[35] John CP Goldberg, 'Two Conceptions of Tort Damages: Fair v. Full Compensation' (2006) 55 DePaul Law Review 435. See below VI.2 for discussion.

In sum, Goldberg and Zipursky's notion of redress does not help us to unpack what it means to satisfy victims. As was seen above, they acknowledge this obscurity: civil recourse is compatible with full compensatory damages, but also with a 'fair' measure of compensatory damages; it can accommodate punitive damages, but also prison time for tortfeasors. It seems that the notion of redress alone cannot do all the work. Hershovitz has recently developed this notion of redress based on the idea of private retribution. The starting point is Zipursky's claim that tort law provides a right of action to victims of wrongs as a substitute of private retribution.[36] Hershovitz follows this argument arguing that tort law 'can serve as an outlet for vindictive motives'.[37] He claims that tort law operates as a substitute for revenge because in many cases it sends the same messages that revenge would have (probably) sent. Interestingly, the argument is built upon the symbolic function that tort awards on damages can potentially perform. Accordingly, Hershovitz argues that in many cases tort law does not seek to repair losses, but rather to send a message holding that 'the conduct in question was wrong and the results the wrongdoer's responsibility'.[38]

To support his thesis, Hershovitz uses the example of an old battery case – *Alcorn v Mitchell* – in which Alcorn, the defendant, spat in the face of Mitchell, the plaintiff. The court awarded a high amount of damages to Mitchell not seeking to redress the material losses suffered by him as a result of the spitting (presumably he did not suffer any), but rather to preserve the 'public tranquillity … by saving the necessity of resort to personal violence as the only means of redress'.[39] Hershovitz

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[36] 'While the state takes away the liberty of private retribution, it offers a right to civil redress in its place'. Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1, 86.

[37] Scott Hershovitz, 'Tort as a Substitute for Revenge', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 88.

[38] ibid 97.

[39] 63 Ill 553 (Supreme Court of Illinois 1872) 554.

claims that revenge shares with corrective justice the concern with equality, with revenge seeking to 'get even'. According to him, revenge involves 'evenness in a certain kind of social standing, expressed in a formula that inverts the golden rule: you may do unto others as they do unto you'.[40] Certainly, the idea of getting even is a metaphor.[41] Modern tort systems do not generally endorse the *lex talionis*. In the case of *Alcorn*, judges would probably not allow Mitchell to spit on Alcorn in the same way as the latter spat on the former. This solution would seem odd. Claiming that the only morally adequate response to a wrong is to commit the same wrong against the injurer is obscure.[42] Although for some it might be perceived as just to punish a rapist by raping him, it is not how the law normally responds to wrongdoing. And it makes sense that it does not. Inflicting pain against another can only metaphorically get the parties even (re-establishing what Nussbaum calls a 'cosmic balance'), but it certainly does not erase the wrong from the victim's personal history.[43] Hence, it seems to me that the 'getting even' metaphor does not put forward a very attractive moral theory. Is this all we can do with tort law?

Hershovitz argues that there is not much space for more optimism here. Tort litigation does not reconcile the parties: 'If anything, a lawsuit is apt to exacerbate

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[40] Hershovitz (n 37) 95.

[41] '[O]ne might worry that I have merely traded one set of abstractions and metaphors for another, and that the new metaphor is rather vacuous. That is right, but it is not a cause for worry: The emptiness of getting even is a virtue, not a vice.' Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2011) 39 Florida State University Law Review 107, 126.

[42] This idea is based on Martha Nussbaum's John Locke Lectures on 'Anger and Forgiveness' (Magdalen College, Oxford, May 2014).

[43] Radzik makes a similar point: Both retributive and restitutive theories of atonement are enamored with economic images … However, on closer examination, these metaphors lose their power. Debt and repayment are useful concepts when we are thinking about how goods may be transferred among persons. Nonetheless, the suffering of one person does not (or anyway should not) count as an intrinsic good to another person'. Linda Radzik, *Making Amends. Atonement in Morality, Law and Politics* (OUP 2009) 54.

tensions between parties, rather than relieve them'.[44] It is true that in many cases tort litigation might not be a healing process; indeed, litigation can be a painful process of claims and counterclaims for victims and defendants. In this sense, there is some truth in Hershovitz's approach based on private retribution: but-for the existence of a tort system, many victims would probably seek to solve their disputes by their own means. Under such framework, this is all that tort law can provide for victims, namely a rule-based institutional platform to solve private disputes. The argument in this general form seems uncontroversial to me. Many areas of the law can be seen from this point of view: if private property were not protected, titleholders would seek to protect their entitlements by their own means; if criminals were not prosecuted, most victims of crimes would seek revenge or retribution, and so on. My point is that providing a substitute of private retribution does not seem distinctive of tort law. It is true that to some extent satisfying victims involves 'preserving public tranquillity' and providing a substitute of private retribution.[45] However, I argue that there is no reason to stop here.

My suggestion is to keep tort law's reparative aim of corrective justice. A justificatory theory of tort law has much to gain and not much to lose with this move. In chapter VI I will argue that this reparative aim solves Goldberg and Zipursky's obscurities regarding tort remedies. In this section, I will argue that the restorative framework of corrective justice outlined in chapter II illustrates the idea of satisfying

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[44] Scott Hershovitz, 'Patching Things Up', Jotwell (May 13, 2014) (reviewing Linda Radzik, 'Tort Processes and Relational Repair', in John Oberdiek [ed], *Philosophical Foundations of the Law of Torts* [OUP 2014]), http://torts.jotwell.com/patching-things-up/.

[45] A similar argument is made by 'resentment-based' conceptions of apologies, establishing a necessary connection between apologies and victims' resentment. But I have argued above (II.5) that it is also possible to elaborate a normative framework of apologies, an account that does not depend directly on placating the victims' resentment. It seems to me that the same argument can be made regarding tort law in general, namely that placating resentment is only one aspect of tort law.

victims. The starting point of the argument is that tort law protects many different interests.[46] While some torts protect sensible personal interests, such as battery, false imprisonment and harassment, other torts protect less sensible interests such as possessory interests and contracts. Similarly, while some tort claims are triggered by intentional conduct, others are caused by momentary careless acts, or even by engaging in legitimate (or justified) activities such as playing cricket[47] and saving a ship from a storm.[48] This diversity of tort claims calls for a flexible justificatory theory. Accordingly, I do not wish to argue that moral reconciliation is involved in all of these cases. Many tort cases are only concerned with redistributing losses. These victims will only be satisfied with material compensation. However, it is my contention that in other cases providing material compensation alone is not enough.

Let us go back to Hershovitz's thesis. He points out that the damages paid in *Alcorn* have a symbolic message, establishing that Alcorn committed a wrong that violated Mitchell's rights.[49] Money reflects then that Alcorn should be held responsible for what he did, regardless of the fact that the victim in this case does not require compensation for any material loss. But *pace* Hershovitz, the award of damages (in this case and generally in any tort case) does not send a message of revenge or payback. Money carries an egalitarian message: the court imposes a duty to pay on Alcorn, indicating that his behaviour is unacceptable because he violated Mitchell's primary right not to be disrespected.[50] Accordingly, material compensation restores a

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[46] John CP Goldberg and Benjamin C Zipursky, *Torts* (OUP 2010) 27-45.

[47] *Miller v Jackson* [1977] 1 QB 966 (CA).

[48] *Vincent v Lake Erie Transportation Co* 109 Minn 456, 124 NW 221 (Minn 1910).

[49] This is compatible with Hershovitz' general conception of corrective justice as requiring not only material compensation, but also explanations and apologies. Scott Hershovitz, 'Harry Potter and the Trouble with Tort Theory' (2010) 63 Stanford Law Review 67, 95-6.

[50] In the same sense, Goldberg and Zipursky argue that there is an egalitarian message in holding wrongdoers responsible: 'In holding individuals accountable based on what they have

condition of moral equality that was lost with the injury. It affirms the fact that Alcorn, or any injurer, must equally respect the rules that govern interactions between human beings.[51]

It follows that tort law is connected with apologies. Regardless of the fact that in most cases tort systems compensate victims materially and do not impose a duty to apologise, awards of damages perform the same normative function of restoring moral equality between the parties (II.4). Many wrongs communicate disrespect to their victims; they send the message that the injurer is superior or beyond the victim's rights. This symbolic aspect of damages therefore is connected with rights-based accounts: the payment of damages is usually the next-best thing that tort law can provide to a victim because in part it communicates the message that the injurer should not have violated the victim's rights in the first place.[52] Again, corrective justice is superior to its rival economic theories of tort law, since it can show that tort law is seeking to affirm that the wrong should not have occurred (I.3). Under this framework, money and apologies are among equals: they communicate that injurers are not morally superior to their victims. Accordingly, it is important to determine

done, irrespective (in principle) of who they are, it embodies and reinforces a notion of democratic equality–the idea that there is not a class or group of persons who are somehow entitled to mistreat another, "lower" class or group'. Goldberg and Zipursky (n 8) 982.

[51] This idea connects the restorative framework of apologies with the egalitarian conception of human dignity. See Jeremy Waldron, 'Lecture 1: Dignity and Rank' in Meir Dan-Cohen (ed), *Dignity, Rank, and Rights* (OUP 2012) 30-6; and Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012). Radzik explores this connection even further, arguing that 'to wrong someone is to treat him in a way that is inconsistent with his value as a human being'. Linda Radzik, 'Tort Processes and Relational Repair' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 240.

[52] Smith shares this communicative feature of compensatory damages: 'What an award of compensatory damages … does very clearly … is to communicate that the defendant has committed, and the claimant suffered, a wrong. And by making the defendant pay compensation to the claimant, the order makes clear that the defendant's wrong was a wrong done to the claimant'. Smith (n 21) 85.

whether tort's awards of damages are able to communicate this message. If this is not the case, then tort law may be failing to satisfy victims properly.

As was seen above (II.7), following Radzik's approach it is possible to argue that the material redress provided by tort law can assume a symbolic function. To perform this function, Radzik claims that 'reparation payments must either be accompanied by other, perhaps verbal, forms of communication or else take place within a social institution or tradition of reparation payments that constructs such an acceptable meaning'.[53] Tort law seems to perform this function by facilitating the interaction between injurers and victims. It is true that insurance schemes complicate this basic structure, as Atiyah famously warned us. But leaving aside for a moment the complications caused by the mechanism of insurance,[54] my claim is that it is possible for the law of torts to perform this symbolic function of restoring moral relationships.

However, one could question whether the law of torts is an adequate instrument to pursue the reconciliation of the parties. There might be other mechanisms that are more successful at achieving this goal. Or perhaps accepting moral reconciliation as a goal of tort law could mean that its basic structure should be radically reformed. In this sense, Radzik claims that 'tort processes pose obstacles to some aspects of an ideal resolution of wrongdoing or harm-causing'. The role for the law of torts then is restricted to securing 'some elements of justice when full or ideal justice is unlikely'.[55] It seems to me though that this aspect of the law of torts should not worry us too much. Indeed, tort law deals with a non-ideal situation, in which a

[53] ibid. Walker also suggests that it is possible for the classical account of corrective justice to perform this function; however, she argues that this will only be possible if corrective justice consolidates 'a more varied and complex process of historical accounting, acknowledgment, cultivating trust and making amends for which restorative justice provides the rationale'. Margaret U Walker, 'Restorative Justice and Reparations' (2006) 37 Journal of Social Philosophy 377, 391-2.

[54] I will later deal with these complications in V.5.

[55] Radzik (n 51) 246.

victim has already suffered a wrong. It would be better if the injury had never occurred, but it would also be better (at least from a moral point of view) if contracts were actually performed, if crimes were never committed, if debts were always paid on time, and so on. Principles of justice are indeed meant to operate in non-ideal conditions.[56] This is very clear in the case of distributive justice, which normally deals with situations in which there is a non-ideal distribution of resources. It is true that tort processes will pose some obstacles to the reconciliation of the parties. As was noted above, tort litigation usually is painful and expensive for the parties. But criminal litigation could be painful and expensive as well. Thus, the aspects of the law of torts that are problematic for Radzik are problems for the law in general; it is not a critique peculiar to tort law.

Other scholars have questioned that moral reconciliation should be regarded as a goal of tort law. In this sense, Encarnacion argues that 'we should be careful not to over-emphasize the notion of reconciliation. Conciliatory gestures need not aim to reconcile victim and wrongdoer, and a conciliatory gesture can succeed in making amends without achieving any recognizable reconciliation'.[57] His emphasis therefore is put on 'conciliatory gestures' that express regret that the wrong took place. These conciliatory gestures can take the form of a sincere apology, but 'there is often no better way of expressing or suggesting regret than by trying to actually undo the damage done as a result of wrongdoing'.[58] Without relying on the ideal of moral reconciliation, Encarnacion's model separates the process of making amends from a

[56] This idea is also reflected in what Rawls called the 'circumstances of justice': 'The circumstances of justice may be described as the normal conditions under which human cooperation is both possible and necessary'. John Rawls, *A Theory of Justice* (2nd edn, Harvard University Press, 1999) 109. See also Hershovitz's version of the circumstances of justice in Hershovitz (n 41) 116-7.

[57] Erik Encarnacion, 'Corrective Justice as Making Amends' (2014) 62 Buffalo Law Review 451, 495.

[58] ibid 497.

subjective measure for the victim's satisfaction. Accordingly, the duty of repair is satisfied once the tortfeasor has made an appropriate conciliatory gesture, regardless of whether the victim *feels* satisfied or not.

By contrast, my approach offers an alternative reconciliatory framework for tort law, holding that the ideal of moral reconciliation is in many – but not all – tort cases[59] part of the restorative operation of corrective justice, which seeks to put victims in the closest position to the wrong not having occurred. This formulation abstracts the duty of repair accommodating the diversity of remedies provided by tort systems. Goldberg and Zipursky argue that civil recourse is able to accommodate these remedies,[60] whereas Encarnacion also claims that his version of corrective justice 'has a built-in flexibility' regarding the remedies.[61] My point is that the restorative framework of corrective justice is also flexible regarding the remedy, without obscuring the aim of repairing the wrong. As was seen above, the reparative aim requires both material and symbolic compensation to be provided. The remedy therefore will depend on the nature of the wrong and the victim's losses, but also on how the wrong was committed. Accordingly, non-compensatory damages such as aggravated and exemplary damages may also be awarded under this framework.[62] These awards do not compensate the victim's losses. Nevertheless, they are reparative in the sense that they seek to restore things back to how they should have been. Similarly, the reparative aim requires compensating both material and immaterial

[59] It seems to me that Encarnacion's theory of tort law understates this point: in many tort cases there is no duty to make amends, at least under an ordinary understanding of the term. This is particularly clear in the case of justified conduct. If I harmed your property violating your right but my action was justified given the circumstances, why should I make amends to you (if I did not do anything wrong)?

[60] Goldberg and Zipursky (n 8) 962.

[61] Encarnacion (n 57) 494.

[62] See below VI.5 for discussion.

losses, including damages for pain and suffering.[63] I will later discuss how each of these heads of damages fit the restorative model outlined here. I will concentrate here on the last questions that need to be answered regarding satisfying victims and moral reconciliation. These questions are connected with how tort law deals with the victim's emotions.

III.5 Tort Law and Emotions

According to the literature on reconciliation,[64] the aim of moral reconciliation seems to put a great burden on the emotions of the parties, on how both wrongdoers and victims *feel* about the wrong and the process of reparation. Emotions are indeed important. A situation in which an injurer apologises and compensates her victim is morally superior to the scenario in which an injurer compensates and does not apologise.[65] Victims' emotions therefore matter and tort law cares about them. For instance, when a tort was committed in an arrogant and high-handed way, tort law provides aggravated damages to repair the victim's 'proper feelings of dignity and pride'.[66] But perhaps tort systems should go even further, aiming to reach closer to ideal scenarios of reconciliation, in which injurers fully satisfy what victims plausibly demand from them (generally, apologising and providing material compensation). Of course, tort systems might have some practical constraints to accomplish this task. For instance, it would be problematic from a practical point of view to force people to apologise. It could encourage people to apologise excessively, or it might be almost

[63] See below VI.4 for discussion.

[64] Eg Margaret U Walker, *Moral Repair* (CUP 2006); Nick Smith, *I Was Wrong: The Meaning of Apologies* (CUP 2008); Radzik (n 43); Radzik (n 51).

[65] The same thesis can be found in David Enoch, 'Tort Liability and Taking Responsibility', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 253.

[66] *Rookes v Barnard* [1964] AC 1129 (HL) 1221 (Lord Devlin).

impossible for the law to verify whether apologies are sincere or not. It seems to me though that a line must be drawn between the emotion-related features that the law of torts should incorporate and those of which it should not, regardless of the law's practical constraints in achieving the ideal of reconciliation.

A first problematic feature of a reconciliatory framework for tort law is the relevance of wealth as a criterion to determine the amount of material compensation that is due in a given case.[67] The reason for this is that under a reconciliatory framework, material compensation performs a symbolic function expressing an acknowledgement that a wrong was committed. It follows that the amount of compensation may depend on the wealth of the injurer. For instance, if a wealthy injurer seeks to repair a wrong with a small gift, the victim may perceive such a gesture as an insult rather than as proper reparation. On the other hand, if the injurer is poor, even a small gift should be highly appreciated by the victim as an effort to make amends. A compensation award thus may communicate different messages depending on the wealth of the injurer.

This feature is problematic for the law of torts, because it contradicts the normal practice of courts that usually do not consider the wealth of injurers and defendants. It could be argued that this practice makes no sense at all from the perspective of reconciliation, and that courts ideally should consider the wealth of the parties when dealing with tort cases. Certainly, it is plausible for an evaluative approach to develop such a critique of existing tort law systems. However, I do not share this view. It is true that the message a reparative measure communicates

[67] '[T]he amount of the transfer should often vary with not only the severity of the wrong or the harm but also the wrongdoer's means'. Radzik (n 43) 98. Smith also adds that 'a small amount of hard-earned money provided to a victim may convey more meaning than a large check from a billionaire because money possesses differential moral value depending on the situation of the debtor'. Smith (n 64) 85.

depends on the defendant's means. Therefore, it makes sense for a victim to feel offended if a wealthy defendant offers to her a small amount to settle the claim. The answer 'you can do better than that' not only reflects that the sum offered was unfair, but also that the wrong deserves a bigger effort. However, when the law provides the remedy, the case is different. The institutionalised form of a remedy granted by a court's judgment has a symbolic meaning that is absent in simple offers to settle. For the court's judgment will hold the defendant responsible and accountable for the wrong that she committed. As Goldberg and Zipursky emphasise, this is an important task for tort law. But it may also be important for victims: the court's public acknowledgement that the defendant committed the wrong repairs the victim, regardless of whether the former is a wealthy person or not. Only with the court's judgement the award of damages can carry the egalitarian message of tort damages, which holds that there are no superior or lower class of persons: no one is allowed to violate another's rights.[68] Hence, the reconciliatory message may still be partially lost, but not entirely.

A second concern with a reconciliatory framework for tort law is the suggestion that the tort process should put the victim closer to forgiveness. For instance, Radzik seems to claim that justice requires the injurer to perform all the reparative measures necessary to be forgiven by the victim. Only with the victim's forgiveness does the resentment disappear and the relationship is repaired, achieving their reconciliation. This is problematic, because as Walker points out, 'there isn't a formula for when forgiving does exactly enough and the right kind of repair'.[69] But

[68] See above n 50 and accompanying text.

[69] Walker (n 64) 169. It is true that there is no exact formula for compensation either. However, it seems to me that classic corrective justice provides clearer guidelines than the idea of forgiveness, and courts have never hesitated to hold that the default remedy of tort law is compensatory damages.

how can we determine when the reparative measures are enough to satisfy the demands of reconciliatory justice? Should we elaborate general standards for this, or should we deal with each case individually considering the different degrees of sensibilities that each one has?[70] Since deciding whether to forgive the injurer or not will always be the victim's prerogative, it is almost impossible to set standards to answer these questions.[71]

We would expect, for instance, that Alcorn's payment of damages put an end for good to his conflict with Mitchell, perhaps moving them closer to an imperfect version of moral reconciliation. This is true even if Alcorn does not regret having spat on Mitchell, or if the latter thinks that the damages awarded are insufficient taking into account the former's wealth. Perfect moral reconciliation would perhaps require that Alcorn sincerely apologise to Mitchell, and that the latter forgive the former for what he did. But imperfect as it is, it seems to me that Alcorn's compensation still improves the situation from a reconciliatory point of view, even if Alcorn is reluctant to pay. The award of damages conveys a symbolic public message by expressing that Alcorn committed a wrong against Mitchell and that he should be liable for it. But this does not mean that the law of torts should care about the different sensibilities that both injurers and victims have.

Imagine, for example, that Mitchell is a particularly sensitive person. After Alcorn's spitting, he feels seriously diminished, even after the court's ruling in his

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[70] Encarnacion makes a similar remark in Encarnacion (n 57) 503 (arguing that Radzik's theory is problematic because it 'implies that making amends fails whenever it falls short of *actual* reconciliation').

[71] Interestingly, Radzik argues that victims have some positive and negative duties. The most important positive duty for a victim is the duty to reconcile with their offenders when appropriate amends have been offered. Radzik (n 43) 126. It seems to me though that this framework is not enough to demand forgiveness from victims in all cases, especially in the cases of severe wrongs. For instance, do victims of rape have this positive duty to reconcile with their offenders?

favour. He loses his job because he is unable to perform any of his tasks at work. Eventually, his wife abandons him because at home he is no longer the same. He lost something when Alcorn spat on him, something that he could not get back. Should the law of torts worry about this situation? Certainly, we should be worried about it and endeavour to help him. But it seems to me that the law of torts cannot be concerned with the fact that Mitchell has an extra sensitivity.[72] It is impossible to provide a remedy to Mitchell that completely erases the occurrence of the wrong; the law can only provide the next-best thing. What would be the next-best thing here? The answer should be determined by the court based on what would normally be the next-best thing for a normal person who suffers a wrong under the same circumstances as the victim. In this case, perhaps the court could grant an award of damages and order Alcorn to publicly apologise for what he did. Tort systems however need to draw the line somewhere. Of course, this is a difficult task, but legal systems very often get involved in it.

In this sense, dealing with emotions is not peculiar to tort law. For instance, breaches of contracts usually cause frustration and distress. Courts however need to draw the line between these normal inconveniencies and those non-pecuniary losses that should be repaired by the defendant.[73] Tort law also deals with this problem in

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[72] This might sound as a contradiction to the 'eggshell skull rule' of tort law, according to which a tortfeasor takes her victim as she finds her (regardless of the victim's extra sensitivities). Goldberg and Zipursky (n 46) 347-50. However, the law of torts establishes some limits to this rule under the heading of causation, when it needs to determine whether an injury was caused by the wrongful act of the defendant or by the victim's particular sensitivity. See *Page v Smith* [1996] AC 155, 170 (Lord Keith of Kinkel) (arguing that if a victim of a collision develops a psychiatric syndrome after some three hours after the accident, even assuming that it was caused by the accident, 'this can only be on account of the *plaintiff's peculiar susceptibility*', emphasis added).

[73] 'A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy'. *Watts v Morrow* [1991] 1 WLR 1421 (CA), 1445 (Bingham LJ).

different ways. For instance, under the Fatal Accidents Act 1976 victims are granted a fixed sum for bereavement (currently set in £12,980).[74] The sum is awarded regardless of whether the beneficiary was very close to the victim or hated her. In the case of pain and suffering however, there cannot be a fixed sum. Courts have suggested taking into account the scale of damages for personal injuries to assess non-pecuniary damages.[75] I will later discuss non-pecuniary damages with more detail (VI.4). My point here is that tort law attempts (successfully or not) to elaborate objective standards to satisfy victims.

Another interesting example of this exercise in the law of torts is the possibility of making a tort claim for pure distress. Notably, the delict that the Romans called *iniuria* provided a broad protection to victims of 'contemptuous harassment … calculated to cause distress in the nature of anger and humiliation'.[76] In the US, the Restatement (Second) of Torts also establishes the tort of intentional infliction of mental distress: 'One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress'.[77] English tort law also protects the intentional infliction of emotional distress: a course of conduct that amounts to the statutory tort of harassment is civilly actionable, leading to 'damages … for (among other things) any anxiety caused by the harassment'.[78] However, courts have warned that to constitute

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[74] 1976 Fatal Accidents Act, s 1A.

[75] See eg *Thompson v Metropolitan Police Comr* [1998] QB 498 (CA).

[76] Peter Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1997) 32 Irish Jurist 1, 11.

[77] American Law Institute, Restatement (Second) of Torts, § 46. Note however that both the Roman delict of *iniuria* and the modern tort of intentional infliction of mental distress require *intentional* conduct. The question then is open for cases of negligent infliction of emotional distress. In the US exceptional cases can be found in *Christensen v Superior Court* 820 P2d 181 (Supreme Court of California 1991) and *Beul v ASSE Intern* 233 F3d 441 (7th Circuit 2000).

[78] Protection from Harassment Act 1997, s 3.

harassment a course of conduct must 'go beyond annoyances or irritations, and beyond the ordinary banter and badinage of life'.[79] Therefore, the law does not protect victims from any disturbance; rather, it protects victims from the inconveniences that go beyond the frustrations and disappointments of ordinary life. The idea is that people should be able to bear on their own these inconveniences of ordinary life. As Goldberg and Zipursky put it, the law reasonably asks individuals to 'develop a certain resiliency that will permit them to weather even difficult situations without falling apart'.[80] Lord Hoffmann made a similar remark in *Wainwright v Home Office* in the context of causing emotional distress in the workplace:

> In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation.[81]

In sum, emotions play an important role in tort law. Victims should be allowed to exercise their prerogative to bring a tort action or not, and to accept or reject a settlement in an existing tort litigation. In this sense, civil recourse theorists rightly point out that this emotional feature of tort law is important.[82] In a similar way, injurers should also be allowed to exercise their prerogative to accept their liability, offering settlement agreements, or to deny their liability and continue with the litigation. But in both cases, strategic reasons might be involved to choose one path or the other, and it is not the law's concern to determine whether injurers have sincere

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[79] *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123, [2011] CP Rep 26 [42] (Rix LJ).

[80] Goldberg and Zipursky (n 46) 135.

[81] [2003] UKHL 53, [2004] 2 AC 406 [46]. In a similar sense, Goldberg and Zipursky argue that 'a wider range of everyday conduct generates distress as a predictable side effect. Office managers are generally thought to be entitled to demand a great deal of their employers in terms of meeting deadlines, sales targets, billable-hour minimums, and so forth, even though their doing so predictably generates serious distress in some employees'. Goldberg and Zipursky (n 46) 134-5.

[82] See above n 36 and accompanying text.

intentions to repair, or whether victims are willing to forgive their injurers. It seems to me that this is an important feature of the law of torts that should not be changed. Again, a tort system that is able to reconcile the parties by providing full satisfaction to victims is morally superior to a system in which victims are unsatisfied. My point is that some limits to this must be drawn. Some practical constraints to what is feasible for the law to do might be involved here. But other limitations are in order too. Requiring sincere intentions to repair for injurers and full satisfaction of victims or forgiveness would become a system intolerably invasive of people's feelings.[83]

An uncontrolled (or extreme) reconciliatory aim would suggest a reform to the law of torts that reflects more accurately the parties' emotions of resentment and regret. Even though the suggestion of reforming existing tort systems is not per se problematic for a justificatory theory, I have already argued that this is a troublesome view, because many tort cases are exclusively about redistributing material losses. Therefore, my claim is that moral reconciliation is a defeasible goal of tort law. As such, the reconciliatory aim can perform an evaluative function of existing tort law systems, criticising those aspects of the practice (especially within the litigation process) that pose substantive obstacles to the reconciliation of the parties. For instance, a reconciliatory aim could critically evaluate many aspects of the adversarial structure of tort law. In this sense, it could be argued that the tort process should provide more incentives to reach settlements, or should establish severe sanctions to inappropriate behaviour from lawyers in the litigation process. In this aspect, I share Radzik's

[83] Smith disagrees. He argues that a perfect (categorical) apology requires the offender to have a sincere intention to apologise. According to him, 'we regularly judge the mental states of others and our notion of *mens rea* in criminal law depends on this ability. An offender's emotions provide one such measure of her mental states'. Smith (n 67) 96. It is true that the requirement of *mens rea* in criminal law has the same invasive effect as the requirement of sincere apologies; however, the law tolerates this requirement only to impose a sanction that severely and exceptionally restricts an individual's freedom. The same is not true in the context of tort law.

concern that the tort process can pose serious obstacles to the reconciliation of the parties. However, I argue that the role emotions play in the law of torts should be limited. As was noted above, existing tort systems indeed establish such limits, and for good reasons.[84]

Drawing the line between the different moral values that the legal system endorses can be difficult, but not impossible. I have argued that tort law involves both material and symbolic reparations. However, I have suggested that some limits must be drawn to the satisfaction of victims and the ideal of moral reconciliation. These limitations are justified not only because the law has practical constrains to fully satisfy victims, but also because the primary goal of tort law is to provide the next-best thing to the wrong not having occurred. In some cases, this will require providing reparations more material than symbolic, whereas in other cases reparations will be more symbolic than material. Reconciliation will play an important role in both cases. But particularly in the latter group of cases, it will be crucial that the material compensation communicates the right message. A tort system that is successful in providing material compensation and sending the right messages is morally superior to another in which only material compensation is provided. But this does not mean that it is necessary to abandon the core features of tort systems and courts' reparative rationale to calculate awards of damages. It means that a flexible justificatory theory of tort law is required, a theory that is able to accommodate the reconciliatory aim

[84] A similar line of reasoning can be found in Ripstein's critique to civil recourse in Arthur Ripstein, 'Civil Recourse and Separation of Wrongs and Remedies' (2011) 39 Florida State University Law Review 163, 186 (arguing that the view according to which tort law placates anger or 'the inclination or urge to get even with those against whom you suppose yourself to have a grievance … generates an unstable amalgam of conceptual and empirical factors. That amalgam is not only inconsistent with corrective justice, but also with the idea of relational duties').

with the restorative operation of corrective justice. I hope to have provided enough guidelines to elaborate such theoretical framework.

IV
Distributive Justice and Tort Law

IV.1 Introduction

In chapters II and III we learnt that restorative justice and its ideal of moral reconciliation plays an important role in tort law. In chapters IV and V I will argue that distributive justice also plays an important role. Chapter IV will be concentrated on the relationship between corrective and distributive justice in the context of tort law. My aim is not to set out an analytical framework to understand these principles of justice;[1] rather, the discussion will be focused on tort law. The aim of the chapter then is to show that tort law involves a distributive task, without entirely reducing corrective justice and tort law to distributive justice. Hence, the challenge is to show that there is a connection between the two principles of justice without conflating them. It will be shown that, at least in the context of tort law, the connection between both principles cannot be denied. The chapter will support this argument discussing the case of proprietary torts, in which the connection between the principles is more visible (IV.5). As a result, if tort law is conceived as a distributive and not only corrective mechanism, it will be argued that it has a moral uneasiness: proprietary torts protect possession or proprietary interests regardless of how these rights were acquired, and regardless of whether their distribution amounts to an unfair

[1] I will not discuss directly here the analytical theories of the relationship between corrective and distributive justice, such as Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, Stephen R Perry, 'On the Relationship Between Corrective and Distributive Justice' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence. Fourth Series* (OUP 2000), or Richard W Wright, 'Substantive Corrective Justice' (1992) 77 *Iowa Law Review* 625, even though some of these theories will be discussed throughout the chapter.

distribution of resources (IV.6). Chapter V will show that these problems can be addressed through the distributive mechanism of insurance.

IV.2 Corrective Justice as a form of Distributive Justice (the Connection Thesis)

In this section I will discuss what I call the *connection thesis*, which holds that the principles of corrective and distributive justice are normatively connected. These theories do not need to argue that both principles of justice are inseparable; they only need to argue that corrective justice is normatively connected with distributive justice, and therefore that corrective justice is a form of distributive justice.

