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Duties in Tort Law and its Theory

Doctor of Philosophy in Law

Trinity Term 2020

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Abstract

This thesis has three aims. The primary aim is to consider the widespread claim that torts are wrongs or (equivalently) breaches of duty. This claim is often presented as essential to understanding tort law's true nature and, relatedly, to the refutation of 'instrumentalism'. I argue against the claim and in favour of duty-scepticism. This requires me to disambiguate the claim, reject some of its meanings as trivial or tautologous, and argue that those that remain fail to identify a necessary or general feature of tort law. Importantly, however, I also reject the common association between duty-scepticism and instrumentalism. The insistence that torts are breaches of duty has therefore become a distraction in the debate against the instrumentalists, who would be better refuted in other ways. The second aim of my thesis is to do this, by explaining how the defendant's liability may be justified (non-instrumentally) by his harm-causing conduct (whether or not that conduct is a breach of duty). Here I rely upon the well-known 'continuity thesis', which I defend from certain objections. One of its implications is that defendants' duties of repair arise strictly (that is, regardless of fault) and that this is indeed the logically primary case. That then leads to my third and final aim, which is to explain why tort liability is conditional, in the vast majority of cases, upon defendant fault. I do this by identifying several benefits in having a fault standard, while arguing that these remain, in an important sense, secondary. My thesis as a whole therefore decentres fault and wrongdoing, two concepts often taken to be integral to anti-instrumentalism, while nevertheless showing, through the continuity thesis, that anti-instrumentalism is ultimately correct.

Acknowledgments

John Gardner inspired me to write this thesis and supervised it for three years, but died tragically in July 2019 before it was completed. John was an exemplar, as both a philosopher and a person, whom I feel greatly privileged to have known. If there is anything of value in this thesis, it is probably traceable to John.

Sandy Steel graciously agreed to take over as my supervisor when John fell ill, and performed the role meticulously and with aplomb. His advice on each of my draft chapters was greatly valued, his faith in me and my work even more so.

I wrote the bulk of chapters 5 and 6 as a visiting fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, where Reinhard Zimmermann was (not for the first time) a wonderful host, mentor, and friend.

I have incurred debts to countless others. My examiners, Scott Hershovitz and Rob Stevens, as well as Timothy Endicott and Les Green, who assessed and guided my work in its earlier stages, deserve special mention. Bruce Chapman, Alon Harel, Ori Herstein, Nick McBride, Jenny Steele, and Emmanuel Voyiakis showed an interest in my work which I treasured, much more than they could have known. Of my many valued peers at Oxford, Achas Burin, Hasan Dindjer, Václav Janeček, Eleni Katsampouka, Tom Kohavi, Timothy Liau, James Manwaring, Joshua Pike, and Leah Trueblood deserve special thanks. My discussions with Martin Fischer, on the streets of Oxford and London, were especially frequent and formative.

My DPhil would not have been possible without the financial support of Balliol College, Oxford, and especially the Commonwealth Scholarship Commission.

Thanks, finally, to my parents, Emile and Suzanna, and to my wife, Tatiana — for everything.

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1. Introduction

Torts, it is often said, are civil wrongs. In other words, they are breaches of duty. That claim is now very widely accepted. Many would say it is a truism, and that to deny it is to misunderstand tort law fundamentally. In this thesis, however, I will risk censure by arguing against it. I doubt it is generally true that torts are wrongs (although many are). Equally importantly, I doubt that this claim, even if it were true, is as significant as its proponents believe. But that requires us to situate the claim that torts are wrongs in the wider debate.

1.1. A game of cricket

Suppose I accidentally hit my cricket ball over the fence and into your window. I should ensure, I hope we can agree, that the window gets fixed. But why? One vogueish line of thought is that requiring those who damage others' property to compensate for it is likely to make them damage it less often. A norm requiring compensation is justified by its deterrent effects. We could widen our focus to consider other consequences of making them pay: not only the desirable deterrent effects but also the undesirable ones—the reduction in cricket-playing, the inhibitory effects on batsmen's stroke-play—as well as consequences other than deterrence. Will having to pay compensation reduce cricket players to financial ruin? Shouldn't those wealthy enough to have windows be the ones made to bear the loss instead? Should we not,

then, impose liability only when that will produce consequences that are all-things-considered best?

But, for many, this explanation is obviously mistaken. It goes too far too fast. One is inclined to say, just as it was said against the consequentialists in general moral philosophical debate, that they have one thought too many.[1] For we do not need to appeal to any desirable consequences of the duty to pay in order to justify it; indeed doing so misses the point. If I were to insist that making me pay you for the window would have no deterrent effect, you would be inclined to say, 'So what? You broke it!' And, composure regained, you might be inclined to add that it is a mistake to justify my having to pay as a mere instrument to some desirable end; or that the right explanation does not look forward, to the consequences that would follow if I were made to pay, but backwards, to the brute fact of what I did to your window. You might say the explanation we are looking for answers not to the logic of consequentialism but of deontology. You should pay for my window because you had a duty not to break it—and to hell with the consequences.

These are, of course, the very things that tort theorists, starting around the 1970s, have been saying against the law-and-economics scholars, who present tort liability as an incentive, justified if and to the extent that it generates desirable conduct by defendants, and against the lawyers and judges who, adopting a similar picture, though with a wider lens (and a loss of focus), say tort liability should be imposed whenever that is good 'policy': whenever the consequences of doing so would be all-things-considered desirable. Tort liability, they reply, is not a means to get potential

[1] 'Persons, Character and Morality' in Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge University Press 1981) 18.

defendants to do things, but a response to what this defendant has already done. The question is not, 'What should defendants be discouraged from doing in future?' but, 'What has this defendant already done that he should not?' And what the defendant has done, the thought quickly follows, is *breach a duty* not to injure the claimant. Is not this primary duty the thing that has dropped out of the economists' picture? Is not the breach of it the past event to which tort liability looks backwards, and in response to which it tries to do corrective justice, quite apart from the desirability of the further consequences of doing it? So is not the restoration of primary duties, then, and with it the anti-consequentialist logic of deontology, the way to resist the economists' deflationary view of tort?

Actually, no; I doubt it is the right way to resist them. Of course, I meant to present the re-emphasis on primary duties as a natural response to the economists' challenge. But on closer inspection one can see we ended up at primary duties not by an inexorable march but by a haphazard retreat. There were many moves packed in, and many of them were overhasty. I think the introduction of duties was one of them. Or perhaps the wrong turn was not introducing duties, but imbuing them with far more normative significance than they can bear. 'Duty' is such a weasel word that it can be hard to tell.

The first chapters of my thesis will be an extended attempt to analyse the wrong turns. After that, I will try to develop a positive account of the justification for tort liability. That account will be duty-free. It therefore helps to consolidate my duty-scepticism, while also showing that, even without duties, the economists can be successfully refuted. Indeed these other ways of refuting them are much more productive.

1.2. Duties

That was an impressionistic introduction to what this thesis is about. Now we need a more precise one.

Throughout the thesis, and especially in Part I, I am going to be arguing against the proposition I will call 'DG':

> **Duty as ground of liability (DG):** Tort liability is grounded upon a wrong (=breach of duty) by the defendant.

We need some cognate definitions. Those who endorse DG I will call (with tongue in cheek) the 'duty-lovers'. The duty the breach of which they think grounds the liability I will sometimes call the 'primary duty'. Of course, since I am arguing against DG, it should be understood that I mean here the *alleged* primary duty; but as long as that caveat is borne in mind I am happy to defer to the conventional (and compendious) terminology. I will refer interchangeably to the defendant's 'liability', his 'remedial duty', his 'duty to pay damages', his 'duty to compensate', etc, with confidence that the reader knows what I am talking about. In doing so, I do not mean to prejudge the debate about whether the defendant comes under a duty to pay damages in virtue of his commission of the tort, or merely a Hohfeldian liability. The language I use should be easily adaptable to the respective partisan views.

We can see that DG itself could do with some refinement. Vicarious liability is imposed even on those who have not breached any duty,[2] for example, so it might be

[2] At least on the conventional picture. A heterodox view is that the tortfeasor's conduct, rather than his liability, is imputed to the defendant made vicariously liable—in which case that defendant has, in fact, breached a duty.

thought to provide an immediate—but thoroughly uninteresting—counterexample. That, however, is because vicarious liability is the imposition of liability *for the tort of another*. And the tortfeasor himself, whose liability is vicariously imputed to the defendant, is understood to have breached a duty. Hence vicarious liability provides no real counterexample; it does not affect the issue of whether liability *for the commission of a tort* is grounded upon a breach of duty.

Of slightly more enduring interest is the award of an injunction. The defendant against whom an injunction is awarded to restrain his publication of defamatory material, for example, may be said to have been subjected to 'tort liability'. But the liability was not grounded upon any breach of duty. (The injunction indeed *prevented* a breach of duty.) Possibly one could refine DG to accommodate this: 'Tort liability is grounded upon a wrong, *or a threatened wrong*, by the defendant', for example. Indeed one could take care of both issues in one fell swoop by replacing DG with a different proposition:

Torts as wrongs (TW): The commission of a tort is a wrong (=breach of duty).

Sometimes I will, for brevity's sake, speak of DG as though it is equivalent to this proposition. And this way of speaking is much assisted by the fact that DG is true only if TW is true. But to simply replace DG with TW at the outset would be risky, since it may cause us to lose sight of the way the breach of duty is meant to figure in the explanation of the liability. So DG's fuller formulation stays.

I will instead deal with the injunction example by noting that the 'tort liability' I have in mind, throughout this thesis, is liability *to compensate* the claimant. I will offer no analysis of what 'compensation' means, except to define it as 'the payment of money in response to a harm'. This has much play in the joints—What is a 'harm'? What

counts as 'responding' to it?—but at this stage that is no bad thing. I am only trying to identify a stable object of study, and distance it from some phenomena that are uncontroversially distinct. Settling the controversial boundaries of that object itself is the task of the argument to come.

A key objective of that argument will be, as I said, to show that DG is false. This is an unorthodox position, at least among non-economists. Yet it is not the radical claim it may appear. Much of my case against DG will involve separating it from claims with which it tends to be bundled, the truth of which is independent; and to suggest that the duty-lovers' wider ambitions can be vindicated—indeed are better vindicated—without insisting upon DG. Rather than trying to stake out a radical position, in other words, I will be trying to show that duty-scepticism is much less radical than sometimes thought.

This is for several reasons, which for now I only flag. First, I do not deny—how could one deny?—that there are some senses in which DG can be made true. That word, 'duty', is too ambiguous for it to be otherwise. A recent study documents eight legal usages of the term,[3] to which more could be added. Some of these are innocuous, and when fed into DG make that claim true. But they make DG only trivially true. It would not, when so understood, be capable of bearing the weight which eminent duty-lovers' arguments place upon it. The view I will be pressing, then, is that when DG is understood in a non-trivial way, then it is false.

The second reason this is not the radical claim it appears is more significant. I do not claim that *no* torts are wrongs. I say only that *not all* torts are wrongs. DG, in other words, is not generally true, even though it may be true in many cases. I will regularly

[3] Martin Hogg, *Obligations: Law and Language* (Cambridge University Press 2017) 15–16.

make the boring point that a feature possessed by one or even several torts need not be a feature of torts generally—along with the important further point that those torts that are not wrongs cannot be marginalised as peripheral or derivative. Despite this modest feature of my duty-scepticism, my disagreement with the duty-lovers remains significant. If DG is not a general truth about tort law, but only a contingent one, it cannot support the conclusions the duty-lovers draw from it.

1.3. Instrumentalism

Most pertinently, the duty-lovers are wrong to think DG holds the key to the refutation of their arch-opponents. As I indicated earlier, DG is commonly presented as marking the fork in the road between 'instrumentalists' about tort law, exemplified by the legal economists, and the 'non-instrumentalists', who oppose them.[4] To be a duty-sceptic is presented as taking one inexorably down the instrumentalist's path to the view that tort liability is justified by its ability to serve as an instrument to good consequences, rather than the fitting response, quite apart from the wider consequences, of the defendant's wrongdoing. To endorse DG, by contrast, is to insist on the centrality of the wrong that the defendant has committed, and thus to preserve the moral idea at tort law's heart.

In this divide between instrumentalists and their opponents—or between the 'economists' and the 'moralists', as others have put it[5]—I side with the latter. I think instrumental accounts of tort law are badly mistaken. But I am a duty-sceptic. I hope

[4] This terminology was popularised by Ernest Weinrib: see eg his 'Understanding Tort Law' (1988) 23 Valparaiso University Law Review 485; *The Idea of Private Law* (Harvard University Press 1995) ch 2.

[5] John Gardner, 'Tort Law and Its Theory' in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020).

to do much, then, to complicate and confound the conventional picture. I will present the fork in the road—DG, or not DG?—as one located *within* moralism. Though the duty-lovers tend to present themselves as a small minority fighting against the economistic majority, they are plainly in the ascendancy within the moralist camp. Theirs is the orthodoxy I wish to question.

My disagreement has two components. The first disagreement—already much laboured in the previous section—is that I think DG is false. The second is that I think DG is *unnecessary* to the vindication of moralism. Differently put, DG does not need to be true to show why the instrumentalists are mistaken. The instrumentalists' true error lies not in their duty-scepticism, but in the kind of justificatory connection they identify between the defendant's commission of the tort and his liability to repair it.

Of course, these two components are related: my willingness to be a duty-sceptic is bound up with my view that it does not lead to, and is not even likely to lead to, instrumentalism or other forms of extremism. And that, in turn, points to the third reason my rejection of DG is not as radical as may appear. Although it takes aim at a core tenet of many moralists, it is not meant to disparage moralism. Rather, it is meant as a friendly amendment. If my arguments succeed, they will show that DG is false, but also that it is inessential to moralism, and unhelpful in demonstrating moralism's supremacy over instrumentalism. The insistence upon duties has run its course, and become an unhelpful distraction in the debate against the economists, who would be more effectively refuted in other ways. So I take issue with a claim that is widely advanced by the duty-lovers, but I do so for the purpose of advancing what seem to be their wider aims.

How to provide the alternative, non-instrumental account of the justificatory connection between the defendant's conduct and his liability for it? It is by no means original to me. I draw upon the tradition to which Tony Honoré gave canonical expression in the concept of 'outcome responsibility',[6] and which has since been taken up by Stephen Perry, Joseph Raz, and John Gardner. Many others have already walked this path, then, but I hope by my lumbering presence to flatten out some of the regrowth—and perhaps to take it further by one or two steps.

1.4. Fault

So much for my duty-scepticism and my anti-instrumentalism. We come now to the third theme that runs through my thesis: the proper role of fault.

But what does fault have to do with the things I have been saying? There are three connections. The first, and most easily stated, is that the 'outcome responsibility' tradition I just mentioned says that one's responsibility to repair harms one has caused is, at base, strict. But, if that is true, my endorsement of that tradition generates an objection to which I owe a response: Why is the fault standard so widespread in tort law as we find it?

The second connection arises from the fact that DG is itself closely related—on some readings—with fault. This is because breaching a duty, on this understanding, entails that one acted as one ought not to; and acting as one ought not to is a necessary condition for acting with fault. Hence by rejecting DG, so understood, I am in the same

[6] Tony Honoré, 'Responsibility and Luck' (1988) 104 Law Quarterly Review 530.

breath rejecting any necessary role for fault. By this route, too, then, I seem to have made the preponderance of fault-based liability entirely mysterious. So I need to dispel that mystery, consistently with my other arguments.

The third connection between fault, duties, and anti-instrumentalism is admittedly more diffuse. It arises from the following loose but, I think, widespread intuition: one is justified in inflicting serious negative consequences upon a person only when they have done something objectionable. That intuition seems borne out by the fact that tort law requires fault on the part of the defendant in the vast majority of cases, and that features seems morally appealing. Hence the enduring aphorism that there can be 'no liability without fault'. And yet this idea, despite its intuitive appeal, quickly comes under pressure. First, there are those exceptional cases of strict liability, when the law dispenses with the fault requirement altogether. Second, even where the nominal fault requirement is preserved, it does not track genuine blameworthiness on the part of the defendant: even the inveterately incompetent defendant is held liable for his unavoidable mishaps, and so on. As even the earliest tort theorists recognised, therefore, our understanding of fault has to be finessed. One needs to move away from the more jejune readings of the aphorism.

The question is: How far should one go? Though almost no one today claims tort liability is conditional upon genuine moral blameworthiness, there are a range of views about the extent of its divergence from that idea (some would say 'ideal'). The trouble is that we seem unable to throw the idea out altogether: it has, as I said, both an affinity with tort doctrine and patent moral appeal. So one needs to distance oneself from the naïve view that tort liability always tracks moral culpability—and yet not lose touch with the attractive idea that underlies it. Or, at any rate, that is the delicate task one

must face *if* one is a moralist about tort law, keen to preserve the sense that tort liability is a matter of 'personal responsibility' in the face of the economists' deflations.

The connection I have in mind, then, is that the claim that 'torts are wrongs' functions as some writers' answer to that question. Their endorsement of DG is, in that sense, a *replacement* for the fault principle. It performs the same function—or at least it holds out that possibility. For it allows these writers to say that, even if those on whom tort liability is imposed are not always *at fault*, they are certainly always *a wrongdoer*. And hence the general architecture of the orthodox moralistic position is preserved.

This characterisation of the folk understanding of tort law may be a little glib—I don't claim it fits any theorist's avowed position—but that is not really the point. The point is to suggest certain themes in my own approach, important features of which may be explained as attempts to move more decisively away from whatever attractions the fault principle is thought to have. And that informs my views, already much emphasised, that both fault and wrongdoing are less central to tort law than often thought.

1.5. A road map

This thesis, then, explores three theoretical propositions about tort law. They correspond to the three Parts into which my nine chapters are divided, and of which I will now provide a step-by-step summary.

1.5.1. Duty-scepticism

The first proposition, and the one to which the thesis owes its title, is that torts are breaches of duty. In Part I, comprising the next three chapters, I argue this claim is false—that is, not generally true.

In chapter 2 I go back to the beginning. I discuss the work of Oliver Wendell Holmes, the archetypal duty-sceptic. I defend him against the attacks of the duty-lovers, taking Goldberg and Zipursky as exemplars, and argue that Holmes' views are more subtle than often thought. Exploring them helps to introduce some important distinctions, and to identify what is really at stake in the debate over DG.

Direct evaluation of DG begins in chapter 3. But the chapter is targeted at only one way in which DG can be understood. It reduces to a proposition I call DC_O:

> **Duty-as-ought as condition of liability (DC_O):** Tort liability is conditional upon a failure by the defendant to act as he ought (all things considered) to have acted.

DC_O is connected to DG because many prominent writers understand a breach of duty to be, or to entail, a failure to act as one ought (all things considered) to have acted. We might say, to complete the formal statement, that DC_O is a result of endorsing both DG and the following claim about the nature of duties:

> **Ought-entailment lemma (OL)**: *A*'s having a duty to *x* entails that *A* ought all-things-considered to *x*.

My argument will be that we should reject DC_O. If a commission of a wrong entails that one has acted as one ought not to have acted, then torts cannot be wrongs—for the commission of many torts is eminently reasonable. The canonical example is *Vincent*

v Lake Erie Transportation Co,[7] but this case can be brought into alignment with other important areas of tort law of more enduring practical significance, especially the modern law of nuisance. While proponents of DC_O do not ignore these, they wrongly marginalise them as exceptions.

The aims of this chapter, as I indicated, are modest: it argues only that tort liability is not grounded upon the breach of a duty by the defendant *if* one adopts an understanding of duties that includes OL. Many writers have other understandings. Can these be used to establish the truth of DG? Or must that claim be rejected altogether? That is what chapter 4 decides. The trouble is that, if one abandons OL, one abandons the most easily intelligible way in which DG can be made distinctive. Without it, DG appears to be either tautologous or mysterious. I explain why this is so and conclude (provisionally, for the moment) that we lack any good reason to believe DG is true.

1.5.2. Anti-instrumentalism

It follows from the arguments of Part I that those who wish to refute the economists by relying on the concept of duties are mistaken. Yet that should not come as a serious disappointment to the duty-lovers, who can refute the economists in other ways. I attempt to do this by showing that the justificatory connection between the defendant's conduct and the imposition of liability upon him can be explained non-instrumentally. That is the second proposition my thesis explores.

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[7] *Vincent v Lake Erie Transportation Co* 124 NW 221 (Minn 1910).

The core of my account is the well-known 'continuity thesis', according to which the defendant acquires a reason to repair the harms he has caused in virtue of his non-conformity to a reason in causing them. In chapter 5, I set out the thesis and defend it from some prominent objections. In chapter 6, I draw out some of its implications. The crucial implication for which I argue is that the justificatory relationship it establishes between the defendant's commission of the tort and his liability for it is suitably non-instrumental, and thus capable of showing the economists' error. In addition, there is nothing in the logic of this account that requires a breach of duty (as opposed to mere non-conformity to a reason) by the defendant. This confirms some of the core conclusions I reached in Part I: DG is neither true nor necessary to anti-instrumentalism. But the alternative account I urge is, and is fully intended to be, only a small adjustment.

1.5.3. The secondary role of fault

Part III is about a third proposition: the proper role of fault. I began to consider this in chapter 3, insofar as I denied that torts are necessarily failures by the defendant to act as he ought to. Moreover, one of the most attention-grabbing implications of the continuity thesis is that the defendant's reasons to repair harms he has caused arise strictly: that is, regardless of whether his initial failure to conform was faulty. That corroborates my conclusion in chapter 3. But it also creates a puzzle for my position. Why, if what I say is true, is the fault standard so pervasive in tort law as we find it? My arguments seem to amount, implausibly, to a defence of general strict liability. This is the challenge I address in Part III.

In chapter 7, I explain that, despite appearances, the continuity thesis does not predict rampant strict liability. Though it denies any *necessary* connection between fault and liability, it confirms a contingent one. Moreover, the continuity thesis sometimes results in indeterminacy, as a result of which further criteria (including, perhaps, fault) are required to single out the defendant as the appropriate bearer of liability.

Chapter 8 continues to explain the various good reasons the law has to enact a fault standard, consistently with the arguments of the previous Parts. The basic point is that the defendant acquires, by the continuity thesis, only a *pro tanto* reason to repair the harms he has caused; it remains an open question whether that reason is a conclusive one, and furthermore whether the law ought all-things-considered to compel the defendant to conform to it. The case for an affirmative answer depends in important ways on whether the defendant was at fault. That helps to justify the use of a fault standard some of the time. But that justification is importantly different from conventional accounts.

My brief conclusion, in chapter 9, highlights these differences. And it explains how Part III has closed some important argumentative circles which I began to draw in Parts I and II.

But all that lies far ahead: for now I must locate DG with a little more precision, and distance it from debates nearby. The way into this debate is, as I said, the work of Holmes.

PART I

DUTY-SCEPTICISM

2. New Holmes for tort lawyers

This first Part of my thesis is about the truth of the very popular claim that torts are wrongs, or breaches of duty. Of course, no one thinks torts are wrongs in the sense, familiar to the layperson, that their commission necessarily implies culpability. That thought was rejected by the earliest tort theorists. As Oliver Wendell Holmes said of John Austin's account, that would be to look at tort law 'too much as a criminal lawyer'.[1] The truth is that tort law cannot be assimilated to the criminal model. For Holmes, that meant we should reject the idea that torts are wrongs altogether. But most now believe this was too extreme. They do not dispute Holmes' rejection of Austin's account: tort law is not a law of wrongs of the kind that criminal law is. They believe a distinctive kind of wrong—a *civil* wrong—is at the heart of tort law.

In this chapter I will reconsider the writings of Holmes and the basis of his duty-scepticism. I will argue that his arguments are not as easy to dismiss as often thought. Hence there remains good reason to be sceptical about the claim which, in the previous chapter, I called 'DG':

> **Duty as ground of liability (DG):** Tort liability is grounded upon a wrong (=breach of duty) by the defendant.

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[1] 'Book Notices' (1872) 6 American Law Review 723, 725.

Sticking up for duty-scepticism is unfashionable. Or, at least, it is unfashionable among so-called 'moralist' or 'anti-instrumental' writers about tort law, who resist the legal economists' attempts to justify the imposition of tort liability by the consequences—fewer accidents, cheaper safety measures—to which it is an instrument. The moralists are near-unanimous in their endorsement of DG. And the stakes are, in their view, very high indeed. They present the claim as foundational to their subject. For Goldberg and Zipursky, for example, on whose pro-DG arguments this chapter focusses, any theory of tort law '[w]ithout wrongs at the center' is 'doomed to fail'.[2] For Nick McBride, the neglect of DG has caused a 'catastrophe' so grave that 'we no longer really understand what we are talking about when we talk about tort law'.[3]

These worries contain some truth, but are, I think, overstated. In Part II of my thesis I will try to recover the sizeable grain of truth. But there is much to do before we get there. The first major task, on which I spend this and the next two chapters, is to argue against DG. Ultimately I hope this will be a friendly amendment to the moralist's position. But for a while yet I will oppose many claims to which the moralists are attached. I think they have tended to assume DG's truth too complacently, tending to focus on their opponents' weakest arguments, and drawing overly strong conclusions from their own. They have been able to exploit the ambiguities in DG, shifting between its many meanings in a way that obscures the weaknesses of each. And their position has been shaped, also, by the extremism of their most eye-catching opponents, the economists, with whom duty-scepticism tends to be closely associated. 'If *that* is the

[2] John CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917, 986.

[3] Nicholas J McBride, 'Rights and the Basis of Tort Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011) 332.

abyss to which duty-scepticism leads', so the implicit thought seems to run, 'then we had better cling to DG.' But that is not where it leads, and when the moderate intermediate positions are restored it becomes rather unclear why we should endorse DG. Or so I will argue.

This chapter's contribution is limited. I aim to set out the terms of the debate more clearly, expose certain of its pathologies, and introduce some of the enduring themes of my thesis as a whole. This is the main conclusion of substance I will urge: certain arguments widely taken to establish the truth of DG are unsound. In particular, I will argue that Goldberg and Zipursky's rejection of duty-scepticism, influential though it has been, is misdirected. They have refuted only one argument, and a rather weak argument, for the denial of DG. This leaves other, stronger arguments against DG unaffected. I develop these points through an extended discussion of the work of the archetypal duty-sceptic, Oliver Wendell Holmes, which when properly understood helps to bring out the diversity of arguments for duty-scepticism, and the diverse themes with which it is connected.

To be sure, nothing I say in this chapter will establish DG's falsity. The aim is only to destabilise the widespread assumptions about its truth—and about its great importance to moralism—putting us in a better position for the direct assault on DG in the next chapter. In that sense, this chapter is an extended ground-clearing exercise. But there will be some landscaping involved too.

2.1. New Holmes

I begin, then, by considering more closely the writings of Holmes, whom defenders of duty-based conceptions of tort law continue to use as their foil. Holmes was an early

and famously forceful denier that there is, properly speaking, a duty not to perform a tortious act or not to breach a contract; there is a duty to pay compensation if one commits the tortious act or does not do as one promised, but there is no anterior duty not to do these things. Holmes makes this point throughout his scholarly writings,[4] and 'pertinaciously defended [it] to the last'.[5] The quotation usually provided is (somewhat unfortunately, as we shall see) from 'The Path of the Law', his 1897 address at the Boston University Law School:

> [T]he so called primary rights and duties [in the law of contract] are invested with a mystic significance beyond what can be assigned and explained. 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.[6]

And the same was true, Holmes said, in tort.[7] Better, then, to 'cease troubling ourselves about primary rights', and speak only of the liability to compensate.[8]

Holmes' arguments are nowadays widely taken to have been refuted, and decisively so.[9] I demur. In revisiting Holmes' arguments, we see they were subtler than popularly supposed, and much less easy to refute. Admittedly they were often obscured by bluster and overstatement. My task will be to retrieve the genuine insights beneath.

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[4] For early examples see eg 'Book Notices' (n 1) 725; Oliver Wendell Holmes, 'The Theory of Torts' (1873) 7 American Law Review 652, 652.

[5] Max Radin, 'Book Review' (1941) 26 Washington University Law Review 583.

[6] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 462.

[7] ibid.

[8] ibid 462–463.

[9] eg Nicholas J McBride, 'Duties of Care—Do They Really Exist?' (2004) 24 Oxford Journal of Legal Studies 417, 417; John CP Goldberg and Benjamin C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 Fordham Law Review 1563; Robert Stevens, *Torts and Rights* (Oxford University Press 2007) ch 1; Robert Stevens, 'Torts' in Louis Blom-Cooper QC, Brice Dickson and Gavin Drewry, *The Judicial House of Lords* (Oxford University Press 2009) 636–637; John Gardner, 'Torts and Other Wrongs' (2011) 39 Florida State University Law Review 43, especially at 58.

Doing so will help to narrow the debate I am entering, and show, I hope, that Holmes still has something to contribute to it.

Dangers lurk when one is drawn into debates about what a particular writer really believed; and with Holmes, especially, there is an enormous secondary literature in which it is frequently concluded that his writings are insolubly incoherent.[10] Fortunately I have no intention of restoring coherence to Holmes' thought: my point will be precisely that he had two independent—indeed rival—arguments for his conclusion that tort law does not create primary duties. The first does indeed go too far, and can be safely rejected. But the second argument is important and fundamentally sound—though it is often neglected by those who have become preoccupied with the first.

2.1.1. The first argument: generalised duty-scepticism

Holmes' first argument proceeds from the general to the particular. It applies his legal-philosophical views, and his scepticism about legal duties in general, to primary tort duties specifically. Thus Goldberg and Zipursky, for example, write that 'Holmes's thinking about tort law went hand in hand with his thinking about jurisprudence',[11] and indeed that '[his] argument for this fundamental tenet [that tort law creates no primary duties] is *identical* to his jurisprudential argument for the nonexistence of legal duties'.[12] So understood, Holmes' scepticism about primary tort duties is an

[10] eg Thomas C Grey, 'Holmes and Legal Pragmatism' (1988) 41 Stanford Law Review 787, 787–788 and authorities cited there.

[11] Goldberg and Zipursky, 'Seeing Tort Law from the Internal Point of View' (n 9) 1568.

[12] ibid 1572 (emphasis added).

instantiation of his views on general jurisprudence. And so it follows, for a number of influential writers, that the way to re-establish the existence of primary tort duties is to refute Holmes' account of the nature of legal duties in general.

The latter stemmed from the claim that law, for Holmes, was 'nothing more pretentious' than 'prophecies of what the courts will do in fact'.[13] Thus it was senseless, Holmes wrote in 'The Path of the Law', to understand legal duties as anything other than a statement that the law would impose certain consequences if one acted otherwise:

> The primary rights and duties with which jurisprudence busies itself are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas … is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterwards. But … a legal duty so called is nothing but a prediction that a man does or omits certain things he will be made to suffer in this or that way by judgment of a court.[14]

This is the so-called 'predictive theory' of legal obligation for which Holmes is infamous. In this respect he is closely associated with Austin, for whom a legal duty is a command by a lawmaker (or, as he thought, the sovereign) disregard of which will, or will probably, lead to the imposition of a sanction.[15] As is well known, Austin's account was subjected to devastating attack by HLA Hart in *The Concept of Law*.[16] Some tort theorists have dismissed Holmes' views on the basis that he is guilty by his

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[13] Holmes, 'The Path of the Law' (n 6) 461.

[14] ibid 458.

[15] John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press 1995) Lecture I.

[16] HLA Hart, *The Concept of Law* (2nd edn, Clarendon 1994).

association with Austin. But that, as we shall see, is a mistake—and not because of recent moves to say that, contrary to the common impression, Hart's attack on Austin failed.[17] Hart was right (we may, at any rate, suppose) about the nature of law, since he showed that legal duties can and do exist without any accompanying sanction, and in fact are frequently the *reason for* the imposition of the sanction by a judge. Hence the duty is logically anterior to the sanction, and cannot be identified with it. It was Holmes, in other words, rather than his opponents, who put the cart before the horse. And, by ignoring the role of the primary duty in the reasoning of judges and other participants in the legal system, Holmes flouts the 'internal point of view', the rightful methodological precept that has characterised analytic jurisprudence since Hart.[18] The perspective of Holmes' 'bad man',[19] relatedly, who cares only about the sanctions the law will impose on him, may be one valid perspective: but one should not neglect the others, such as the judge.

If one sees Holmes' scepticism about tort law's primary duties as an instantiation of his scepticism about legal duties generally, then, Hart seems to have refuted it. Some theorists have concluded, accordingly, that the failure of Holmes' predictive theory entails the falsity of his scepticism about tort law's primary duties. Goldberg and Zipursky, for example, believe it is 'a telling observation', on which their argument pivotally rests, that Holmes' view on primary duties in tort instantiates his general

[17] eg Frederick Schauer, 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (2010) 23 Ratio Juris 1; *The Force of Law* (Harvard University Press 2015).

[18] The literature here is enormous. See eg Scott J Shapiro, 'The Bad Man and the Internal Point of View' in Steven J Burton (ed), *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes Jr* (Cambridge University Press 2000); Benjamin C Zipursky, 'Legal Obligations and the Internal Aspect of Rules' (2006) 75 Fordham Law Review 1229.

[19] Holmes, 'The Path of the Law' (n 6) 459–461.

scepticism about legal duties, since the latter 'has long been discredited'.[20] One needs only to recognise that Hart's refutation is 'equally applicable at the level of tort theory'.[21] Other writers, too, present the persistence of Holmes' views among tort writers as a relic soon to be swept aside.[22] It is simply a matter of discoveries taken for granted by writers in other fields filtering through to tort lawyers.

2.1.2. The second argument: no evidence of a prohibition

It is a striking and unfortunate feature of the debate about Holmes' contribution to tort theory that it takes as its starting point his remarks in 'The Path of the Law'. These are by far his most exaggerated, and least persuasive, statement of his views. As so often, his crucial ideas are 'expressed in delphic aphorisms', and—hardly surprisingly for an oral address to students—it 'reflect[s] not only the strains of meeting stringent deadlines, but also a tendency to prefer provocative expression over more extended elaboration'.[23]

If one pays attention to Holmes' earlier work, which sets out his views more carefully, it is obvious that his scepticism about primary tort duties does not rest, at least not only, on the predictive account. For his second argument—as I shall call it, at some risk of confusion, since temporally it precedes the first—is quite different. It is targeted narrowly at the evidence, or lack thereof, from which to infer that tort

[20] Goldberg and Zipursky, 'Seeing Tort Law from the Internal Point of View' (n 9) 1572.

[21] ibid.

[22] eg McBride, 'Duties of Care—Do They Really Exist?' (n 9) 417–418.

[23] David Rosenberg, *The Hidden Holmes: His Theory of Torts in History* (Harvard University Press 1995) 164.

liabilities rest on the breach of a primary duty. It entails no wider duty-scepticism, and in fact presupposes that talk of primary private-law duties is meaningful. That may give us reason to doubt whether Holmes was really committed to the predictive account at all, if by that is meant the strong thesis that *all* talk of legal duties was senseless unless boiled down to a prediction that certain consequences would follow. Or it may show that Holmes' views changed over time. Either way, Holmes' writings disclose a more subtle argument for duty-scepticism than the discreditably extreme one on which his opponents have focussed.

Hart, who cited only 'The Path of the Law', influentially presented Holmes as heir to Austin's sanction theory of duties, according to which a law is a command of the sovereign backed by a sanction.[24] This yields the devastating critique of Holmes that I mentioned above. But in his earlier work on the subject, Holmes had taken a subtler line. Though Holmes undoubtedly admired Austin,[25] he rejected his sanction theory of duties on several grounds. In his very first written work, he had denied that all laws were issued by a 'sovereign', whose very existence was indeed open to doubt.[26] Two years later, in 1872, Holmes added two more grounds of objection, which he had conceived in the course of teaching Jurisprudence at Harvard.[27] The first was that it is not only the existence of a penalty or sanction that determines whether a legal duty has

[24] Hart, *The Concept of Law* (n 16) 8. He again cited only 'The Path of the Law' when he returned to the subject in his *Essays on Bentham* (Clarendon Press 1982) ch 6.

[25] Thomas C Grey, 'Accidental Torts' (2001) 54 Vanderbilt Law Review 1225, 1239–1246.

[26] Oliver Wendell Holmes, 'Codes, and the Arrangement of the Law' (1870) 5 American Law Review 1, 4.

[27] 'Book Notices' (n 1). Holmes is giving an account of Pollock's lectures on jurisprudence at Harvard, which were published as 'Law and Command' (1872) 1 Law Magazine and Review 189. But most of the article clearly reflects Holmes' own views. Compare Grey (n 25) 1276 fn 160.

been breached; Austin had been wrong to treat this 'as the final test'.[28] One has to look, Holmes said, at 'a number of consequences' attached by the legal system to the conduct at issue.[29] The list of these is not closed or neatly determinable in advance, but certainly there are some relevant consequences which should not be forced into the mould of a penalty or sanction: the example Holmes gave was the invalidity of a contract concluded in defiance of the alleged duty,[30] which he regarded as one way in which a breach of a command may be 'deprived of the protection of the law'.[31] From later work it is clear he would also have included here the awarding of an injunction to prevent the conduct.[32] It was this set of features, and not only the presence or absence of a sanction, Holmes thought, that would determine whether there existed a legal duty properly so called.

Second, and crucially, Holmes thought that the sanction and these other consequences were not *constitutive* of the duty, but *evidence* of it. 'The test of a legal duty', he wrote, 'is the absolute nature of the command', which means a legal rule embodies a duty if the lawmaker wished 'to bring about [the conduct identified by the rule], and to prevent the contrary'.[33] 'The imposition of a penalty is therefore only evidence tending to show that an absolute command was intended' by the lawmaker.[34] The nub of the matter, of which the consequences for the law's subjects are indicia, is

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[28] 'Book Notices' (n 1) 724–725.

[29] ibid.

[30] Austin, as is well-known, had sought to assimilate invalidity to a sanction. Holmes evidently found this unpersuasive.

[31] 'Book Notices' (n 1) 724–725. Holmes mentions also 'the denial of relief when the illegal act is part of the plaintiff's case, etc'.

[32] Holmes, 'The Path of the Law' (n 6) 462.

[33] 'Book Notices' (n 1) 724.

[34] ibid.

what attitude the lawmaker takes to the conduct governed by the rule. The theorist must discern from the available evidence whether the lawmaker 'wish[ed]' or 'intended' to prohibit or prevent the conduct at issue:[35] and only where it did is there properly speaking a legal duty.

All this clears the way for Holmes to distinguish between liabilities that are based on the breach of a primary duty, and those that are not. For the latter he gives the famous example of an import tariff, which, while resulting in the incurrence of a financial liability by any person who imports the product, 'does not create a duty not to bring it into the country'.[36] There is no duty because we cannot point to any evidence that the importation of the product is prohibited or sought by the lawmaker to be prevented. The financial liability apart, importation 'is protected and treated as lawful in all the other connections in which it may come before the court'.[37] Applying Holmes' test, we see that the lawmaker leaves the option open to import the product, requiring only that one pay the price of the tariff if one exercises it. We rightly say, then, that the import tariff is a liability that is not based upon the breach of any legal duty. The tariff imposes no duty against importation, but is, in Holmes' well-known phrase, a mere 'tax on a certain course of conduct'.[38] And note that we are right to say this in spite of the fact that the consequence of importing the product, namely the financial liability, is identical to that which follows the breach of certain criminal prohibitions—which do properly speaking impose a duty.[39]

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[35] See also Oliver Wendell Holmes, *The Common Law* (Little, Brown 1881) 148.

[36] 'Book Notices' (n 1) 724.

[37] ibid.

[38] ibid 725; Holmes, 'The Theory of Torts' (n 4) 652.

[39] Holmes, 'The Theory of Torts' (n 4) 652.

What emerges from Holmes' discussion of the import tariff is that many liabilities, even liabilities that are incurred upon the performance of certain conduct by the defendant, are not based upon the breach of a primary duty. And Austin's sanction theory must be wrong, Holmes urges us to conclude, for it gives the unacceptable opposite result: that the import tariff and criminal sanction are indistinguishable, both being responses to the breach of a legal duty. In truth, the two had to be distinguished. The mere fact of the liability, then, cannot be enough to establish the primary duty's existence. The liability, he says, does not '*of itself* creat[e] a duty';[40] '[t]he notion of a legal duty involves something more'.[41] And so the challenge, Holmes says, is to determine, by looking also at the 'collateral consequences' of the defendant's conduct, whether the liability at issue is grounded upon the breach of a legal duty:[42] whether it is to be grouped with criminal liability, or with the import tariff.

Fair enough, you may say, but isn't it still naïve to deny that private law sometimes imposes primary duties? Yes, which is why Holmes did not deny it. Contrary to the common understanding—and, to be sure, his bombastic aphorism in 'The Path of the Law'—it was not his view that there was never a duty not to breach a contract. He said we are sometimes justified in inferring a duty not to breach a contract, and sometimes we are not.[43] He proposed a criterion by which those cases could be distinguished—the 'absolute nature of the command'—and identified certain cases where the criterion

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[40] 'Book Notices' (n 1) 725 (emphasis added). See also *The Common Law* (n 35) 149 ('liability to an action does not necessarily import wrong-doing').

[41] 'Book Notices' (n 1) 724. See also Holmes, 'The Theory of Torts' (n 4) 652 ('Mere liability to what is called a penalty… may not create a duty').

[42] 'Book Notices' (n 1) 725.

[43] ibid 724–725 (explaining that the invalidity of an unlawful contract, and the denial of restitution for its performance, suffice to show that the lawmaker intended that it not be concluded). In fact he makes this point in 'The Path of the Law' itself, immediately after the oft-quoted aphorism: see 'The Path of the Law' (n 6) 462.

was met. What he objected to was the overgeneralisation, the reflexive assumption that since a primary duty could be established in the case of some civil liabilities it could be established in the case of all. Whereas in some cases the 'collateral consequences' of the conduct (such as the invalidity of a contract concluded in disregard of the rule) are enough to decide the matter in favour of the existence of a primary duty, these are not sufficiently widespread to make general claims.[44] And, as we surely agree, the way out of this problem that Austin favoured—that tort liability presupposes a breach of duty because it implies culpability—is false.[45] Nor, again *pace* Austin, is the quantum of tort liability 'proportioned to the defendant's guilt'.[46] For all these reasons, we lack an explanation of the sense in which there is—generally, or necessarily—a legal duty not to commit a tort.

2.1.3. Holmes' challenge

This second argument represents a neglected strand in Holmes' thought. From it, ironies abound. Hart took Holmes to task as heir to Austin's sanction theory of duties,[47] yet Holmes had prefigured Hart's very criticisms of Austin. Indeed it was Holmes' avowed ambition, in setting out his jurisprudential views, to show that Austin was wrong. In addition, Holmes' second argument does not rest on the predictive account for which he is infamous, and is in fact signally at odds with it. Far from saying that exposure to a sanction makes it the case that a legal duty exists, Holmes emphasises

[44] Holmes, 'The Path of the Law' (n 6) 462.
[45] 'Book Notices' (n 1) 725.
[46] Holmes, 'The Theory of Torts' (n 4) 652.
[47] Hart, *The Concept of Law* (n 16) 8.

that the existence of a legal duty is established on an entirely different ground, of which exposure to a sanction is merely evidence. Nor, it seems, did Holmes 'define … out of existence' the internal point of view,[48] since that other ground is the attitude taken by the lawmaker to the conduct in question. And Holmes concluded that we are often justified in regarding liabilities as grounded upon the breach of a primary duty, which has an independent existence—thus defying the duty-scepticism he is taken to exemplify.

Strikingly, a key passage in *The Concept of Law*, in which Hart urges us not to force all legal rules into the sanction-imposing model, mimics Holmes' own treatment of the problem almost exactly:

> A punishment for a crime, such as a fine, is not the same as a tax on a course of conduct, though both involve directions to officials to inflict the same money loss. What differentiates these ideas is that the first involves, as the second does not, an offence or breach of duty in the form of a rule set up to guide the conduct of ordinary citizens.[49]

This is, of course, a synoptic version of Holmes' second argument, whose central distinction—responding to a breach of duty versus taxing a course of conduct—Hart repeats almost verbatim. Hart fails to attribute the argument to Holmes. He does mention Holmes on the following page—but only in order, once again, to criticise Holmes, for supposedly *failing* to draw this very distinction.[50] Hart was quite right that the predictive theory obliterates this distinction, but it is remarkable that he did not see

[48] ibid 91.

[49] ibid 39.

[50] ibid 40, and see also Hart's 'Notes' at 286.

that the distinction itself came from Holmes' earlier work—not even as he borrowed that distinction as a key plank of his argument.[51]

No doubt Holmes gave his interpreters abundant reason to understand, or misunderstand, him in these ways. The views most often ascribed to Holmes are richly evidenced in his writings, and it is only natural that his most provocative statements, which came at the height of his esteem, have tended to grab attention since. And 'The Path of the Law' is so widely fêted—an 'acknowledged masterpiece',[52] and 'the best article-length work on law ever written'[53]—that it is inevitable that Holmes' less eye-catching writings have receded into its shadow. Though it is not unusual to point out that Holmes' writings should be separated into different 'modes'[54] or 'phases',[55] the trouble is that 'The Path of the Law' is usually seen as the culmination of his first, 'scholarly', phase,[56] and the most 'mature, polished expression of his concept of law'.[57] This being so, there is thought to be little reason to return to his earliest forays into that terrain: only their consummation in 'The Path of the Law' is worth reading. Most commentators accordingly do not mention Holmes' early 'Book Notice'. Of those who do, many brush off its inconsistencies with 'The Path of Law' as irrelevant wrinkles that Holmes would later iron out.

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[51] Hart cites only 'The Path of Law', although the famous phrase 'tax on a course of conduct' does not appear in it; Hart must have been influenced (probably indirectly) by Holmes' earlier work.

[52] Saul Touster, 'Holmes a Hundred Years Ago: "The Common Law" and Legal Theory' (1981) 10 Hofstra Law Review 673, 692.

[53] Richard A Posner (ed), *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* (University of Chicago Press 1992) x.

[54] AW Brian Simpson, 'The Elusive Truth about Holmes' (1996) 95 Michigan Law Review 2027, 2033.

[55] Posner, *The Essential Holmes* (n 53) xi.

[56] ibid.

[57] Albert W Alschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* (University of Chicago Press 2000) 132.

This was a view which Holmes himself encouraged. He seems to have been pleased with the sweeping 'predictive theory' at which he had arrived and did not reprise his more careful early arguments. Indeed his views only calcified over time, so that in his last years he would himself describe his view ('that when you commit a tort you incur a liability to damages *simpliciter*') as 'a particular case of my general definition of a right as the hypostasis of a prophecy'.[58] In short it was Holmes himself, and not only his opponents, who came to believe that his generalised duty-scepticism was the most compelling and considered basis upon which to ground his denial of DG.

The most attentive writers on Holmes, however, have seen that his earlier work demands closer attention. Thomas C Grey's assessment is that '[t]he literature of legal theory contains few performances of more concentrated brilliance than the thirty-one-year-old Holmes' "Book Notice" of scarcely a thousand words'.[59] Holmes' biographer Mark de Wolfe Howe devotes several pages to it, and from his discussion the discontinuities between it and Holmes later work emerges unmistakably.[60] As Morton Horwitz has shown, Holmes' views were changing even during his 'scholarly' period, and 'The Path of the Law' reflected an important break with what had come before.[61]

Why does any of this matter? True enough, the fact that Holmes elsewhere expressed views of greater subtlety may have no lasting significance for general

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[58] Letter from O W Holmes to Frederick Pollock (30 May 1927): see Mark de Wolfe Howe (ed), *Holmes–Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874–1932* (Harvard University Press 1941) 200.

[59] Grey (n 10) 831–832.

[60] Mark de Wolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years, 1870–1882* (Harvard University Press 1963) 71–80. See too G Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press 1993) ch 4.

[61] Morton J Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford University Press 1992) ch 4.

jurisprudence. Holmes' predictive theory, and his bad man, have served as useful foils in the development of the subject; that the man himself may not have held views so blithe is now of only passing interest.[62] The important point is that legal duties may exist, even apart from the liabilities consequent upon their breach.

To tort lawyers, by contrast, Holmes' early work has a significance that endures. The reason is simple: duty-loving tort lawyers, led by Goldberg and Zipursky, have used Hart's arguments to support a different and further point, namely that liability *in tort* is grounded upon the breach of a legal duty. It does not follow from the fact that it is *possible* for legal duties to pre-exist liability for their breach—the point Hart established—that liability *in tort* is necessarily explained in this way. Goldberg and Zipursky imply that it does follow. Their key argumentative strategy, as we saw, has been to use Hart's arguments to refute Holmes' predictive theory. By encouraging the view that generalised duty-scepticism is the sole refuge of those who would deny DG, they have created the impression that DG has been carried to victory by Hart's assault on Holmes. But their criticisms were directed at only one Holmesian argument—his weaker argument—for scepticism about the centrality of primary duties in tort. The danger posed by Holmes' second argument has not been snuffed out. As soon as one sees that one can agree with Hart's general jurisprudence and yet deny that *torts* are breaches of duty, Goldberg and Zipursky's flagship argument is undercut.

[62] Even within general jurisprudence, however, some have tried to rehabilitate Holmes and his Realist followers, eg Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 Ethics 278, 290–293.

Only very rarely has this limitation in Goldberg and Zipursky's approach been acknowledged. Grey quietly dissented in a footnote to 'Accidental Torts', his 2001 study of Holmes' tort theory:

> It is useful to keep Holmes' limited point about the compensatory damage remedy [viz. that the imposition of liability leaves open the possibility that the lawmaker did not intend a prohibition] distinct from the more general scepticism he sometimes expressed about the grounding of law in a deontological morality of rights and duties.[63]

Grey noted that these two points 'are often conflated'—and singled out here the early work of Goldberg and Zipursky.[64] But when they mounted their main offensive against Holmes a few years later they did not heed Grey's warning, and few have heeded it since. Most have agreed with Goldberg and Zipursky's self-assessment that Hart's refutation of Holmes 'undercuts much of the impetus for duty scepticism in tort'.[65]

This understanding, besides causing DG's proponents to neglect an important argument against their position, tends to polarise the debate unnecessarily. If the moderate case for duty-scepticism in tort is overlooked, then the duty-sceptics seem inevitably to be extremists. The middle position—that Hart was correct to reject Austin's general account of duties, but that tort liability does not rest (at least not always) on a breach of duty—has dropped out. And, that being so, duty-scepticism seems to constitute a benighted failure to grasp the lessons of twentieth-century legal theory. Or one must, at the very least, be in thrall to the economists, since they are

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[63] Grey (n 25) 1277 fn 162. See also Grey (n 10) 829–834.

[64] Grey (n 25) 1277 fn 162. The work he cites is John CP Goldberg and Benjamin C Zipursky, 'The Moral of MacPherson' (1998) 146 University of Pennsylvania Law Review 1733, 1737–1743.

[65] Goldberg and Zipursky, 'Seeing Tort Law from the Internal Point of View' (n 9) 1564, 1572. For their influence on subsequent writers see again the works cited at n 9.

duty-scepticism's most influential modern-day proponents. As Peter Jaffey, a rare critic of this dichotomy in the English literature, rightly puts it, 'some commentators seem to have assumed … any suggestion that claims arise other than from a breach of duty must reflect externalist scepticism', i.e. 'a general scepticism about the existence of duties'.[66] And once *that* inference is drawn, duty-scepticism becomes easy for moralists to dismiss: one needs only to point out the many errors in economistic accounts of tort law—for all of which duty-scepticism becomes guilty by association.

But the association is spurious. As Jaffey says later, recognising the possibility that *some* liabilities are not grounded upon the breach of a primary duty 'is not inimical to the recognition in principle of primary duties'.[67] In fact one should say something stronger. Holmes' second, 'narrower doctrine', as Grey points out, '*depends* on the existence of genuinely peremptory duties'.[68] For Holmes established it by contrasting those cases of liability where the legal materials admittedly disclose a primary duty (such as in criminal law) with those where that same evidence is lacking (such as the import tariff).

Holmes, in short, had a more precise thesis, standing apart from the excesses of the predictive account, which continues to undergird scepticism about DG and must be evaluated in its own terms by those who would deny his conclusions. He has, in effect, laid down a challenge to those who would defend the view that tort liability presupposes a breach of a duty: 'On what basis do you say that tort liability is something more than a tax on a course of conduct? The imposition of liability itself

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[66] Peter Jaffey, 'Duties and Liabilities in Private Law' (2006) 12 Legal Theory 137, 151–152.

[67] Peter Jaffey, 'Liabilities in Private Law' (2008) 14 Legal Theory 233, 244.