Let me begin with Nozick's theory of entitlements. He distinguishes between the principles of 'justice in holdings' that regulate the acquisition of holdings, the principles of 'justice in transfers' that regulate how holdings can be transferred, and the principles of 'rectification of justice in holdings', which correct past violations to either the justice in holdings rules or the transfer of holdings rules.[2] It seems clear that Nozick's rectification of justice in holdings is a principle of corrective justice: it seeks to re-establish the previous condition of equality that was lost with the infringement of a rule either regarding the justice in holdings or the justice in transfers. What about the other two types of rules? Are they rules of corrective or distributive justice?

Perry argues that Nozick's account should be understood merely as a corrective justice theory.[3] However, it is not clear why we should understand that both justice in holdings rules and justice in transfers rules are principles of corrective justice. For they do not aim to re-establish a pre-existing condition of equality; rather, they

[2] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 152.

[3] Perry (n 1) 254.

determine how the initial entitlements are acquired and how they are legally transferred once they are acquired.[4] Nozick argues that any additional principles of justice cannot be justified, especially *patterned* theories of distributive justice (such as Aristotle's or Rawls's). Surely, an un-patterned theory of distributive justice such as Nozick's is very limited: it precludes the possibility of redistributing or rearranging current distributions of entitlements in order to fit an ideal scheme for the distribution of holdings. But to claim that Nozick's theory of entitlements is not a theory of distributive justice at all is an entirely different thing. It seems to me that Nozick's rules of acquisition of holdings are rules of distributive justice, at least according to the Aristotelian formula, since what the rules of original acquisition and transfer actually do is to distribute the entitlements – the 'things that fall to be divided among those who have a share in the constitution'.[5]

But let us go back to Nozick's principle of corrective justice. Recall that the 'rectification of justice in holdings' principle seeks to correct violations of either the rules of original acquisition or the rules of transfers. Hence, according to this conception something must have gone wrong with either the acquisition or the transfer of some good in order to have a corrective justice claim. The role of corrective justice is nothing more than the enforcement of the rules of distributive justice. Although this theory might be attractive, it explains too little. The problem is that corrective justice is reduced to only rectifying property rights infringements, leaving without explanation many aspects that reparation mechanisms are usually

[4] An additional reason to reject Perry's suggestion is that, as was argued above (I.5), the notion of corrective justice by itself does not determine the content of the rights and duties that the operation of corrective justice seeks to protect. Nozick's rules of original acquisition and transfers lack a remedial or corrective rationale; they are substantive rules that determine how the rights to entitlements are acquired and legally transferred.

[5] Aristotle, *The Nicomachean Ethics* (David Ross ed and Leslie Brown tr, OUP 2009) V.3 1130b32-33.

meant to protect, of which harm to persons is the paradigmatic example. It might be tempting for Law & Economics scholars to argue that even in the case of bodily harm to persons a wrongful transfer has occurred. However, I have argued above (I.3) that this is a problematic view of tort law, for it conceives the practice of tort law as an instrument to legitimise the infringement of the victim's rights.

A more recent version of this conception of corrective justice as a form of distributive justice is Sheinman's account of corrective justice as a form of *redistributive* justice.[6] Sheinman reformulates Aristotle's notion of corrective justice in terms of an operation that involves 'an active interference with the existing distribution of goods'.[7] He argues that corrective justice is concerned with the distribution of the consequences that the wrongful interaction caused. But according to him, wrongful interactions also give raise to a question of distributive justice, namely '[h]ow to distribute the interparty transferrable consequence of the underlying interaction between their potential bearers?'.[8] Perry once called this feature of corrective as a form of 'localized distributive justice', dealing with the problem of distributing the burden of an injury among a group of persons.[9] For Perry however, this localized nature of distributive justice was unjustified: there are no reasons to limit the potential bearers of the loss to victims and injurers only.[10]

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[6] Hanoch Sheinman, 'Tort Law and Distributive Justice', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

[7] ibid 367.

[8] ibid 368.

[9] Stephen R Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa Law Review 449, 461 ff.

[10] ibid 471.

In the same vein, Gardner has developed this notion of localized distributive justice in what he calls the 'distributive justice between the parties'.[11] Contrary to Perry's argument, Gardner holds that the localized nature of this type of distributive justice is justified based on corrective justice: the reasons that support restricting the potential bearers of the burden of the injury to victims and injurers alone are 'reasons to do (and to support the doing of) corrective justice'.[12] Applying this idea more concretely, Gardner argues that some tort doctrines – such as mitigation and remoteness of damages, and contributory negligence – seek to share the losses between plaintiffs and defendants. According to him therefore, they lack a 'corrective-justice rationale'.[13] Similarly, Sheinman claims that corrective justice can only explain tort doctrines such as proximate cause, contributory negligence, and mitigation of damages if it is conceived as a form of distributive justice. For these 'doctrines are sensitive to the relative contribution of the parties to the production of the wrongful interaction or its consequences'.[14]

I share this view according to which, in some sense, the operation of corrective justice involves a distributive task. It seems correct to me to argue that in many cases tort adjudication distributes the burden of the injury among the parties involved in the interaction (usually but not always, among the victim and the injurer). However, in my view, the operation of corrective justice in tort law should not be entirely

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[11] John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 346-50. See also Finnis's remarks regarding the distributive nature of the act of adjudication (arguing that it is a matter of distributive justice, '[f]or the submission of an issue to the judge itself creates a kind of *common* subject-matter, … which must be allocated between the parties'). John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 179.

[12] Gardner (n 11) 348. Sheinman also thinks that the *localized* feature of distributive justice that the operation of corrective justice involves is justified, for it makes the corrective redistribution in the 'direction of burdening-by-benefitting'. Sheinman (n 6) 369.

[13] Gardner (n 11) 349.

[14] Sheinman (n 6) 376.

conceived as a form of distributive justice. First, the notion of corrective justice that tort law implements is broader than Sheinman's conception as a redistributive mechanism. For Sheinman, corrective justice is a matter of transferring between the parties the gains and losses caused by the wrongful interaction. Accordingly, he claims that '[r]eparation of harm in torts is essentially *redistributive* and can only take the form of transfer'.[15] I have criticised this view in chapter III, arguing that tort law is not *only* about redistributing losses. Surely, some tort claims are only about money; but in many other cases victims seek non-material reparations that cannot be explained by an account of corrective justice understood merely in redistributive terms. *Pace* Sheinman, these victims do not seek the transfer of their 'collateral loss of mitigating and coping with the injury';[16] rather, they seek to see their injurers facing them in a courtroom, or they want to see their injurers officially acknowledging that they have committed a wrong against them.[17] Furthermore, tort systems usually provide remedies that do not transfer the gains and losses caused by the wrongful interaction, such as exemplary damages (VI.5), nominal damages (VI.3), and apologies in the case of the tort of defamation (VI.4).

Secondly, I do not share the view according to which tort doctrines such as contributory negligence and proximate cause cannot be explained in terms of corrective justice. Again, in some sense these doctrines can certainly be explained in terms of distributive justice between the parties: they distribute the burden of liability between the parties. But they *do* have a corrective justice rationale. Take contributory

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[15] ibid 374.

[16] ibid.

[17] And recall Radzik's excellent critique to this economic view of reparations: '[P]ayments are objectionable when they are represented as a form of restitution, which suggests that the value damaged and the value offered in response are fungible and that the latter could be exchanged for the former without the loss. To suggest that money is a suitable restitution for pain and suffering is an insult to the victim'. Linda Radzik, *Making Amends. Atonement in Morality, Law and Politics* (OUP 2009) 98.

negligence.[18] It is true that in a distributive sense, contributory negligence seeks to distribute between the claimant and the defendant the losses that the former suffered as a consequence of the tort. But it is also true that contributory negligence aims to determine – most accurately as possible – which losses the injurer caused, and which losses the victim herself caused. This operation must be part of corrective justice. Indeed, it would be unfair and against the principle of corrective justice to hold a defendant liable for an injury she did not cause.

It follows that corrective justice must have an underlying notion of causation to establish which gains and losses were caused by the wrongful interaction. This task should require at least taking into account a factual test of causation (but-for). However, other legal doctrines of causation are compatible with this corrective justice-based operation. In this sense, the doctrine of proximate cause corrects the unfair results of the application of the but-for test, seeking to determine what should be reasonably deemed as a cause of the injury. The same applies to contributory negligence. Some of these legal doctrines of causation will result in a distribution of losses between the parties. But this distribution of losses will be strictly aimed at determining which losses caused the defendant and which of them not, and nothing else. Courts are generally reluctant to take into account any other considerations in the causal inquiry. They do not distribute the burden of the injury according to the wealth of the parties, or according to the reprehensibility of the defendant's conduct; rather, they confine the causal inquiry to the questions of to what extent the defendant

[18] And it seems to me that the same could also be applied to the mitigation of damages doctrine. Despite that I cannot defend thoroughly this view here, this doctrine also seems to have an underlying corrective rationale. For if a court holds that a claimant should have taken the necessary steps to mitigate the harm caused by the defendant's conduct, the court is still dealing with the causal and corrective issue of determining to what extent the claimant's losses were caused by the defendant's conduct, and to what extent they were caused by the claimant's own ineptitude to deal with the damages caused by the wrongful interaction.

caused the injury, to what extent the claimant caused the injury, and to what extent the injury was caused by extraneous events.

It might be argued that in some cases in which there are serious evidentiary problems for victims, courts have determined liability based on distributive considerations. The doctrine of market share established in *Sindell v Abbott Laboratories*[19] is a clear example of this type of cases.[20] In *Sindell*, the plaintiff jointly sued 11 drug companies that manufactured and marketed the drug diethylstilbesterol (DES) between 1941 and 1971. The drug can cause cancerous vaginal and cervical growths in the daughters exposed to it. The plaintiff's mother ingested the drug, and as a result, the plaintiff developed a malignant bladder tumor that was removed by surgery, and she suffered from adenosis. The problem was that the plaintiff was unable to identify with enough certainty the manufacturer of the precise drug that her mother ingested, since it happened many years back and approximately 200 drug companies made DES. The Supreme Court of California solved this problem by determining liability based on the market share of each of the defendants.[21]

These cases however are exceptional.[22] The market share doctrine has been applied only to a special type of cases (DES type of cases), and it is accepted in a very

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[19] 26 Cal 3d 588, 607 P2d 924 (Supreme Court of California 1980).

[20] Another example is *Fairchild v Glenhaven Funeral Services Ltd and Others* [2002] UKHL 22. In this case, the House of Lords held that the claimants established a causal connection between their injuries (suffering mesothelioma disease) and the defendant's conduct (negligently exposing its employees to asbestos dust), despite that they could not prove that in the balance of probabilities the defendant caused the disease.

[21] J Mosk argued that the decision was justified based on the idea according to which in these type of cases (when there are evidentiary causal difficulties) 'as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury'. *Sindell* (n 19) 936. It was held that the cause of action should be granted against any defendant who had a 'substantive share of the DES which her mother might have taken', and that this 'substantial share of the appropriate market also provides a ready means to apportion damages among the defendants'. ibid 937.

[22] See Sandy Steel, 'Justifying Exceptions to Proof of Causation in Tort Law' (2015) 78 The Modern Law Review 729, 731 (arguing that exceptions to the general rule of causation 'can

few jurisdictions. It seems to me that the courts' reluctance to expand these doctrines is based precisely on the corrective nature of causation, which seeks to determine to what extent the defendant caused the injury.[23] In most tort cases, corrective justice can justify the causal inquiry understood in these terms. However, some cases might give raise to serious evidentiary difficulties that makes very difficult for victims to make their cases in court. In such cases, courts will be justified to make some changes to the standard rules of causation. The solutions implemented by courts in these cases will probably remain controversial in the future;[24] what is clear though is that the application of standard rules of causation in these cases would lead to unfair results.

In sum, my claim is that there is a normative connection between corrective and distributive justice. First, distributive justice requires an account of corrective justice to protect the distribution of entitlements – even in a simple model of distributive justice such as Nozick's. And secondly, in some sense the operation of corrective justice is a form of distributive justice between the parties, in terms of distributing between the parties the gains and losses that the wrongful interaction caused. However, corrective justice cannot be entirely reduced to distributive justice. For the corrective duty of repair is broader than merely allocating gains and losses between the parties, as was argued above in chapters II and III. By the same token, despite the fact that some tort doctrines such as contributory negligence and

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be justified … *only* where the defendant has wrongfully caused injury to an indeterminate claimant, where the claimant has been the victim of a wrongfully caused injury at the hands of one or more defendants who may have wrongfully caused that injury, and in cases which bear both of these features', emphasis added).

[23] Steel even argues that the justification of this 'defendant indeterminacy' exception is also based on corrective justice: 'the best way the defendant can comply with its secondary duty towards its victim is by paying into the fund. It is individualised or relational corrective justice'. ibid 735-6.

[24] See for example J Richardon's dissenting opinion in *Sindell* (arguing that market share liability is 'directly contrary to long established tort principles', and that its injustice 'is compounded by the fact that plaintiffs who use it are treated far more favorably than are the plaintiffs in routine tort actions'). *Sindell* (n 19) 940, 941.

proximate cause share a distributive rationale, as Gardner and Sheinman have pointed out, they also share a corrective rationale. Contributory negligence in particular applies the causation requirement of corrective justice, determining to what extent the defendant caused the losses suffered by the victim. The conclusion is that there is a sense in which corrective justice is a form of distributive justice, but corrective justice should not be entirely reduced to distributive justice. What is then the connection between the two principles of justice?

IV.3 The No-Connection Thesis and the Distinctive Character of the Injury

In the previous section we learnt that there is a normative connection between corrective and distributive justice. This connection is formulated in terms of how both principles depend on each other: distributive justice depends on the corrective protection of the wrongful transfers of entitlements, whereas corrective justice depends on how the protected initial entitlements are determined by distributive justice. But to what extent the two principles of justice are connected? Should we conclude that they are indistinguishable? I will explore here how the operation of corrective justice can be distinguished with the operation of distributive justice, despite the fact that in some sense they both depend on each other. For this task, I will discuss what I call the *no-connection thesis*.

The definitional feature of this thesis is epitomised by Weinrib's claim according to which both forms of justice 'are categorically different and mutually irreducible'.[25] He holds that if corrective justice depends on the initial entitlements determined by distributive justice, then 'corrective justice would become a species of

[25] Ernest J Weinrib, *The Idea of Private Law* (revised edn, OUP 2012) 74.

distributive justice'.[26] According to Weinrib, it follows that the relationship of private law must be understood in terms of corrective justice rather than distributive justice: 'Admixing distributive considerations into the corrective framework of private law precludes the relationship from attaining the coherence of either corrective or distributive justice'.[27] Let us examine the argument in more detail. The core of Weinrib's thesis is that, following Aristotle, corrective justice involves a different type of operation than distributive justice, for it 'looks only to the distinctive character of the injury, and treats the parties as equal'.[28] Other scholars share this view, arguing that this is a necessary feature of corrective justice. For instance, Waluchow argues that the distinctive function of corrective justice is to rectify the imbalance produced by the defendant's action 'who has seized an advantage … at the plaintiff's expense'.[29] Accordingly, he claims that the rectifying operation of corrective justice excludes all distributive considerations, such as the relative merit of the parties or the greater need for the good acquired. Similarly, Wright argues that what provides a substantive content to the principle of corrective justice is the fact that it excludes considerations of virtue, merit or any other distributive comparative criterion to rectify the injustice.[30]

Certainly, Aristotle's depiction of corrective justice fits with the normal practice of courts dealing with tort cases, which usually do not consider, for example, the wealth of injurers and defendants. But the important question is whether this practice is justified or not. Should courts always look to the distinctive character of the

[26] ibid 79.

[27] ibid 74.

[28] Aristotle, *The Nicomachean Ethics* (David Ross ed and Leslie Brown tr, OUP 2009) V.4, 1132a4–5.

[29] Wil J Waluchow, 'Professor Weinrib on Corrective Justice' in Spiro Panagiotou (ed), *Justice, Law and Method in Plato and Aristotle* (Academic Printing & Publishing 1987) 156.

[30] Wright (n 1) 701.

injury only? Weinrib seems to come close to defend such a position, when he argues that corrective justice secures that private law is a 'purely juridical and completely non-political' activity.[31] For, according to him, corrective justice does not need to make a political choice of an extrinsic goal in order to operate. Under this framework, distributive justice seems to be connected with the legislative bodies, whereas corrective justice would be connected exclusively with the adjudication of private disputes. But the truth is that in many cases courts *do* take into account the virtues and vices of the parties involved in a private dispute. Take family law. I assume it would not be difficult to justify taking into account the personal character of a father to decide whether he should have the custody of his son or not. Weinrib could respond either that family law is not private law, or that this practice is wrong. Both responses seem unsatisfactory to me. Why should we treat the case of family law differently? Not taking into account the character of the parties in family law for the sake of coherence does not look promising.[32] Furthermore, Weinrib's thesis according to which distributive justice should be restricted to the legislature is unattractive because, as was seen above (IV.2), in a sense tort adjudication is also distributive justice between the parties. How can we justify then the practice of courts in the case of tort law, and Aristotle's formulation of corrective justice?

Let us unpack Aristotle's notion of 'the distinctive character of the injury'. The character of the injury seems to be contrasted with the character of the parties. In this sense, corrective justice seems to mandate that courts should not take into account the character of the parties at all. There is some truth here for tort law. Defendants will

[31] Weinrib (n 25) 214.

[32] Keren-Paz makes a similar point: 'it is hard to understand why the rulings of courts in public law litigation which is based (in part) on considerations of equality is deemed legitimate, while similar rulings in the context of private law litigation are not'. Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2007) 25.

generally not be allowed to argue that they are virtuous persons. For instance, 'I have always been a very careful driver' will not count as a successful defence in a tort suit. This is justified by the reparative aim of corrective justice: its objective is not to distribute gains and losses according to the merit of the parties or some other criteria; rather, it seeks to repair the losses suffered by the victim as a consequence of a wrongful interaction. Hence, Aristotle's formulation of corrective justice adequately captures an important truth about the practice of tort law, namely, that tort adjudication, in contrast with for instance criminal law, is not about judging character; it is about repairing wrongful losses.

However, this characterisation of tort law needs to be hedged at least in three senses. First, as civil recourse theorists have vigorously argued, it is important to publicly hold wrongdoers responsible for the wrongs they commit.[33] Following this idea, it might well be argued that tort law is a judgement of character after all: holding a defendant liable for a wrong does not say whether she is a good or bad person, but it holds that she committed a wrong and she is accountable for it. Certainly, this fact does not make tort law indistinguishable from criminal law, but it cannot be denied that it makes them more similar, as Duff has recently pointed out.[34] Weinrib's response might be that this feature of tort law is a positive side effect. Accordingly, tort's aim is to undo the injustice caused by the wrong and nothing else. If in the

[33] John CP Goldberg and Benjamin C Zipursky, 'Tort Law and Responsibility' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014). Similarly, the reconciliatory literature has also agued that officially holding wrongdoers responsible for the wrongs they have committed is a crucial step towards reconciliation. See above II.5.

[34] RA Duff, 'Repairing Harms and Answering for Wrongs' in John Oberdiek (ed), Philosophical Foundations of the Law of Torts (OUP 2014) 229 (arguing that 'civil recourse is much more like the criminal process than its proponents seem to allow: in both cases, someone who is alleged to have committed a wrong is called to account for it in a court of law; in both cases, if he is held liable for that wrong, he is liable, also, to suffer the imposition of a legal consequence (a civil remedy, a criminal punishment) that is essentially punitive in its meaning').

process of undoing the injustice wrongdoers are held responsible and accountable, that fact should not lead us to abandon the way in which courts deal with tort cases, looking only to the distinctive aspect of the injuries. That might well be the case for an explanatory theory of tort law. But in a justificatory inquiry, the response is less attractive. Why should we disregard justifying the existence of tort systems based on the importance of holding wrongdoers officially responsible for the wrong they have committed?

Secondly, tort law usually takes into account the defendant's behaviour in order to allow a victim to bring an action against her. In some cases, it is irrelevant whether the defendant committed the wrong negligently or intentionally, such as in the case of most proprietary torts. It is irrelevant whether the defendant did not know that she was trespassing on the claimant's land; what is relevant in these cases is only that the defendant infringed a claimant's proprietary right. However, in other cases the defendant's behaviour is taken into account. The tort of negligence is a paradigmatic example of this. If courts should only look to the distinctive character of the parties, then why should courts determine whether the defendant was negligent or not? Weinrib holds that the standard of negligence is compatible with corrective justice, since the 'conception of reasonable care gives expression to the idea of agency that underlies' it.[35] Hence, under this framework determining whether the defendant was negligent or not can be part of looking to the 'distinctive character of the injury'. For the injury, in this case, would be defined in terms of imposing 'a risk that no reasonable person would impose upon others'.[36] Weinrib may be right on this. It might well be the case that negligence is indeed compatible with corrective justice.

[35] Weinrib (n 25) 151.

[36] ibid 147.

Weinrib's argument however cannot explain why some torts distinguish between negligence and malicious or reckless wrongdoing to determine whether a defendant is liable. For instance, in the United States the Supreme Court established that a defamatory statement related to the official conduct of a public official will not amount to a tort unless the plaintiff can prove that the statement was made with 'actual malice' ('with knowledge that it was false or with reckless disregard of whether it was false or not').[37] In the UK courts do not require malice, but in the case that the defamatory statement is a matter of public interest, mere negligence will not be enough; the claimant will need to show that it was not reasonable for the defendant to believe that the statement she published was true.[38] In these cases, courts are mandated to look not only to the 'distinctive character of the injury' (the defamatory statement); they also have to take into account whether the defendant published the statement maliciously or not, and with or without the reasonable believe that the statement was true. It might be argued that these are exceptional regimes, since the constitutional value of freedom of speech is involved. But there are other examples as well. Intentional torts such as battery, assault and false imprisonment are good examples of torts in which mere negligence is not enough; in these torts, a claimant will need to show that the defendant acted with the intention of unlawfully touching, assaulting or confining the victim against her will.[39] Another example is the tort of intentional infliction of emotional distress in the United States, which subjects to liability a defendant who 'by extreme and outrageous conduct *intentionally or recklessly*

[37] *New York Times v Sullivan* 376 US 254 (1964) 279-80.

[38] Defamation Act 2013, Section 4, (1) (b). See also *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273 [79].

[39] Despite the fact that in some of these cases the conduct might still be actionable by the tort of negligence.

causes severe emotional distress to another'.[40] Finally, another example is the role that intention plays in cases of nuisance, for in some cases it has been argued that malice is relevant to determine whether the defendant's activity is wrongful or not.[41]

And thirdly, in many cases courts do take into account the defendant's conduct to determine the adequate remedy. Exemplary and aggravated damages are the most obvious examples, for the reprehensibility of the defendant's conduct will be an important factor to determine whether a court will grant an exemplary or aggravated award.[42] Disgorgement damages are another example, which have been awarded by courts in many cases of wrongs committed intentionally, such as in the torts of trespass, conversion and inducing breach of contract.[43] The examples are problematic for Aristotle's mandate of looking only to the 'distinctive character of the injury', since in these cases courts will have to consider whether the defendant's conduct was intentional or merely negligent, awarding this type of remedies only in the former case. I will later deal with these remedies in chapter VI.

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[40] American Institute of Law, Restatement (Second) of Torts, § 46(1).

[41] *Christie v Davey* [1893] 1 Ch 316 (arguing that 'what was done by the Defendant was done only for the purpose of annoyance and in my opinion it was not a legitimate use of the Defendant's house to use it for the purpose of vexing and annoying his neighbours' [326-7 (North J)]). See also *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468. Beever however disagrees; he has recently argued that malice per se is irrelevant to determine whether the defendant's activity was wrongful or not. What is important for him is to determine whether the defendant's use of the property is less fundamental than the claimant's use of land. Allan Beever, *The Law of Private Nuisance* (Hart Publishing 2013) 51-8. While English law can be controversial regarding this matter, other jurisdictions are clearer to establish that intention plays an important role in this type of wrongs. For instance, section 226 of the German Civil Code establishes that 'The use of a right is not permitted when it can only have the purpose of causing harm to another'. James Gordley, 'Disturbances among neighbours: an introduction' in his *The Development of Liability between Neighbours Vol 2* (CUP 2010) 7.

[42] '[I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff'. *Rookes v Barnard* [1964] AC 1129 (HL), 1221 (Lord Devlin). See above VI.5.

[43] The cases are summarised in James Edelman, *Gain-Based Damages. Contract, Tort, Equity and Intellectual Property* (Hart Publishing 2002) 136-45. See above VI.6.

But in my view, the exceptions in tort law to Aristotle's mandate of corrective justice explained above show that the no-connection thesis could not stand as a justificatory theory of tort systems. The key to solve the problem is to interpret Aristotle's mandate of looking only to the 'distinctive character of the injury' in a different sense. *Pace* Weinrib and Wright, what distinguishes corrective justice from distributive justice is not excluding considerations based on merit, virtue or wealth, but rather the aim of repairing the injury. Under this framework, looking to the 'distinctive aspect of the injury' means that courts indeed will usually disregard distributive considerations. However, it does not exclude the possibility of considering these factors in order to perform the task of repairing the injury. Hence, corrective justice and distributive justice are not indistinguishable, since they involve different types of operations: while distributive justice concerns the *distribution* of goods, corrective justice is concerned with *repairing* wrongful losses. But their separability does not mean that they exclude each other.

Hence, Weinrib's claim according to which the private law relationship must be understood solely in terms of corrective justice needs to be re-examined. In this section it has been shown that Aristotle's mandate of looking only to the 'distinctive character of the injury' does not necessarily require the exclusion of distributive considerations; rather, it commands to repair the injury suffered by the victim. The lesson to be learnt from Weinrib and the corrective justice theorists is that both principles of justice are conceptually distinguishable, for they involve different type of operations; while the task of corrective justice is to repair wrongful losses taking into account only the distinctive character of the injury, the task of distributive justice is the distribution of common goods and common burdens among the members of the community. However, the lesson to be learnt from this and the preceding section is

that the separability of the two principles of justice does not preclude a justification based on both principles of justice simultaneously. In the next sections I will discuss how this is possible and why such justification is necessary in the context of tort law.

IV.4 Distributing Tort Law

A first step towards unpacking the connection between corrective and distributive justice in the context of tort law is to explore what tort law protects, whom it protects, and to whom it imposes the duty to pay. It was argued above (I.5) that corrective justice does not provide a definition of what is protected by tort law. I will briefly defend here the view according to which these crucial definitions of tort law are provided by distributive justice, following the works of Cane and Gardner.

A starting point is Cane's claim according to which 'tort law has distributive effects that need to be justified if tort law is to be judged an acceptable legal and social institution'.[44] But Cane immediately warns us that he will not attempt to justify tort law as a scheme of distribution. Certainly, such an attempt would be destined to fail. As Atiyah famously pointed out, tort victims are a privileged group of persons among victims of misfortunes getting full compensation for their losses.[45] And as Keren-Paz has more recently argued, tort law is regressive because it is 'inimical to redistributive considerations'.[46] I share these views. The justification of tort law cannot be found exclusively in distributive justice. However, it is worth exploring the tensions between

[44] Peter Cane, 'Distributive Justice and Tort Law' (2001) 4 New Zealand Law Review 401, 404-5. In the same sense, Keren-Paz claims that '[t]ort rules, like any other legal rules, have inevitable distributive effects'. Keren-Paz (n 32) 25.

[45] Atiyah's position has been developed and updated through many years by Cane. Its latest version can be found in Peter Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, CUP 2013).

[46] Keren-Paz (n 32) 67.

distributive and corrective justice in the context of a justificatory inquiry of tort law. For Cane, there is no tension between the two principles, since for him 'making the rules that define the grounds and bounds of tort liability is a distributive task, while applying such rules in individual cases is a corrective task'.[47] He later adds that 'corrective justice provides the structure of tort law within which distributive justice operates'.[48]

In my view, it is very difficult to deny that the definition of the grounds and bounds of tort law is provided by distributive justice. Gardner has developed this point further:

> In deciding whether something should be a tort … it is never enough to conclude that it is a wrong calling for repair. It is not enough to conclude that it should be *recognized by the law* as a wrong calling for repair. The question that must be confronted, in addition, is whether the law should give it *this kind of recognition* – the tort law kind of recognition – complete with its generous terms for power-sharing and cost-sharing as between the aggrieved party and the legal system. That question is a question of distributive justice.[49]

Given the privileged protection that tort law provides to its victims, the decision to treat an individual as a tort victim must be a decision based on distributive justice. It follows that the law's decisions to treat a conduct as a tort, a particular person as a tort victim and another particular person as a tortfeasor are distributive. This aspect of tort law is what Zipursky calls the 'substantive standing' rule of tort law, which cannot be explained by corrective justice principles.[50] As was noted above (I.5), I agree with this claim. But it must be added now that these decisions are distributive rather than

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[47] Cane (n 44) 412.

[48] ibid 413.

[49] Gardner (n 11) 340-1.

[50] See Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1, and Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 The Georgetown Law Journal 695.

corrective: tort law distributes among claimants the right to make a tort claim. In *Palsgraf*,[51] the victim – Mrs. Palsgraf – was unable to recover her damages in tort from the defendants, despite the fact that they were negligent. The reason for this is that the defendants did not commit a wrong *in relation to her*. Goldberg and Zipursky argue that this 'relationality-of-breach requirement' is what 'justifies the law's giving the power to respond to the wrong through a lawsuit for damages'.[52] But what is the justification here? The answer seems to be that the law imposes liability when a defendant has breached a duty that she owed to the claimant. Would the decision have been any different however if Mrs. Palsgraf would have been closer to the incident? Again, the issue is to determine whether in such scenario the defendant owed Mrs. Palsgraf a duty of care or not. My point is that drawing the line between these different types of claims is a distributive task, for it extends the protection of the tort's apparatus and full compensation scheme to some individuals, whereas it denies this protection to other unlucky individuals, such as Mrs. Palsgraf.

Cases of psychiatric illnesses suffered as a consequence of accidents are also illustrative on this matter. In the common law, courts have been careful to draw the line between cases that are recoverable in tort and which of them are not. A leading case in the UK is *Alcock v Chief Constable of the South Yorkshire Police*.[53] The claimants were relatives and friends of the victims of the Hillsborough disaster, who suffered psychiatric illnesses by watching shocking images of their loved ones being crushed to death. The disaster was caused by the negligence of the police. However, all of these tort claims failed, for the House of Lords ruled that the claimants were entitled to

[51] *Palsgraf v Long Island Railroad R.R. Co*. 162 N.E. 99, 99 (N.Y. 1928). See also *Bourhill v Young* 1942 SC (HL) 78.

[52] John CP Goldberg and Benjamin Zipursky, *Torts* (OUP 2010) 102.

[53] [1992] 1 AC 310 (HL).

bring a tort action only if they could prove a 'factual causal relationship similar to that of an ordinary parent-child or husband-wife relationship'.[54] Most of the claimants in these cases failed to meet this requirement. Only two cases met it, but they also failed, since the House of Lords found that the images seen by the claimants were not shocking enough.[55] I cannot settle here whether this decision was justified or not. But it is important to clarify which type of decision was involved in the case. For the reasons stated above, drawing the line between these different claims is a distributive task, and judges should be aware of this.

Moreover, it is my contention that tort law in some cases also involves distributive decisions when it determines from whom a tort victim can recover. As was argued above (I.5) vicarious liability cannot be deduced from corrective justice. The law's fiction of regarding the employee's tortious act as an employer's wrong cannot be based on corrective justice. For corrective justice does not determine why the law should make this fiction and under what conditions. However, if we understand the decision to hold the employer responsible as a distributive choice that the law makes, then it is easier to justify it. Most of the justifications that have been put forward in favour of vicarious liability are explicitly based in distributive justice. For instance, one of the most common arguments to justify the doctrine is that the law needs to secure compensation to the victim by looking to the most solvent defendant and the one who is in a better position to be insured.[56]

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[54] ibid 360 (Parker LJ).

[55] Roderick Bagshaw and Nicholas J McBride, *Tort Law* (4th edn, Pearson 2012) 143-4.

[56] See for example *Limpus v London General Omnibus Company* (1862) 158 ER 993 (Court of Exchequer), 998: 'It is well known that there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible; for there ought to be a remedy against some person capable of paying damages to those injured by improper driving' (Willes J).

Another important theory to justify vicarious liability is that of enterprise liability. In general terms, it holds that if employers are entitled to benefit from their employee's activities, they should also bear the burdens and losses of their employee's activities.[57] This is clearly a distributive argument. Recall that distributive justice is not only concerned with the distribution of common goods among the members of the community, but also with the distribution of the common burdens and losses. Hence, the theory of enterprise liability clearly has a distributive basis: the concern for the distribution of burdens and benefits. Under the framework of this theory, it is easier to understand why vicarious liability only applies when the employee 'commits a tort in the course of his employment or in circumstances sufficiently connected to his employment'.[58] If the reason why the employer is held liable is connected with the benefits that she obtains with her employee's work, it seems obvious to require that the employee acted in the course of her employment when she committed the tort. I do not wish to endorse here the enterprise liability theory to justify vicarious liability.[59] Again, my point is that we must be aware that the decision to hold liable an

[57] Gregory C Keating, 'The Idea of Fairness in the Law of Enterprise Liability' (1997) 95 Michigan Law Review 1266, 1360 (arguing that 'it is fair to make enterprises pay for the accidental injuries characteristic of their activities whenever doing so will distribute the financial burdens of those accidents among those who have benefitted from the underlying risk imposition'). See also *Dubai Aluminium Co Ltd v Salaam and Others* [2002] UKHL 48, [2003] 2 AC 366, [21] (Lord Nicholls) (holding that 'carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged'), and *Bazley v Curry* [1999] 2 SCR 534 (Supreme Court of Canada) [31] (McLachlin J) .

[58] John Murphy and Christian Witting, *Street on Torts* (13th edn, OUP 2012) 646.

[59] For a critique to these and other arguments in favour of vicarious liability, see JW Neyers, 'A Theory of Vicarious Liability' (2005) 43 Alberta Law Review 287, 291-301. The fact that charities are also variously liable for their employee's torts is particularly challenging for the theory of enterprise liability.

extraneous party – an employer – to the bipolar relationship of private law is a distributive decision.[60]

Likewise, tort adjudication is also, at least in some sense, a distributive task.[61] Take Lord Denning's opinion in *Miller v Jackson*.[62] The claimants were the owners of a property located next to a cricket ground. They sued the cricket club for negligence and nuisance, claiming for damages and an injunction to restrain the club from playing cricket without taking adequate steps to prevent balls being struck out of the ground on to the claimant's house or garden. In this case, the Court of Appeal had to make a choice: either to grant the injunction to the claimant, restraining the practice of cricket in that ground (which was practiced there for about 70 years), or to refuse the injunction, allowing the practice of cricket and its interference with the enjoyment of the neighbouring properties when cricket is being played. On the face of it, it seems to me that a judge cannot rely on property law to solve this problem. At first sight, the solution seems to point in favour of the claimant, since the defendant's activity is interfering with the claimant's enjoyment of the land. However, for Lord Denning the law should also take into account the beneficial effects on the general public for each of the possible solutions. This means balancing 'the interest of the public at large' with the 'interest of a private individual':

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[60] And in my view, the same conclusion can be reached in the examples examined above in I.5. For instance, when tort law holds responsible the keeper of a dangerous animal for the damage that it causes, the law is making a distributive decision based on an idea of reciprocity: if A keeps a dangerous animal, A will be entitled to retain any benefits she may receive for keeping such an animal. But she must also be responsible for the risks that she is imposing with her activity on all of her neighbours.

[61] '[A] court presented with a tort dispute (for instance) cannot avoid or evade the distributive decision involved in choosing or making a rule of liability to resolve the dispute'. Cane (n 44) 420.

[62] [1977] 1 QB 966 (Court of Appeal).

> The public interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The private interest lies in securing the privacy of his home and garden without intrusion or interference by anyone… As between their conflicting interests, I am of opinion that the public interest should prevail over the private interest. The cricket club should not be driven out.[63]

Lord Denning's approach is controversial, and I do not wish to make a defence here. However, it must be noted that my framework is compatible with this type of argument. By contrast, corrective justice scholars usually criticise *Miller*. For instance, Beever argues that the decision is unjust because it confiscated the claimant's property rights 'on the basis of interests possessed by the public … that have no proper legal status whatsoever'.[64] From an exclusively doctrinal point of view, Beever's claim has weakened after the Supreme Court's recent decision in *Coventry v Lawrence*,[65] in which the Court firmly established that the public interest must be taken into account to decide whether an injunction should be granted or not in cases of nuisance.[66] But Beever's claim is that the decision in *Miller* was not only doctrinally wrong, but also *unjust*. Why? The reason seems to be that courts should not be allowed to take this type of decisions. Again, the argument is that the role of judges should be restricted to implement corrective justice with its correlative or bilateral structure, whereas distributive decisions should be confined to legislative bodies, in which the public interest concerns can be taken into account properly. But as was seen above (IV.3), it

[63] ibid 981-2.

[64] Beever (n 41) 148.

[65] [2014] UKSC 13, [2014] AC 822.

[66] 'As for the second problem, that of public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor … The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood.' ibid [124] (Lord Neuberger).

is questionable to argue that this is a requirement of corrective justice, and it is also very doubtful that such division of labour between courts and legislative bodies is feasible.

But my framework does not need to rely on *Miller* to show that tort adjudication involves, in some sense, a distributive task. *Donoghue v Stevenson*[67] is, for instance, an uncontroversial example. The famous case had a clear distributive effect: the losses associated with defective products were transferred from consumers to manufacturers. Accordingly, the decision redistributed the burden of these losses from the class of consumers to the class of manufacturers. As Stapleton points out, '*Donoghue*'s case shows us the redistributional potential of changes in the law'.[68] Cardozo J's decision in *MacPherson v Buick Motor Co*[69] is another example. *MacPherson* overruled the old 'privity' rule, according to which victims injured by defective products or negligently provided services could not make a tort claim if they were not the immediate purchaser of the product or service.[70] Abolishing the privity rule leads to the same result than in *Donoghue*: losses were redistributed from one class of individuals (consumers) to another (manufacturers or service providers).

Let us go back now to Cane's thesis according to which distributive justice defines the grounds and bounds of tort liability, whereas corrective justice provides the 'correlative structure' of tort law in which distributive justice operates. I hope to have provided enough reasons to defend Cane's first claim regarding the role that distributive justice plays in tort law. What about his second claim? In my view, corrective justice should not be reduced to provide the structure under which

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[67] [1932] AC 562 (HL).

[68] Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 The Modern Law Review 820, 837.

[69] 111 NE 1050 (NY 1916) (New York Court of Appeals).

[70] The rule was originally established in *Winterbottom v Wright* 152 Eng Rep 402 (Ex 1842).

distributive justice operates. Cane seems to argue this position based on Weinrib and Coleman's theories of corrective justice as a bipolar relationship between victims and injurers. Three points must be made. First, I do not share the view according to which 'corrective justice has no substantive content'.[71] It is true that corrective justice does not determine what counts as a wrong. But as was noted above (I.5), this truth does not mean that corrective justice has no substantive content at all.[72] Indeed, in chapter III we learnt that the operation of corrective justice involves a more complex operation than just connecting the parties together.[73] Secondly, if corrective justice indeed *requires* a bipolar or correlative structure for tort law, then it would be difficult to justify tort decisions such as *Miller* and *Coventry* mentioned above. Why a judge should be able to take into account interests (such as the 'public interest') that are not possessed by any of the parties in a tort dispute? It seems to me that if one concedes to Weinrib and Beever – among others – that the role of corrective justice is only to determine the bilateral structure of tort law, one is forced to disagree with these decisions.

And thirdly, Cane's claim regarding the role of corrective justice seems to suggest that the structure of tort law should be shielded against any distributive considerations, particularly regarding the effects of insurance in tort law. He argues that various distributional criteria that have been suggested – such as the 'cheapest cost-avoider' and 'loss spreading' principles – are 'inconsistent with tort law's correlative structure', and that this inconsistency 'explains why courts have been

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[71] Cane (n 44) 416.

[72] See Wright (n 1) 701 (arguing that the substantive content of corrective justice is that 'utilitarian, efficiency, and all other aggregative criteria' cannot be taken into account in tort adjudication).

[73] See also John Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1.

generally unwilling to take account of insurance in fashioning rules of tort law'.[74] Again, I cannot find a good reason to shield tort law's structure against taking into account the effects of insurance mechanisms in tort litigation. I will discuss with more detail the relationship between insurance and corrective justice in chapter V. For the purposes of this chapter though, my point is that in some cases courts *do* take into account distributive criteria 'in fashioning rules of tort law'. Of course, it is possible to argue that these decisions were wrong or unjust. But I cannot see why should we forget about fairness and distributive justice for the sake of a doctrinal coherence or integrity of the law. This seems to me an important lesson that we learnt from the works of Atiyah and the school of Law & Economics.

In sum, we have reached the conclusion that distributive justice plays an important role in tort law. As Cane and Gardner have shown, determining what counts as a tort is a matter of distributive justice. And it also seems to me that determining who counts as a tort victim and who counts as a tortfeasor are also matters of distributive justice. But some questions still remain unanswered. Particularly, the questions arise regarding the role that corrective justice plays in tort law. If, after all, distributive justice plays such a prominent role in tort law, then what is left for corrective justice (if there is anything)? In the next section I will seek to explore this question in the context of proprietary torts.

IV.5 Proprietary Torts and the Protection of Entitlements

The clearest connection between corrective and distributive justice in tort law seems to arise in the context of proprietary torts, in which tort law seems to be protecting an existing distribution of entitlements. Accordingly, the tort of trespass to land protects

[74] Cane (n 44) 419. See also below V.1 n 2.

the claimant against wrongful interferences with possession, the tort of private nuisance protects the claimant's use and enjoyment of her land, and the tort of conversion protects the claimant against a wrongful disposition of her property. All these torts require the claimant to have a possessory right or interest regarding the asset in question: trespass protects the claimant who is in actual possession of the land,[75] private nuisance protects the claimant who has an 'interest in the land',[76] and conversion protects the claimant who has the 'superior *possessory* right in the asset concerned'.[77] Hence, in these cases tort law seems to be operating *à la* Nozick as a rectificatory mechanism to protect existing distribution of entitlements (IV.2). Corrective justice (and the practice of tort law) would be a species of distributive justice. Is that the case? Is there something distinctively *corrective* in this type of cases?

Several points can be made about this claim. At first glance, it seems natural to conceive these torts in terms of the protection of property rights and interests. This is particularly notorious in the case of nuisance, which was famously described by Lord Hoffmann as 'a tort against land' in the outset of his opinion in *Hunter*.[78] It has been argued that Lord Hoffmann did not mean this literally, since torts are always against persons,[79] but rather to remark that private nuisance aims to protect the claimant against 'an interference with the claimant's reasonable enjoyment of his land' or an interference 'with the claimant's enjoyment of his land'.[80] Two consequences follow from this formulation. First, the fact that nuisance protects proprietary rights and

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[75] Edwin Peel and James Goudkamp, *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) 428-30.

[76] *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) 702 [Lord Hoffmann].

[77] Sarah Green and John Randall, *The Tort of Conversion* (Hart Publishing 2009) 106.

[78] *Hunter* (n 76) 702.

[79] Donal Nolan, ''A Tort Against Land': Private Nuisance as a Property Tort' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 460.

[80] *Coventry* (n 65) [3] (Lord Neuberger).

interests means that it will be necessary for a claimant to have a proprietary interest in order to bring an action. Hence, the landowner's children or spouse will not be entitled to bring this action into court. Although the issue has been discussed in the case law of different common law jurisdictions,[81] in English Law it seems clear that those who do not have a right or interest in the land will not be entitled to sue for private nuisance. Here, tort law seems to be depending entirely on property law: if the tort leads to an unjust result – e.g. a spouse that is not able to bring an action against an interference with the enjoyment of the matrimonial home –, then we have a problem that needs to be dealt with in the context of property law and not tort law. In the words of Lord Hoffmann, the answer to such a problem 'lies in the law of property, not the law of tort'.[82] Is it possible for tort law to get away with this?

A second consequence that follows from this formulation of private nuisance as 'a tort against land' is the assessment of damages for the commission of the tort. If private nuisance aims to protect the claimant's enjoyment of her land, it must be concluded that the tort should provide remedies to repair not only the material injury caused to the property, but also the losses of the 'amenity value' of the property. In *Hunter*, Lord Hoffmann explained this consequence in the following terms:

> In the case of nuisances 'productive of sensible personal discomfort', the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered 'sensible' injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation.[83]

[81] Cfr *Khorasandjian v Bush* [1993] 3 All ER 669 (CA). See also the Canadian case *Motherwell v Motherwell* (1976) 73 DLR (3d) 62 (Alta SC, App Div), and Lord Cooke's dissenting opinion in *Hunter* (n 76) 712 (arguing that '[w]here interference with an amenity of a home is in issue there is no a priori reason why the expression should not include, and it appears natural that it should include, anyone living there who has been exercising a continuing right to enjoyment of that amenity').

[82] *Hunter* (n 76) 708.

[83] ibid 706.

Private nuisance is a good example to explore how the principles of corrective and distributive justice connect with each other in the context of tort law. On one hand, the conception of corrective justice as an indistinguishable form of distributive justice cannot explain why a claimant should be entitled to recover the utility of the land that was diminished by the existence of the nuisance. Recall that in *Hunter* Lord Hoffmann argues that a claimant is entitled to damages for loss of amenity because her property's 'utility has been diminished by the existence of the nuisance'.[84] In *Boomer v Atlantic Cement Company*,[85] the Court of Appeals of New York reached the same conclusion: while refusing to grant an injunction that would have forced the defendant to close down his cement plant, the court held that plaintiffs were entitled to recover permanent damages that 'would compensate them for the total economic loss to their property present and future caused by defendant's operations'.[86] The distinctive role of corrective justice here is to serve as a proxy method to protect entitlements by establishing that claimants are entitled to recover the economic value that was diminished by the nuisance. Why claimants are entitled to recover the economic value of their properties? The answer cannot be found in terms of distributive justice. Surely, they are entitled to their properties in a distributive sense, but it does not follow that they are entitled to the economic value of their properties. However, in terms of corrective justice, the answer is that claimants are entitled to recover the diminished value of their properties because such lost value serves as a proxy to determine the 'injury to land'.[87]

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[84] ibid.

[85] 257 NE 2d 870.

[86] ibid 873 (Bergan J).

[87] *Hunter* (n 76) 707 (Lord Hoffmann).

By the same token, corrective justice can successfully explain why the damages for loss of amenity value might not necessarily be reflected on the market value of the property. In *Hunter*, Lord Lloyd and Lord Hoffmann emphasised this feature. Lord Lloyd claimed that these damages 'cannot be assessed mathematically',[88] whereas Lord Hoffmann argued that 'diminution in capital value is not the only measure of loss'.[89] Again, the measure for the quantum of these damages is corrective, for it seeks to put the claimant in the next-best position as to the nuisance not having occurred in the first place. This corrective mandate is in order even if the market value of the claimant's property did not suffer any impact with the tort. This is why both Lord Lloyd and Lord Hoffmann referred to the contracts case of *Ruxley Electronics and Construction Ltd v Forsyth*.[90] In *Ruxley*, the defendant built a swimming pool with a diving area 6 feet deep for the claimant. However, according to the contract the pool's diving area should have been 7 feet 6 inches deep. There was no adverse effect on the value of the property. The point was how to put the claimant as if the breach of contract would never have occurred. The House of Lords refused to award the claimant the cost of rebuilding the swimming pool with the specified depth, since such an award was unreasonable (the cost of £21,560 was higher than the original price paid by the claimant). However, the award of £2,500 awarded by the trial judge for loss of amenity was restored. Corrective justice is the only principle that can explain such an award: the claimant was entitled to be compensated for the breach of contract since

[88] ibid 696.

[89] ibid 706.

[90] [1996] AC 344 (HL).

the building of the swimming pool with the specified depth was a matter of importance for him, even though the market value of his property was unaffected.[91]

However, property torts also show that the no-connection thesis cannot stand. As was seen above, property torts protect property or possessory rights. Under this scheme, the operations of both corrective and distributive justice remain separated: while distributive justice deals with how individuals acquire or are allowed to hold their legally acquired entitlements, corrective justice serves as a proxy to determine the amount that is necessary to correct an injury caused to the victim's property. But it follows that at least in this sense, Keren-Paz is correct when he argues that tort law is 'regressive by nature', for it seeks to perpetuate the status quo, i.e. 'the existing distribution of wealth in society'.[92] Is it possible for tort law to get away with this? Does tort law assume that the status quo is just or adequate? Again, an answer could be to claim that this problem does not concern corrective justice (and tort law), since if there is a systematic problem of distributive justice, then it 'must be dealt with systemically; perhaps anti-trust law must be tightened up, or the marginal tax rates increased, or the social minimum raised'.[93]

I find this answer unsatisfactory. Why should a 'systemic deficiency' not be dealt with by modifying, for instance, the compensation scheme of that system?[94] If tort law is simply preserving an illegitimate distribution of entitlements, then the

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[91] This fact seems to be the main difference with the American case *Jacob & Youngs v Kent* 230 NY 289 (Court of Appeals of New York) decided by J Cardozo, in which it was found that the defective performance of the contract was insignificant or trivial.

[92] Keren-Paz (n 32) 67.

[93] Perry (n 1) 261.

[94] Keren-Paz makes a similar remark, arguing that the measures based in public law should be seen as complimentary rather than contrary to tort law. Keren-Paz (n 32) 35.

practice seems to me morally problematic.[95] Moreover, this is problematic for tort law even in cases in which we are dealing with non-systematic distributive injustices. Take the conversion case of *Costello v Chief Constable of Derbyshire Constabulary*.[96] The police seized a Ford Escort car that was in the possession of the claimant in the belief that it was stolen. The seizure was lawful, but after no criminal proceedings were brought against the claimant, the police refused to return the car to him. The judge at first instance found in favour of the police, holding that the car was stolen and that the claimant knew this. The Court of Appeal however reversed the decision and ordered the car to be returned to the claimant. Lightman J justifies the decision based on the idea that the possessor of a chattel is entitled to the possessory title regardless of how she obtained such possession:

> In my view, … as a matter of principle and authority possession means the same thing and is entitled to the same legal protection, whether or not it has been obtained lawfully or by theft or by other unlawful means. It vests in the possessor a possessory title which is good against anyone setting up or claiming under a better title.[97]

In sum, the case was decided in favour of the claimant because he had a better title to the possession of the car than the police, regardless that the judge at first instance found that the car was stolen and that the claimant knew it. There is some uneasiness with this solution. Should tort law protect the entitlements of wrongdoers? Acknowledging this 'intuitive difficulty', Green and Randall argue that '[t]here is, however, no real alternative to this way of deciding the issue; at least not if the law in

[95] 'If the net effect of securing and sustaining a system of norms and rights in transfer is to embed a fundamentally and uncontroversially unjust distribution of holdings, then one would be hard pressed to say that doing so is a requirement of justice'. Jules L Coleman, *Risks and Wrongs* (CUP 1992) 351.

[96] [2001] EWCA Civ 381, [2001] 1 WLR 1437.

[97] ibid [31].

its broader context is to maintain its integrity'.[98] Again, tort law can rely on property law to deal with this problem: if property law protects even an unlawful possessor, then tort law should also protect the unlawful possessor. If there is a problem here – the argument goes – it must be a problem of property law and not tort law. However, the solution still puts tort law in a troubling position, at least from a moral point of view. It seems to me that some uneasiness is inevitable in this context: it is unlikely that the status quo protected by tort law will always be an ideally just distribution of entitlements. Perhaps we need to tolerate some uneasiness in tort law for the sake of the integrity or coherence of private law, as Green and Randall seem to suggest. But to what extent should we tolerate this moral discomfort in tort law?

IV.6 The Distributive Uneasiness of Tort Law

As was noted in the previous section, there is some moral uneasiness with tort law. Consider the following example: 'Rolando' is a very successful football player who drives a fancy (and very expensive) BMW car, and 'Jim' is a football player striving to improve his career on an amateur team. Jim gets distracted for only a few seconds while driving his mother's old car, and he negligently crashes Rolando's BMW. The collision causes only minor damages to both vehicles, but Rolando's car must be repainted and some pieces must be replaced. The total cost for these repairs is around £10,000. Without taking into account the insurance that one or both of them could (and should) have, is it fair to impose on Jim – who earns a monthly salary of £500 – the duty to compensate these damages to Rolando – who earns a monthly salary of £100,000? Rolando's natural talent to play football seems an unfair basis to justify his advantages over Jim. If both players perform the same activity, and they (presumably)

[98] Green and Randall (n 77) 85.

spend the same amount of time playing, then why does Rolando *deserve* to earn such a high salary compared with Jim? The situation could be described as a distributively unjust scheme of resources. In this sense, Jim's duty to compensate does not seem to re-establish a just state of affairs between the parties, but rather appears to be perpetuating an unjust distribution of holdings. How could corrective justice get away with this?

Similarly, tort law also seems to be at odds with morality in terms of the magnitude of the duty of repair that it imposes to tortfeasors. As Goldberg and Zipursky point out, '[f]ew, we suspect, would sign on to the idea that one who carelessly knocks over a fellow pedestrian incurs a moral duty to make the victim whole, at least if that entails paying tens of thousands of dollars to cover lost wages, pain and suffering, and the like'.[99] Furthermore, tort law is quite unforgiving with tortfeasors regarding the condition in which they find their victims – what is called the 'eggshell skull' rule of tort law. For instance, a tortfeasor is liable to fully compensate her victim even if she had a hidden vulnerability that aggravated her damages. The American battery case of *Vosburg v Putney*[100] is a famous illustration of this rule. One adolescent schoolboy kicked one of his classmates in the leg. The kicking unexpectedly caused the victim to be crippled. The defendant claimed that he should be held liable only for the amount of damages that he could have reasonably contemplated as a likely result of his kicking. However, the court rejected this argument: 'the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him'.[101]

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[99] Goldberg and Zipursky (n 33) 30.

[100] 50 NW 403 (Wis 1891) (Supreme Court of Wisconsin).

[101] ibid 404 (Lyon J).

Goldberg and Zipursky claim that the eggshell skull rule is a 'reasonable albeit controversial judgement' made by Anglo-American tort law.[102] But how could tort law get away with this mismatch with morality and still be a morally justified legal practice? Goldberg and Zipursky claim that tort law understood as a system of redress for wrongs 'sits well with the values that law and morality tend to regard as important'.[103] But they argue that tort law has a 'normative defeasibility', since in some cases 'tort law ought to give way to a scheme, ordered on different principles, that better permits the realization of these values or other important values'.[104] It is true that in some cases tort law simply needs to be put aside to solve the problem. For instance, we can think of workmen's compensation schemes that were designed precisely to solve the problem of industrial accidents that the traditional systems of tort law were unable to solve adequately.[105] Hence, the legal theorist seems to be facing a dilemma here: she must tolerate the moral uneasiness of tort law for the sake of the values that a coherent tort system enhances, or she must replace tort law with a system structured under different principles – such as New Zealand's compensation scheme for automobile accidents.

It is my contention that we must take this moral uneasiness of tort law more seriously, without necessarily replacing the system as a whole. Some European jurisdictions have already tried to solve this problem, noticing that compensatory tort awards in some cases may originate or exacerbate distributive injustices. For instance, the Dutch Civil Code establishes that the court is allowed to 'reduce the amount of an obligation to pay for damages if a full award of damages would lead to *obviously*

[102] Goldberg and Zipursky (n 52) 348.

[103] Goldberg and Zipursky (n 33) 37.

[104] ibid.

[105] See below V.3.

unacceptable results in view of the circumstances of the given situation'.[106] The Principles of European Law also took a similar approach:

> Where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it.[107]

Some European jurisdictions however do not have provisions like this, notoriously in the case of German, French and English tort systems. The corrective mechanism therefore seems to remain controversial in the context of European tort law, although the PEL's decision to follow this approach to the problem. It is not my intention to articulate a defence of this legislative choice. Indeed, I will argue below (VI.2) that there are other ways to correct the distributive uneasiness of tort law. My point here is to stress that tort law has some important tensions with distributive justice. Some tort systems deal with the problem by allowing courts to reduce the awards of compensatory damages. But is there an answer from the perspective of a justificatory theory?

Gordley provides a possible answer to this question. He argues that in some cases distributive considerations can 'change the normal operation of corrective justice. A person in urgent need can take another's property for his own use'.[108] The exception suggests that the 'urgent need' criterion is based on distributive justice. Indeed, need has been described as one of the different criteria that distributive justice

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[106] Dutch Civil Code, art 6:109(1). See also the Swiss Civil Code (Part Five: The Code of Obligations) (30 March 1911) art 44 (2): 'The court may also reduce the compensation award in cases in which the loss or damage was caused neither wilfully nor by gross negligence and where payment of such compensation would leave the liable party in financial hardship'.

[107] PEL/von Bar, Liab. Dam, art 6:202.

[108] James Gordley, 'Tort Law in the Aristotelian Tradition' in David G Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1995) 134.

may consider.[109] But how could this *urgent need defence* count as a distributive reason? Let us examine how the defence operates in a concrete case. In *Vincent v. Lake Erie Transportation Co.*,[110] the defendant, who was the owner of a steamship, caused damages to the claimant's dock by keeping the boat moored during a heavy storm. If the vessel's master had lifted the lines that held the ship to the dock during the storm, it would most probably have drifted away the ship. The central question of the case was not to determine whether the conduct was justified or not. The court seems to suggest that the conduct was indeed justified. However, the defendant still had to compensate for the damages caused to the dock. One could argue that this case is not covered by corrective justice, but rather by restitutionary principles.[111] But if the distributive criterion of need changes the normal operation of corrective justice, then one would expect that the defendant in *Lake Erie* should not have been found liable for the damages. If the urgent need is a valid distributive defence, then it should be argued that *Lake Erie* was an incorrect decision.[112] If not, then when do distributive considerations change the normal operation of corrective justice?

I will argue in chapter V that the distributive uneasiness of tort law is reduced with the mechanism of insurance. In this sense, insurance will be conceived as a morally justified practice that needs to be taken into account within a justificatory theory of tort law. Corrective justice theorists have been generally reluctant to take into account the effect of insurance in tort law. Weinrib vigorously rejects this possibility. He claims that combining the principle of corrective justice with the loss-

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[109] Finnis (n 11) 174. The same intuition is, I believe, behind Rawls' notion of primary goods. John Rawls, *A Theory of Justice* (2nd edn, Harvard University Press 1999) 79.

[110] 109 Minn 456, 124 NW 221, 1910 Minn (Supreme Court of Minnesota).

[111] This is precisely Weinrib's approach to this case. Weinrib (n 25) 196 ff.

[112] Surprisingly, Gordley mentions the case to support the urgent need defence. Gordley (n 108) 135.

spreading principle based on distributive justice is a mistake: 'The combination of elements from both forms of justice ensures that neither form is achieved'.[113] But Weinrib does not consider the problem with which I am dealing here. He is only concerned with the explanation and justification of the structure of tort law, which arguably should remain untouched by the mechanism of insurance. However, I hope to have provided enough evidence to show that the practice of tort law exclusively based on the principle of corrective justice and its correlative structure is problematic from the point of view of distributive justice. The next step of my argument is to claim that the mechanism of insurance can reduce or ameliorate these problems.

[113] Weinrib (n 25) 75.

V

Insurance and Tort Law

V.1 Introduction

This chapter will discuss how the mechanism of insurance can reduce the distributive uneasiness of tort law. In chapter IV we learnt that there is some moral uneasiness with tort law from the point of view of distributive justice. In general terms, my aim is to show that the mechanism of insurance can reduce this moral uneasiness. It will be argued that insurance is a morally justified mechanism of tort law. My claim is not that tort law is in essence about insurance,[1] but rather that insurance provides an opportunity to correct the distributive unfairness of tort law. More specifically, the objective of the chapter is threefold. First, it will be argued that determining who pays (whether the tortfeasor herself or through her insurance company) is a morally relevant factor for a moral theory of tort law. I will argue that tort theorists have understated the importance of this feature.[2] Secondly, the chapter needs to demonstrate that the mechanism of insurance is able to correct, or at least reduce the distributive uneasiness of tort law and, if that is the case, how insurance corrects the operation of tort law in practice. And thirdly, the chapter needs to show that it is possible to correct tort law without threatening the reconciliatory framework of tort law elaborated on chapters II and III.

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[1] A position famously criticised in Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 The Modern Law Review 820.

[2] Most of these tort scholars will be discussed throughout the chapter. However, a non-exhaustive list can be provided here: Michael J Trebilcock, 'Comment on Epstein' (1985) 14 The Journal of Legal Studies 675; Ernest J Weinrib, 'The Insurance Justification and Private Law' (1985) 14 The Journal of Legal Studies 681; Jules L Coleman, *Risks and Wrongs* (CUP 1992); Stapleton (n 1); Arthur Ripstein, *Equality, Responsibility, and the Law* (CUP 1999); Allan Beever, 'Corrective Justice and Personal Responsibility in Tort Law' (2008) 28 Oxford Journal of Legal Studies 475.

V.2 Who Pays is Important

It is to some extent surprising that for most corrective justice theorists, the fact that a third party pays the award of damages on behalf of the tortfeasor is only a secondary factor that does not concern the law. It is surprising first because most defendants of tort suits are insured.[3] Leaving insurance out of the analysis of tort law therefore seems unrealistic or artificial. But more importantly, if the correlation between injurer and victim is an important (if not *the* most important) feature of corrective justice, as Weinrib and Coleman suggest, then why should we allow for a third party (the insurer) to fulfil the injurer's obligation and also to subrogate her rights in some cases?

According to Coleman, this is not a problem for the mixed conception of corrective justice that he supports:

> Even if the injurer has the duty to repair in justice, it does not follow that justice requires that the duty be discharged by the injurer. We need to distinguish between the grounds of the duty and the institutional mechanisms that are permissible ways of implementing the duty.[4]

Coleman seems to think that his analytical distinction between the grounds and modes of recovery does the work of acknowledging the fact that many tort damages are paid in the end by insurance companies and not tortfeasors themselves.[5] However, the answer still seems unsatisfactory to me, even in a strictly analytical sense. It is odd to claim that I have a duty to repair *in justice*, but that *justice* does not demand me to fulfil that duty. What could be the content of the duty then? A more charitable reading of

[3] See eg *Royal Commission on Civil Liability and Compensation for Personal Injury*, Cmnd 7054-II, vol 2, para 509.

[4] Coleman (n 2) 327.

[5] Weinrib provides a similar answer in terms of distinguishing between the nature of the duty and the different mechanisms by which the injurer can fulfil that duty: 'Corrective justice goes to the nature of the obligation; it does not prescribe the mechanism by which the obligation is discharged'. Ernest J Weinrib, *The Idea of Private Law* (revised edn, OUP 2012) 135 n 25.

Coleman's position here would involve eliminating the reference to justice in the passage, like the following: 'Even if the injurer has a duty to repair, it does not follow that the duty should be discharged by the injurer'.