[68] Grey (n 25) 1277 fn 162 (emphasis added).

does not help, of course, because it cannot be distinguished from an import tariff (which we can agree is not levied because of any breach of duty). If there were collateral consequences of committing the tort, those might help, but there is none sufficiently widespread. And finally, you cannot help yourself to the arguments used to establish the point in relation to criminal law: for the commission of a tort is not always blameworthy, nor is the quantum of the liability ratcheted to the degree of blameworthiness.'

This is the challenge whose force I want to re-evaluate in Part I of this thesis, free of the spurious associations with which the literature has lumped it. As we shall see, I doubt whether Holmes' challenge has been adequately met.

2.2. Duties and liabilities

2.2.1. The trivial understanding

To be sure, DG can be recast so that it becomes trivially true. On any view, tort liability is imposed only if certain legally stipulated conditions are met; and these conditions are (in part) to do with the defendant's conduct. Can we not aptly say, then, that when the defendant's conduct meets these conditions he has 'breached a legal duty', 'committed a legal wrong', etc, and thus that tort is about 'duties' after all? Well, sure. It is possible to say that, and many tort writers over the years have said that. Even Holmes chose to use that word, apparently unable to find a better one.[69] But he meant it only as a compendious statement of the conclusion that liability in tort will follow if

[69] Holmes, 'The Theory of Torts' (n 4) 659–660.

the defendant's conduct meets certain legally stipulated conditions.[70] His saying '*x* is a breach of duty' simply means that 'liability will follow if the defendant does *x*'. That is the same meaning Prosser would ascribe, some decades later: 'Duty is only a word', he said, 'with which we state our conclusion that there is or is not liability'.[71]

So the terminology is intelligible—some sense can be ascribed to it—but we ought to do better. One reason we ought to do better is, of course, that the terminology obscures the theoretically important distinction I was at pains to draw in the previous section. I will do so by distinguishing 'duties' from mere 'rules', which lack the special features that turn an ordinary rule into a duty. Although there is a legal *rule* stipulating that the performance of a certain action will make one liable to the import tariff, then, there is no *duty* not to do it. This reminds us that a duty is only *one kind* of legal rule, and we should not lightly assume that all legal rules—even those which determine, on the basis of the defendant's conduct, the circumstances in which liability will be imposed—are, specifically, duties. This is true even when judges and lawyers *call* it a 'duty', since they could be adopting the Prosserian usage.

The second reason we must reject the trivial recasting is that DG's proponents themselves reject it. After all, their endorsement of DG is not meant to be trivial. It is meant to be a significant thesis, which, far from uniting all tort theorists behind an ecumenical banality, serves to distance them from a rival camp. Indeed the duty-lovers are trying to distance themselves from precisely those who give DG a merely trivial reading—those who think 'D owed a duty to C' means only 'D is appropriately held

[70] He noted that he was using the word only 'to avoid a circumlocution', and subject to the qualifications he had previously outlined: ibid 660 fn 1.

[71] William L Prosser, 'Palsgraf Revisited' (1953) 52 Michigan Law Review 1, 15.

liable to C'. For McBride, for example, that way of viewing things is 'vacuous and circular'.[72] Similarly, Goldberg and Zipursky take their endorsement of DG to entail the rejection of views like Prosser's. Their aim is to recapture a role for wrongs that is not a 'mere tautology'.[73] And Rob Stevens says the question of whether the claimant has a right, and the defendant a corresponding duty, is 'anterior'—and hence not merely reducible—to the question of whether he is liable.[74]

2.2.2. Four ideas comprising duty-loving

The debate over DG is therefore a non-starter unless we understand the claim in such a way that the primary duty is distinct from the liability. To endorse it meaningfully one must consider—in defiance of Holmes in his most blustery moments—'the duty as something existing *apart from and independent of* the consequences of its breach'.[75] Holding the duty and the liability to be separate things: that is the minimum qualification to be a duty-lover.

There is a further idea that comes hot on the heels of this one, and which the quotation from Stevens anticipates. It is not just that the duty is separate from the liability, but that the two stand in a certain relation. This idea is harder to characterise precisely. McBride sometimes puts it like this: tort liabilities 'arise out of' the breach of duty.[76] The wrong is the answer, he says elsewhere, to the question '*why* … will the

[72] McBride, 'Duties of Care—Do They Really Exist?' (n 9) 422.

[73] Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1, 41.

[74] Stevens, *Torts and Rights* (n 9) 2.

[75] Holmes, 'The Path of the Law' (n 6) 458 (emphasis added).

[76] McBride, 'Duties of Care—Do They Really Exist?' (n 9) 422.

law hold someone like [D] liable [to C]' in the given situation.[77] We thus enter the realm of justification. The wrong, for the duty-lovers, is a premise in the argument by which the liability is justified. D is held liable to C, McBride says, *because* he breached a duty he owed her.[78] For Goldberg and Zipursky—and this is the way I put it when I formulated DG—the breach of duty is the *ground* of the liability.[79] The wrong, finally, acts as *the reason for* the liability, and not merely as a *condition* defining the circumstances in which it is imposed.[80]

Here we see again the close echoes of the general jurisprudential debate that Hart settled. Summing up his attack on those who would boil legal rules down to the sanction that is imposed when they are contravened, he wrote:

> The fundamental objection [to the predictive theory of obligation] is that [it] obscures the fact that, when rules exist, deviations from them are not merely grounds for a prediction … that a court will apply sanctions to those who break them, but are also a *reason or justification* for … applying the sanctions.[81]

Substitute in 'primary duties' for 'rules', and we have the duty-lovers' fundamental objection to (what they take to be) Holmesian duty-scepticism. And one may point out, also, that Hart had specifically dealt with Kelsen's attempt[82] to recast all laws as sanction-based '[b]y greater and greater elaboration' of the conditions, or 'if-clauses',

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[77] ibid.

[78] ibid.

[79] Goldberg and Zipursky, 'Seeing Tort Law from the Internal Point of View' (n 9) 1589; Goldberg and Zipursky, 'Torts as Wrongs' (n 2) 949.

[80] Compare John Gardner, 'Backward and Forward with Tort Law' in Joseph Keim Campbell, Michael O'Rourke and David Shier (eds), *Law and Social Justice* (MIT Press 2005).

[81] Hart, *The Concept of Law* (n 16) 84 (emphasis added).

[82] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1945) 53–54, 58–64.

for the sanction's imposition.[83] The parallel move here, of recasting all primary duties in tort law as mere 'fragments' of the liability-imposing rules, may be said by DG's proponents to be equally misguided.[84]

Once the primary duties are restored in this way, another thought tends quickly to follow. It is that tort law is in the business not (only) of goading its subjects, but of guiding.[85] The fact that liability will be imposed for tortious conduct changes—worsens—the consequences for the law's subject of performing it. By changing the consequences of his actions, the law changes how a rational person will behave. In particular, by making it the case that his tortious conduct will have an unwanted consequence for him, it goads him into behaving otherwise. But the law also has another technique for altering behaviour. This technique does not change the outcomes of the subject's choices, but tells him what practical attitude to have to the choices that are available. It guides him by prescribing norms of conduct. DG's proponents are wont to say it guides him, specifically, by the enactment of primary duties. Thus emerges the well-known contrast between two competing views of tort liability. One treats it, in the modish language of the economists, as an 'incentive', against which the moralists push back with their insistence upon the liability's foundation in 'duty'. And thus emerges, also, a contrast between Holmes' 'bad man', who responds to the law only to the extent that its sanctions impinge upon his self-interest, and the 'good man', who wants to be guided by the legal norms that are addressed to him.[86]

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[83] Hart, *The Concept of Law* (n 16) 35–38.

[84] eg Stephen A Smith, 'The Normativity of Private Law' (2011) 31 Oxford Journal of Legal Studies 215, 233.

[85] WD Falk, 'Goading and Guiding' (1953) 62 Mind 145.

[86] eg Rebecca Stone, 'Legal Design for the Good Man' (2016) 102 Virginia Law Review 1767.

Finally, and perhaps most importantly, we see emerging one of the best-known distinctions in private law theory: between 'guidance rules' and 'liability rules'.[87] This is the distinction Goldberg and Zipursky appear to regard as fundamental.[88] In their view, it maps onto the different theories of Hart and Holmes—and thence their respective followers, the moralists and the economists. The conception of law as liability rules only 'has its roots in Holmes', Zipursky writes, 'and it has carried through to the current law and economics movement'.[89] '[B]ut as HLA Hart and many others have pointed out, it is woefully incomplete', since laws are treated by citizens not only as conveying information about when liability will follow, but as guides to how they ought to behave.[90] In their presentation, then, the alternative to thinking that tort law is about liability rules only is that tort law has primary duties which guide citizens' conduct; and they appear to regard 'guidance rules' as interchangeable with 'duty-imposing rules',[91] the term Hart used.[92]

The idea of tort law's primary duties' action-guiding properties is taken up with gusto by the duty-lovers. What remains for them is to spell out the kind of guidance that tort law's primary duties provide. The duty-lovers' proposals are natural enough. For Nick McBride, '[t]o say that someone has a legal duty to do *x* is a shorthand way

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[87] Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089. The formulation I use in the text is the slightly different one used by Goldberg and Zipursky: see eg 'Seeing Tort Law from the Internal Point of View' (n 9).

[88] eg Goldberg and Zipursky, 'Seeing Tort Law from the Internal Point of View' (n 9) 1563; 'Rights and Responsibility in the Law of Torts' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011) 262 (describing this contrast as 'critical').

[89] Zipursky (n 73) 58.

[90] ibid.

[91] eg Goldberg and Zipursky, 'Torts as Wrongs' (n 2) 949; 'Rights and Responsibility' (n 88) 262.

[92] Hart, *The Concept of Law* (n 16) 81, 240.

of saying that the law tells, or requires, him or her to do *x*'.[93] For Goldberg and Zipursky, a legal duty to φ exists if the law 'prohibits' or 'enjoins' that conduct,[94] or directs that φ 'is not to be done'.[95] For Stephen Smith, finally, '[t]he straightforward and indeed unavoidable meaning of a statement to the effect that "everyone has a duty to φ" is simply that everyone ought to φ'.[96]

By this sequence of thoughts we see, in sum, that to the duty-lovers the primary duties in tort (i) are separate from, and not reducible to, the liability, (ii) are the reason for the liability, (iii) are normative or action-guiding, and, in particular, (iv) prohibit or forbid the commission of the tort.

2.2.3. A fundamental distinction: Conduct and justification

My presentation of the four ideas above sought to bring out their connectedness, which was helped along by the way the concept of duties has been used as a convenient bridge between them all. But they are not the same. In fact I skipped over a significant shift that occurs in the move from duties as reasons for the liability (point (ii) above) to duties as guidance rules (point (iii) above).

Often the relevant shift is presented as a shift from one kind of guidance to another.[97] Whereas Kelsen, Holmes, and their ilk can, at best, recognise that the law addresses its

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[93] McBride, 'Duties of Care—Do They Really Exist?' (n 9) 417 fn 1.

[94] Zipursky (n 73) 58–59.

[95] Goldberg and Zipursky, 'Seeing Tort Law from the Internal Point of View' (n 9) 1574; 'Torts as Wrongs' (n 2) 945, 950.

[96] Stephen A Smith, 'Duties to Try and Duties to Succeed' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Bloomsbury 2015) 67–68.

[97] eg Smith (n 84) 233. This contrast is, along with much else in this field, traceable to Hart: see *The Concept of Law* (n 16) 39.

directives *to legal officials* ('Impose liability!'), they cannot recognise the distinctive role of law in addressing directives *to citizens* ('Don't commit torts!'). Duty-scepticism is thus presented as a failure to recognise this second form of guidance that tort law offers. That characterisation loses sight, however, of the equally important question, which Hart also emphasised, of whether the (supposed) breach of duty is a *reason for* the liability. This is a claim the duty-lovers surely cannot ignore; they profess to be committed to it, and rightly perceive that it helps to distance them from the instrumentalists. But it is also very different from the claim that tort law guides citizens' conduct. That claim is about the norms that tort law contains, and the features those norms possess. It says tort law's norms include 'primary duties', properly speaking. But the claim that a breach of duty is a reason for tort liability is not a claim about what norms tort law contains. It is a claim about how the imposition of tort liability is justified, about what reasons there are to impose it. It says that liability is justified by the what the defendant has done.

We recognise this distinction easily enough in the creation of the (supposed) primary duties themselves. If I make a contractual promise, the law holds me to a duty to fulfil it. The fact of the promise is (in the normal case) not only a condition for coming under the duty but the reason for it.[98] Yet it does not follow, and is in fact false, that one has a primary duty to make the promise. Making the promise is permitted, and certainly not prohibited. It is, from the law's perspective, entirely optional.

This distinction, between power-conferring rules (such as the rule that one may agree a contract) and duty-imposing rules (such as the rule that one will be liable if one

[98] The abnormal cases, which leaves the truth of what I say in the text unaffected, are those in which I did not make a promise but gave the objective impression that I had.

does not perform a contract one has made), was of course a central tenet of Hart's first chapters of *The Concept of Law*. He was anxious to point out the perils of assuming all legal rules are duty-imposing. Yet when DG's proponents apply Hart's arguments to the different context of tort law, they reach more or less the opposite conclusion: they insist that the legal rules on which tort liability is conditional are necessarily duty-imposing ones—and that to dissent from that view is to defy Hart. Merely observing this irony does not, of course, show the duty-lovers are wrong. But it does allow us to reprise a relatively underappreciated Hartian lesson, on which he and Holmes agreed: that we should not be as eager as Austin to force onto all areas of law the duty-imposing model, familiar though that model is.

More to the point, examples from contract law shore up one of the lessons of the import tariff, as Holmes recognised. 'I do not owe my butcher a duty not to buy his meat', he pointed out, merely because 'I must pay for it if I buy'.[99] Both one's liability to pay the butcher, and to pay the import tariff, arise without any breach of duty. One is given the option whether to agree the sale, and whether to import the product. What the contract law example importantly adds is that the defendant's conduct, even though it does not constitute a breach of duty, may be *the reason for* the liability, in much the same sense as in (ii) above. It is the very fact that the defendant made the promise that justifies his being required to perform it. The same cannot be said of the import tariff. Although the defendant's importing of the product is a condition of his being subjected to the tariff, it is not the reason for it. To justify the tariff one would have to point to something else: the importance of raising revenue, for example, or of protecting local

[99] Holmes, 'The Theory of Torts' (n 4) 652.

industries.[100] The contract law example shows us, however, *not only* that the defendant's making of the promise does not constitute a breach of duty, *but also* that this in no way diminishes its capacity to ground the duty that results.

This suffices to show a clear logical distinction between two questions:

(1) First, what is the proper characterisation of the defendant's conduct? In particular, does it constitute a breach of duty?

(2) Second, what is the justificatory connection between the defendant's conduct and his incurrence of a subsequent legal duty?

DG's proponents tend to elide these questions. They assume a very close association between claims (i)–(ii) and claims (iii)–(iv), presenting it as integral to moralism that one accept *both* that the defendant's commission of the tort constitutes a breach of duty *and* that this breach of duty is the reason for his liability. The contract law example pertinently shows, however, that some acts by the defendant are not themselves breaches of duty, and yet that they are the reason for his coming under a duty of a different kind. The defendant's promising to *x* does not constitute a breach of duty, but in virtue of it he comes under a legal duty to *x*.

The tort context is, of course, different; and the point is certainly not that tort law's primary rules are power-conferring. The point is only to bring out the distinctiveness of the first, 'conduct question' and the second, 'justification question'. One's answer to one of them does not entail any particular answer to the other—at least not without

[100] Compare Joseph Raz, 'Promises in Morality and Law' (1982) 95 Harvard Law Review 916, 929–30 (contrasting the justificatory role played by the defendant's voluntary choice in the imposition of contractual liability and of import duties).

a great deal of further argumentation. And it is at least possible that the duty-lovers are quite right about (i) and (ii) (which bear on how the liability is justified), but wrong about (iii) and (iv) (which bear on how to characterise the defendant's conduct).

It remains for me to go further: to show that this is not only a possibility, but the truth of the matter; and hence to justify my heading, which proclaims the distinction between the conduct and justification questions as 'fundamental'. I will start to do so only in the next chapter. In what remains of this one I will say more about what DG, properly speaking, consists in, and continue to explore its connections with other claims.

2.3. Duties and oughts

The closing passages of section 2.2.2, in which I laid out the duty-lovers' characteristic claims (i) to (iv), was a little too quick—and not only because of the shift of focus that occurs between (ii) and (iii). We also need to note an outstanding ambiguity in the move from (iii) to (iv). The ambiguity is most apparent in Smith's formulation. Unlike Goldberg and Zipursky and McBride, who use 'prohibit', 'enjoin', and so on, Smith uses the perhaps more flexible word 'ought'. What does he mean?

2.3.1. Defining duties

Smith may, of course, simply mean the same thing as his fellow duty-lovers: that the commission of the tort is prohibited, forbidden, and so on. But he might mean something more modest. For oughts come in two varieties, which yield two rival understandings of duties. The first variety are *pro tanto* oughts. The second are all-

things-considered oughts. *Pro tanto* oughts count in favour of an action, but do not make it the case that it is the right action to perform. They could be outweighed, or otherwise defeated, by other considerations. All-things-considered oughts, by contrast—and as their name suggests—determine conclusively what action is the right one to perform.

Both kinds of oughts can be rendered in the language of reasons,[101] which I will tend to use in what follows. I take it, following Raz, that '*A* ought *pro tanto* to *x*' is equivalent to '*A* has a reason to *x*',[102] and that '*A* ought all-things-considered to *x*' is equivalent to '*A* has a conclusive reason to *x*'.[103] An action, *x*, was 'unreasonable' if *A* had a conclusive reason to not-*x*. That is equivalent to saying that *A* ought not, all things considered, to have *x*-ed.

These two kinds of oughts (or two kinds of reasons), as I said, yield two rival understanding of duties. One understanding holds that a duty to *x* entails that one ought all-things-considered to *x*. Hence if one has a duty to *x* then necessarily one has a conclusive reason to do it.[104] This may sound like a truism: 'How could it be', one might wonder, 'that I have a duty to *x* and yet that I should not *x*?' That would seem to some to defy duties' most important feature. This account also has a distinguished pedigree among moral philosophers, usually being traced to Kant. It has a natural

[101] There are some hidden controversies in the move from 'ought' to reasons: see eg John Broome, 'Reason versus Ought' (2015) 25 Philosophical Issues 80. But these can be safely bypassed here.

[102] Where necessary for clarity, I will call a reason that is not conclusive a '*pro tanto* reason'.

[103] Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999) 27.

[104] Later I will often lapse into saying things like, 'A duty is (or is not) a conclusive reason'. This is strictly speaking inaccurate: a duty is not itself a reason, but *one's having* a duty entails that one has a reason. But I will favour brevity over accuracy, having made clear here what I mean.

affinity with his distinctly demanding moralism, in which one's duties are 'absolute',[105] determining inexorably what one should do even if the consequences will be catastrophic. The rival account denies the entailment. According to it, one's duties count strongly in favour of an action, but not conclusively.[106] It may be that one ought all-things-considered to breach a duty: the duty, then, is shown to be 'defeasible', and its breach in these circumstances 'justified'.

Which conception do the duty-lovers adopt? Their unqualified use of words like 'prohibit', 'requires', and 'enjoins' suggests they adopt the conception of duties in terms of which they entail an all-things-considered ought. As we will see in the next chapter, the positions they stake out in defending DG are suggestive of the same conclusion. McBride, at any rate, is explicit about this. In his most recent work he says that the law's imposition of a duty to *x*

> is meant to do more than just give me a reason to do *x*, in the sense of counting in favour of doing *x*—it is meant to provide me with a conclusive reason to do *x*: it is meant to decide the issue for me of whether or not I will do *x*.[107]

Happily for my purposes, this brings McBride's understanding nicely into alignment with Holmes'. Recall that Holmes, in the course of his second argument, gave us a precise criterion by which to test whether a legal duty exists: the criterion is whether an 'absolute command' was intended by the lawmaker. This means that there is a duty if the lawmaker wished 'to bring about [the conduct identified by the rule], and to

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[105] See eg Larry Alexander and Michael Moore, 'Deontological Ethics' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2016 edn, Stanford University 2016) pt 4.

[106] WD Ross called these '*prima facie* duties', but that contains an unfortunate ambiguity that is better avoided: John Gardner, *Offences and Defences* (Oxford University Press 2007) 78 fn 4; Alexander and Moore (n 105) pt 4.

[107] Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart 2019) 36.

prevent the contrary'. I do not detect any difference of significance between an 'absolute command' and one that is meant to be 'conclusive', nor indeed between the duty-lovers' other formulations and Holmes'.

That the duty-lovers share Holmes understanding of duties may be surprising, of course, since they take themselves to be breaking from it. But that is only because they are preoccupied with Holmes' first argument, which denies the independent existence of primary duties altogether. As far as his second argument is concerned, their understandings—'wishing to bring about' the conduct, 'requiring' it, or 'telling' the defendant to do it, and 'preventing', 'prohibiting' or 'enjoining' its opposite—are of a piece.

2.3.2. A separation of issues

This usefully narrows the debate between Holmes and his opponents, since we can side-step, for the moment, the rivalry between the two conceptions of duties that I mentioned earlier.[108] Both Holmes and the duty-lovers seem to share an understanding of what duties are. Their dispute is about whether or not tort law's primary rules match that understanding.

The debate has also been narrowed in a further (and probably more important) respect, which I heralded earlier. This is because the question whether tortious conduct is a breach of duty, as now cashed out, has served to isolate the question raised by (iii) and (iv) above from that raised by (i) and (ii). Whether a duty exists, as we have seen,

[108] The debate will re-emerge pertinently in chapter 4.

depends on whether the conduct in question is 'prohibited' rather than permitted; whether the lawmaker intends to prevent it or allow it to continue; and whether the subject has (in the law's view) a conclusive reason not to perform it. These criteria, it surely cannot be doubted, have nothing to do with the justificatory connection between the defendant's conduct and his liability for it. They are to do with the nature of the defendant's conduct as such, and the law's attitude to it. They can be applied without any consideration of whether and how that conduct features as a reason for tort liability.

To consolidate this separation of issues, we must replace DG with another claim. For DG rests, I have argued, on the truth of two sub-claims, which are better kept apart. DG is true only if *both* the commission of a tort constitutes a breach of duty *and* its commission grounds the imposition of tort liability. But we want to strip out the latter sub-claim, whose ambition is to state the justificatory connection between the defendant's conduct and his liability, so that we can isolate the question whether the defendant's tortious conduct constitutes a breach of duty. The new claim is one I call 'DC':

> **Duty as condition of liability (DC):** Tort liability is conditional upon a wrong (=breach of duty) by the defendant.

This is the claim I will carry forward for the remainder of Part I. If DC is false, then DG is false—since I take it to be tolerably clear that *A* cannot ground *B* unless *B* exists only if *A* exists. So arguing against DC is a fully effective way of falsifying DG. But proceeding in this way allows us to preserve, for later consideration, the kind of justificatory connection that DG identified between the defendant's conduct and his liability.

2.4. Duties and instrumentalism

Holmes, as I began this chapter by saying, is taken by the duty-lovers to be their arch-rival. In large measure that is because they concentrate on his bombastic first argument from 'The Path of the Law', which defies all of the Hartian precepts they hold dear. Their criticism of that argument is valid, but it doesn't go as far as they think. More illumination is likely if one concentrates on Holmes' strongest argument, not his weakest. That was the point of recovering his modest second argument, which narrowly targets (iii) and (iv). It stands in contrast, again, to Holmes' first argument, which pulls the rug out from under all of (i) to (iv).

If one does not observe this difference, however, then a further association naturally arises: Holmes seems to be a proto-economist, and a proto-instrumentalist, about tort law. The duty-lovers frequently present the legal economist Richard Posner, for example, as heir to Holmes, and committed to the same views.[109] And as a matter of intellectual history, I am sure there is much truth in this association.[110] (Posner himself is certainly happy to claim Holmes' support.[111]) Even so, it has the potential to mislead—especially if one is seeking to distinguish Holmes' second argument from his first, and the conduct question from the justification question. Holmes and Posner are,

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[109] See eg Zipursky (n 73) 44–45 (arguing that '[t]he Holmesian view [of duties] has ripened into the law and economics movement', the most prominent theory in which 'is that of Landes and Posner'); Goldberg and Zipursky, 'Seeing Tort Law from the Internal Point of View' (n 9) 1589. I don't claim Posner's view is the only, or even the typical, economistic approach to tort law; that there is a variety of views only confirms the need for caution in parsing them.

[110] See eg G Edward White, *Tort Law in America: An Intellectual History* (Oxford University Press 1980); Goldberg and Zipursky, 'The Moral of MacPherson' (n 64) 1752–1777.

[111] William M Landes and Richard A Posner, 'The Positive Economic Theory of Tort Law' (1980) 15 Georgia Law Review 851, 852; Richard A Posner, 'Instrumental and Noninstrumental Theories of Tort Law' (2013) 88 Indiana Law Journal 469, 469.

in truth, most unstable allies. No doubt the duty-lovers have good reasons to take issue with both of them, but they are not the same reasons.

Whereas Holmes, as we have seen, took as his starting point the fact that torts could not be assimilated to a criminal-law model, Posner's 'optimal deterrence' theory[112] is only a short step away from a model of exactly that kind. For Posner, the imposition of tort liability deters conduct that is, in economic terms, unjustified. He famously deployed the Learned Hand formula[113] as his key piece of evidence, on the basis that it ensures negligence liability is imposed only if the defendant's conduct was all-things-considered unreasonable. The effect of imposing liability, then, as well as its justification, is to deter conduct of that kind.

It follows that Posner can and should say—and in fact more or less did say—that tort law admonishes the conduct for which it imposes liability. It is integral to his account, after all, that torts are objectionable (albeit only on efficiency grounds) and to be avoided. For only if conduct is objectionable is there reason to deter it. Hence he says, for example, that we are rightly 'indignant' about tortious conduct and meet it with 'moral disapproval'.[114] Indeed he presents his account as valuable partly because it explains *why* we do this. So the core features of Posner's account means he can and should reject what I have singled out as Holmes' key claim: that the law takes the view not only that they are unreasonable, but that they ought not to be performed, is essential in getting Posner's theory off the ground. So if the acid test is whether the defendant

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[112] Richard A Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29.

[113] See *United States v Carroll Towing Co* 159 F.2d 169 (1947).

[114] Posner, 'A Theory of Negligence' (n 112) 32–33. Goldberg and Zipursky acknowledge this point in 'Torts as Wrongs' (n 2) 927. This improves upon their earlier suggestion that Posner, like Holmes, would argue that tort law does not tell actors how they ought to behave: 'Seeing Tort Law from the Internal Point of View' (n 9) 1589.

ought not (in the law's view) to commit torts, or, put differently, whether the defendant has (in the law's view) a conclusive reason not to do so, then Posner and Holmes are not allies, but opponents. Holmes denies that tort law contains primary duties in this sense, but Posner must insist it does.

For these reasons, the moralists' emphasis on the prohibitive role of primary duties has always been a suspect strategy for refuting Posner and his ilk. We can see this by an analogy to criminal-law theory. Being a deterrence theorist about criminal law hardly commits one to denying that criminal law contains genuine prohibitions, which exist apart from the liability for their breach. Hart provides a handy example. That he (like Holmes) believed the general justifying aim of criminal liability was deterrence[115] did not, of course, undermine his conviction that the criminal conduct was legally prohibited.[116] He would surely have said his two positions were mutually supportive, and indeed shared a common explanation, namely that crimes ought not (in the law's view) to be committed. It is perhaps odd, therefore, that in tort law deterrence theory tends to be conflated with the view that tort law has nothing to say about the ways in which citizens ought to behave.

None of this means we ought to be deterrence theorists about tort law, of course. Quite the contrary. Showing why Posner's deterrence theory establishes the wrong kind of justificatory connection between the defendant's commission of the tort and the resulting liability is a key task. But we should not think the way to do it is by dogmatically insisting, as the economists supposedly cannot, that the tortious conduct

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[115] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon 1968). For Holmes' views see *The Common Law* (n 35) Lecture II.

[116] Hart, *The Concept of Law* (n 16) 39.

is prohibited. The problem lies, again, in failing to appreciate the distance between (ii) and (iii) above. Posner alights upon deterrence as the answer to the justification question: the case in favour of imposing tort liability, he says, is that it will reduce the number of torts committed. That answer is a questionable one, and the moralists are right to want to refute it. But one cannot do so by asserting an answer to the conduct question, namely that torts are contraventions of a legal prohibition. Posner has no reason to deny that.

If Posner is to be tackled, then, it must be done in other ways. The first step, I'm sure, is to reject his unfortunate value theory. This is something Holmes himself would have done. He pointedly rejected any suggestion that all value could be understood in consequentialist terms[117]—and would surely have rejected, *a fortiori*, the specialised way in which the economists came to rank those consequences. But this does not take us very far. No doubt it allows for some valid *ad hominem* attacks on Posner, whose consequentialism is notoriously thoroughgoing. It is therefore prey to all the usual objections to consequentialism that have become familiar through general moral-philosophical debate—and, by using willingness to pay as the metric by which consequences are judged, attracts other objections besides. The problem, however, is that even if not *all* value should be understood in consequentialist terms, it may well be that *some* should be. But if that is so, then perhaps the value *of tort law* is one of those things that can or should be understood consequentially. So yes, we should not be consequentialists about all things. That suffices to distance us from extremists like

[117] Oliver Wendell Holmes, 'Law in Science and Science in Law' (1898) 12 Harvard Law Review 443, 444. See further, on how Holmes' 'energetically denied the principle of utility', Sheldon M Novick, 'Introduction' in Oliver Wendell Holmes, *The Common Law* (Dover 1991) xii; 'Justice Holmes's Philosophy' (1992) 70 Washington University Law Quarterly 703, 717.

Posner. But the moderates must then confront a more significant question: why should we not be consequentialists *about tort law*? A targeted argument is required to answer it. Just as rejecting an exclusively consequentialist value theory does not refute deterrence-based accounts of criminal law, so it does not refute Posner's account of tort law.

A more targeted argument of this kind proceeds by pointing out, correctly, that there is more to having a duty to *x* than the simple idea that one ought to *x*. Posner may agree that one ought not to commit torts, then, but he cannot account for the genuinely non-consequentialist aspect of duties—and that suffices to show that he cannot account for the truth of DC, when adequately spelt out. The wrongfulness of rape, for example (to pluck the low-hanging fruit), is not best explained in consequentialist terms, despite Posner's willingness to try.[118]

We can leave aside, for now, the difficult questions about what this 'genuinely non-consequentialist aspect of duties' is. For notice how high the bar is that this kind of argumentative strategy would need to clear. It would not be enough, to refute Posner and his ilk by this route, that the wrongfulness of *some* tortious conduct cannot be explained in consequentialist terms. It would need to be true of *all* tortious conduct. That is because DC, as I said earlier, was meant to be a general truth (indeed a defining truth) about tort law. And asserting DC against the economists was not meant merely to take issue with their justification of one or other of tort law's primary rules. It was meant to show that they misunderstand something about tort law *tout court*.

[118] Richard A Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Columbia Law Review 1193, 1198–1199; *Sex and Reason* (Harvard University Press 1992) ch 14.

Some tort writers would indeed try to explain the wrongfulness of all torts using, as it were, exclusively Kantian resources. Allan Beever and Arthur Ripstein, for example, have tried to boil all of them down to the protection of 'independence' or 'freedom': 'the moral idea that no person is in charge of another', or that one is not 'constrained by another's choice', as they variously put it.[119] The reductionism of these accounts has been regularly criticised; they may cope well with some torts, but struggle to explain all of them with so few resources.[120]

Suppose one believes, for example, that misrepresenting the qualities of a product one is selling, or disclosing inaccurate company accounts, should (in some circumstances) be a tort against those who suffer detriment in reliance upon them, and that this is so because the free flow of information improves the operation of the marketplace, and thus has desirable effects for wealth-creation. Such explanations of these and other similar torts do not strike me as obviously wrong. In any event, it would seem a misdiagnosis to say that a person who endorses this explanation of one of them has ipso facto lost touch with tort law's anti-consequential nature. Perhaps the dyed-in-the-wool Kantians would say that. But there is a more moderate, and less partisan, view that is at least equally plausible: that torts are heterogenous, and so we should expect that the reasons against committing them derive from a mix of consequentialist and non-consequentialist considerations—but that the fundamental complaint about Posner's theory of tort law was simply never about that.

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[119] Allan Beever, *A Theory of Tort Liability* (Hart 2016); Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016).

[120] eg Victor Tadros, 'Independence Without Interests?' (2011) 31 Oxford Journal of Legal Studies 193; Sandy Steel, 'Saving Private Wrongs' (2016) 14 Jerusalem Review of Legal Studies 1; Nicholas J McBride, 'Book Review' (2017) 76 Cambridge Law Journal 464.

The comparison with criminal law is again instructive. Disagreeing about whether this or that criminal action is objectionable for consequentialist, or instead exclusively non-consequentialist, reasons simply does not engage the debate between deterrence-based theories of criminal law and (say) retributive ones. And one can, like Hart, be an 'instrumentalist' about the imposition of criminal liability—justifying it by its capacity to serve as an instrument of deterrence—and yet have no hesitation in endorsing an anti-instrumentalist account of the wrongfulness of some (or indeed all) crimes. So tackling theories like Posner's on the basis that he misunderstands what is objectionable about committing torts would seem to have similar limits.

After all, is not the striking feature of Posner's theory, which tends to draw instinctive reproof, that it seeks to justify the imposition of tort liability by the consequences it will bring about? That explains, I thought, why his theory was quickly labelled by early critics as unduly 'instrumental': it justifies the imposition of liability by the consequences to which it is an instrument, rather than because of the value, quite apart from the further consequences, of the defendant's repairing the harms he has caused.[121] And it was because of this feature that the 'instrumentalist' epithet could be applied also to Guido Calabresi's otherwise quite different theory of the 'cheapest cost-avoider':[122] for, despite their differences, Posner and Calabresi's theories have in common that they identify a desirable societal consequence to which the imposition of tort liability is an instrument. Hence, as I put it in the last chapter,[123] the instinctive

[121] See especially Ernest J Weinrib, 'Understanding Tort Law' (1988) 23 Valparaiso University Law Review 485.

[122] Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale University Press 1970).

[123] See section 1.1 above at n 1.

objection to those theories is that they have 'one thought too many'. One does not need to invoke the further consequences of imposing liability, so the anti-instrumentalist's thinking runs, for either the incidence of accidents in society or the cost at which they will be avoided, to explain why tort defendants are made liable for the harms they have caused.

That is, inevitably, only a brief sketch of the contest between instrumentalism and non-instrumentalism about tort law. But it suffices to introduce, if not yet to argue for, an important claim underlying my thesis. The defining feature of instrumentalism that I have identified—that it seeks to justify the imposition of tort liability by its tendency to bring about desirable consequences (other than the consequence that the defendant will be made to compensate the claimant)—is about the justification question, not the conduct question. One would think, then, that the best way to refute instrumentalism would be to provide, directly as it were, a non-instrumental account of the value of the defendant's paying compensation. And yet, somewhere along the way, anti-instrumentalist writers about tort law have come to insist on a particular answer to the conduct question—that the commission of a tort always constitutes the breach of a duty—and to see that, indeed, as constitutive of their anti-instrumentalism. So there is something surprising about this strategy.

In any event, even if this strategy were to succeed, the anti-instrumentalist would still need another—this one targeted at denying that the justificatory connection between the defendant's conduct and the liability is instrumental. This is because, as I have kept saying, one might think that the commission of a tort is undoubtedly a breach of duty, but that the imposition of tort liability is justified because it will (for example) deter the commission of those wrongs. Surely the anti-instrumentalists would not be

content with that: they would say, rightly, that this account of tort law is still 'too instrumental'.

In sum, just as there are two questions at issue in the debate I am entering—what I have called the conduct and the justification questions—so it follows that there are two ways in which one can be a non-consequentialist about tort law. One way is to give a non-consequentialist answer to the conduct question: to say that consequentialism cannot explain what is objectionable about committing torts. Another is to give a non-consequentialist answer to the justification question: to say that, once a tort has been committed, the justification for imposing liability for it is not consequentialist. I have suggested that—at least if we are trying to identify general properties of tort law rather than properties of this or that tort, and if we reject the extremism not only of Posner's consequentialism but also of the most thoroughgoing Kantians—then the latter strategy is the more promising. At any rate, its success or failure should not be thought to follow from one's answer to the former. But perhaps the most important point is that Holmesian duty-scepticism has only a tenuous connection with any of this.

2.5. Conclusion

Nothing I have said in this chapter has sought to tackle directly the truth or falsity of DC. I have only tried to survey the terrain, using Holmes' work as a lens. Mostly my aim has been to draw boundaries between certain claims that are often presented as coextensive. Doing so has helped to show, I hope, that Holmes' work is more subtle and enduring than the duty-lovers seem to think. The primary import of this is not biographical, however, but analytical.

The key move of this chapter was to use Holmes' second argument to apply some pressure to the duty-lovers' claims, as a result of which (i) and (ii) splintered off. Whether the commission of a tort really constitutes a breach of duty can be separated from the question whether, and how, that act grounds the liability. Keeping these two questions duly separate, we see that there is much logical space within which to be a sceptic about the first claim without being instrumentalist or economistic about the second.

That is the logical space I wish to inhabit in the remaining chapters of this thesis. Chapters 3 and 4 aim to show that torts are not breaches of duty. To that extent, the duty-lovers have overreached. But in Part II of this thesis I switch to the second question, and recover the vitally important grain of truth in their approach: that the economists are wrong about the justificatory connection between the commission of the tort and the liability. I hope the thesis as a whole, therefore, will serve as an illustration that the best way to defend moralism is by this alternate approach. But first I must tackle the first part of the job. We have isolated a single question—is a tort a breach of duty?—and arrived at an understanding of the latter concept that allows us to address a narrower one—is a tort a failure to act as one ought?

3. Wrongs and reasonableness

One of the points that emerged in the previous chapter is that many duty-lovers adopt an understanding of duties in terms of which having a duty to do something entails that one ought, all things considered, to do it. If one has a duty not to *x* then it seems to follow—some would say it is a truism—that *x* 'is not to be done'.[1] And to have a *legal* duty not to *x* entails that, *in the law's view*, *x* is not to be done. This understanding can be fitted, moreover, to Holmes' second argument, which says the test of a legal duty's existence is that the lawmaker's attitude was that the conduct ought to be avoided or prevented. Holmes denies that torts are breaches of duty, so understood; the duty-lovers (or those I am considering in this chapter) say they are. But both sides agree on the acid test. And that gives us a secure basis upon which to proceed.

More formally, the debate about whether DC is true—whether tort liability is conditional upon a breach of duty—comes to turn, in part, on a debate about another proposition, which I called 'DC_O':

> **Duty-as-ought as a condition of liability (DC_O):** Tort liability is conditional upon (what the law takes to be) a failure by the defendant to act as he ought (all things considered) to have acted.

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[1] John CP Goldberg and Benjamin C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 Fordham Law Review 1563, 1589; 'Torts as Wrongs' (2010) 88 Texas Law Review 917, 950.

This is the proposition that results from the combination of DC with the understanding of duties I mentioned, that is to say with the proposition I call 'OL':

> **Ought-entailment lemma (OL)**: Having a duty to *x* entails that one ought (all things considered) to *x*.

As I also said previously, to behave 'unreasonably' is, on my approach, equivalent to behaving as one ought not to behave, all things considered. That helps to explain my chapter title: I am considering the view that wrongdoing entails unreasonable conduct—and seeing what follows. The pertinent thing that follows, I will argue, is that not all torts are wrongs. In other words, DC_O is false.

Naturally this argument, if sound, has implications for the truth of DC (and thence for DG). Yet the implications are modest. It follows from it that, if duties are understood on the lines reflected in DC_O—if, in other words, one takes OL to be true—then DC must be false. That is, of course, only one way of understanding the nature of duties and their breach. That understanding is prominent and worth evaluating. But many writers have other understandings, which the argument of this chapter does not affect. Indeed those writers may have adopted those understandings precisely *because* they already accept arguments of the kind I will develop here—in which case this chapter may test their patience. In the next chapter I will turn to their alternative accounts and suggest that they, too, leave much room to doubt the truth of DC. But for a while yet I will evaluate only DC_O, and remain agnostic about whether its falsity means we should abandon OL, or DC, or both. Assessing the truth of DC in this slow way may not be fun, but it is the only way to assess it well.

3.1. A fresh approach

In the previous chapter, I presented Holmes' most compelling challenge to the duty-lovers, which forswears generalised duty-scepticism for a more targeted distinction between liabilities that are wrongs-based and those that are not. Holmes distinguished between prohibitions (such as those in criminal law) and taxes (such as the import tariff), only the former of which embody a primary duty, and said that tort liability falls on the latter side of the line. The key question, Holmes said, is whether the defendant's conduct that triggers the liability is something that ought, in the law's view, to be prevented. He said we lack sufficient evidence from which to infer that torts are wrongs in this sense.

3.1.1. Two exhibits

But is there not ready evidence available? Nick McBride, in an influential 2004 article, argues that there is.[2] Exhibit A is the fact that the law not only orders compensation when torts are committed, but awards injunctions to prevent their commission. Plainly the law would not do this unless it took the view that the conduct ought not to be performed.[3] Exhibit B is the fact that the law awards not only compensatory but also punitive damages, which shows, it is said, that the law does not merely want to 'tax' the activity that is in breach of the duty, but disapproves of it.[4]

[2] Nicholas J McBride, 'Duties of Care—Do They Really Exist?' (2004) 24 Oxford Journal of Legal Studies 417.

[3] ibid 427–430.

[4] ibid 426–427.

These exhibits are not conclusive, as McBride's critics like Dan Priel have pointed out.[5] Holmes himself, in fact, took full account of them. The problem is that neither establishes that it is *always* a precondition for tort liability that the defendant failed to act as he ought. Punitive damages are very exceptional indeed. They are available only for conduct that is 'so outrageous as to warrant a punitive response'.[6] This is a deliberately high bar, which few tortious acts will meet.[7] Injunctions, though perhaps less rare, are plainly not awarded standardly. As Holmes pointed out in 'The Path of Law', the cases in which an injunction will be awarded to prevent a tort are 'relatively few'.[8] This remains the case today, as the duty-lovers do not deny.[9] In the tort of negligence, certainly, injunctions are almost never awarded.[10] It is true, as McBride notes, that the rarity of injunctions does not show that DC_O is *false*: there are many reasons why, even supposing a duty exists, the law would balk at compelling its performance.[11] But that is not in dispute. What is in dispute is whether this slender evidentiary basis establishes that DC_O is always and everywhere true. The answer must be 'no'. These exhibits may well establish that *some* torts are breaches of duty, but, as Holmes pithily wrote, 'I hardly think it is advisable to shape general theory from the exception'.[12]

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[5] See further Dan Priel, 'Tort Law for Cynics' (2014) 77 Modern Law Review 703, 710–715.

[6] *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29 [131]; also [89].

[7] Punitive damages are 'a remedy of last resort': *Kuddus* (n 6) [63].

[8] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 462.

[9] eg Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart 2019) 56–58.

[10] Both McBride and Priel agree that, so far as we know, injunctions are unavailable in the tort of negligence. They cite *Miller v Jackson* [1977] QB 966, 980, which I discuss later.

[11] McBride (n 9) 56–58.

[12] Holmes, 'The Path of the Law' (n 8) 462.

3.1.2. Generality

Notice, however, that the source of the disagreement here between McBride and his opponents is not about what the legal materials say. All participants in the debate agree that injunctions and punitive damages are awarded only on satisfaction of criteria *additional* to the mere existence (or threat) of a tort, that these criteria are not negligible, and that they ensure that these awards are made only in a limited number of cases. The disagreement is about what ought to be inferred from that limited number of cases.

And that depends on certain other assumptions—most pertinently, on how one understands the argumentative burden under which one is labouring. McBride's exhibits may well suffice to refute the opponent whom he seems to have in mind: the person who thinks torts are *never* wrongs does indeed run aground on his two exhibits, which seem to show clearly that the law regards the commission of a tort as unreasonable and in need of prevention. If one has granted, however, that some torts are wrongs, and now seeks evidence for the duty-lovers' much stronger claim that they are *generally* or *necessarily* wrongs, then these two exhibits are inadequate.

This difference does much to explain, of course, why in the previous chapter I emphasised the shift from Holmes' first argument to his second. It is not only that by refuting Holmes' first argument one does not refute his second. It is also that the conclusion his second argument supports is one at a different level of generality. It is not directed towards the overly general, or overly extreme, view that liabilities in private law are *never* based upon a breach of duty. To the contrary, Holmes explained, with reasons, why we should conclude that some of them are—on the basis of much the same evidence that his opponents would invoke 130 years later. Where he differed from them was in his lesser willingness to extrapolate from the patchy evidence

available. He thought some torts are wrongs, but some are not—and thought we should leave it there.

But Holmes' caution against over-ready generalisation came to be neglected (and unfortunately his own position only became more dogmatic over time, as his oft-cited exchanges with Frederick Pollock show).[13] The moderate, middle position he once favoured has dropped out, leaving only totalised duty-scepticism and totalised duty-loving as the two perceived options. And on that schema McBride's exhibits seem telling: if generalised duty-scepticism is one's implied opponent, then there is ample evidence to refute them. But if one rejects the false dichotomy, the shoe is on the other foot. The truth of DC_O now also looks rather shaky, and cannot be satisfactorily proved by arguments applicable only to a small subset of liabilities in tort.

All this is to say only that the two exhibits, these two indicia drawn from the legal materials, do not by themselves prove the general truth of DC_O (though they may establish the falsity of extreme duty-scepticism). But of course there is more to say. The duty-lovers can give other reasons, of different kinds, to establish what these two exhibits cannot. To bring this out I will delve, one last time, into the work of Holmes.

[13] Mark de Wolfe Howe (ed), *Holmes–Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874–1932* (Harvard University Press 1941).

3.1.3. The sources of cynicism

McBride presents Holmes, in a familiar image, as the arch 'cynic' about tort law.[14] Holmes' own writings are, as so often, the source of this provocative description.[15] Even so, it is misleading.

In the previous chapter, I developed two reasons for caution. First, Holmes' early work does not deny, and in fact assumes, that primary legal duties exist. Thus it does not seek to puncture *all* talk of 'rights' and 'duties', but only its unjustified use, as he saw it, to state a general feature of tort law. Second, we have no good reason to think he endorsed an instrumental answer to the justification question. His duty-scepticism, I argued, is severable from this issue, and Holmes would surely have rejected the thoroughgoing 'instrumentalism' with which his work has come to be associated after the fact.

There is another reason his reputation as a 'cynic' is ill-fitting. It can be introduced by recalling that his lectures on *The Common Law*, first published in 1881,[16] are one of the most important texts in the rationalistic study of private (and criminal) law, its methodology still easily recognisable in mainstream common-law scholarship today. The account of tort liability he developed in Lecture III was the culmination of at least a decade of theoretical reflection, and was, he thought, both morally appealing and

[14] McBride (n 2) 417–418.

[15] He famously said we would better understand law, and the notion of duty in particular, 'when we wash it with cynical acid': Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 462.

[16] Oliver Wendell Holmes, *The Common Law* (Little, Brown 1881).

capable of unifying the subject.[17] So there is some irony in Holmes' reputation as the *Ur*-cynic about tort law, even though he dedicated much of his academic career to giving a rational reconstruction of its doctrines and bringing out its distinctive value.[18] His account is also, incidentally, one on which modern-day moralistic writers continue to draw heavily, sometimes only shortly after condemning Holmes as their arch-rival—an especially odd feature of his legacy.[19]

Despite all this, there is some truth in Holmes' reputation for cynicism. It derives from the fact that one of the main ambitions was to drive a wedge between law and morality. To a large extent his approach is now orthodox, but when pushed too far it can lead to positions fairly described as cynical.

As a young upstart energised by the positivists' 'scientific' study of law, and by the critique it offered of the ailing natural law orthodoxy, it was predictable that Holmes would rail against those who assumed, too easily, that what was true in morality was true in law. His particular complaint was the assumption that the civil law, like criminal law, was concerned with the defendant's moral culpability, or 'subjective' fault. It was this error he sought to dispel by objecting to the use in this context of 'duty' and 'wrongdoing', which brought in its train, he thought, the inapt idea that the law was concerned with the defendant's moral blameworthiness.[20] One had to recognise, he

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[17] G Edward White, *Tort Law in America: An Intellectual History* (Oxford University Press 1980) ch 1; Thomas C Grey, 'Accidental Torts' (2001) 54 Vanderbilt Law Review 1225.

[18] Attention tends to focus on his apparently cynical statement in 1871 that 'Torts is not a proper subject for a law book': 'Book Notices' (1871) 5 American Law Review 340, 341. That he then spent a decade *making* it a proper subject for a law book is mentioned less often.

[19] See, among many possible examples, Stephen Perry, 'The Role of Duty of Care in a Rights-Based Theory of Negligence Law' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Hart 2009) 84, 112.

[20] eg 'Book Notices' (1872) 6 American Law Review 723, 725; 'The Theory of Torts' (1873) 7 American Law Review 652, 652.

thought, that the legal regulation of society raises special concerns, the accommodation of which causes the position in law to diverge from that in raw morality. Hence the imposition of legal liability cannot be tied to a simple assessment of the moral quality of the defendant's conduct. Rather, the application of moral standards must be tempered by the law for the sake of clarity and generality, and so that the interests of claimants are also given adequate protection. Hence, although the law takes standards of moral blameworthiness as its starting point, it 'nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones'.[21] This 'objectivism' was the running theme of all of Holmes' scholarly work, and certainly of *The Common Law*.

That account is today entirely *de rigueur*. Few would deny that the law ought to regulate generally and predictably, and that its posited standards only very rarely, if at all, test for the defendant's subjective fault. Also now unfailingly orthodox is Holmes' application of objectivism to tort law in Lecture III, which provides what is still the canonical defence of the tort of negligence's adoption of an 'objective', rather than 'subjective', fault standard.[22]

But Holmes' course of reasoning does contain one surprising feature. It is that he associates the 'moral' approach (as well as the concept of a 'duty') exclusively with blameworthiness. As a result, his 'scientific' or 'positivist' approach, though reasonable in itself, leads him rather quickly to the *un*reasonable conclusion that the theorist should ignore morality altogether in trying to understand law. That view seems to have hardened over time, leading to its notoriously hard-headed expression in 'The

[21] Holmes, *The Common Law* (n 16) 38.

[22] Especially well-known is the passage at ibid 108.

Path of the Law'.[23] But it was always there.[24] And it leaves him vulnerable at a crucial point.

In what I called his second argument, he identified an evidentiary gap in the legal indicia from which theories of tort are constructed. He pointed out that the practical steps taken by the law in response to tortious conduct are too patchy to justify the conclusion that it regards them, across the board, as things that ought to be prevented. Indeed in some cases, the law takes no practical steps at all—except to impose the liability itself, which, as the example of the import tariff was meant to show, is no evidence at all. Thus, if we are scrupulously scientific in our assessment of the legal materials, Holmes thought, we are not justified in concluding that all torts are breaches of duty. We must stay ruthlessly focused on what the law actually does—not supplement it with 'moral' understandings, which entail, he thought, a plainly erroneous fixation upon the defendant's blameworthiness.

Nowadays this seems an unduly austere approach. Holmes thought the way to better the wrongheaded natural lawyers was to block *all* inferences from morality to law. But this conclusion far outstrips his premise. Though Holmes is surely correct that one cannot sustain the view that tort liability tracks blameworthiness, he did not pause to consider whether there was some more moderate moral premise from which inferences could be legitimately drawn. Could it not be that tort law insists on conduct that is *deficient in some way*, even if not on conduct that is full-bloodedly culpable? The intuition that one is justified in imposing burdens of liability only on a person who has

[23] See the analysis of Holmes' changing views in Morton J Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford University Press 1992) ch 4.

[24] See eg his 'Book Notices' (1872) 6 American Law Review 723, 724.

behaved objectionably seems rather widespread—and sufficiently robust that it stands up even when we surrender the idea of culpability. This explains, I take it, why many have been attracted to 'the fault principle' even once it is realised that tort law tracks only a kind of 'legal', rather than 'moral' or 'subjective', fault, and why many have seen an important role for duties: those who have behaved wrongly are justly exposed to the burden of liability in a way that others are not. We want to hang on to this general idea that liability is justifiable only in respect of conduct that is deficient—call it the 'deficient conduct principle'—even if it requires some finessing (and the principle's name is intended ecumenically to allow this). Indeed Holmes' own theory of 'objective' wrongdoing is amply sufficient, one might think, to sustain it. But it is at this crucial juncture that Holmes, in his anxiety to avoid the mistakes of the natural lawyers, races straight to the conclusion that we should throw out the idea of wrongdoing altogether. That is the conclusion that now, of course, seems so heterodox.