But even with this reading of the passage, it is still necessary to clarify the content of the duty. The extent to which it is true that the duty should not be necessarily discharged by the injurer herself, depends upon the definition of the duty to repair. We can distinguish between *delegable duties* that can be delegated from the duty-bearer to third parties, and *non-delegable duties* that must be performed personally by the duty-bearer. It is possible to understand this even in ordinary language, in terms of having a duty, which is *prima facie* non-delegable, and making sure that the duty is performed by the duty-bearer or someone else. For instance, if my wife tells me that I must repair the car, what she really means is that it is my duty to make sure that the car is repaired, regardless of whether I repair it myself or, (most likely), that the garage does the repairs for me. Hence, I agree with Coleman that in many cases the duties of repair are delegable. However, if my wife tells me that I must buy our daughter her birthday's gift, what she means is that it is my personal duty to buy her a gift. She would certainly not expect me to ask someone else to buy the gift; relying on someone else to discharge this duty for me would not be generally acceptable. The meaning associated with gifts is usually connected with the fact that one buys the gift personally.[6] Coleman's view therefore does not accommodate the possibility of conceiving the existence of non-delegable duties in tort law.[7]

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[6] See Viviana A Zelizer, *The Social Meaning of Money* (BasicBooks 1994) 201-4.

[7] Wright also argues that the duty to repair of corrective justice can always be delegated: 'There is nothing in corrective justice which prevents that duty from being discharged voluntarily, on behalf of the party with the duty, by someone else – e.g. that party's insurer or rich aunt'. Richard W Wright, 'Right, Justice and Tort Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1995) 178. See also Andrew Burrows, *Understanding the Law of Obligations* (Hart Publishing 1998) 123 (arguing that tort law 'does not say, "the defendant must pay" but rather "the defendant must ensure that payment is made"').

According to Coleman, tort law always involves delegable duties that can be satisfactorily performed by other parties on behalf of the tortfeasor, because they can be assimilated with debts:

> The duty to repair is a debt of repayment. People who take out loans incur debts of repayment. We might even say that these are debts in justice. But it does not follow that an injustice is done whenever someone other than the indebted individual pays back the debt.[8]

Two points must be made here. Is it possible to assume that nothing is morally lost when a third party pays someone's debt? Coleman claims that if Donald Trump decides to pay back all his debts, all of his claims will be extinguished: 'If the loans are repaid by someone other than me, no injustice has been done. This is true even if it is me, not Donald Trump, who has the duty in justice to repay the debts'.[9] It seems to me though that something is missing here. It might be true that Coleman's debts with his bank are extinguished with Trump's payment, but there are other debts that cannot be delegated to a third party. In chapter II I have provided a number of examples: a husband buying flowers for his wife because he forgot their wedding anniversary, a person buying chocolates for a friend because he forgot her birthday, or a father buying a trip to Disneyland for his family because he could not take them to the beach on a weekend as he promised. What is missing in Coleman's example is the symbolic message that can be carried by material compensation. The point in all of these examples is not the material gift or compensation that is being provided; it is rather about the meaning of the gesture.

[8] Coleman (n 2) 327.

[9] Coleman (n 2) 327.

A second concern with Coleman's solution to the problem is that, as Radzik warns us, one must be careful with the analogy between wrongdoing and debts.[10] If the whole point of corrective justice is to enforce a system of moral duties between the parties, establishing who should be held liable when a wrong has been committed (I.3), then equating tort liability only with financial debts should be a suspicious idea. For it suggests that tort law is merely about transferring or redistributing material value, a suggestion I have criticised in chapter III. Certainly, the duty to pay tort damages is a debt that must be fulfilled by the defendant.[11] This factor alone however should not necessarily lead us to the conclusion that there is nothing else in play here. For instance, in a sense a criminally accused person also has a debt to pay if she is convicted for her crime,[12] but she cannot rely on her insurance to pay that debt; she and she only must spend the time in jail, nobody else can do that for her. Why? The sense of moral responsibility involved in criminal liability is incompatible with the mechanism of insurance.[13] In this sense, tort law seems to be a middle ground between contract law and criminal law. While in some cases the law of torts resembles

[10] 'Debt and repayment are useful concepts when we are thinking about how goods may be transferred among persons. Nonetheless, the suffering of one person does not (or anyway *should not*) count as an intrinsic good to another person. Furthermore, many of the "goods" that may be damaged by wrongdoing are clearly not transferable. Trust, friendship, community, self-esteem, health, life, a sense of security, and a feeling of wholeness are all valuable things that, once damaged or destroyed, cannot simply be repaid or compensated'. Linda Radzik, *Making Amends. Atonement in Morality, Law and Politics* (OUP 2009) 54.

[11] A feature of tort law that has been emphasised by Smith and his thesis according to which there is no pre-existent duty to pay damages until a court orders so. Stephen Smith, 'Why Courts Make Orders (And What This Tells us About Damages)' (2011) 64 Current Legal Problems 51.

[12] It is common in ordinary language to hear people talking about criminals paying their 'debts with society', or maybe paying their debts with their victims.

[13] See Lord Denning's opinion in *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 (KB), 38: 'It is, I think, a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment'.

the contractual situation described by Coleman, in which the law encourages[14] (and in some cases even requires)[15] the parties to be insured, it seems that in other cases – especially intentional torts – insurance should not be encouraged. For instance, insurance policies should not provide coverage for punitive damages. I will deal with this issue later in the chapter (V.5).

But having established that who pays matters, we have encountered a serious challenge for the theory of corrective justice. Gold has recently suggested that this is one of the main reasons why corrective justice fails to explain the system of private law.[16] He cites Gardner's proposition (c) of corrective justice, according to which a norm of corrective justice 'regulates the actions of the person from whom is to be made *or another person acting on behalf of that person*'.[17] For Gardner, this presupposition seems to be true, with the following caveat:

> To explain how corrective justice can be done as between two parties without the co-operation of the party from whom the transfer back is to be made we need to explain the possibility of vicarious agency: how there can be an agent who acts on my behalf, such that on occasions I can be regarded as having conformed to norms of corrective justice even though it was someone else that did the allocating back for me. Explaining this possibility is a tricky task which I will not be undertaking here.[18]

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[14] See eg Lord Denning's remarks regarding insurance in *Lamb v Cambden LBC* [1981] QB 625, 637-8: 'the criminal acts here – malicious damage and theft – are usually covered by insurance. By this means the risk of loss is spread throughout the community. It does not fall too heavily on one pair of shoulders alone. The insurers take the premium to cover just this sort of risk and should not be allowed, by subrogation, to pass it on to others'.

[15] Eg Road Traffic Act 1988 s 143. See below V.3.

[16] His suggestion is to replace corrective justice with a notion of redressive justice. Andrew S Gold, 'A Theory of Redressive Justice' (2014) 64 University of Toronto Law Journal 159.

[17] John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 10. Emphasis in the original. A similar formulation can be found in Wright (n 7) 178, arguing that the 'required mode of rectification is the restoration by the injurer (*or someone voluntarily acting on behalf of the injurer*) of the injured party's preexisting stock of resources to the extent possible'. Emphasis added.

[18] Gardner (n 17) 11.

Gold is correct when he argues that '[t]his vicarious agency problem is not a minor difficulty for corrective justice'.[19] To some extent, corrective justice must allow third party enforcement of the duty to repair. It would not make much sense to require defendants to pay awards of damages with money directly coming from their pockets. It seems rather straightforward to allow defendants to rely on their banks to perform the payment of damages on their behalf. What about judicial enforcement? The law authorises successful claims of tort law to be coercively enforced, procedures in which the defendant may not be seen as paying damages directly. At the extreme, we can find the situation of the insurer who pays on behalf of the assured. Is this situation similar to the ones described before? For instance, what is the difference between an insurance company paying on behalf of the tortfeasor and a bank account that makes a deposit to the tort victim on the injurer's behalf? Perhaps one possible answer to this problem is to argue that there is no legal duty to pay damages.[20] According to this view, since there is no personal duty to pay damages, vicarious agency is not problematic. However, this is an exaggerated reaction. The duty to pay damages might be a special sense of duty, but it is a duty: my duty to fix the car is a duty, despite the fact that I am expected to delegate it.

It is my contention that moving along these different mechanisms to fulfil the duty to repair is not irrelevant to corrective justice. As was mentioned above, corrective justice inevitably will have to tolerate some delegation of the duty. This is an important difference with apologies, which would never allow third party enforcement of the duty. However, the symbolic meaning of paying tort damages will be reduced as long as one moves towards the extreme of insurance. Corrective justice

[19] Gold (n 16) 177.

[20] Stephen A Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harvard Law Review 1727, 1741-9.

already deals with a non-ideal situation. The ideal situation would be that the wrong would never have occurred in the first place. Corrective justice arises as the second-best solution that the law can provide to the victim of a tort, since it is not possible to undo the harm done.[21] Certainly, the *second-best* situation would require the defendant to pay the award of damages by herself.[22] It seems to me that corrective justice should allow some third party enforcement of this second-best solution, such as bank's deposits or even legal enforcement.[23] However, insurance seems to go one step further, since the injurer relies entirely on a third party to fulfil the duty to repair. In my view, insurance amounts to a *third-best* (or perhaps even a fourth or fifth-best) solution for the tort victim. To this extent, tort law is (again) disappointing from a restorative point of view. But the question is why and under which conditions should we allow the tortfeasor to provide this not-so-next-best solution?

V.3 When the Law Cares: Compulsory Insurance

One of the aims of this chapter is to show that the existence of insurance is an important aspect of the practice of tort law. In this section, I will briefly discuss the existence of compulsory insurance schemes in tort law. In my view, these mechanisms provide enough evidence to demonstrate the important role of insurance in modern tort law, a factor that has been understated by most corrective justice theorists. For instance, Wright claims that while tortfeasors may voluntarily choose to ask their

[21] This aspect of corrective justice has been emphasised by Hershovitz in Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2011) 39 Florida State University Law Review 107, 116.

[22] Gold reaches a similar conclusion: 'In an important respect, we may consider it more ideal – and differently just – if the wrongdoer has fixed the harms he caused'. Gold (n 16) 194.

[23] It might even be argued that the ideal second-best solution would require defendants to pay damages with their own goods rather than with money. Perhaps allowing tortfeasors to satisfy their reparative duties paying monetary awards is already a *third-best* solution.

insurers to fulfil their reparative duties on their behalf, compulsory insurance is incompatible with any form of justice: 'No one can justifiably be compelled to discharge another's duty in the absence of a prior voluntary contractual agreement to do so'.[24] In a similar way, Ripstein argues that questions about insurance are 'too idiosyncratic and too general'. According to him, such questions are too idiosyncratic because they depend too much on the 'particular interests' and particular sensitivities' of the parties, whereas they are too particular 'because whether it is rational for a particular person to insure depends on that person's general pattern of activities'.[25] Ripstein holds that this overall pattern of activities is incompatible with the choices that each person should be entitled to take between more security (getting insurance for the risk involved) and more liberty (choosing not to insure against the risk in question). Insurance is problematic because it assumes that 'the loss is the common problem for both parties'.[26]

It is true that the law is generally not concerned with whether a person is insured or not. However, in some cases the law *requires* people to insure against the risks associated with engaging in some particular activities. Paradigmatic cases of compulsory insurance in the UK are motor vehicles and employer's liability, but they are not the only ones.[27] These two categories together represent the 85 per cent of all the personal injury claims brought in the UK.[28] Hence, it cannot be argued that these compulsory insurance schemes are exceptional or peripheral to tort law. How could the duty to insure then be justified if the law is not supposed to care about whether the

[24] Wright (n 7) 178.

[25] Ripstein (n 2) 61-2.

[26] ibid 62.

[27] A complete list is provided in Richard Lewis, 'The Duty to Insure' (2004) 19 Journal of Insurance Research and Practice 57.

[28] Datamonitor, *UK Personal Injury Litigation 2003*, fig 5.

parties are insured or not? The obvious answer is that in these cases the law *does* care about whether the parties are insured or not. Following Merkin and Steele, three strengths of insurance can be mentioned: first, it helps to secure the funds to compensate victims; second, it protects assured parties from insolvency; and third, the sums paid to the victims are funded by the premiums contributed to by all those who engage in the activity. These features are not confined to compulsory insurance, 'but the *need* to be insured heightens' their likely effect.[29]

Interestingly, both systems of compulsory insurance for motor vehicles and for employer's liability operate under the rules of tort law, and these rules remain mostly intact with the existence of the compulsory insurance scheme.[30] For instance, it is still necessary to show the existence of a duty of care owed by the defendant to the claimant has been breached in order to bring a motor claim into court.[31] However, this classic scheme of tort law coexists with a regime of compulsory insurance. The Road Traffic Act 1988 imposes both criminal and civil sanctions (a statutory tort) to enforce this duty to insure: it is a criminal offence for a person to use a motor vehicle on a road or in a public place without insurance or security complying with the requirements of the Act.[32] This interaction between the classic principles of tort law and the mechanism of insurance as a legal requirement cannot be explained by tort theories that leave insurance out of the analysis.[33]

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[29] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) 260.

[30] '[T]he starting point is that the general tort rules are largely intact in relation to road traffic liability'. ibid 261. An exception is the defence of voluntary assumption of risk (*volenti non fit iniuria*) that is void under the Road Traffic Act 1988, s 149(2).

[31] Robert Merkin and Jeremy Stuart-Smith, *The Law of Motor Insurance* (Sweet & Maxwell 2004) ch 4. As Merkin and Steele put it, '[i]n the road accident context, fault is the gatekeeper'. Merkin and Steele (n 29) 260.

[32] Road Traffic Act 1988, s 143.

[33] As Merkin and Steele note, the duty to insure has been neglected by tort scholars, treated 'as simply the end of the story so far as tort is concerned, and perhaps the solution to a problem, namely how to make tort judgments effective'. Rob Merkin and Jenny Steele,

Perhaps one possible answer is to argue that in these cases tort law should give way to a system completely structured under the principles of insurance and distribution of risks. Weinrib has recently recognised that some cases 'such as workplace injuries or automobile accidents can be coherently treated under either form of justice [corrective or distributive justice]'.[34] The value of coherence therefore seems to be more important than corrective justice in Weinrib's theory. But why should we leave insurance outside the normative scope of tort law? The fact that most tort claims (at least personal injury claims) are at odds with these theories – because the law requires those who want to engage in the relevant activities to insure against the risks involved – suggests that something must be wrong with these theories, especially if they are meant to explain existing systems of private law.

Another possible response from Weinrib (and his followers) to this challenge could be to argue that the duty to insure has nothing to do with tort law. According to this argument, it may be true that in some cases the law cares on whether the tortfeasor is insured or not – imposing as a consequence a duty to insure. This does not mean however that the duty to insure belongs to tort law. Should we allow corrective justice to make such a move? In my view, allowing this move would require to assume the point that Weinrib is precisely trying to prove with his theory, namely, that tort law (and private law in general) is an autonomous body of law. But he could not rely on this autonomous nature of tort law (which is his conclusion) to prove his point. In short, it seems difficult to ignore the existence of compulsory insurance in tort law without making a circular argument.

'Policing Tort and Crime with the MIB: Remedies, Penalties and the Duty to Insure' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 27.

[34] Ernest J Weinrib, *Corrective Justice* (OUP 2012) 6.

Moreover, the origin story of the compulsory insurance scheme for motor vehicles in England shows that this legislation aimed to play an important role in the tort (bipolar) relationship. Compulsory insurance was introduced by the Road Traffic Act 1930. In parallel, the Third Parties (Rights Against Insurers) Act 1930 was also introduced by granting the victims of a negligent policyholder the right to enforce any judgment against the insurer. The legislation's aim was clearly not to protect the policyholder, but rather to protect the third parties to whom the assured could be liable. Some years after, the Cassel Committee in 1937 reviewed the road traffic legislation and confirmed the emphasis on the protection of third parties:

> The basis of voluntary insurance is the protection of the insured by means of a contract between himself and the person whom he selects as an insurer; but the person for whose benefit compulsory insurance has been introduced is not a party to the contract of insurance and has no voice in the framing of its terms. It is in the main the securing of protection for a stranger to the contract which has given rise to the problems which we have had to consider.[35]

The current structure of the Road Traffic Act 1988 still retains the features of the basic structure established since 1930, with only some slight modifications as a result of the European Union's free movement programme. It seems to me that the existence of this legislation in the context of road traffic challenges the conception of insurance as a private matter between the insurer and the assured, precisely because the duty to insure is justified based on the protection of a third party to the contract of insurance. The law therefore *does* care whether the tortfeasor is insured or not.

The same pattern can be seen in the development of the employers' liability insurance scheme. During nineteenth century, classic tort law rules were clearly unable to adequately protect workers who were injured in the course of their employment. The initial response in the common law was to hold that employees

[35] Board of Trade, *Report of the Committee on Compulsory Insurance*, Cmd 5528 (July 1937) 7.

assume the risks of their employment, including the risk of being injured by the negligence of a co-worker.[36] This doctrine was known in England as the 'common employment doctrine', which was considered as an implied term of the contract of employment.[37] The doctrine was abolished with the Employers' Liability Act 1880, enabling employees to hold their employers liable in tort.[38] Compulsory insurance however was not established until the Employers' Liability (Compulsory Insurance) Act 1969 was enacted, which was supplemented later by the Employers' Liability (Compulsory Insurance) Regulations 1998. The legislation requires every employer carrying on any business in Great Britain to insure against liability for bodily injury or diseases sustained by his employees, and arising out of and in the course of their employment in Great Britain.[39] Again, the law imposes the duty to insure to anybody who wants to engage in a business in Great Britain, and the breach of the duty gives rise to criminal liability.[40] And once more, the compulsory insurance scheme aims to protect third parties (the employees) and not the policyholder (the employer). The simple conception of insurance as a relationship between the insurer and the assured once again fails to explain this system.

In my view, the fact that the theories of tort law discussed above are unable to explain and justify the schemes of liability that have arisen out of road traffic and

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[36] *Priestley v Fowler* (1837) 3 M & W 1, 150 ER 1030 (Court of Exchequer); *Farwell v Boston and Worcester Rail Road* 45 Mass 49 (Supreme Court of Massachusetts 1842).

[37] Merkin and Steele (n 29) 282.

[38] By contrast, in the United States courts showed reluctance with workers' compensation legislation even at the beginning of the twentieth century, including the infamous *Ives v South Buffalo Ry Co* 201 NY 271 (New York Court of Appeals 1911) decision. See John Fabian Witt, *The Accidental Republic* (Harvard University Press 2004) for a detailed account of this socio-legal struggle.

[39] Employers' Liability (Compulsory Insurance) Act 1969, s 1(1).

[40] ibid ss 5, 5A, and 5B. The difference with the road traffic regulation is that in the case of employers' liability, the failure to insure does not give rise to civil liability: *Richardson v Pitt-Stanley* [1995] QB 123 (CA).

workplace accidents is revealing. Even though I do not seek to argue that the operation of these insurance schemes should be expanded to all the areas of tort law,[41] it cannot be denied that both of these categories are not on the periphery of tort law. In this sense, the case of road traffic accidents is particularly remarkable, since they belong to the 'traditional' cases of tort law, in which 'the defendant's own positive careless act directly causes physical injury to the plaintiff'.[42] Automobile accidents are indeed customarily used in lectures and exams as paradigmatic cases of tort law, since they arise among complete strangers. How could a justificatory theory of tort law leave out these paradigmatic cases? I hope to have provided enough reasons in this section to reject the conception of insurance as a secondary matter for tort law; what needs to be shown now is how a theory of tort law could materialise its abandonment.

V.4 The Morality of Insurance

Perhaps the reason why corrective justice theorists have not paid attention to the existence of insurance is based on their understanding of insurance as a contractual relationship that concerns only the assured and the insurer. It follows – according to this argument – that this relationship of insurance has nothing to do with the bilateral relationship between injurers and victims. For instance, Ripstein argues that contracts of insurance 'and their terms are a matter between the defendant and those with whom such agreements are made, in which the law takes no interest'.[43] Similarly, Beever claims that even though the consequences of insurance are irrelevant to the

[41] As Stapleton warns us, 'we must be vigilant not to allow assumptions made in the traffic context to be generalised'. Stapleton (n 1) 842-3.

[42] Jane Stapleton, 'Evaluating Goldberg and Zipursky's Civil Recourse Theory' (2006) 75 Fordham Law Review 1529, 1530.

[43] Ripstein (n 2) 61. See also Beever (n 2) 494 (arguing that '[l]iability insurance merely allows the defendant to shift the loss from his shoulders to those of others. This is *completely irrelevant to corrective justice as it relates to the defendant and the claimant*'). Emphasis added.

relationship of corrective justice between the injurer and the victim, the relationship between the insurer and the assured is relevant for corrective justice: 'corrective justice demands that the insurer keep his agreement to indemnify the defendant for the consequences of his tort'.[44] Both arguments rely on the conception of insurance as a bilateral contract between the defendant and the insurer that has nothing to do with the relationship between injurer and defendant.

Certainly, it is possible to conceive insurance as a contractual relationship between the parties of such agreement. After all, the insurance relationship is based on the agreement between the parties (insured and assured). I argue however that the influence of the insurance mechanism is not restricted to the relationship between the insurer and the assured, and that such influence is what justifies the existence of voluntary and compulsory insurance schemes. The argument requires showing that insurance is a morally justified practice. At first sight, the mechanism of insurance seems to contradict our notions of moral responsibility and accountability. Indeed, it has been argued that insurance not only distributes risk, but that it also transfers responsibility.[45] Why should we allow this to happen in tort law? As was noted above (V.2), insurance is not allowed in the case of criminal liability. Similarly, if holding wrongdoers responsible or accountable for their wrongs is an important feature of tort law – as civil recourse theorists suggest, then insurance is problematic for tort law. As Duff puts it, 'why should the law, which does not allow criminal offenders to shift the

[44] Beever (n 2) 495.

[45] Tom Baker, 'Risk, Insurance, and the Social Construction of Responsibility' in Tom Baker and Jonathan Simon (eds), *Embracing Risk. The Changing of Culture and Responsibility* (The University of Chicago Press 2002) 33.

penal cost of their wrongdoing onto insurers, allow a tortious wrongdoer to shift the remedial cost of his wrongdoing onto an insurer?'[46]

My suggestion is that insurance plays the morally important role of distributing the burden of losses caused as a consequence of wrongs. I will later argue that this role should be reduced in the cases of intentional wrongdoing and exemplary damages (V.5). But leaving aside for a moment these problems, it is important to emphasise that insurance can be conceived as a vehicle to distribute the burden of bearing losses among a broader pool of individuals than the injurer and the victim of the tort alone.[47] This conception of insurance as a distributive mechanism can be easily seen operating in the cases of automobile accidents and employer's liability discussed above (V.3). Take the motor insurance case. Forcing motor drivers to insure has a clear distributive effect. All drivers must pay an insurance premium if they want to drive a car. It follows that the risks involved in the driving of motor vehicles (normally, personal injuries and damage to vehicles) are supported by all drivers and not only those who are directly involved in car accidents. The mechanism of insurance operates well in this context, for accidents are perceived as an unavoidable price that has to be paid if we permit people to drive their own cars.

By the same token, employer's liability insurance can also be justified in these terms: the existence of workplace accidents seem to be, at least to some extent, an inevitable consequence for any modern industrial society. It is true that workplace accidents should be deterred and avoided, but it must be acknowledged that they will

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[46] RA Duff, 'Repairing Harms and Answering for Wrongs' in John Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (OUP 2014) 226.

[47] It is particularly interesting to analyse how a similar conception of insurance was developed in Islamic law, in which insurance was initially associated with gambling, and hence prohibited. But after some years, a conception of insurance based on solidarity prevailed, conceiving insurance 'as a charitable collective enterprise'. Frank E Vogel and Samuel L Hayes III, *Islamic Law and Finance: Religions, Risk and Return* (Brill 2006) 150-3.

never be reduced to zero. Accidents will continue happening. Employer's liability insurance enables the problem of workplace accidents to be dealt with as a social problem: any person who wants to engage in a business will insure to cover any injury caused to her employees in the course of their employment. Again, all the other employers that pay their insurance premiums will support the risk of suffering the burdens for these injuries. The traditional theories of corrective justice view this distributive move with suspicion: why – they could say – should we allow the interference of third parties (insurers) in the bipolar or correlative relationship between the parties? The approach suggested here looks at the matter quite differently, in the sense of asking why a single person (the defendant) should bear the costs of injuring a victim (the claimant) in the context of normal interactions that will likely be harmful to some. In these terms, the development of workers' compensation schemes during the beginning of twentieth century are not seen with suspicion; quite the opposite, with the development of these schemes, tort systems have become more just, transferring the burden of losses from employees to employers.

In sum, insurance seems to be required in the case of automobile accidents and employer's liability because they are activities that will necessarily cause accidents. We must tolerate the occurrence of these accidents because the social benefits obtained with these activities are superior to the costs of these accidents. Hence, compulsory insurance is justified to distribute these costs within the broader group of people that actually engage in these activities. What about other cases of insurance? Is it also justified to insure against risks that arise in the context of other activities? In my view, insuring is also justified in these cases. It is true that when compulsory insurance is required, it is easier to see how the losses are distributed among those who engage in the relevant activity (e.g. automobile drivers and employers), whereas in the case of

other activities (e.g. medical negligence) it is more difficult to see clearly among whom the losses are being distributed.[48] The scenario gets even more complicated when the existence of reinsurance contracts is taken into account. Through reinsurance losses are distributed in a broader pool of insurers, in a national and international context.

But the distributive operation of insurance is in place even in these cases. In my view, three situations can be distinguished here: first, compulsory insurance cases, in which the losses associated with the relevant activity are (relatively) homogenously spread among those who engage in the activity; secondly, voluntary insurance cases, in which losses are also spread but it is less clear how they are distributed in the insurance market; and finally, social insurance cases, in which losses are (relatively) homogenously spread among the society.[49] Each legal system can choose between these three alternatives to deal with the losses associated with the different activities. For instance, some societies decide to deal with health care through nationwide social insurance, whereas others prefer to leave the matter to private insurance. My point is that in both cases losses are distributed.

Two counterarguments to this understanding of insurance can be made. The first is well known and has been made many times. It holds that insurance is morally defective because it does not incentive or motivate people enough to behave correctly.

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[48] 'Insurance rarely consists of a homogenous risk pool, in that policies cover a variety of first- and third-party risks and there is no legal requirement, other than in respect of the separation of assets and liabilities attributable to life (long-term business) and non-life (general business), for premiums to be allocated to classes of risk.' Merkin and Steele (n 29) 140.

[49] A clear case in which losses are spread within the community is how damage caused by riots is dealt with in England. The Riot (Damages) Act 1886, s 2(1), establishes that any damage caused to a house, shop, or building caused 'by any persons riotously and tumultuously assembled together' must be paid out of a police fund. This police fund is funded through taxation. Merkin and Steele (n 29) 157-9.

In other words, insurance does not deter the occurrence of wrongs.[50] It would require a whole chapter or perhaps an entire thesis to defend insurance against this objection. I can only sketch two points here. First, as Baker points out, insurers coined the concept of 'moral hazard' during the nineteenth century precisely to solve this problem from a moral point of view.[51] This notion of moral hazard was created to deal with the relationship between the assured's character and the temptation to carelessness: 'the worse the insured's character, the less temptation needed to provoke her to cheat the insurance company, and the more likely she is to seek out a situation in which the temptation is present'.[52] This early conception of moral hazard challenges the economic view, according to which less insurance is better, and it also shows that this moral concern was on the mind of insurers even in those early days. And secondly, the economic view of moral hazard is based on the assumption that insurers are unable to condition their coverage on whether the assured behaved carelessly or not. However, in some cases insurers are able to condition the payments on certain levels of care. Requirements such as the installation of anti-theft devices or smoke alarms are examples of these situations.[53] These are some of the reasons to support the conclusion that legal economists have exaggerated the problem of moral hazard in tort law.[54]

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[50] See eg George L Priest, 'The Current Insurance Crisis and Modern Tort Law' (1987) 96 The Yale Law Journal 1521 and Jane Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 Law Quarterly Review 301.

[51] Tom Baker, 'On the Genealogy of Moral Hazard' (1996) 75 Texas Law Review 237, 250-2.

[52] ibid 251. Insurers dealt with the problem by refusing to insure those who presented a more than usual moral hazard (in exceptional cases), and alternatively (more generally) by increasing the insurance premiums.

[53] ibid 280-1.

[54] Merkin and Steele also reach a similar conclusion (arguing that insurers 'are able to exert a degree of control over policyholders by increasing premiums or, ultimately, withdrawing cover, sanctions which plainly have a significant deterrent effect; and may also involve themselves in the risk management process of their clients… [I]t can also be argued that an uninsured person who has nothing to lose if he or she faces liability has less incentive to take

I will concentrate now on the second counterargument to this view of insurance, which is subrogation. Going back to Ripstein again, he claims that 'the law takes no interest' in the relationship between the tortfeasor and her insurance company because the insurance contract grants the insurer the right of subrogation of the assured's rights. Therefore – the argument goes – the existence of insurance does not change the normal operation of tort law: if the victim of a tort is insured, her insurance company will compensate her losses, and eventually a tort suit will be brought against the tortfeasor. And similarly, if the tortfeasor is insured, her insurer will pay any damages that she will eventually be required to pay to the victim of the tort.[55] Relatedly, Beever argues that although the focus of corrective justice is the relationship between the claimant and the defendant alone, 'corrective justice demands the observance of liability insurance'.[56] Moreover, he adds that 'corrective justice supports subrogation because the insurer is in the best position to present the defendant's position from the standpoint of corrective justice, not because insurance is socially desirable'.[57] According to Beever, the insurer is in a better position to present the case than the defendant 'because the defendant lacks the relevant financial incentive'.[58]

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care than an insured person who cannot continue their activities without insurance'). Merkin and Steele (n 29) 141. See also Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (2012) 75 Modern Law Review 301, 308 (arguing that 'given that most tort claims are paid by third party liability insurers, a poor claims record runs the risk of rendering an assured either uninsurable or insurable only for high-level premiums: the cost of unavailable or unaffordable insurance is the loss of the right to drive or of the right to employ and, even where insurance is not compulsory, its unavailability may remove the ability to bid for lucrative tenders which require liability insurance as a part of the offer package').

[55] Ripstein (n 2) 61.

[56] Beever (n 2) 495.

[57] ibid 497.

[58] ibid 496.

Subrogation is an important objection to the distributive understanding of insurance that has been defended here, and must be seriously taken into account. Its existence would show that insurance is nothing more than a contractual relationship between insurer and assured that allows the former to subrogate the latter's rights based on their insurance contract. Beever indeed has a point when he emphasises the fact that the insurer cannot pursue the subrogated action in her own name; she must bring the action in the name of the insured. As Mitchell notes, this procedural rule 'reflects the fact that the insured's rights continue to vest in him even after he has received a payment from the insurer in respect of the insured loss'.[59] Accordingly, corrective justice seems to be compatible with the subrogation of insurers: they only act on behalf of their policyholders. In the end, subrogation allows holding liable those who must be held liable, namely the tortfeasors themselves.

Two points must be made here. First, to Beever 'the insurer is in the best position to present the defendant's position from the standpoint of corrective justice'. But why should corrective justice care about who is *in the best position to present the defendant's position?* Beever argues that 'the defendant lacks the relevant financial incentive'. But is that a matter important for corrective justice? It seems to me that corrective justice imposes the duty upon the tortfeasor to repair the wrongful losses caused to her victim. However, if corrective justice must look at the relationship injurer and the victim only, then why should we care about who is in the 'best position to present the defendant's position'? Once the victim has been satisfied, the duty of corrective justice should also be satisfied.[60] The fact that the defendant lacks a

[59] Charles Mitchell, *The Law of Subrogation* (Clarendon Press 1994) 6.

[60] Tony Weir reaches a similar conclusion regarding the relationship between subrogation and tort law in a case note that was published *post mortem*: 'the devices of subrogation and contribution are not part of the law of tort at all, *whose role is exhausted once the primary victim is paid*'. Tony Weir, 'Subrogation and Indemnity' (2012) 71 The Cambridge Law Journal 1, 4.

financial incentive to present her position in the court does not seem to be a matter of concern for corrective justice, at least in Beever's account of the principle. The question unanswered is why corrective justice should care to provide financial incentives to the parties to enable them to present their cases in court. Hence, the connection between subrogation and corrective justice is not that straightforward.

Secondly, many reasons have been put forward for and against subrogation.[61] A strong argument to support subrogation seems to be avoiding the unjust enrichment of the insured in cases in which she has received two payments in respect to the same insured loss.[62] My point is however that the principle of subrogation still needs to be corrected, for in many cases it leads to undesirable distributive consequences. I argue that these problematic features of subrogation arise as a consequence of the distributive conception of insurance that has been defended here. To unpack this argument I will discuss here the case of employer's liability, which in my view clearly illustrates how this conception of insurance interacts with subrogation. In *Lister v Romford Ice & Cold Storage Co Ltd*,[63] the House of Lords dealt with this problem. The case involved an apparently simple case of subrogation: an employee (Mr Lister) was injured due to the negligent driving of a fellow employee. Mr Lister sued the company for its vicarious liability, and was awarded £1,600 in damages. A few days later, the company's insurer sued the employee who acted negligently for his contribution to the tort, subrogating the rights of the employer. The defendant in this case happened to be the victim's son. The House of Lords ruled in favour of the insurance company (on behalf of the employer). The case is usually regarded as a clear evidence to show the

[61] A complete list of both types of arguments can be found in Peter Cane, *Tort Law and Economic Interests* (Clarendon Press 1996, 2nd edn) 437-8, and in Merkin and Steele (n 29) 111-5.

[62] Mitchell (n 59) 67-80.

[63] [1957] AC 555 (HL).

irrelevance of insurance in tort law.[64] The following passage of Viscount Simonds, who wrote the opinion of the majority, reflects this view:

> As a general proposition it has not, I think, been questioned for nearly two hundred years that, in determining the rights inter se of A and B, the fact that one or other of them is insured is to be disregarded … I cannot wholly ignore a principle so widely applicable as that a man insures at his own expense for his own benefit and does not thereby suffer any derogation of his rights against another man.[65]

In my view, this decision has undesirable distributive effects. As was seen above (V.3), the aim of employer's vicarious liability is to transfer the risks of accidents from employees to employers. However, allowing subrogation in these cases precludes the distributive effect of employer's vicarious liability. In cases of widespread insurance such as automobile and workplace accidents, the law seems to expect that the risk of liability should not fall on individual drivers and employees. As Merkin and Steele note, it is unrealistic to think otherwise: 'In light of the existence not only of widespread motor insurance, but also of compulsory motor insurance, the idea that the parties would expect the risk of liability to fall on the individual driver is indeed unreal'.[66]

Some years later, the Court of Appeal dealt again with the issue but with a different result in *Morris v Ford Motor Co Ltd*.[67] In *Morris*, Ford had an agreement with Cameron, a firm of cleaners, to provide their services in a motor factory owned by Ford. Cameron had a contractual obligation to indemnify Ford in the case that one of Cameron's employees was injured in the course of the work done for Ford. Mr Roberts, one of Ford's employees, injured Mr Morris, an employee of Cameron. Mr

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[64] Eg Stapleton (n 1) 823.

[65] *Lister* (n 63) 576-7.

[66] Merkin and Steele (n 29) 131.

[67] [1973] 1 QB 792.

Morris sued Ford, who issued a third-party notice against Cameron. The claim was eventually paid by Cameron (apparently, through its insurers). However, Cameron brought an action against Mr Roberts seeking to subrogate Ford's rights. The majority of the Court dismissed Cameron's claim for subrogation. Lord Denning MR, who wrote one of the majority's opinions, emphasised that *Lister* 'was an unfortunate decision', but that its consequences were only theoretical because there was 'an agreement between insurers not to enforce it'.[68] He argued that in this particular case it was 'not just and equitable' to allow Cameron to use Ford's name to sue Mr Roberts directly, because is it normally expected that these risks are covered by insurance: 'Everyone knows that risks such as these are covered by insurance'.[69] James LJ agreed with Lord Denning's result, but he articulated his opinion in a slightly different framework. According to him, the crucial point of the case was to determine whether the contract of indemnity between Ford and Cameron 'excluded, expressly or impliedly, the right of subrogation to the defendant's rights and remedies against a servant of the defendants'.[70] James LJ concludes that it 'would be unrealistic and unacceptable' to hold that subrogation to the rights and remedies of Ford against its employees was implied in the agreement,[71] especially taking into account the fact that the implications of *Lister* 'were well known among employers (the defendants included)'.[72]

[68] ibid 801.

[69] ibid.

[70] ibid 812.

[71] ibid 815.

[72] ibid 814.

The decision has been criticised by tort scholars,[73] but for most of them it reached the correct outcome.[74] In my view, *Morris* adequately put forward the possibility of limiting the doctrine of subrogation to deal with the unfair consequences of its application. Many tort scholars have suggested similar limitations since then.[75] The Australian Insurance Contracts Act 1984 is particularly illustrative in this respect, expressly removing the right of subrogation in the case of employer's liability,[76] and in cases where the assured might reasonably be expected not to exercise a claim by reason of a family or other personal relationship between the insured and the third party.[77] In both cases, if the third party is found guilty of serious and wilful misconduct, she loses the subrogation immunity. My point here is that these worries about subrogation reveal the nature of insurance as a distributive mechanism. By contrast, if insurance is conceived as a mere contract between insurer and assured, then it seems very difficult to avoid Viscount Simonds' conclusion about insurance: 'a man insures at his own expense for his own benefit and does not thereby suffer any derogation of his rights against another man'. I hope to have provided here enough reasons to prove that this is a mistaken view: people *do not* necessarily insure at their own expense and for their own benefit.

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[73] Reuben Hasson, 'Subrogation in Insurance Law – A Critical Evaluation' (1985) 5 Oxford Journal of Legal Studies 416, 434-5.

[74] 'This reasoning is rather artificial and lacking in clear principle, but the decision is a sensible one in practical terms'. Cane (n 61) 439. See also Merkin and Steele (n 29) 132-4.

[75] See eg Hasson (n 73) 436-8; Cane (n 61) 441 (arguing that 'there is nothing wrong with allowing contractual rights of subrogation, but we need a better test for deciding when such rights arise'); Weir (n 60) 7 (arguing that the Law Commission should propose legislation 'to the effect that insurers should no longer be able to sue, whether by subrogation or assignment, person liable to their insured save, perhaps, to the extent that those persons are themselves insured against liability').

[76] The Insurance Contracts Act 1984, s 66.

[77] ibid s 65.

V.5 The Gains and Losses of Insurance

In the previous sections it was argued that who pays tort damages is morally important, and that insurance is a morally justified practice. In this last section I will discuss how insurance can correct – or at least reduce – the distributive uneasiness of tort law. In other words, I will argue that tort law has something to be *gained* with the existence of insurance. Finally, I will also discuss what is *lost* in tort law with the existence of insurance.

Is there something to be *gained* from the existence of insurance in a theory of tort law? Some tort theorists have answered this question negatively.[78] These authors argue that we should be careful not to confuse tort law with insurance, mainly because insurance contradicts our notions of moral responsibility and corrective justice. It is true that insurance can be problematic for corrective justice and I will later discuss these moral losses of insurance. But my suggestion is not to understand tort law as a form of insurance; rather, the point is taking into account how insurance operates in the context of tort law. Under this framework, insurance is not conceived as a definitional feature of tort law, but rather as an opportunity to correct the distributively unjust results of tort law. In these terms, taking into account whether the parties in a given tort suit are insured or not should not be a suspicious practice. Stapleton and Cane however warn us that insurability of the parties 'is an imprecise criterion because it is not clear how to evaluate it and in which direction it points',[79] and that the only judge 'who has regularly and explicitly given weight to insurance

[78] Eg Coleman (n 2) 208 (arguing that '[w]e need to be careful not to confuse the fact that liability decisions have insurance implications with the very different claim that insurance implications should dictate liability decisions'); Stapleton (n 1) 820 (claiming that 'neither actual insurance nor insurability are or should be relevant to the reach and shape of tort liability'); Cane (n 61) 427 (arguing that insurance 'is quite inconsistent with the notions of personal responsibility and corrective justice which underlie the common law of obligations').

[79] Stapleton (n 1) 824.

considerations is Lord Denning'.[80] It is true that many of Lord Denning's opinions were controversial and criticised by the literature, but as Morgan notes, we also must remember that 'his innovations often won through in the end'.[81]

This is not the place to make a detailed account of judicial references to insurance. It is important however to note that there are some recent decisions in the Court of Appeal that have taken insurance into account, and they do not come from Lord Denning.[82] Stapleton argues that in most of these cases insurance is mentioned 'selectively as a make-weight argument',[83] but that the really important reasons that justify these decisions must be found elsewhere. For instance, she claims that the judicial references to insurance 'can reasonably be seen as a shorthand for or evidence of the indeterminacy problem'.[84] That might be the case, but my point is that there is no need to look at the judicial references to insurance with suspicion from a theoretical point of view. On the contrary, they can be seen as an opportunity to correct the operation of tort law. Lord Denning's *Nettleship* case is illustrative in this respect.[85] The claimant was a friend of the defendant who agreed to give her some driving lessons. As a result of one of these lessons, he was injured. An important question raised by the case was to determine the standard of care that could be expected from the learner driver: is it the standard of an ordinary skilful driver, or is it rather a specific standard for inexperienced drivers? The case decided that even

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[80] Cane (n 61) 424. The following cases are usually provided as examples of Lord Denning's position: *Dorset Yacht Co Ltd v Home* Office [1969] 2 QB 412; *Nettleship v Weston* [1971] 2 QB 691; *Spartan Steel v Martin* [1973] QB 27; *Lamb* (n 14).

[81] Jonathan Morgan, 'Tort, Insurance and Incoherence' (2004) 67 Modern Law Review 384, 385.

[82] Eg *Gwilliam v West Hertfordshire NHS Trust* [2002] EWCA Civ 1041, [2003] QB 443; *Vowles v Evans* [2003] EWCA Civ 318, [2003] 1 WLR 1607.

[83] Stapleton (n 1) 833.

[84] ibid 830.

[85] *Nettleship* (n 80).

learner drivers are subject to the objective standard of care. It is difficult to understand this decision without making a reference to insurance. Lord Denning held:

> The high standard thus imposed by the judges is, I believe, largely the result of the policy of the Road Traffic Acts. Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can … Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her.[86]

It may be argued that this is just judicial rhetoric, and that there are other reasons behind insurance to justify this decision. But it seems difficult to morally justify the decision unless one recognises the existence of insurance. Without the existence of insurance, demanding learner drivers to drive according to the objective standard of care seems oxymoronic. Perhaps if we should not take into account the effects of insurance in tort law, learner drivers should only be expected to drive the best they can given their lack of skills. The High Court of Australia established this type of standard in *Cook v Cook*: the standard 'reasonably to be expected of an unqualified and inexperienced driver in the circumstances'.[87] However, more recently the High Court overturned *Cook*, establishing the objective standard of care for these cases. Kirby J made explicit that this decision was based on the existence of insurance:

> For this Court to overturn *Cook* and to substitute a single, uniform and objective standard as the criterion for the existence and ambit of the duty of care, owed by one motorist to third parties, a new legal ingredient is necessary. What is that ingredient that authorises and obliges this Court to adopt a different approach? In my opinion, it is the existence of compulsory motor vehicle third party insurance: a statutory phenomenon that has existed in the context of motor vehicle accidents in Australia for approximately sixty years… If such compulsory insurance were not part of the legal background to the expression of the applicable common law … it is extremely unlikely, in my view,

[86] ibid 699-700.

[87] (1986) 162 CLR 376 (High Court of Australia), 384 (Mason, Wilson, Deane and Dawson JJ).

> that the courts would impose on them liability, as in the case of the appellant's claim, sounding in millions of dollars.[88]

Again, I am not suggesting that tort law should be reduced to insurance and that judges should rely entirely on insurance companies to provide compensation to victims of wrongs. My argument is that we should not block considerations of insurance out of tort law because they are allegedly contrary to our moral principles of personal responsibility and corrective justice. I have argued in chapter IV that in a relevant sense tort law performs a distributive function. I argue here that this distributive function is connected with insurance, which allows correcting the distributive unfairness of tort law, or its 'regressive nature' as Keren-Paz calls it.[89] Recall the moral problem presented above (IV.6): why should justice require a poor football player to compensate the (somewhat extravagant) losses of another rich football player? Insurance helps to ameliorate this problem by distributing these losses among a broader pool of individuals.[90] Stapleton argues that these types of cases are 'ambushes' of tort liability that are kept by the law to a minimum. She holds therefore that there is no need to discuss insurance to solve these problems.[91] Even if that is the case however, I believe that the existence of this moral uneasiness is problematic for a theory of tort law. At least some reasons must be provided to show that there is a duty *in justice* to repair these losses.

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[88] *Imbree v McNeilly* (2008) 236 CLR 510 (High Court of Australia) [110-1].

[89] Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2007) 67.

[90] Some might be disappointed with this account of insurance, because it does not advance a patterned distribution of losses. There are two possible responses: first, I do not think that a theory of distributive justice needs to be patterned; and secondly, it is possible to argue that under this framework there is a pattern for distribution: each person pays (more or less) the same premium to insure.

[91] Stapleton (n 1) 829-30.

How could this correction of tort law be materialised? In my view, the case *Vowles v Evans*[92] is a good answer to this question. The case involved a serious injury suffered by a rugby player (Mr Vowles) who sued the referee of the match (Mr Evans) and the Welsh Rugby Union Ltd ("WRU") that appointed the referee of the match (vicariously liable). The claim was based on the fact that the referee breached a duty of care that he owed to the claimant, by allowing his team to replace a front row forward player with another player that was playing as a flanker. Morland J decided the case in the first instance in favour of the claimant.[93] The Court of Appeal upheld the decision. Morland J's judgement is particularly interesting for our purposes. He explicitly analyses the issue taking into account the availability of insurance:

> In my judgment when rugby is funded not only by gate receipts but also by lucrative television contracts I can see no reason why the Welsh Rugby Union should not insure itself and its referees against claims and the risk of a finding of a breach of duty of care by a referee … Amateur rugby players will be young men mostly with very limited income. Insurance cover for referees would be a cost spread across the whole game.[94]

The WRU criticised this statement in the Court of Appeal, claiming that it was not based on any evidence. They argued that the WRU was heavily in debt. Lord Phillips – who wrote the majority opinion of the Court of Appeal – did not accept this response, because WRU's statements neither were supported by any evidence. Furthermore, he added the following: 'We accept that the availability of insurance, both to players against the risk of injury and to referees against the risk of third party liability could bear on the policy question of whether it is fair, just and reasonable to impose a duty of care on referees'.[95] Again, without taking into account the existence

[92] *Vowles* (n 82).

[93] [2002] EWHC 2612 (QB).

[94] ibid [23].

[95] *Vowles* (n 82) [12].

of insurance, it seems very difficult to morally justify the decision. Imposing liability on a referee of an amateur rugby match seems to go too far, beyond what ordinary morality would demand. However, once the discussion is framed in terms of insurance, the outcome is easier to justify: the cost of insurance should be spread across the whole game.

Finally, we need to ask the reverse question: is there something to be *lost* with the existence of insurance in a theory of tort law? Certainly, when insurers pay on behalf of tortfeasors something is lost in the process. It was already noted that insurance is problematic for the apologetic message that tort remedies should communicate.[96] A situation in which a wrongdoer provides by herself full compensation to her victim is morally superior to another situation in which the wrongdoer provides full compensation through her insurance company. For in the first scenario the compensation provided carries a symbolic message that is lost in the second case. My suggestion is to argue that each legal system needs to make a choice on how to balance protecting the restorative framework of tort law (forbidding insurance, for example) with the distributive correction of insurance.

Under this framework, even though each particular tort system could provide a different answer to this challenge, it seems to me that in the case of many torts, material compensation is enough and insurance should be allowed, encouraged, and even in some cases required. Examples of these three types of cases have been provided along this chapter. First, a case in which tort law could *allow* injurers to insure against third party liability is *Vowles*. In a case like this, our main concern is not to restore a moral relationship between the defendants (the referee or the WRU) and the claimant; rather, we care about who should bear the risks of suffering an injury in

[96] See above n 22 and n 46.

a rugby match when a referee's duty of care has been breached. Secondly, tort law *encourages* individuals to insure against first party liability for purely economic losses: as a general rule, tort systems (in common law countries) will not compensate these losses. Hence, Lord Denning was right when he claimed that in this type of cases 'most people are content to take the risk on themselves'.[97] Again, I cannot see strong reasons to suggest that a restorative remedy should be in place in a case of unexpected cutting of the electricity supply.

And thirdly, tort law *requires* individuals to insure against third party liability in cases of compulsory insurance, with the characteristic examples of motor insurance and employer's liability insurance. It was argued above (V.3) that in these cases it is justified to force people to insure against third party liability, since they involve activities that will normally involve injuries to persons. Hence, it is justifiable to require insurance to those who want to engage in these activities. Moreover, insurance in these cases corrects the disproportion between the defendant's gains (for instance, her momentary careless driving) and the victim's losses. Insurance provides a practical solution to the problem of gains and losses of corrective justice (I.4). Additionally, the interaction between tort law and compulsory insurance schemes retains at least *some* of the symbolic meaning of the tort process: tort claims are still brought against the insurer under the tortfeasor's name and by the insurer under the claimant's name, and the litigation usually involves determining whether the defendant and the claimant were negligent or not.[98]

However, tort systems must draw a line somewhere in which tortfeasors should not be allowed to insure against third party liability. It is my contention that this line

[97] *Spartan Steel* (n 80) 38.

[98] See above n 31.

should be drawn in cases of intentional wrongdoing.[99] Of course, victims should be allowed to protect themselves by first-party insurance against intentional wrongdoing. But allowing third-party insurance for intentional wrongdoing is problematic for the framework of restorative justice that was discussed in chapters II and III. The broader concept of the reparative mandate of corrective justice that was developed in these chapters allows distinguishing between wrongs caused by mere negligence and intentional wrongdoing. Cane disagrees. He argues that '[f]rom the claimant's point of view, the harm to be repaired is the same regardless whether it was caused intentionally, recklessly, negligently or without fault'.[100] The truth of this position however depends on the meaning of the term 'repair'. In chapter III I have suggested that the mandate of corrective justice can be formulated in abstract terms, demanding to restore a previous condition of equality. Under this framework, repairing wrongful losses is more than just providing material compensation to victims; it requires providing the next-best thing to the wrong not having occurred in the first place. I have argued that this task is connected with the ideal of moral reconciliation, especially in cases of intentional wrongdoing. Insurance can pose an obstacle to this process. Hence, the nature of the wrong makes the difference: a victim of negligence requires a different remedy than a victim of intentional wrongdoing.

Relatedly, exemplary (or punitive) damages should not be subject to third-party liability, for insurance precludes its expressive meaning. Of course, the insurability of exemplary damages depends on how these awards are conceived. For instance, from the perspective of deterrence, Baker argues that insurance companies

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[99] Insurance for this type of wrongdoing is also problematic for other reasons, such as deterrence: 'insurance for intentional harm poses a clearer insurance-deterrence tradeoff than insurance for inadvertent harm'. Tom Baker, 'Reconsidering Insurance for Punitive Damages' (1998) 211 Wisconsin Law Review 101, 120.

[100] Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 247.

are in the best position to uphold the deterrent function of exemplary damages, because they have financial incentives to control moral hazard and adverse selection 'through the use of underwriting and insurance contract provisions'.[101] However, from the perspective of a retributive rationale of exemplary damages, insurance is problematic. As Baker acknowledges, 'the goals of insurance companies do not mesh as neatly with the retribution objectives of tort law as they do with the prevention objectives of tort law'.[102] Hence, it seems that the case against the insurability of exemplary damages is stronger when the emphasis is put on their retributive rationale.

The question then is whether courts, based on the retributive rationale of exemplary damages, should forbid that insurers pay these awards on the defendant's behalf. In *Lamb v Cotogno*,[103] the High Court of Australia held that exemplary damages could be awarded even in cases where the tortfeasor is under a compulsory insurance scheme to pay them. The court refused to distinguish between voluntary and compulsory insurance schemes; in both cases claimants should be granted exemplary awards. Similarly, in the English case *Lancashire County Council v Municipal Mutual Insurance Ltd*,[104] the Court of Appeal held that employers' liability insurance coverage extended to exemplary damages. Simon Brown LJ argued that it would be inappropriate for the court to 'create and impose a rule of public policy in English law refusing to permit indemnity against exemplary damages awards'.[105] This decision was based on two main reasons. The first one was that regardless of its insurability, 'an exemplary damages award is still likely to have a punitive effect', in terms of

[101] Baker (n 99) 127.

[102] ibid 128.

[103] (1988) 74 ALR 188.

[104] [1997] QB 897.

[105] ibid 909.

paying deductibles and higher premiums in the future.[106] It is true that these consequences may follow for the defendant. However, the same consequences usually follow from insurance claims. For instance, even a non-negligent driver involved in a collision will have to pay a deductible if her insurance contract establishes a deductible, and she might also have to pay higher premiums in the future. If both compensatory and exemplary damages awards provide these punitive effects, what is the point then to award exemplary damages?

The second reason for the Court of Appeal was that courts 'should be wary of minting new rules of public policy when the legislature has not done so', especially taking into account that the issue was being discussed by the Law Commission at the time the decision was made.[107] Indeed, the Law Commission only a few months later suggested that insurability of exemplary damages should be possible, because 'the insurance industry, in controlling the availability and cost of such insurance, is in a position to exert significant pressure on present or potential insured parties'.[108] From a retributive rationale, this is an unfortunate conclusion. As was observed above, it may well be that insurance is compatible with the deterrence rationale of exemplary damages; however, the conclusion seems difficult to conciliate with the retributive (or what I will call the restorative) framework of exemplary damages, which should not allow insurance for these awards. As Morgan notes, the Law Commission dismissed this argument 'with surprising celerity',[109] and did not 'engage with the scholarly

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[106] ibid.

[107] ibid.

[108] Law Commission for England and Wales, 'Aggravated, Exemplary and Restitutionary Damages', Law Com No 247 (16 December 1997), 5.238.

[109] Jonathan Morgan, 'Reforming Punitive Damages in English Law' in Lotte Meurkens and Emily Norden (eds), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia 2012) 201.

literature'.[110] The case for the insurability of exemplary damages is weak from a retributive point of view. Therefore, I argue that the line must be drawn here: exemplary damages should not be subject to third party insurance.[111]

In sum, the chapter has shown that a justificatory theory of tort law has much to gain from insurance. In V.2 it has been argued that who pays is morally important, and therefore, that moral theories of tort law cannot ignore the existence of insurance. It was also shown that the law does not ignore the existence of insurance, requiring people to insure in order to engage in some activities, and in other cases encouraging people to do so. It was argued that compulsory and voluntary insurance schemes distribute losses among larger pools of individuals than the victim and her injurer only, helping to ameliorate the moral uneasiness of tort law. However, something is also lost with the effect of insurance. A situation in which a wrongdoer pays by herself is morally superior to another in which an insurer pays on the wrongdoer's behalf. Each tort system needs to balance these values. I have suggested here that there is at least one line that must be clearly drawn: third party insurance should not be available for intentional wrongdoing and to pay exemplary damages awards. I do not wish to argue that courts should enforce this limit 'with a sudden burst of common law creativity';[112] rather, my point is that insurability of intentional torts and exemplary damages is not morally desirable, and legal systems should find their way to restrict the coverage.

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[110] ibid 202.

[111] The argument could also be expanded in English law to aggravated damages as well, in the sense that they also share a restorative rationale (VI.5). By contrast, those who think that aggravated damages are compensatory might answer the question differently. In other jurisdictions, these damages should be included under the punitive head of damages; they should not be therefore subject to third party insurance.

[112] *Lancashire* (n 104) 909 (Simon Brown LJ).

VI
Remedies

VI.1 Introduction

In the previous chapters I have suggested a justificatory model of tort law based on the principles of corrective, restorative and distributive justice. The general objective of this chapter is to explore the remedies that this justificatory model requires in tort law. In chapters II and III it was argued that it is possible to understand tort law as a restorative practice aiming at the moral reconciliation of the parties, whereas in chapters IV and V it was shown that distributive justice plays an important role in tort law, providing the mechanism of insurance to correct its distributive unfairness. Under this framework, tort remedies should comply with the 'next-best formula', which requires putting the victim in the next-best position as to the wrong not having occurred in the first place.[1] I have argued in chapters II and III that this task involves providing both symbolic and non-symbolic remedies to tort victims. In this chapter I will first examine the paradigmatic case of non-symbolic remedies, namely compensatory damages. The challenge here is to justify the measure of full compensatory damages as the default rule in tort law, as opposed to an alternative measure such as Goldberg's 'fair compensation'.[2] I will argue that the justificatory model of the thesis based on the gains and losses of the parties is able to accommodate successfully the full compensatory measure of tort damages.

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[1] Andrew Burrows, *Remedies for Torts and Breach of Contract* (OUP 2004, 3rd edn) 33; Robert Stevens, *Torts and Rights* (OUP 2007) 326; John Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 37.

[2] John CP Goldberg, 'Two Conceptions of Tort Damages: Fair v. Full Compensation' (2006) 55 DePaul Law Review 435. Of course, claiming that the full measure of compensatory damages is not a 'fair' measure seems question begging.

The chapter then will seek to fill the third gap of corrective justice – the diversity of remedies problem (I.6) –, discussing the existence of 'unorthodox' remedies. It will be argued that most of these remedies have a symbolic feature. Hence, they can be justified under the restorative framework of the thesis. Apologies in the tort of defamation and nominal damages will be discussed as the paradigmatic cases of symbolic remedies (although the legal formulation of the offer of amends is a defence rather than a proper remedy). The chapter will also discuss non-pecuniary damages. Despite the fact that some of these awards can be justified under a compensatory rationale, it will be emphasised that the awards deal with immaterial harms that are incommensurable, and that in many cases the compensatory rationale is inadequate. It will be argued that the restorative framework of the thesis can justify this symbolic feature of non-pecuniary damages.

The chapter will also discuss the existence of aggravated and exemplary damages. The common characteristic that all these types of damages share is the requirement of intention or malicious wrongdoing. I will claim that these damages can be justified under the restorative framework of the 'next-best formula' of corrective justice, as long as claimants are not put in a *better position* than if the wrong had never occurred. The model of the thesis however leaves open the possibility of justifying exemplary damages on different grounds, such as deterrence. Finally, two additional cases will be discussed. First, regarding gain-based damages, it will be argued that the next-best formula can justify the existence of licence fees damages for proprietary torts. And secondly, the chapter will discuss injunctions. It will be argued that the remedial structure of corrective justice can justify some injunctions and compensatory damages in lieu of injunctions, but the model cannot justify injunctions that have a

prospective nature. Again, the thesis leaves enough conceptual space to justify these remedies under a different set of principles.

VI.2 The Full Compensatory Measure of Damages

Compensatory awards of damages are the default remedies of tort law as of right.[3] This feature is adequately captured by corrective justice theories that can justify the moral duty to compensate materialised with the award of damages. Indeed, as Gardner notes, putting too much emphasis on the other (unorthodox) tort remedies might be misleading.[4] For instance, why would a legal system aimed at providing victims with the right to redress require defendants to fully compensate their losses? If the attention is drawn to remedies such as injunctions or punitive damages, the risk then is to be unable to explain the fact that compensatory damages is the default remedy in tort law. Is this problematic for the justificatory model of the thesis? Does the abstraction of the corrective justice mandate come with the risk of losing explanatory power of the full compensatory measure of damages? I will argue in this section that the justificatory model of the thesis accommodates well the full compensatory measure, without requiring an alternative account of a *fair* compensatory measure.

How do tort theorists usually justify the full compensatory measure of damages? Weinrib's theory of corrective justice can provide us a starting point. As was seen above (I.4), he argues that the correlativity of gains and losses required by corrective justice can be satisfied in normative terms, with the tortfeasor's breach of a

[3] I use the idea of compensatory damages as a default remedy in the sense of Gardner's argument: reparative damages 'is the only remedy against a tortfeasor that the successful plaintiff enjoys *as of right*'. John Gardner, 'Torts and Other Wrongs' (2011) 39 Florida State University Law Review 43, 53.

[4] ibid 55.

duty and the violation of the victim's right. He must however introduce the element of factual losses at some point. Otherwise, how could the model satisfactorily explain the full compensatory measure of damages? Weinrib provides the following explanation:

> The normative aspect of gain and loss, that is, the correlativity of right and duty, is the vehicle for assessing the legitimacy of transactional gains or losses in their factual aspect. When the plaintiff claims compensation for a factual loss, the issue is whether by causing a deterioration in the condition of the plaintiff's holdings the defendant has breached a duty correlative to the plaintiff's right. If so, the defendant *is required to undo the consequences of his or her wrongful act by making good the factual loss*.[5]

Weinrib's move here is not straightforward. He disentangles first a normative understanding of the gains and losses of corrective justice from a material conception, arguing that corrective justice is not about welfare: 'What matters is the correlativity of normative gain and loss'.[6] But welfare now *does* matter, in the sense that *undoing* the injustice committed to the victim seems to require compensating the *factual* losses that she suffered as a consequence of the wrong. Weinrib does not explain however why this is possible or necessary. Why should we only look at losses in a normative sense when we justify the duty of corrective justice, but then look at factual losses when we determine the adequate remedy? Why are factual losses the proper measure to determine the remedy that is required?[7] It seems to me that Weinrib needs to show that compensating all the victim's losses is the best way to undo the injustice.[8]

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[5] Ernest J Weinrib, *The Idea of Private Law* (revised edn, OUP 2012) 129. Emphasis added.

[6] ibid 119.

[7] Edelman makes a similar objection to Weinrib in James Edelman, 'In Defence of Exemplary Damages' in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing 2009) 239-41.

[8] In my view, the same explanation needs to be provided by Stevens' rights-based account of tort remedies. He distinguishes between 'damages awarded as a substitute for the right infringed and consequential damages as compensation for loss to the claimant, or gain to the defendant, consequent upon this infringement'. Stevens (n 1) 60. Stevens needs to explain how we can move from the normative sphere of damages (substitutive damages) to the factual sphere of gains and losses (consequential damages).

Starting also from a Kantian-based account of rights, Ripstein seeks to answer this challenge. He defines first the primary rights protected by tort law in terms of 'each person's means against other persons', securing that each person uses their own means with a reciprocal limit: 'You must use your means in a way that is consistent with everyone else being able to use what is, in turn, theirs'.[9] As a result, the remedy in Ripstein's account of tort law takes the form of some kind of restitution rather than compensation: 'Damages are not awarded to compensate for the awful things that people do to each other, but rather to make it as if it the persons had the means that they would have had if others had not wrongfully deprived them of them'.[10] Tort remedies therefore seek to *give the victims back* the means that were deprived by the tortfeasor. But when these means no longer exist – such as losing an arm –, Ripstein holds that money provides victims with *almost* the same range of options that they had prior to the wrong. Accordingly, compensatory damages take the form of a restitutionary award: 'damages do not restore or correct anything. Compensatory damages give you back the means you had'.[11]

Ripstein's restitutionary formulation of compensatory damages is an interesting solution to the challenge. Two points however must be made. First, I have argued above that the conception of tort law as a restitutionary mechanism is problematic (I.3). Ripstein himself acknowledges that it is not possible to place victims on the same indifference curve that they would have been had the wrong not occurred in the first place: most people would choose not to lose an arm at all over receiving

[9] Arthur Ripstein, 'As If it Had Never Happened' (2007) 48 William and Mary Law Review 1957, 1966. More recently, Ripstein has formulated this mandate in the following terms: 'You cannot use any other person's means without his or her authorisation, and you can only use your means in ways that do not characteristically damage or destroy means belonging to another'. Arthur Ripstein, 'Means and Ends' (2015) 6 Jurisprudence 1, 12.

[10] Ripstein (n 9) 1968.