In sum, the deficient conduct principle, if it is valid, seems a natural way of meeting Holmes' challenge. The evidentiary gap that he identifies in the legal indicia can be plugged by a small piece of rational reconstruction of the kind that legal theorists nowadays take for granted: we presume that the law is acting on reasons that we recognise as morally valid, which allows us to flesh out the direct evidence of what the law says and does.[25] True, we do not have direct evidence, in relation to each and every tort, of the law's prohibitory intention. But that does not matter. The absence of evidence is not evidence of absence. The most plausible inference to draw, in light of the deficient conduct principle, is that the prohibitory intention is there (and explains

[25] I am paraphrasing Joseph Raz, 'Responsibility and the Negligence Standard' (2010) 30 Oxford Journal of Legal Studies 1, 9.

why we have the direct evidence that we do), but is not always manifested because of the humdrum countervailing reasons that McBride identifies: issuing an injunction is sometimes too draconian, and so on.

Holmes' position becomes all the more puzzling in light of the main thesis of Lecture III of *The Common Law*, which seeks to nullify all instances of liability that might serve as counterexamples to the deficient conduct principle. The tort of negligence embodied, for him, the wholesome principle that liability would be imposed only for conduct that was 'objectively' unreasonable, and he argued that all apparent instances of strict liability, such as in trespass and under the rule in *Rylands v Fletcher*,[26] were either disguised forms of fault-based liability or, if not, were 'primitive' and unfair. That left negligence as the paradigm around which tort law could be unified.

So there is a genuine puzzle here. How is it that Holmes was able to hold both of the two theses for which he is most famous? In Lecture III of *The Common Law*, he argued, first, that tort law is unified by its concern with cases where the defendant has acted unreasonably; and yet he also argued, as we discussed above, that liability in tort is not based upon the breach of a primary duty. The two are not easy to reconcile, even allowing for all the complexities in his views that I have discussed. For if the commission of a tort is unreasonable, according to the law's 'objective' standards, we seem only a whisker away from admitting that it is a breach of a (legal) duty—all the more so on the definition Holmes adopts in the course of developing his subtler, second argument, namely that it is conduct that ought, in the law's view, not to be done.

[26] *Rylands v Fletcher* (1868) LR 3 HL 330.

Moreover, if it is a general truth that all tortious conduct is, in the law's view, unreasonable, then one's theory should surely not present that as a mere *coincidence*. The best inference to draw would seem to be that all tortious conduct is unreasonable *because* its being so is integral to the justification for imposing liability for it. And that is, of course, just what the duty-lovers tend to say, applying what I earlier called the deficient conduct principle: tort liability is a fitting remedial response to the defendant's contravention of a legal standard; that is *why* it is imposed only for conduct that is a breach of duty in the sense I am considering.

There is an interesting literature discussing this puzzling aspect of Holmes' views,[27] but it need not detain us. It does not affect the aims of this section. These were, first, to show the limited truth in the common charge that Holmes was a cynic. His antipathy to prevailing natural law accounts led him into some positions that, in their overeager rejection of all moral premises, are aptly described as cynical. But his cynicism springs from a much smaller source than usually alleged. This helps to confirm a general lesson of the previous chapter: that Holmes' duty-scepticism cannot be dismissed out of hand on the basis that he was a thoroughgoing extremist.

At the same time, Holmes' cynicism did have an important consequence. It meant he did not deal well with an obvious riposte that the duty-lovers might offer. The riposte is based upon what I called the 'deficient conduct' principle, a significant idea that accounts, I think, for some of the enduring appeal of DC. If the principle is sound, then it may well serve to plug the evidentiary gap in the legal materials that Holmes

[27] eg Morton J Horwitz, 'Review' (1975) 42 University of Chicago Law Review 787, 796 (arguing that Holmes defended negligence liability on 'moral and political grounds, whatever the sacrifice to his general theory'); David Rosenberg, *The Hidden Holmes: His Theory of Torts in History* (Harvard University Press 1995) (arguing that in fact Lecture III does not favour negligence liability).

identified. And that would be an especially compelling solution if, as Holmes argued in Lecture III, all tortious conduct is objectively unreasonable. Holmes' refusal to admit moral premises was his tenuous way of stopping that claim from swamping his duty-scepticism. And that brings me to my second aim, which was to map out my own views, to be defended in what follows, in contradistinction to Holmes'. He got himself into a tight spot because he endorsed the view that all tortious conduct is unreasonable, and he could get out of it (or try to do so) only by rejecting moral premises altogether. I have no intention of making that same cynical move. But I do not need to, since I reject Holmes' view in Lecture III of *The Common Law*. Tort liability is often imposed for conduct that is not unreasonable. That is the true explanation of the evidentiary gap he identified, in other words the lack of a general admonitory attitude on the part of the law. And it is true not because the law should be hived off from morality, but because it tracks it. Notwithstanding the intuitive plausibility of the deficient conduct principle, it turns out on closer inspection to be false.

3.1.4. Wrongs and fault

Henceforth Holmes and I part ways, then, largely because of his claim in Lecture III of *The Common Law*, on which I now focus.

It is easy to see some plausibility in his claim, since it is very *often* a precondition for tort liability that the defendant acted in a way he ought not. Liability in the tort of negligence, after all, requires that the defendant acted unreasonably—which is

equivalent, on the schema I mentioned in the last chapter,[28] to acting as one ought not to. And many writers since Holmes have agreed with him that negligence is the paradigm case of tort liability.[29] This may indeed have become all the more plausible as a result of legal developments since Holmes' time, when 'the staggering march of negligence' was just beginning.[30]

One might also think, again with Holmes, that the intentional torts are, if anything, *a fortiori*: for isn't it obvious that assault, theft, defamation, etc, are things one ought not to do? True, the elements of these torts, unlike negligence, do not require direct proof of the unreasonableness of the defendant's conduct. But plausibly the unreasonableness has been, as it were, predetermined. The other elements ensure that liability is imposed only when, according to the law's 'objective' and general standards, the defendant has intentionally done something he should not have.

As these remarks suggest, and the previous subsection already signalled, there is an important connection between wrongs and fault. Some deny the connection, since they deny that breaching a duty entails acting as one ought not to act. Their views are considered in the next chapter. But for those who subscribe to DC_O, the connection is plain. To breach a duty, according to DC_O, entails that one has acted as one ought, all things considered, not to have acted; and acting as one ought not to have acted is a

[28] This was based on Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999). For its application to the negligence standard see eg John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 Law Quarterly Review 563.

[29] For discussion of this aspect of Holmes' work see again Grey (n 17); White (n 17) 12–19.

[30] Tony Weir, 'The Staggering March of Negligence' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998).

necessary condition for acting with fault.[31] It is not a sufficient one, because one's actions may be unjustified but excused. One may have been reasonably ignorant, for example, of the facts in virtue of which one's conduct was unjustified. And, if that is so, one's conduct is not faulty in the layperson's sense of the term; and, moreover, one will be exempted from liability by the law's fault standard, at least some of the time. The important upshot is that instances of fault liability, and especially negligence liability, are consistent with DC_O, since these ensure that liability is imposed only when the defendant has done what he ought not to have done. On the other hand, those instances of liability absent a fault standard are not consistent with DC_O—or not obviously so. Accordingly, DC_O's proponents, as we shall see, tend to foreground instances of negligence liability as representing tort law's general nature; and when faced with apparent counterexamples they must either assimilate these (despite appearances) to the negligence model—or, failing that, marginalise them.

The counterexamples usually provided are, naturally enough, cases of strict liability. These suggest tort liability may be imposed even if the defendant's conduct was reasonable—causing Holmes to observe that these cases were 'the greatest difficulty to be overcome' in establishing the truth of his claim.[32] Debate about these has persisted ever since. But it has not been especially productive. The trouble is that the facts of these cases are 'often within a hair's breadth' of sustaining fault-based liability.[33] After all, the defendant's activities that fall under these rules tend to be unusually dangerous;

[31] There may be some exceptions. For example, one might have acted for the wrong motive, or one might fortuitously have done the right thing even though, on the facts as one believed them to be, one's act was unjustified. These do not detract materially from the points in the text.

[32] Holmes, *The Common Law* (n 16) 130.

[33] John CP Goldberg and Benjamin C Zipursky, *Torts* (Oxford University Press 2010) 267.

they have caused harm to the claimant; and there tend to be few available explanations for this other than defendant negligence. How else did the dam wall, which the defendant constructed and maintained, break? How else did the product manufactured in the defendant's factory become defective? And so on.

Accordingly, there is no way to break the impasse between those who think these are cases of 'true' strict liability, i.e. where the law is truly unconcerned with the reasonableness or otherwise of the defendant's conduct, and those who think the law is concerned with it but for countervailing reasons does not make direct proof of it a precondition for liability:[34] the cost and difficulty of proof, for example, make it better not to require it, especially since it tends to be present in any event; or—Holmes' own strategy[35]—these are cases where the law has decided the conduct is *per se* unreasonable (in a way analogous to the intentional torts), and thus has no need to require it to be established anew by the plaintiff.[36] These deprecatory readings are helped along by the diminution, over recent decades, of certain prominent pockets of strict liability. *Rylands v Fletcher*, as is well known, has been whittled down in England and Wales[37] and abandoned altogether in Australia.[38] For both these reasons, then, the use of *Rylands* and its ilk to argue against the centrality of fault has gone a bit stale.

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[34] 'Strict liability' is multiply ambiguous, as these remarks reveal. For a useful attempt to summarise the ambiguities see Allan Beever, *A Theory of Tort Liability* (Hart 2016) 32. The meaning I adopt in this thesis is the one the text implies, i.e. liability that is imposed for harm-causing act *x* (subject to defences), regardless of whether one's *x*-ing was reasonable.

[35] Holmes, *The Common Law* (n 16).

[36] Other writers have adopted similar strategies: see Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 189; Jules L Coleman, *Risks and Wrongs* (Oxford University Press 2002) 367–369.

[37] See now *Transco plc v Stockport MBC* [2004] 2 AC 1.

[38] *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13.

What about the intentional torts, like trespass and defamation? It is often said that these impose 'strict liability'.[39] So perhaps I was too credulous, a moment ago, in accepting they were *a fortiori* negligence in affirming DC_O. For example, in *E Hulton & Co v Jones* the House of Lords held liable a defendant who been unaware (on the facts presented to the court) that his defamatory statement about a fictional character would be taken in reader's minds to refer to the plaintiff.[40] It strongly affirmed that liability for the tort of libel does not depend on fault,[41] and this is still the modern position.[42] Trespass provides an even readier source of stock examples: if I stray onto my neighbour's land, even reasonably believing it is my own, I have committed the tort.[43] At first glance, then, these torts might seem inconsonant with DC_O. They lack the fault standard which, I said, makes negligence easily assimilable to it.

Yet, in truth, they do not help the argument of this chapter. One reason, as with *Rylands*-style strict liability, is simply dialectical. Prominent writers, including both Holmes and McBride, have already rejected these cases as unilluminating. Holmes, even in 1881, felt able to denounce the strictness of liability in trespass as a 'primitive' rule, in the course of being steadily eroded.[44] McBride, writing more recently, has concluded that all remaining examples of strict liabilities in English tort law 'are demonstrable historical excrescences' that ought to have been purged long ago.[45]

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[39] But note the cautions in n 34.

[40] [1910] AC 20.

[41] See especially 23–24 (Lord Loreburn LC).

[42] It was repeated, for eg, in *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331. See further Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005) ch 5.

[43] eg *Basely v Clarkson* (1681) 3 Lev 37; *Conway v George Wimpey & Co* [1951] 2 KB 266; Restatement (Second) of Torts § 164.

[44] Holmes, *The Common Law* (n 16) 100.

[45] McBride (n 9) 39.

But there is a second, and more fundamental, reason to put these cases to one side—and one which makes it idle to quibble with McBride's conclusion. The reason is that the defendant's conduct in these examples was unjustified, even though it was excused. In *Hulton v Jones*, for example, the defendant ought not to have published the statement, even though his doing so was blameless given his reasonable ignorance that the claimant would be associated with it. Trespassing on another's land is (in ordinary circumstances) unjustifiable in the eyes of the law, although we are blameless if we do not know that is what we are doing. The defendant's actions were unreasonable relative to the facts as they existed, even if not relative to his (reasonable) beliefs at the time he acted.[46] It would have been better if the defendant had not published the statement, or strayed across that boundary—but, alas, he did not know the true facts.

If this interpretation is at least plausible, then these examples do not cleanly test the truth of DC_O. They contrast with the tort of negligence in their relative unwillingness to afford defendants an excuse. But they stand together with negligence in imposing liability only on defendants whose conduct was (fact-relative) unreasonable—what I have been calling 'unjustified'. And hence they are fully consistent with the truth of DC_O.

These remarks return us, then, to the difference between justifications and excuses, and the important point that DC_O is about the former only. DC_O states that tort liability is conditional upon the defendant's acting against the balance of reasons. It does not say he must have acted against the balance of reasons as he believed them to be, or in any other way require the defendant's conduct to have been (even in the law's view)

[46] The distinction between fact-relative, belief-relative, and evidence-relative unreasonableness is owed to Derek Parfit, *On What Matters: Volume One* (Oxford University Press 2011) 150–151.

blameworthy. I think everyone agrees *that* claim would be a non-starter. DC_O, by contrast, still has adherents. It does not collapse into a claim about the necessity of fault—but it arguably does enough to preserve the intuitive appeal of the deficient conduct principle. In any event it is a claim many duty-lovers continue to defend, and which I want to tackle.

3.2. Liability for justified conduct

By following Holmes' thought through the last chapter and more, I have tried to open up some logical space that is underexploited in the conventional lines of theoretical debate about tort. Thus far I have stayed mostly agnostic about the correctness of Holmes' duty-sceptical conclusion. I merely argued that the duty-lovers' strategies do not tell so conclusively against it as they imagine. The time has now come, finally, to tackle the matter head-on, and to argue that DC_O is in fact false.

My previous section introduced some ways in which mine will be, relatively speaking, 'A fresh approach'. The main one is that I believe a satisfying debate requires cases which—unlike *Rylands*, and unlike many cases involving the intentional torts—are (i) relatively recent and of enduring practical significance, and (ii) impose liability even though the law's view is inarguably that the defendant's conduct was not merely excused but justified. Fortunately there are cases of this sort in modern English law, which provide the robust counterexamples needed to refute DC_O.[47] The point is nicely

[47] Gregory Keating has mounted a sustained argument against a certain wrongs-based picture based on these cases' US equivalents: 'Nuisance as a Strict Liability Wrong' (2011) 4 Journal of Tort Law 1; 'Is There Really No Liability without Fault: A Critique of Goldberg & Zipursky' (2016) 85 Fordham Law Review Res Gestae 24, 35–37. So the freshness of my approach is only relative.

illustrated, in fact, by returning to McBride's Exhibit A. It's not just that there is a lack of evidence that courts would injunct all torts. There is clear evidence that they would not.

3.2.1. Nuisance

Thus the English courts have decided, in several carefully considered cases, that an injunction should not be awarded, because the activity ought to continue; but that compensation must be paid to those injured by it. In other words, they have decided that a tort can be committed even when the defendant's conduct is palpably reasonable.

In *Miller v Jackson*, the claimants' house had been peppered with balls struck from the neighbouring village cricket field.[48] Though this was an actionable nuisance entitling the claimants to compensation, the recreational value of cricket was so great, the Court of Appeal held, that it should be allowed to continue. The authority is admittedly a peculiar one, since only a minority of the judges agreed with the result attributable aggregatively to the court: only the speech of Cummings-Bruce LJ is aimed at justifying the order that issued.[49] But through that fortuity a precedent was established which later courts have embraced.

In *Dennis v Ministry of Defence*, Buckley J held that the Royal Air Force was justified in using its airfield to train its pilots, and should be allowed to continue, but

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[48] *Miller v Jackson* [1977] QB 966.

[49] Lord Denning MR thought there was no nuisance and therefore no remedy; Geoffrey Lane LJ thought there was a nuisance entitling the claimant to both damages and an injunction. Cumming-Bruce LJ thought damages, but not an injunction, should be awarded, and each aspect of that award carried a (differently composed) majority. On the other hand, Lord Denning MR might have refused to recognise a nuisance *only because* he thought an injunction would then follow: ibid 981H–982A.

that doing so constituted a tort against the claimant, who owned neighbouring land.[50] After all, the noise from the airfield was a serious disturbance, and it was no consolation to him that the operation of the airfield was, on balance, justified. Thus, on the one hand, no injunction should be awarded, since 'the public interest clearly demand[ed]' that pilot-training should continue; but that is irrelevant to the question of whether there is an actionable nuisance entitling the claimant to damages.[51] That question turns on the degree to which the defendant's activity has set back the claimant's interests, and the fact that the activity was reasonable, all things considered, is beside the point. Buckley J therefore applied the approach of *Miller v Jackson*, which he thought embodied a sound principle.

Not all courts took the same view,[52] however, producing a conflict of authorities which the Supreme Court resolved in 2014 in *Coventry v Lawrence*.[53] It held unanimously, affirming both *Miller* and *Dennis*, that judges should be free to decline an injunction because of the public interest in the continuance of the defendant's activities, even to a claimant who has established a tortious nuisance.[54]

It is true, as I mentioned earlier, that there are reasons for a court to refuse an injunction quite apart from the reasonableness of the defendant's conduct. It might be unduly heavy-handed to deploy the legal machinery to prevent even conduct that ought

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[50] *Dennis v Ministry of Defence* [2003] EWHC 793.

[51] ibid [46]–[48].

[52] eg *Kennaway v Thompson* [1981] 1 QB 88.

[53] *Coventry v Lawrence* [2014] UKSC 13.

[54] Nominally the Supreme Court preserved the proposition that an injunction is the 'prima facie' remedy (at [121]), but in substance it plainly departed from that approach: the court's power to award damages rather than an injunction should be 'much more flexible' than usually suggested; it was 'simply wrong in principle' to do this only in exceptional circumstances (at [119]).

not to occur.[55] But that is not what motivated these decisions. What motivated them was that the activity ought to continue. In *Miller* this was because of the value to the community of the 'manly' sport of cricket.[56] In *Dennis* it was the patent public interest in the RAF's work.[57] And the unmistakable basis of the Supreme Court's decision in *Coventry* was that, although concerns about the law's heavy-handedness had long been recognised as reasons for refusing an injunction,[58] these were *not* the only reasons;[59] courts should readily refuse an injunction on the quite different basis that, because the defendant's activity is of benefit to the public, it should go ahead.[60]

In doing so the Court was, in fact, spelling out the implications of a principle of 150 years' standing: that an activity is all-things-considered reasonable does not imply that it is not a tortious nuisance. Overwhelming though the benefits of the activity may be, 'that law … is a bad one which, for the public benefit, inflicts loss on an individual without compensation'.[61] This celebrated principle, from Bramwell B's speech in *Bamford v Turnley*, came shortly to be applied in other judgments of equally high authority to deny that nuisance liability depends on unreasonable conduct by the defendant.[62] The point is complicated, to be sure, by the fact that liability in nuisance depends on the 'reasonable use' enquiry, but that complexity is only superficial: that enquiry relates, as few seriously dispute, not to the reasonableness of the defendant's

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[55] See again McBride (n 9) 56–58.

[56] *Miller v Jackson* (n 10) 988 (Cumming-Bruce LJ).

[57] *Dennis v Ministry of Defence* (n 50) [46]–[48].

[58] This is according to *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

[59] See eg *Coventry v Lawrence* [2014] UKSC 13 [119], [239].

[60] ibid [124]–[125], [240].

[61] *Bamford v Turnley* (1862) All ER 706, 713.

[62] *St Helen's Smelting v Tipping* (1865) 11 HL Cas 642. See too *Brand v Hammersmith and City Railway Co* [1867] LR 2 QB 223, 231.

conduct but to the reasonableness of the claimant's having to put up with the interference without remedy.[63] That there is logical space between the two—with the effect that the claimant is sometimes entitled to damages even though the defendant's conduct is reasonable—is amply demonstrated by the cases under discussion. *Coventry* confirms, by corollary, that in circumstances of this kind the court should not issue an injunction. This was the same the conclusion that American law had reached a half-century ago, incidentally, in *Boomer v Atlantic Cement Co*.[64]

Admittedly *Coventry v Lawrence*—like *Boomer*—has divided opinion. For some, its sharp end is the court's willingness to deny an injunction even when it has found an actionable nuisance. Thus the court, in defiance of its responsibilities, 'is, in effect, licensing a continuing wrong'.[65] As we shall see later, I doubt this alarmism is justified. But for now I want to view the case from its other end. From that perspective, what is striking about the court's approach is not the denial of an injunction as such, but its ready acceptance that damages may be paid even for conduct it regards as obviously reasonable. That may sound strange to those accustomed to the practical preponderance of negligence and the intellectual architecture that has been built around it, starting with Holmes. But these nuisance cases are all the more important for that: they breathe new life into negligence's competitor, according to which the defendant may have a duty to compensate even when he has acted eminently reasonably.

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[63] See eg *Transco* (n 37) [26].

[64] *Boomer v Atlantic Cement Co* 26 NY2d 219 (NY 1970).

[65] The phrase originates in Jasen J's dissenting judgment in *Boomer* (n 64). This critique is made of *Coventry* in, for eg, Emma Lees, 'Lawrence v Fen Tigers: Where Now for Nuisance?' [2014] Conveyancer and Property Lawyer 449; Paul S Davies, 'Injunctions in Tort and Contract' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017). See also Allan Beever, *The Law of Private Nuisance* (Hart 2013) 147–153.

3.2.2. Necessity

The classic case to instantiate that thought is, of course, the Minnesota Supreme Court's 1910 decision in *Vincent v Lake Erie Transportation Co*.[66] Virtually every tort theorist has felt an obligation to comment on the case, and I do not consider myself exempt. The plaintiff ship's captain overstayed his contractual permission to moor at the defendant's dock in order to keep the ship safe in a sudden storm. The ship, pitched back and forth by the rough weather, caused damage to the dock, resulting in a claim by the defendant for the cost of repair. The Minnesota Supreme Court made plain that the ship's captain had behaved reasonably in staying moored to the dock. Yet it held the defendant liable to compensate the plaintiff. '[T]he dock owner may recover from the shipmaster for the injury sustained', the Court held, 'although prudent seamanship required the master to follow the course pursued.'

Tellingly, the Court did not think the principle on which it relied was an adventitious one. It said the same principle would have applied in other reported cases, and that 'theologians' supported it: in cases of necessity, one may take the property of another 'without moral guilt', yet an obligation to pay compensation remains. Moral philosophers, too, have argued for the validity of this principle. A stranded hiker breaks into your mountain cabin to avoid freezing to death, in Joel Feinberg's famous example; he is justified in doing so, but should pay for the damage.[67] A diabetic takes your insulin to avoid life-threatening hyperglycaemia; the non-consensual taking is

[66] *Vincent v Lake Erie Transportation Co* 124 NW 221 (Minn 1910).

[67] Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' (1978) 7 Philosophy & Public Affairs 93.

justified, but he ought to replace the insulin.[68] These kinds of examples can be multiplied—and often are in the moral-philosophical literature.[69]

3.3. What next?

Usually, however, these cases are not taken very seriously. Some say *Vincent* and its ilk were wrongly decided.[70] The more common move, however, is to accept that they were rightly decided, and then marginalise them as exceptions, leaving intact the general truth of DC_O. Allan Beever, for example, has recently presented it as obvious that the defendant in *Vincent* committed no tort, since the court found that the defendant had behaved reasonably.[71] But this shows only that Beever is in thrall to DC_O. What we want is an *argument* for the conclusion that, in virtue of DC_O, *Vincent* cannot be a tort case—rather than that *Vincent* shows DC_O is false.

3.3.1. Conditional fault

One time-honoured attempt to defuse the tension, owed to Robert Keeton, is to say that *Vincent* is a case of 'conditional fault'.[72] The claim is that, even though the defendant is not at fault for committing the tort, he is at fault if he does not compensate for it.

[68] Coleman (n 36) 282–283, 292ff.

[69] See eg Elinor Mason, 'Between Strict Liability and Blameworthy Quality of Will' in David Shoemaker (ed), *Oxford Studies in Agency and Responsibility* (Oxford University Press 2019); Justin A Capes, 'Strict Moral Liability' (2019) 36 Social Philosophy and Policy 52.

[70] Stephen D Sugarman, 'The "Necessity" Defense and the Failure of Tort Theory' (2005) 5 Issues in Legal Scholarship.

[71] Allan Beever, 'Negligence and Utility' (2017) 17 Oxford University Commonwealth Law Journal 85, 107. He had taken a more moderate line in *A Theory of Tort Liability* (n 34) 91–92.

[72] Robert E Keeton, 'Conditional Fault in the Law of Torts' (1959) 72 Harvard Law Review 401. He applies the same analysis to other well-known instances of strict liability, such as *Rylands*.

Hence the imposition of liability in *Vincent*, in common with the general run of tort cases, rests on a judgement that the defendant was at fault. The only novelty of *Vincent* is that it requires a further condition—the defendant has committed the tort *and also* failed to compensate for it—before that judgement can be reached. By this route, Keeton said, the case could be seen not as a 'diversion from the main theme of fault' but as 'bear[ing] some important similarities' to it.[73]

This response, however, does not help to narrow the gap between *Vincent* and DC_O. It is true that the defendant ought to compensate the plaintiff for the damage to his dock; in failing to do so, therefore, he may be at fault. But that was never in dispute. And it leaves the key question unaffected: *Why* does the defendant have that duty, in virtue of which his failure to compensate is faulty? Some say he has it by virtue of a (prior) breach of duty; others deny this. Keeton's response does not help us to see who is correct. He only deploys the term 'fault' unconventionally—in relation to the failure to compensate—to mask the problem. As Arthur Ripstein says, 'the idea of conditional fault repackages the result without explaining it'.[74]

3.3.2. Marginality

Possibly more suggestive is the way in which Goldberg and Zipursky deal with *Rylands v Fletcher*. Though I said earlier I wanted to skirt around *Rylands*, the canonical case of strict liability that is usually deployed to cast doubt on DC_O, the strategy Goldberg and Zipursky deploy there is a useful comparator. They rightly note that in that case

[73] ibid 418.

[74] Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 155.

'[l]iability is imposed even though the defendant has caused harm through conduct that the courts themselves are at pains to say is entirely permissible'.[75] How does liability imposed on these terms conform to DC$_O$? 'The short answer', they frankly admit, 'is that it does not.'[76] But to recognise this is 'hardly to make a substantial concession', since the case 'sits at the margin of tort law'.[77] 'To be sure', they continue, 'if *Rylands* were emblematic of a broad area of tort law, rather than a narrow exception, it would pose a challenge to the idea that liability for torts is wrongs-based.'[78] But it is not, so it does not.

Goldberg and Zipursky do not themselves apply this strategy to *Vincent* and the nuisance cases.[79] But how successful would it be if one did? It can hardly be denied that *Rylands* is a statistical exception to the general rule in tort law that fault is required, and no doubt there are many who would say something similar about *Vincent*. Weinrib, for example, reminds us that it was a split decision of a fairly lowly state court, now over a century old, and is willing to grant its relevance to theoretical discussion apparently only *arguendo*.[80] That presentation of the case might be a touch self-serving, given that the principle endorsed in *Vincent* is firmly entrenched, then as now,

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[75] Goldberg and Zipursky, 'Torts as Wrongs' (n 1) 951.

[76] Goldberg and Zipursky, *Torts* (n 33) 267.

[77] Goldberg and Zipursky, 'Torts as Wrongs' (n 1) 951–952.

[78] ibid 952.

[79] They discuss only *Rylands* in the article I quoted, and we know from other work that their strategy for dealing with both *Vincent* and the nuisance cases is very different. They say these are 'strict liability wrong[s]': John CP Goldberg and Benjamin C Zipursky, 'The Strict Liability in Fault and the Fault in Strict Liability' (2016) 85 Fordham Law Review 743, 751–755; Goldberg and Zipursky, *Torts* (n 33) 240. That seems seriously to undermine their own professed understanding of wrongs (as prohibitions) and to introduce an inconsistency with their treatment of *Rylands* (which they cast out of tort law on the basis that the defendant's activity was 'permissible and indeed valuable'—which could equally be said of *Vincent*, *Dennis*, etc). I deal directly with attempts to preserve a wrongs-based understanding of these cases in the next chapter.

[80] Weinrib (n 36) 197 and fn 62.

in the law of other jurisdictions.[81] In any event, is this response adequate once we bring *Vincent* into alignment with the law of nuisance? The UK Supreme Court has confirmed, as I said, that in the latter field there is a general principle, with 150-year-old roots, that an actionable nuisance entitling the claimant to compensation does not entail that the nuisance ought not to be committed. That should at least to give one pause before dismissing the case as statistically marginal.

More importantly, on what basis does one deny that even a statistical exception reveals nothing of significance about the contingency of the connection between tort liability and unreasonable conduct? It is true that one's theory of tort law need not, and probably should not, seek a unified explanation of every single instance of liability that is conventionally classified as a tort. But the challenge is to explain why one's choice of outcasts is not *ad hoc*. There must be some reason (other than the mere fact of their statistical rarity) to think they are explained on a basis that all other cases in the subject are not. I cannot see that Goldberg and Zipursky have provided one.

3.3.3. Tort and insurance

We might be pointed in the direction of a deeper explanation by Martin B's judgment in *Blyth v Birmingham Waterworks Co*,[82] often cited as the archetypal case of negligence liability in English law, decided at much the same time that Bramwell B's version of nuisance law was clicking into gear. The case is best known for Alderson B's canonical formulation of the negligence standard—which allowed the defendant,

[81] See eg the German Civil Code § 904, of which Bohlen reminds us: 'Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality' (1925) 39 Harvard Law Review 307, 314.

[82] *Blyth v Birmingham Waterworks Co* [1856] All ER 478.

having done all that was reasonable, to avoid liability. Our interest is in the dichotomy tersely stated by Martin B in support of that result:

> The defendants are not responsible, unless there was negligence on their part. To hold otherwise would be to make the company responsible as insurers.[83]

He had, in fact, said the same thing in *Rylands*, where in the Court of Exchequer he had refused, over Bramwell B's dissent, to hold the defendant liable.[84] That point of view did not prevail before the House of Lords in *Rylands* itself, but ultimately it would. And the tort of negligence's staggering march to victory over Bramwell B's view was assisted, at some important junctures, by the invocation of Martin B's contrast between liability in tort and the liability of an insurer.[85] To fail to restrict liability to breaches of the negligence standard, these later courts have seemed to say, is to dispense with the logic of tort liability altogether.

That reasoning reflects a commitment to DC_O, but how persuasive is it? Plainly the liability of an insurer is importantly different from liability in tort.[86] It sets up a useful contrast case. But reflecting on that contrast case hinders rather than advances the case for DC_O. Martin B's dichotomy is a false one, if it is meant to imply that a liability is analogous to that of an insurer merely because the conduct that incurred it was not unreasonable. That implication is untrue, and indeed misses the point. What characterises the liability of an insurer is that it is imposed *regardless of any harm-causing conduct by that person at all*. If my house burns down, I can claim under my

[83] ibid 480.

[84] *Fletcher v Rylands* [1865] 3 H&C 737, 745. Here Bramwell B dissented.

[85] eg *Hambrook v Stokes Brothers* [1925] 1 KB 141, 125; *Bourhill v Young* [1943] AC 92, 110; *Glasgow Corporation v Muir* [1943] AC 448, 455–456, 465.

[86] It has been given theoretical depth in, for eg, Raz (n 25) 7–8.

insurance policy even though my insurer had nothing at all to do (one hopes) with the fire. The insurer's liability is conditional upon the incurrence of the fire damage, but in no way grounded upon the insurer's harm-causing conduct. It seems in this respect to be plainly different, therefore, from *both* liability in negligence *and* the liability in *Vincent*, *Dennis*, and similar cases. For I do not think anyone would deny that the results in these latter cases depend crucially for their justification on the fact that the defendants caused the harm for which they were held liable.

In other words, the problem with Martin B's dichotomy is that (at least for moralists who endorse OL) negligence liability rests on *both* DC_O-compliant conduct by the defendant *and* a non-instrumental justificatory connection between that conduct and the liability. The liability of an insurer, on the other hand, rests on neither. It requires no conduct by him at all. Hence, by suggesting that an insurer's liability is the sole alternative to liability in negligence, Martin B conflates the two questions I laboured to drive apart in the previous chapter. He rules out any possibility that the defendant's conduct can non-instrumentally justify his liability for it and yet not constitute a breach of duty in the sense that DC_O understands it. But that is to rig the case in favour of DC_O, rather than to mount an honest defence of it from the counterexamples I discussed in the previous section. There is logical space between Martin B's two alternatives—the defendant's harm-causing conduct grounds his liability for it, but that conduct need not be unreasonable—which should not be surreptitiously closed.

Moreover, the discussion has revealed an obvious commonality between *Vincent*, *Dennis*, etc, and liability in, for example, negligence. The commonality is that the defendant's harm-causing conduct is what grounds or justifies his liability for it. Hence there is at least a *prima facie* case against driving the two apart on the basis that one requires unreasonable defendant conduct and the other does not. Rather, the

commonality suggests that, although there are two species of liability here—liability that is DC_O-compliant, and liability that is not—they are both species of the genus tort.

3.4. Three responses

The key disagreement, as I said, is not about the existence, or correctness, of the cases I identified in which liability was imposed for justified conduct. The question is: what follows from them? Do they refute DC_O, or can they be shown to fall outside DC_O's scope, thus leaving that claim intact? Thus far I have only set up that problem—and shown why it should not be lightly dismissed. In what follows, I say a bit more about modern attempts to show that these cases should be exiled from tort law nevertheless. They are not always avowed or argued. Often they proceed by suggestion. Certain features of these cases tend to be focussed upon, and this encourages thinking of them as somehow anomalous—and not really capable, therefore, of casting serious doubt on DC_O.

3.4.1. Property

First, there is a long tradition of treating these cases as being distinctively about property.[87] *Vincent* involved the unauthorised use by the defendant of the claimant's jetty; the nuisance cases involve the impairment by the defendant of the claimant's use of his land. And property rights are special—based on the claimant's 'sovereignty',

[87] eg Weinrib (n 36) 190–203; Dennis Klimchuk, 'Property and Necessity' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013). That the strictness of liability in nuisance is justified by the particular nature of property rights is one of the main theses of Beever, *The Law of Private Nuisance* (n 65).

perhaps, rather than the avoidance of harm[88]—and thus justify the kind of rigidity that sees liability arise even for reasonable infringements. This line of thought seems to have contributed to the sense that these cases are marginal. As Frederick Schauer says, for example, in his recent survey of the topic, 'property law remains an anomaly'.[89] He rests content with an account that explains all the other cases—where justified conduct does *not* attract a duty of repair—and leaves 'unanswered' the question why the property cases are different.[90] The implication is that the principle that animates the necessity and nuisance cases, whatever it is, is confined to a small subset of tort cases, and, moreover, that it derives from the peculiar logic of property law. These cases remain problematic, in other words—but it is somebody else's problem. Tort theorists can concentrate on explaining the ordinary, DC_O-compliant cases.

I doubt this is a legitimate move. By itself, it is a *non sequitur*: it could be that these cases tell us a great deal about the nature of property rights *and* the nature of tort law (to the extent, at least, that it protects property rights). We still need an argument to the contrary. We still need a reason to think, in other words, that they are explained by a logic different from all the other tort cases, rather than sharing a logic and requiring us to revise our understanding of it.

[88] Arthur Ripstein, 'Beyond the Harm Principle' (2006) 34 Philosophy & Public Affairs 215. Ripstein's is only one attempt to distinguish harm-avoidance from the distinctive powers of authority and control that property rights (are meant to) provide.

[89] Frederick Schauer, 'Rightful Deprivations of Rights' (2018) 27 <ssrn.com/abstract=3221184>.

[90] ibid 27–28.

3.4.2. Enrichment

But the property-based analysis does help to point us in the direction of other arguments of that kind. As Hume noticed, our property, unlike our body, can in general be appropriated (or misappropriated) 'without suffering any loss or alteration'; and hence remains 'of advantage to him who deprives us of them'.[91] Cases of use by the defendant of the claimant's property are thus ripe for reinterpretation as turning not on the harm done to the claimant, but on the benefit accruing to the defendant. Thus Weinrib famously argued that *Vincent* is explicable as an unjust enrichment case.[92] The ship's captain was benefited by his use of the dock, and unjustly so because he used it without the owner's consent. Hence, by familiar principles, he must restore the benefit to the owner. And that—not the logic of tort law—explains the liability result in *Vincent*.

The sticking points in this analysis are, however, easy to spot.[93] Suppose the damage to the dock had, through unforeseeable bad luck, been greater than the corresponding benefit to the ship owner, i.e. the damage that would have befallen the ship if it had been unmoored. Does it follow without more that the claimant could not receive the full extent of the damage, but only the extent of the benefit, as an unjust enrichment analysis presupposes? For that matter, would the claim be dead in the water if, despite the captain's prudence, the unforeseeably catastrophic storm had wrenched the ship free and destroyed it after the damage to the dock had been done? Surely not. And the

[91] David Hume, 'A Treatise of Human Nature' in David Fate Norton and Mary J Norton (eds), *The Clarendon Edition of the Works of David Hume: Vol. 1* (Oxford University Press 2007) 487.

[92] Weinrib (n 36) 196–203.

[93] They have been pointed out by many, eg Keeton (n 72) 410–418; Kenneth W Simons, 'Justification in Private Law' (1996) 81 Cornell Law Review 698, 722–727.

Vincent court saw no need to enquire whether it was so. The true object of its analysis was the damage to the dock, not the benefit (if any) the captain received.

The switch from tort to enrichment may seem to many a natural one. Peter Birks established as orthodoxy that the defining difference between liability in tort and in enrichment is that the former depends upon a wrong by the defendant and the latter does not.[94] For those who believe OL, *Vincent* does not involve a wrong; and it is tempting to conclude, by application of the Birksian schema, that it should be defended as an enrichment case.

Yet that response is much too extreme. Its vice is the same as that exhibited by Martin B's dichotomy. It leaps right over the distinction I drew in the previous chapter, and then again in section 3.3.3 of this one, between the nature of the defendant's conduct and the justificatory connection between it and his liability. For notice that in enrichment, or at least the mistaken payment cases Birks thought were the subject's core,[95] the defendant's prior conduct plays no role in justifying his liability at all. What matters is the fact of his enrichment at the claimant's expense, its being irrelevant if that occurs by a payment into his bank account in which he was entirely uninvolved. To treat *Vincent* as susceptible to the same analysis causes the defendant's role in damaging the dock to drop out entirely. Whatever one thinks about whether the defendant's conduct was wrongful, it is a drastic move to say his conduct is *irrelevant*. Seeing that *Vincent* may not be a good fit with tort law in one respect, then, Weinrib

[94] Peter Birks, 'The Concept of a Civil Wrong' in David G Owen, *Philosophical Foundations of Tort Law* (Clarendon 1995) 47–49.

[95] See especially Peter Birks, *Unjust Enrichment* (Oxford University Press 2005) ch 1.

assimilates it to a model with which it is an even worse fit in another respect that is no less important.

3.4.3. Economics

The most popular way of analysing the nuisance cases, and one with perhaps wider reach, is in terms of economics. On this approach, the imposition of liability in the nuisance cases is an attempt to efficiently allocate the cost of the parties' respective activities. The economists thus seize upon, and thrust into centre stage, the conspicuous feature of *Miller* and *Dennis*, namely the public interest in the defendant's activities. Maximising the social value of activities, they say, is what nuisance law is all about. And by explaining the liability as a means to that end, perhaps they can address some of the explanatory gaps in the previous responses I mentioned: what I trumpeted as the irreducible role of the defendant's harm-causing conduct, for example, they explain away as a simple entailment of cost-internalisation and its healthy incentive effects on defendants.

No doubt the economists themselves would see the nuisance cases merely as a useful staging post for a wider attack on the moralistic account of tort law. They would deploy nuisance law as the core case from which others can be explained derivatively or by analogy. But for my purposes the question is whether there is some validity to the moralists' and duty-lovers' opposite perspective: that the nuisance cases, or the features of them I discussed above, inhabit an anomalous enclave in which the economists' ideology has gained a foothold. Rather than illuminating tort law's true nature, they only show that—as the moralists so often lament—some lawyers and judges have lost touch with its true nature through the economists' malign influence.

Certainly there is a long ideological association between nuisance law and economics. Two of the most influential essays in twentieth-century legal scholarship, one by Ronald Coase and the other by Calabresi and Melamed, used nuisance cases to illustrate the susceptibility of law to economic analysis.[96] Calabresi and Melamed directly tackled the feature of the nuisance cases I emphasised throughout section 3.2.1: that it is often appropriate to award damages, but not an injunction, in nuisance cases.[97] Specific relief should be denied because the defendant should be permitted, indeed encouraged, to continue the nuisance when it is economically efficient to do so. Damages, on the other hand, should be awarded, precisely because that will help to ensure, through cost-internalisation, that the defendant decides to engage in the conduct only when it is indeed efficient. On this view, then, my alleged counterexamples to DC_O are departures from moralistic orthodoxy that are to be justified, if at all, by their economic efficiency benefits.

Interestingly, even the English judges who decided these cases have been drawn into this way of speaking. Lord Sumption in *Coventry* described the clamour to award an injunction whenever a nuisance has been established as 'unduly moralistic', contrasting this with the more sensible approach of '[m]odern economic theory', from which it follows that 'an injunction should not usually be granted' where the defendant's activity has great social value.[98] But 'an award of damages ensures a more efficient

[96] RH Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1, 8–15; Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089, 1115–1124.

[97] See also William M Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987) 42–48. More famous still is the economic defence of these twin propositions—grant damages, but deny specific relief—in contract law, viz. the theory of 'efficient breach'.

[98] *Coventry v Lawrence* (n 59) [160]–[161].

allocation of scarce economic resources'.[99] From this perspective, *Coventry*'s logic is akin to that underlying the rule in *Rylands v Fletcher*, which the House of Lords has also interpreted (retrospectively) as thoroughly economic: for Lord Hoffmann, *Rylands* was 'an isolated victory' for the theory that 'requir[es] the costs of a commercial enterprise to be internalised';[100] for Lord Hobhouse, it is 'easily apparent' that the rule 'reflects a social and economic utility'.[101] Lord Hoffmann sourced this understanding in the founding judgments of Bramwell B,[102] who was indeed a well-known as 'an enthusiast for *laissez-faire*' and whose reasoning was expressed in terms patently indebted to that economic theory.[103]

Undoubtedly, therefore, some judges have tried to fit their DC_O-defiant conclusions to prevailing economic theories of the time. But how seriously should we take this? Other judges, after all, have defended these conclusions in terms quite different. *Boomer*, decided in the headiest days of law and economics, might have foregrounded 'economic consequences' and incentives to justify its choice of remedy,[104] but such language is absent from the key earlier precedent on which its award was based.[105] *Vincent* sought authority for its views not from economists, but from 'theologians'. And it should be remembered, conversely, that the great rival to Bramwell B's views—the negligence principle—was itself given its foundational theoretical justification, by

[99] ibid [160], quoting *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1996] Ch 286, 304.

[100] *Transco plc v Stockport MBC* [2004] 2 AC 1 [29].

[101] ibid [55].

[102] Lord Hoffmann cites *Bamford v Turnley* (n 61) 712–713; *Brand v Hammersmith and City Railway Co* (n 62) 230–231. Bramwell B, as mentioned, sat in the Court of Exchequer in *Rylands*.

[103] AW Brian Simpson, *Leading Cases in the Common Law* (Oxford University Press 1996) 173–175.

[104] *Boomer* (n 64) 222–224.

[105] *Northern Indiana Public Service Co v Vesey* (1936) 210 Ind 338.

Holmes among others, in *laissez-faire* economics.[106] Indeed Bramwell B's view was in the minority. Only by the backwards-projection of the theory of cost-internalisation does his preference for strict liability come to seem the natural entailment of economistic thinking.[107]

A better approach is to ask: what is it about the nuisance cases that only the economists are supposed to be able to explain? Surely not the kind of value that the defendant's activities had. The majesty of village cricket, or the importance of training fighter pilots: these are not easily reduced to the value of economic efficiency. Or, more accurately—since economic efficiency is famously elastic, and capable of being stretched to subsume all forms of value—they *need* not be so reduced. It hardly requires a relentlessly welfarist approach to say the continuance of these activities is something that we, and therefore the law, ought to value.

But if the law is to give some weight to that value, then surely it will sometimes be capable of defeating the reasons, even undisputed and important reasons, generated by the interests of the claimant. It is true that utilitarians and welfarists are especially willing to make trade-offs of this kind, as a result of their commitment to the commensurability of all value. And it is also true that the most dogmatically deontological approaches seem to be opposed to *any* such balancing, at least where a right or duty is at stake.[108] These facts help to explain, I am sure, why those who resist the rigidity of these deontological approaches have sometimes found it convenient to

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[106] Horwitz (n 23) ch 3.

[107] Compare Simpson (n 103) 173–175.

[108] I discussed such views in section 2.3.1 above. Allan Beever's recent writings seem to be based on a similar supposition: that to balance the claimant's rights against other factors would be to succumb, ipso facto, to utilitarianism: see his 'Negligence and Utility' (n 71).

invoke the language of the economists. But there are a range of intermediate views, which, while rejecting the economists' approach, accept that reasons are *pro tanto*, and even that rights and duties are *pro tanto*.[109] Both count towards determining what we ought to do, but can be defeated by sufficiently powerful countervailing considerations—of which the great public interest in the defendants' activities in the nuisance cases, and the urgent threat to safety in *Vincent*, are examples. It is an ordinary feature of normative ethics, in other words, that reasons (and duties) can be defeated. So the supposedly anomalous feature of these cases—that the claimant has a justified complaint, even though the defendant's activity is reasonable—can be explained without any recourse to economic analysis at all.

While economic analysis has tended 'monopolize' these cases over recent decades,[110] then, the moralists should not surrender them on that basis. And they have indeed been ably defended in terms of both 'corrective justice'[111] and 'rights'.[112] Ultimately we should conclude, with Brian Simpson, that Bramwell B

> was not engaged in economic analysis at all. His real concern was ethical—the injustice of someone profiting through depriving another of property rights without compensation. Again he stood in the Blackstonian tradition.[113]

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[109] eg Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990). This kind of approach is discussed in much more detail in chapter 4.

[110] Weinrib (n 36) 190.

[111] ibid 190–196. See also Richard A Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8 Journal of Legal Studies 49.

[112] Keating, 'Nuisance as a Strict Liability Wrong' (n 47); 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 2011) 469.

[113] Simpson (n 103) 175.

But, if that is so, defenders of DC_O cannot reject these cases as malign departures, triggered by law-and-economics, from tort law's moral foundations. They are cases that tort law's moral foundations need to explain.

3.5. The simple argument

My objections to these ways of understanding *Vincent* and the nuisance cases were cursory. Rather than getting drawn into these debates, I wanted to bypass them. I hope to do so by means of what I call 'the simple argument'. It is simple because it merely points out the continuity between these DC_O-defiant cases and the indisputably central cases of tort liability. This strongly suggests that no wedge can be driven between the two sets, so as to put one within the logic of tort liability and one without. And, if I am right about this, the ingenious attempts that have been made to assimilate *Vincent* and the nuisance cases to models outside the law of torts are not so much wrong as unnecessary.

Miller v Jackson's personal-injury analogue is in fact well known. In *Bolton v Stone* the claimant was hit on the head by a cricket ball driven out of the defendant's cricket ground.[114] The facts in the two cases are strikingly similar: balls struck in the course of the defendant's cricket-playing caused harm to persons on neighbouring land. The difference was that in *Miller* the balls caused diminished amenity value, whereas in *Bolton* the ball caused personal injury to the claimant. The result in *Bolton*, to be sure, was that the defendant was not liable, because it would not have been reasonable, given the small risk of injury, that cricket be stopped altogether. It is now regarded as a

[114] *Bolton v Stone* [1951] AC 850 (HL).

canonical judgment in the development of the English law of negligence, and thus strongly affirmative of DC_O. But its result was not by any means written into the moral firmament. In fact it was widely criticised at the time. It seemed puzzling to many observers that the all-things-considered reasonableness of the defendant's cricket-playing was thought to provide an answer to the claim.

Indeed this was a view expressed by Lord Radcliffe in his speech in the case. He wrote that he 'can see nothing unfair in the [defendants] being required to compensate [the claimant, Ms Stone] for the serious injury that she has received as a result of the sport that they have organized'.[115] But that did not suffice to make out liability, he said 'with regret', under the contemporary law of negligence.[116] And in closing he wrote portentously that, although the defendant need not have taken further safety precautions:

> Whether, if the unlikely event of an accident did occur and his play turn to another's hurt, he would have thought it equally proper to offer no more consolation to his victim than the reflection that a social being is not immune from social risks, I do not say.[117]

His implication that the club ought to have compensated Ms Stone was taken up with vigour by commentators, both popular and professional, whose reaction to the judgment was hostile.[118] Heft was added to the public outcry by Arthur Goodhart's

[115] ibid 868.

[116] ibid.

[117] ibid 869.

[118] See further Mark Lunney, 'Six and Out: *Bolton v Stone* after 50 Years' (2003) 24 Journal of Legal History 1, 15–17.

note arguing that the case had been wrongly decided.[119] As a result, the defendants decided to let Ms Stone keep the compensation she had been awarded by the Court of Appeal, and anxiously conveyed their decision to the *Law Quarterly Review*.[120] Some distinguished tort scholars of the time took these events sufficiently seriously to develop the notion of 'ethical compensation':[121] the *Bolton* saga showed, they thought, that the defendant has a duty to compensate the claimant, even in circumstances when the law of negligence fails to acknowledge it. Richard Epstein drew on these writings when he famously argued, in 1973, that the club ought to have been held strictly liable.[122]

Whatever the merits of Epstein's broader project,[123] it seems to contain an important truth about *Bolton*. The point is not that the case should necessarily have been decided differently. It is only that, *if* the House of Lords had decided the case differently, it does not seem plausible to insist they would have lost touch altogether with tort law's moral foundations. The applicable doctrine, to which the Lords ultimately acceded, coupled tort liability with unreasonable conduct. But if the Lords had uncoupled it, they would have made an equally viable choice, and quite possibly one that would have been less controversial.

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[119] AL Goodhart, 'Is It Cricket?' (1951) 67 Law Quarterly Review 461. See also Dennis Lloyd's note which, while not saying the judgment was wrong, presents it as adventitious: 'Notes of Cases' (1951) 14 Modern Law Review 499.

[120] AL Goodhart, 'Notes' (1952) 68 Law Quarterly Review 3.

[121] John Salmond, *The Law of Torts* (13th edn, Sweet & Maxwell 1961) 30; also Glanville Williams, 'The Aims of the Law of Tort' (1951) 4 Current Legal Problems 137, 142.

[122] Richard A Epstein, 'A Theory of Strict Liability' (1973) 2 Journal of Legal Studies 151, 170.

[123] I discuss this in detail in chapter 7.

They might have supported it using the same points made by the courts in *Bamford v Turnley* or (later) in *Dennis*. In short, what does it matter to the claimant that it was all-things-considered reasonable for the defendant's club to keep playing cricket? Nothing. The claimant has been injured as a result of actions the club chose to undertake. The defendant is responsible, therefore, for the harm, and should have to compensate accordingly. It offers up the defence that its cricket-playing was in the public interest—but 'that law … is a bad one which, for the public benefit, inflicts loss on an individual without compensation';[124] that would be for her 'private rights [to] be subjugated to the public interest'.[125] Whether or not the defendant's cricket-playing was all-things-considered reasonable was, the court might have said, simply beside the point. The close similarity with the facts of *Miller v Jackson* surely shows this. If the result of that case is morally intelligible, then a result of liability in *Bolton v Stone* must also be morally intelligible, even if the injury was in that case personal rather than proprietary. And they are surely intelligible, moreover, *on the same basis*.

That has obvious implications for the attempts to exile *Miller v Jackson* and its ilk from tort law. Recognising that *Bolton v Stone* might have been decided in the same way tells directly against some of the responses I considered in the previous section: the DC_O-defiant cases cannot reflect a principle applicable only to the claimant's property rights, for example.[126] But it also shows, more generally, that any attempt to confine the issue to a marginal pocket of liability is suspect.

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[124] See again *Bamford v Turnley* (n 61) 713.

[125] *Dennis v Ministry of Defence* [2003] EWHC 793 [46].

[126] Others have, understandably, regarded this as obvious, eg Bohlen (n 81) 319; Kenneth Simons, 'Self-Defense, Necessity, and the Duty to Compensate, in Law and Morality' (2018) 55 San Diego Law Review 357, 372–373.

Some defenders of DC_O may nevertheless bite the bullet: they may accept that the DC_O-defiant principle that animated *Vincent* and the nuisance cases has application even in tort law's heartland, but insist that, whenever a court decides a case according to that principle, it ipso facto substitutes the ordinary logic of tort law with another. But that view is seeming increasingly strange. Where would we locate the discontinuity? I hit my ball onto your property and smash your window; I hit my ball onto your property and impair the use of your garden; I hit my ball onto your property and onto your head. I can see only seamless continuity here, as we move from cases of property damage like *Vincent*, through to nuisance cases like *Miller v Jackson*, and on into the heartland of what is now negligence liability for personal injury like *Bolton v Stone*. The moral and legal phenomenology is the same. We are asking, in each of these extremely similar factual scenarios, whether the defendant owes a compensatory remedy for the (legally recognised) harms he has caused to the claimant. The courts have taken different views, to be sure, on the narrow question of whether unreasonable conduct is required. But DC_O's defenders have to inflate that difference of views into an incomparably grander one: they have to say that, despite appearances, these were disagreements about whether to apply the ordinary logic of tort law or substitute it for another. If one approaches the data without a strong preconception, that view seems hard to credit. If in *Vincent* and *Miller* there is compensation without reference to fault, why should we insist that in *Bolton v Stone* it is a fundamental precondition—absent which that case, too, would have to be exiled from tort law altogether? Far more natural, it seems to me, to accept that both are viable ways, well within the logic of tort law, to decide whether compensation should be paid.

3.6. Conclusion

Rylands v Fletcher has been described as 'tort law's conscience', reminding us that, although the tort of negligence now dominates our thinking, things could have been different.[127] I suggested that the more effective conscience is *Vincent*, and more especially the nuisance cases. These are instances of liability where, unlike in *Rylands*, there is no room to dispute that, in the court's view, the defendant's conduct was patently reasonable. And their enduring vitality has recently been confirmed by the decision in *Coventry v Lawrence*. The principle endorsed there was birthed in the Victorian era, but, unlike the rule in *Rylands*, it still shows strong signs of life.

Many would shut their minds to its pangs of conscience and succumb to the alluring simplicity of $DC_{O.}$ I have argued against this. I said there is an obvious commonality between these cases and those that conform to DC_O, namely that the liability is grounded upon the defendant's harm-causing conduct, and that the various attempts to re-analyse them fail to unsettle that common foundation. The path of virtue is to hold these thoughts in one's mind a little longer. The right conclusion to draw is that tort theorists ought, at least *prima facie*, to prefer an account that can provide a unified explanation of both possibilities—both the case where tort liability is conditional upon the defendant's failure to do what he ought, and the case where it is not—over one that explains only the former.

The '*prima facie*' is significant, because important objections remain. Some will agree, for all the reasons I have given in this chapter, that there is a theoretical price to

[127] Kenneth S Abraham, '*Rylands v Fletcher*: Tort Law's Conscience' in Robert L Rabin and Stephen D Sugarman (eds), *Tort Stories* (West Academic 2003).

be paid if one shears off the DC_O-defiant cases. One risks the fate of Procrustes. But they will say that is nevertheless the wiser course: if one tries to accommodate the DC_O-defiant cases, the explanatory price to be paid is greater still.

The first challenge is this: How can it be that the mere fact of the defendant's harm-causing conduct grounds his liability? Liabilities that conform to DC_O seem to have a strong intuitive force behind them. That was the intuition I tried to capture with the (deliberately vague) deficient conduct principle. But if the defendant's conduct was impeccable, then we have lost contact with a seemingly essential part of the liability's justification. The worry, then, is that by trying to explain the DC_O-defiant cases co-equally with the DC_O-compliant ones, we end up being able to explain neither.

The second challenge is this: Supposing the two sets of cases do have a shared explanation—if both are equally compatible, as I claim, with the principle that animates tort law as a whole—then why are the DC_O-compliant cases overwhelmingly more prevalent than the latter? The view I am urging risks leaving the statistical preponderance of fault-based liability mysterious. Or, perhaps worse, it leads to a *reductio ad absurdum*. As Holmes put the objection almost 140 years ago, 'if strict liability is to be maintained at all, it must be maintained throughout'.[128] By defending cases like *Vincent* and *Dennis*, in other words, I seem committed to the view that strict liability is *always* a viable option—but that is a position that all modern legal systems plainly reject.

Meeting these two challenges will require most of my remaining thesis. I take up the first challenge in Part II, which tries to show how the imposition of liability can be

[128] Holmes, *The Common Law* (n 16) 91.

justified (non-instrumentally) even absent defendant fault. And I try to meet the second challenge in Part III, by explaining how, although defendant fault is not indispensable to the liability's justification, there are good reasons to have a fault requirement much of the time. Where those reasons do not obtain, however, we get the kind of result we saw in *Vincent*, *Dennis*, and so on.

Before we get there, however, we need to say more about the duty question. Where does the rejection of DC_O leave us? Can DC be rehabilitated by a different account of duties, shorn of OL? Or must the whole thing go? That is what the next chapter will decide.

4. Dispensing with duties

Throughout the previous chapter I made the point that tort law allows its alleged primary duties to be justifiably breached. Some find this disappointing. They see in it an unacceptable utilitarian willingness to trade off claimants' rights against other interests. Duties were supposed to be absolute, to protect the corresponding right-holder from being sacrificed to the interests of others. Yet the courts think *Vincent*'s ship's captain, and *Dennis*'s air force, ought to breach their (supposed) duties precisely because of those other interests. Hence, for some writers, these cases should be deprecated for dispensing with, or defying, the primary duties. Or, at any rate, if the decisions are to be defended, it must be on some basis other than that they afforded a remedy for a wrong.

4.1. Rebooting wrongs

But there is another tradition of duty-based thinking that is invigorated by all this. For from a different perspective—and it is the distinctive perspective, one might think, of the tort lawyer—the previous chapter has shown the duty's enduring power. Even when it is breached justifiably, it nevertheless generates a duty of repair. Viewed from the perspective of *ex ante* action guidance, the duty meekly submitted to other considerations; but viewed from the perspective of *ex post* remedy, the duty is surprisingly tenacious, generating a duty of repair resting even on those who behaved

as they ought. That fact may be said to hold the key to understanding the duty's enduring importance, quite apart from the question of what ought to be done.

Indeed, some readers will have found this second way of viewing the matter so natural that their patience was tested throughout the last chapter. Isn't it obvious, they will have thought, that the existence of a duty does not conclude the question of what ought to be done? To think otherwise was always naïve. The much better approach is to understand duties as *pro tanto* reasons—they count in favour of what ought to be done, without concluding that question—but ones with special force. In the formal terms I put it in the previous chapter, we should abandon what I called OL: the claim that having a duty to *x* entails that one ought (all things considered) to *x*. As soon as we do so, the truth of DC is entirely unaffected by my arguments in the previous chapter.

This tracks a well-known view in the philosophical literature. For Judith Thomson, for example, the only tenable understanding of duties is that they are not 'absolute'; they do not conclude the question of what ought to be done.[1] In her toy example, if I promise a banana to A, and a banana to B, I plausibly owe a duty to each of A and B to give them a banana; yet it is not plausible that I *ought* to give each of them the single banana that, in her example, I happen to have; and the most sensible solution is to abandon the claim that having a duty to *x* entails that one ought to *x*.[2] The duty shows up, then, not in concluding what ought to be done, but in the 'moral reside' that it leaves behind:[3] to the person, A or B, to whom I did not fulfil my promise, I seem to owe

[1] Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990) ch 3.

[2] ibid.

[3] ibid 85–86.

some sort of reparation. For Neil MacCormick, too—and he also used the paradigmatic case of a broken promise—one may have acted correctly in breaking the promise in response to some emergency, and yet the moral consequences of one's breach remain.[4] 'The morally justified decision not to fulfil the overridden duty may nevertheless result in an obligation of reparation.'[5] All this seems congenial to tort lawyers, or at least to moralistic ones, whose ambition is, after all, to connect breaches of duty with the incurrence of a duty to compensate.

It also seems a useful way of explaining the nuisance and necessity cases. Thomson herself explains the latter.[6] Even though the ship's captain in *Vincent*, and Feinberg's famous stranded hiker,[7] ought to use the other's property without authorisation, they have done something that justly attracts a duty to compensate. It seems natural to say that what they have done is breach a duty owed to the claimant (albeit that that duty does not determine what ought to be done). As Thomson says of her banana example, 'Why should we think we can pass from the fact of the broken promise to the fact of the later moral residue only by way of an intermediary fact to the effect that I *ought* to have kept my promise?'[8] That is the thought the necessity cases belie. And yet, it seems right, and indeed for moralists essential, to maintain that 'we can pass from the fact of the broken promise to the fact of the later moral residue only by way of *some* intermediary fact'.[9] Is not the wrong, the breach of a primary duty, the obvious

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

[5] ibid 175–176.

[6] Judith Jarvis Thomson, 'Rights and Compensation' (1980) 14 Nous 3.

[7] See section 3.2.2 above.

[8] Thomson, *The Realm of Rights* (n 1) 85.

[9] ibid (emphasis in original).

candidate for that intermediary role? The least costly course, again, is not to abandon primary duties altogether, but to abandon the dogmatic insistence that they are 'absolute'.

Of course it is also an obtrusive feature of the necessity cases, as well as MacCormick's example, that they involve emergencies. They are cases of special exigency. They should not cause us to forget the normal case. That the ship's captain in *Vincent*, and Feinberg's stranded hiker, are justified in using another's property in the exceptional circumstances in which they find themselves hardly means that the other person's property rights make no claim on them. On the contrary, high stakes are necessary to justify the use of the property in these exceptional cases precisely because there is *something there*—some kind of claim to the captain's and the hiker's attention—that has to be overcome. There seems to be a logic of defeasibility here[10]—of a wrong, albeit one that is justified—that the primary duty helps us to understand.

Hence there are two ways of viewing the line of cases culminating in *Coventry v Lawrence*. For some, as I said in chapter 3, the striking feature of the case is the Court's willingness to refuse the claimant an injunction. If a tort has been committed, how can the court tolerate, and indeed licence, its continuance? For on this view it is part of the nature of duties that it is always impermissible to act contrary to them. But a change of perspective reveals a different side to these cases. Rather than focusing on the non-award of an injunction, one might focus on the remedy that *was* awarded, namely damages. From this point of view, the line of cases culminating in *Coventry,* far from confiscating the claimants' rights, has ringingly endorsed them. For despite the

[10] Neil MacCormick, 'Defeasibility in Law and Logic' in Zenon Bankowski, Ian White and Ulrike Hahn (eds), *Informatics and the Foundations of Legal Reasoning* (Springer 1995).

overweening public interest against which the humble claimant is set—despite the might of the Royal Air Force, and despite the majesty of village cricket ascribed to it by Lord Denning—he has emerged with his tort claim fully intact. What could more amply attest to these judgments' rights-protective effect than that? No wonder, then, that the decision in *Dennis*—decried though it was by rights advocates of one stripe—was justified, the High Court held, by the claimant's rights under the Human Rights Act 1998.[11]

All of this is to say that DC is not dead. And in fact, in the view of many, it is rejuvenated and reaffirmed by the very arguments through which, in the previous chapter, I sought to refute DC_O. As I cautioned there, those arguments were directed only at that *one* variant of DC; I thought it was essential, for its proper assessment, to handle it alone. But to honour that separation of issues I had to postpone certain responses—namely those that say, in effect, that DC_O is not the right way to cash out DC. In this chapter I turn to the alternative understanding, the appeal of which this introduction has tried to bring out. I will argue that, despite this appeal, these attempts to revive DC fail. Once OL is abandoned, the case for DC becomes mysterious. The right conclusion to draw, in the end, is that we lack any good reason to believe it is true.

4.2. Specifying duties

For rights theorists, one of the greatest sources of anxiety about *Vincent* is that it seems to involve an inconsistent attitude to rights. The plaintiff has a property right in the dock, which entails a right to exclude the defendant from it. Yet the defendant is

[11] *Dennis v Ministry of Defence* [2003] EWHC 793 [46]–[47].

allowed—given the right, you may say—to thwart it. How can that be explained, consistently with the fact of the plaintiff's property right? And, moreover, if the defendant was acting consistently with his rights, then why can the imposition of liability upon him be justified?

The points can be more neatly stated in terms of duties. *Vincent* appears to show that each the following propositions is true:

(1) *D* has a duty not to interfere with *P*'s property.

(2) *D* is justified in interfering with *P*'s property.

(3) *D* ought to compensate *P* for interfering with *P*'s property.

Similar propositions can be set up in relation to the nuisance cases I considered in the previous chapter. But for the sake of brevity and tradition I will speak here only of *Vincent*, which should be understood to exemplify a more general problem.

The three propositions create a dilemma for the duty-lover. The argument of chapter 3 was, in a nutshell, that cases like *Vincent* are fatal to a certain conception of DC that holds '*D* has a duty to *x*' entails '*D* ought all-things-considered to *x*'. I expressed this entailment with the claim OL, which I said the duty-lovers are forced to abandon. This is because, if that conception of duties were correct, (1) and (2) are inconsistent. Hence one of them (at least) is false. It is not plausible to deny (2); hence one must abandon either (1) or OL (or both). In favour of abandoning OL is the line of thought I took Thomson to exemplify. According to it, (1) figures in the explanation of (3). Hence we want to retain (1). But the price of doing so is, again, that we must abandon OL.

An alternative response is to dissolve the inconsistency between (1) and (2) by refining (1). This response says that (1), as it stands, is too generally stated. *D* does

not have a duty not to interfere with *P*'s property *tout court*. That is exactly what (2) shows: *D* was justified in interfering with *P*'s property in the circumstances of *Vincent*, and therefore, by application of OL, it cannot be said that he had a duty not to do it. Properly understood, then, we need to adjust (1) to accommodate (2):

(1') *D* has a duty not to interfere unjustifiably with *P*'s property.

By this adjustment, (1) and (2) are brought into harmony. The decision in *Vincent* shows us that (1) is not quite right. We must replace it with (1'). That dissolves the dilemma, and revitalises OL, since *D* cannot breach the duty expressed in (1') other than by acting as he ought (all-things-considered) not to act.

This kind of response is sometimes called 'specificationist':[12] it says we should understand the content of the duty with the greater specificity that is reflected in (1'), rather than in the sweeping way reflected in (1). By this method, cases of apparently justified breaches of duty cease to be breaches: the circumstances in which the conduct is justified are built into the duty as negative conditions. It is not a justified breach because the duty-bearer's conduct constitutes a breach, according to (1'), only when it is *un*justified.

One can see this response's appeal. But it comes at a prohibitive cost to duty-loving tort lawyers, since it falsifies their key claim. The problem is that (1') cannot figure in the explanation of (3): the whole point of *Vincent*, after all, is that *D* has acted justifiably; hence he has *not* breached the specific duty expressed in (1'). And so his duty to compensate cannot, on this revised understanding, be reconciled with DC.

[12] Russ Shafer-Landau, 'Specifying Absolute Rights' (1995) 37 Arizona Law Review 209; John Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28 Oxford Journal of Legal Studies 127.

So those are the options. The first—call it the 'defeasibilist' response—preserves the truth of DC; the second, specificationist response does not. If the specificationist response is the only correct one, then DC is falsified by *Vincent*—and that is the end of the enquiry. But why should we insist that the first response is mistaken?

Some have regarded it as obviously mistaken because of the (supposed) connection between law and guidance.[13] The defeasibilist view, they say, would fail to provide the law's subjects with adequate guidance about whether or not they ought to commit the tort. The law must decide firmly, one way or the other—as only the specificationist reading of *Vincent* recognises. But this objection inevitably begs the question. The guidance offered by cases like *Vincent* is crystal clear: the court was adamant that the defendant ought to have committed the tort (and that he ought to pay compensation after). 'True', the objector might respond, 'but its saying that was incoherent, unless you abandon DC. For if the commission of the tort was a breach of duty then it follows, inconsistently with what the court said, that the defendant should *not* have committed the tort.' But of course this follows *only if* one assumes the truth of OL—which is exactly what defeasibilism denies. One cannot refute defeasibilism merely by stipulating its opposite. At this point the objector has to bite the bullet, insisting that a decision to impose tort liability ipso facto entails a judgement that the defendant's conduct ought not to have been performed.[14] But that is exactly the claim that *Vincent* and its ilk falsify.

[13] Peter Jaffey, 'Duties and Liabilities in Private Law' (2006) 12 Legal Theory 137, 138–143. See further his 'Liabilities in Private Law' (2008) 14 Legal Theory 233.

[14] Jaffey, 'Duties and Liabilities in Private Law' (n 13) 138.

We can see there is some truth in these anxieties about the way *Vincent* might have contradictory effects on defendants' conduct. The defendant—or those who will in future find themselves in a similar position—might be forced into an invidious choice. If they act to save their ship, they know they will incur a hefty liability to compensate the dock owner. That may confound their decision about how to act, and cause some of them to risk the open waters. These unwanted incentive effects count against the imposition of liability in cases like *Vincent*, as I will argue in chapter 8. But they do not affect the argument here. For the incentive effects of liability should not be confused with attempts by the law to guide conduct—that is the truth in the moralists' Hartian critique of the economists[15]—least of all when they are the unwanted side-effect of a decision that is justified (if it is) on unrelated grounds. *Vincent* might create messy incentives, but that implies no view on what the defendant ought to have done, and hence cannot be worked up into an objection about the inconsistent guidance that defeasibilism offers.

John Oberdiek offers a more compelling objection to the defeasibilist reading of *Vincent*.[16] The gravamen is that (1) above can have no meaningful role in practical reasoning at all—whether in law or in life. It would be 'redundant'.[17] Why? Because a defeasible duty,[18] by definition, does not determine of itself how one ought to act; it counts in favour of some action *x*, but does not conclude the case in *x*'s favour. The duty, in other words, provides only a *pro tanto* reason, rather than a conclusive one. But that is a fatal admission, says Oberdiek, because in that case 'simple garden-variety

[15] See section 2.1.1 above.

[16] Oberdiek (n 12).

[17] ibid 138–139.

[18] Oberdiek expresses his argument in terms of rights. I have adapted it accordingly.

moral reasons already do the work supposedly done by [the duty]'.[19] Counting in favour of an action, without concluding the case in its favour, *just is* what *pro tanto* reasons do. Hence the duty has no 'independent bearing in moral assessment of action';[20] it merely 'provide[s] another way of talking about what we can already talk about perfectly adequately'[21] using the more basic concept of reasons, which are in their nature *pro tanto*. (1), in particular, says nothing more than that the defendant had a *pro tanto* reason not to use the claimant's dock.

Oberdiek's objection—call it 'the redundancy objection'—recapitulates a dilemma for the duty-lovers that has run through these last three chapters, and which instantiates the dilemma that has plagued duties in moral philosophy generally. Duties seem to be either 'either redundant or unjustified'.[22] One may insist upon a strong conception of duties, in terms of which they entail absolutely a negative verdict upon the conduct of he who infringes them. But that is too strong a position to hold, as the cases in chapter 3 attest. We soon see that things do not work in this simple way. In law, as in life, one cannot but acknowledge certain obstacles and sideroads on the path from duty to ought. That leaves the duty-lover is in a tight spot. If duties do not entail conclusive reasons, they seem incapable of differentiation from the explanatorily basic concept of a (*pro tanto*) reason.

The duty-lover is thus caught upon the horns of a dilemma, with no apparent midpoint. To say duties entail conclusive oughts is implausibly strong, but, once one

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[19] Oberdiek (n 12) 139.

[20] ibid. He is quoting Thomson, 'Rights and Compensation' (n 6).

[21] Oberdiek (n 12) 139.

[22] Compare Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999) 194. I consider Raz's solution in section 4.5 below.

surrenders one's grip on that claim, one appears to slip and slide down the slope towards the conclusion that duties, so called, are nothing but reasons.

4.3. The residual problem

So it is clear where the challenge now lies. The primary duty is becoming elusive. The duty-as-ought picture, though it falls to be rejected, was nothing if not clear. It identified a feature of the primary duties—that they conclusively determined what one ought to do—that allowed us to identify them apart from the resulting imposition of liability. The duty embodied an attitude as to whether the tort ought to be performed in the first place. But if the supposed duty does not tell us how we ought to act, how is it helpful at all?

Judith Thomson's initial response, that the breach of duty leaves a 'moral residue', does not seem to advance things much. This residue is, one might object, equally elusive; we need something more precise than a metaphor.[23] Thomson did, however, take the suggestion further. Both she and MacCormick came to focus on something very precise: the wrongdoer's *duty to compensate* for the wrong.[24] This, as I said earlier, may seem an appealing suggestion for tort lawyers: this duty to compensate is central to their subject. And the duty-lovers are aiming, again, to tie it to the breach of

[23] Frederick Schauer's appropriately gloomy assessment is that the literature 'rarely addresses just what it means for there to be a moral residue, when such a residue exists, and what obligations the existence of a moral residue imposes': see his 'Rightful Deprivations of Rights' (2018) <ssrn.com/abstract=3221184>.

[24] MacCormick (n 4); Thomson, 'Rights and Compensation' (n 6). Strictly speaking, MacCormick discusses a duty *to repair*. This is a more supple term which I discuss further in later chapters.

a primary duty. Now they have a leading writer in moral philosophy offering an analysis which seems to do exactly what they wish.

But appearances are deceiving. For duty-loving tort lawyers, Thomson's suggestion will not do. Undoubtedly the duty to compensate is integral to their subject, but that is exactly the problem. The duty to compensate has been our *explanandum* all along. We were trying to give an account of how that compensatory duty comes into existence. The duty-lovers' answer was that it comes into existence in virtue of the breach of a primary duty. But for the duty-lovers to take up Thomson's suggestion is, in effect, to adopt the compensatory duty also as their *explanans*, and thus to make their claim circular. 'Why should the defendant compensate?' 'Because he breached a primary duty.' 'Why do you say he has breached a primary duty?' 'Because he ought to compensate.' So understood, the duty-lover's argument has merely put us back where we started.

Far from restoring the paramountcy of primary duties, then, this rebooted understanding seem dangerously close to the Prosserian view we rejected in chapter 2 on the basis that it makes DC trivial.[25] 'Duty' becomes 'only a word with which we state our conclusion that there is or is not liability'.[26] So here: the duty is to be explained not by its capacity to determine what one ought to do at the time the tort was committed, but by its generation of the subsequent duty to compensate. But that is exactly the move that the duty-lovers cannot make. It would cause DC to collapse into the claim they were seeking to refute.

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[25] See section 2.2.1. above.

[26] William L Prosser, 'Palsgraf Revisited' (1953) 52 Michigan Law Review 1, 15.

Thomson is well aware of all this. Indeed she admits virtually all the elements of the Holmesian challenge with which I began my assessment of DC in chapter 2. 'The duty to compensate', she says, 'is at best a sign of an infringed right [or breach of duty]—and probably not even a very good one at that'.[27] It is not a very good one, she says, because we know of many cases where one person must compensate another even though, unquestionably, he has breached no duty.[28] Thomson's example is of having to pay for a restaurant meal if one orders it,[29] which recalls, complete with gastronomic flavour, Holmes' example of having to pay a butcher for his meat if one buys it.[30] This shows, just as with Holmes' more famous example of the import tariff, that the mere fact of the liability does not help to explain why we should insist on the primary duty or its breach.

Is a more satisfying explanation available? Thomson recognises that she has not provided one. By itself, her analysis of duties as leaving a 'moral residue' risks collapsing into a restatement of the claim that is in need of explanation: the moral residue she identifies is the alleged wrongdoer's duty to compensate—but that is the *explanans*. If we are to escape from this 'tautology problem', as I will call it, we need to be able to identify the primary duty *other than* by the existence of a duty to compensate. And then we need to provide some reason to believe that a primary duty, specifically, is essential to the explanation of how the duty to compensate can arise.

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[27] Thomson, 'Rights and Compensation' (n 6) 14.

[28] ibid.

[29] ibid 10, 14.

[30] Oliver Wendell Holmes, 'The Theory of Torts' (1873) 7 American Law Review 652, 652.

This returns us to the same kind of duty-sceptical challenge that I set up, relying on Holmes, in chapter 2. And indeed the duty-lovers are, in one significant respect, *worse* off than when we last encountered this challenge. The obvious way out of the bind, as Holmes accepted, was to show that the act which generated the duty to compensate was one that I ought not to have performed. But that way is closed, by virtue of the arguments in chapter 3. Thomson would, of course, agree. And hence she leaves us with her own, unanswered challenge: how does the fact that you owe me a duty to *x* explain the fact that you ought to compensate me if you fail to *x*? 'It is not obvious', she concludes, 'how it does'.[31]

Notice there is nothing specifically 'instrumentalist' about the objection (although that is, predictably, the way it has tended to be typecast by modern tort writers).[32] I am assuming throughout that the duty to compensate is grounded non-instrumentally upon the defendant's commission of the tort. The question is why we ought to insist that—of all the kinds of conduct that there are, and of all the ways of characterising the conduct—tort liability may be imposed *only* where the defendant's conduct is, specifically, a breach of duty? As Thomson put it, although 'we can pass from the fact of the [harm-causing conduct] to the fact of the later moral residue only by way of *some* intermediary fact',[33] we need some reason for believing that *this* is the 'intermediary

[31] Thomson, 'Rights and Compensation' (n 6) 14.

[32] Goldberg and Zipursky, for example, are well aware of this 'circularity problem', but attribute it to Prosser (as above) and to Richard A Posner, 'Instrumental and Noninstrumental Theories of Tort Law' (2013) 88 Indiana Law Journal 469, 473. See Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1, 41; John CP Goldberg and Benjamin C Zipursky, *Recognizing Wrongs* (Harvard University Press 2020) 256–259. They respond, accordingly, on the basis that the objection is underlain by instrumentalist assumptions—which means they overlook the points I am making.

[33] See again n 9 above.

fact' in question—especially when, as Oberdiek reminds us, there are other, more ecumenical possibilities available.

What we need, then, is to stay focused on the nature of the defendant's conduct in committing the tort, rather than drifting into the tautology problem. We need to pick out some feature of that conduct that avoids the redundancy problem: in other words, it must go beyond saying he failed to conform to a (perhaps very weighty) *pro tanto* reason. And then we need to show why that feature is *always* or *necessarily* at issue when tort liability is appropriate, in the way that DC claims. In doing so we should remember, finally, that the obvious way in which DC derives its appeal—the deficient conduct principle—cannot be invoked. This is because, once OL is abandoned, as it must be, the defendant's breach of duty *is not necessarily deficient*. So we need some new reason to believe that a breach of duty, when understood in a way that is both non-tautologous and non-redundant, figures as a necessary part of the explanation of why tort law's duties to compensate arise.

4.4. Some dead ends

To be clear, nothing I have said so far was meant to decide the case against DC. I have only tried to clarify the challenges that need to be met in order to make a persuasive case that DC is true. Of course, I think these challenges are significant. In explaining them I am, therefore, slowly tightening the net around DC. This section continues to do this, by arguing that certain ways in which the duty-lovers have tried to escape from their predicament do not work.

4.4.1. Wrongfulness and wrongs

The dichotomy that structured this and the previous chapter was this: either OL is true, or it is not. The previous chapter supposed that it is true (yielding the duty-loving claim, DC_O); this chapter supposes it is not. There is an undeniable logical separation between the two propositions, and I think it must be honoured if DC is to be assessed clear-sightedly. But I did not mean to imply that other writers do the same.

To the contrary, many duty-lovers adopt a mix-and-match approach: they say that DC_O is true most of the time, and use another rendering of DC to preserve the connection with duties where it is not. These writers do not insist, then, that *all* torts are failures by the defendant to behave as, all things considered, he ought. Nor do they say that we can ignore all those that are not, treating them as marginal. Instead, they concede that while much of tort law imposes liability for unreasonable conduct, we need a different conception of wrongs to mop up. But that different conception is sufficient, in their view, to sustain the truth of DC.

Thus Jules Coleman, perhaps most famously, said tort law was about 'wrongfulness' (what I have been calling unreasonableness) *and* 'wrongs'.[34] The former category is the statistically much larger one, with its bulk attributable primarily to the tort of negligence.[35] But the latter category was necessary to account for his insulin-starved thief's duty of repair,[36] as well as *Vincent*, which, as Coleman rightly saw, destroyed

[34] Jules L Coleman, *Risks and Wrongs* (Oxford University Press 2002) ch 14.

[35] ibid 367–369.

[36] See again section 3.2.2 above.

the unitary unreasonableness picture.[37] The first category comprises wrongs coupled with 'wrongfulness', but the latter are instances of 'wrongdoing' nevertheless.

This mix-and-match strategy complicates matters, but does not avoid the difficulties I have been discussing. The strategy concedes that cases like *Vincent* are not reconcilable with DC_O, just as I urged in the previous chapter. But then we need an explanation of how they are duty-based at all. Coleman says that the conduct of *Vincent* and the insulin-starved thief is not unreasonable ('wrongful'), but that it still gives rise to liability because it is a 'wrong'. But why do we say so? That it justly attracts compensation is, as I said, entirely unhelpful: the wrong is meant to figure in the explanation *why* a duty to compensate is appropriate, not merely to restate the fact that it is. Coleman owes us an explanation why the latter category merits the description 'wrongs'—all the more so given that he has admitted they are not wrongs in the obvious sense on which he capitalised in respect of the first category.

In the absence of an explanation, Coleman not only fails to deal with the problem, but is in danger of masking it with his choice of words. As Howard Klepper points out, Coleman's attempt to preserve the idea that the defendant in *Vincent* has infringed the claimant's right[38] (or, as I would say, breached a duty), albeit justifiably so, 'is not

[37] Coleman (n 34) 292–293, 371–372.

[38] ibid 282. He borrows Thomson's distinction between 'infringing' a right, which is to act contrary to the demands it imposes, and 'violating' a right, which is to act contrary to the demands it imposes and unjustifiably so: Judith Jarvis Thomson, *Rights, Restitution, and Risk* (Harvard University Press 1986) 51; Thomson, *The Realm of Rights* (n 1) 122.

helpful'.[39] Coleman does not explain 'why it is wrongful to take property where the taker acts justifiedly':[40]

> To let the argument stop at this point is to have the right appear as a *deus ex machina* to rescue our moral intuitions and legal practices. The source and nature of the right, and the reason why a faultless infringer owes compensation … are a mystery.[41]

So the mix-and-match strategy does not help. It introduces new taxonomies by which to re-describe the cases that cannot be reconciled with DC_O, but does nothing to show how they can be reconciled with DC. It leaves unexplained why we should insist on the defendant's breach of duty as a condition of liability. And the claim that there is indeed a breach of duty seems at risk of collapsing, tautologously, into the claim that liability is appropriate.

4.4.2. Incomplete privilege

Something similar is true of Francis Bohlen's description of *Vincent* as an instance of 'incomplete privilege', a phrase which originates in his famous 1925 study[42] and has since become the 'standard reading' of the case.[43] The description captures, on the one hand, the fact (established in the earlier case of *Ploof v Putnam*[44]) that the defendant

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[39] Howard Klepper, 'Torts of Necessity: A Moral Theory of Compensation' (1990) 9 Law and Philosophy 223, 234.

[40] ibid.

[41] ibid.

[42] Francis H Bohlen, 'Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality' (1925) 39 Harvard Law Review 307.

[43] John CP Goldberg and Benjamin C Zipursky, *Torts* (Oxford University Press 2010) 239.

[44] *Ploof v Putnam* 81 Vt 471 (1908).

has a privilege to use the plaintiff's dock: that is, he is allowed to do it. But, on the other hand, he must (by the decision in *Vincent*) compensate the plaintiff for doing so, the privilege being in this sense 'qualified' or 'incomplete'.

Some rights theorists are attracted to this description,[45] presumably because it highlights a sense in which the defendant in *Vincent* infringed the claimant's right, despite behaving reasonably. The right explains why the privilege is incomplete. Its infringement explains, in other words, why the defendant has a duty to compensate. Thus far, however, we are in the same position as Coleman: the right-infringement, rather than a step in the argument for liability, looks like something that we posit after the fact, to make the appropriateness of liability seem congruent with our usual ways of thinking. We still lack an explanation of what work the right is doing. Indeed the other component of Bohlen's description underscores the mystery: it reminds us that the law imposes the duty to compensate *even though* it does not think the defendant ought to refrain from the conduct that attracts it (rather, he has a 'privilege' to do it). Whereas in other areas of law having a privilege to do something means one is *relieved* of liability for doing it, in this context it does not. But why? Merely saying that the privilege is incomplete, or that despite the privilege a right was infringed, does not tell us. As Goldberg and Zipursky say, Bohlen's description 'is more question-begging than helpful. If the defendant really was privileged to remain on the land, then why is he required to compensate the plaintiff?'[46]

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[45] eg Robert Stevens, *Torts and Rights* (Oxford University Press 2007) 102–105; Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 146–155.

[46] Goldberg and Zipursky, *Torts* (n 43) 239. I am not sure, however, that the authors' own account of *Vincent* and its ilk fares any better, for reasons to which I alluded in section 3.3.2 above n 79.

True, I have neglected a further feature of Bohlen's analysis—perhaps the most important one to rights theorists. The value of the word 'privilege', it may be said, is that it draws our attention to the fact that the defendant is not ordinarily allowed to use the dock. He needs a special concession, which is granted only in special circumstances, to use it *despite* the owner's usual power to exclude. And that paves the way, then, to recognise that the claimant's right does indeed exist—as evidenced by the general power to exclude—even though it is, in *Vincent*'s circumstances of emergency, 'suspended'.[47]

This returns us to the logic of defeasibility which I mentioned at the start of this chapter, and which I granted has an intuitive appeal. There is a right (or duty) which would ordinarily determine what the defendant ought to do. In extraordinary circumstances, it can be defeated—but the very fact that powerful countervailing factors are needed to do so only confirms that there is something there to be overcome.

Precisely because it returns us to the idea of defeasibility with which I began the chapter, however, I do not see how it solves any of the problems I have identified since. The defeasibilist response seems to carve out no meaningful role for duties (or rights) distinct from garden variety reasons—since these, too, count in favour of an action without providing a conclusive case in its favour. They may, in other words, be defeated by countervailing reasons. And, if the reason is sufficiently weighty, then the countervailing reasons would need to be very powerful to defeat it. So it seems, as Oberdiek points out, that everything we want to say about *Vincent* could be said in the

[47] Ripstein (n 45) 153.

language of reasons. It also seems that those things we would say would—unlike DC—be truisms, on which everyone can agree.

4.4.3. Rights

No doubt one of the truisms would be that the reason to which the defendant failed to conform is one that derives from the claimant's ownership of property, and that the fact of his ownership also explains why ordinarily—that is, whenever the 'privilege' is absent—the defendant ought, all things considered, not to use that property. Put differently, it does of course seem overwhelmingly likely that the defendant's (specified) duty not to use the claimant's dock in ordinary circumstances has a *shared explanation* with his being liable to the claimant in the extraordinary circumstances of *Vincent*.

It is popular to express that shared explanation in the language of property rights. And it is true that if the claimant did not own the dock—if he did not 'have a right' in the dock, in that sense—he would not have a tort claim in the circumstances of *Vincent*. This fact is sometimes held up as preserving a properly rights-based understanding of *Vincent*.[48] But what it really does is remind us of the notorious slipperiness of the language of rights.[49] If the claimant did not have a property right in the dock, he would not have suffered any damage or loss at all; and hence he would—of course—not have a tort claim. But is this truism seriously held up as establishing an illuminating and

[48] That seems to be the assumption of the writers I cited in section 3.4.1.

[49] Compare eg Peter Cane, 'Rights in Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011); Nicholas J McBride, 'Rights and the Basis of Tort Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011).

indispensable role for rights in understanding tort law? Maybe so. But, in that case, it is a quite different role to the one I thought rights theorists were defending. I thought their claim was that the defendant in tort cases is liable for *x*-ing because he has infringed the claimant's right that he not *x*. In other words, he has breached a duty the content of which is given by one of the earlier propositions: (1), or (1'), or something similar. But when that claim comes under pressure, its proponents switch to a very different one.

Their claim was once:

> *D* is liable in *Vincent* because he breached a duty (correlative to a right held by *C*) not to use *C*'s dock.

But once that claim is revealed to be either false or mysterious, they turn to this one:

> *D* is liable in *Vincent* because *C* is the owner of the dock that *D* damaged.

As it happens, I doubt there is any cognate claim that could be deployed in the other cases discussed in the previous chapter, namely *Dennis* and its ilk,[50] and certainly not in my imagined reversal of *Bolton v Stone*.[51] Regardless of this, however, the fundamental objection is that there is a world of difference between the two claims above—although it can be, and often is, obscured using the promiscuous language of rights. One can straddle both by saying, '*C*'s having a right in the dock is a condition of *D*'s being liable to him', and from there create the impression that one has sustained

[50] To create such a claim, one has to elevate the doctrinal choice made by a majority in *Hunter v Canary Wharf Ltd* [1997] AC 655, viz. that only those with an interest in property can sue in private nuisance, into a conceptual truth—for which purpose the rights theorists tend to invoke Lord Hoffmann's thoroughly question-begging speech.

[51] See section 3.5 above.

the truth of DC. But, if one presses just a bit on this phrasing, one sees that the content and nature of the alleged 'right' has changed entirely from the first claim to the second. The first claim states that *C* has a right that *D* not interfere with his dock. This is a 'three-term'[52] right, i.e. one which corresponds to a (primary) duty resting on *D*. But the second claim does not correspond to any duty resting on *D* at all. The second claim states only a 'two-term' right—a relation between *C* and his dock—in which any corresponding duty resting on *D* has dropped out.

We might try to restore the duty, but then we will soon see we are back where we started. The defining feature of *C*'s having a property right in the dock is usually said to be that he may exclude others from it. In other words, those others have a duty not to intrude upon *C*'s property (without *C*'s consent). But that is the very duty with which we began, and the explanatory deficiencies of which the rights theorists tried to solve by shifting to the second claim. In short, the introduction of rights-talk has added little except confusion.

4.4.4. Conclusion

Rather than fronting up to the problem I mentioned, then, these writers end up obscuring it with a verbal contrivance. This kind of strategy leaves the problem unaddressed. But it also alerts us to a new worry. The claims of the duty-lovers start to seem *ad hoc*. They began by setting out their stall: they insisted tort law's primary

[52] John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 199 ff. The point can be expressed also in terms of McBride's distinction between 'rights that' and 'rights to', as to which see his *The Humanity of Private Law: Part I: Explanation* (Hart 2019) 43–54. He mounts a critique of rights-based theories of tort law, paralleling what I say in the text, in McBride (n 49).

duties told the defendant how he ought to act; and torts are wrongs in the sense, they said, that the defendant has failed to do what he ought; and hence the insistence on a breach of duty was given normative plausibility by the 'deficient conduct' principle. Now, under pressure, they appear willing to abandon each of those aspects of their account. They have tried to ensure linguistic fidelity to their initial claims, but only by emptying them of the content they once had. That makes the case in favour of those claims all the more mysterious and unpersuasive. And it makes one suspicious they are simply clinging on doggedly to DC, come what may.

4.5. Duties as reasons of special force

So much for the non-solutions. We now come, finally, to a proposal that meaningfully addresses the duty-lovers' predicament. It identifies a feature of duties' capacity to guide action that falls short of the provision of a conclusive reason, yet differentiates them from garden-variety reasons. It thus arrests the slide that Oberdiek thought fatal. And it improves upon Thomson's work, which threatened to reduce DC to the tautology that duties are special because their breach requires compensation.

4.5.1. Mandatory and categorical reasons

What I have in mind is Raz's famous account of duties as comprised of mandatory and categorical reasons.[53] They are categorical because they are not contingent upon the

[53] See especially Joseph Raz, 'Promises and Obligations' in PMS Hacker and J Raz (eds), *Law, Morality and Society* (1977). Strictly speaking, the duty is not itself a reason: it is the fact that one has a duty that provides the reason. Nothing turns on this.

wishes of the duty-bearer. They are mandatory because they exclude (at least some) reasons against the performance of the action prescribed by the duty. This latter feature, which itself rests upon Raz's analysis of 'exclusionary reasons',[54] has been welcomed because it promises a route out of the dilemma I have mentioned throughout this chapter. To regard duties as absolute, i.e. as always determining conclusively what one ought to do, is implausibly strong. But if we give up on that feature, they seem to collapse into mere *pro tanto* reasons in favour of an action. Raz arrests this slide by saying that a duty to *x* has special force because it excludes (some of) the reasons to not-*x*.

In ordinary circumstances, I have reasons to go to the cinema, but I also have reasons to stay home. If I am feeling lazy or think the films showing tonight are unappealing, those add to the case for staying home. But things are different if I have promised my friend that I will go to the cinema with him. The promise gives me a duty to go, and thus makes it the case that I ought to go to the cinema regardless of the inconvenience of doing so, my lack of interest in the cinematic offerings tonight, etc. It is not only that my promise adds to or strengthens the reasons in favour of going, such that they are more likely to outweigh the reasons against. The promise does something more: it makes it inappropriate for me to act on those reasons for not going at all.[55] If I do not see that I need to put these reasons to one side, I have not really understood the normative force of the duty I owe my friend.

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[54] See eg Raz, *Practical Reason and Norms* (n 22) 178–199.

[55] I set aside the complication that some believe exclusionary reasons do not defeat the excluded reasons completely, but reduce their weight: Stephen R Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 Southern California Law Review 913.

Exclusionary reasons thus promise to explain why duties are distinctive—more forceful than mere reasons—and, when coupled with duties' categorical nature, the familiar sense that one is bound, 'despite oneself', to do one's duty. *Even though* there are reasons against doing one's duty, one ought to do it regardless. Unlike the 'first-order' reasons for and against going to the cinema, which compete with one another in weight, the 'second-order' exclusionary reason has the capacity to defeat its competitors outright. That accounts for its distinctive power relative to garden-variety reasons, which it 'trumps'.[56]

At the same time, one is able to avoid the extremes of the absolutist account of duties: it is not true, on this account, that one should do one's duty even though the heavens would fall. The reasons against *x*-ing are still there, and only *some* of them are excluded.[57] If I encounter a serious traffic accident on my way to the cinema, for example, I should stop to help even though this will cause me to break my promise to my friend. I have breached my duty to him—I have wronged him—but I was justified. Hence the duty is both defeasible but more powerful than a garden-variety reason.

By this route, we seem able to model other perennial problems in deontological ethics. When my wife and a stranger are drowning in the sea and I can save only one, I plainly ought to save my wife.[58] That there are admittedly strong reasons in favour of saving the stranger—suppose he is a brain surgeon who will save many other lives, whereas my wife is a layabout—but that does not matter. It is a moral mistake even to

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[56] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) xi.

[57] Possibly *some* duties are absolute, which this model can allow for on the basis that, in those cases, all countervailing reasons are excluded altogether.

[58] Bernard Williams, 'Persons, Character and Morality' in Bernard Williams, *Moral Luck* (Cambridge University Press 1981) 18.

enter into this calculus; to consider the relative weight of the reasons to save each of them is to have (to repeat what I said in previous chapters) 'one thought too many'.[59] Raz allows us to say why: one has a duty to save one's wife, in virtue of which the admitted reasons in favour of saving the brain surgeon are excluded.

Similarly, one can explain why the 'transplant surgeon', in Philippa Foot's famous example,[60] should not kill one person even though his organs could be used to save the lives of five others. One has a duty not to kill the one, and that excludes consideration of the undoubted benefits that would accrue to the other five. That cannot be adequately explained as a competition in weight between first-order reasons: it is not open to one to 'maximise' the benefits of life; the fact that killing the one would prevent the death of five is simply off the table.

There is no need to labour these well-known examples. The point is simply that Raz's account seems to offer a way to understand duties that is non-tautologous, shows them to be different and more powerful than garden-variety reasons in their capacity to guide action, yet stops short of endorsing the implausibly strong lemma, OL. And it does all this in a way that seems to bear out the sense in which duties are anti-consequentialist, since they stand apart from the ordinary commensuration of the good and bad consequences of an action.

Certainly I think Raz's account deals with Oberdiek's 'redundancy objection' which I set up in section 4.2. He stakes out a midpoint in which duties are defeasible but have

[59] ibid.

[60] It originates in Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect' (1967) 5 Oxford Review 5.

a role in practical reasoning that is non-redundant. Oberdiek's work seems to overlook this possibility without adequate explanation.[61]

4.5.2. Application to tort law

But notice that even a more modest objection would suffice to sustain Oberdiek's ultimate conclusion, namely that DC is not generally true. His objection to defeasible duties, after all, goes much wider than tort law. It says there is no way to give defeasible duties any (non-redundant) role in practical reasoning *at all*. Certainly that rules out any attempt to plug defeasible duties into DC: there is nothing there to serve as a plug. But that is a tort law-specific entailment of Oberdiek's much wider conclusion. A more modest claim is this: Although non-redundant accounts of defeasible duties (such as Raz's) are available, when those are plugged into DC they do not yield a claim that we have good reason to believe is true. In other words, even granting that duties are distinguished from reasons by the two features Raz identifies[62]—their being mandatory and categorical—it remains to connect those features to tort liability. We need some explanation why that feature possessed by duties *is always or necessarily* present, whenever tort liability is justifiably imposed. As is well known, some eminent writers

[61] He acknowledges this aspect of Raz's account only in a footnote, and for reasons I find obscure seems to assume it is compatible only with specificationism: Oberdiek (n 12) 139 fn 24. He may be failing to allow for the fact that an exclusionary reason need not exclude *all* countervailing reasons (nor for Stephen Perry's point: see n 55 above). In any event, he provides no response to the points I make in the text.

[62] Oberdiek is not the only person who rejects Raz's account outright. Chaim Gans, for example, argued influentially that exclusionary reasons do not exist: 'Mandatory Rules and Exclusionary Reasons' (1986) 15 Philosophia 373. His scepticism is taken up by William A Edmundson, 'Rethinking Exclusionary Reasons' (1993) 12 Law and Philosophy 329.

on tort law have adopted Raz's account as the lynchpin of their endorsement of DC.[63] But why should we suppose they are right to do so? That is the issue I now pursue.

I think we can grant that the categorical feature is necessary. If a reason is conditional upon the wishes of a person, it is hard to see how it could ever justify legal intervention, since that would be to hold him *un*conditionally to it. Reasons that are not categorical are, virtually by definition, reasons conformity to which ought to be left to the agent. Or so I am willing to grant.

What is less clear is why the reason must be mandatory.[64] Why, in other words, must the reason non-conformity to which grounds tort liability have exclusionary force? To answer this question, one needs to distinguish the exclusionary force of reasons from their weight. Even garden-variety first-order reasons can defeat countervailing reasons by outweighing them. So what we need is an argument that the reasons non-conformity to which ground tort liability do something different: they have the specific effect of defeating countervailing reasons *by exclusion*.

It is true that exclusionary reasons are more robust than first-order reasons. To the extent that they exclude countervailing reasons, they defeat them outright—that is, regardless of weight. This property may be said to make them especially well-suited to legal regulation. More precisely, reasons that are protected by exclusionary force

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[63] eg John Gardner, 'Obligations and Outcomes in the Law of Torts' in John Gardner and Peter Cane (eds), *Relating to Responsibility: Essays in Honour of Tony Honoré on his 80th Birthday* (Hart Publishing 2001) 135; Stephen A Smith, 'Duties to Try and Duties to Succeed' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Bloomsbury 2015).

[64] Notice it is beside the point whether (or why) legal directives operate by excluding the subject's own judgement on the balance of reasons, as Raz argues in, for eg, *The Morality of Freedom* (Clarendon Press 1986) chs 2–4. We are trying to find out what kind of reasons can justify tort law's issuance of a liability-imposing directive. The fact (if it is one) that a legal directive has exclusionary force *once issued* does not help with that question.

are more likely to defeat countervailing reasons, and thus to provide conclusive reasons for action. And, what's more, they are more likely to remain conclusive reasons over time, and across a wide range of circumstances: even as the relative weight of the countervailing reasons waxes and wanes, they are always defeated by exclusion. So it may well be that mandatory reasons provide a particularly secure basis for the law to require the performance of the action for which they are a reason.

There is much in this argument that seems to me highly plausible. In fact I will develop these points myself in chapter 6. But the problem, as we can already see, is that they establish only that a reason is *more likely* to defeat the countervailing reasons if it is protected by exclusionary force. That establishes a contingent connection between exclusionary force and the justified imposition of legal liabilities. But what we need is a necessary connection. To support DC, we need to rule out the possibility that a garden-variety first-order reason suffices to justify tort law. The argument I have outlined trades on exclusionary reasons' power to defeat the reasons that countervail. But, again, exclusion is only *one way* of defeating countervailing reasons. The other is, of course, to outweigh them. And where the first-order reason's weight is very great, I cannot see any reason to rule out its being a sufficiently robust basis for institutionalisation in law.

A further worry about this kind of argumentative strategy is that the point of chapter 3 was precisely to show that tort liability can be justifiably imposed even for conduct that was plainly *not* a failure to conform to a conclusive reason. So it does not seem, in the absence of further argument, that trading on exclusionary reasons' power to provide conclusive reasons is going to help. There are, to be sure, some such further arguments, borne of a particular understanding of what it takes to justify tort liability, which I will consider in chapter 6. But, at this stage, the abstract properties of

exclusionary reasons do not seem capable of proving the general and necessary truth of DC.

Perhaps another way of making the case for DC, however, is to apply a 'phenomenological test'.[65] We can simply ask ourselves how we experience the practical force of the reasons against committing torts. Raz says, for example, that there is a 'peculiar feeling of unease' associated with deliberations about exclusionary reasons,[66] and we might ask whether that feeling is characteristically present in the circumstances in which tort liability is imposed.

It is sometimes suggested, rather loosely, that the feeling in question is one of regret.[67] But, so stated, that seems overinclusive.[68] If I move away from the city in which my parents live in order to pursue a career opportunity elsewhere, it seems likely I may experience a kind of regret.[69] I might regret that I could not spend more time with my parents, etc. It does not seem to be the case, however, that I had a duty not to make the move. (At any rate, the belief that regret is appropriate does not rest on a judgement that I did.) If any further point is needed, it is the incommensurability of these reasons, rather than any exclusionary force, that seems best to explain why regret is rationally appropriate. By virtue of their incommensurability, the value achieved by my moving cities is no substitute for the value lost.[70]

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[65] See for this term, and helpful discussion, Edmundson (n 62).

[66] Raz, *Practical Reason and Norms* (n 22) 41.

[67] Judith Thomson was drawn to this suggestion in characterising the 'moral residue' I discussed earlier: Thomson, *The Realm of Rights* (n 1) 97. For a recent survey see Schauer (n 23).

[68] Compare Gans (n 62); Edmundson (n 62) 334.

[69] Ruth Chang, 'Incommensurability (and Incomparability)' in Hugh LaFollette (ed), *The International Encyclopedia of Ethics* (Wiley 2013) 4.

[70] ibid.

The introduction of incommensurability reminds us of a broader point. Although it is true that utilitarianism admits of very little 'unease' (except perhaps of an epistemic kind) in weighing up the balance of reasons, one should not think that any unease that exists must be chalked up to deontological constraints. That opposition is overly simple. It could be that the unease results from the inability to commensurate the competing values. That may help to provide a satisfying explanation of the invidious choice faced by the defendant in *Vincent*.

Be that as it may, there is plainly much to be said in favour of the view that exclusionary reasons are at work in important areas of tort law. We can apply a more discriminating test and still come out with a positive result.

Take a classic tort like battery. It seems highly plausible that one's reasons not to commit battery are protected by exclusion. It is not a good answer to the question, 'Why did you batter him?' to say, 'I was offered a lot of money to do it.' It is probably not even a good answer to say, 'I knew that if I battered him, that would prevent five others from being battered.'[71] Neither of these facts is likely to justify the battery, and it does not seem to matter if we increase the amount of money at stake, or increase the number of batteries that would be prevented.[72] This suggests that these considerations are excluded, and not merely outweighed. Finally, it seems that, whichever action is in the end justified—battery or not—we are faced with the characteristic unease Raz identifies, at least in the second case: we feel 'torn between conflicting reasons', and indeed that 'the action can be assessed in two ways which yield conflicting results'.[73]

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[71] Compare Bernard Williams' famous example 2 in *Utilitarianism: For and Against* (Cambridge University Press 1973) 98–99.