[11] ibid 1984.

compensatory damages for losing an arm.[12] He seems to think that the caveat 'almost' can do the work here: compensatory damages should get the victim's means back *almost* as if the wrong would not have occurred in the first place. With the caveat, the mandate resembles the 'next-best formula' of corrective justice. The difference is that in Ripstein's formula compensatory damages are restitutionary: they do not repair, but rather give victims (almost) something back. But how could the formula operate if it is no longer possible to get the means back? It seems to me that in these cases (i.e. in tort cases) Ripstein's formula can only be a metaphor. If it is no longer possible to reinstate things the way they should have been, why not then explicitly argue that compensatory damages provide a second-best thing to the wrong not having occurred?[13]

A second point is that Ripstein assumes that giving the victim's means back requires only material compensation. He explicitly leaves out of the formula damages for pain and suffering.[14] I will argue below that awarding this type of damages can be justified (VI.4). It is worth mentioning here though that leaving these awards out of the explanation is difficult to reconcile with the case law.[15] But other remedies are left out of the explanation as well. For instance, the model cannot explain why apologies are deemed an adequate remedy in the tort of defamation.[16] Certainly, when a

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[12] 'Compensation does not aspire to place a person on the same indifference curve she would have been on had she not been injured'. ibid.

[13] To some extent, Hershovitz is right when he claims that corrective justice theories are full of caveats or qualifiers. Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2011) 39 Florida State University Law Review 107, 116. The point is that we need to be aware of the fact that in most tort cases it is not possible to reinstate things as they were before or should have been.

[14] 'Your happiness, considered as such, is not among the means you use to set and pursue your purposes, even if, for example, your mental health could be described as something you use in that way'. Ripstein (n 9) 1984.

[15] Eg *Jacob & Youngs v Kent* 230 NY 289 (Court of Appeals of New York); *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL).

[16] See below VI.3.

defendant apologises to the claimant she is not giving her something back, even if we say that, in a metaphorical sense, she *owed* her an apology. But the 'giving something back' language is misleading here; the point is that the defendant's gesture is repairing the wrong, not that she is giving something back to the claimant.[17] Moreover, Ripstein also leaves out of his formula other awards such as punitive or aggravated damages. The problem is that he has not shown why the restitution of means is required and not something else. And even leaving aside these problems, Ripstein's 'giving something back' metaphor or ideal does not seem to offer a substantively different account of remedies to the traditional 'next-best' formula of remedies used by courts and corrective justice theorists alike. In this sense, claiming that compensatory damages give the victims 'something back as if the wrong had never happened' seems to add little to the argument that compensatory damages seek to put the claimant *back* in the position she would have been had the wrong not occurred.

It is my contention that the 'next-best' formula of corrective justice can meet the challenge of solving the problems discussed above. It is true that the formula is more abstract than Aristotle's arithmetical formula of corrective justice. Nevertheless, the 'next-best' formula retains the remedial nature of corrective justice keeping in sight the material losses suffered by the victim. The Aristotelian or classic model of corrective justice can easily justify the measure of full compensatory damages because the emphasis is put on the gains and losses of the parties. Under this framework, making victims whole is necessary in order to correct or restore equality between the parties. In chapter I we learnt that this classic model needs to be reformulated. The

[17] Another problem with Ripstein's conception of remedies is that is not able to accommodate the truth that was shown above in V.2: who pays for tort damages is morally important. If tort remedies are restitutionary, then it should follow that who pays is morally irrelevant.

suggestion is to reformulate the mandate of corrective justice in terms of providing victims with the next-best thing as to the wrong not having occurred.

Under the 'next-best' formula, the full compensatory measure of damages is justified because it seeks to provide victims with the next-best thing to the wrong not having occurred in the first place. The formula clearly expresses that the best option for the victim would be for the wrong not to have occurred at all. The point therefore is not giving victims something back; rather, the point is to provide them the second-best option, since it is no longer possible to undo the wrong. As was noted above (V.2), perhaps tort law will only be able to provide the third or even fourth next-best thing to victims. Tort law however should aim at getting closest to the best option. The formula applies Gardner's 'continuity thesis' of corrective justice, according to which the breach of a primary obligation calls for 'the closest to full satisfaction that is still available'.[18] The continuity thesis nicely bridges tort law's secondary obligation to pay damages with the secondary obligation in contract law. In the case of the latter, the non-performance or defective performance of the contract calls for the next-best thing as to the breach of contract not having occurred in the first place.[19]

Legal systems certainly have some flexibility to accomplish the ideal of the continuity thesis. For instance, common law systems seem to prefer the payment of damages to specific performance as a general remedy for a breach of contract, whereas civil law systems tend to prefer specific performance.[20] The continuity thesis of corrective justice should regard the specific performance of the contract as the

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[18] Gardner (n 1) 33.

[19] Interestingly, it has been ruled that under special circumstances, the law should not seek the second-best response (specific performance), but rather a third-best solution (damages). *Patel v Ali* [1984] 2 WLR 960 (Chancery Division).

[20] Even though it has been noted that the tendency has been changing in England during the last century. Burrows (n 1) 458 (claiming that 'specific performance may be more freely available now than it was in the past').

response closest to the full satisfaction of the contract,[21] regardless that in many cases it might not be possible for the law to provide the second-best response due to other reasons – such as an excessive interference with personal freedom.[22] In the case of tort law, legal systems also provide an array of responses to this ideal, but they tend to share the endorsement of the full compensatory measure of damages.[23] It seems to me that corrective justice and its continuity thesis accommodates this measure better than rights-based accounts. For the reparative nature of corrective justice allows us to remember that the aim of an award of damages is to repair the wrongful losses suffered by the victim. Whereas a rights-theorist cannot justify the full compensatory measure of damages because it is not possible to explain how to move from the infringement of a right to consequential losses,[24] the corrective justice theorist can easily justify the full compensatory measure because her emphasis is on the wrongful losses suffered by the victim that need to be corrected. This is why I have stressed above (I.4) that gains and losses are important for a theory of corrective justice.

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[21] A common lawyer might say that specific performance is not the second-best thing as to the breach not having occurred at all; it is just simply the performance of the contract. The point however is that at the moment specific performance is granted, a breach has already occurred. Despite that the contract will be performed as a result of the court order, it is still true that the best thing for the claimant would have been that no breach would have occurred at all. Hence, specific performance is also a second-best option. As Winterton and Wilmot-Smith note, 'the performance obtained following an order for specific performance is also a substitute for actual performance because the performance is rendered late'. David Winterton and Frederick Wilmot-Smith, 'Steering a Course on Contract Damages and Failure of Consideration' (2012) 128 Law Quarterly Law Review 23, 27.

[22] Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing 2003) 99 (arguing that even though specific performance may be 'the remedy that best supports the practice's instrumental function', the law's reluctance to award it is justified because it 'represents an excessive interference with personal freedom').

[23] In this sense, see PEL/*von Bar*, Liab Dam, Chapter 6, Article 6:101: 'Reparation is to reinstate the person suffering the legally relevant damage in the position that person would have been in had the legally relevant damage not occurred'.

[24] For instance, Stevens claims that '[i]n theory, the law could adopt almost any secondary obligation as a response to the wrong. A trespasser could have his hands cut off, or a slanderer could be required to be locked in stocks and publicly humiliated'. Stevens (n 1) 59.

The 'next-best' formula of compensatory damages has been widely accepted by courts. In England, Lord Blackburn's statement in *Livingstone v Rawyards Coal Co* is the most famous endorsement of the formula.[25] His Lordship claims that the measure of damages is 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'. Courts have applied a similar formula in the case of contracts.[26] As Burrows points out, both courts and tort scholars accept 'without dispute that the compensatory aim is and should be to put the claimant into as good a position as if no tort had been committed'.[27] The exception is the tort of misrepresentation, in cases of negligent misrepresentation or failure to provide information. In these cases however, the problem is not that the 'next-best formula' is inadequate; the point is rather to determine how the test should be applied. The question is whether the test requires putting the claimant in the same position as if she would have received a competent advice,[28] or in the same position as if she had received no advice at all.[29] This is not the place for a thorough discussion of the issue. For the task at hand, it is important to

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[25] (1880) 5 App Cas 25, 39. Other tort systems make similar formulations of the principle. See for example the first sentence of § 249 of the BGB: 'A person who is obliged to make reparation for harm must restore the situation which would have existed if the circumstances giving rise to the obligation to make reparation had not occurred'. Walter van Gerwen and others, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart Publishing 2000) 753.

[26] *Robinson v Harman* (1848) 1 Exch 850, 855 (Parke B): 'The rule of the common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed'.

[27] Burrows (n 1) 38-9.

[28] The leading case that suggests this approach is *South Australia Asset Management Corpn v York Montague Ltd* (SAAMCO) [1997] AC 191 (HL).

[29] This approach can be found regarding fraudulent misrepresentation in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, and was later followed by *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 (HL). In the case of negligent misrepresentation, *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465 (HL) and *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 are the leading cases.

emphasise that the application of the 'next-best formula' should not place claimants in a *better* position as if no statement or advice would have been given at all.[30] The point is that the compensatory remedy should not be used as an instrument to avoid the consequences of a bad bargain.

Finally, it is necessary to justify the full compensatory measure over alternative measures such as a *fair* compensatory measure of damages. Certainly, the fit of the full compensatory measure with existing tort systems is not a conclusive argument for the framework of this thesis (0.4). However, fitting with existing tort law is not the only reason why the full compensatory measure of damages is justified. Goldberg suggests that the fair compensation model of damages is superior to the model based on full compensation for two main reasons.[31] First, he argues that the fair compensatory model better accommodates the role of punitive damages, whereas the full compensation model regards punitive or exemplary awards as anomalies, for the fair compensation model 'there is nothing necessarily odd (or un-tort-like) in courts sometimes recognizing' these awards.[32] I will argue below (VI.4) that the full compensation conception of damages can successfully accommodate the existence of

[30] Accordingly, the 'next-best formula' is applied differently in cases of torts and breach of contract. As Lord Scott points out, '[i]f the defendant was under a contractual obligation to give competent advice, the claimant is entitled to be put in the position he would have been in if competent advice had been given. But if the defendant owes no contractual obligation to the claimant and the case is brought in tort, the claimant must be put in the position he would have been in if no advice had been given at all'. *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309, [130]. In my view, not putting claimants in a *better* position justifies the different formulation of the 'next-best' solution for cases in which there is a breach of contract. For if there is a contract, the response closest to its full satisfaction is the diligent performance of the primary obligation (giving competent advice). In such a case, the remedy does not put the claimant in a better position as if the contract would not have been breached, because the claimant is entitled to the diligent performance of the contract. By contrast, if there is no contract the remedy cannot put the claimant in a better position as if the tort would not have occurred.

[31] In this discussion I will ignore a third argument, which is the historical point that Goldberg makes in the paper. The reason for this is that is not my concern to determine whether the full compensatory measure of damages was historically endorsed by courts from the beginning or not.

[32] Goldberg (n 2) 466.

punitive damages. But Goldberg also adds that the fair compensatory measure is able to accommodate jurors' informal adjustments of damage awards downward from the making victims whole 'to reflect what they take to be the equities of a given case'.[33]

A first point to be made is that Goldberg's use of the term 'fair' is not very helpful. The whole point is to discuss which measure of compensatory damages is fair or just in cases of tort law. It seems difficult to deny that in many cases full compensatory damages is a fair measure, and Goldberg does not deny it. Some cases however might lead to distributively unfair results (IV.6). The key question is how to deal with the problem. Goldberg's suggestion is unhelpful to solve this problem. Some jurisdictions – such as Switzerland[34] and Holland[35] – allow judges in exceptional cases to correct the compensatory measure by reducing the award of damages, and the tendency was recognised in von Bar's Principles of European Law.[36] But the provisions do not endorse a fair measure of compensatory damages as a general rule; they rather allow judges to adjust the award in exceptional circumstances. For instance, in the Dutch Civil Code the corrective mechanism requires that a full award of damages 'would lead to *obviously unacceptable results*',[37] in the Swiss Civil Code it is

[33] ibid.

[34] Swiss Civil Code (Part Five: The Code of Obligations) (30 March 1911) art 44 (2): 'The court may also reduce the compensation award in cases in which the loss or damage was caused neither wilfully nor by gross negligence and where payment of such compensation would leave the liable party in financial hardship'.

[35] Dutch Civil Code, art 6:109(1): 'The court may reduce the amount of an obligation to pay for damages if a full award of damages would lead to obviously unacceptable results in view of the circumstances of the given situation, among which the nature of the liability, the legal relationship between parties and their financial resources'.

[36] PEL/von Bar, Liab. Dam, art 6:202: 'Where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it'.

[37] Swiss Civil Code, art 44 (2) (n 35). Emphasis added.

required that full compensation 'would leave the liable party in *financial hardship*',[38] and in von Bar's Principles of European Law the judicial adjustment is applicable only if 'liability in full would be *disproportionate* to the accountability of the person causing the damage or the extent of the damage or the means to prevent it'.[39] Hence, the provisions seem to be correcting the unfair consequences of the full compensatory model of damages, but they do not necessarily endorse a different model or measure for compensatory damages.

Relatedly, there are other mechanisms to correct the unfair results of the full compensatory measure of damages that are more helpful than Goldberg's 'fair' measure.[40] Take contributory negligence. At first sight, making victims whole might seem unfair in cases where the victim's negligence was also a cause for the losses she suffered. The old 'all-or-nothing' approach of the common law produced this unfair result.[41] The doctrine of contributory negligence corrects this unfairness, posing a limit to the full compensation ideal: victims that were also negligent will not be made whole. The same applies with regards to the duty to mitigate damages: again, victims who failed to mitigate their losses will not be fully compensated.[42] Both of these

[38] Dutch Civil Code, art 6:109(1) (n 34). Emphasis added.

[39] PEL/von Bar, Liab. Dam, art 6:202 (n 36). Emphasis added.

[40] Indeed, Goldberg acknowledges on a note at the outset of the paper that doctrines such as comparative fault and the failure to mitigate damages are left aside of the scope of his article. Goldberg (n 2) 435 n 1.

[41] Tony Weir, 'ALL or Nothing?' (2004) 78 Tulane Law Review 511. For some however, the old 'analogue' rule of contributory negligence was not unfair. See Robert Stevens, 'Should Contributory Fault be Analogue or Digital?' in Andrew Dyson and others (eds), *Defences in Tort* (Hart Publishing 2015).

[42] *British Westinghouse Electric v Underground Electric Rlys Co of London Ltd* [1912] AC 673 (HL), 689 (Viscount Haldane LC) (arguing that the duty to mitigate 'imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps').

doctrines limit the full compensatory measure of damages without necessarily endorsing a different model for compensatory damages.[43]

Finally, the justificatory model of this thesis is also able to accommodate the full compensatory measure of damages with its conception of insurance as a distributive mechanism that reduces the unfairness of tort law (V.5). In chapter V we learnt that insurance is a morally justified practice, for it allows spreading the burden of losses among a wider universe of possible tortfeasors. It was argued that this moral conception of insurance corrects the distributive unfairness of tort law. It follows that the justificatory model of the thesis does not need a different measure of compensatory damages; it sits well with the full compensatory measure because as long as in modern tort systems insurance is available (and in some cases (V.3) mandated), the (eventual) unfairness of the full compensatory measure is reduced or at least moderated.

VI.3 Nominal Damages

Nominal damages are awarded in cases where the claimant's legal rights have been infringed, but she has suffered no loss. Hence, they are available only when compensatory damages are unavailable, for torts that are actionable per se. For instance, in a trespass to land case in which the claimant's property has not suffered any material loss as a consequence of the trespass, the claimant may still be entitled to an award of nominal damages. The fact that nominal damages do not seek to compensate the claimant's losses seems to indicate that the remedy is not compensatory. Is it possible however to conceive nominal damages as a compensatory remedy? It is certainly possible to regard these damages as compensatory in the

[43] This explains why these doctrines (among others) are usually mentioned in textbooks as limits to compensatory damages. See eg Burrows (n 1) 73 ff and Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), 101 ff and 249 ff.

following sense: awards of nominal damages may represent the court's attempt to provide compensatory damages when it is not possible to value the infringement of the claimant's right. In this sense, the problem is not that the claimant has not suffered any losses; rather, the problem is that it is very difficult for a court to assess the claimant's losses. Without necessarily arguing that these damages are non-compensatory, my aim here is to emphasise the symbolic meaning of nominal damages, as a means to communicate the infringement of the claimant's rights. Lord Halsbury LC's opinion in *The Mediana* provides a good starting point:

> 'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.[44]

This depiction of nominal damages reveals a tension. On one hand, Lord Halsbury's definition suggests that nominal damages should be awarded in cases where there is *injuria sine damnum*, i.e. cases in which a claimant's legal right was infringed ('there is an infraction of a legal right') but no losses were suffered as a consequence of the infringement ('you have negatived anything like real damage'); on the other hand however, it seems that nominal damages should be awarded in all cases of breach of contract and torts, for in all of these cases the claimant's legal rights have been violated. The latter approach would support a rights-based account of remedies. For instance, an award of nominal damages can undo the injustice in Weinrib's terms, restoring the balance between the *normative* gains and losses of the parties. But the problem is that in practice, nominal damages are not awarded in all cases in addition to compensatory damages. Stevens seeks to solve this problem. He holds that

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[44] *The Owners of the Steamship 'Mediana' v The Owners, Master and Crew of the Lightship 'Comet' (The Mediana)* [1900] AC 113, 116 (HL).

technically courts always award what he calls 'substitutive damages', which reflect the infringement of the claimant's rights.[45] But for Stevens substitutive damages and nominal damages are not interchangeable terms. In some sense, substitutive damages should take the form of nominal damages: 'Damages are awarded even if there is no loss to the claimant or gain to the defendant consequent upon the infringement of the right'.[46] He later adds however that 'in most cases the value attached to the right is precisely the same as the loss suffered, usually financial, by the claimant'.[47] According to Stevens, in these cases substitutive damages take the form of full compensation of losses, but the claimant is not entitled to an additional award. There is also a mismatch between nominal damages and Stevens' substitutive damages in how they are assessed: whereas nominal damages are small sums of money (usually £5 or £10) that represent the violation of the claimant's rights, substitutive damages are also assessed objectively 'save where the infringement is particularly egregious'.[48] Accordingly, substitutive damages justify (and even demand for) awarding a substantive amount under the heading of *vindicatory damages* to vindicate the claimant's rights when an important right has been violated.[49] However, the Supreme Court has recently rejected vindicatory damages in *R. (on the application of Lumba (Congo)) v Secretary*

[45] Stevens (n 1) 60. See above VI.2 n 8.

[46] Stevens (n 1) 60. He later suggests that '[n]ominal damages should be awarded where the right is infringed in an insignificant way'. ibid 84. The point is why nominal damages should only be available when the rights have been infringed in an insignificant way.

[47] ibid 61.

[48] ibid 60.

[49] See *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328 [19] (Lord Nicholls): 'The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches'.

of State for the Home Department.[50] The decision contained emphatic rejections of vindicatory damages.[51]

The traditional approach to nominal damages seems to be more promising. Under this approach, nominal damages are awarded *only* in cases of *injuria sine damno*.[52] Accordingly, nominal damages should be awarded in the case of torts actionable *per se*, i.e. torts that do not require proof of losses in order to be actionable. As Lord Halsbury LC pointed out, nominal damages is a technical term to designate the court's attempt to monetise the infringement of the claimant's rights, despite the fact that the infringement did not cause her any losses. *Constantine v Imperial London Hotels*[53] is usually cited as a characteristic case in which nominal damages were awarded. In *Constantine*, the defendants unjustifiably refused to offer accommodation in one of their hotels to the claimant, who was a well-known cricketer. The claimant did not suffer any loss as a consequence of the wrong because he was offered accommodation elsewhere. The court however awarded him the sum of five guineas as nominal damages. Today, we would regard this sum (equivalent to £100) as indicative of a small sum of compensatory damages rather than a proper sum for nominal damages.[54] If that were indeed the case, it would mean that the court in *Constantine* thought that the claimant *did* suffer losses that needed to be compensated with a substantive award of damages.

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[50] [2011] UKSC 12, [2012] 1 AC 245.

[51] For instance, Lord Dyson argued that there is 'no justification for letting such an unruly horse [vindicatory damages] loose on our law' (ibid [101]), and Lord Collins concluded that he did not 'consider that the concept of vindicatory damages should be introduced into the law of tort' (ibid [232]).

[52] Despite the fact that some courts might still be reluctant to award nominal damages even in cases where there was a violation of a right (the *injuria*). See eg *Pagnan & Fratelli v Corbisa Industrial Agropacuaria* [1970] 1 WLR 1306 (CA).

[53] [1944] KB 693.

[54] Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) 690 n 17.

How could this conception of nominal damages fit into the justificatory model of the thesis? Recall that the model requires a remedy that is able to put the claimant in the closest position to the wrong not having occurred in the first place. If the claimant suffered losses as a consequence of the wrong, it was argued above (VI.2) that the closest position is to fully compensate the claimant's losses. When no losses have been caused however, a response might still be needed. Most civil law systems do not provide a response in these cases (where torts are not actionable without damage).[55] Common law systems provide a response in terms of nominal damages. One reason to support this response is to argue that '[e]very violation of a right imports damage'.[56] This argument supports the conception of nominal damages as a compensatory remedy. However, the approach seems fictional,[57] and it does not explain why claimants who are entitled to an award of compensatory damages are not also entitled to an additional award of nominal damages. In my view, nominal damages can be justified as a symbolic response that the law requires in the case of some torts. In practical terms, nominal damages allow claimants to set the record straight, establishing publicly that the defendant committed the wrong.[58] This could be particularly interesting for defamation cases (even though liability in these cases does not necessarily indicate that the defendant's statement was untrue). Similarly, it might be important for proprietary torts to be actionable *per se* with nominal damages in order to assert the proprietary right involved. In both of these cases, nominal damages perform a symbolic function: it is the law's attempt to express in material terms the fact that a victim has been wronged. Since in these cases no losses have been

[55] See eg articles 1382 and 1383 of the French's Civil Code, both requiring damage to bring a tort action into court.

[56] *Neville v London Express Newspapers Ltd* [1919] AC 368 (HL) 392 (Viscount Haldane).

[57] McGregor (n 43) 448.

[58] Nicholas McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2012) 750.

caused and compensatory damages are not available, nominal damages are the next-best response the law can provide. The response is necessary to publicly express that the victim was wronged.

VI.4 Apologies and Non-pecuniary Damages

The next-best formula can also justify the existence of other remedies that tort law provides to victims. In this section I will concentrate on apologies and non-pecuniary damages, remedies that seek to repair immaterial losses. Accordingly, these remedies are also in a sense compensatory, since they compensate losses that cannot be materially assessed. Indeed, the difference between these remedies and nominal damages is that apologies and non-pecuniary damages seek to repair losses (even though it might not be easy to assess them), while nominal damages do not seek to compensate losses – unless one takes the approach according to which any infringement of a right causes damage (VI.3). Hence, law textbooks are correct when they label non-pecuniary damages as compensatory damages.[59] Nevertheless, it was for good reasons that I reserved the label of 'compensatory damages' for remedies that compensate for pecuniary losses.[60] These reasons will be explained throughout the section, but the main point is that non-pecuniary damages provide monetary relief to victims for harm that cannot be monetised. They can be regarded as compensatory only in a metaphorical sense, for pain and suffering cannot be monetised, in terms of

[59] See eg McGregor (n 43) 66 ff.

[60] The traditional distinction between general and special damages used to reflect this difference between the two types of compensatory damages. According to this distinction, special damages are compensatory damages that can be quantified with precision, whereas general damages are those that cannot be assessed with precision. I have not used this distinction however because it has been used in many different senses. See McGregor (n 43) 25 (arguing that the book does not rely on the distinction because 'there is so much ambiguity in the use of the terms general and special damage') and Stevens (n 1) 61 (claiming that the terms 'are used in a variety of ways and are best avoided').

being bought and sold in a market. Similarly, it will be shown that, under certain conditions, an apology can be considered an adequate remedy in a defamation case, for it may mitigate the damages. However, it would be misguided to conceive of an apology as a compensatory remedy; it certainly seeks to repair the harm done, but it compensates only metaphorically the claimant's losses.

Let me begin with apologies. I have argued in chapters II and III that most tort remedies should have an apologetic meaning. Under this framework, compensatory damages should carry a symbolic message of reconciliation, restoring the moral relationship of the parties that has been disrupted with the wrong. Interestingly, the tort of defamation provides an example in which apologies can mitigate the size of an award of damages. Sections 2 to 4 of the Defamation Act 1996 establish the defence of the offer to make amends. The defence requires the defendant:

> (a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party, (b) to publish the correction and apology in a manner that is reasonable and practicable in the circumstances, and (c) to pay to the aggrieved party such compensation (if any), and such costs, as may be agreed or determined to be payable.[61]

Hence, the offer to make amends must include an 'apology that is reasonable and practicable in the circumstances', but the parties do not necessarily need to agree on the compensatory sum to be paid. If the parties do not reach an agreement regarding the award of damages, the court will determine the amount 'on the same principles as damages in defamation proceedings'.[62] Taking into account the sufficiency of the apology and the suitability of the correction, the court 'may reduce or increase the

[61] Defamation Act 1996 s 2(4).

[62] ibid s 3(5).

amount of compensation accordingly'.[63] It has been argued that the purpose of this defence 'is to encourage settlement'.[64] The defence indeed provides an important incentive for the defendant to settle the case before moving on to a litigation process that is usually painful for both defendants and victims (especially for the latter).

There is, however, something revealing about this defence. When the parties cannot agree on the compensation to be paid, the court determines the amount taking into account the apology that was offered by the defendant. If the court thinks the apology was satisfactory, the award of damages might be reduced even up to 50%.[65] This means that for the law apologies are, at least in part, adequate remedies for the tort of defamation. A suitable and sufficient apology mitigates the damages to be paid because to some extent it satisfies the claimant, putting her in a closer position as to the wrong not having occurred in the first place. It is true that the defamation cannot be erased (the best option), but the apology provides at least some relief to the victim. The restorative aim of the tort remedy shares the restorative aim of the apology (II.6). In *Nail v News Group Newspapers*,[66] the Court of Appeal took a similar approach. The claimant Jimmy Nail was a well-known actor and performer that brought actions for libel against News Group Newspapers Ltd, the publishers of the News of the World, for the publication of an article titled 'Auf Wiedersehen Jimmy's Secret Bondage Orgies', and against Geraint Jones, the author of a book called *Nailed: The Biography of Jimmy Nail*, and also against the book's publisher. The publications made several allegations that, according to Eady J who was the judge in the first instance, were

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[63] ibid.

[64] 'The main purpose of the statutory provisions is plain. It is to encourage the sensible compromise of defamation proceedings without the need for an expensive jury trial'. *Milne v Express Newspapers* [2004] EWCA Civ 664, [2005] 1 All ER 1021 [14] (May LJ).

[65] *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR [50] seems to suggest that courts should not go beyond this threshold.

[66] [2004] EWCA Civ 1708, [2005] 1 All ER 1040.

defamatory. The defendants made unqualified offers to make amends for the newspaper article and the book, but the parties did not agree on the compensation required.

In the first instance, Eady J made interesting points regarding the determination of the compensation under the offer of amends regime, remarks that May LJ quoted with approval in the Court of Appeal's decision:

> The very adoption of the procedure [the offer of amends regime] has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrongdoing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced … [O]nce an offer of amends has been accepted the impact of the libel upon the claimant's feelings will have greatly diminished and, as soon as the apology is published, it is also hoped that reputation will be to a large extent restored.[67]

The Court of Appeal shared these views. May LJ argued that 'if an early unqualified offer of amends is made and accepted and an agreed apology is published, as in the present cases, there is bound to be substantial mitigation'.[68] In this case in particular, the court found that with the publication of the apology and suitable correction the claimant's 'reputation has been repaired to the full extent that that is possible. He is vindicated'.[69] In both arguments it is visible that applying the 'substantial mitigation' or 'healthy discount' to the award of damages as a consequence of the offer of amends regime means determining to what extent the claimant's reputation has been adequately repaired with the apology. In this sense, Eady J in the first instance claims that the apology should have *restored* the claimant's reputation to a large extent, and May LJ in the Court of Appeal says that the claimant should be *vindicated* with the

[67] [2004] EWHC 647 (QB), [2004] EMLR 362 [35] and [36].

[68] *Nail* (n 66) [41].

[69] ibid.

amends. This fact is revealing and even revolutionary for the traditional conception of tort remedies:[70] suitable apologies and correction take the place of money in the award of damages. It is easier now to understand why apologies are not compensatory: they do not seek to compensate the claimant's losses; rather, they seek to *restore* or *vindicate* the claimant.

Of course, determining to what extent the amends can replace a monetary award is a difficult (and usually controversial) task. In these cases, courts must fix a percentage that will be deducted from the compensatory award of damages. The task involves putting in numerical terms what is not possible to put in numerical terms: the restoration of the claimant's reputation. Courts face similar problems when they determine awards of non-pecuniary damages. Whereas in the case of apologies courts need to assess how a suitable apology and correction can be expressed in numerical or monetary terms, in the case of non-pecuniary damages courts need to determine the monetary award that is necessary to repair harm that is by definition not expressed in monetary terms. It has long been recognised that non-pecuniary losses cannot be compensated with monetary damages. In the words of Lord Denning in *Ward v James*,[71] a victim who has suffered serious injuries 'is deprived of much that makes life worthwhile. No money can compensate the loss. Yet compensation has to be given in money'. Similarly, the Second Restatement of Torts holds that when a 'tort causes bodily harm or emotional distress, the law cannot restore the injured person to his

[70] Perhaps this is an old revolution. In this sense, Gordley points out that the medieval jurists rejected the Roman remedy of damages for *iniuria*, holding that in cases of injury to another's reputation or honour, 'the wrongdoer must publicly declare that he had been in error, or must apologize for an insult'. James Gordley, *The Jurists. A Critical History* (OUP 2013) 58.

[71] [1966] 1 QB 273, 296.

previous position. The sensations caused by harm to the body or pain or humiliation are not in any way analogous to a pecuniary loss'.[72]

Interestingly, both Law & Economics and corrective justice theorists have criticised non-pecuniary damages. From the economic point of view, it has been argued that it is not rational to insure against non-pecuniary losses, for these losses do not affect the marginal value of wealth.[73] On the other hand, it has been argued that corrective justice is unable to justify recoverability for these losses.[74] I will concentrate here on the relationship between corrective justice and non-compensatory damages; nevertheless, my argument should also be helpful to respond to the Law & Economics' approach to the topic. Let me begin with Chapman's argument, according to which monetary awards are unable to restore 'a welfare loss *in the normatively appropriate respect*; it can only work in some *other welfare space*'.[75] In my view, the problem here is to assume that compensatory awards for pecuniary losses restore the claimant's rights in a 'normatively appropriate respect'. As was seen above (VI.2), in Weinrib's account of tort law (which is Chapman's starting point) there is a gap between restoring (non-welfare) rights and compensating material losses (welfare). To argue that pecuniary damages restore the normative loss is to take the point for granted.

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[72] American Law Institute, *Restatement (Second) of Torts* (1979), § 903 cmt a.

[73] George L Priest, 'The Current Insurance Crisis and Modern Tort Law' (1987) 96 The Yale Law Journal 1521, 1553. This fact alone however does not mean that non-pecuniary losses should not be recovered once a wrong has occurred. As Sunstein points out, commodifying some risks (such as the loss of a child) in the form of insurance would 'reflect a strange kind … of valuation of the underlying good … On this view, the failure to insure reflects a quite particular judgment, and it does not mean that these events are not harms deserving compensation when they occur'. Cass R Sunstein, 'Incommensurability and Valuation in Law' (1994) 92 Michigan Law Review 779, 845 n 253.

[74] Margaret J Radin, 'Compensation and Commensurability' (1993) 43 Duke Law Journal 56; Bruce Chapman, 'Wrongdoing, Welfare and Damages: Corrective Justice and the Right to Recover for Non-Pecuniary Loss' in David G Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1995).

[75] Chapman (n 74) 420. Emphasis added.

The problem of non-pecuniary damages seems to lie elsewhere. As Radin points out, the problem is connected with what Raz calls 'constitutive incommensurabilities'.[76] According to Raz, in these situations most people will refuse to compare or rank a range of options. He provides a clear example of this: most parents would not be able to accept comparing the value of having children with having money. In these cases, the incommensurability is constitutive because exchanging children 'is inconsistent with a proper appreciation of the value of parenthood'.[77] Perhaps it is possible that some parents would contemplate the possibility of exchanging their children for money. Raz's point is not to claim that these parents are wrong; rather, the point is that they do not grasp the social notion of parenthood that is built upon the idea of incommensurability. The same problem arises in the context of non-pecuniary damages. For instance, a claimant that is awarded a monetary sum of damages for bereavement under the Fatal Accidents Act 1976 (currently set in £12,980)[78] should normally refuse to compare the damages received with the loss of her loved one. The bereavement damages therefore cannot put the claimant in the same position as if the wrong would not have occurred.

Radin argues that the incommensurability of non-pecuniary losses is a problem for the traditional conception of corrective justice: 'If corrective justice requires rectification, and if injury cannot be translated into money, how can payment of money ever amount to rectification, so as to satisfy the demands of corrective justice?'[79] She suggests replacing the concept of rectification in corrective justice with a notion of redress in which material compensation symbolises that the tortfeasor has

[76] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 345-53.

[77] ibid 348.

[78] 1976 Fatal Accidents Act, s 1A.

[79] Radin (n 74) 68.

committed a wrong 'by requiring something important to be given up on one side and received on the other, even if there is no equivalence of value possible'.[80] The justificatory model of this thesis however does not have this problem, because it does not entail a commitment with commensurability of non-pecuniary losses. As was seen above (VI.2), the 'next-best' formula of damages recognises that tort law is always late: once a wrong has occurred, it is not possible to erase it or undo it. What tort law can offer instead is a response that is the closest to full satisfaction as it is possible given the circumstances.[81]

Private law is familiar with this type of incommensurability. Courts usually seek to provide some satisfaction to victims for the immaterial inconveniencies they have suffered as a consequence of the wrong. This satisfaction is provided under different heads of damages, such as mental distress, loss of reputation, pain and suffering, bereavement, and loss of amenity. The main problem encountered by courts in these heads of damages is how to assess them. As Diplock LJ pointed out in *McCarey v Associated Newspapers Ltd*, '[i]n putting a money value on these kinds of injury, as the law requires damage-awarding tribunals to do, they are being required to attempt to equate the incommensurable'.[82] As was seen above, in some cases the law standardises the award. The bereavement fixed sum of £12,980 is always awarded. In the case of pain and suffering however, there cannot be a fixed sum. Courts usually frame the task of assessing these awards under a compensatory rationale. For instance, in the case of loss of reputation, claimants need to provide evidence that they have

[80] ibid 69.

[81] As Viscount Dunedin put it in *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 (HL), 661, 'the common law says that the damages due either for breach of contract or for tort are damages which, *so far as money can compensate*, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act'. Emphasis added.

[82] [1965] 2 QB 86, 108.

suffered pecuniary losses as a consequence of the wrong, such as difficulties to find employment, difficulties to set up a new business, and so on.[83] Certainly, a claimant that is retired and has no prospects of working again will have a difficult case to make a claim for damages.[84] Similarly, English courts have recognised for quite some time now that claimants should recover damages for the mental distress and disappointment they can feel as a consequence of a holiday that was largely inferior to the one that was promised.[85] Courts tend to frame this type of cases in terms of providing compensation for pecuniary losses: 'the loss here is the monetary difference between what was bought and what was supplied'.[86]

However, in many cases it is inadequate to deal with non-pecuniary damages under a compensatory rationale. It has been recently argued indeed that labelling awards for loss of amenity in cases of breach of contract 'compensatory' is 'artificial and liable to confuse'.[87] By the same token, in many of these cases the compensatory rationale is inadequate. For instance, in *Hamilton Jones v David & Snape (a firm)*,[88] the claimant (Mrs Hamilton Jones) brought a claim against her solicitors, arguing that the defendant's negligence (failure to renew a notice to the United Kingdom Passport Agency) caused that her ex husband was able to remove their two children from the United Kingdom to Tunisia. As a result, Mrs Hamilton Jones lost the custody of her

[83] *McCarey* (n 82) 108.

[84] As Burrows notes, 'the greater the loss of reputation the greater the damages should be, and in order to prove anything other than general loss of reputation *a claimant would presumably need to bring evidence to indicate the difference between his present and former reputations'*. Burrows (n 1) 319. Emphasis added.

[85] Eg *Jarvis v Swans Tours Ltd* [1973] QB 233.

[86] *Milner v Carnival Plc* [2010] EWCA Civ 389, [2010] PIQR Q3, [29] (Ward LJ).

[87] David Winterton, *Money Awards in Contract Law* (Hart Publishing 2015) 42.

[88] [2003] EWHC 3147 (Ch), [2004] 1 WLR 924.

two children. Following the House of Lords' decision in *Farley v Skinner*,[89] Neuberger J held that the claimant was entitled to recover damages for the mental distress she suffered as a consequence of the breach of contract because for the claimant to retain the custody of her children was, to some extent, 'for her own pleasure and peace of mind'.[90] The claimant was awarded the sum of £20,000 for these losses. Neuberger J reached this sum by taking into account the bereavement damages awards of the 1976 Fatal Accidents (then £10,000).

Hamilton Jones seems to me a clear case of constitutive incommensurability. It is very likely that Mrs Hamilton Jones would be horrified with the suggestion that the £20,000 award of damages can be compared with having the custody of her children. She (most likely) would not be able to answer the question of how much would she be willing to pay to lose the custody of her children. Certainly, the award of damages does not put her in the same position as if she would still have the custody of the children. In this sense, Chapman and Radin are right: the law cannot undo or erase the injustice. The damages however do improve Mrs Hamilton Jones' situation, despite the fact that it is no longer possible to turn things back. As the Second Restatement of Torts holds, non-pecuniary damages 'give to the injured person some pecuniary return for what he has suffered or is likely to suffer'.[91]

My suggestion is that non-pecuniary damages have a symbolic feature. It is true, as was seen above, that some of these awards can be understood under a compensatory rationale. However, many of these awards deal with immaterial losses that are incommensurable. In these cases, non-pecuniary damages do not compensate

[89] [2001] UKHL 49, [2002] 2 AC 732. Lord Steyn set out the conditions under which it is possible for a claimant to recover non-pecuniary damages in a breach of contract case: 'It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind'. ibid [24].

[90] *Hamilton Jones* (n 88) [61].

[91] American Law Institute, *Restatement (Second) of Torts* (1979), § 903 cmt a.

the victim's losses; rather, they seek to put the victim closer to her full satisfaction by providing some form of relief (given the fact that it is no longer possible to reach full satisfaction). Certainly, Radin is right when she argues that a restorative approach of redress is involved in this task. This facet of non-pecuniary damages explains why in English tort law these damages are recoverable under the heading of 'aggravated damages',[92] and it also explains why in some civil law systems the defendant's behaviour is taken into account to assess the amount of the award.[93] I will deal with this restorative feature of tort remedies in the next section (VI.5). But it is worth mentioning here that awarding non-pecuniary damages under a restorative framework is compatible with the justificatory model of the thesis and its next-best formula of remedies. In this sense, non-pecuniary damages are symbolic because they represent the law's attempt to improve the situation of the victim, especially when she has suffered an irreparable harm. As O'Malley points out, money here is a 'currency of justice' because it is a mean to repair losses that is less coercive than other alternative means (such as inflicting corporal punishment or taking away liberty).[94] But this reparative aim of non-pecuniary damages does not mean that money commodifies harm, because money is not provided by courts as an equal replacement for the losses suffered:

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[92] In cases of defamation, trespass to person, trespass to land, deceit, malicious prosecution, misfeasance in a public office, misuse of private information, and the statutory torts of discrimination. Peel and Goudkamp (n 54) 698. Courts have emphasised that these awards are compensatory and not punitive: 'It is important to emphasise that any sum to be awarded is a single sum and any aggravated damages are intended as compensation and not as a form of punishment of the defendant.' *Khodaparast v Shad* [2000] 1 WLR 618 (CA), 632 (Otton LJ).

[93] A fact that has led commentators to argue that non-pecuniary damages entail a form of punitive damages in civil law systems. See eg for French law, Jean-Sébastien Borghetti, 'Punitive Damages in France' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 63-6.

[94] Pat O'Malley, The Currency of Justice. Fines and Damages in Consumer Societies (Routledge-Cavendish 2009) 133.

> Money in the form of damages may indeed have its purpose in buying pleasures as solace, but by distancing the award of compensation from the commodities it can purchase, it allows the courts leeway to argue against the commodification of harm.[95]

Non-pecuniary damages therefore have a symbolic feature, for they represent the law's attempt to put the victim closer to the position that she were in if the wrong would not have occurred. As Raz points out, money exchanges 'are natural candidates for certain symbolic messages'.[96] But non-pecuniary damages do not commodify the harm and they are not committed to the commensurability of harm. I will leave aside discussions concerning the best way to assess these damages. Of course some difficulties for the assessment of the damages may arise under the framework described here for non-pecuniary damages. One of these difficulties arises in connection with unconscious victims. Are these victims entitled to recover non-pecuniary damages? The House of Lords discussed this issue in *H West & Son v Shephard*.[97] Interestingly, this was not a case in which the victim was completely unconscious: she suffered a cerebral atrophy on the right side and paralysis of all four limbs, but she was conscious. While Lord Morris argued that the fact the claimant was probably unable to use the money should not be considered as a reason to reduce the award,[98] Lord Reid said that 'there is something unreal in saying that a man who knows and feels nothing should get the same as a man who has to live with and put up

[95] ibid 139. See also Viviana A Zelizer, *The Social Meaning of Money* (BasicBooks 1994) 19 (arguing that '[t]he assumed dichotomy between utilitarian money and nonpecuniary values is false, for money under certain circumstances may be as singular and unexchangeable as the most personal and unique object), and Jenny Steele, 'Satisfying Claims? Money, Tort, and "Consumer Society"' (2011) 20 Social & Legal Studies 516, 519 (claiming that 'the social meaning of money cannot be reduced to simple "commodification"').

[96] Raz (n 76) 350.

[97] [1964] AC 326 (HL).

[98] ibid 349:

with his disabilities'.[99] In my view, the fact that the victim in this case was not fully unconscious is decisive.[100] The majority of the House of Lords correctly decided that the victim of this case was entitled to recover non-pecuniary damages because it was still meaningful to grant her an award of damages under this heading. Certainly, a different answer would have been put forward had the victim been fully unconscious.[101]

But my point is that the conception of non-pecuniary damages as a symbolic remedy is compatible with the next-best rationale of tort damages. Under this framework, it is important to keep in mind that the message that these monetary awards communicate is not the commodification of harm; rather, the message is that the law is seeking to satisfy the victim of a tort providing some form of relief, improving her situation. In this sense, monetary relief is the next-best solution the law is able to provide. Legal systems have some flexibility to accomplish this ideal of the next-best rationale. Whereas some systems prefer to have uniform guidelines for assessment of these awards, other systems will retain judicial discretion to determine the sums on a case-by-case basis. Both methods of assessment are compatible with the framework outlined here, as long as non-pecuniary awards are formulated in symbolic terms. It is my contention that the symbolic conception of non-pecuniary damages offers a solution to the incommensurability problem that, in my view, a compensatory view of these remedies cannot adequately solve. Some civil law systems might reject

[99] ibid 341.

[100] This is the reason why I disagree with Chapman's discussion of the case. He holds that '[n]ominal damages are all that can, and probably should, be awarded'. Chapman (n 74) 421.

[101] This can be contrasted with French and German legal systems, in which non-pecuniary damages have been awarded to victims who are fully unconscious or in a coma. Cees van Dam, *European Tort Law* (2nd edn, OUP 2013) 365.

this symbolic conception of non-pecuniary damages.[102] In these cases however, I will argue in the next section (VI.5) that a different type of remedy is involved, a remedy that takes into account under which conditions the wrong was committed: aggravated damages.[103]

VI.5 Exemplary and Aggravated Damages

Exemplary (or punitive) damages[104] have been regarded as an anomaly in English law,[105] whereas aggravated damages have raised strong disagreement among legal scholars.[106] The line between the two remedies was drawn by Lord Devlin's famous

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[102] See eg Civ 2e 22 February 1995 (Cour de Cassation) (held that the claimant, who was in a vegetative state, was entitled to recover non-pecuniary damages). Similarly, despite that the German BGH seems to endorse the symbolic conception of non-pecuniary damages by using the notion of 'satisfaction' (*Genugtuung*) instead of 'compensation' (*Ausgleich*), in 1995 the court rejected this approach, holding that cases where the victim has suffered severe brain damage 'demand … stronger weighting, and preclude a merely symbolic assessment … [D]amage to the personality and the loss of personal quality as a consequence of severe brain damage represent in themselves non-material harm which is to be compensated for independently of whether the person affected feels the impairment'. BGH 13 October 1992, BGHZ 120, 1 = NJW 1993, 781 (Sixth Civil Senate), cited and translated in Basil S Markesinis and Hannes Unberath, *The German Law of Torts. A Comparative Treatise* (4th edn, Hart Publishing 2002) 998.

[103] See eg Nils Jansen and Lukas Rademacher, 'Punitive Damages in Germany' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 80: 'In the terminology of the English common law, these damages can be understood as "aggravated"'.

[104] I will use the term 'exemplary damages' throughout the section, mainly because I will discuss here the English approach to punitive damages. In general, all my claims regarding exemplary damages can be extended to what is known as punitive damages in other jurisdictions. However, I do not wish to use the terms interchangeably because aggravated damages are also covered by punitive damages in other jurisdictions, most notably in the US. See Anthony J Sebok and Vanessa Wilcox, 'Aggravated Damages' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 269.

[105] Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 Oxford Journal of Legal Studies 87, 110: 'Exemplary damages … are logically an anomaly that should be expunged from the law'. See also Lord Scott's opinion in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] AC 122, [95]: 'an award of exemplary damages, the intention of which is not to compensate the victim of a wrong but to punish its perpetrator, is an anomaly'.

[106] John Murphy, 'The Nature and Domain of Aggravated Damages' (2010) 69 The Cambridge Law Journal 353.

opinion in the landmark case of *Rookes v Barnard*.[107] His Lordship sought to distinguish between the two remedies, emphasising the exceptional nature of exemplary damages. His first step was to recognise the existence of aggravated damages in the case law:

> [I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride.[108]

Beever and Murphy have elaborated their theories of aggravated damages based on Lord Devlin's last remarks regarding the injury to 'the plaintiff's proper feelings of dignity and pride'.[109] According to these authors, aggravated damages compensate injuries to dignity. Beever argues further that this aspect distinguishes aggravated damages from exemplary damages. He claims that the latter should be abolished. But the burden of this section is narrower. The point is not to determine whether these remedies can be justified *at all*; rather, the point is to determine whether the framework outlined in the thesis can justify these remedies. I will argue that both remedies are justified under the framework of the thesis. Hence, there is no need to show that aggravated damages are compensatory rather than punitive: both exemplary and aggravated damages can be understood as reparative and therefore justified.

Exemplary and aggravated damages are discussed together in this section precisely because it is difficult to draw a line between them. Lord Devlin himself acknowledged this truth when he was trying to distinguish them in *Rookes*: 'when one examines the cases in which large damages have been awarded for conduct of this

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[107] [1964] AC 1129 (HL).

[108] ibid 1221.

[109] Beever (n 105) and Murphy (n 106).

sort, *it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed*'.[110] Both Beever and Murphy strive to show that aggravated damages are compensatory, while exemplary damages are punitive or aimed at punishing the wrongdoer.[111] It seems to me that Lord Devlin, in *Rookes*, was not necessarily committed to this position. As the passage quoted above shows, his Lordship did not claim that the line to be drawn between the compensatory and the punitive aim of these remedies was easy to draw. He famously restricted the availability of exemplary damages to three cases: first, oppressive, arbitrary or unconstitutional action by servants of the government; second, cases in which the defendant's conduct was calculated to make a profit for herself; and third, cases in which exemplary damages are expressly authorised by statute.[112] Lord Devlin thought that this restrictive application of exemplary damages would 'remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject'.[113] Note however that when his Lordship describes cases in which damages have been increased as a consequence of the defendant's malice or the manner of doing the injury, the increased awards can 'more easily be justified on that ground [of aggravated damages] than on the ground that they were exemplary'.[114] His Lordship later adds that '[a]ggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages'.[115] Lord Devlin therefore was not seeking to restrict the punitive aim of damages; rather,

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[110] *Rookes* (n 107) 1221. Emphasis added.

[111] Beever (n 105) 90 ('it is plausible to regard aggravated damages as genuinely compensatory'); Murphy (n 106) 359 ('the aggravated damages due are to compensate the injury to dignity, not to punish the tortfeasor').

[112] *Rookes* (n 107) 1226-7.

[113] ibid 1230.

[114] ibid 1229.

[115] ibid 1230.

he was trying to show that an exceptional remedy such as exemplary damages should be granted only in a few cases, because most of the cases can be dealt with the heading of aggravated damages. In my view, this approach does not necessarily regard aggravated damages as strictly compensatory.

As McBride and Bagshaw point out, aggravated damages are awarded in cases where 'the tortfeasor has behaved in an *arrogant and high-handed* way, either in committing that tort, or in the way he treated the victim of the tort after it was committed'.[116] Four important points follow from this definition. First, a basic requirement is that a tort has been committed; in principle, mere arrogant or high-handed behaviour does not amount to damages. Secondly, the trigger of aggravated damages is 'the manner in which or motive for which the defendant' committed the tort. The focus of the award therefore is the defendant rather than the claimant. Thirdly, aggravated damages have been awarded not only in cases where the defendant acted in an arrogant or high-handed way in committing the tort; they have also been awarded in cases where the defendant's acted in such way *after* the tort was committed.[117] And finally, McBride and Bagshaw correctly exclude from the definition a common (but mistaken) view according to which aggravated damages compensate the claimant's mental distress.[118]

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[116] McBride and Bagshaw (n 58) 789.

[117] Eg *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 (the defendant made untrue allegations about the claimant during the proceedings to justify a false imprisonment).

[118] Eg Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247 (1997), para 2.1. This view does not seem to be supported by the case law. In this sense, Murphy (n 106) 357 shows that of 653 cases dealing with aggravated damages only 63 of them have made any mention of mental distress.

Corrective justice theorists have usually been reluctant to defend exemplary damages.[119] Hence, a compensatory approach to aggravated damages seems more promising for a corrective justice theorist. The compensatory approach however cannot satisfactorily explain the main features of aggravated damages mentioned above. The fact that the award is focused on the defendant's behaviour rather than on the seriousness of the injury is problematic for the compensatory rationale of these damages. If aggravated damages are compensatory, why then is the focus of the remedy posed on the defendant's behaviour rather than the victim's losses? Beever's answer is that the concern on the defendant's behaviour is justified because it provides 'our sole epistemological access to the claimant's injury'.[120] The problem is that this view is difficult to reconcile with the third point mentioned above. Recall that courts have awarded aggravated damages in cases where the defendant behaved in an arrogant and high-handed way *after* committing the tort. For instance, in *Sutcliffe v Pressdram Ltd*,[121] Nourse LJ held that the failure to make a sufficient apology, behaving in a manner calculated to deter the claimant from proceeding, persisting in a plea of justification that is bound to fail, among others, could support a claim for aggravated damages. Why and how does the manner in which the claimant behaves during the trial give 'epistemological access' to the injury to the victim's dignity?

In my view, the fact that aggravated damages require that a tort has been committed also reveals that the compensatory approach is defective. In this sense, Birks has suggested that these damages protect a distinct interest, which is 'the victim's

[119] Eg Weinrib (n 5) 135 n 25: 'under corrective justice damages are compensatory, not punitive. Therefore, the common law jurisdiction whose attitude regarding punitive damages comes closest to conformity to corrective justice is England'.

[120] Beever (n 105) 92-3.

[121] [1991] 1 QB 153, 184.

right to his or her proper share of respect'.[122] He disentangles therefore aggravated damages from the interest in emotional welfare. But he also separates the distinct interest protected by the aggravated damages from the interest protected by the tort involved: 'one cannot explain enhanced damages for contempt by appealing to the infringement of the interest protected by the unaggravated versions of other wrongs'.[123] Birks' conclusion is that aggravated damages amount to a separate tort that protects the individual's proper share of respect, following the Roman's tort of *iniuria*. Beever and Murphy disagree. They argue that 'the injury must occur … in tandem with the commission of some other recognised tort'.[124] But if the interest protected is the injury to the victim's dignity, then why can the legal protection of this interest only be triggered by the commission of an independent tort protecting a different interest?

A new starting point is required. This starting point is provided by the fact that contemptuous or contumelious wrongdoing is more serious than inadvertent or merely negligent wrongdoing.[125] In the words of Holmes, 'even a dog distinguishes between being stumbled over and being kicked'.[126] Beever holds that this truth comes from the fact that contemptuous wrongdoing violates the victim's dignity.[127] That might be the case, but my point here does not depend on whether the victim's dignity has been injured. If tort law, based on the restorative ideal of corrective justice described in chapters II and III, seeks to restore the relationship between the parties,

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[122] Peter Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1997) 32 Irish Jurist 1, 11.

[123] ibid 30.

[124] Murphy (n 106) 366.

[125] 'The more outrageous the defendant's conduct, the greater the infringement of the right and the greater the substitutive award'. Stevens (n 1) 85.

[126] Oliver W Holmes, *The Common Law* (Little Brown 1923) 3.

[127] Beever (n 105) 89.

by putting the victim in the next-best position as if the wrong would not have occurred, the law needs to pay attention to how the wrong was committed. Under this framework, the aim is not punishing the defendant per se; rather, the point is restoring the victim's rights. The process might involve, to some extent, punishing the defendant. But even an unaggravated tort action can also be seen as a punishment for the defendant.[128] As Edelman points out, if tort law is understood in terms of a functional approach aimed exclusively at compensating victims of wrongs, then it is difficult to explain why compensation should come from particular defendants and not from some other source of funding that have deeper pockets (such as the state).[129]

Tort law cares how the tort was committed not because it seeks to punish the defendant, but rather because the way in which the tort was committed indicates the remedy that is required to restore the victim's rights.[130] In this sense, as was seen above (VI.4), a victim that receives no apology (or an apology that is deemed as satisfactory) does not deserve the same remedy as a victim who did receive a satisfactory apology. In my view, there is no need to argue that refusing to apologise amounts an injury to the victim's dignity to be able to support this claim. By the same token, an additional (or aggravated) remedy is justified when a defendant refuses to acknowledge her responsibility and continues to make false allegations about the victim.[131] The defendant's behaviour during and after committing a wrong is not irrelevant to the victim: it affects how she perceives the injury, and therefore must also

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[128] 'Compensatory damages easily run into hundreds of thousands of pounds even without the addition of an aggravated, let alone a punitive element'. Peter Birks, 'Civil Wrongs: A New World' in *Buttersworths Lectures 1990-1991* (Buttersworths 1992) 80.

[129] Edelman (n 7) 234.

[130] Stevens makes a similar point: 'The more outrageous the defendant's conduct, the greater the infringement of the right and the greater the substitutive award'. Stevens (n 1) 85.

[131] Eg *Thompson* (n 117) 518 (Lord Woolf MR): 'Where a false defence is persisted in this can justify an increase in the aggravated or exemplary damages'.

affect the remedy that is required. This is the reason why aggravated damages have been associated with compensating the victim's mental distress in England,[132] and with compensating non-pecuniary losses in other jurisdictions.[133] But the point is not that in these cases the victim's feelings are affected; the point is that the defendant's contemptuous behaviour aggravates the injury in an objective sense.[134]

It follows that scholars who criticise exemplary damages because they allegedly confuse the realms of private law with criminal law do not have a good case. For instance, Burrows argues that if there are good reasons to justify civil punishment through exemplary damages, there are then no reasons to restrict the claims to monetary punishment: 'Why should not the plaintiff equally well be able to insist that the defendant should be subject, for example, to a community service order or, in an extreme case, imprisonment?'[135] Two points must be made. First, it cannot be assumed that exemplary and aggravated damages solely seek to punish the wrongdoer. We learnt from civil recourse theory that holding wrongdoers responsible is an important function tort law.[136] There is nothing wrong with this *public* function of private law that to some extent condemns the tortfeasor's behaviour. As Birks notes, '[n]ot having succumbed to the notion that awards for civil wrongs must necessarily or

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[132] Eg *Rookes* (n 107) 1221 (Lord Devlin); *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL), 1124 (Lord Diplock).

[133] See above VI.4 n 102 and n 103.

[134] This view would allow awarding exemplary or aggravated damages in the case examined above (VI.4) of unconscious victims. Stevens also supports awarding these damages in cases of unconscious victims. Stevens (n 1) 86.

[135] Andrew Burrows, 'Reforming Exemplary Damages' in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press 1996) 166.

[136] John CP Goldberg and Benjamin C Zipursky, 'Tort Law and Responsibility' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014). See also Stephen A Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harvard Law Review 1727, 1753 (arguing that 'the law's main concern is to provide a means whereby victims may have their infringed rights publicly acknowledged or "vindicated"').

even normally compensate a loss, the Romans saw no difficulty in that'.[137] And secondly, the remedy based on a restorative framework is expressed in a monetary award because it is the less coercive expression private law can provide.[138] The fact that private law (in contrast with criminal law) cannot provide more coercive remedies does not preclude its capacity to award non-compensatory remedies.

Once aggravated damages awards are conceptually disentangled from a compensatory rationale, the case against exemplary damages is weaker. I do not wish to argue here that both heads of damages are indistinguishable,[139] despite the fact that in most jurisdictions they are.[140] My point is that both aggravated and exemplary damages can be justified under the same restorative rationale. Of course, some aspects of exemplary damages cannot be justified under this theoretical framework. Perhaps a deterrence rationale is able to accommodate better the existence of this remedy. However, I argue that exemplary damages are not a lost case for the 'next-best' formula of corrective justice. As a contrast, the orthodox claim is that exemplary damages are incompatible with the formula. In this sense, exemplary damages have been regarded as offering a 'windfall' to victims, putting them in a *better* position as if the wrong would not have occurred.[141] I will label this constraint as the 'better position constraint'. Edelman argues that this constraint is tautological, since Weinrib and Beever have not shown how normative gains and losses are calculated in monetary terms.[142] I have argued above (VI.2) that this is problematic for both

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[137] Birks (n 122) 10.

[138] O'Malley (n 94) 133.

[139] A position held by many tort scholars, such as Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 114 and Arthur Ripstein, *Equality, Responsibility and the Law* (CUP 1999) 151.

[140] See above n 104.

[141] Eg Beever (n 105) 107.

[142] Edelman (n 7) 239.

Weinrib and rights-based theorists. But once the remedy is formulated under the continuity thesis, the formula is clearer: the law must provide the remedy that comes closest to the position that the victim would have been in had she not suffered the wrong.[143] The formula therefore entails that victims should not be put in a *better* position than they would have been had the wrong not occurred. What the formula does not do, however, is preclude exemplary or aggravated damages.[144] How does the better position constraint to exemplary damages operate in concrete terms? Tort systems certainly have some flexibility to establish limits to these awards with more precision. The US Supreme Court has been attempting to do this task,[145] even though many of the decisions have been controversial and criticised by many legal scholars.[146] Three points must be made regarding the justification of exemplary damages under the restorative framework of this thesis.

First, exemplary damages are exceptional. Even enthusiastic supporters of these damages acknowledge this fact.[147] This might be obvious, but those who think that corrective justice is flawed because it is (arguably) unable to explain the existence

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[143] Edelman further argues that this task involves valuing the victim's right that was infringed, which allows taking into account not only the consequential losses that the victim suffered, but also 'subsequent events which show a need for additional deterrence'. ibid 243-4. But I am not entirely convinced that valuing the victim's right allows taking into account which remedy would be able to deter the occurrence of that wrong, for this rationale seems to go beyond the reparative aim of tort law.

[144] In my view, this is the aspect that worries corrective justice theorists such as Gardner: 'One may regret that people have come to expect, and are often granted, various kinds of awards that *go beyond the strictly reparative*'. Gardner (n 1) 47-8. My point is that punitive damages can be reparative, but they should not go beyond that rationale.

[145] Most notably in *BMW v Gore* 517 US 559 (1996), *State Farm Mutual Auto Insurance Co v Campbell* 538 US 408 (2003), and *Philip Morris USA v Williams* 549 US 346 (2007).

[146] See eg Anthony J Sebok, 'The U.S. Supreme Court's Theory of Common Law Punitive Damages' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 136-40.

[147] Eg Edelman (n 7) 227: 'exemplary damages will only be needed in exceptional circumstances'.

of exemplary damages seem to understate this truth.[148] Second, the justification of exemplary damages outlined here mandates that courts should only take into account what the defendant has done to a particular claimant, and not to the public in general.[149] This constraint, that Zipursky calls the 'non-party harm rule',[150] can be eliminated if one endorses a different theory of exemplary damages. It is not my intention to argue that my justificatory framework is the only possible justification for exemplary damages. Rather, my point is that – contrary to traditional wisdom – exemplary damages are compatible with corrective justice. Finally, the third guideline is that exemplary damages should be not only exceptional, but they also should be awarded in cases where compensatory damages are not enough. This restriction was emphasised in the influential opinions of Lord Devlin in *Rookes*[151] and Lord Diplock in *Broome*.[152] It reveals that in most cases compensatory damages can do all the work on their own: they can compensate the victim's losses, and at the same time condemn the wrongdoer's behaviour. Only when compensatory damages are not able to perform these tasks, an award of exemplary damages will be needed. Lord Devlin's opinion in *Rookes* was precisely an attempt to delineate these exceptional circumstances: 'there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law'.[153]

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[148] Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 The Georgetown Law Journal 695, 711. See above I.6.

[149] See *Rookes* (n 107) 1227 (Lord Devlin): 'the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour', and *Williams* (n 145) 355 (Justice Breyer): 'a jury may not … use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to visited on nonparties'.

[150] Benjamin C Zipursky, 'Punitive Damages After *Philip Morris USA v. Williams*' (2007) 44 Court Review 134, 135.

[151] *Rookes* (n 107) 1228.

[152] *Broome* (n 132) 1221-2.

[153] *Rookes* (n 107) 1226.

VI.6 Gain-based Damages

The topic of gain-based damages is controversial in English law. It is not entirely clear for which torts gain-based damages are available,[154] and while in most torts intentional (or cynical) wrongdoing is required, in the case of equitable wrongs and intellectual property torts gain-based damages have been awarded without the need to establish intentional wrongdoing.[155] Unsurprisingly therefore, there is no unanimous theoretical account for these awards.[156] As a consequence, discussing this difficult issue from a theoretical point of view would deserve a complete chapter (or even a book) on its own. The aim of this section is narrower. It seeks to determine whether it is possible to justify these remedies under the framework of the thesis. Within this discussion some of the main theoretical aspects will be brought out, but I will not provide an independent justification for these remedies. The reason for this is that gain-based damages are restitutionary remedies concerned with gains rather than losses. This thesis is concerned with justifying tort law as a mechanism that repairs wrongful losses. In practice, the importance of gain-based damages arises only in cases in which either

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[154] The traditional approach was to award gain-based damages only in the case of proprietary torts. Eg *Ministry of Defence v Ashman* (1993) 25 HLR 513 (CA) (trespass to land) and *Strand Electric and Engineering Co Ltd v Brisford Ertertainments Ltd* [1952] 2 QB 246 (conversion). However, even in some cases of proprietary torts courts have refused to award gain-based damages (eg *Forsyth-Grant v Allen* [2008] EWCA Civ 505, [2008] Env LR 41). And on the other hand, after the House of Lords *Attorney General v Blake* [2001] 1 AC 268 (HL) awarded gain-based damages for a breach of contract case, the Court of Appeal has recently open the possibility of awarding gain-based damages in non-proprietary torts as well: 'The overall holding in Blake's case is that the law on remedies for interference with property, damages in lieu of an injunction, damages for breach of fiduciary duty and breach of contract should be coherent and that the same remedies should be available in the same circumstances, even if the cause of action is different'. *Devenish Nutrition Ltd v Sanofi-Aventis SA and others* [2007] EWHC 2394 (Ch), [2009] Ch 390, [4] (Arden LJ).