[72] It does not seem to matter, at any rate, until we reach some threshold. That suffices for the point.

[73] Raz, *Practical Reason and Norms* (n 22) 42–43.

On the balance of first-order reasons, one should commit the battery, to avert serious harms to several others. But the second-order reasons say one should not. So, whichever choice one makes, one seems guilty of a kind of rational failure.

For how much of tort law, however, does this kind of analysis hold? It seems to me the answer is: not enough. That exclusionary force is at work becomes less plausible as we move away from intentional torts, and as we move away from claimants' most vital interests.

Why suppose that it is at work, for example, across the most practically significant tort of all, the tort of negligence? The most famous (or infamous) account of what it takes to behave negligently is the Learned Hand formula.[74] This has been claimed by the economists as involving a utilitarian calculus, in which the reasons for and against the defendant's harm-causing conduct are commensurately weighed up.[75] But one need not be a utilitarian to agree that the courts conduct a balancing exercise that seems—at least in some cases—broadly consistent with the weighing up of reasons for and against the commission of the tortious act, with little sense that exclusion is at work.[76] Certainly the reasonable course of action is dependent upon the cost of taking precautions to avoid the risk, and of the value of the activity in the course of which the risks were created.[77] And judges, for what it's worth, repeatedly say they are required

[74] *United States v Carroll Towing Co* 159 F.2d 169 (1947).

[75] eg Richard A Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29.

[76] Compare Gregory C Keating, 'Must the Hand Formula Not Be Named?' (2014) 163 University of Pennsylvania Law Review Online 367.

[77] eg *Tomlinson v Congleton BC* [2003] UKHL 47.

to 'balance' these factors against the likelihood and gravity of injury,[78] and that liability will be imposed only if they were 'outweighed'.[79] Hence, quite unlike in the case of trespass, it seems that the financial and other benefits of risking the commission of the tort are firmly *on* the table. Rather than being excluded, they add to the case in favour of committing the tort in proportion to their weight.

It is worth returning at this point to Foot's canonical case of the surgeon, often used to demonstrate the anti-consequentialist features of practical reason. Incommensurability does not work well here, since the reasons for and against killing the one person—the potential 'organ donor'—seem to be of the same kind: they are reasons borne of the value (roughly speaking) of human life. It seems quite *possible* to commensurate this value and maximise it: five lives saved is more than one. That doing so is not *permissible* therefore requires some other explanation. Very plausibly, the explanation is that there is a mandatory norm prohibiting the surgeon from killing the one person. The admitted benefits to be derived from killing him seem to be excluded.

That is the case in favour of thinking exclusion is at work in some contexts with obvious tort-law analogues. But how far does it extend? A common reading—perhaps the orthodox reading—of the surgeon example, and others like it, is that the norm in question prohibits killing that was *intentional*.[80] Suppose the surgeon is facing a different dilemma: he is considering whether to apply to his patient some new radiation therapy which has *x*% chance of curing the patient's otherwise fatal illness but *y*%

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[78] eg *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333, 336H; *Tomlinson* (n 77) [35]–[37]. For a detailed study see Stephen G Gilles, 'The Emergence of Cost–Benefit Balancing in English Negligence Law' (2002) 77 Chicago-Kent Law Review 489.

[79] *Scout Association v Barnes* [2010] EWCA Civ 1476 [32].

[80] Analogous examples were used by Thomas Aquinas to argue in favour of the so-called doctrine of double effect: *Summa Theologica*, vol II, pt 2, Q 64.

chance of causing a fatal cancer in the five attending medical staff. If he takes an unreasonable decision, given the relative magnitudes of the risks, and harm results from the risk he underrated, he will be exposed to a medical negligence claim—from either the patient or the staff, as the case may be. But it seems strange to insist that the decision facing the surgeon was not one of weighing up the relative magnitude of the risks, but was, rather, a case of one set of reasons trumping the countervailing reasons by exclusion.

In this way, reflecting on the famed surgeon example suggests exclusionary reasons are sometimes at work in tort law contexts—but that they are not characteristic of *all* tort law contexts. There is the eminently plausible possibility that the mandatory norms at work in tort law are limited to intentional conduct, leaving (inadvertent) negligence outside it.

And I doubt the other two examples, which I mentioned before that one, are going to provide a general case in favour of mandatoriness either. Both involve 'special relationships': between promisor and promisee in the first case, and between spouses in the second. These are the very contexts Raz foregrounded in developing his account of exclusionary reasons,[81] and they seem well analysed in these terms. Their distinctive feature, after all, is that the interests of the other party to that relationship are appropriately given special importance; the reasons so derived are removed from competition with the reasons deriving from the interests of others, outside the relationship. When a stranger's interests compete with those of my wife—even when the interests are exactly the same, and hence presumably of similar weight—my wife's

[81] See especially Raz, 'Promises and Obligations' (n 53).

always win. So the analysis in terms of exclusionary reasons works well here. Perhaps it can be extended to some pockets of tort liability (such as where liability depends on the 'special relationship' created by an assumption of responsibility). But it is hard to see how the analysis would be extended to tort law as a whole. In a way, it is the very thing that justifies the exclusionary force that makes this kind of example limited in its sphere of application: it operates only as between parties in a special relationship, not between strangers. Again, reflecting on the nature of the examples usually taken to support the exclusionary reasons analysis have clearly perceptible limits.

A final example. How about my decision whether to watch television at 70 decibels in volume or 80 decibels, or until 10pm at night or until 11pm? My TV-watching might constitute a noise nuisance to my neighbours, and so might allow them to hold me liable in tort. Yet my reasons, borne of my neighbours' interests, not to watch TV, or not to do so in a certain manner or at a certain time, do not seem to me protected by exclusionary reasons. It seems adequately to explain the situation to say I ought to weigh up the value of my TV-watching against its possibly detrimental effects on my neighbours. Each incremental increase in the value of TV-watching to me—how good is the show? etc—seems to strengthen, proportionately, the case in favour of my doing so. And, even if my TV-watching does, in the end, constitute an actionable nuisance to my neighbours, it seems much too dramatic to compare their interest in enjoying their evenings noise-free to their interest in not being physically assaulted. A mandatory norm plausibly protects the latter, but it seems lacking in the case of the former.

Of course, one could insist that there is some kind of exclusion operating across all these diverse contexts—regardless of whether the defendant's conduct was intentional or inadvertent, regardless of the triviality of the interests at stake, and so on. That

would not be easy to falsify, given the myriad exclusionary norms one could posit, and given that the phenomenological test becomes increasingly difficult to apply if (one posits that) not all of the countervailing reasons are excluded, or that they are not excluded completely. Can we *rule out* the possibility that, even in the nuisance example, the reasons against committing the nuisance are attenuated, or excluded below some threshold, and so on? I doubt it. But perhaps the most basic point is this: Why one would think that any of these disagreements about the proper characterisation of these examples reveals the fundamental nature of tort law? Why, in other words, would one think that someone who doubts that the exclusionary reasons analysis applies to every single instance of tort liability has failed to understand the justification for imposing it? These seem much more like debates to be had between people who fully grasp the nature of the subject, indeed the moralistic nature of the subject, and are having a localised debate about the proper characterisation of particular examples. And even if one did engage in a squabble about each and every example, pressing a plausible case in favour of the exclusionary reasons analysis, I cannot see that would tell us anything about the *necessity* of that analysis in justifying tort liability. In short, I still cannot see that DC, on this new Razian reading, is playing the role the duty-lovers claim for it.

4.6. Conclusion

My argument for this has, however, been inconclusive. It had to be. I cannot rule out the possibility that there is some other conception of duties, or some argument for their necessary connection with tort liability, of which I am unaware. To make it conclusive requires me, in what remains of this thesis, to give a positive account of tort liability's

justification—one which does not rely on the breach of a primary duty, yet does justice to the anti-instrumental nature of tort law on which both the moralists and I insist.

4.6.1. Some truisms about tort law

For now, the most efficient way of summing up my case against duties is to list, in closing, the various claims which one is fully able to make, using only reasons. I will, again, use *Vincent* as a convenient archetype (though most of the claims are true, *mutatis mutandis*, of all tort cases).

(1) The defendant had a *pro tanto* reason, to which he failed to conform, not to use the claimant's dock.

(2) The reason in (1) was a very weighty reason.

(3) In the circumstances of *Vincent*, the reason in (1) was not a conclusive reason.

(4) In other circumstances, the reason in (1) is very often a conclusive reason.

These all seem to me like truisms on which everyone would agree. The question, again, is why we should go further, and insist on the much more puzzling and contentious claim that the defendant had a duty not to commit the tort—not only in *Vincent* but in every single tort case.

One possibility is that we need the idea of a duty to do justice to the sense in which tort law is 'relational' or 'directed'. A tort defendant—so the common thought runs—not only has a duty not to commit the tort, that duty is *owed to* the claimant. Sometimes

the impression is created that only duties can have this property.[82] Indeed one sometimes gets the impression that it is *only because* duties are thought to have this property that the duty-lovers are so wedded to them.[83] Similarly, the importance of connecting the duty to the interests of the claimant is a major motivation, I take it, for rights-based theories of tort law. But the truth is that we do not need duties to capture any of these ideas. Reasons can be 'relational' or 'directed' too. For example, if a duty's directedness consists, as very plausibly it does,[84] in the fact that the duty is justified by the interests of a particular person (viz. the holder of the corresponding right) then this property can quite obviously be possessed equally by mere reasons. So, in short, we can also say this:

(5) The reason in (1) is justified by the interests of the claimant. (It is a 'relational' reason.)

Another common suggestion made by the duty-lovers is that we must regard tort law as wrongs-based to get away from the idea that it is 'loss-based'.[85] That latter view implies, wrongly, that the defendant's faulty causation of loss is (defeasibly) sufficient

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[82] See eg Weinrib's influential discussion of 'correlativity', which he assumes throughout is a property of rights and duties: *The Idea of Private Law* (Harvard University Press 1995) ch 5. And see the duty-lovers' famous discussions of *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 99 (1928). The case is held up as proving that an indispensable ingredient of liability is that the defendant breached a duty which he owed to the claimant. But it is difficult to see why we should go further than saying the defendant failed to conform to a reason that was justified by the claimant's interests. Cf. Weinrib ch 6; Zipursky (n 32).

[83] See eg John CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917, 927. The authors grant that their arch-opponents like Posner may be able to account for the fact that torts are breaches of duty as they have defined them (i.e. as prohibitions), but then immediately offer the riposte that Posner cannot account for the fact that they are *directed* (or 'private') duties. That may be true, but it strikes me as a significant shifting of the goalposts.

[84] Raz, *The Morality of Freedom* (n 64) ch 7.

[85] eg Stevens (n 45) especially ch 1.

for his liability. The truth, according to the duty-lovers, is that a case for liability arises only if the defendant has committed a wrong (or infringed a right).

I think the duty-lovers are right that we need to get away from the loss-based view, but nothing I have said has come close to endorsing it. On my view, too, there is at least one vital further ingredient of a tort claim. It is only that I think the further ingredient is a failure to conform to a reason, not (always or necessarily) a breach of duty properly speaking. So we can, and should, add the following claim:

(6) The defendant's non-conformity to the reason in (1) is a necessary condition for his liability.

4.6.2. W(h)ither duties?

You can see, then, why I think the moralists can get by quite happily without insisting upon DC. The truths about tort law to which they are wedded do not require it.

You can also see that a crucial move in this chapter was to introduce, as a rival to DC, the claim that torts are failures to conform to a reason. That considerably shifts the conventional terms of the debate, in which DC is pitted against thoroughgoing instrumentalism. If *that* were indeed the alternative to DC, then we should all want to be duty-lovers. But once a different null hypothesis is introduced, then the case for insisting on primary *duties*, specifically, seems to me very thin.

Indeed you might say there is not much difference at all between my null hypothesis—that torts are failures to conform to a reason—and DC. Hence I seem to have drained the debate of the importance it once had. And in a way that is true. It was my aim to strip away the grand claims with which duty-loving is spuriously

associated, so that we can see more clear-sightedly what is most important. And DC, I would suggest, is not it. We can retain all of the truths that are essential to a moralistic account of tort law *without* insisting on the truth of DC, which does not, in the end, survive scrutiny.

It should not be thought, however, that I have made the contest over DC sterile, or merely semantic. Insisting on DC has consequences. It leads moralists into the contortions that I have spent the last three chapters unpicking. By getting drawn so deeply into what, in chapter 2, I called the 'conduct question', the moralists arrive at positions that are, by turns, offputtingly strong and unpersuasively opaque.

Instead they should focus more squarely on the 'justification question'—which, as I also suggested in chapter 2, was always the more natural basis upon which to contest instrumentalism. One should try to show that tort liability is grounded *non*-instrumentally upon the defendant's commission of the tort. I think we can do this without assuming the duty-lovers' particular answer to the conduct question. Hence the case for proceeding with the thinnest and least controversial view on that latter issue: namely, that the defendant's commission of a tort is a failure to conform to a (weighty) reason.

Of course, the duty-lovers will say this is most unpromising. They think the breach of duty is integral to explaining how the imposition of liability could be (non-instrumentally) justified. The next Part of my thesis tries to show that is not so, by providing a justification for tort liability that is duty-free. It argues, in other words, that:

(7) Tort liability is grounded (non-instrumentally) upon the defendant's non-conformity to the reason in (1).

There is a further worry, no doubt, about this. The worry can be brought out with the following claim, which is also surely true:

> (8) Tort liability can be justified only in a small subset of cases in which the defendant has failed to conform to a (relational) reason.

My account may seem, in other words, hopelessly broad. Does it not suggest, most implausibly, that we are exposed to potential tort liability at almost every turn? That seems to be the implication of adopting such a thin answer to the conduct question. Do we not need some way of capturing the obvious truth that *not any reason will do*?

Well, indeed. We need to say a very great deal about what kinds of reasons can ground a duty to compensate, and when, and how. And no doubt we must considerably reign in the reasons non-conformity to which makes one liable to compensate, for tort law clearly concerns itself only with a small subset. These are vitally important issues. All the more reason, then, not to pre-empt or prejudice them based upon a kind of unexamined *a priori* truth. But that, it seems to me, is how DC has come to function. It tends to provide a wrong answer, an overly general answer, a tautologous answer, or a mere smokescreen for a real answer. I think we should rather rid ourselves of the complacent belief in its truth so that we can 'build anew from the foundation'.[86] That is what I will begin to do in the remainder of this thesis.

[86] René Descartes, *Meditations on First Philosophy* (Stanley Tweyman ed, Routledge 1993) 45.

PART II

ANTI-INSTRUMENTALISM

5. Reasons for repair

The previous chapters argued against the claim that tort liability is grounded upon a breach of duty by the defendant. Now, as promised, I will argue that tort liability is nevertheless grounded non-instrumentally upon the defendant's role in causing the claimant's injury. This allows us to refute the economists' account of tort law—indeed much more successfully than does the questionable emphasis on duties. The arguments of Part I should not be too disappointing, therefore, even to the duty-lovers it criticised. I think their ultimate aims can be vindicated. But for that we need to switch from the 'conduct question' to the 'justification question'.

Fortunately, a moralistic answer to the justification question has been developed at length in recent work by John Gardner and Joseph Raz.[1] Their core claim has come to be called 'the continuity thesis'. My arguments in this Part, and the next one, are based upon it. I will not repeat the comprehensive explications of the thesis that appear in Gardner's and Raz's work. But I do owe a response to some important objections which the thesis has attracted, from different directions, since it was formulated. In the

[1] John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1. See too Joseph Raz, 'Personal Practical Conflicts' in Peter Baumann and Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cambridge University Press 2004); reprinted as Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011) ch 9. Prototypical versions of the thesis appear in John Gardner, 'Wrongs and Faults' in Andrew Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005) 58–60; John Gardner and Timothy Macklem, 'Reasons' in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 467.

process of doing so, I hope to clarify the nature and operations of the thesis—since these will be integral to the arguments of subsequent chapters. In those two respects, then, this chapter lays the groundwork for my arguments in those that follow.

5.1. The continuity thesis

Here is the first crucial idea behind the continuity thesis: a reason to perform an action at one moment in time (call it 't_1') can become, as a result of one's failure to perform that action, a reason for a different action at a later moment in time ('t_2'). The reason does not disappear in virtue of the failure to conform to it at t_1. Rather, it continues—hence the thesis's name—and becomes a reason for a different action.

To see how this can happen, suppose I need to get to London by 14h00 to give a lecture, and accordingly have reason to catch the 12h15 bus.[2] But I miss it. The reasons I had do not disappear, merely because I failed to perform the action they were reasons for. They become reasons for a different action: to catch the 12h30 bus, or, failing that, the 12h45 bus, or to use the train instead. The example illustrates, to repeat, that a reason, *r*, that was once a reason for my performing action *x* may, by virtue of my failure to perform action *x*, become a reason for me to perform a different action, *y*. Here action *x* is 'catching the 12h15 bus' and action *y* is 'catching the 12h30 bus', or 'taking the train', or whatever. This key idea is not especially controversial, as the example helps to show. The challenge is to fit this to tort liability: to show that when action *y* is replaced with '*D*'s paying damages to *C*' and action *x* is replaced with '*D*'s

[2] This example is adapted from Raz, *From Normativity to Responsibility* (n 1) 256 fn 6.

refraining from committing a tort against *C*', it is still plausible to see these as two ways of conforming to the very same reason.

Of course, we are still some way off doing that. The bus example doesn't get us very far. What makes the bus example a useful starting point is that the action at t_2—catching the 12h30 bus—is so obviously a way of conforming to the same reason, *r*, that was a reason for catching the 12h15 bus at t_1. We can identify the rational case in favour of taking the two actions very straightforwardly (and have already done so): namely, that I had to be at the lecture at 14h00. And it is self-evident that my reason for catching the 12h15 bus, and, when I fail to catch it, the 12h30 bus, is that same one.

What makes it self-evident is that any reasons I had to catch the particular buses were *derivative* of the reasons that I had to get to the lecture.[3] That is, I had reason to use those means of transport only because, and to the extent that, doing so would facilitate—would make more likely—my timeous arrival. The two buses were my means, one might say, to the end of arriving at the lecture. The rational case in their favour is exhausted by their capacity to serve as a means to that end, which is held constant.

What follows from this is that, provided only that I arrive timeously at the lecture by *some* means of transport or other, I have completely conformed to the reasons that applied to me. That is so even after I miss the 12h15 bus. Provided I at least catch the 12h30 bus, or use the train instead, so as to arrive timeously at the lecture, I have completely conformed to the ultimate, or non-derivative, reason that I had. Hence the

[3] On facilitative (and derivative) reasons generally, see Raz, *From Normativity to Responsibility* (n 1) ch 8.

reason I had for catching the 12h15 bus in particular has, as it were, no further claim on me. There is nothing more for me to do to conform to it. For the case in favour of my catching the 12h15 bus was entirely derivative, owed entirely to that action's capacity to facilitate my timeous arrival at the lecture—and that is what I have done, by another means. The reason from which the case for catching the 12h15 bus derived, in other words, has been fully conformed to, and no longer has any derivative force. There is no longer any case for performing the action that would facilitate conformity to it.

As Raz says: 'Failing to follow a derivative reason has no consequences, provided one took an alternative (adequate) route to the same goal'.[4] Perhaps that way of putting it risks downplaying something important. Failing to follow a derivative reason does have a consequence: it strengthens the rational case for taking that alternative (adequate) route to the same goal. That is why, at t_1, one ought to take the 12h15 bus, but, at t_2, the 12h30 one. But what Raz means to emphasise is, of course, that there is no *further* consequence, once one does indeed catch the 12h30 bus and arrive timeously. And that, again, underscores the fact that in this example there is no 'conformity deficit': even though I failed to do what I had reason to do at t_1, I can ensure perfect reason-conformity by doing what I had reason to do at t_2. And that is a distinctive feature—and, for my purposes, a limitation—of the example.

So what we should imagine next is a scenario in which, in virtue of my failure to catch the Oxford-to-London bus leaving at 12h15, I cannot now arrive at the lecture on

[4] ibid 256.

time.[5] But I will still be able to arrive a few minutes late. Should I get the 12h30 bus in order to do so? The answer seems to be: obviously, yes. And that introduces a second basic idea of which the continuity thesis is comprised: 'when we fail to conform fully to a reason we have reason to come as close to full compliance as we can'.[6] Just as having a reason to pay you £10 gives me a reason to pay you £8, if that is all the money I have,[7] and just as having a reason to pay it to you on 1 August gives me a reason, if I fail to pay it then, to pay it to you on 2 August, so in the case of my reasons to be at the lecture. That I will be late for the lecture, that I will miss some of it, means I have failed to conform fully to the reasons I had to be there (which were, *ex hypothesi*, reasons to be there *on time*). But it does not follow, of course, that I no longer have any reason to be there at all. I should try to get there at 14h01, or, 14h02, or 14h10, or however early I can. And what if I will be able to get there only once the lecture is over? Well, in that case I should probably try to connect to the live stream of the lecture, or, failing that, listen to a recording—or do *something* to try to conform, insofar as I can, to the reason that once required me to be there at 14h00.

That is the same lesson to emerge from the famous example, in which I promise to take my children to the beach.[8] On the appointed day, an emergency intervenes—one of my students has had a nervous breakdown ahead of his exam the next day—so I attend to him and miss the chance to go to the beach with my kids. Is that the end of the matter? It is not. I have broken my promise to my kids. The chance to perform it

[5] This kind of example is a classic. Compare, for eg, John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 98–99.

[6] Raz, *From Normativity to Responsibility* (n 1) 190.

[7] ibid 189.

[8] DN MacCormick, 'The Obligation of Reparation' (1977) 78 Proceedings of the Aristotelian Society 175. It is developed in Gardner, 'What Is Tort Law For?' (n 1) 28–30.

is gone. But the reasons I had to keep it do not disappear. They are still there, demanding that I conform to them as best as I now can. They are not now—they cannot be—reasons to perform the promise I made. But they are reasons for a different action: to take my kids to the beach tomorrow, or to take them to the movies, or to do whatever is, in the circumstances, the next best thing.

These two examples extend the continuity thesis to cases where full conformity is not possible, not even if the next-best action is taken at t_2. In this respect they differ from the first example, in which catching the 12h30 bus will get one to the lecture on time. What they also show, relatedly, is that the reparative action that the reason requires may be rather different in character from the initial action—and probably increasingly so, the further we get from the possibility of full conformity. As circumstances changed, making conformity to the reason more and more difficult, that which remains to be done becomes something different from what I had reason to do initially: rather than attend the lecture, I have reason only to listen to a recording of it; rather than take my kids to the beach, I have reason only to take them to the cinema. And a point will be reached, one can imagine, where no conformity to that reason is possible, so that all we can do is apologise.

The continuity thesis is a powerful one. That it has *some* validity seems to me difficult to deny. As Raz says, it 'is not an "independent principle". It is not as if one has a reason to do something, and because of the [thesis] one should conform to that reason.'[9] Rather, it is a logical entailment of having a reason, which in its nature calls for conformity—either complete conformity or, if that is not possible, conformity to

[9] Raz, *From Normativity to Responsibility* (n 1) 189.

the greatest extent that one can. True, the thesis rests on the additional claim that reasons do not disappear merely because one failed to conform to them. All else being equal, they endure, calling for conformity later. But that added claim, too, seems difficult to deny, for to do so would entail, 'absurdly', that one can free oneself of a reason merely by failing to conform to it.[10]

The controversy comes, as I suggested earlier, in connecting the continuity thesis to private law—or, more precisely, to liabilities to pay compensation for harms that one has caused. Is the defendant's paying damages to the claimant really a means of conforming to the same reason that he had not to commit the trespass, libel, act of negligence, etc, in the first place?

It would be nice if it were connected. It would seem to provide a justification for the imposition of liability of exactly the kind the moralists seek. First, it would explain the difference between tort liability and Holmes' import tariff, which I used to set out a challenge to moralistic theories in chapter 2. The reason for the duty to pay the tariff is not based upon any reason the payer had not to import the product. Probably the payer had no such reason. Certainly the tariff is not imposed because of it. By contrast, tort liabilities would, according to the continuity thesis, be justified by the reason the defendant had not to commit the tort in the first place, and to which, in committing that tort, he failed to conform. And that seems to be a justification for tort liability which, if sound, would rival that proposed by the instrumentalists. But now I am getting ahead of myself.

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[10] Compare Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 135.

5.2. The continuity thesis is too strong

Thus far I have merely set out the building blocks of which the continuity thesis is comprised. In doing so, I relied on the work of Raz and Gardner, the thesis's architects. Their work is detailed and elaborate and I have tried to avoid repeating it wholesale. The burden of my argument in this chapter is, instead, to respond to the objections to the thesis that have arisen since Raz and Gardner first set it out. Even then, my discussion is not always novel. Often it consists in drawing attention to certain points that are implicit, and indeed sometimes express, in Raz's and Gardner's work, but which have been overlooked by their critics.

One surprisingly common objection to the continuity thesis is that it implies that duties of repair arise too often, or, perhaps, that those duties are overly demanding. The thought appears to be that, if the duty of repair is explained by the continuance of the very reasons that underlay the primary duty, then it must follow that *any* breach of the primary duty attracts a duty of repair. According to the continuity thesis, it is, after all, in the very nature of reasons that non-conformity to them does not cause them to disappear; rather they continue to exist and to demand conformity. This, the objector rightly notices, is the key insight on which the continuity thesis trades. And the fact that it is entailed by the very nature of reasons means that it holds *wherever* there was a reason to conform to in the first place. But that appears to commit one to the view that one ought *always* to repair one's non-conformity at t_1. Moreover, what that requires, according to the familiar phrase adopted by the continuity thesis's architects,[11]

[11] eg Raz, *From Normativity to Responsibility* (n 1) 190; Gardner, 'What Is Tort Law For?' (n 1) 33–34, 40.

is that one does 'the next best thing': that is to say, in order to conform to the reasons that have continued, one must come as close as possible to doing that which one failed to do at t_1.

These implications are, the objector points out, implausibly strong. There are compelling counterexamples that show that duties of repair are, in truth, more modulated than this—often one's non-conformities at t_1 should not be taken to place one under a duty of repair at t_2, or at any rate not a duty to do the next best thing. For example, Emmanuel Voyiakis argues in his recent monograph that we should 'not assume either that such "continuity" will always obtain, or that its normative consequence will always be that one ought to do the "next best thing" in repair'.[12] He rejects the continuity thesis because it is too unyielding, as he sees it, in insisting that the defendant's failure to conform to the reasons that applied to him at t_1 now demand that he do the next best thing at t_2.

The counterexample he invokes is the well-known case of *Ruxley v Forsyth*.[13] The defendant, Ruxley Ltd, had agreed to build in Mr Forsyth's garden a swimming pool that was 7 ft 6 inches deep. It built one that was 6 ft 9 inches deep. The evidence was that the discrepancy did not affect the usefulness of the pool or its market value. Nevertheless, Mr Forsyth sued Ruxley Ltd for breach of contract, seeking 'cost of cure' damages: the amount of money required to demolish the pool and rebuild it to the contractually specified depth. The Court of Appeal had found for Mr Forsyth, which was in accordance with the accepted measure of damages in contracts of this kind. The

[12] Emmanuel Voyiakis, *Private Law and the Value of Choice* (Bloomsbury 2017) 19.

[13] *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8. Much the same argument, also based on *Ruxley*, is stated by Stephen Smith in his *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford University Press 2019) 189–190.

House of Lords was, however, more innovative. It recognised an exception to the ordinary measure where awarding it would be disproportionate to the benefit the claimant would derive. The court awarded Mr Forsyth a lesser sum for loss of amenity, but my focus here is on its denial of cost of cure damages.

Voyiakis believes, very plausibly, that this is the right result. What is contentious is that he thinks the continuity thesis cannot support this result, but must insist, instead, that the defendant rebuild Mr Forsyth's pool. Here is the crucial passage of his book:

> The 'next best thing' to doing the job right the first time is to do it right the second time, or to pay Forsyth the amount of money that would be required for someone else to do the job. Unless it is qualified in some way, the principle of doing the 'next best thing' has no room for the idea that the content of the burden that the contractor ought to bear must stand in some reasonable proportion to the loss suffered by Forsyth ... The reason is that the principle of doing the 'next best thing' ties the content of the burden of repair to Forsyth's original entitlement. It does not allow considerations that arise after the contractor's failure to honour that entitlement to influence what the contractor ought to do in repair.[14]

I said earlier that this line of objection is 'surprisingly' common. It is surprising because it can be addressed very simply, and is in fact addressed by both of the architects of the continuity thesis in their key works. The point they make is an elementary one: the reason that, according to the continuity thesis, endures from t_1 to t_2 is *pro tanto* rather than conclusive. Here is what Raz says in discussing the implications that the continuity thesis may be thought to have, but in fact does not:

[14] Voyiakis (n 12) 20–21.

> Most important, [the thesis] does not claim that one has a conclusive reason to compensate whenever one fails to conform to reason. The strength of the reason is its original strength. It may be defeated by conflicting reasons.[15]

Gardner, in a similar vein, says that the reason that one has to perform one's reparative action 'only counts for as much as it counts for'.[16] What the continuity thesis establishes is only 'that, still being available for conformity, [that reason] counts for something'.[17] Being a *pro tanto* reason, it justifies one in repairing one's non-conformity at t_1 only if, in light of all the other reasons that apply to one at t_2, one ought to act in accordance with it. Plainly it will not always do so, for, '[n]aturally, other reasons may countervail'.[18] That is simply what it means to be a *pro tanto* reason, which must compete in the struggle with the countless other reasons that exist in determining what ought to be done.

Voyiakis' objection therefore rests on a misreading of the continuity thesis. He treats it as entailing that, where it applies, the reason that one has to conform to one's original obligation at t_1 is a conclusive reason at t_2. But that inference cannot be justified by what Raz and Gardner say: in fact they say the opposite. True, in *Ruxley v Forsyth*—and no doubt many other cases the continuity thesis seeks to explain—the reason in question was a conclusive one at t_1: the defendant ought, all things considered, to have dug a 7 ft 6 inch swimming pool. And that reason is, by the continuity thesis, the very reason that justifies the defendant's reparative action. So perhaps Voyiakis thinks these two premises imply that the reason that continues must be a conclusive

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[15] Raz, *From Normativity to Responsibility* (n 1) 190.

[16] Gardner, 'What Is Tort Law For?' (n 1) 32–33.

[17] ibid 33.

[18] ibid 32.

reason for one's reparative action not only at t_1 but at t_2. It is, after all, the very same reason: either it is a conclusive reason, or it is not.

Yet that reasoning would be fallacious. It may be more likely that a reason that was conclusive at t_1 would be a conclusive reason at t_2, but there is no necessary connection.[19] Whether a reason is conclusive depends only in limited part by that reason's properties. The other indispensable part of the equation is (as the quotations from Raz and Gardner make clear) the set of reasons that countervail. And, crucially, one should not suppose the set of countervailing reasons at t_2 is unchanged from the set at t_1. Sometimes it changes decisively. In *Ruxley v Forsyth* itself, of course, an obtrusive fact obtained at t_2 that did not obtain at t_1: a 6 ft 9 inch swimming pool existed in Mr Forsyth's garden. This made the sinking of a 7 ft 6 inch pool on the same spot far more costly at t_2 than it had been at t_1, since the existing pool would have had to be dug up. The cost of performing an action is, I hope we can agree, a reason against performing it. It must follow that where those costs are very high—and where, as in *Ruxley* itself, any further benefits of having the deeper swimming pool were negligible—it is correspondingly less likely that one will have a conclusive reason to perform it. Nothing in this explanation requires one to deny that there was, at both t_1 and t_2, a *pro tanto* reason to provide Mr Forsyth with a 7 ft 6 inch pool. No matter how weighty that reason, there would be some point at which the additional costs at t_2 would be so great that a reasonable defendant would not conform to it, and (therefore) that a reasonable court would not compel him to do so. In *Ruxley v Forsyth*, the court concluded, quite plausibly, that that point had been reached.

[19] This is an important point that I take up in chapter 7.

Thus, far from providing a counterexample to the continuity thesis, the case helpfully illustrates one of its important corollaries: just as it is in the nature of reasons that they continue to exist, including after one has failed to conform to them, so they can always be defeated by the myriad other reasons that apply. And whereas the vaunted benefit of the account that Voyiakis prefers is that 'it remains open to the possibility that sometimes considerations that did not bear on the justification of the original burden may bear on the justification of the burden of repair, and vice versa',[20] this in fact states a key implication of the continuity thesis itself. One need only understand it, correctly, as a thesis about the continuity of reasons that are *pro tanto* rather than conclusive. These cannot but be open to being defeated at t_2 by considerations that did not bear on them at t_1, provided only that, between those two moments, the considerations have changed.

That same point is at issue in a counter-example raised by Diego Papayannis.[21] He asks us to imagine that Alexandros, who 'is terribly poor', leans in a moment of weakness against Olympia's parked Rolls Royce, badly scratching the paintwork. That he is poor 'is irrelevant', Papayannis plausibly says, 'to the justification for his action', since the precautions he ought to have taken 'have no monetary cost to him'.[22] So he had a reason not to lean against the paintwork which was conclusive, was unaffected by the fact of his impoverishment, and now, by the continuity thesis, furnishes him with a reason to compensate Olympia for the damage to the paintwork of her car. The question then arises whether that reason to compensate at t_2 is conclusive. The answer,

[20] Voyiakis (n 12) 19.

[21] Diego M Papayannis, 'The Morality of Compensation in Tort Law' (2019 draft) 13.

[22] ibid.

Papayannis says, must be sensitive to the fact that paying compensation would be ruinously expensive to Alexandros: it would, he asks us to imagine, cost the equivalent of nine months' salary. This is a countervailing reason of considerable significance. It should lead us to conclude, in Papayannis' view, that the imposition of this tremendous burden of repair on Alexandros is unjustified.

So the salient feature of this example is that, although Alexandros had a conclusive reason not to damage Olympia's car at t_1, he plausibly lacks a conclusive reason to repair the damage at t_2. Or, at any rate, Alexandros' impoverishment is a highly relevant consideration in determining whether he ought to repair the damage, but not in determining whether he ought to have damaged the car in the first place. Papayannis rightly perceives, in a way Voyiakis does not, that this is not of itself an objection to the continuity thesis, since the continuity thesis holds, relatively modestly, that 'compensation is, *in general*, a means by which we conform to the original reasons we had not to harm, and we should act on the basis of these reasons which lead us to repair the harm done; provided, of course, all else remains equal'.[23] This crucial proviso explains *Ruxley v Forsyth*, where all else is *not* equal: the interposition of the costly-to-remove swimming pool at t_2 explains why the defendant should not be made to act on the reason that has continued from t_1. Nevertheless, Papayannis presses the objection on the basis that Alexandros' case is one 'where the reasons that had sufficient weight to justify the primary obligation not to harm in t_1 do not have sufficient weight to justify the secondary obligation to pay compensation in t_2, *even though no normatively relevant aspect is altered*'.[24] So understood, Alexandros' case

[23] ibid (emphasis in original).

[24] ibid 14 (emphasis added).

is of a different kind from Ruxley Ltd's, and requires a different response: his case, unlike *Ruxley*, cannot be explained away by pointing out that the facts on the ground have changed between t_1 and t_2. Unlike the interposition of the 6 ft 9 inch swimming pool, Alexandros' impecuniosity obtained at both times. 'Nothing has changed since t_1. Alexandros is still as poor as he was', Papayannis says.[25] 'The *ceteris paribus* condition still holds.'

But Papayannis takes an unduly narrow view of how the reasons that apply to Alexandros might have changed between t_1 and t_2. He overlooks a fundamental change—not in Alexandros' means or capacities, but in the kind of action whose performance is at issue. At t_1, the action at issue was a negative one, viz. not to lean against Olympia's car. The reason that he had (its precise characterisation is not important for now) was a reason for him not to lean against Olympia's car. The performance of this action, as Papayannis himself explains, had no monetary cost to Alexandros. There was accordingly no question of his reason to perform it being countervailed by the ruinous financial cost of doing so; there simply was no such cost. When, however, Alexandros fails to conform to that reason, and scratches the car, the reason is no longer (merely) a reason not to lean against the car. It is a reason to repair the damage he caused by leaning on it in the first place. That much is common ground. The crucial point is that this new action, for which *r* has become a reason, is of a different character from the action for which it was a reason at t_1. And that makes all the difference to the rational case for performing it, since, as Papayannis again points out himself, this new action is a very onerous one for Alexandros to perform: it will, indeed, bring him to financial ruin. That is plainly a weighty reason against his

[25] ibid 13.

performing it, and against the law's compelling him to perform to it. What follows is that we have, at t_2, a major obstacle to *r*'s becoming a conclusive reason that did not exist at t_1.

On reflection, therefore, Papayannis's example is not so different from *Ruxley v Forsyth*. Both are cases where the countervailing reasons have changed significantly between t_1 and t_2, because the action for which *r* is a reason at t_2 is much more onerous to perform than the action for which it was a reason at t_1. In that sense, then, Papayannis' example presents no special challenge to the continuity thesis. His example is taken care of, with only minor modulations, by the same explanation that took care of *Ruxley*.

Even so, we should dwell on it a little longer, since it helps to bring out a point of general significance. For, despite their substantial commonality, there is a difference between the two examples. That difference lies in the explanation for the onerousness of the action at issue at t_2. In *Ruxley* the explanation was that the 6 ft 9 inch pool now had to be dug up in order to sink a new and deeper one. In Alexandros' case, by contrast, the explanation is that the action in question has switched from a negative one (to desist from leaning on the car) to a positive one (to repair the damage caused by his leaning on the car), which is much more costly to perform. This change in the character of the action is not just *one* way in which *r* can cease to be a conclusive reason at t_2, it is an exceptionally important way. The general point, of which Papayannis' example is one instance, is explained thus by Raz:

> [M]any reasons to refrain from certain actions are, in normal circumstances, easy to comply with, as conformity does not reduce one's options, and has virtually no cost. Compensating for violation of the reason to refrain will typically be a much

> more burdensome and costly action, which may therefore be more frequently defeated in normal circumstances.[26]

What this helps to show is that, whereas the facts of *Ruxley* may be exceptional, the facts of Papayannis' example are not: they helped to bring out that there is—across a general domain, rather than exceptionally—a powerful set of countervailing reasons that inevitably kicks in at t_2 and makes it much more likely that what was a conclusive reason for action at t_1 is no longer a conclusive reason for action. And this goes a long way to explaining why, in the ordinary run of tort cases, there is a powerful consideration that militates against the imposition of a duty of repair at t_2 even on defendants who failed to conform to a conclusive reason at t_1. This is because tort law's primary duties are, with rare exceptions, *negative* duties, and the remedial response available to it is to impose a *positive* duty of compensation.

So the impression that some have gained of the continuity thesis as an overly dogmatic, and overly demanding, view of the reparative burdens we ought to bear is seriously mistaken. The continuity thesis allows for and indeed requires that one weigh up the reason that has continued against the countless others that apply, at both t_1 and t_2; and, far from insisting that one must always conform to the reasons to which one failed to conform previously, helps to bring out some general reasons against doing so.

[26] Raz, *From Normativity to Responsibility* (n 1) 191.

5.3. The continuity thesis is too weak

That helps to dispel, I hope, the common impression that the continuity thesis insists on conformity to all reasons of repair. Properly understood, it is not so dogmatic. Perhaps the wider set of objections to the continuity thesis, however, is in the opposite spirit. It says the thesis is too feeble: either because it cannot account for the full significance of the defendant's breach, or because it lacks the explanatory reach to account for liability in tort law. These are the objections that this section considers and rejects.

5.3.1. The significance of breach

The first subset of such objections, as just mentioned, says the continuity thesis cannot account for the full significance of the defendant's breach. I think we can see why the thesis is wont to attract responses of this kind. There is something deflationary about it. In fact I encouraged this view by starting my exposition of the thesis (as do its proponents) with thoroughly quotidian examples. They are cases where the conduct in question is relatively innocuous, and often reasonable. They seem far removed from culpable killing or assault, catastrophic motor vehicle or industrial accidents, and other stock examples drawn from tort litigation, where what the defendant has done seems much more morally serious, and to call for a fulminatory response. And it may be worried that the continuity thesis is unable to provide it.

Unsurprisingly, my view is that the thesis's deflationary character is a feature, not a bug. It is one of my objectives to decentre the role of defendant fault: to show that it is not generally necessary to justify tort liability (I showed my hand on this in chapter

3), and that, even insofar as it is necessary, this is to be explained secondarily (in a sense to be explained in chapters 7 and 8). Even apart from these points, however, we should remember the thesis's limited aims. It sets out to explain why we have reasons to repair the harms we have caused. It does not set out to explain all that we might wish to say about the acts that give us those reasons. Certainly the fact that those acts are sometimes *culpable* should not form a necessary part of the explanation of why we have reasons to repair, since, on any view, we have reasons to repair even actions that were not culpable. We may put the point in lawyer's terms: although some actions constitute both a tort *and* a crime, these two facts should not be given a shared explanation, since the overlap is far from total.

This point generalises. Our explanation of why we have reasons to repair should, in the first instance, cover all cases—or, at any rate, all cases where one has reasons to repair in virtue of one's role in causing the harm being repaired. To that explanation we should then add further points, which contribute to our understanding of the relevant subset of cases. I have already made some remarks about that, and will say much more in later chapters: what difference does it make, to the strength of one's reasons to repair, if one's harm-causing conduct was justified, culpable, etc, or if the harm caused was especially serious, burdensome to repair, and so on? But, for now, we should not reject the continuity thesis because we overinflate its *explanandum*.

Be that as it may, important objections have been mounted to the role the continuity thesis ascribes to breach, which it is my task in this section to refute. The writer who has made this point most pertinently is Stephen Smith. In his recent book,[27] which

[27] Smith (n 13).

echoes his earlier writings,[28] he says the continuity thesis makes the defendant's wrongdoing 'irrelevant' to his liability:

> According to the thesis, the legal question facing wrongdoers after they have committed a wrong is the same question they faced before the wrong: What is the best way to comply with my substantive duty? The fact that they previously failed to comply with this duty changes the context, but normatively their situation is unchanged. A wrong is no different from any other action or change of circumstance that affects a substantive duty's content … [It] may be part of the causal explanation for why the wrongdoer's duty takes the particular form that it takes (namely, to pay damages), but its wrongfulness is irrelevant.[29]

We need to bracket, for the moment, Smith's use of the word 'wrong'. It was the argument of chapter 3 that the natural way to interpret his use of the term—as entailing a conclusive reason against committing the tort—is misguided. If that is how one uses the word, then the wrongfulness of the defendant's conduct *should* be irrelevant to one's explanation of the liability. If it were not, we would be powerless to explain cases of tort liability for acting as one ought to. In any event, we do not want to rehash the debates of Part I here. I don't think we need to: we can understand the gravamen of Smith's complaint while leaving open, for the moment, what exactly he means by 'wrong' and its cognates. The point, I take it, is that the continuity thesis cannot account for the full normative significance of the defendant's commission of the tort.

Still, Smith's way of formulating the objection is not very helpful. His contrast between the wrong's being part of the 'causal' or 'context[ual]', but not the

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[28] eg 'Duties, Liabilities, and Damages' (2012) 125 Harvard Law Review 1727, 1753.

[29] Smith (n 13) 183. A very similar objection is made in Victor Tadros, 'Secondary Duties' in Paul B Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press 2020) 188.

'normative', explanation for the duty to pay is overdrawn.[30] It is true that the continuity thesis says the duty to pay is explained by a change in the facts, rather than in one's operative reasons.[31] Indeed it is the essence of the thesis that there is *not* a change in the relevant operative reason: the very same reason that counted against committing the tort at t_1 is, by the continuity thesis, a reason to pay damages at t_2. Even so, the commission of the tort undeniably has 'normative' implications, since it changes what action I have reason to do. It does so, moreover, by changing one's auxiliary reasons—which are themselves, of course, reasons.[32] It is by changing these reasons, *by* changing the facts, that the same operative reason becomes a reason for a different action. So the commission of the tort changes the actions the tortfeasor ought to perform, and does so, naturally enough, by changing the reasons that apply to him. That is surely, *pace* Smith, a 'normative' change that occurs by virtue of the tort. Nor is he right to say that 'the continuity thesis grounds the substantive duty to pay damages in the persistence of the original substantive duty, *not* the fact that the wrongdoer has committed a wrong'.[33] Both are bound up together; the role of the latter is irreducible, since without it we cannot understand why the reason that has continued is now a reason for a different action—one that is reparative.

So far this may seem like nit-picking, and indeed it is a small point. Yet it alerts us to the fact that Smith owes us a more precise explanation of what the continuity thesis is lacking; and, when his objection is demystified in this way, it quickly loses traction. I take it that his point is that, even if the continuity thesis ascribes normative

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[30] Compare Sandy Steel, 'Compensation and Continuity' (2019 draft) 18.

[31] See Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999) 33–35.

[32] ibid.

[33] Smith (n 13) 185 (emphasis added).

significance to the commission of the tort, it cannot show why it is *a bad thing*. But this betrays a simple misunderstanding of the thesis. For example, Smith suggests that the problem with the continuity thesis is that it implies that 'the wrong can be retroactively undone'.[34] If that were true, it would indeed be a point against the continuity thesis. But it is not true. The version of the continuity thesis I am defending rejects any thought of this kind.[35] It is integral to it that the failure to conform to the reason at t_1 leaves an irreparable conformity deficit—at least in the kinds of cases with which tort liability is concerned.

Now, it may be true, in a manner of speaking, that the continuity thesis makes the defendant's conformity deficit irrelevant *to his duty to pay*. The duty to pay arises at t_2 because, and to the extent that, notwithstanding one's wrongdoing, one can still conform to the reasons to which one failed to conform at t_1. That states the continuity thesis itself. But, of course, one should not forget that one has failed to conform at t_1. And, almost invariably, one's prospects of conforming to those reasons at t_2 are not perfect. Even if one does all that one can to conform to them at t_2, one can do so only incompletely. '[A]ll possible means of correction, even if conscientiously and promptly implemented', Gardner explains, 'still leave too great a rational remainder behind, too much in the way of unsatisfied or imperfectly satisfied reasons, for the wrongdoing to have been averted by the act of correction alone.'[36] That conformity

[34] Smith (n 28) 1753.

[35] It may have more traction in relation to Weinrib and Ripstein's version, which says it is the *duty* that continues: see Weinrib (n 10) especially at 135; Arthur Ripstein, 'As If It Had Never Happened' (2006) 48 William & Mary Law Review 1957. See further Zoë Sinel, 'Understanding Private Law's Remedies' (PhD thesis, University of Toronto 2013) 144–147.

[36] Gardner, 'What Is Tort Law For?' (n 1) 34.

deficit is an irreducible normative loss that has occurred by virtue of one's wrongdoing, and which one can do nothing to mitigate.[37]

This corollary to the continuity thesis, then, implies precisely the opposite of what Smith says. The continuity thesis itself might not show what is lamentable about the commission of torts, but it isn't meant to. What does the work are the reasons that one *cannot* conform to, try as one might. And that normative deficit, needless to say, is a bad thing.

The same line of thought takes care of another of Smith's misleading formulations. In a nutshell, he says that the continuity thesis is committed to the 'Holmesian heresy' I discussed in chapter 2. For it 'flows naturally' from the continuity thesis, he says, that 'citizens can choose to pay damages rather than perform their primary duties'.[38] This is because the payment of damages just is an alternative way of conforming to the primary duty (or, rather, the reasons that ground it). But that is, again, a misunderstanding. In a manner of speaking, the payment of damages is another way of doing what one ought to have done at t_1. But it is certainly not an *equally good* way of doing so. If citizens were to choose to pay damages instead of performing their primary duties, they would leave an irreducible conformity deficit. The continuity thesis therefore denies, with reason, that paying damages is just as good as performance—and indeed Gardner spells out the grim implications of this for Holmes.[39]

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[37] ibid 35.

[38] Smith (n 28) 1752–1753.

[39] Gardner, 'What Is Tort Law For?' (n 1) 35 fn 57.

In sum, it is most unpersuasive to attack the continuity thesis on the basis that it cannot show what is wrong with committing torts. The thesis does not deny that there is something wrong with it. In fact it provides an account of what is wrong with it.

5.3.2. The stringency of repair

Smith therefore overstates things when he says the continuity thesis cannot explain why breach has any normative significance at all. But it may nevertheless be that it cannot account for its *full* normative significance. It may be said, in particular, that it cannot account for the *stringency* of one's reasons of repair.[40]

For one thing, the continuity thesis says the reason to repair just is the reason to which one ought to conform in the first place. Sometimes one feels, however, that wrongdoers have a *heightened* responsibility to make amends. The case for doing so seems to go beyond the case that existed to conform in the first place. But I think that can be explained entirely consistently with the continuity thesis.

Take the man who breaks his promise to take his kids to the beach. It seems likely that his breach will have *further* effects, beyond the brute fact that he does not take them to the beach. It seems plausible that, in some circumstances, his wider relationship with his children will be affected. He might have damaged his relationship with his children, undermined trust and confidence between them, given the impression that he lacks respect for interests, and so on and on. The possible long-term damage to his relationship to his children gives him special reasons to arrest this slide. But *these*

[40] Tadros (n 29) 189. Compare Steel (n 30) 19 (considering this objection).

reasons need not be the ones that continued (though they may be): plausibly the man did not have them *until* he put his long-term relationship with his children in jeopardy. Or, at any rate, the reasons became pressing only when the relationship began its downward slide. Now that his children suspect he lacks concern for their interests, he has a specially strong reason to counteract that impression: he should now take more urgent steps to make it up to them, shut his mind still more dogmatically against the inconvenience and opportunity cost of doing so, and so on. But of course he did not have this reason, or at any rate not such a strong reason, when his children did not have any such impression.

Such considerations seem to me to show the grain of truth in so-called 'reconciliation theory', often presented by writers such as Linda Radzik as a rival to the continuity thesis's explanation of reasons of repair.[41] Radzik says the continuity thesis is 'too narrow'[42] and thus deficient in comparison to reconciliation theory, which 'provides a better, more comprehensive understanding'[43] because it 'attends to the broader moral context'.[44] Whereas the continuity thesis is preoccupied with 'the duty that was owed and not fulfilled', reconciliation theory attends to the need to repair the relationship between the wrongdoer and his victim, who must be reassured that she will be treated with adequate respect by the wrongdoer, despite his prior failings.[45] The wrongdoer must ensure, for example, that the victim is able to 'let go of anger' and that

[41] eg Linda Radzik, 'Gardner on Corrective Justice: Comment on From Personal Life to Private Law' (2019) 19 Jerusalem Review of Legal Studies 21.

[42] ibid 21.

[43] Linda Radzik, 'Tort Processes and Relational Repair' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 239.

[44] Radzik (n 41) 26.

[45] ibid 26–27.

'trust and cooperation' between the two will be restored.[46] These sorts of remedial measures cannot be explained, Radzik suggests, by the continuity thesis.

That may be true, but for reasons already given provides no objection to the continuity thesis.[47] It does not try to cover the field. That in particular moral contexts there are reasons for wrongdoers to repair their actions that derive from, say, the need to restore trust between the parties, may add to the rational case for performing the reparative action. But those reasons will not always be present in all contexts in which repair is called for, and that counts strongly against elevating them into an account of reasons of repair generally. Moreover, these reasons of reconciliation will often provide me with additional reason *to do the very same thing* that the continuity thesis gave me reason to do. It is *by* taking my kids to the beach at the next available opportunity, or otherwise to the cinema, etc, that I will be able to reconcile with them. For, by performing that action I may demonstrate to my children (with help, no doubt, from some expressions of fastidious commitment to spending time with them, of mortification at having failed previously, etc) that I am, contrary to the impression created by my initial failure, attuned to what I owe them. But reconciliation theory would need to explain why it is that the performance of *that* action, in particular, would tend to promote reconciliation. And that, it seems to me, requires the continuity thesis, with which reconciliation theory must work in tandem.

This provides one route by which proponents of the continuity thesis can respond to this new objection. They illustrate one way in which the rational case for making

[46] ibid 27.

[47] For a fuller response to reconciliation theory (which is not my topic here) see, for eg, Gardner, *From Personal Life to Private Law* (n 5) especially at 90–98.

amends can be (in some respects) stronger than the case for conformity in the first place. One's reasons of repair are, in that sense, *more* stringent than the initial obligation. And that is fully compatible with the fact that the continuity thesis says the reason for making amends *just is* the reason to which one ought to conform in the first place.

Of course there may be doubts about how far my preceding explanation extends. My example relied upon the need to restore trust in an enduring relationship of an especially close kind, and those relationships do not exist in typical private-law contexts. It seems to me, however, that analogous considerations may be used to establish the same point, at least in some such contexts.[48] But I will not press that point here. Rather, I will turn to some other, general reasons why reasons of repair might seem more stringent than the initial reasons.

One such reason is obvious—not least because I mentioned it earlier. An action may be more or less onerous or burdensome to perform. If I have reason to attend my friend's birthday party, it will be more onerous to conform to that reason if he lives an hour away than if he lives next door. It means the performance of the action demands more from me, requires me to make a greater sacrifice of other things of value. (Think of how tiring it will be to drive there! Think of all the things I could have been doing during that time instead! And so on.) Now, remedial actions have a tendency to be more burdensome to perform than the initial action—this was the point I made earlier.

[48] For example, contractual obligations generally derive their importance from their assurance value: Joseph Raz, 'Is There a Reason to Keep a Promise?' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014). Once that value is threatened, by virtue of their initial breach, it becomes even more urgent that it be restored by assiduous performance of the second-best obligation.

Hence they, too, tend to make greater demands of the actor, require him to make a greater sacrifice, etc, than did the initial action. And that is 'stringency' of a kind. So that feature of remedial duties can be accounted for, to that extent, in the most humdrum way.

But this is not, perhaps, the kind of stringency that objectors to the continuity thesis have in mind. For the fact that a certain reason is difficult to conform to is, all else being equal, a reason *against* conforming to it. That was the elementary point I emphasised in my discussion of *Ruxley v Forsyth*. Hence the 'stringency' that I identified in the previous paragraph does not take us very far. That kind of stringency obtains only up to a certain point. It obtains, to be precise, only to the extent that the reason in question is a conclusive one. As long as this is so, an increase in that the burdensomeness of conforming to it makes the reason more stringent, in the sense identified: conforming to it is more demanding than it would otherwise be. But as soon as the reason ceases to be a conclusive reason (perhaps in virtue of that very burdensomeness), it cannot be stringent in the sense identified. The demands it places upon one are no longer stringent, since one ought not to conform to it at all.

When will this point be reached? It depends how weighty the reason is, and whether it is protected by mandatory force. If it is protected by mandatory force, then the burdensomeness of conforming to the reason is excluded altogether (or at least much diminished).[49] To that extent, mandatoriness does a great deal to explain the stringency of remedial duties.[50] Even with reasons that lack mandatory force, but are very

[49] The parenthetical phrase is to allow, once again, for Stephen Perry's point, noted at section 4.5.1 above n 55.

[50] Whether it states a *necessary* condition for having a remedial duty is a proposition I take up (and reject) in the next chapter.

weighty, they may continue to be conclusive even as the burdensomeness of conforming to them is steadily ratcheted up. One ought to conform to such a reason, even when the burden of doing so is extreme, because the countervailing reasons borne of that burden are nevertheless outweighed.

We can agree, however, that the point will be reached sooner or later. And that invites us to consider other ways of accounting for the stringency of remedial obligations that the objector perceives.

This returns us to Papayannis. When I last mentioned him, I said he had misrepresented the continuity thesis, suggesting it was more pig-headed about one's reasons of repair than in fact it is. I explained why it should be understood as a thesis about *pro tanto* reasons, from which it inevitably follows that countervailing reasons will sometimes defeat the reasons one has to repair one's harms. Papayannis may welcome all this, insofar as it explains that the continuity thesis is sensitive to the means of the potential duty-bearer—in his example, Alexandros. Yet he thinks an objection now looms from another direction.[51] Whereas he initially argued the continuity thesis was too strong, it now seems he would regard it as too weak. After all, my remarks suggest Alexandros may be let off the hook by virtue of the extreme burden that would be imposed on him by having to compensate. But is it really true that Alexandros is let off the hook merely because of how burdensome it is for him to make the payment? You may well think that Alexandros's reasons to compensate are stickier than this implies. They seem to be rather resistant to the consideration I identified, and tend to

[51] Papayannis (n 21) 15.

endure, at least up to a point, notwithstanding how burdensome it will be for him to conform.

I have already offered some cautions here: Alexandros would be let off the hook only if, or only beyond the point that, the burden suffices to defeat the reasons of repair. There is a more far-reaching response to the objector, however—a more fundamental reason, in other words, why Alexandros would not be let off the hook merely in virtue of the burdensomeness, given his limited means, of making repair. What we need to do is widen our focus from the burden of conforming to one's duty of repair, and remember why it was incurred in the first place.

This is the important point of which Voyiakis reminds us.[52] According to it, my discussion hitherto has drawn too neat a distinction between the Alexandros's reasons at t_1 and his reasons at t_2. I may have suggested that the much greater burdensomeness of conforming to *r* at t_2 led, rather straightforwardly, to the conclusion that he should not do so, regardless of the fact that he ought to have conformed to it at t_1. But the two cannot be driven apart in this way. Though it is true that the continuity thesis does not demand pig-headed conformity to all reasons of repair, come what may, it does not confer a licence to ignore them as soon as they become onerous either. This is for a simple reason: the justifiability of Alexandros's bearing the burden to compensate is a function not only of the magnitude of the burden, but also of how easily he could have avoided it. If it was a very large burden, but one he could very easily have avoided in the first place, then we should not feel *too* sorry for him when he comes to labour under

[52] Voyiakis (n 12) 33–34.

it. And this 'avoidability criterion' has the effect of binding t_1 and t_2 together, and reducing in importance Alexandros's limited means. As Voyiakis explains,

> the fact that Poor [read: Alexandros] has an unjustly small share of resources may make it harder for Poor to *discharge* the burden of repair, but it does not make it harder for Poor to *avoid* that burden.[53]

Why so? Because all he had to do to avoid the burden of repair was conform to the reasons he had at t_1. All he had to do, in other words, was avoid scratching Olympia's car. And *that* was not, of course, a difficult thing for him to do: it is something a poor person can do just as easily as a rich one.

Hence, as Voyiakis continues, 'we do not need to appeal to some special normative idea … to block considerations of distributive justice from affecting whether Poor may be required to bear the burden of repair'.[54] It is explained straightforwardly by the existence of the avoidability criterion: this means that the burden of repair is, by and large, insensitive to the defendant's resources, provided only that the original burden was insensitive to them—since discharging the original burden just is a way of avoiding the burden of repair. Despite the great burden of his making repair, he has, in short, brought it upon himself.

This is an elegant argument, which seems to me to account for the relative insensitivity of Alexandros's reasons of repair to his meagre means.[55] Naturally there

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[53] ibid 33 (emphasis in original).

[54] ibid 34.

[55] Voyiakis takes this argument too far, in my view, since he believes it provides a *complete* explanation of the normative significance of the defendant's breach. That is to collapse, almost entirely, the distinction between duties of repair that are responsibility-based and those that are not. Assessing each move in Voyiakis's argument would, however, take me too far from my topic here; the important points are the moderate ones in the text on which he and I agree.

may be debate about the moral force of the avoidability criterion relative to the size of the burden for the duty-bearer. This is nothing other than the perennial debate about the proper weight to be attached to personal responsibility in a world of distributive injustice, which I cannot hope to resolve here. For which burdens are the less well-off responsible? Even for those they are, should society not relieve them of this burden, at least when it becomes overwhelming? And so on. Voyiakis's suggestion that the avoidability criterion 'block[s]'[56] entirely the consideration of Alexandros's resources may seem implausibly harsh. But I think we can avoid this debate, as long as we agree that both considerations are, at least, *relevant* in determining whether Alexandros ought to bear the burden. What the argument relies on, in other words, is that the case for *A*'s conforming to a reason is a function of *both* the burdensomeness of his doing so *and* the extent to which *A* had the opportunity to avoid incurring that burden. To say anything more precise about the function is likely to prove controversial—but then that stands to reason, since the readiness with which Alexandros should be relieved of his burden is also likely to be controversial. The point is that, insofar as his reasons of repair do not dissipate in proportion to their demandingness, that can be accounted for by means of the avoidability criterion—and hence this fact poses no threat to the continuity thesis.

5.3.3. Morality, but not law?

In these ways, I think the continuity thesis can amply explain, or is at any rate fully compatible with, the stringency of our reasons of repair. The previous section,

[56] See again Voyiakis (n 12) 34. Elsewhere in the book, however, it becomes clear that Voyiakis strongly opposes any such view: see especially his ch 4, and the remarks at 65–67.

however, comes with a coda. It is necessitated by the perhaps distinctive stringency of duties of repair *in law*. For some objectors have suggested that, even if the continuity thesis can plausibly account for the position in morality, perhaps in the ways discussed above, that is insufficient to close the gap with tort law, whose duties of repair seem uniquely demanding and insensitive to the considerations I have just been discussing. In this way, the objection I considered in the previous section may be refined, and perhaps given added bite.

That may indeed be the best way to understand Papayannis's own view on his example of Alexandros and Olympia.[57] In tort law, after all, Alexandros would be held liable to compensate Olympia, with no accommodation made *at all* for the ruinous effects on him. Hence we should accept that the continuity thesis is valid, Papayannis comes to suggest, but reject it *as the explanation of tort liability*. Precisely because the continuity thesis is sensitive (at least up to a point) to the potential duty-bearer's means in a way that tort law is not, it cannot illuminate our understanding of the latter. Papayannis may come to accept, in other words, that the continuity thesis is not as dogmatic as it may appear—but so much the worse for it, then, as the explanation of our dogmatic tort law.

This refinement of the objection does little to strengthen it. First, I'm not sure Papayannis is right to imply that tort law pays *no* attention to defendants' means in determining whether to hold him liable. There seems to me little doubt that the rapid expansion of tort liability over recent decades in three prominent domains—product liability, vicarious liability, and public authority liability—is explained, at least in part,

[57] See Papayannis (n 21) 12–13.

by the fact that the defendants in those classes of cases are wealthy corporations, or in the last case the state, who can bear the liabilities with relative ease. Indeed the courts sometimes say as much, as where they identify the defendant's 'deep pockets' as a reason for holding it vicariously liable.[58] Similar points can be made about the ubiquity of insurance, which eases the burden of liability on defendants and seems almost certainly to have resulted in greater liability. True, these developments are controversial, and usually associated with instrumental accounts of tort liability. I will argue later that this association is overly simple.[59] For now, we can see there is some doubt about the descriptive claim on which Papayannis' objection rests.

My second point may be more important. Insofar as the courts don't take defendants' resources into account more often—or don't take it into account in relation to the *particular* defendant before them—this is easily explained on rule-of-law grounds. There are obvious perils in allowing a court to draw distinctions between persons based on its sense of whether they ought, in light of their individual characteristics, to bear them. Hence the case against giving courts a discretion to deny, or attenuate, liability on the basis of the defendant's relative wealth.[60] That would take us too close to the kind of palm tree justice it is part of the purpose of the law to prevent. It is better that courts apply stable, general, and predictable rules, rather than possessing that kind of power. Accordingly, the fact that the law is more rigid than the continuity thesis itself should not surprise us: it is what one would expect when one attends not

[58] eg *Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56 [35].

[59] See chapter 8 below.

[60] Very occasionally it does do so, however: see eg *Patel v Ali* [1984] Ch 283 (refusing specific performance on the grounds of the extreme 'hardship' it would cause to the defendant, because of her dire financial circumstances).

only to the reasons resting on defendants but on the reasons that apply to the law. Any added stringency that derives from the role of law, therefore, can be readily explained, and does not count against the continuity thesis.

Third, however, any remaining disconnect between the law and its rational justification should be an embarrassment not to the theorist but to the law. That it works in blunt and inegalitarian ways, imposing crippling liabilities on those like Alexandros to repair Olympia's car, or on those who have the misfortune to injure those with the earning potential of Mick Jagger,[61] is a fact for which it has been enduringly criticised. Indeed, the objection I am considering is usually made vivid by pointing out just how rigid the law's duties of repair can be. 'How calamitous for the defendant, how unfair and unyielding of the law!' the objector invites us to think. But it seems strange to draw, from that, a criticism of the continuity thesis, which is not itself so unfair or unyielding.[62] One should not make the Panglossian assumption that 'the common law is the best of all possible laws', and reject theoretical accounts of it that do not show it to be so.[63] The law answers to the standard of rational justification, not the other way round.

[61] James Penner, 'Don't Crash into Mick Jagger When He Is Driving His Rolls Royce: Liability in Damages for Economic Loss Consequent upon a Personal Injury' in Paul Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press 2020).

[62] Compare Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 Georgetown Law Journal 695, 728–729, who acknowledges that his argument might support a 'normative critique' of tort law, but says this is irrelevant because he aims 'to interpret tort law' rather than critique it. I am not sure I recognise (or understand) this deep distinction between the two activities.

[63] Raz, *From Normativity to Responsibility* (n 1) 258.

5.3.4. Contract, but not tort?

Perhaps more pressing are certain other reasons that have been suggested to me for doubting that the continuity thesis explains tort liability. Here the objectors are usually willing to grant, at least *arguendo*, that the continuity thesis is valid. They grant it is true, in other words, that when we fail to conform to a reason at t_1 that reason does not disappear, but remains a reason at t_2, and thus can explain the rational case in favour of performing certain reparative actions. And they seem prepared to grant also (in a way the objection considered in the immediately preceding subsection did not) that the thesis can explain some *legal* duties of repair. But they say the thesis cannot explain the duties of repair that are embodied *in tort* law. Its explanatory reach is limited, the objectors say, in some important way.

The gist of these objections, as my section title suggests, is that the continuity thesis may succeed in explaining (some) contractual liability, but not tort liability. Certainly my exposition, like that of the thesis's architects, relied upon examples of promise-keeping, which bear an affinity with contractual liability. The objector says, in effect, that these examples cannot be extended, in the way that I am hoping, to tort. Why might that be? There are several possibilities.[64] The first, partly touched upon already, is that contract law typically deals with positive obligations, whereas tort law typically deals with negative obligations. The second is that contract law typically creates obligations to secure results, whereas tort law typically creates obligations to make best efforts. In both cases, the idea seems to be that the continuity thesis can explain how

[64] Variants of this objection have been put to me orally by Roderick Bagshaw and John Goldberg. Similar ideas are reflected also in Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart 2019) 29–30. McBride, in turn, cites Zipursky (n 62) 727–729.

breach of the first-mentioned kind of obligation gives rise to duties of repair, but it cannot do the same for the latter. And to similar effect, third, is another objection from Steve Smith:

> [T]he continuity thesis easily explains orders to perform already-breached contractual duties. My duty to pay you a contractually promised sum of money survives my failure to pay the sum on time. However, the reason that the continuity thesis easily explains such orders is that there is an obvious and straightforward sense in which it is possible for me to comply with my duty to pay you a sum of money notwithstanding that the payment may be late. Paying late is still paying. Cases in which the remedy for a contractual breach is damages are different. In such cases, it is typically impossible for the defendant to perform its duty, even in a second-best version of performance.[65]

Presumably Smith would turn this point about contractual damages also against damages in tort—indeed he would probably say the point applies here *a fortiori*.

The general idea, then, can be brought out with some examples:

> *Pool*. *D* owes a contractual duty to *C* to build a swimming pool. When he is halfway through the job, he stops and refuses to do any more work. The court orders *D* to complete the job.

> *Widgets*. *D* owes a contractual duty to *C* to deliver 500 widgets by 1 January. He fails to deliver them on time. The court orders *D* to pay damages in the amount required for *C* to buy 500 widgets on the market.

> *Driving*. *D* owes a duty in the tort of negligence to drive carefully. In breach of that duty, he fails to check his rear-view mirror before changing lanes, and crashes

[65] Smith (n 13) 184.

> into *C*'s car. The court orders *D* to pay damages in the amount required to repair *C*'s car.

Each of the objectors points out, correctly, that the reparative action required of *D* in *Pool* is very similar to the action the non-performance of which is being repaired. He is ordered to do the very action that was required at t_1, albeit perhaps a few days later. That the law is trying at t_2 to secure conformity to the same reasons with which it was concerned at t_1 seems very plausible. By contrast, the objector continues, tort law's reparative measure requires an action very different to the action being repaired. The action initially required in *Driving* was that the defendant check his rear-view mirror. The action now required, at t_2, for his failure to do that is to pay a sum of money. The gap between the two is vast. It is not plausible, the objector concludes, to think that the reparative action is explained by the same reason as the initial action. The 'key objection' to the continuity thesis, as McBride puts it, is simply that 'there is no real continuity' between these two duties.[66]

The three forms of the objection have all this in common. They differ in where they locate the discontinuity. They differ, in other words, in how they interpret the fault line between the cases that are plausibly explained by the continuity thesis and those that are not. The first objection I mentioned distinguishes *Pool* and *Widgets*, on the one hand, from *Driving*, on the other, because the first two involve positive obligations at t_1 whereas the latter involves a negative obligation at t_1. On this approach, the fact that this negative obligation has morphed into a positive obligation at t_2 is what makes it implausible to regard the performance of the latter as a means of discharging the

[66] McBride (n 64) 30.

former. The second objection says the difference between the examples lies in the fact that *Pool* and *Widgets* involve obligations at t_1 that required *D* to secure a result. The reparative action required of *D* in these cases was evidently directed at securing that same result. Hence the continuity is evident. In *Driving*, by contrast, *D*'s initial obligation was to drive reasonably. But paying a sum of money continuous with *that*?

Smith's version of the objection is slightly different. He grants only that *Pool* is explicable by the continuity thesis. The reparative action in *Widgets*, paying a sum of money, is already too far removed from the action it repairs, namely delivering some widgets. It thus stands with *Driving* as an example of a reparative action that is not explicable by the continuity thesis. But the important upshot is, of course, unchanged: the continuity thesis cannot explain the characteristic tort example, *Driving*.

None of these objections is, in the end, convincing. The problem recalls one that surfaced earlier. It stems from the popular maxim that private-law remedies require one to 'do the next best thing', of which the continuity thesis is often said to offer an account. But the maxim is very misleading. We have already encountered one respect in which that is so. Voyiakis, as we saw, placed much emphasis on it, and was accordingly led astray. The mistake he made was to think that, according to the continuity thesis, one *must always* do the next best thing. Hence he leapt to the conclusion that in *Ruxley* the defendant must, according to the continuity thesis, re-sink the pool. But that is not so. The continuity thesis does not say one must always do the next best thing. It says only that one has a reason to do the next best thing. Whether one ought, all things considered, to conform to that reason is not a question the

continuity thesis claims to answer. But we can say with confidence that the answer will sometimes be negative.[67]

The second way the maxim tends to mislead—and the one pertinent here—is that it suggests the *action* that one ought to perform at t_2 must be *as much like* the earlier action that one failed to perform as possible. That might seem the natural way to make sense of the idea that the reparative action must be the 'next best'. Hence, the thinking goes, the remedy offered in *Pool* and *Widgets* seems plausibly explained by the continuity thesis. In *Pool* the defendant is being required to do the very same thing he had reason to do at t_1; all that has changed is the timing. In *Widgets* the defendant is being required to do something that will bring about the very same thing he had reason to do at t_1. In *Driving*, however, the difference between the actions is stark. And that is taken to count against the attempt to explain it using the continuity thesis. This is, indeed, the animating thought that seems to lie behind all three variants of the objection: the reparative action is simply too different from the initial action to be explained as continuous with it, as an attempt to do the action that is next best.

But this line of thought is mistaken. The continuity thesis does not say, or imply, that one must perform the action that is most similar to the action one failed to perform at t_1. This is not only because one may (as I explained a moment ago) lack a conclusive reason to perform the action for which, by the continuity thesis, one has a *pro tanto* reason. It is because, even to the extent that the reason that has continued is conclusive, it may be a reason for a very different action. The thesis says the *reason* is the same,

[67] The answer might also be that one should conform to that reason *only to a limited extent*. Perhaps one should (as was decided in *Ruxley* itself) pay *some* compensation to Mr Forsyth, but not re-sink the pool, since in respect of *that* action the countervailing reasons are formidable.

but it does not follow, and it is not the case, that the *action* must be the same, or even similar.

Suppose I miss the 12h15 bus to London, and the next leaves a full hour later. Perhaps I should wait for it, but more likely I should instead catch the train that leaves at 12h25: that will make it more likely that I'll make it in time for the lecture. It all depends on what will best secure conformity to the reasons that apply to me. Certainly the fact that catching the 13h15 bus is more like the action I initially failed to perform does nothing to recommend it. And when I fail to take my kids to the beach, it would be unduly stubborn to insist that I take them to the beach the next day even if it is pouring with rain.[68] That may be the action that most resembles the action I wrongly failed to perform at t_1, but that is hardly a point in its favour. The way to make it up to them is to take them to the cinema, to the museum, or whatever. Perhaps we can say, more generally, that I should ask them what they would most like to do: and if they suggest something with no resemblance to going to the beach at all, that is no point against my complying.

So it is perilous to describe these remedial actions as 'doing the next best thing'. If we are speaking more precisely, we would say that the remedial action must be the best way of conforming to the reason to which we failed to conform at t_1. Otherwise, we are wont to short-circuit the enquiry to which the continuity thesis truly directs us, and will try to identify the action that in its content seems *most like* the action that the defendant failed at t_1 to perform. In truth, however, the best reparative action to perform depends on all the surrounding circumstances—what is the quickest form of

[68] Compare Gardner, 'What Is Tort Law For?' (n 1) 33.

transport? what's the weather like? etc—and humdrum changes to these can affect what action is best. But, even as the right reparative action starts to look very different from the action one failed to perform in the first place, it is still evidently an attempt to conform to the same reason. Surely the fact that the train leaves sooner than the bus, or that it is raining, does not have the power to change *that*.

The objections I am considering in this section thus seem to trade on a simple error. The remedial action in *Driving* is simply too different, they urge, from the action the defendant initially failed to perform, to be plausibly explained by the continuity thesis. But the similarity of the action required at t_1 to the action required at t_2 is not the right thing to focus on.

When we realise that this is the wrong way to think about the continuity thesis, the objection seems to me to lose its allure. But it does not refute it. The fact that the actions required at t_1 and at t_2 are very different does not preclude their being two different ways of conforming to the same reason. Still, it remains to be shown that they *are* two different ways of conforming to the same reason. I took some steps in this direction in my discussion of Papayannis's example, which involved a negative action (not to scratch the Rolls Royce) turning into a positive one (to pay compensation). This led me to a discussion of Raz's point about the difference between positive and negative obligations, which accepts that the difference is significant—but in a way that is predicted by, rather than confounding of, the continuity thesis.

Here is an attempt to go over that same ground in a slightly more methodical fashion, by constructing a simple chain of examples. I will try to show that there is no point in the chain at which the explanation for the reparative action plausibly changes character. Accordingly, the best inference to draw is that, if the continuity thesis explains one of

the links in the chain, it explains them all. The disconnect that the objectors identify does not, then, plausibly exist.

Vase.

1. Visiting your house one day, I walk past an attractive vase that is perched on a cabinet in your living room. I ought not to bump into it.
2. I clumsily bump into the vase, which starts to wobble. I ought to stabilise it in case it falls over.
3. The vase wobbles off the cabinet. I ought to try and catch it before it hits the floor.
4. The vase has landed on the floor, but fortunately remains intact. I ought to pick it up and put it back on the cabinet.
5. The vase has smashed on the floor. I ought to acquire a replacement for you.
6. The vase has smashed on the floor, as in 5 above. But it is a rare vase and you are a fastidious vase aficionado, so I doubt I can replace it to your satisfaction. I ought, therefore, to give you the money necessary to buy yourself a replacement.
7. The vase has smashed on the floor. You are a dealer in vases and intended to sell this one soon. I ought, therefore, to give you its market value.

This simple series of examples is, I hope, plausible, in the sense that it seems rational to believe that in the circumstances stipulated the best thing to do is that action mentioned. But, if that is so, it suggests to me there is little to recommend the objector's line of thought. In reflecting on these examples, it seems very difficult to me to identify the kind of fault line on which the objector relies. Even as the reparative action changes character in line with the circumstances, it seems difficult to argue that the case in favour of performing it has fundamentally altered.

First, take the move from 1 to 2. It seems very hard to deny that the reason I have to stabilise the vase is the same one I had not to bump into it in the first place—the reason is (something like) one not to damage your possessions.[69] Yet in the move from 1 to 2 the action required has changed from a negative action to a positive one. So it seems very implausible that this particular change in the character of the action is one the continuity thesis cannot explain. The transition from a negative to a positive obligation is, in the end, 'relatively superficial'.[70]

The objector may say it is not the change from a negative action to a positive action *per se* that is inexplicable, but the change from an action that is easy to perform to one that is very onerous (which the negative–positive distinction is only a proxy, as I have kept saying). But that, too, is something compatible with the continuity thesis, as becomes clear as we move step-by-step from 2 to 7. The actions become increasingly onerous, but that does not seem to present any difficulty for the continuity thesis. The change in the onerousness of the actions required seems to be a simple function of the change in the facts: whether the vase has fallen over, whether it has smashed, etc. I can see no plausible case for positing a discontinuity in the reason to which these actions aim to conform.

The only step in the series that seems like it might be controversial is that from 4 to 5. Certainly the reparative action required in 5 has become, at this point, much more onerous. But it became so, it seems plain, only because of contingent features of the

[69] It may be objected that this does not state the ultimate, or non-derivative, reason not to bump into the vase. I don't think this matters: one can simply replace the reason I have stated with whatever reason it is taken to facilitate. The upshot will be the same.

[70] Gardner, 'What Is Tort Law For?' (n 1) 40. It may be that the positive–negative distinction is more significant when comparing *primary* obligations, as well-known debates about the act–omission distinction suggest.

facts, and in particular the fact that in 5 (unlike in 4) the vase was insufficiently strong to withstand the drop. Hence, once again, the continuity thesis seems to provide the right explanation: the (operative) reason I have for making repair remains the same throughout; what has changed is only the facts (or the auxiliary reasons), which in turn change what action that reason is a reason *for*. And, again, the mere fact that the action in 5 is more onerous than that in 4 does not justify doubts about this—since the action became more onerous in each of the prior steps too, without plausibly causing the thesis any trouble. The move from 4 to 5 seems simply to be a further iteration of the moves between 1, 2, 3, and 4, except that the change in the facts has had more dramatic implications for the actions that can now further conformity to the reason in question: since the vase is broken, damage to it can no longer be *prevented*; all that remains to be done is for the consequences of the damage to be ameliorated in some other way.

The best conclusions to draw, then, are surely these: the reason, *r*, that one had to perform the action in 1 is also the reason that one has to perform the action in 2, 3, and 4; and, given that this is so, notwithstanding the increasing onerousness of the action for which *r* is a reason, it is also the reason that one has to perform the action in 5, 6 and 7. (And we might add that, to the extent that the much-increased onerousness of the actions at 5, 6 and 7 affects the case for performing those actions, that is accommodated, consistently with the continuity thesis, by the logic outlined in earlier sections.) To instead take the view that there is some radical discontinuity when we move from 4 to 5, such that the explanation that sufficed in each of the prior moves must be thrown out, seems like the wrong inference to draw.

That seems to me an adequate response to the first form of the objection. But the person who understood the objection in the second way I mentioned—as turning on the distinction between obligations to secure results and obligations to make best efforts—

may still not be satisfied. They may say *Vase* was rigged because I implicitly used an obligation to secure a result—viz. one not to damage the vase—in step 1. This made it easier, they may continue, for me to present the reparative actions as attempts to conform to the very same reason—since they were directed to securing the very same result. If, instead, we interpret the action that I ought to have performed in step 1 as being one to *take care* to avoid bumping the vase, then the continuity between that action and the actions in 2 to 7 is less plausible. It brings the example closer to *Driving*, where, the objector claimed, there is something odd about claiming that my failure to check my rear-view mirror and my having to compensate the person whose car I damaged are explained by the very same reason.

I have already suggested it is not quite right to think about the similarity between the *actions* as the pertinent question. In any event, the objection can be easily addressed, by adding only a small further point to the ones already made. The truth is that the objector's new point is a red herring. For the reasons I have to take care to avoid damaging the vase are, surely, *derivative* reasons. I should take care only because if I do so I am less likely to damage the vase. The reasons for taking care acquire whatever force they have only because of this facilitative relationship with the reasons that I have for not damaging the vase. So reinterpreting step 1 as being about the reasons I have to take care does not change anything of significance. It draws our attention away from the ultimate reason in question—not to damage the vase—but inevitably our attention must return to it as soon as we recognise that our reasons to take care are derivative of it.

5.3.5. Repair, but not money?

That concludes my discussion of the objection which, while granting the continuity thesis can explain (some) contractual remedies, says it cannot explain those in tort. You will notice, though, that I have not yet said much about steps 6 and 7. They become relevant now, when I turn to a final problem, the gravamen of which is this: 'Why is tort liability always about *money*?' The problem is perennial, but has come of late to be turned against the continuity thesis specifically,[71] since to the general mystery of why the commission of a tort always attracts a duty to pay money it adds the further claim that this fact is to be explained by the very same reason that explained the wrongness of the tort. The continuity thesis is thought uniquely susceptible to the objection, in other words, because tort law's fixation upon monetary remedies seems especially odd if those remedies are means of conforming to the same reason that underlay the original, *non*-monetary obligation.

Objections of this kind tend to follow hot on the heels of those I have considered already: again, the thought is that this remedial duty is so different from the one breached in the first place that this claim cannot be accepted. They have an affinity, also, with Papayannis's point about tort law's insensitivity to the defendant's resources, which I considered earlier. If the continuity thesis requires open-ended assessment of how best to conform to the reasons that have continued, including of the defendant's means, why does tort law unerringly insist on monetary compensation—in an amount that is calculated imperviously to the defendant's means?

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[71] McBride (n 64) 30. He is citing here Ben Zipursky's criticisms of corrective justice accounts more generally: Zipursky (n 62) 727–729.

My response, accordingly, involves reprising things I have already said. First, let us revisit steps 5 to 7 in *Vase*. These show there is nothing especially mysterious about how a money payment can be an appropriate reparative response to damaging something. And it becomes so not (necessarily) by virtue of any discontinuity in the reason to which one is aiming to conform. It may become so merely because of some readily intelligible features of the factual situation in which repair must be offered, as step 6 helps to bring out. Step 6 shows that sometimes a monetary payment becomes appropriate because of the defendant's inability to repair the harm more exactly of his own accord: better to allow the claimant a role in selecting the optimal form of repair, and use the fungibility of money as a means to do this. Step 7 is a little different. It shows that sometimes a monetary payment becomes appropriate because of the kind of interest of the claimant that was set back in the first place. If the claimant's interest in the vase was largely or purely financial, then a monetary payment is a very good way for the defendant to conform *ex post* to the reasons that interest grounded.

Now, this only establishes that the payment of money *can* be justified as a reparative duty without posing any difficulty for the continuity thesis. It does not establish that it *always is* the justified response, in the way that the law seems to assume. But this further step is not an especially difficult one.[72] To the fungibility of money, one must add the fact, mentioned earlier, that the law deals in generalities. It must cater for all eventualities. Attention to the particular needs of particular claimants, and the capacities of the particular defendant to meet them, is not possible—or, at any rate, not practicable. The law prefers a one-size-fits-all solution, and virtually by definition a rule requiring a payment of money, the most perfectly fungible good, does that better

[72] Compare Gardner, 'What Is Tort Law For?' (n 1) 44–45.

than any other. Moreover, the prospects of the law's doing a better job of serving the claimant's needs than the claimant herself are remote. Even though claimants are not always vase aficionados, they are certainly better positioned, in general, to know their own interests than is the law. And money, again, is the best way to provide claimants with the widest range of options. Finally, monetary awards (preferably in a lump sum) give the parties a 'clean break', from both the court and from each other. All these reasons are well-known, since they are exactly the reasons that the courts themselves give for preferring damages awards to mandatory orders of the kind that would be needed to offer tailored remedies.[73]

Moreover, we must re-introduce the feature to which step 7 drew our attention. We imagined there that your only interest in your vase was economic. Hence you intended to sell it forthwith. You had no attachment to it except to the extent it would fetch a monetary price. Accordingly, a monetary remedy was ample redress for its loss. Standing alone, to be sure, the point has little force. Not everyone is like the vase dealer; many of us have interests in property that are not purely economic. Yet, when paired with points already made, it is not so feeble. Though many of us have attachments to our possessions that transcend the economic, those are—again, virtually by definition—idiosyncratic. It is not easy, or desirable, for the law, in its generality, to attend to them.

And finally: how could it? To the extent that you are attached to your vase, that interest cannot be protected any longer after the vase is smashed. Buying you a new one would never address *that* interest. That chance was gone as soon as we moved

[73] eg *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] UKHL 17.

from step 4 to step 5. This leaves the law with little to do but protect your financial interest in the vase. And that takes us back to a point about the continuity thesis I have emphasised throughout: it gives us reason to make repair only to the extent that doing so constitutes conformity to the reason we had not cause the harm in the first place. For that reason, financial interests have special purchase in tort law, just as they have special purchase in reparations generally. They are the kinds of things that can be protected by the payment of monetary compensation. The reasons they generate, in other words, can be conformed to at t_2 even after they have been set back at t_1. But the reasons borne of my sentimental attachment to my now non-existent vase, by contrast, cannot.

In a way, then, the practical significance of financial losses in tort law is outsized. It is not that they are the only interests, nor even the most important ones, that are set back when torts are committed. It is only that they are ones whose impairment can be meaningfully repaired. In this way, tort law's preoccupation with financial interests, and thus with financial compensation, far from yielding an objection to the continuity thesis, is something the continuity thesis helps to explain.

5.4. Conclusion

These are the reasons, then, why the common objections made against the continuity thesis are unpersuasive. They should not cause us to doubt the compelling case in its favour that was set out by Gardner and Raz. My remaining chapters, proceeding on that basis, develop some of the continuity thesis's implications. And I hope these chapters will, in their way, continue to advance the case in favour of the continuity

thesis: not by responding directly to its objectors, as this one did, but by illustrating its explanatory power.

6. Implications

The previous chapter explained that tort liability is grounded upon the defendant's role in causing the claimant's injury. It did so by drawing upon and defending the well-known 'continuity thesis'. I said that, in virtue of the defendant's non-conformity to a reason when he committed the tort, he has a reason to repair the harm he thereby caused. This chapter draws out some implications of this view.

I have two key aims. The first is to argue that this truth about tort liability that I identified in the previous chapter is able to refute the economist's account of tort law. It is, in a word, 'anti-instrumental'. That is why I said the conclusions of Part I should not be too disappointing, even to the duty-lovers whose arguments it criticised. The anti-instrumental justificatory connection between the defendant's commission of the tort and his liability for it is sufficient, regardless of the truth of DG, to refute the economists.

The second aim is to consolidate the argument of Part I by revisiting it in light of the continuity thesis. Now that it has armed us with this anti-instrumental justificatory connection, we can use it as a cross-check. I argue that the continuity thesis does not (contrary to the way it is sometimes presented) support the truth of DG. In that way, it confirms the conclusions of Part I. At the same time, it shows why, despite the falsity of DG, *most* torts are wrongs in the sense discussed in chapter 2. That does justice to the thought often seized upon by the duty-lovers. But it should not be taken too far.

6.1. Instrumentalism and its opposites

One of the points underlying Part I of my thesis was that a key goal of the duty-lovers is to show the wrongheadedness of rival views. For example, I said the 'thin conception' of duties, though it might make DC (trivially) true, cannot be a conception worth pursuing, because it does nothing to distinguish the duty-lovers from their opponents. I was relying on the fact that the duty-lovers, even if there is some ambiguity about what they are for, are very clear about what they are against. The modern love of duties arose as a reaction to law and economics, which explains tort liability as means to ends like maximising economic efficiency or minimising the costs of accident-avoidance. The duty-lovers describe these accounts as 'instrumentalist', which is used not only as a convenient label but as a description of the source of their error.

Thus Goldberg and Zipursky write that a successful account of tort law 'must conceive of duty as a *non-instrumental* (or deontological) concept by taking seriously the idea that "duty" carries with it a notion of obligatory force'.[1] They describe their account as having a 'generally deontological and anti-instrumentalist bent'.[2] And they say that '[d]uty, as the word itself suggests, is a non-instrumental concept'.[3] In this, they are, of course, echoing Weinrib, the most sustained critic of the economists' account, which he described as 'unabashedly instrumentalist' and for that reason unacceptable; the task he set himself, and which he tackled in a decades-long series of

[1] John CP Goldberg and Benjamin C Zipursky, 'The Moral of MacPherson' (1998) 146 University of Pennsylvania Law Review 1733, 1744.

[2] ibid 1831 fn 378.

[3] ibid 1846.

writings, was to develop a 'completely non-instrumental understanding of tort law',[4] in which the defendant's breach of duty is indispensable.[5] Weinrib, in turn, was influenced by George Fletcher,[6] who was apparently the first, in 1973, to contrast 'instrumental' theories of tort law (then 'fashionable' as a result of law and economics writers led by Guido Calabresi) with 'non-instrumental' theories of tort law such as his own.[7] And 'instrumentalism' here seems to operate as a synonym for 'consequentialism': for Fletcher, for example, instrumentalist claims are those that evaluate the imposition of tort liability by whether it 'advance[s] a desirable goal',[8] and, on the other hand, '[t]he distinctive characteristic of non-instrumentalist claims is that their validity does not depend on the consequences of the court's decision' to impose liability.[9]

I have already explained that insisting on DC—despite appearances—is not a productive way to resist instrumentalism. I drew an important distinction between two sites of contestation (which the quotations from the 'anti-instrumentalists' I gave above slide between): (i) the features of the defendant's conduct, and (ii) the justificatory connection between it and the imposition of liability upon him. I argued throughout Part I that the duty-lovers answer to (i)—that is, DC—is either trivial, unmotivated, or untrue. Moreover, even if it were true, it would hardly nip instrumentalist theories of

[4] Ernest Weinrib, 'The Special Morality of Tort Law' (1988) 34 McGill Law Journal 403, 404. See also his 'Understanding Tort Law' (1988) 23 Valparaiso University Law Review 485, 486–489; *The Idea of Private Law* (Harvard University Press 1995) 48–53.

[5] eg Weinrib, *The Idea of Private Law* (n 4) ch 5.

[6] eg Weinrib, 'The Special Morality of Tort Law' (n 4) 404–406.

[7] George P Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537, 538–539.

[8] ibid 538.

[9] Fletcher (n 7) 539 fn 4.

tort law in the bud: it would still leave open the possibility that the justificatory connection mentioned in (ii) is an instrumental one.

6.1.1. Instrumentalism and liability

And now we should add that picking out (ii) as the thing that needs to be 'non-instrumental' does not go far enough. That would still mischaracterise the difference between the accounts favoured and disfavoured by the moralists, or risk doing so. For the moralists, too, frequently justify the imposition of tort liability instrumentally.[10] Suppose one says, for example, that the imposition of liability is justified because it makes it more likely that defendants will conform to their moral duty to repair the harms they have caused—which duty arises, one might add, simply in virtue of the defendant's breach of a primary duty not to commit the tort. That, as we just saw, is exactly what the self-proclaimed 'anti-instrumentalists' said (or is, at least, fully compatible with what they said) in attempting to *distance* themselves from 'instrumentalism'. And yet that would be to justify tort liability 'instrumentally', by their own definition. It justifies the liability by its usefulness as a means to the end of ensuring greater conformity by tort defendants to their duties of repair. So the contrast has been misdrawn if it condemns those kinds of justification as unacceptably 'instrumental'.

[10] See for discussion Stephen R Perry, 'Professor Weinrib's Formalism: The Not-So-Empty Sepulchre' (1993) 16 Harvard Journal of Law & Public Policy 597; John Gardner, 'Tort Law and Its Theory' in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020).

We must therefore reject Fletcher's definition of instrumentalism that I gave above, as well as Weinrib's most famously overblown insistence that one must reject any account which 'understands private law as a means to something else',[11] or which sees it as 'the legal manifestation of independently justifiable goals'.[12]

In fact one is tempted to say these suggestions get things exactly the wrong way around. Is it not *essential* that tort liability be justified 'instrumentally', in this sense, if it is to be justified at all? If the defendant does *not* have a pre-existing reason to repair the damage, apart from the law, then the law's ordering him to do it would be a morally alarming sacrifice of his interests. It would foist upon him a liability that can run to millions of pounds, even when he lacked any reason to pay it. That would seem to be an unacceptable use of the defendant as a means. It would unacceptably 'instrumentalise' him, one might say. And yet instrumentalism, the (increasingly inaptly named) proposition we are considering, is in fact necessary to avoid this conclusion. Only if the defendant already has a reason,[13] apart from the law, to repair the harm he has caused can the law's making him do that be given a morally acceptable justification. Instrumentalism of this kind, though often presented as the economists' great sin, is something the moralists need to preserve.

In the previous chapter, I offered the continuity thesis as a way to understand the justificatory connection mentioned in (ii) above. In this one, I am trying to show that the justification it provides is suitably non-instrumental. And, thus far, it seems to be

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[11] Weinrib, *The Idea of Private Law* (n 4) 49.

[12] ibid 5.

[13] Probably he needs more than merely *a reason*: he needs a complete one, a conclusive one, or similar. Some would say, of course, he needs a *mandatory* one, which for obvious reasons I do not want to prejudge.

doing quite well. True, the justification for tort liability that the thesis offers may well be 'instrumental' in the sense that it rests on the liability's capacity to serve as an instrument to bringing about the defendant's conformity to a reason he already had. But that, we have seen, is no objection to it at all. If anything, it is a recommendation of it, since *only if* the defendant has that pre-existing reason can the imposition of liability be justified. We need a better definition of the sin of instrumentalism, in short, if the continuity thesis is to be criticised for committing it.

6.1.2. Purely probabilistic instrumentalism

Some important possibilities remain. One of them proceeds from the thought that the justification I have sketched presents the law, wrongly, as nothing more than the enforcement apparatus of reasons that exist apart from the law. That seems, especially to Kantians, to underrate the law's significance in determining what we ought to do. Thus another way to understand the 'instrumentalist' pejorative is, as Weinrib elsewhere puts it, that we cannot treat private law 'merely as a means' to the implementation of moral duties, nor 'assum[e] that legal duties are the collectively imposed counterparts of prior moral ones'.[14] As Ripstein explains:

> Kant rejects the suggestion that legal norms or institutions are instruments for achieving results that can be specified apart from the law. … [Rival views] presuppose the idea that the way people should behave in any particular situation is fully determinate. … [I]t is the job of legal and political institutions to arrange things so as to increase the likelihood of achieving it.[15]

[14] Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 50.

[15] Arthur Ripstein, *Force and Freedom* (Harvard University Press 2009) 9.

The Kantian view accepts that tort law helps us do what we ought to do. But it says it serves that value not only probabilistically, by making it more likely that defendants will do what they should, but constitutively, by helping to determine *what* they should do. The instrumentalists get this wrong, so the argument goes, because they fail to allow for the latter possibility.

But if *this* is how we should understand what anti-instrumentalism consists in, then the account I have sketched is anti-instrumentalist after all. I have been careful to say throughout that the reason that the continuity thesis provides to the defendant is one 'to repair the harm he has caused'. This was left deliberately vague, precisely in order to allow for the Kantians' point. For indeed it would be implausible to say that, before liability is imposed, the defendant has a complete reason to pay (say) £359,640. That kind of specificity cannot be provided by morality. In part that is why we need the law.[16] Apart from the law, the action for which the defendant has a reason is incapable of such close specification; it is made specific only by the imposition of liability. This is one manifestation of what Tony Honoré called 'the dependence of morality on law'.[17] Just as one's reason to contribute to state expenditure crystallises into an obligation to pay a specific amount only through the interposition of tax law, so one's reason to repair the harm one causes crystallises into an obligation to pay a specific amount only through the imposition of tort law.

Thus, nothing I have said denies that tort law plays a constitutive role. And notice, moreover, that tort law cannot play that constitutive role unless the thinly instrumentalist thesis I have been advancing is indeed true. The constitutive connection

[16] Gardner, 'Tort Law and Its Theory' (n 10) 19–20.

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

depends on the instrumental one.[18] For only if carrying out the court's order—that is, ensuring payment of the sum specified—*is a means* of conforming to the reason one had to repair the harm can that liability help to constitute it. Only if one has a reason to make repair apart from the law, and only if meeting one's tort liabilities is a way of conforming to it, can the imposition of tort liability be justified as helping to constitute what one ought to do. Just as tax law cannot be justified to an anarchist, for whom there is no obligation to contribute to state expenditure at all, so the attempt to justify tort liability by its constitutive function would be without foundation unless there is a pre-existing reason conformity to which it can help, constitutively, to serve.

6.1.3. Instrumentalism of the right kind

But one might now say that, even if *the imposition of liability* is to be justified instrumentally, the same is not true of the moral value to which it is an instrument. Stephen Perry, for example, interpreting Weinrib's 'shifting attack on instrumentalism',[19] says that he 'draws an implicit distinction between non-instrumentalist accounts of *morality* and non-instrumentalist accounts of *social institutions* such as tort law'.[20] Perry rejects Weinrib's condemnation of instrumentalist accounts of the latter, for reasons of the kind I have just given. But he says Weinrib may well have a point in insisting on non-instrumentalist accounts of the former. True, in other words, any plausible account of a social institution is necessarily instrumental,

[18] John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 18–20.

[19] This phrase is from Richard W Wright, 'Substantive Corrective Justice' (1991) 77 Iowa Law Review 625, 631–634.

[20] Stephen Perry, 'The Role of Duty of Care in a Rights-Based Theory of Negligence Law' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Hart 2009) 82.

in the sense that it must show that social institution to serve some end apart from its own existence. But all that Weinrib means to say, with his choice of epithet, is that an account of tort law must not rest on an instrumental account of morality:

> [T]he more limited use of the term [instrumentalism] to identify a category of theories which regard tort law as an instrument for pursuing collective or aggregative goals like efficiency is quite widespread, and so long as one bears in mind that the term is being used in this particular sense, there should be no confusion.[21]

This is certainly an improvement on targeting instrumentalism of all kinds whatsoever, and I think Weinrib and his followers would, despite their sometimes overstated rhetoric, go along with it.[22] What they meant to reject was the particular goals the economists identify, after all, and their phraseology is best understood on that basis.

But I am not quite as sanguine as Perry, at least not yet. The contrast between instrumental and non-instrumental morality is still far from perspicuous (even apart from the terminological opacities I have tried to clarify thus far). The source of the remaining problem is that, on any view, not *all* value is intrinsic. That has just been confirmed in my discussion of the value of imposing tort liability, which I said is not plausibly intrinsic, but must be instrumental. In fact you might point out, rather confounding Perry's dichotomy, that an instrumental account of a social institution like tort law is possible *only if* one endorses an (at least partly) instrumental account of morality. After all, an account of tort liability, far from being distinct from one's

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[21] ibid 82–83.

[22] It is not clear Weinrib really takes a position as extreme as the quotations I gave earlier would suggest. In explication, his view seems to boil down to the much more modest one that an account's being based on non-instrumental morality is only necessary, and not sufficient, to make it valid (as few would deny). See eg *The Idea of Private Law* (n 14) 49–50, 55.

account of morality, is a particular application of it. Whether tort liability can be justified is a kind of moral question. So to suggest there are two rival camps, only one of which recognises that value can be instrumental, is unhelpful.[23]

Once again, therefore, we come back to the point that one has to say precisely *what it is* whose value should be understood non-instrumentally. Perry gets us closer to an answer by bracketing the issue that has preoccupied me hitherto, namely whether or not the imposition of liability itself is to be justified instrumentally. We can agree that it is. But what about the reasons of repair to the conformity of which the liability is an instrument? That is where the true contrast between the economists and the moralists lies. The economist denies (or overlooks the fact) that the defendant has a reason, apart from the law, to repair the harms he has caused, and hence has to locate the value of imposing liability in the further consequences it will bring about (that is, in the consequences *other than* the mere fact of making the defendant repair his harms): deterring accidents, incentivising optimal insurance arrangements, or whatever. The moralist says appealing to the further consequences is to have 'one thought too many', to reprise Williams' famous phrase,[24] since the imposition of liability is amply capable of justification by the very fact it will bring about conformity by the defendant to the reasons of repair he has apart from the law. There is no need to look beyond that. Hence, although the imposition of liability is justified instrumentally, even for the

[23] Similarly, even the most thoroughgoing 'instrumentalist' or 'consequentialist' cannot think *all* value is instrumental: the buck has to stop somewhere. The distinctiveness of consequentialism lies in saying that only *states of affairs* have intrinsic value. See Bernard Williams, 'The Structure of Consequentialism' in JJC Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge University Press 1973) 82–83.

[24] 'Persons, Character and Morality' in Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge University Press 1981) 18.

moralists, they draw no instrumental connection to the *further* consequences I mentioned—and that is how they differ from the economists.

This suffices to set up a real contrast between the two camps that is certainly in the neighbourhood of 'instrumentalism'. One can understand, in other words, why the moralists alighted upon that terminology to mark the distinction. But it also invited much ambiguity and overstatement. Now we have, finally, picked out the precise point at which the two camps differ.

6.1.4. Conclusion

Having done so, our enquiry is at an end. As soon as we clear away the spurious claims with which anti-instrumentalism is encrusted, we lose any reason to doubt that the continuity thesis is anti-instrumental.

According to the thesis, the reason the defendant has to repair the harms he has caused arises regardless of the further consequences of his doing so. It follows, simply from the nature of a reason, that non-conformity to it does not make the reason disappear; it continues to be a reason for what one ought to do thereafter. There is no need to have the instrumentalist's 'one thought too many'. The defendant's failure to conform to the reason he had at t_1 is the reason for his having a reparative reason at t_2, quite apart from the consequences. And the existence of that reparative reason makes a thinly instrumentalist, but in substance anti-instrumentalist, justification of tort liability possible. In other words: there is a reason, conformity to which the imposition of liability is an instrument; but because that reason itself arises regardless of the further consequences of conformity to it, we have an account that is anti-instrumental so far as it is possible, or desirable, for an account to be. In explaining why the defendant has

reason to repair the harms he has caused, and in explaining why the law has reason to make him do so, the goals the economists identified—deterring accidents, optimising insurance arrangements, etc—do not get a look-in.

6.2. Reasons and duties redux

That, then, seems to vindicate a claim that underlay Part I of this thesis, namely that the falsity of the economists' view can be demonstrated quite apart from whether torts are breaches of primary duties. The economists' mistake lies in the justificatory connection they identify between the defendant's conduct and his liability for it. And that is entirely independent of whether the defendant's conduct inevitably constitutes a breach of duty. It is a mistake either way.

It is time now to subject this series of thoughts to a final re-inspection. It may be that the two issues I identified are indeed logically distinct, and that the connection between them that is often imagined is in fact absent, and yet that a different connection between them can be established in another way. Now that we are armed with the continuity thesis, in other words, should we conclude that there is a connection between the two issues after all? That is the question I answer in this section.

This section, in other words, is about the continuity thesis's implications for the proposition that, in previous chapters, I called DC:

> **Duty as condition of liability (DC):** Tort liability is conditional upon a wrong (=breach of duty) by the defendant.

In chapter 3, I rejected one, strong rendering of DC, in terms of which duties are conclusive reasons. In chapter 4, I turned to a softer rendering, in terms of which torts

are breaches of a *pro tanto* duty. Here I said there was no clear reason to suppose DC, so understood, was true. Accordingly, I ended chapter 4 on a note of Cartesian scepticism. I said I would rid myself of my complacent belief in DC's truth. Now we have worked our way back to these issues. We will see what light the continuity thesis sheds on DC, on each of these two renderings.

6.2.1. Duties as conclusive reasons

The continuity thesis trades on the fact that reasons continue to call for conformity at t_2 when they were not conformed to at t_1. It applies this insight to the defendant's reasons to compensate that arise in virtue of their commission of a tort. It says that, in committing the tort, the defendant failed to conform to a reason, *r*, which subsequently becomes a reason for him to pay compensation. The point to notice is that the reason to which he failed to conform at t_1 need not have been a *conclusive* reason. If it was a conclusive reason, the defendant's commission of the tort would have been unreasonable. His conduct at t_1 would have been unjustified. But that need not be so. The mere fact that he failed to conform to *r* at t_1 does not mean he behaved unreasonably. It just means he failed to conform to *r*. There may well have been other reasons that defeated it.

One example that made that vivid was MacCormick's, in which I broke my promise to take my kids to the beach. It is intuitive, I hope, that my promise-breaking was justified; and yet I ought to make amends. The continuity thesis provides a theoretical explanation of why that is so. I had a reason—and no doubt a strong one—to keep my promise, but it was defeated at t_1 by the urgent imperative to attend to my student. It must follow that the reason given to me by my promise, strong though it was, was not

conclusive. Nevertheless, it continued to call for conformity at t_2. That explained why I ought to take some remedial measures.