[155] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 635.

[156] The best attempt so far has been made in James Edelman, *Gain-Based Damages. Contract, Tort, Equity and Intellectual Property* (Hart Publishing 2002).

the victim does not suffer any losses or the wrongdoer obtained more gains than the losses caused.[157] Hence, the thesis will only seek to discuss to what extent the justificatory model of remedies outlined in this chapter is compatible with the practice of awarding this kind of damages.

Burrows seeks to provide a starting point for the justification of these awards based on corrective justice in the following lines:

> Although both parts of the law of restitution may be regarded as resting on corrective justice, the precise notion of corrective justice in play is different in each part. In respect of restitution for wrongs, the disruption to the status quo has been brought about by the civil wrong and the law may respond to the wrong by a number of different remedies, most obviously compensation but also restitution. Restitution for a wrong directly reflects the idea that 'no person shall profit from his or her wrong'.[158]

Burrows' attempt to show that the law of restitution is consistent with the demands of corrective justice runs in the same direction of this thesis, in which an approach based on the classic model of corrective justice has been preferred over some recent alternative justificatory models (0.2). The passage above however does not say much on whether gain-based damages are justified. Indeed, Burrows himself acknowledges that 'the law may respond to the wrong by a number of different remedies, most obviously compensation but also restitution'. But this conclusion seems to be question begging: to establish that the law's response to the wrong should be compensation or restitution, one needs to show first why it is legitimate for the law to respond this way. I hope to have provided above (VI.2) enough reasons to show that compensatory damages is a legitimate response to a wrong based on the next-best formula of corrective justice. What needs to be discussed here is whether that same formula is

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[157] The claimant must choose between compensatory damages or gain-based damages, but she cannot claim for both. *Blake* (n 154) 280 (Lord Nicholls).

[158] Burrows (n 155) 621.

able to accommodate awards of gain-based damages or not. I will argue that, at least to some extent, gain-based damages are justified.

A new starting point is provided by the cases in which courts have been less reluctant to award gain-based damages: proprietary torts. The American case of *Edwards v Lee's Administrator*[159] is an interesting example. The defendant discovered a cave under his land that contained rock crystal formations. He exploited the cave as a touristic attraction. A neighbouring landowner, who argued that a portion (one third) of the cave was under his land, brought the tort claim. Since the claimant did not suffer any loss as a consequence of the trespass, it was held that '[t]he law, in seeking an adequate remedy for the wrong, has been forced to adopt profits received, rather than damages sustained, as a basis for recovery'.[160] Hence, the court ruled that the claimant was entitled to recover all the profits that the defendant made as a consequence of his trespass (one third of all the profits). The remedy seems to be justified by corrective justice, in the sense that the defendant secured gains (or at least some of them) at the claimant's expense, using the claimant's resources. This idea has led Kantian theorists – such as Ripstein and Weinrib – to support the decision based on the idea that the law needs to react as a consequence of the violation of the victim's proprietary right to his exclusive use of the land.[161]

But from the point of view of the next-best formula of remedies, it is doubtful whether a *full* account of profits in this case puts the claimant in the next-position to

[159] 96 SW 2d 1028 (1936) (Court of Appeals of Kentucky).

[160] ibid 1032.

[161] Arthur Ripstein, 'Authority and Coercion' (2004) 32 Philosophy & Public Affairs 2, 24; Weinrib (n 5) 142. Their arguments are slightly different though. Whereas Weinrib holds that the remedy is required because the defendant infringed the claimant's right (causing her a normative loss), Ripstein argues that the defendant's act in this case restricted the claimant's liberty because landowners should be able to choose how they want to use their property; hence, the law should treat the unauthorised use as tough it were done only for the landowner's benefit.

the wrong not having occurred. Two points must be made. First, the proprietary right seems to justify the full account of profits, in the sense that the landowner has the exclusive right to enjoy the benefits of her property. The problem however is to connect the gains obtained by the defendant and the unauthorised of the property. The full account of profits measure takes this issue for granted: it assumes that all the defendant's profits were obtained as a consequence of the unauthorised use of the land. But this was not true in this case (and in most other cases too). At the beginning of the decision, the court explains that the defendant embarked upon a program of advertising and exploitation of the cave to attract tourists: 'Circulars were printed and distributed, signs were erected along the roads, persons were employed and stationed along the highways to solicit the patronage of passing travelers'.[162] Moreover, the defendant also improved the cave for this purpose, building a hotel near the entrance, and improving the footpaths and avenues in the cave. The point is that a full account of profits does not take into account these factors. In this sense, in most cases the remedy seems to be putting the claimant in a *better* position than if the wrong had not occurred. Of course, determining with precision to what extent the gains were secured by the defendant's own effort and labour rather than the unauthorised use of the property is a difficult task. However, it is a task that must be done.

Secondly, the full account of profits is also questionable from the perspective of a functionalist conception of property. Of course, Kantians will argue that landowners have the exclusive right to enjoy their land for whatever purposes they decide; it is irrelevant whether they decide to exploit their land or not. However, a functionalist approach to property looks at the matter differently: if private property is justified to solve the 'tragedy of the commons' problem, then it becomes important to know

[162] *Edwards* (n 159) 1028-9.

whether the property is being used or not.[163] Under this framework, the question is why the law should respond with a full account of profits to a situation like this, in which it is doubtful that the claimant would have been able to exploit the portion of his land that was unlawfully used.[164] The fact that the law's response is a full account of profits reveals an underlying non-functionalist substantive conception of property rights.[165] However, a functionalist approach to private property points to a different direction. As Gordley points out, to conclude that the owner of a land has the exclusive right to use her land 'requires an argument, and one based on the reasons for recognizing property rights'.[166] Accordingly, it seems that awarding a full account of profits in these cases require a commitment with a Kantian conception of property rights.

Courts have often dealt with the issue from a different and more promising perspective, awarding successful claimants with 'license fee damages' instead of full account of profits.[167] The leading case is *Wrotham Park Estates Ltd v Parkside Homes Ltd*.[168] The defendants breached a restrictive covenant that forbade from building on the claimants' neighbouring land, except in accordance with a lay-out plan approved by the vendor or the surveyors of the land. The defendants developed a housing estate

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[163] See eg Aristotle's justification of private property: 'Property should be in a certain sense common, but, as a general rule, private; for, when everyone has a distinct interest, men will not complain of one another, and they will make more progress, because every one will be attending to his own business'. Aristotle, *Politics* (tr Benjamin Jowett, Clarendon Press 1885) II v.

[164] In fact, this was not possible for the claimant because the entrance to cave was located on the defendant's portion of land.

[165] Eric R Claeys, 'On the "Property" and the "Tort" in Trespass' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 138 (arguing that in property tort-disputes, 'while judges try to secure corrective justice, they simultaneously specify the substantive rights that generate correlative obligations').

[166] James Gordley, *Foundations of Private Law. Property, Tort, Contract, Unjust Enrichment* (OUP 2006) 448.

[167] McBride and Bagshaw (n 58) 814-6; Peel and Goudkamp (n 54) 700-1.

[168] [1974] 1 WLR 798 (Ch D).

without sending the lay-out plans to the claimants. Brightman J refused to grant an injunction to destroy the houses.[169] The defendants argued that the claimants did not suffer any compensable losses; therefore, that nil or only nominal damages should be awarded in lieu of an injunction. But Brightman J said that this result would be 'of questionable fairness'.[170] Therefore, he provided the following solution:

> On the facts of this particular case the plaintiffs, rightly conscious of their obligations towards existing residents, would clearly not have granted any relaxation, but for present purposes I must assume that it could have induced to do so. In my judgment a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant.[171]

Interestingly, Brightman J calculates this sum of money (or price) that could have been 'reasonably' demanded by the claimants to relax the covenant based on a percentage of the profits that the defendants would have obtained with the development. Many academics have largely discussed whether this award has a compensatory, restitutionary, or even a *sui generis* rationale.[172] Without seeking to solve this discussion, *Wrotham Park* damages provide an interesting conceptual framework for gain-based damages in the form of license fee damages for three reasons. First, *Wrotham Park* damages were clearly awarded as a third-best option to the claimants, for the next-best option for the claimants would have been the destruction of the houses through an injunction.[173]

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[169] 'It would, in my opinion, be an unpardonable waste of much needed houses to direct that they now be pulled down and I have never had a moment's doubt during the hearing of this case that such an order ought to be refused'. ibid 811.

[170] ibid 812. He later adds: 'If the plaintiffs are merely given a nominal sum, or no sum, in substitution for injunctions, it seems to me that justice will manifestly not have been done'. ibid 815.

[171] ibid.

[172] Eg Gordley (n 166) 451-2; Burrows (n 155) 635-8; Kit Barker, '"Damages Without Loss": Can Hohfeld Help?' (2014) 34 Oxford Journal of Legal Studies 1.

[173] See above n 21 and accompanying text for the conception of specific performance as the next-best solution.

Secondly, these damages successfully applied the next-best formula of damages in the following terms: the claimants were put in the position as if the defendants would have previously asked them to relax the covenant. This hypothetical bargain approach can lead to the view according to which these damages provide compensation for the claimant's lost opportunity to bargain. The approach seems to work especially in cases where the claimant would have been willing to negotiate.[174] Under this framework, the ideal scenario for these claimants is that the defendants would have negotiated with them before using their property. However, in other cases where the claimant was not willing to bargain – such as *Wrotham Park* – the approach seems artificial, for there is no opportunity to bargain that was lost.[175] But the important point is that in these cases the law is also seeking to put the claimant in the next-position as if the wrong had not occurred. The ideal scenario for these claimants would have been that the defendants did not commit the wrong at all. But tort law acts when it is too late for that; awarding license fee damages is therefore the best the law can do for these claimants.

Relatedly, a third important point about these damages is that they carry an important restorative message to the defendant, namely: 'you should have bargained the right to use this property', or in plain words, 'you should have asked first'.[176] There are some passages in the *Wrotham Park*'s decision that point to this direction.

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[174] Eg *Strand Electric* (n 154) and *Tamares (Vincent Square) Ltd v Fairpoint* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167. However, two decisions of the Court of Appeal have refused to award *Wrotham Park* damages for the tort of private nuisance: *Stoke-on-Trent City Council v W & J Wass Ltd* [1998] 1 WLR 1406 (CA) and *Forsyth-Grant* (n 154).

[175] '[T]hese awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss'. *Blake* (n 154) 279 (Lord Nicholls). See also Edelman (n 156) 99-102 and Burrows (155) 647-53.

[176] In a similar vein, Gordley calls these damages 'you-are-encouraged-to-contract-instead' damages. Gordley (n 166) 452.

For instance, after Brightman J refuses to grant an injunction to destroy the houses, he adds: 'But the fact that these houses will remain does not spell out a charter entitling others to despoil adjacent areas of land in breach of valid restrictions imposed by the conveyances'.[177] Similarly, when he refuses to award nominal damages, he says: 'is it just that the plaintiffs should receive no compensation and that *the defendants should be left in undisturbed possession of the fruits of their wrongdoing*? Common sense would seem to demand a negative answer to this question'.[178] From this perspective, licence fee damages are necessary to restore the victim's rights, but mainly because compensatory damages are inadequate and it is necessary to reinstate that the defendant's use of another property was unlawful. It follows that, at least to some extent, licence fee damages are symbolic.

Two further issues need to be discussed regarding gain-based damages. I cannot deal thoroughly with these issues here. I will only outline some preliminary points. The first issue is to justify the fact that licence fees damages are usually only available in cases of proprietary torts.[179] As Lord Nicholls famously pointed out in *Blake* regarding the remedies for breach of contract, 'it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights'.[180] The theoretical attempts to restrict the application of the remedy to proprietary torts seem to be unsatisfactory.[181] In my view, it is possible to justify the restrictive application of

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[177] *Wrotham Park* (n 168) 811.

[178] ibid 812. Emphasis added.

[179] Usually, because even in some proprietary torts cases courts have been reluctant to award gain-based damages. See above VI.6 n 174.

[180] *Blake* (n 154) 283.

[181] For instance, Jackman argues that restitutionary remedies are meant to protect the 'facilitative institutions' the law provides to create private arrangements such as contracts and private property. Hence, he claims that these rights deserve a different kind of protection than

licence fees damages for a more practical reason. In the case of most non-proprietary torts, licence fees damages will be inadequate. As was noted above (I.5 and VI.2), reducing tort law to a restitutionary rationale is troublesome: it would not be appropriate to inquire how much a victim who lost a leg should be paid to grant the tortfeasor the right to injure her; similarly, it would be absurd to ask a victim how much she would have been willing to accept for being defamed.[182] Hence, courts have been rightly reluctant to make more readily available licence fees damages in other torts, for in these cases they are inadequate to restore the victim's rights.

The second issue is disgorgement damages. In some cases courts have not awarded licence fees but rather a full account of profits.[183] Edelman labelled these awards as 'disgorgement damages'.[184] He argues that the rationale of these remedies is 'the need to ensure deterrence of wrongdoing'.[185] They are restricted to two exceptional circumstances: when wrongs are committed cynically with the purpose of making a material gain, and for breach of a fiduciary duty. Edelman's justification of these awards based on deterrence must run in a separate line to corrective justice and, hence, this thesis. However, the possibility of justifying disgorgement damages with the restorative framework of this thesis should not be dismissed.[186] Under this

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other rights such as reputation that do need these facilitative institutions. IM Jackman, 'Restitution for Wrongs' (1989) 48 Cambridge Law Journal 302, 304. The problem is that if the remedies are meant to protect these facilitative institutions, then there is no basis to award these remedies to a particular claimant rather than another party such as the state.

[182] McBride and Bagshaw make a similar point regarding a victim of assault: 'We cannot assess what a "reasonable sum" might be for the privilege of being allowed to beat someone else up'. McBride and Bagshaw (n 58) 815.

[183] Eg *Kuwait Airways Corpn v Iraqui Airways Co (Nos 4 & 5)* [2002] 2 AC 883 (HL).

[184] Edelman (n 156) 72.

[185] ibid 83.

[186] Indeed, attempts to conciliate disgorgement damages with corrective justice have been made. See eg Peter Benson, 'Disgorgement for Breach of Contract and Corrective Justice: An Analysis in Outline' in Jason W Neyers and others (eds), *Understanding Unjust Enrichment* (Hart

framework, disgorgement damages can also perform the same symbolic function of exemplary damages in terms of Lord Devlin's second category of cases (VI.5), in which the message sent is 'tort does not pay'.[187] Edelman holds that disgorgement damages provide 'a sharper and less objectionable tool in such instances as they are not subject to objections such as indeterminacy'.[188] However, the next-best formula of remedies poses an important constraint, namely, that claimants should not be put in a *better* position as if the wrong would not have occurred. How could disgorgement damages put claimants in such a better position? If these damages are awarded in an all or nothing rationale, without taking into account the wrongdoer's own initiative and labour, then claimants are being put in a better position, for they are benefitting with the fruits of the wrongdoer's own effort.[189] Of course, enabling a reduction of the award for these reasons can solve the problem. However, to determine which gains were obtained as a consequence of the wrongdoer's initiative seems to me a very difficult causal inquiry.[190]

VI.7 Injunctions

The framework of the thesis cannot justify all types of injunctions. This is not necessarily a problem, because the thesis does not seek to justify all the features of existing tort systems (0.4). However, I will argue here that the next-best formula of

Publishing 2004) and Andrew Botterell, 'Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract' (2010) 16 Legal Theory 135.

[187] *Rookes* (n 107) 1227.

[188] Edelman (n 156) 72.

[189] Burrows makes a similar critique: 'Once one is profit-stripping, it has to be all or nothing. Applying Edelman's view, the disallowance of remuneration for skill and labour cannot be justified as disgorgement … and therefore has to be viewed as being designed to punish the wrongdoer'. Burrows (n 155) 634.

[190] An attempt can be found in Charles Mitchell, 'Causation, Remoteness and Unauthorised Fiduciary Gains' (2006) 17 King's Law Journal 325.

remedies can justify at least some injunctions. Other injunctions cannot rely on the remedial conception of corrective justice that has been developed in this thesis.

I do not wish to argue that injunctions play a secondary role in tort law because they are not available as of right in all tort claims: they are discretionary (as an equitable remedy).[191] Two points must be made. First, despite the fact that injunctions cannot be demanded as of right, it has been argued (at least in the case of private nuisance) that prima facie claimants should be entitled to a prohibitory injunction, restraining the defendant to commit the wrong in the future.[192] And secondly, in many cases injunctions are very important for claimants. For instance, a victim of a private nuisance, whose enjoyment of her land is disturbed with the smell coming from a neighbouring factory, is not looking for damages in a tort claim. She simply wants the nuisance to stop.

The remedial structure of corrective justice cannot generally accommodate injunctions granted to secure that wrongdoers will not commit a tort in the future. For corrective justice has a retrospective rationale (I.3), it looks at the injury caused to the victim, not on whether wrongs will be committed in the future or not.[193] This is not the end of the story however. To some extent, tort remedies are always prospective. A compensatory award seeks primarily to compensate the victim's losses, but it also seeks to communicate that the defendant committed a wrong, and it may also aim (perhaps as a positive side effect) to show others that they should not commit that wrong. It

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[191] Gardner (n 3) 53-4.

[192] *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433, [101] (Lord Neuberger) (holding that '[w]here a claimant has established that the defendant's activities constitute a nuisance, prima facie the remedy to which she is entitled … is an injunction to restrain the defendant from committing such nuisance in the future'). See also Peel and Goudkamp (n 54) 734.

[193] This may be one of the reasons why Wright prefers using the notion of 'interactive justice' to corrective justice. He claims that injunctions 'are part of the remedial component of interactive justice'. He does not show however why is that the case. Richard W Wright, 'Private Nuisance Law: A Window on Substantive Justice' in Andrew Robertson and Donal Nolan (eds), *Rights and Private Law* (Hart Publishing 2012) 494.

follows that the possibility of justifying under a corrective justice rationale some types of injunctions should not be dismissed. It might be useful to begin with injunctions that clearly cannot be justified. In my view, this is the case of *quia timet* injunctions, for they seek to prevent the occurrence of a wrong that is almost about to occur. Since no wrong has yet occurred, the retrospective nature of corrective justice is unable to justify these injunctions. It seems to me though that it should not be difficult to find a different set of principles to be able to justify them.[194]

Generally, prohibitory injunctions also seem to be located outside the scope of corrective justice, for they instruct the defendant to cease from behaving in a wrongful way *in the future*. The point is that the law usually prefers to provide damages in lieu of injunctions. The reason for this is that damages are the less coercive response the law can provide to restore the victim's rights.[195] On the other hand, an injunction measure is more coercive. Indeed, following AL Smith LJ's opinion in *Shelfer v City of London Electric Lighting Co*, injunctions should be avoided in cases in which 'it would be oppressive to the defendant to grant an injunction'.[196] When courts refuse to grant injunctions, awarding damages in lieu of injunctions, the rationale is reparative. The award of damages here seeks to satisfy as much as possible the victim, since it is not possible to provide a fully satisfactory remedy such as an injunction. However, in some cases courts have granted injunctions using a reparative rationale, regarding

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[194] For instance, Smith holds that injunctions are 'replicative' orders, since they order to do what the defendant should do regardless of the order. Smith's explanation is that these orders 'call upon the citizen's allegiance to the law purely as a practical authority'. Stephen A Smith, 'Why Courts Make Orders (And What This Tells us About Damages)' (2011) 64 Current Legal Problems 51, 64.

[195] As Smith points out, private law 'appears to be concerned more with ensuring that disappointed claimants get what they are legally due than with ensuring that citizens generally do what they ought to do'. Stephen A Smith, 'The Normativity of Private Law' (2011) 31 Oxford Journal of Legal Studies 215, 234.

[196] [1895] 1 Ch 287, 323. Recently, the Supreme Court has relaxed the requirements for injunctions, holding that it is wrong to claim that injunctions are granted 'only in very exceptional circumstances'. *Coventry* (n 192) [119] (Lord Neuberger).

them as a useful tool to send a restorative message. For instance, in *Shelfer v City of London Electric Lighting Co*, a case in which an injunction was granted, Lindley LJ said that 'the Court [of Chancery] has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict'.[197] Therefore, when courts decide to grant a more coercive measure than damages, such as an injunction, it is possible to justify the measure based on the restorative framework of the thesis. In this sense, the court would not only be seeking to instruct the defendant to cease committing a wrong to the claimant, but also to send the message that wrongdoers cannot impose forced sales on the victim's rights. If that is the case, then injunctions can have a symbolic meaning too.

[197] *Shelfer* (n 196) 315-6.

Conclusion

VII.1 Summary of the Argument

It is possible now to summarise the argument of this thesis. The starting point was that the Aristotelian understanding of corrective justice is necessary but not sufficient to justify the practice of tort law. Hence, the basic premise of chapter I was that other principles need to provide normative force to the practice of tort law. The argument of the thesis is that the notions of restorative and distributive justice provide this normative force. Accordingly, chapters II and III have shown that the principle of restorative justice is connected with the ideal of corrective justice that seeks to restore or put the parties in the closest position as if the wrong had never occurred. The connection was based on the symbolic or communicative feature of tort remedies that provide more than just material compensation to victims. In this sense, it has been argued that damages share a restorative aim with apologies. Additionally, chapter IV has shown that corrective justice has a normative connection with distributive justice in the context of tort law, for tort law seeks to reinstate and perpetuate the initial entitlements defined by distributive justice. It follows that from the perspective of distributive justice, there is some moral uneasiness in tort law, for it protects rights regardless of how such rights were acquired, and regardless of whether their distribution amounts to an unfair distribution of resources. Chapter V has argued that the mechanism of insurance can correct – or at least reduce – this moral uneasiness, by distributing the burden of losses caused as a consequence of wrongs among broader pools of individuals. Finally, chapter VI has shown that this justificatory model based on corrective, restorative and distributive justice accommodates most of the remedies that tort systems provide.

The thesis shows that a commitment to the Aristotelian understanding of corrective justice does not necessarily lead to a monist account of tort law. This might be disappointing for those looking for a single unifying moral principle to justify tort law.[1] It has been shown however that monist accounts of tort law have been unsuccessful, mainly because the scope of tort law is difficult to narrow in terms of a single ideal. The reason for this is not only the wide range of interests that tort law protects (personal autonomy, privacy, reputation, property interests, and so on),[2] but also the fact that tort law is involved in a varied array of human interactions. In this sense, tort law usually deals with interactions among strangers, such as automobile drivers, but also among neighbours,[3] schoolmates,[4] friends,[5] and even family members.[6] By the same token, the scope of tort law includes a diverse range of behaviour, from the paradigmatic case of intentional wrongdoing to negligent and even justified conduct.[7] As a consequence, monist accounts of tort law have been unsuccessful to explain the complex nature of the legal practice. The thesis provides a number of instances in which this occurs. The most notorious example is the justification of the full measure of compensatory damages (VI.2). While it is true that theories of tort law need to explain (and justify) the existence of non-compensatory damages, they also need to explain (and justify) the fact that full compensatory damages are the default tort remedy as of right. Civil recourse and rights-based theories draw the attention to other remedies such as injunctions, gain-based damages

[1] Eg Ernest J Weinrib, *The Idea of Private Law* (revised edn, OUP 2012).

[2] John CP Goldberg and Benjamin C Zipursky, *Torts* (OUP 2010) 27-45.

[3] Eg *Christie v Davey* [1893] 1 Ch 316 (Chancery Division).

[4] Eg *Vosburg v Putney* 50 NW 403 (Wis 1891) (Supreme Court of Wisconsin).

[5] Eg *Nettleship v Weston* [1971] 2 QB 691 (CA).

[6] Eg *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555 (HL).

[7] *Vincent v Lake Erie Transportation Co* 109 Minn 456, 124 NW 221 (Minn 1910) (Supreme Court of Minnesota).

and exemplary damages. However, they acknowledge that these models cannot justify full compensatory damages.[8] By contrast, the thesis offers a model based on the corrective justice ideal of making victims whole that is able to justify full compensatory damages, but also *most* of the non-compensatory remedies that tort systems usually award to victims. The thesis however leaves open the possibility of justifying these remedies under a different set of principles (such as deterrence).

The thesis also discusses how the values of restorative and distributive justice coexist within the practice of tort law. Chapter III has argued that the restorative ideal of moral reconciliation must be limited. Despite the fact that satisfying victims is a desirable goal for the law, tort systems need to draw some limits to this satisfaction. Of course, the law has some practical constraints to enforce sincere apologies, or to compensate victims who have suffered immaterial losses. But other constraints are also justified. From the tortfeasor's point of view, chapter III has argued that requiring sincere apologies would imply an unacceptable invasion to people's feelings. Additionally, from the perspective of the victim, it has been argued that the victim's forgiveness cannot provide clear guidelines to determine tort remedies. It is true that tort litigation and its remedies can move the parties closer to their reconciliation, by allowing victims to face their injurers in the courtroom, to find out the truth about what happened, and to hold the defendants responsible and accountable for what they did. However, it has been argued that tort systems justifiably put some limits to this satisfaction in subjective terms. Chapter III has provided two examples of these limitations: non-pecuniary damages and damages for pure distress. In both cases, the

[8] Robert Stevens, *Torts and Rights* (OUP 2007) 59; John CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917, 962 n 223.

law distinguishes between the normal inconveniencies of ordinary life and those 'beyond the ordinary banter and badinage of life'.[9]

In the same vein, chapter V has discussed how the distributive mechanism of insurance can be reconciled with the restorative framework of tort law elaborated in chapters II and III. To some extent, the operation of insurance affects the symbolic or restorative meaning of tort remedies: a situation in which the tortfeasor pays by herself is morally superior to another in which a third party pays on the injurer's behalf. In the case of apologies, the case is even clearer: apologies on behalf of others are questionable. Chapter V has argued that tort systems require at least some vicarious agency; injurers can ask their banks to pay damages on their behalf, and successful tort claims can be coercively enforced. However, insurance moves one step further, since the injurer relies entirely on a third party to fulfil the duty to repair. It has been argued that tort systems should draw a line in which tortfeasors should not be allowed to insure against third party liability. The thesis has suggested the limits of intentional wrongdoing and exemplary damages.

VII.2 Significance

The argument of the thesis is significant primarily in the context of the literature on the moral foundations of tort law. I will highlight two aspects of the thesis that illustrate this significance. First, the emphasis on the apologetic nature of tort remedies moves the attention from the orthodox compensatory rationale to the notion of restorative justice, suggesting that this principle of justice should not be the exclusive concern of criminal lawyers. It is true that in some cases tort litigation is painful and a source of more conflicts among the parties. However, this fact should not obscure tort

[9] *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123, [2011] CP Rep 26 [42] (Rix LJ).

law's aim of repairing wrongs, a task connected with moving the parties closer to their moral reconciliation. Second, the connection between corrective and distributive justice in the context of tort law reveals the distributive features of tort law. The thesis argues that both principles of justice operate in the practice of tort law, suggesting that the customarily exclusive attention to corrective justice is unjustified. The conclusion therefore is that tort scholars should pay more attention to theories of distributive justice,[10] but also that they should be aware of the distributive injustice that tort law can perpetuate or even generate. The thesis conceives insurance as an adequate mechanism to be able to correct, or at least reduce, the unfairness of tort law. Other theoretical frameworks however could also succeed at fulfilling this task.[11]

Relatedly, the thesis also has important implications for corrective justice scholars. First, the thesis suggests abandoning the idea of corrective justice as a single and unifying notion of tort law. In this sense, it has been suggested that a commitment to corrective justice does not necessarily involve a commitment to monist accounts of tort law. Secondly, it has been argued that it is possible to reformulate the corrective justice duty of repair in terms of putting victims in the next-best position to the wrong not having occurred. It has been shown that this operation demands providing in most cases monetary compensation. However, in other cases different remedies might be in order. Chapter VI has discussed how the model of the thesis could justify these unorthodox remedies. Accordingly, it has been argued that a proper apology could be the adequate remedy in a defamation case, and also that aggravated damages could be necessary to repair the victim, because the way in which the wrong was committed

[10] Cane also reaches this conclusion in Peter Cane, 'Distributive Justice and Tort Law' (2001) 4 New Zealand Law Review 401, 419.

[11] Eg Tsachi Keren-Paz, *Torts, Egalitarianism, and Distributive Justice* (Ashgate 2007). Keren-Paz's approach however holds that corrective justice is regressive per se. I have offered a different view in IV.4.

deserves a different remedy. The argument is significant for it shows that corrective justice is able to accommodate the diversity of remedies that tort systems usually provide. It follows that corrective justice still is the starting point to justify the practice of tort law. In this sense, it has been shown that corrective justice is able to explain and justify an important feature of tort law that other theories such as civil recourse theory or rights-based accounts cannot explain, namely the full measure of compensatory damages. Most tort systems endorse the measure of full compensatory damages.[12] While fitting is not a primary concern of the thesis (0.3), it seems odd to leave this feature as a contingent characteristic of tort law. Regarding this aspect, the corrective justice-based model of the thesis provides more fitting of existing tort systems than the alternative explanatory theories. Thirdly, chapter V has shown that who pays tort damages is relevant for corrective justice, an issue that corrective justice scholars have understated. The argument is that the operation of corrective justice in practice cannot be isolated from the effects of insurance. Chapter V has offered a preliminary discussion of the relationship between corrective justice and insurance, but the discussion needs to be further developed, for corrective justice scholars have not paid enough attention to the effects of insurance.

Finally, the argument has implications in the broader context of private law at two different levels. At a first level, theoretical accounts of tort law seek to determine the distinctive aspects of the practice, features that allows distinguishing tort law from other areas of private law, mainly from contract law and unjust enrichment. Tort scholars have recently put forward many different theories to perform this task, such as the vindication of rights, holding wrongdoers responsible and private retribution.

[12] See eg PEL/*von Bar*, Liab Dam, Chapter 6, Article 6:101: 'Reparation is to reinstate the person suffering the legally relevant damage in the position that person would have been in had the legally relevant damage not occurred'.

These theories have been discussed throughout the thesis, showing that each of them emphasise different aspects of tort law. None of them however are able to capture the wide array of interests and conflicts that tort law regulates. For instance, chapter III has argued that tort law indeed holds wrongdoers responsible and provides to some extent a substitute for revenge. However, tort law also covers situations in which these ideas lose their importance. Chapter V has provided some examples of these situations that are usually covered by schemes of compulsory insurance, such as automobile and workplace accidents. By contrast, the reparative rationale that the thesis elaborates is flexible enough to include these situations. This flexibility makes the task for the legal theorist much more difficult, leaving open the question of what is distinctive about tort law. The justificatory account of the thesis suggests that monist explanatory accounts are destined to fail.

At a second level, there are implications for a general theory of private law. The question here is what is distinctive about private law. The most important implication is that corrective justice cannot serve as the gatekeeper of private law. The thesis has shown that tort law is connected with distributive justice – usually associated with public areas of the law such as administrative law – and also restorative justice – usually associated with criminal law. What is it then that puts together all the different areas of private law? This question cannot be answered here. The thesis only has mentioned some features that tort law shares with other areas of private law. In this sense, tort law shares with contract law Gardner's continuity thesis of corrective justice,[13] and with unjust enrichment the aim of restoring things as if the wrong would

[13] John Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 33.

never had happened.[14] However, some differences have also been noted. The fact that tort law deals with non-contractual interactions distinguishes tort law from contract law, whereas dealing with wrongs distinguishes it from unjust enrichment. Certainly, there is enough ground to explore how the justificatory model of the thesis could be applied to these other areas of private law, and whether it is possible to provide a unified theoretical account of private law.

[14] Especially in the case of Ripstein's account of remedies. Arthur Ripstein, 'As If it Had Never Happened' (2007) 48 William and Mary Law Review 1957.

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