Something similar can be said about the cases I discussed in chapter 3. Take *Vincent*.[25] The defendant there plainly had a reason not to damage the plaintiff's dock. But he was nevertheless justified, all things considered, in doing so. His liability can be explained by the reason against damaging the dock, which, by the continuity thesis, has become a reason to pay damages for its repair. This explanation does not suppose that he had a conclusive reason against damaging the dock, and in fact the court's judgment insists he did not: his damaging it was, they said, eminently justified. And in the nuisance cases, such as *Dennis*,[26] the same analysis may be offered. The Ministry of Defence failed to conform to its reason not to cause a noise nuisance to Mr Dennis. That reason was not conclusive—the imperative to train fighter pilots defeated it—but even so it endured to t_2, calling for conformity by the payment of damages.

Hence, the defendant behaved reasonably in committing the tort, but liability was imposed regardless. By the continuity thesis, there is no difficulty in understanding why that would be so. It provides a theoretical explanation of liability that makes it irrelevant whether the defendant had a conclusive reason against doing as he did—and therefore makes it irrelevant also, on the account of duties as entailing conclusive reasons that I considered in chapter 3, whether the defendant breached a duty.

Well, not quite. The continuity thesis shows that a breach of duty, in this sense, is not *necessary* to justify liability. But it does not go so far as to make breaches of duty

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[25] *Vincent v Lake Erie Transportation Co* 124 NW 221 (Minn 1910).

[26] *Dennis v Ministry of Defence* [2003] EWHC 793.

irrelevant. For the continuity thesis also shows why tort liability is *often* appropriate only where there was a primary duty, so understood, not to commit the tort—thus resolving the puzzle raised by cases like *Vincent* and *Dennis* which I mulled in my conclusion to chapter 3. In other words, although we are still no closer to establishing the general truth of DC_O—and in fact have, by the continuity thesis, given its rejection theoretical grounding—we can at the same time see why torts that are congruent with DC_O are statistically preponderant.

The idea goes something like this. Tort liability is appropriate, virtually by definition, only where the defendant ought, all things considered, to repair the harm he has caused. That means the reasons the defendant has to repair the harm must be fairly strong—they must be strong enough, at any rate, to be decisive in determining what he ought to do. But since these strong reasons are, by the continuity thesis, the very reasons that counted against the commission of the tort in the first place, is it not very likely that they are *also* strong enough to be decisive in what the defendant ought to have done at that earlier time? In other words, is it not very likely that they are strong enough to make it the case that he ought, all things considered, not to have committed the tort? Indeed they are, which is why DC_O is very often satisfied.

I will have cause to revisit this argument, and the connection it establishes between liability and unjustified conduct, in the next chapter.[27] For the moment, the important point is that the connection is merely contingent. Even granting that the argument is valid, it will not *always* be the case that *r* was a conclusive reason not to commit the tort at t_1. This is because there are sometimes very strong competing reasons that count

[27] See section 7.1 below.

in favour of committing the tort—the defendant needs to keep training fighter pilots on its land, for example, or needs to save his ship from a calamitous storm—and these outweigh even the strong reasons against. But these reasons counting in favour of committing the tort do not count at all against compensating the neighbour or the jetty owner later, for the simple reason that paying compensation later is not incompatible with committing the tort. One can do both.

This is, in a way, the mirror-image of the point I made in relation to *Ruxley v Forsyth*.[28] There the circumstances changed significantly between t_1 and t_2, such that conformity to *r* at t_2 was much more burdensome than at t_1. Even though the 7 ft 6 inch pool could still be built, it was unreasonably costly to do so, because a 6 ft 9 inch pool now stood in the way. Although *r* was a conclusive reason at t_1, it was defeated at t_2 by the interposition of new reasons that countervailed. Hence the defendant had a conclusive reason to build the pool at t_1, but not to repair that failure at t_2. In *Vincent* and *Dennis*, things are the other way around. The reason at issue was a conclusive one to pay damages at t_2, but was not a conclusive reason against committing the tort in the first place. The countervailing reasons were in these cases much *less* pressing at t_2 than at t_1—because at t_1 there was an emergency.

What's more, the very fact that the reasons that count against committing the tort can, by the continuity thesis, be partly conformed to at a later stage—once my student's crisis is over, or once the storm has passed—may be exactly why one ought not, all things considered, to attend to them now.[29] If it is a choice of two evils, rather avert

[28] *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8. See section 5.2 above.

[29] DN MacCormick, 'The Obligation of Reparation' (1977) 78 Proceedings of the Aristotelian Society 175, 176; Gardner, 'What Is Tort Law For?' (n 18) 43–44.

the one that is least capable of being remedied later: that is the best way of optimising reason-conformity overall. By this logic, the continuity thesis shows not only that the defendant's duty to repair *need not* be conditional upon the breach of a primary duty, but that, in one respect, the very fact of his duty to repair *counts against* its being so conditional.

The continuity thesis thus helps to explain why DC_O is wrong. The continuity thesis predicts that torts are often breaches of duty so understood, but not always, or not necessarily. It provides an important capstone, then, to the argument of chapter 3. You will recall that, while I laboured the phenomenological continuity between two classes of cases—those where liability is imposed for justified conduct and those where it is imposed for *un*justified conduct—I did not provide a theoretical explanation for it there. Now we have the theoretical explanation, which confirms that liability for justified conduct and liability for unjustified conduct are two species of the genus tort. Both are explained by the continuity thesis, albeit that this plays out in different ways: usually, it plays out such that tort liability is justified only where the defendant's conduct is not; but occasionally it is otherwise. That last point entails that DC_O is wrong, but at the same time we can see why it strikes so many people as right. It is true in the vast majority of cases. But it is not true in all.

6.2.2. Duties as *pro tanto* reasons of special force

The discussion so far leaves unaffected the alternative view, in terms of which duties are *pro tanto* reasons of special force, discussed in chapter 4. I ended that chapter by concluding—though only provisionally—that we should reject DC when cashed out according to this view. I said we lacked a good reason to suppose that the defendant's

conduct always, as a necessary truth, constitutes non-conformity to a reason with the mandatory force that is said to characterise duties.

It is now time to revisit that claim. Does the continuity thesis give us a good reason, after all, for believing in the truth of DC? The question arises with particular force because John Gardner, the main architect of the continuity thesis, thinks the answer is 'yes'. But, on the other hand, his view has been criticised, and Raz, who has also contributed to the thesis, seems to think the answer is 'no'.

Raz's view is perhaps easier to understand. The continuity thesis seems to be a thesis about *reasons*. It says it is in the nature of reasons that they continue, calling for conformity at t_2 to the extent they were not conformed to at t_1; and that is crucial to the (normal) explanation of why one should compensate, when indeed one should. But given that it is the reasons that continue, and since reasons of themselves provide a rational case for action, we seem already to have a complete explanation of why one ought to make repair. Duties do not enter the picture. Reasons seem to be all we need.

Accordingly, Raz's discussion of the continuity thesis proceeds entirely in terms of reasons, and steers conspicuously clear of tying it to the breach of a primary duty.[30] It is clear from later work that he regards *negligence* liability as resting on a breach of duty,[31] but as we saw in chapter 3 that may be so without establishing DC's general truth. And when Raz states his precise thesis about liabilities that are grounded upon

[30] Joseph Raz, 'Personal Practical Conflicts' in Peter Baumann and Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cambridge University Press 2004). To be clear, although he occasionally speaks about a 'duty' *to compensate*, the issue is whether that arises by virtue of the breach of a *primary* 'duty' (as opposed to mere non-conformity to a reason).

[31] Joseph Raz, 'Responsibility and the Negligence Standard' (2010) 30 Oxford Journal of Legal Studies 1.

the defendant's responsibility for damage he has caused, he says that responsibility is triggered by the 'failure to conform to a non-derivative *reason*'.[32] So Raz, even as he discusses the continuity thesis, makes no suggestion that it supports DC, and understandably so. If we were to stop here, the continuity thesis looks like it provides a positive justification for tort liability that shows primary duties to be surplusage.

Gardner's treatment, however, is different. He does not deny that the continuity lies in the reasons, rather than the duties. Indeed he forcefully rejects Weinrib's suggestion that one's duty to pay damages is the same duty that one had not to cause harm in the first place.[33] Duties, he points out, are individuated by the action they require, and plainly there are two distinct actions, and therefore two distinct duties, here. What continues, then, is not the primary duty, but the reasons that grounded it. So far, so familiar. And yet Gardner repeatedly implies that the continuity thesis can explain tort liability only to the extent that there was the breach of a primary duty (or, as he also puts it, 'obligation').[34] And this insistence persists, despite criticism of it,[35] in his more recent work.[36]

So there seems to be a live debate here. At first glance, the continuity thesis casts further doubt about DC, since the duties seem peripheral to the explanation it provides.

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[32] ibid 2 (emphasis added).

[33] Gardner, 'What Is Tort Law For?' (n 18) 29–30. This marks a refinement of the views he had set out in his 'Wrongs and Faults' in Andrew Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005) 59. There he wrote, consistently with Weinrib's treatment, that the (moral) duty to repair 'is the same primary duty that one violated when one breached the contract or committed the tort'. For Weinrib's views see *The Idea of Private Law* (n 14) 135; 'Two Conceptions of Remedies' in Charles EF Rickett (ed), *Justifying Private Law Remedies* (Hart 2008).

[34] Gardner, 'What Is Tort Law For?' (n 18) 33.

[35] Emmanuel Voyiakis, *Private Law and the Value of Choice* (Bloomsbury 2017) 56.

[36] John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 184; 'The Negligence Standard: Political Not Metaphysical' (2017) 80 Modern Law Review 1, 6.

And yet it is thought by Gardner, on more careful inspection, to be bound up with DC's truth. Why is that?

The continuity thesis establishes that the reason, *r*, to which the defendant failed to conform at t_1 continues after the non-conformity, and that *r* may become a reason at t_2 for the kinds of reparative action that tort liability compels. But that does not yet suffice to justify the imposition of liability at t_2. It suffices to justify the imposition of liability at t_2 only if further conditions must be satisfied. The first and most basic condition we already encountered above: it must be the case, in addition, that *r* is a conclusive reason for the reparative action. Call this the 'conclusiveness condition' that *r* must satisfy.

And there are probably further conditions here too. Given the generality at which legal rules operate, the conclusiveness condition must be satisfied *generally*. It is not good enough, to justify the imposition of liability in a given case, that the defendant in that case has a conclusive reason to compensate the claimant. It must be the case that *all* the defendants who would be hit by the precedent created by that case will have a conclusive reason to compensate those claimants who will be able to use that precedent to have liability imposed upon them. In other words, across the set of cases $\{1, 2, \ldots, n\}$ to which a particular liability-imposing rule would apply, it must be true for all defendants $D_1, D_2, \ldots, D_n$ that there is some r_x to which they failed to conform at t_1 and which is a conclusive reason for reparative action at t_2. Call this the 'generality condition'.

Third, for any case within that set, the conclusiveness condition must be satisfied *stably* (the 'stability condition'). The reason must be a conclusive reason even when the circumstances of the claimant and defendant change, and (pertinently here) despite other choices or actions they make.

These conditions help us understand Gardner's view. Although it is the continuity of reasons alone—not duties—that explains why the defendant has reason to compensate, it is only if that reason grounds a duty can the three liability-justifying conditions above be met. It is the need to satisfy those kinds of further conditions, in other words, that in Gardner's view turns the seemingly reason-focused continuity thesis into one that insists upon the breach of a primary *duty*—is that only if *r* grounds a duty can the three liability-justifying conditions above be met. That is to say, applying the Razian account of duties that I mentioned in chapter 4, that the three conditions will plausibly hold only if *r* is both mandatory and categorical.

Gardner builds up to these conclusions in the following way.[37] He notes that (what he would later call) the continuity thesis, i.e. the idea that the 'old' reasons to which we have failed to conform 'are still hanging around waiting for conformity', may have 'scary implications'.[38] This is because we constantly fail to conform to reasons—and very often rightly so, because although they were reasons they were not *conclusive* ones. And yet, even though we behaved rightly:

> Doesn't it follow that over time the old unconfirmed-to reasons will tend to pile up and overwhelm the new ones, and leave us rationally doomed to a life of little else but regret?[39]

In other words, the continuity thesis seems to imply that we have reasons to regret our past non-conformities far too often. And something similar can be said of our reasons

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[37] See for his sketches of this argument Gardner, 'Wrongs and Faults' (n 33) 58–60; John Gardner and Timothy Macklem, 'Reasons' in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 467.

[38] Gardner, 'Wrongs and Faults' (n 33) 58.

[39] ibid.

of repair. By the continuity thesis, *any* reason that we failed to conform to continues to hang around, calling for next-best conformity. But are we really at risk of having to make repair for *every* reason to which we failed to conform, even reasonably? That sets up a puzzle. As Gardner says, 'normally things are not quite so bad'.[40] We are not normally beset by this overwhelming pile of unconformed-to reasons. Why not? Gardner's answer is that run-of-the-mill reasons—reasons that lack any special force associated with duties—cease to be reasons for us if our goals change, and tend in any event to surrender fairly meekly in the contest with the reasons that countervail:

> Among the many reasons that we do not conform to, there are many that are *non-categorical*. We have them by virtue of our personal goals and we no longer have them when our goals change. Furthermore, many are *non-mandatory*. They simply weigh in the balance of reasons and do not exclude any countervailing reasons from consideration. When we do not fully conform to a non-categorical and/or non-mandatory reason, the reason that remains to haunt us still is non-categorical and/or non-mandatory. Such a reason is therefore permanently vulnerable to the abandonment of old goals and/or to defeat by the new reasons that militate powerfully in favour of getting on with our lives.[41]

In this passage we can see why Gardner thinks reasons that fall short of duties will inevitably fail to meet my three liability-justifying conditions. Since run-of-the-mill reasons are non-categorical, they almost by definition fail the stability condition: the defendant merely has to change his personal goals, and *r* will disappear—and, with it, the purported justification of the liability. Since run-of-the-mill reasons are non-mandatory, the *pro tanto* force they have is 'permanently vulnerable', as Gardner puts it, to the reasons that countervail. They are likely not to be conclusive, or if they are

[40] ibid 59.

[41] ibid.

conclusive, will not be stably and generally so. They are not sufficiently robust to defeat the countervailing reasons in different or changing circumstances.

Gardner's conclusion now looms inexorably. The obverse of the points he has just made is that only when the reason *does* have mandatory and categorical force is it sufficiently robust:

> When things are not so easy [i.e. the unconfirmed-to reason cannot be defeated or dismissed] is when we are left with old unconformed-to reasons that are both categorical and mandatory, i.e. when we had duties that we failed to perform, and hence acted wrongfully.[42]

Only then are the reasons that continue sufficiently robust to survive 'a change in our personal goals' and to avoid 'defeat' by 'conflicting reasons'.[43] Only 'wrongful action, in short', is capable in Gardner's view of justifying the imposition of tort liability.[44]

So much for the argument. Is it sound? As I said in chapter 4, I think we can immediately concede that *r* must be categorical in order to meet the stability condition.[45] This result is almost trivial. But what of Gardner's insistence that *r* is also mandatory? This seems more questionable. His rationale for insisting on the reasons' being exclusionary is that this helps to ensure that they *defeat* the countervailing reasons. In order to make it reasonable for the defendant, post-breach, to repair the damage he has caused, his reasons to repair it must be sufficient to defeat those that countervail. By the continuity thesis, those reasons are the very same reasons that,

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[42] ibid.

[43] ibid.

[44] ibid.

[45] See section 4.5.2 above.

prior to the breach, counted against committing the tort. Hence it is likely, all else being equal, that the reason is an undefeated reason to repair the damage if and only if it is (or was) an undefeated reason not to commit the tort. The further point Gardner's argument has now introduced is that a reason is more likely to be an undefeated reason to repair the damage if it is an exclusionary reason.[46] For an exclusionary reason, by definition, defeats by exclusion (at least some of) the countervailing reasons.[47]

Gardner is surely correct that if some or all of the reasons that countervail against *r* are excluded, then it is more likely that *r* will be a conclusive reason. That is a truism. But a stronger premise is needed to justify his conclusion that *all* reasons non-conformity to which can justify liability are mandatory. Exclusionary force must not only *help* to make *r* conclusive, it must be *essential*. And this does not seem to be true, for the reasons I gave in chapter 4. After all, excluding is only one way of defeating countervailing reasons. The other is, of course, to outweigh them. So the rationale Gardner has identified does not establish that the exclusionary force of the reasons against committing the tort is essential to grounding liability to compensate in the event of non-conformity. It is one way of doing so. But the very same rationale indicates that it is not the only way. Reasons against committing the tort that do not have exclusionary force, but do have very great weight, are likely also to be conclusive. Gardner's argument succeeds in establishing a contingent connection between *r*'s being a duty and its capacity to justify liability. But his conclusion needs a necessary one.

[46] He is also assuming, plausibly, that whether *r* is mandatory (or categorical) is a fixed property, and so is constant between times t_1 and t_2.

[47] Again, I ignore the complication mentioned in section 4.5.1 above n 55.

To be sure, the contingent connection is strengthened when we remind ourselves of the stability and generality conditions. These demand that the conclusiveness of the reason is robust across different and changing circumstances. It seems fair to suppose that a reason with mandatory force stands up better against a wide set of diverse countervailing considerations. It *rules out* those considerations, and does not have to compete with them in weight. But even a very strongly contingent connection is not a necessary one.

It is worth noting that Gardner's wider philosophical commitments make him especially reliant on the mandatory force of duties. For him it is a special challenge to reign in the set of reasons that might otherwise, by the continuity thesis, generate reasons of repair. Two features of his wider philosophy are especially significant:

(i) First, Gardner has an almost uniquely expansive view of what reasons apply to us. In his view, 'A has a reason to ϕ only if at least one conceivable human being has the capacity to ϕ and A is a human being.'[48] He rejects a range of other possible views, including, for example, the view that A has a reason to ϕ only if *A himself* was in a position to ϕ.[49] Thus even a wheelchair-bound person, he says, 'could have reasons to run a four-minute mile or to climb Mount Everest'.[50] And presumably he thinks I have reason to rescue a person who is drowning in a lake in Outer Mongolia, even though I do not know it is happening and would have no hope of

[48] John Gardner, 'Reasons and Abilities: Some Preliminaries' (2013) 58 American Journal of Jurisprudence 63, 72.

[49] A more plausible view would limit the kinds of capacities that count here; A's lack of *some* capacities (such as his being so evil that he could never bring himself to ϕ) would not plausibly preclude A's having a reason to ϕ. But Gardner rejects *any* view of this kind.

[50] Gardner, 'Reasons and Abilities' (n 48) 72–73.

preventing it even if I did.[51] Others would distinguish more sharply between axiology and morality: the person's being rescued has value, but it does not follow that I have reason to do it.

(ii) Gardner also has a very wide view of the circumstances in which we may be (basically[52]) responsible for our failures to conform to a reason. It requires only that we had 'the ability and the propensity to have and to give self-explanations in the currency of reasons'.[53] He rejects other prominent views that limit responsibility to, say, intentional actions and those one is ordinarily able to perform successfully.[54] According to those views one must, roughly speaking, show that the reason has borne on our rational faculties in the right way before we can be responsible for failing to conform to it. There is disagreement, naturally, about what 'the right way' is, and about how close the bearing needs to be. But Gardner thinks the whole enterprise is misbegotten: we are responsible for failing to conform to reasons even when we 'overlooked' them altogether, when they did not bear on our consciousness at all.[55] Indeed it is the very fact we overlooked them that requires explanation.

These two claims, taken together, yield a very wide set of reasons that apply to a defendant and may be a reason for reparative actions after he has failed to conform to

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[51] Compare John Gardner, 'Obligations and Outcomes in the Law of Torts' in John Gardner and Peter Cane (eds), *Relating to Responsibility: Essays in Honour of Tony Honoré on his 80th Birthday* (Hart Publishing 2001) 137.

[52] 'Responsibility' has well-known terminological ambiguities. Here I take it to mean not 'being held responsible' but a condition for being so held that turns, roughly speaking, on the connection between one's agency and the action one performs (or the outcomes one brings about).

[53] Gardner, 'The Negligence Standard' (n 36) 7. The fuller development of his views is in 'The Mark of Responsibility' (2003) 23 Oxford Journal of Legal Studies 157.

[54] This is a rough statement of Raz's view, which Gardner rejects as 'untenabl[e]': see Raz (n 31); Gardner, 'The Negligence Standard' (n 36) 13.

[55] See again Gardner, 'The Negligence Standard' (n 36) 13.

them. Whereas other theorists would screen out many more of these at the outset, Gardner is left with an unusually wide set of plausible candidate reasons for reparative action. Moreover, when those lingering reasons call for conformity, Gardner does not think it is easy, in the ordinary course, to reach a rational determination that they ought on balance to be conformed to. This is because of a third feature of his wider philosophy:

> (iii) Gardner believes in the incommensurability of reasons, and that incommensurability is 'pervasive'.[56] It follows that, when *r* calls for conformity through some reparative action ϕ, it cannot (necessarily) be said that ϕ ought, on balance, to be performed, *even if* the agent had an undefeated reason to do it. That is what it means for *r* to be incommensurable with the reasons that countervail. There is a rational case for both ϕ-ing and not-ϕ-ing, since there are reasons in favour of both, and—these being incommensurable—neither outweighs the other. Hence 'the principle of rationality … does not adjudicate as between the two alternatives'.[57] For Gardner, then, even a person's undefeated reasons to perform a reparative action frequently fall short of giving him a rational case for performing it—and hence the law cannot hope to be justified in holding him liable to do so.

The net effect of these three commitments is to generate a serious rational predicament. We are, in Gardner's view, in danger of being so overwhelmed by these reasons' deafening demands for attention that we cannot hope to extract from them conclusive reasons for action, unless by some further means we are able to limit the set that has rational salience. So you can see why exclusionary force is so important in

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[56] Gardner and Macklem (n 37) 470–474.

[57] ibid 471.

Gardner's view of rationality. We need it if we are to have a hope of navigating the turbulent sea of reasons on which we are adrift. In other words:

> (iv) Gardner believes that exclusionary reasons, as Raz explains them, are (often) necessary to explain how it may be rationally required to perform a reparative action (or indeed any action), given the range of reasons that apply to us and the rarity with which any one of them outweighs the others. Only if some reasons are excluded from consideration can they be defeated. And only if the reason, *r*, for reparative action ϕ is protected by an exclusionary reason that defeats the reasons that countervail can ϕ be rationally required. Contrast those who doubt exclusionary reasons exist at all,[58] or who believe there are tenets of rationality which requires us to select between undefeated reasons even when they are not excluded.[59]

Gardner's fifth relevant commitment is the most obvious, since it and its rivals underlay Part I of this thesis, but let me set it out anyway:

> (v) Gardner believes that exclusionary force is a property of duties (and that exclusionary force together with categorical force is something that, by definition, *only* duties have).[60] Contrast those who believe (regardless of whether they think exclusionary reasons exist) that duties are something different, such as a categorical and conclusive reason.[61]

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[58] See section 4.5.2 above.

[59] eg TM Scanlon, 'Reasons: A Puzzling Duality?' in R Jay Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford University Press 2004).

[60] See again 'Wrongs and Faults' (n 33) 59; 'Obligations and Outcomes' (n 51) 140.

[61] Gardner discusses these rival views in *Offences and Defences* (Oxford University Press 2007) 77–79.

The upshot is simple. It is only because of commitments (i) to (v) that Gardner's course of reasoning generates (what he takes to be) an indispensable role for duties. Only because of (i) to (v) does his argument yield the conclusion that the defendant *must* have breached a primary duty if he is to acquire a reason in favour of repairing the harms he has caused that is (stably and generally) conclusive. As was implicit in my exposition, however—and should in any event not surprise us—each of propositions (i) to (v) is controversial. Each has been rejected by other writers. For those who do not share them, it is far from obvious that we should think of Gardner's argument as capable of establishing a necessary and general truth of the kind that DC requires. There is a clear path by which one may endorse the continuity thesis without being committed to the view that torts are breaches of primary duty. In fact Gardner's argument, as I suggested, supports the idea that, although they often are (because the exclusionary force of duties helps to make the reasons conclusive), they need not be (because the great weight of a reason can of itself ensure conclusiveness).

At any rate, (i) to (v) seem to have only the remotest of connections to the claims with which duty-loving is associated.[62] It is hard to see why any of them is essential to a moralistic understanding of tort law. Their plausibility is something to be debated *among* moralist tort theorists; denying their truth, and thus Gardner's conclusion in favour of DC, should not disqualify one from membership of that camp. In fact they support Gardner's conclusion *only if* one already accepts the continuity thesis, or some very similar moralistic account of tort liability, as valid. In that sense, they lie downstream. The first and most fundamental question is whether the justificatory connection between the defendant's harm-causing conduct and his liability for it is non-

[62] These were discussed in section 2.2.2 above.

instrumental. Only then should we turn to squabbling over the relatively incidental question of whether (or when) the defendant's harm-causing conduct must, if that justificatory connection is in fact to obtain, be a breach of duty.

6.3. Conclusion

Laura Valentini's recent discussion of 'claim rights'[63]—the Hohfeldian correlative of duties—concludes that, in light of the term's rampant ambiguities, and the diverse family of attributes and justifications with which it is associated, 'we are better off doing away with the notion of claim rights' for most theoretical purposes.[64] The many concepts clustered around it are important, but 'focussing directly on those attributes or justifications', Valentini says, 'is more intellectually transparent'.[65] Rather than insisting that all insights and arguments are channelled through the opaque concept of a duty, more progress would be made by attending, without mediation, to what really matters. 'The substantive ethical materials remain the same'—all that changes is that we can see them with more clarity.[66]

In the same spirit, what I think we should do is ask ourselves: 'Of the countless reasons to which tort defendants might fail to conform, what kinds of reasons are capable of justifying their being held liable?' Perhaps the answer will sometimes turn out, after many intermediate steps, to be: 'mandatory and categorical reasons'. Or sometimes it will be, of course, 'conclusive reasons'. But I don't think we should

[63] Laura Valentini, 'Claims Rights, Moral Theory, and Social Empowerment' (2019 draft).
[64] ibid 4.
[65] ibid 16.
[66] ibid.

prejudge that question by insisting on a general answer to it, nor refuse to allow the debate to continue until everyone has sworn fidelity to that weasel word, 'duties'.

I will attempt no comprehensive answer to this question in what remains of this thesis (though I have already mentioned some relevant principles). I will, instead, address myself to one particular sub-question: When, and why, should liability be imposed only when the defendant's failure to conform to *r* at t_1 was coupled with fault? In doing so, I will rely on some features of the continuity thesis that I emphasised repeatedly over the course of the last two chapters. The thesis explains why one has a reason to pay damages in tort, to the extent that one has it. As with all reasons, however, it remains to be asked whether one should conform to it. And, in the case of tort liability, there is another question after that: namely, whether the law should *make* one conform to it. These are difficult questions, which the continuity thesis makes no attempt to shortcut in the way sometimes imagined. To the contrary: the considerations that bear on whether the defendant has a conclusive reason to compensate the claimant, and on whether the law should hold him to it if he does, are as diverse as in practical life generally. Is it fair? Would it ruin him? Was he reasonably able to avoid incurring it? And so on. Some of these were already mentioned, and there will be more to come. The point is that it is within these further questions, rather than in the logic of the continuity itself, that the fault standard finds its justification.

PART III

THE ROLE OF FAULT

7. The continuity of fault

One of the implications of the continuity thesis is that a reason to pay compensation at t_2 may arise from non-conformity to a reason at t_1, regardless of whether that reason was a conclusive one. Hence one may have a reason to compensate even when one was justified. And hence—another short logical step—one may have a reason to compensate even for conduct that was faultless. That is, as Raz says, probably the thesis's 'most controversial implication'.[1] Endorsing it draws one into conflict with much writing about tort law, which asserts, or more often assumes, a close connection between liability and fault. Though few would deny that tort law sometimes departs from the 'fault principle', these departures are presented as exceptions. They can be explained, but not on the ordinary basis; to impose tort liability without fault is *extra*ordinary. This we saw in chapter 3.

I said even this position is unwarranted. True it is that tort liability may be imposed, and rightly, for conduct that is faultless. Almost everyone concedes this. But there is a further point, which is more rarely conceded, and is often obscured: when tort liability is imposed for conduct that is faultless, it is to be justified on the same basis as liability that is fault-based. There is no discontinuity, as I put it in chapter 3, between the principles at work in the two sets of cases. Hence it is misleading to present cases of

[1] Joseph Raz, 'Personal Practical Conflicts' in Peter Baumann and Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cambridge University Press 2004) 192.

strict liability as departures from the ordinary logic of tort liability, an ordinary logic that is more perfectly reflected in the cases of fault-based liability.

Those formulations—'there is no discontinuity…', 'departures from ordinary logic…'—contained some imprecision. Chapter 5 has allowed us to tighten things up, in the way I did in the first sentence of this chapter. The continuity thesis provides the common explanation of both sets of cases. Non-conformity by *D* to a *pro tanto* reason at t_1 gives rise to a *pro tanto* reason for *D* to compensate at t_2. That is the general explanation that applies equally to both sets of cases. Hence the radical discontinuity often imagined between the two does not withstand scrutiny. What grounds the liability is, in both sets of cases, the same: *D*'s non-conformity to a *pro tanto* reason at t_1. To that extent, the 'simple argument' of chapter 3 is vindicated by the continuity thesis.

But, of course, important objections remain. These stem from a fact that also permeated chapter 3. Quite apart from the success of my 'simple argument'—that is, quite apart from my denial that fault-based liabilities enjoy theoretical primacy—they are undoubtedly *statistically* preponderant in tort law as we find it. This has allowed DC_O's proponents to downplay the danger posed by strict liability, pointing out that it exists only in isolated, and often historically anomalous, enclaves, surrounded by ranks of fault-based torts.[2] It was the rise of the tort of negligence, in particular, that allowed Holmes to present liability for unreasonable conduct as tort law's organising principle;[3] and the staggering march of negligence has—a brief irruption of strict product liability

[2] See section 3.3.2 above.

[3] See section 3.1.4 above.

aside—continued ever since.[4] In this way, advocates of DC_O can present the historical record as bearing out the conceptual inescapability of fault. David Owen, for example, was able to proclaim in 1992:

> Fault lies at the heart of tort law, the private law of wrongs. This concept, simple yet profound, always has been true and probably always will.[5]

My emphasis on the nuisance cases, rather than the familiar instances of strict liability, was partly a means of deflecting these glib pronouncements. The law of nuisance provides a domain of liability without fault that is extensive and still shows strong signs of life. Bringing it into alignment with *Vincent*[6] helps to show that this case, too, is not quite as odd as it appears. So there is some reason to be sceptical of the historical triumphalism of DC_O's proponents.

Nevertheless, it cannot be doubted that fault-based liability is dominant. And that is something that calls for urgent explanation by those, like me, who say the justification for tort liability is, at base, strict. How can it be that, if duties of repair arise strictly, those we encounter in tort law are usually fault-based? That is the explanatory hurdle I need to overcome in this final Part of my thesis. If I cannot, then my arguments would seem to be in trouble.

It is not that any divergence between a normative theory of tort law and its actual practice is a problem. The role of the legal theorist is not to strive to justify every law

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[4] See eg Tony Weir, 'The Staggering March of Negligence' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998). And see the coda, tellingly entitled 'The Unexpected Persistence of Negligence', to G Edward White, *Tort Law in America: An Intellectual History* (expanded edn, Oxford University Press 2003) ch 8.

[5] David Owen, 'The Fault Pit' (1992) 26 Georgia Law Review 703, 703.

[6] *Vincent v Lake Erie Transportation Co* 124 NW 221 (Minn 1910).

we happen to have. But it would cast legitimate doubt on a theory if it implied that a feature that is very widespread, both within and across legal systems, and is widely thought desirable by judges, lawyers, and scholars alike, is entirely incapable of rational explanation. So I owe a rational explanation, and in what follows I aim to provide it.

I do this over the course of this chapter and the next one. Hence these two chapters form a pair. Jointly they make the case for having a fault standard, even in the face of all the conclusions I have been urging hitherto. That argument is divided across this and the next chapter partly for convenience and partly because there is a real conceptual difference between two. This chapter is about the way in which the preponderance of the fault standard is not only consistent with, but is to an extent *entailed by*, the logic of the continuity thesis. That is despite its headline implication with which I began this chapter. The next one, chapter 8, widens the focus, looking beyond the continuity thesis to the considerations that cut across and countervail. These considerations do much to support a fault standard even where the continuity thesis of itself does not.

7.1. Conclusive reasons for liability

The continuity thesis does not ascribe any necessary and general role to defendant fault, nor to unjustified conduct. That is its controversial headline implication. Yet perhaps it should not be so controversial. For, upon closer inspection, the continuity thesis does much to explain why one *typically* ought to pay compensation at t_2 only when one has behaved unjustifiably at t_1, and hence why tort law *typically* makes liability dependent on fault.

7.1.1. Continuity and conclusiveness

This was gestured at already in the previous chapter.[7] Here is a schematic form of the argument I developed there:

1. By the continuity thesis, the reason a defendant, *D*, has at t_2 to repair a harm he has caused at t_1 is the same reason, *r*, to which he failed to conform when he caused it.
2. The imposition of tort liability on *D* to repair a harm he has caused is justified only if he ought all things considered to repair it.
3. Therefore, the imposition of tort liability on *D* to repair the harm is justified only if *r* is a conclusive reason to repair it.
4. If *r* is a conclusive reason for *D* to repair the harm at t_2, then it is more probable that it was a conclusive reason for *D* not to commit the tort at t_1.
5. Therefore, it is more probable that the imposition of tort liability is justified at t_2 only if *r* was a conclusive reason not to commit the tort at t_1.
6. The fault standard ensures (inter alia) that tort liability is imposed only for conduct that *D* had a conclusive reason not to perform.
7. Therefore, it is more probable that the imposition of tort liability is justified only if it is conditional upon *D*'s breach of a fault standard.

Premise 1, as indicated, follows from the continuity thesis. Premise 2 is uncontroversial (though I will return to it shortly): the law should not (special cases

[7] See the discussion in section 6.2.1 above.

apart) order someone to do something unless they ought to do it. The inferences in 3, 5, and 7 are trivial.

Premise 4 is the one that requires most attention. In part it was explained in the previous chapter, by drawing out some elementary properties of reasons. In a nutshell, the weightier the reason the more likely it is to be conclusive. It is more likely to defeat countervailing reasons. And, conversely, the fact that a reason is conclusive at any given moment, that it has succeeded in defeating countervailing reasons, speaks in favour of its being weighty. So its being conclusive at t_x speaks in favour of its being conclusive, also, at t_y. Similarly in respect of the exclusionary force of a reason. If a reason is exclusionary (or, perhaps more accurately, if it is protected by a reason that is exclusionary) it by definition defeats (at least some) countervailing reasons, and hence is more likely to be conclusive. And if it is conclusive then it is more likely to be exclusionary. So, by this route, too, a reason's being conclusive at t_x speaks in favour of its being conclusive, also, at t_y.

That grimly abstract argument can be made more vivid with examples. Take the kinds of weighty interests that tort law protects. It protects the security of one's body, and of one's possessions. These are fundamental to a person's well-being. They are the kinds of interests that tend (or ought) to dominate others' assessments of how they ought to behave. It is only rarely that others may justifiably set them back. Well, if that is so—if the reasons generated by these interests strongly tend to defeat countervailing reasons—and if, by the continuity thesis-derived premise 1, they are the very same reasons the defendant has to repair the harms he has done at t_2, then it is only natural that they are conclusive also at this latter stage, ensuring there is not only a weak case for holding the defendant liable, but a conclusive one. And vice versa. This is no more mysterious than the fact that these interests tend to provide conclusive

reasons to avoid injury in the first place in a range of different fact situations. It is all a function of their capacity to defeat other reasons, which remains constant across different times and circumstances.

7.1.2. How probable?

So that is the case for premise 4. But 'more probable' is vague. How much more probable? I don't think that question can be answered precisely. That does not affect the soundness of the argument, but it does, of course, bear on what exactly we should infer from it.

One can give an indication of when the relation picked out by premise 4 does *not* hold, as I briefly did already in chapter 6.[8] It does not hold when there is a dramatic change, between t_1 and t_2, in the reasons that countervail. That change can make it the case that—even though *r*'s own weight is unchanging across the two times—*r* is defeated at t_1 but not at t_2. And thus *r* provides a conclusive reason to pay compensation at t_2, but not a conclusive reason not to commit the tort at t_1. And why might the countervailing reasons dramatically alter? It may be that, as in *Vincent*, there was a pressing emergency at t_1 the demands of which served to defeat the reasons against the commission of the tort. One should save the ship, even if that means one fails to conform to the reasons generated by the plaintiff's property interest. But at t_2, when the ship is safe, the countervailing reasons are no longer present. The reasons generated by the plaintiff's property interest now tell in favour of compensation, unopposed.

[8] See again section 6.2.1 above.

And there may be converse cases, like *Ruxley v Forsyth*,[9] in which *r* is conclusive at t_1 but not at t_2, perhaps because it was much more onerous to conform to *r* at the later stage. This reminds us of an important factor in this mix that considerably strengthens the probabilistic connection that my argument generates. It is this: it is usually much more onerous to repair damage that has occurred than to avoid it in the first place. Hence there tends to be a more powerful set of countervailing forces that exist at t_2 to defeat *r* but not at t_1. And that tightens tort liability's connection with unjustified conduct by the defendant. It makes it more likely still that the imposition of liability can be justified only in circumstances where the defendant had a conclusive reason not to commit the tort. For if *r* was unable to defeat the relatively feeble countervailing reasons that tend to exist at t_1, how likely is it to defeat the formidable ones that exist at t_2?

This asymmetry I identified—that repairing damage is usually more onerous than avoiding causing it—is itself only contingent, of course. It is often said that repairing the harm is a 'positive obligation', and that refraining from causing it is (usually) a 'negative obligation'; and that positive obligations are more onerous. But that may not be the best way to look at it. If the damages are modest (or if the defendant is very rich), then the positive act of repair will not be all that demanding.[10] On the other hand, even negative obligations to avoid damage can be very restrictive of valuable activities. Cricket, for example, involves some inherent risks to those nearby. Having to give it up in order to minimise that risk will involve a serious loss—at least if you love cricket

[9] *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8. See the discussion in section 5.2 above.

[10] I take this point up in more detail in the next chapter: see section 8.4.2 below.

as much as does Lord Denning.[11] One can easily see that one might have an undefeated reason to keep playing, notwithstanding the reasons against. And yet it need not follow that one lacks a conclusive reason to compensate those whose interests are set back as a result. Having to pay one's way might be far less onerous than giving up cricket altogether. Reason *r* might then be a conclusive reason to pay damages, but not to avoid the risk of causing them in the first place.

So there are factors tending to suggest that the probabilistic connection in premise 4 will be a strong one. And it may be strengthened further by reintroducing the stability and generality conditions that I mentioned in chapter 6.[12] But it would be misguided to try and pin down the lesson of premise 4 more firmly than that.

7.1.3. Conclusiveness and fault

What is the connection between *r*'s being conclusive and the fault standard? This brings us to 6 (and 7) above. That there is a connection seems undeniable, but it is a limited one. Not every aspect of the fault standard can be justified by the argument.

What the argument establishes is that tort liability is more easily justified if the defendant failed to conform to a conclusive reason at t_1. But this is a point about the actual reasons that apply to him, not about the reasons he perceives. Why so? This flows from premise 2. It states that the law should not impose liability on a person, i.e. order them to pay damages, unless they ought all things considered to pay them. This is because the law should compel people to do only those things it would be better that

[11] I am referring to his famous speech in *Miller v Jackson* [1977] QB 966.

[12] See section 6.2.2 above.

they do.[13] But what matters here is that the balance of reasons *as they actually exist* must favour its performance. It does not matter whether the defendant *believed* the balance of reasons to favour this. Premise 2 goes no further than saying that the action must be the right one to perform. The action must be justified 'objectively', as it were. And hence the conclusion of the above argument establishes only that tort liability is more easily justified when it is imposed only on defendants whose conduct in committing the (alleged) tort was unjustified. To the extent that the fault standard in the tort of negligence does this, the above argument counts in favour of having it. But to the extent that the fault standard goes further, and releases from liability those defendants whose actions are unjustified but excused, the argument does nothing to support it.

Some might object, however, that premise 2 can in fact be strengthened by the addition of an excusing condition. It should say the law should not impose liability on a person unless (i) the person has a conclusive reason to compensate, *and* (ii) they know, or ought to know, that this is so. This stronger premise can be justified by principles deriving from the rule of law, restrictions on the use of coercion, etc, the outlines of which are not hard to perceive. But this strengthened premise would not strengthen the argument's conclusion. Even supposing it is true, it would not help to justify the fault standard to the extent that it relieves of liability those whose actions at t_1 were excused but unjustified. Condition (ii) embodies an excuse, but it would not carry through to 5 above. Whether or not the defendant knows, or ought to know, that he ought to conform to *r* is not a property that is constant between t_1 and t_2. Premise 4,

[13] Perhaps the law is justified in compelling people to do that which *it has reasonable grounds to believe* the defendant ought to do. This does not affect the point in the text, which is that *the defendant's* beliefs about the matter do not enter the picture.

by contrast, rested on the capacity of *r* to defeat countervailing reasons, which is constant across time.[14] Hence *r*'s having a considerable capacity to defeat countervailing reasons at t_2 told us something about its capacity to defeat countervailing reasons at t_1. But the knowability of reasons is not like that. *D* might have been unaware, and reasonably so, that his boiler would explode and damage his neighbour's flat; and hence he would be unaware, and reasonably so, that he should switch it off before leaving for work. But it would not follow that *D* was unaware, still less reasonably so, that he should compensate for that damage (if he should) after it happened. The explosion put him on notice (or, if not, then the litigation did). So condition (ii) above is satisfied in relation to the imposition of liability on *D*, but its counterpart condition was not satisfied when he committed the (alleged) tort. That should not surprise us, since condition (ii)'s satisfaction is something that depends entirely on the circumstances. Its introduction into premise 2 is therefore a distraction.[15]

7.1.4. Conclusion

Nevertheless, the argument of this section establishes an important result. When the logic of the continuity thesis is fully spelt out, we see that it implies that the imposition of tort liability will usually be justifiable only for conduct that was unjustified. This it does by establishing a contingent connection, and consistently with its denial of any

[14] Albeit that the force of the countervailing reasons themselves does vary. That is why premise 4 contains only a probabilistic claim.

[15] To be sure, *D*'s reasonable ignorance of the material facts at t_1—at the time of the explosion—may itself be a reason not to impose liability upon him: see section 8.3 below. The only point here is that this is not entailed by the continuity thesis.

necessary and general one. Usually a defendant has a conclusive reason to pay compensation only when he had a conclusive reason not to commit the tort. Far from making it a mystery why we have a fault standard, then, the continuity thesis helps to explain it. Even though it implies that strict liability is justifiable and indeed logically primary, the thesis predicts that fault-based liability will be preponderant.

But the preponderance so established is, as I admitted, limited. For one thing, there is much room for debate about the strength of the probabilistic connection it establishes between liability and unjustified conduct. Some may doubt it can fully explain the closeness of that connection in tort law as we find it. What's more, the argument is incapable, in principle, of accounting for the fact that tort law frequently affords defendants not only a justification but also an excuse. My argument explained only the provision of justifications. Hence more is needed to understand why the fault standard goes further. Fortunately, there is much more to say.

7.2. Indeterminacy

One very important thing to say is this: the continuity thesis is sometimes indeterminate. By this I mean it does not always identify uniquely one candidate to repair a certain harm. Most pertinently, the explanation it offers for a tort defendant's having a reason to repair a certain harm applies equally to the claimant. That is the insight on which this section trades. It follows from this insight that, if the law is to impose liability on the defendant, it cannot but invoke additional criteria. And that opens the way for the fault standard.

So understood, therefore, the fault standard is again shown to be an entailment of the continuity thesis rather than an embarrassment to it. To that extent, this section has

an affinity with the previous one. But it differs in that it widens the focus. The previous section was blinkered in that it attended only to the reasons resting on defendants. Even this narrow approach was able to show the importance, albeit the contingent importance, of a fault standard. But the arguments were incomplete, in that we cannot leave out the reasons that rest on the claimant. Precisely because *both* the claimant and the defendant often have reasons not to cause the tort, and thus, by the continuity thesis, to repair it, the mere fact of the defendant's reason to pay does not take us very far. The continuity thesis identifies the defendant as *one* candidate to pay for the damage, but where there are also others it remains to select from the candidates available. We need to reintroduce this important point to understand the fault standard's sphere of application, and its special utility where it is necessary to allocate liability between two candidates who are jointly responsible.

7.2.1. Epstein and Perry

The argument I just sketched is recognisable as the nub of Stephen Perry's well-known account (adjusted to the language of the continuity thesis). He developed it in response to the work of Richard Epstein, who in 1973 argued with much insight and imagination in favour of strict tort liability.[16] It will already be apparent, from chapter 3, that my arguments are indebted to Epstein's: I not only endorsed similar conclusions, but used many of the same cases to buttress them, such as *Vincent*[17] and *Bolton v Stone*.[18]

[16] Richard A Epstein, 'A Theory of Strict Liability' (1973) 2 Journal of Legal Studies 151.

[17] *Vincent* (n 6).

[18] *Bolton v Stone* [1951] AC 850 (HL).

The compelling objection Epstein faced from Perry, however, was that a system of generalised strict liability would be unworkable, indeed impossible.[19] This was because the causation of harm, which Epstein presented as the ground of the defendant's liability, was indeterminate. The conduct of both the defendant *and* the claimant to a tort suit are causes of the harm for which the claimant is seeking compensation. Hence, as Perry went on to argue more fully later,[20] the law cannot but introduce some further criterion to distinguish the two: and the fault standard (together with assessments of the claimant's own fault, through doctrines like contributory negligence) ensures that the loss falls on the person who was most at fault in causing it, and thus who most deserves to bear it. Tort law is thus a hybrid of 'corrective justice' and 'distributive justice'. The causation of harm—or, rather, what Perry called 'outcome responsibility', borrowing from Honoré[21]—identifies the set of potential bearers of the loss. That is the 'corrective justice' component. But since the set so identified contains both the claimant *and* the defendant, the additional criteria embodied in the fault standard are needed to select the one to bear the loss. That is the 'distributive justice' component. But it is 'localized' distributive justice, since the two candidates for the application of these criteria have by this stage been pre-selected, as it were, by their outcome-responsibility.

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[19] Stephen R Perry, 'The Impossibility of General Strict Liability' (1988) 1 Canadian Journal of Law and Jurisprudence 147.

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

[21] See Stephen R Perry, 'Honoré on Responsibility for Outcomes' in John Gardner and Peter Cane (eds), *Relating to Responsibility: Essays in Honour of Tony Honoré on his 80th Birthday* (Hart 2001); 'Responsibility for Outcomes, Risk, and the Law of Torts' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press 2001).

For those who (perhaps wrongly[22]) understood Epstein as attempting to justify a generalised regime of strict liability, his project was taken *ipso facto* to have failed. It was left devastated, they thought, by Perry's criticisms. True, Epstein had tried, in later work, to reconcile his project with tort law as we find it, where liability is usually imposed only for conduct that is faulty. He did this by emphasising the role of defences: the defendant's *prima facie* liability arises strictly, he clarified, but can often be discharged by raising a subsequent plea that his conduct was justified or excused.[23] But many felt this only served to undermine Epstein's stated views: when all is said and done, he seemed to be admitting, tort law tries to ensure that liability is imposed only on defendants who were at fault. He began as a forceful advocate of strict liability, but seemed to retreat to fault liability under pressure.

So Epstein's theory was widely thought to be either implausibly extreme or uninterestingly meek. And that impression has by and large persisted. The continued dominance of negligence, as I suggested in my introduction to this chapter, has no doubt been taken as corroboration. Epstein's views nowadays have few thoughtful defenders, and tend to be quickly dismissed.[24] Moralists have tended to think he took an obvious wrong turn, and have reinstated the core concepts—fault and duty—from which Epstein sought unsuccessfully to divert them.

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[22] Compare Epstein's own account of his views in 'Toward a General Theory of Tort Law: Strict Liability in Context' (2010) 3 Journal of Tort Law 1, 6 ff.

[23] Richard Epstein, 'Defenses and Subsequent Pleas in a System of Strict Liability' (1974) 3 Journal of Legal Studies 165.

[24] Coleman and Ripstein, for example, two leading moralists, evidently take the failures of Epstein's theory to be a matter of public record: 'one might wonder', they say, 'why its appeal persists despite what strike many as obvious problems'. See Jules Coleman and Arthur Ripstein, 'Mischief and Misfortune' (1995) 41 McGill Law Journal 91, 107.

That is unfortunate. For my part, I believe the views Epstein stated in 1973 are basically on the right track—although those have been so widely misunderstood that it may be unhelpful and misleading to say so. In what follows, I will try to preserve the very important kernel of truth in Epstein's work, while conceding to his critics where appropriate, and clarifying that less separates the two camps than is often thought. Perry's work is illuminating, but his criticisms must be handled with care. From the synthesis, the core lesson of Epstein's work re-emerges intact. But it has limits—which help to explain the fault standard.

That I would argue for a moderate position on these issues was, I hope, already apparent. Certainly I hope I have said enough, first, to dispel any thought I am arguing for the wholesale reform of tort law in favour of a system of strict liability. The task I have set myself here—to justify the fault standard—militates against any such suggestion. What is significant about my position is that the fault standard's justification lies downstream of the emergence of the defendant's reasons to repair. Strict liability therefore has logical primacy over fault liability, just as Epstein would have it. The continuity thesis allows us to be a bit more precise about this primacy. It explains that the defendant acquires a reason to repair the harms he has caused, regardless of whether he was at fault in causing them. It is then a further question whether that reason is a conclusive one, and moreover whether it is a conclusive reason to which the law ought to make him conform. It is within those enquiries that the fault standard finds its justification, to the extent it has one.

The argument of this section, in particular, is moderate in the following way. It accepts that strict liability is an impossibility in some cases. This is because the criteria it deploys are, in those cases, indeterminate as between claimant and defendant. To that extent, there is a necessary role for the fault standard, or something like it. But this

is true only sometimes. In many, perhaps most, cases, strict liability is successful in isolating the defendant as the proper person to repair the harm. That was true, certainly, of the instances of liability for unjustified conduct that I discussed at such length in chapter 3. In *Vincent*, *Bolton v Stone*, and the nuisance cases, the defendant was the sole cause of the harm to the claimant. That is why it was quite possible to hold him liable strictly. But that is not always so. Indeterminacy does arise elsewhere—and this helps to explain why we have the fault standard as often as we do.

7.2.2. Coase, Coleman and Ripstein

Indeterminacy is real, then, but it does not necessitate a fault standard in *all* cases. To sustain this claim requires me to refute, however, what has become a surprisingly common view.

Perry, as I said, argued against Epstein that a general strict liability regime was impossible. The question is what conclusion to draw from this. The most popular answer, as I also said, is that it is destructive of Epstein's project. The causation of harm simply cannot pick out the defendant as the appropriate subject of liability. Hence one cannot but invoke the fault standard, or something like it, in order to do so. Perry's work is often taken to show, in other words, that strict liability is *always* unworkable and in need of supplementation (sometimes covertly) by fault-based moral premises, because the claimant is *always* a cause (jointly with the defendant) of the injury. If true, that would invalidate the position I staked out a moment ago.

Perry himself did not draw a conclusion so strong. In fact he expressly cautioned against doing so. 'It should be emphasised', he said, that his argument against Epstein

'applies only to a *general* standard of strict liability'.[25] Indeed this limitation was apparent in the title of his article. 'The coherence', he continued, 'of what might be called localized standards, in which liability can only be said to be "strict" relative to certain specified preconditions having been met'—the examples he gave were product liability and *Rylands v Fletcher*—'is not called into question'.[26] In other words, it would be unworkable to have a general principle of liability stating, 'One is liable to compensate for the harms one causes'. But it would *not* be unworkable to have domain-specific principles such as, 'One is liable to compensate for the harms one causes by the manufacture of products', or for the harms one causes 'by the escape of dangerous things one brought onto one's land'. The argument from causal indeterminacy, in short, does not invalidate strict liability altogether,[27] because causation is not indeterminate in general. It is indeterminate only in a subset of cases (though admittedly a large one, in Perry's view). This held out the possibility, Perry explains in closing, that 'once [Epstein's] theory has been properly interpreted and appropriately modified, it can be shown to be fundamentally right'.[28]

Yet those who have followed Perry have ignored these qualifications. Jules Coleman and Arthur Ripstein, for example, draw from his work an unyielding lesson.[29] If we ask whether the defendant was the cause of the injury, and whether the claimant was the cause of the injury, they say, 'the answer to both questions seems always to be

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[25] Perry, 'The Impossibility of General Strict Liability' (n 19) 158 (emphasis in original).

[26] ibid.

[27] Perry's other arguments, some of which he did think applied to all instances of strict liability, are considered below.

[28] Perry, 'The Impossibility of General Strict Liability' (n 19) 171.

[29] Coleman and Ripstein (n 24). See also Izhak Englard, 'The System Builders: A Critical Appraisal of Modern American Tort Theory' (1980) 9 Journal of Legal Studies 27, 60–61; 'Can Strict Liability Be Generalized?' (1982) 2 Oxford Journal of Legal Studies 245.

"yes"'.[30] On a purely causal analysis, therefore, 'we are likely to get the same result for every accident: both the injurer and the plaintiff cause the injury. Thus, we seem to find everyone liable for everything.'[31] Later they attribute to Perry—again without heeding his cautions—the claim that these 'problems of indeterminacy' are 'pervasive'.[32] In truth, of course, Perry had expressly denied that the problems were pervasive: they are only partial.

Why do Coleman and Ripstein overinflate Perry in this way? The trouble begins with Ronald Coase's 'The Problem of Social Cost',[33] on which Coleman and Ripstein heavily rely.[34] Coase discussed cases like *Bryant v Lefever*,[35] in which the plaintiff sued his neighbour, the defendant, for a smoke nuisance that arose when the smoke leaving the plaintiff's own chimney was trapped by the defendant's newly built boundary wall. Coase writes:

> Who caused the smoke nuisance? The answer seems fairly clear. The smoke nuisance was caused both by the man who built the wall *and* by the man who lit the fires. Given the fires, there would have been no smoke nuisance without the wall; given the wall, there would have been no smoke nuisance without the fires. Eliminate the wall *or* the fires and the smoke nuisance would disappear.[36]

Coase suggested the same analysis applied in *Sturges v Bridgman*,[37] in which the plaintiff doctor sued his neighbour, the defendant confectioner, for a noise nuisance

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[30] Coleman and Ripstein (n 24) 104.

[31] ibid.

[32] ibid 107.

[33] RH Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1.

[34] Coleman and Ripstein (n 24) 103–104.

[35] *Bryant v Lefever* 4 CPD 172 (1878).

[36] Coase (n 33) 13.

[37] *Sturges v Bridgman* (1879) LR 11 Ch D 852.

arising from the latter's machinery. 'The doctor's work would not have been disturbed if the confectioner had not worked his machinery', Coase writes; 'but the machinery would have disturbed no one if the doctor had not set up his consulting room in that particular place.'[38] 'If we are to discuss the problem in terms of causation', Coase concluded, 'both parties cause the damage.'[39] It is this analysis that Coleman and Ripstein endorse, deriving from it the conclusion that causation of harm is *always* an indeterminate criterion.

One doubts whether even Coase would have endorsed this reading. His article is about what liability results economic efficiency would recommend, not to offer an analysis of the nature of causation (although the quotation I gave can, when taken out of context, suggest that he is). He also says, in terms, that the problem he is addressing is different to the one facing judges and lawyers.[40]

At any rate, the conclusion Coleman and Ripstein derive from Coase's article cannot be correct. It generates absurdities. According to their account, *Bolton v Stone* can be fairly described as a case in which Ms Stone slammed her face into a cricket ball. That sounds like a joke, but if so it is one that Coleman and Ripstein, as John Gardner puts it, 'are a bit too clever to get'.[41] Well, that is a little unfair. They would not say that Ms Stone slammed her face into the cricket ball. But they are committed to saying that Ms Stone caused her own injuries—just as much as the batsman did. They embrace that conclusion as orthodox when it ought to be regarded as a *reductio ad absurdum*.

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[38] Coase (n 33) 13.

[39] ibid.

[40] ibid 13, 15.

[41] See his terse but devastating discussion in 'Punishment and Compensation' in Russell Christopher (ed), *George Fletcher's Essays on Criminal Law* (Oxford University Press 2013) fn 10.

Of course we can tell there is something fishy in describing Ms Stone as the cause, co-equally with the batsman, of her head injuries.

The problem should be obvious from Coleman and Ripstein's own exposition. They repeatedly use the word 'injurer', as in the quotations I gave above, to refer to the defendant, whom they contrast with the 'victim' plaintiff.[42] But does that not give away the game? One cannot draw this distinction, and uniquely designate the defendant with the word 'injurer', without an understanding that it is he, and not the plaintiff, who caused the harm. The truth is we know immediately that the 'injurer' is the defendant: in *Bolton v Stone*, the batsman who hit the ball, rather than the woman whom it struck. We know this because 'injurer' picks out a causal concept which—contrary to Coleman and Ripstein's professions—*is* sufficiently determinate to isolate the defendant.

The same objection might be made to Coase's work (though whether that would matter to Coase himself is, as I explained, doubtful). In fact Epstein did make it. Coase says, in the quotation I gave above discussing *Sturges v Bridgman*, that 'the [confectioner's] machinery would have disturbed no one if the doctor had not set up his consulting room in that particular place'. Even as he asserts that both the confectioner *and* the doctor caused the nuisance, then, he says it is the former's machinery that 'disturbed' the doctor. But that is to acknowledge that the machinery, rather than the doctor's surgery, caused the disturbance. So the detail of Coase's exposition, like that of Coleman and Ripstein's, tacitly assumes what he professedly denies. As Epstein says, 'Coase describes each situation by the use of sentences that

[42] See again Coleman and Ripstein (n 24) 104 and passim.

differentiate between the role of the *subject* of each of these propositions and the role of the *object*'.[43] But that is to recognise the relative determinacy of causation.

Perry, seizing upon Epstein's choice of phrase here, condemned this criticism of Coase as merely 'grammatical'.[44] That is ungenerous. Epstein's 'subject' and 'object' designations are not meant as a claim about the grammar of Coase's sentences, but to signify that, in the causing of harm to the claimant, the defendant was the actor and the claimant the passive victim of his conduct.

The same quotation from Coase alerts us to a further point. When he urges the conclusion that both the plaintiff and the defendant are the cause of the former's injuries, he is using what lawyers will recognise as the 'but for' test for factual causation. One mentally eliminates the conduct of a person, and, if the harm would not on that hypothesis have eventuated, his or her conduct is a cause of it. But, as all lawyers also know, the 'but for' test does not exhaust the concept of causation. Sheer 'coincidences'—events but for which the outcome would not have eventuated, but which did not make it more likely—are not aptly described as causes. Nor is it apt to say that an antecedent has caused an event that is 'too remote' from it. And much more could be said here.[45] Each of these concepts is slippery, to be sure. But that does not matter; there is no need to pin them down here. The point is simply that, even though

[43] Epstein, 'A Theory of Strict Liability' (n 16) 165.

[44] Perry, 'The Impossibility of General Strict Liability' (n 19) 157 fn 34.

[45] Most of it was said in HLA Hart and Tony Honoré, *Causation in the Law* (Clarendon 1959). See, for the points I made in the text, 164–168 and chs 8–9.

the 'but for' test picks out both the defendant and the claimant, as Coase argued, it does not follow that the concept of causation as a whole cannot distinguish them.[46]

In sum, therefore, none of the arguments considered succeeds in showing that causation of harm is *always* indeterminate as between the claimant and the defendant. The arguments are over-general and fallacious. The truth is that it is only sometimes, indeed perhaps relatively rarely, that the resources of a causal analysis run out—and only then does a fault standard need to be interposed.

7.2.3. What cases?

When is causation indeterminate? I will offer only a rough sketch. In *Sturges v Bridgman* it was not indeterminate. Undeniably the noise was caused by the defendant's machinery, not by the plaintiff. That is what Coase's own account of the case disclosed. In *Bolton v Stone*, I went on to argue, it was also not indeterminate. To claim that Ms Stone caused the cricket ball to hit her head is absurd. In truth the batsman was its cause, and not her. The same can be said of *Miller v Jackson*, where of course the offending conduct of the defendant was much the same as in *Bolton*. And it can also be said of *Vincent*, in which it was plainly the ship's captain who damaged the plaintiff's dock, not the plaintiff.

But then we get to cases where the same cannot be said. Take two vehicles colliding while in motion on the public highway. Who caused the collision? Both are 'but for'

[46] What about those who insist that these alleged additional causal components are mere smokescreens for moral judgements? It is beyond the scope of this thesis to respond to those arguments—though it is implicit in what I say in the rest of this chapter how I would do so. Fortunately, Hart and Honoré provide a full response.

causes; without the presence of either, it would not have happened. More interestingly, both are *active* participants in the collision. That is an important difference from the cases I considered above. It means we cannot distinguish the two in the way I distinguished the batsman from Ms Stone, and the confectioner from the doctor. Hence we are drawn into the question of which driver behaved more riskily, which driver could have avoided doing so, and so on. We must, in short, introduce a fault standard of some kind to decide who is liable. And it is surely no coincidence, then, that this was the kind of case in which the modern negligence standard was forged.[47]

The point is brought out nicely by the speeches of Bramwell B. As we saw in chapter 3, he staunchly resisted the importation of a fault standard into nuisance law, regarding strict liability as much fairer. This was in early cases like *Bamford v Turnley*, in which the defendant's brick kiln emitted noxious smoke onto his neighbour's land.[48] It is in the same category as *Sturges*—and hence it was entirely possible for Bramwell B to resist the importation of a fault standard. The same was true in *Brand v Hammersmith & City Railway Co*, in which the source of the noise that disturbed the claimant was the defendant's railway, and in which Bramwell B said the *Bamford* principle applied.[49] But he saw that the position was, of necessity, different in the early cases of negligence on the highway: 'Where two carriages come in collision', he said, 'if there is no negligence in either it is as much the act of one driver as of the other that they meet.'[50] The case in which he made this remark, incidentally, was not of that kind.

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[47] Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press 1977) 95.

[48] *Bamford v Turnley* (1862) All ER 706.

[49] *Brand v Hammersmith and City Railway Co* [1867] LR 2 QB 223, 231.

[50] *Fletcher v Rylands* [1865] 3 H&C 737, 790.

It was *Fletcher v Rylands*, where Bramwell B would have imposed strict liability on the defendant—a result which first the Exchequer Chamber (per Blackburn J), and then the House of Lords, would later famously endorse.

Epstein wrestled with the collision cases. He rejected the distinction I have just drawn between the two categories, trying to present even the collision cases as viable instances of strict liability.[51] We need not do the same. His critics have a point—but one that identifies his theory's limits, rather than undermining it altogether.

7.2.4. Defeating conditions

That does not conclude the matter. Further points have been marshalled against Epstein to show that his arguments fail outright. One of them says that, even in cases like *Sturges v Bridgman* and *Bolton v Stone*, where I said causation *is* determinate, the truth is otherwise. This can be demonstrated by varying the facts, to introduce some blameworthy conduct by the claimant.[52]

Suppose, for example, that Ms Stone had wandered onto the cricket pitch, in defiance of the match being played there, and was then struck on the head by the ball. Few would argue she should succeed in holding the club liable. Or suppose the claimant had foolishly parked her car on the road's shoulder, just past a bend, where oncoming drivers could not see it until it was too late. The defendant duly crashes into it. Should he be liable to the claimant? Surely not. The general point these examples

[51] Epstein, 'A Theory of Strict Liability' (n 16) 187. Perry takes him to task over this (with citations to parts of Epstein's later work) in 'The Impossibility of General Strict Liability' (n 19) 166–168.

[52] See Perry, 'The Impossibility of General Strict Liability' (n 19) 156–159, 162–163. Also Englard, 'Can Strict Liability Be Generalized?' (n 29) 248, 252.

are taken to illustrate is that the law must consider the claimant's own conduct, and if that is seriously faulty then liability should not be imposed on the defendant. Hence the latter's causation of harm cannot be sufficient for liability—not even in the cases I said were immune to the previous objection.

The objection has force, but what exactly does it show? 'Epstein claimed fault is irrelevant to liability', runs a certain simple-minded thought, 'but here we see it plainly intruding.' Hence the objection is thought to undermine Epstein's theory altogether. In truth it does not. The examples show that the defendant should be excused from liability where the claimant's own faulty conduct contributed to the injury. They do not show that he should be excused where the claimant's conduct did not. In other words, the defendant's causing of the harm is only *defeasibly* sufficient for his liability. That is an important point, but it should not be overdrawn. Some faulty conduct by the plaintiff must be shown. If no such conduct is shown, the causation of harm by the defendant is a perfectly adequate criterion for the imposition of liability.

All this is consistent with Epstein's own distinction between the *prima facie* case for liability, for which the causation of harm is the criterion, and the conditions that may defeat it *ultima facie*, of which the claimant's faulty participation in his own injury is one. And there is a world of difference, which should not be obscured, between that model and the one which makes the defendant's fault an indispensable condition for liability *prima facie*. There is not only a profound theoretical difference, but also a patent practical payoff.[53] The two models give opposite answers to the question: Who is liable when *neither* party is at fault? Epstein's answer is, of course, 'the defendant',

[53] This is usefully brought out in Jules L Coleman, 'The Morality of Strict Liability' (1976) 18 William & Mary Law Review 259, 274.

in defiance of the fault-based orthodoxy. The good sense in that answer should not be thrown out merely because he has to concede that claimant fault can act as a defeating condition.

7.2.5. Causation and morality

Epstein's critics often complain that he treats the defendant's causation of harm as a 'sufficient' condition for liability,[54] or as leading 'automatically' to liability.[55] It is plain from the preceding discussion that this is unfair, or at least overly simple. Epstein went to great lengths to explain how 'defences and subsequent pleas' raised by the defendant could allow him to escape liability, notwithstanding the claimant's establishment of a *prima facie* case.[56] So it is not true that he thought the causation of harm is 'sufficient' *sans phrase*, nor that it led 'automatically' to liability. The objection must therefore be made more precise, or deepened, if it is to count as an objection at all. It must be that Epstein fails to show that 'causing harm is sufficient to establish *even a prima facie case* for liability'.[57] That would mark a true objection to Epstein's account, even once allowance is made for the defeating conditions that he fully recognised.

But why might one think the objection is sound (apart from the reasons of alleged causal indeterminacy that I have already rejected)? At this point in the argument,

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[54] Englard, 'Can Strict Liability Be Generalized?' (n 29) 250; Jules L Coleman, 'Book Review: A Theory of Strict Liability' (1983) 92 Philosophical Review 613, 615–616.

[55] Tony Honoré, 'Responsibility and Luck' (1988) 104 Law Quarterly Review 530, 541.

[56] Epstein, 'Defenses and Subsequent Pleas in a System of Strict Liability' (n 23).

[57] Coleman (n 54) 616 (emphasis added).

Epstein's critics usually tap into a deeper sense of distrust about his wider ambitions. They suggest his account is overly austere, trying to displace the moral complexities of tort law with his simple causal criterion, and trying to replace politics with mechanics. His causal paradigms are 'not normatively neutral', say his critics; a moral proposition is 'built into' them, without acknowledgement.[58] Epstein's theory, as others put it, 'contains normative elements';[59] he has to 'beg important questions' and 'presuppose' answers to them before causation can do the job.[60] Hence his attempt to displace these 'difficult questions' with a simple causal criterion fails.[61] This seems to be the critics' bedrock objection to Epstein, the most fundamental flaw from which they believe no recovery is possible.[62]

On one level, this is a surprising criticism, since Epstein makes the case for his theory on openly 'normative' grounds.[63] He has two key arguments.[64] The first is an analogy with the case of 'self-injury':[65] he says there is no principled difference between a person who damages his own property, who would obviously bear the costs of doing so, and a person who damages another's; such a person should not be able to foist the costs on someone else merely by damaging their property rather than his own,

[58] ibid 615.

[59] Perry, 'The Impossibility of General Strict Liability' (n 19) 159.

[60] Coleman and Ripstein (n 24) 106–107.

[61] ibid 107.

[62] Indeed one doubts whether Coleman and Ripstein truly believe what they say in the quotations in section 7.2.2 above, viz. that the causation of harm is incapable of distinguishing between claimant and defendant. In truth they seem to be setting up a staging post for their main assault on Epstein, which is that the causation of harm is not sufficient *without supplementation by normative judgements*.

[63] He also describes his task as 'normative' at the outset: 'A Theory of Strict Liability' (n 16) 151.

[64] They are helpfully discussed in Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) ch 7.

[65] This is Weinrib's term: ibid 172–173.

and so tort liability is justified in order to prevent this.[66] The second, probably related, argument is an analogy with expropriation. If one's property is seized by another, one is entitled to compensation. But things should be no different if one's property, rather than being taken away, is damaged: one is in both cases being non-consensually deprived of rights in the property.[67]

There is no need to get into the details of Epstein's arguments here. They have been roundly, and probably soundly, criticised. Since I do not adopt them, that is irrelevant. I raise them only to observe that they are clearly normative arguments, as Epstein made no attempt to deny.

Hence the charge that he illegitimately suppresses normative considerations must have a different target. And indeed a different target does present itself: not the arguments by which Epstein motivated his position, but the criterion for allocating liability that he took these arguments to yield. True, in other words, Epstein's arguments for using the causation of harm as a (defeasibly) sufficient condition for the imposition of liability were avowedly normative. But the application of that criterion—deciding *whether* the defendant has caused harm—does not require a moral judgement by the person applying it. Or so Epstein seemed to think.[68] And that, his critics say, is a mistake.

To assess force of the objection, we need to reflect a bit more on the distinction just drawn. Take two propositions:

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[66] Epstein, 'A Theory of Strict Liability' (n 16) 158–160.

[67] Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 2009) especially at 97–98.

[68] See eg 'A Theory of Strict Liability' (n 16) 189.

(A) A contract term ought to be struck out if the proferens did not bring it to the attention of the other party.

(B) A contract term ought to be struck out if it is unfair.

Or this pair:

(C) You ought to love your child.

(D) You ought to love your child if their conduct is acceptable.

All of these propositions are normative principles. How could it be otherwise? They say what one ought to do. And yet plainly there is an important difference between the members of each pair. The application of the first propositions in each pair, A and C, does not depend on any further normative judgement. It depends only on factual judgements. (Who is the proferens? What actions did he take when the contract was being agreed? Who is your child? And so on.) In the second propositions in each pair, B and D, it does depend on further normative judgements. This difference is not called into question merely because all four are normative principles. Nor does it matter that the condition stated in A ('…if the proferens did not bring it to the attention of the other party') must itself be defended on moral grounds. That defence would turn, one imagines, on further principles to do with the voluntary nature of contractual obligation, the necessity of knowledge for voluntary choice, and so on. Yet the condition so identified remains a non-moral one. It does not itself entail a normative judgement.

Much the same is true of the debate about whether strict liability is defensible. Consider:

(E) A defendant ought to be held liable for causing harm to the claimant.

(F) A defendant ought to be held liable for causing harm to the claimant only if that conduct was unjustifiable.

Undoubtedly E is a moral principle. It must be defended on moral grounds, as no one in the debate denies. And yet it is plainly shorn of the criterion contained in F whose application requires a moral judgement—an evaluation of the justifiability—of the defendant's conduct. This means it is not very compelling to object to Epstein's theory on the basis that he tries to eliminate moral premises from tort law. No one tries to do that, and no one could succeed if they tried. But that gives us no reason to doubt that Epstein has succeeded in dispensing with the fault requirement. And that, plainly, was his core objective.[69]

But can he not be criticised, even so, for obscuring the normative questions behind the 'harm' criterion? Indeed he can, as Epstein in later work acknowledged.[70] Whereas his early work implied that all harms caused by the defendant justified his (*prima facie*) liability, the truth, he said later, is that one must identify, through normative argument, the relevant 'subset'.[71] And that brings us, finally, to the valid form of the objection. Only once the harms have been identified for which tort law provides an action can Epstein's criterion do its work. For plainly—as his critics noted, and Epstein agreed—not *all* harms can attract liability. Running one's competitor out of business, or spurning a lover, never attracts liability, despite the reduction in well-being that it causes.[72] It does not even establish liability *prima facie*, i.e. prior to the raising of defences. In that respect, it goes beyond the objection I considered at the end of the previous subsection. So one's account, in short, must have the resources to show why

[69] See eg his characterisation of his position in ibid 152, 189.

[70] Richard Epstein, 'Causation in Context: An Afterword' (1987) 63 Chicago-Kent Law Review 653. He grants that it is necessary to identify the subset of harms.

[71] ibid 653–664. Here his newfound commitment to utilitarianism served to fill an important normative gap.

[72] Coleman (n 54) 615–616.

the causation of only *some* harms plausibly give rise to liability. And only normative argument, of some kind,[73] can do that job.

7.2.6. Causation and the continuity thesis

Having located—at last—the truth in the objection, all that remains is to point out that the continuity thesis fully accommodates it. Far from obscuring these moral questions, as Epstein's critics accused him of doing, the continuity thesis helps to underscore them. It draws our attention to what is needed to justify liability. The continuity thesis establishes, to recall, that a defendant has a *pro tanto* reason to repair harms he has caused by non-conformity to a reason. That means the following questions need to be answered to determine whether liability is justified. The first is whether (and to what extent) the defendant's commission of the (alleged) tort constituted non-conformity to a reason that applied to him at t_1. The second is whether (and to what extent) his compensating for the harm caused would constitute conformity to that reason at t_2. The third, and perhaps the most wide-ranging, is whether that reason is a conclusive one at t_2. And finally, there is the question whether the law ought all things considered to impose liability on the defendant, in other words whether it should compel him to conform to that reason. These questions are, of course, moral ones. They are about what reasons we have, and about their force relative to many others. They offer an

[73] Many objectors try to twist the knife by saying Epstein needs an account of 'rights' to isolate the cases in which the defendant's causing of harm attracts liability: Coleman and Ripstein (n 24) 116–117; NE Simmonds, 'Epstein's Theory of Strict Tort Liability' (1992) 51 Cambridge Law Journal 113, 131–132. For reasons already apparent from Part I, I doubt this adds anything useful to what I say in the text.

account of what it takes for a given 'harm' to form part of the subset for which liability may be imposed, quite apart from the question whether the defendant has caused it.

So the continuity thesis, far from obscuring these moral questions, helps underscore their complexity. And it does so notwithstanding the support it provides for using the non-moral criterion of causation, apart from fault, as a necessary, but not a sufficient, condition for liability.

7.3. Conclusion

The takeaways from this chapter are that, in two respects, the continuity thesis predicts the deployment of a fault standard much of the time. This is despite its headline implication that defendants' reasons to repair arise strictly. First, that reason to repair is likely to be conclusive, and thus to be capable of justifying liability, only if it was also a conclusive reason not to commit the (alleged) tort: in other words, if the commission of the tort was unjustified. Second, the problem of indeterminacy means that sometimes an additional criterion—including, very plausibly, fault—is indispensable to justify the imposition of liability on the defendant, given that the claimant and defendant are otherwise symmetrically situated. But only sometimes. The point should not be overgeneralised.

We can recognise these truths while maintaining what is distinctive about the continuity thesis, and, more generally, of the claim that strict liability is logically primary. The defendant acquires a complete reason to repair the harm he has caused simply in virtue of his non-conformity to reason in causing it. Fault is, to that extent, irrelevant. But whether the defendant should be made liable turns on difficult further questions. Most importantly, it depends on whether the complete reason I mentioned

is also a conclusive one, as well as on whether the law ought coercively to hold the defendant to it. Nothing I have said suggests a simple answer to those questions. All sorts of reasons, and all sorts of arguments, can bear upon it. In the next chapter I identify some of them. These constitute a case in favour of the fault standard that is more robust, and more general, than the case I made in this chapter.

8. Justifications for fault

The previous chapter narrowed the gap between the continuity thesis's headline claim that duties of repair arise strictly and the widespread, rationally appealing deployment of fault liability in tort law. It did so by spelling out the logic of the continuity thesis, which in fact predicts a relative preponderance of liability for conduct that is unjustified, and which cannot but be supplemented by additional criteria, among which fault is an appealing contender, to allocate liability in cases of indeterminacy. But that did not suffice to close the gap. In this chapter, I look at some additional reasons why defendants should not be compelled to conform to their reasons of repair at t_2 except where their non-conformity to those reasons at t_1 was faulty. For the most part, these considerations have been widely recognised by other tort theorists, of various partisan affiliations. But my task is to integrate them with my own account, with which they might be thought in tension.

In a way, that is true: the continuity thesis *is* in tension with these considerations, in the following sense. The continuity thesis says that defendants have a reason (call it, again, *r*) to repair the harms they have caused through non-conformity to a reason. The case for liability so generated is strict: it does not depend on defendant fault. But there are reasons that countervail against *r*, and reasons that count against the defendant's being made to conform to *r* by the law; and it is through these that the fault standard is justified. It follows that defendant fault is not part of the positive case for liability. Rather, it helps take care of some objections. That bears out the sense in which strict

liability is the logically basic form of tort liability, while helping to show that my endorsement of that view is not the radically reformist view it may have appeared. Strict liability is the logically basic form of liability, but not therefore the best. Fault liability has some significant advantages over it.

At the same time, those advantages are only partial and contingent. Contrary to the way the fault standard tends to be presented, it is justified only sometimes, and only ever antinomously. The arguments in its favour produce a mess of competing considerations, which the fault element usefully allows judges to adjudicate, but from which will emerge no case for fault's being an indispensable precondition for liability. But these complexities are consistent with the practice of tort law as we find it.

8.1. The defendant's liberty

So what has the fault standard ever done for us? I have denied its immanence in the positive justification for tort liability, but am no ingrate. There are many reasons for having a fault standard. My point has been only that these are not entailed by the explanation of why duties of repair arise. Hence they must be explained otherwise. The basic insight that explains them is this: the defendant's liberty is something tort law ought to respect. That is the insight I will develop at length, and in its various iterations, in the rest of this chapter. Though emphasising the importance of the

defendant's liberty to the fault standard is not new,[1] I think the roles I ascribe to it will be at least somewhat unusual.

One common line of thought runs thus. A reasonable person is not 'a timorous faintheart, always in trepidation' lest he causes some injury; he does not avoid all risks, however slight, but 'ventures out into the world, engages in affairs, and takes reasonable chances'.[2] The reasonable person, in other words, balances the value of his pursuits against the risks they create. He considers the importance of avoiding harms to others, but rightly does not give up his own liberties altogether. Hence, liability should not be imposed where, because of the importance of the defendant's own freedom, a reasonable person would not have avoided the harm that befell the claimant.

This line of thought will not do for our purposes. It begs the question at issue in this chapter. We are trying to justify having a fault standard. This line of thinking presupposes, however, that the fault standard is justified. It starts from the premise that tort law ought to impose liability only for unreasonable conduct, and then cashes out what reasonableness means with due regard for the defendant's liberty. But the truth of the premise is what we are investigating here, so that popular way of deploying the defendant's liberty is foreclosed for us. What we seek to explain, without begging the question, is why we should even be asking what a reasonable defendant would do.

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[1] See eg Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press 1998) ch 3. Other Kantian accounts are similar in spirit, eg Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) ch 6. See finally the 'Rawlsian' approach of Gregory C Keating, 'Reasonableness and Rationality in Negligence Theory' (1996) 48 Stanford Law Review 311.

[2] *Herschel v Mrupe* 1954 (3) SA 464 (A) 490. See also *Bolton v Stone* [1951] AC 850 (HL) 860–61 (Lord Normand): 'It is not the law that precautions must be taken against every peril that can be foreseen by the timorous'.

8.2. Deterrence

The argument we begin with is simple. If tort liability is imposed on defendants to repair the harms they cause, that gives them a (further) reason to avoid causing them. It makes the defendants' actions more costly to them than they would otherwise be. It may be, therefore, that the imposition of liability would deter the activity in the course of which the harms are likely to be caused. If the activity is valuable, then its deterrence is necessarily a bad thing. Hence the law has reason to avoid or reduce these deterrent effects. The introduction of a fault standard helps the law in this task, since it gives defendants a means by which to avoid the incurrence of liability without giving up the activity altogether.

8.2.1. Preliminary objections

Some moralists will recoil at this argument. With its emphasis on the social consequences of imposing liability, and its language of 'costs' and (one might also say) 'incentives', it carries the stench of the economists whom they deplore. It suggests that tort law is to be imposed (or not) depending on the 'policy' arguments that can be marshalled in its favour. All these are things the moralists have said, over many years, are not a proper basis for justifying tort liability.[3] To be a moralist is to reject this kind of instrumental reasoning, including the notorious 'optimal deterrence' theory.

[3] See most famously Weinrib (n 1) 5–6, 142.

There is some overstatement in these views, but even if they are valid I can appease the objectors. The role of deterrence in my argument is limited. It is of a kind that should not draw the moralists' ire.

The consequences of tort liability, if it were imposed, are surely *relevant* to whether imposing it is justified. Suppose the imposition of tort liability in case *x* is justified. But now suppose that imposing it would cause the death of one million babies. It is no longer justified, I hope we can agree. But if that is true, as it surely is, then I cannot see that we can rule out, in principle, syllogisms such as, 'The imposition of liability in this case would be justified, except that it will severely diminish the resources available to the National Health Service, so it is unjustified', or, 'The imposition of liability in this case would be justified, except that it would so badly clog up the court roll with others of the same kind that it is unjustified'. And so on, to such claims as, 'The imposition of liability in this case would be justified, except that it would deter valuable activities to such an extent that it is unjustified'. These would be sound arguments—albeit that of course one might take different views on the extent of the resource-diminution, the flood of litigation, or deterrence of valuable activities that would plausibly make liability unjustified.

There is a grain of truth in the moralists' resistance to deterrence arguments, but the above points are compatible with it. The grain of truth—perhaps more than a grain—is that these kinds of deterrence arguments (and other similar 'policy' arguments) are *secondary* in the justification of liability. The continuity thesis allows us to see why. The defendant acquires a *pro tanto* reason, *r*, to repair the harm simply in virtue of his non-conformity to *r* in causing it. So the case in favour of his repairing the harm arises regardless of the consequences of his doing so (apart from the 'consequence' that his repairing it will constitute conformity to *r*). And it follows that there is a case for the

law's imposing liability on the defendant regardless of the consequences of its doing so. The *pro tanto* case for the imposition of liability is therefore complete without any room for consideration of deterrence or other policy implications. These can only belong, therefore, to the considerations that bear on whether the *pro tanto* case for liability is a conclusive one.[4]

The instrumentalists flout these facts and correspondingly overrate the importance of deterrence and other policy considerations in their attempts to justify liability. To that extent the moralists are justified in their antipathy to them. It leaves my own deterrence argument, however, fully intact. I do not ascribe to deterrence considerations the wrong kind of normative significance: I quite agree that they matter only insofar as they bear on turning the non-instrumental *pro tanto* case for liability into a conclusive one, as I have just explained.

Nevertheless, does my argument not rest on the same questionable empirical claim as the instrumentalists'? If the imposition of tort liability *has no* deterrent effects, then my argument has no practical force. It provides no reason against the imposition of liability. And there is, of course, a venerable tradition of denouncing the tenuousness of the link, on which the instrumentalists insist, between liability and deterrence.[5] If the sceptics are right, my arguments might seem to fall flat.

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[4] It is tempting to say, on this basis, that 'policy' arguments can be reasons against imposing liability, but never reasons in favour: John CP Goldberg and Benjamin C Zipursky, 'The Moral of MacPherson' (1998) 146 University of Pennsylvania Law Review 1733, 1842 fn 418; Nicholas J McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2008) 103. That is on the right track, but too stark. Whether the *pro tanto* case for liability is a conclusive one is not determined by countervailing reasons only; it is determined also by the reasons, other than *r*, that support the *pro tanto* case. But the upshot, for my purposes, is much the same.

[5] See for an eye-catching recent example Lord Sumption, 'Abolishing Personal Injuries Law: A Project' (2018) 1 Journal of Personal Injury Law 1, especially at 6.

Yet that is not quite right. The scepticism about tort law's deterrent effects is well taken, but its context must be remembered. The instrumentalists (or many prominent members among them) need to rely on the empirical link between the two *in order to justify having tort law*. They say that tort law exists because of the consequences it has: in particular, that it lessens the incidence of the harms for which it is imposed. But if it does not, in fact, have those consequences, then this purported justification is no justification at all. So the instrumentalists rely on this empirical link to a special degree, and their opponents rightly object that it is too tenuous to bear that weight. Tort law's deterrent effects are too limited to provide a plausible justification for having it (at least not when compared to the other means by which deterrence could be secured). But it does not follow that its deterrent effects are too limited to have any effect on how judges ought to tailor the requirements for tort liability, even where, as in my account, that liability is justified on other grounds. The deterrent effect that I need to support my argument is much less than that which the instrumentalists need to support theirs.

The instrumentalists also need a deterrent effect that is *more precise* than the one I have in mind. Imagine a legal system is deciding whether to impose liability on the fire service for its incompetent handling of a fire. To justify this extension of liability by its incentive effects, it needs to be the case that the firefighters will be induced by the threat of liability to fight fires more competently. But the liability might also have other incentive effects. The fire service might be disinclined to take steps that serve the public interest but harm potential claimants—the proverbial act of destroying the neighbouring house to prevent the fire's spread, say—in order to reduce its liabilities. It might, *in extremis*, encourage the fire service not to show up at fires at all, for fear of incurring liability if it does. For the instrumentalist seeking to justify liability on the basis of its deterrent effects, haphazard ones of this kind are not good enough. Only

the first will do, since only the first is a desirable consequence, counting in favour of that which causes it. The second and third do not help their argument, since they are not good things to bring about, and in fact they confound the attempt to justify liability by its beneficent consequences. But, for me, these only strengthen my argument. It is the very fact that tort liability's incentive effects are imprecise, scattergun, unintended, that provide reasons against imposing it, notwithstanding the non-instrumental case in favour.

In short, scepticism about tort law's deterrent effects furnishes no objection to my argument—in contrast to the arguments at which that scepticism is usually directed—unless tort law has no deterrent effects at all. And that would seem an implausible claim.[6] The most reasonable inference is that tort law's incentive effects are real, but haphazard. That is enough for my argument. Indeed my argument would count for something even if these incentive effects are merely *perceived* by judges, since even then this would likely affect their decisions. But the main point is that I intend to remain agnostic about the strength of the incentive effects mentioned; my argument will be that, *to the extent* that tort liability deters the activities that are likely to attract it, that is a reason to have a fault standard.

[6] For a helpfully nuanced recent discussion see Jonathan Morgan, 'Abolishing Personal Injuries Law? A Response to Lord Sumption' (2018) 34 Professional Negligence 122, 127–133.

8.2.2. The tragedy of *Bolton v Stone*

I will develop these points by reflecting on *Bolton v Stone*,[7] which I said in chapter 3 was a more puzzling case than sometimes suggested, and whose insistence on the fault standard has not been explained by anything yet said in this chapter.

The case was brought by Ms Stone for the injury she had suffered when she was struck on the head by a cricket ball hit out of the defendant's cricket ground. The House of Lords found for the defendant on the basis that the risk that the ball would fly out of the ground and hit a passer-by was so slight that a reasonable person in his position would not have taken steps to avert it. The case is a landmark in the history of the tort of negligence, to the conventional understanding of which it is thought neatly assimilable. A reasonable person does not try to avoid even tiny risks; modern tort law imposes liability only on those who have behaved unreasonably; and hence this faultless defendant should be let off, despite his passivity in the face of a risk that was (dimly) foreseeable. This logic can be (and has been) buttressed by pointing out that the reasonable person considers also the cost and difficulty of avoiding the risk.[8] Where, as in *Bolton* itself, those are considerable, the reasonable person would not take the precautionary steps.

Of course, for reasons already given, this line of thought provides no justification of the kind we are seeking. It justifies the decision once the association between liability and defendant fault is in place. But it does not justify putting it in place.[9] We can

[7] *Bolton v Stone* (n 2).

[8] See eg *Tomlinson v Congleton BC* [2003] UKHL 47 [37].

[9] As Lord Hoffmann passingly recognised in *Tomlinson* (n 8) [4]. The law does not impose liability in the absence of fault, he said, but '[p]erhaps it should'.

outline a case in its favour, however, by reflecting a little on the social context of the case.[10]

Ms Stone lost in the Manchester Assizes, before a judge well-known to be cricket-lover, who perfunctorily acquitted the defendant of negligence.[11] His decision passed with only minimal comment. But things were different when the Court of Appeal reversed the Assizes and found for Ms Stone. That judgment received much media attention, and was presented to other cricket clubs, which might find themselves in the defendant's position, as an existential threat. Counsel for Ms Stone had indeed admitted that his argument 'seems to be an attack on cricket', but said that was the conclusion to which he was driven.[12] The Court of Appeal's agreement spurred cricket clubs across the country into action. Several leading officials indicated their willingness to finance an appeal to the House of Lords; a litigation fund was set up, and several associations were enjoined to provide support. Sir Walter Monckton, then counsel for the National Cricket Club Association and later president of the MCC, effectively the national body in charge of the sport, agreed to argue the appeal. 'The issue was no longer about the liability of Cheetham Cricket Club in this case', as Mark Lunney explains; 'it was about the liability of cricket clubs more generally'.[13] Their concern was that the liabilities that might result from a negative decision would cripple the sport. Plainly the Lords were alive to this—not only because of the media furore,

[10] See especially Mark Lunney, 'Six and Out: *Bolton v Stone* after 50 Years' (2003) 24 Journal of Legal History 1.

[11] *Stone v Bolton* [1949] 1 All ER 237. See Lunney (n 10) 6–8; Simon Burnton, 'Bessie Stone's Head Injury and the Court Case That Threatened Cricket' *The Guardian* (15 October 2019).

[12] Lunney (n 10) 9; Burnton (n 11). The quotation is from a contemporary account, viz. the front page of the *Manchester Evening News* (13 October 1949).

[13] Lunney (n 10) 12.

in which counsel for both sides had been involved, but because both Lord Normand and Lord Reid noted in their judgments (as had Jenkins LJ in the Court of Appeal) that the stakes were such that the defendants might have to stop playing cricket on this ground (which they had been doing since 1864).[14]

The Lords did not say, as Lord Denning famously said 25 years later in *Miller v Jackson*,[15] that the majesty of local cricket was their reason for refusing to impose liability on the defendant club whose activities had harmed the neighbours. But given the context of the case it is not far-fetched to think those same considerations were at work among the Lords deciding *Bolton*.[16]

True, my discussion of *Miller* in chapters 3 and 4 traded on the distinction between the two remedies that were at issue, damages and an injunction. I said an injunction should obviously not be awarded if the defendant's activity ought, on balance, to continue. But I also said that this was no answer to an award of damages—since that need not prevent the defendant's activity. But it is of course possible that damages awards will be so burdensome to defendants that they will choose to give up the activities that are likely to incur them, even in the absence of direct compulsion. And the stakes in *Bolton* may at least arguably, or at least perceivably, have been of that kind.

The Lords' judgment was widely understood, then as now, to have turned on their estimation of the special social importance of cricket. The 1951 *Modern Law Review*

[14] *Bolton v Stone* (n 2) 862, 867.

[15] *Miller v Jackson* [1977] QB 966.

[16] They are expressly equated in Steve Greenfield and Guy Osborn, 'The Sanctity of the Village Green: Preserving Lord Denning's Pastoral Vision' (2012) 9 Denning Law Journal 53.

ventured that the result would have been different if the imposition of liability would not have proclaimed that 'the highly laudable pursuit of the national game is to be abandoned'.[17] In the High Court of Australia it was said that *Bolton* was driven by '[p]olicy considerations concerning English cricket' rather than sound application of the principles of negligence.[18] The official position in England and Wales, per Lord Hoffmann, is that negligence was not made out in the case because 'the cricket club were carrying on a lawful and socially useful activity'—more so than the defendant's activities in other leading negligence cases—'and would have to stop playing cricket at that ground'.[19]

Lord Hoffmann's interpretation of *Bolton* may be integrated, to be sure, into the reigning ideology, which is that the fault element helps to ensure that tort liability is imposed only on those who 'deserve' it, in virtue of their objectionable conduct, much as it does in criminal law. Reasonable defendants do not give up activities because of tiny risks, hence the defendant's failure to give up cricket cannot justify its liability. But that explanation does not square well with the controversy about the case. Although the Lords refused to impose liability on the club, they did so reluctantly, and indeed they thought there was something unjust in the club's evasion of its responsibilities. Lord Radcliffe suggested the fairer result would have been for the defendant to compensate Ms Stone, and that it was regretful that the law of negligence

[17] Dennis Lloyd, 'Notes of Cases' (1951) 14 Modern Law Review 499, 499, 502.

[18] *Wyong Shire Council v Shirt* [1980] HCA 12, 50.

[19] *Tomlinson* (n 8) [36].

did not allow that; and several commentators, both popular and professional, appeared to agree. All this I explained, at some length, in chapter 3.[20]

The point here is that this other side of the case does not sit well with the view that fault is integral to tort liability's justification. If an essential element of the positive case for liability is lacking, why would the result attract such controversy, with even a judge who decided it recording that he thought the defendant ought to pay compensation? These complexities are not impossible to reconcile with the conventional, fault-based picture. But they are much more smoothly recognised by an account of the kind I am advancing, according to which the defendant had good reason to compensate the plaintiff—probably a conclusive one—by virtue of causing it, but the law did not require that of him because that would have other, unacceptable consequences. That can explain why, on balance, *Bolton v Stone* was decided in the way that it was, and yet not cast out altogether the widespread and plausible sense, on which I traded in chapter 3, that there was a strong case for deciding it differently.

Notice, on this reading, the tragic position in which the law finds itself, in virtue of its unwanted but unavoidable deterrent effects. The defendant had a sufficient reason to compensate Ms Stone, and the law accordingly had a sufficient reason to compel him to do so—if only it could, without doing unacceptable damage to other values. The law ought to take action—if only it were not so inept at doing so. Since the law's methods are ham-handed, it has to stand by even as the defendants before it fail to do what they ought to.

[20] See section 3.5 above.

So Richard Epstein was only half right when he described *Bolton v Stone* as an 'easy case', of which the fault-based ideology makes a mess.[21] He thought the application of a strict liability standard would have straightforwardly generated the 'proper result', which was the one for which the public clamoured.[22] It is true that the defendant acquires a sufficient reason to compensate the claimant apart from any fault on his part, which the deployment of a fault standard, or rather the ideology that typically underpins it, tends to obscure. That is the half-truth. But it does not follow that the law ought to impose liability. There are good reasons why it should not require defendants to do even that which they ought to. Despite the logical primacy of strict liability, in other words, there are many other considerations the law has to juggle too. It is better to recognise that the law is pulled in different directions, and legitimately so, with the result in *Bolton* possibly justified as a reluctant concession to the law's unintended deterrent effects. But whatever result ought ultimately to have been reached, it was not an easy case—notwithstanding the sufficient, but only defeasibly sufficient, reason in favour of liability.

Seen in this light, *Bolton* is not so different from *Vincent* after all—at least not deep down. There was, in both, a complete case for the defendant to make repair. And hence there was, in both, a compelling case for imposing liability, despite the reasonableness of the defendants' conduct. The two courts made different marginal judgements, however, about the relative significance of the damaging incentives that liability would create. In *Vincent*, the Minnesota Supreme Court chose to act on the complete case, which it rightly perceived, for holding the defendant liable. That has

[21] Richard A Epstein, 'A Theory of Strict Liability' (1973) 2 Journal of Legal Studies 151, 171.
[22] ibid.

attracted the critique—also rightly—that the judgment may create messy incentives for those facing similar situations of necessity.[23] It might induce them to take the (otherwise unreasonable) step of risking their ship, for fear of liability. That is the *pro tanto* case against what the Court did.

In *Bolton*, in contrast to *Vincent*, the House of Lords thought this case against liability was more than merely *pro tanto*. The damage done by the heavy-handed imposition of liability was sufficiently serious to outweigh the case in favour. That being so, the cause for regret there, expressed by Lord Radcliffe and many others, was the opposite of that in *Vincent*: what was to be lamented was the fact that the defendant, and others in its position, were not made to do that which they ought to have done.

8.2.3. Deterrence and fault

How exactly does all this justify the fault standard? True, it was the fault standard that allowed the defendant in *Bolton* to escape, which may have been justified, I just suggested, because of the deterrent effects that the imposition of liability would have had. But there were any number of ways a result of 'no liability' could have been achieved. Why enact the particular features of the fault standard?

[23] eg Kenneth Simons, 'Self-Defense, Necessity, and the Duty to Compensate, in Law and Morality' (2018) 55 San Diego Law Review 357, especially at 373. See also Francis H Bohlen, 'Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality' (1925) 39 Harvard Law Review 307, 317; Fleming James, Jr, 'Some Reflections on the Bases of Strict Liability' (1958) 18 Louisiana Law Review 293, 295–296. Both defend the result in *Vincent* because they doubt that its deterrent effects will be significant—which is fully consistent with what I have been arguing. But their points do count against those who claim the deterrent effects are what justifies imposing liability, as I just explained in section 8.2.1 above.

The case for this is, in the first instance, straightforward. It is a bad thing to deter actions that ought to be performed;[24] that is the truth on which the argument rests. But, equally obviously, it is no bad thing to deter actions that ought not to be performed. (In fact it is a good thing, which instrumentalists commonly try to leverage, as we saw, into a justification for having tort law.) In sum, the argument from deterrence establishes that, all else being equal, the law has reason to impose liability only for conduct that is unreasonable—i.e. where the balance of reasons was against its performance. Since that is what the fault standard achieves, that is a good case for having it.

This argument, to emphasise, gives a role for the fault standard, or a key component of it, that does not work through a moral evaluation of the defendant's conduct. True, the court has to decide whether the defendant behaved unreasonably to determine whether the imposition of liability would risk undesirable deterrent effects. But that judgement serves only as a minor premise in an argument about whether the consequences of liability are desirable. It is not about determining whether the defendant is a fitting candidate for liability by application of what I called, in chapter 3, the 'deficient conduct' principle.

This means, incidentally, that there is at least one thing that might be said in favour of the much-maligned Compensation Act 2006, s 1, which is headed 'Deterrent effect of potential liability' and instructs courts, when adjudicating the fault standard, to consider whether their decision might 'prevent a desirable activity from being

[24] Even actions that are merely permissible have value, and hence there is some reason not to deter them. But the force of those reasons depends on difficult questions, such as whether there are other options of equal or similar value available to the agent. I leave these complexities to one side.

undertaken at all, to a particular extent or in a particular way', or 'discourage persons from undertaking functions in connection with a desirable activity'. Some recent judicial pronouncements view things in a similar way, as where the Court of Appeal in *Scout Association v Barnes* said that the negligence standard must be applied so as not to 'stamp out socially valuable activities'.[25] This presents the fault standard as a mode through which courts can manage the deterrent effects of liability on future defendants—which resonates with the argument I have outlined in this section, but not with the more orthodox presentation, in which the fault standard is understood as a mode of assessing the moral quality of the defendant's acts.

There is a further way in which the features of the modern fault standard are supported by the argument. The extent of the deterrent effects of liability, and the desirability of them, depends a great deal on whether there are steps the defendant can take to avoid liability *other than* by giving up altogether the valuable activity in which he was engaged. If the Cheetham Cricket Club can avoid liability simply by erecting protective netting around the ground (a possibility considered in the judgments in *Bolton v Stone*[26]), then it will not need to stop playing cricket in order to escape liability. And that is the position that the fault standard helps to bring about. It makes it the case that if the club takes reasonable protective measures then it will not be liable, because it was not at fault. That gives defendants a means of escaping liability, short of giving up the activity altogether. Hence the liability so modulated will not cause them to give it up. And that is a good thing, of course, since *ex hypothesi* the activity has value.

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[25] *Scout Association v Barnes* [2010] EWCA Civ 1476 [34] (Jackson LJ), [49] (Smith LJ).

[26] *Stone v Bolton* [1950] 1 KB 201 (CA) 211; *Bolton v Stone* (n 2) 852, 869.

True, the law is still having a deterrent effect in my envisaged scenario: it is causing the club to put up the safety netting, and thus deterring, so to speak, the playing of cricket without netting. But that deterrent effect is no longer an undesirable one. The thing that has value is cricket-playing. It is not the case that playing cricket without safety netting around the ground is more valuable than playing cricket with it.[27] Hence the deterrent effect that the liability continues to have, once a reasonableness standard is interposed, is no longer one the law has reason to avoid. By this second route, therefore, the deterrence argument reinforces the *pro tanto* case for imposing liability only on defendants who behaved unreasonably.

Prima facie my deterrence argument counts against the imposition of liability only on defendants who are justified. It does not count against the imposition of liability on defendants who are unjustified but excused. This is because the evil that the law is trying to avoid is deterring activities that are actually valuable, not activities that the defendant mistakenly believes to be valuable. The defendant's mistake as to an activity's value, even a reasonable one, does not give that activity value. If it did, it would not be a mistake. All this being so, the deterrence argument appears to provide no reason to make allowance for the defendant's beliefs. It supports an unadorned justificatory standard, but nothing more. That, at any rate, was the position I have been assuming thus far. But perhaps that answer needs fine-tuning.

[27] Or perhaps it is. Maybe the netting would obscure the sense of space those on the field enjoy and which is part of the appeal of the game, etc. Certainly there are some activities that are less valuable when they are made safer, like extreme sports. Whether scout games are of this kind was a source of contention in *Scout Association v Barnes* (n 25). If they are, that weakens the case for finding the more dangerous form to be unreasonable.

After all, it is only possible for the imposition of liability to alter the conduct of future defendants if they anticipate it. Only if they expect liability to descend upon them if they take a certain action can they be caused to desist. Do deterrence considerations not, therefore, justify the interposition of a knowledge condition? In addition to the justificatory standard to which the argument has been directed, in other words, perhaps defendants should also be given a (partial) excuse. The courts should impose liability on defendants only if their conduct is unreasonable *and they knew it was unreasonable* (or something to that effect). For it is only when the defendant knew their conduct was unreasonable, and hence that the court would (consistently with my *prima facie* argument) impose liability on them for it, that the defendant might be deterred. *Ultima facie*, therefore, the deterrence argument goes further than I allowed. It supports the conferral not only of a justification but also of an excuse. Or so the objection runs.

There is some sense in this objection, but it has been misdirected. Although it is true that liability can deter only when it is anticipated (a point I will return to in a moment), the objection draws from that the wrong inference. The mistake it makes is the one I have been cautioning against throughout this section. It slips into treating deterrence considerations as part of the justification for liability, when in fact they count against it. It rests on the idea that liability should be imposed only where there will be a desirable deterrent effect of doing so, but that is no part of my argument. Recall that at this point in my thesis we are assuming that—deterrence considerations apart—there is a continuity thesis-derived case for imposing liability regardless of fault. And where the liability will have no deterrent effect on the defendant's activity (or where its deterrent effect will be a desirable one), the deterrence argument gives no reason against imposing liability. To that extent, the case in favour of liability can

retake, as it were, its natural shape. That is to say, liability should be imposed on the defendant regardless of fault, regardless of his state of knowledge. Hence the argument from deterrence does not justify the enactment of a knowledge condition, because where the defendant does not know about the liability the deterrence argument does not justify anything at all. The defendant who cannot be deterred by the liability can have it imposed upon him strictly; there is no countervailing reason against doing so. That is far removed from saying—it is more or less the opposite of saying—the defendant should have liability imposed on him only if he can be deterred.

8.2.4. A general complication

The argument of this section has built towards the claim that deterrence considerations count in favour of having a justificatory standard, though not an excusatory one. There remains an important complication, which for ease of exposition I have been suspending. The complication is that the deterrence argument operates generally, across classes of cases. It assumes a connection between the imposition of liability in case *x* and the conduct of defendants in cases *x+1*, *x+2*, and so on. It is only once liability has been imposed in case *x* that it is possible for future defendants to be deterred by it. The defendant in case *x* itself is incapable, in fact, of being influenced in this way (so some of my earlier references to the defendant in *Bolton v Stone*, though helpful for the sake of brevity, were too simple). This means that the deterrence argument does not give the court reason to impose liability only where the defendant *in the case before it* has behaved unreasonably. It gives the court reason to decide the case in such a way that liability will be (or is more likely to be) imposed *in future* only on defendants who are (or are likely to be) behaving unreasonably.

One might respond to this with the following series of thoughts. It is the liability-attracting activity in general that is likely to be deterred, not the defendant's undertaking of it in case *x*, and accordingly it is the appropriateness of liability for harms caused by that activity in general that is in need of assessment by the court. So the deterrence argument counts in favour of an assessment that is coarse-grained, and abstracted from the conduct of the defendant before it. In *Bolton v Stone*, it did not justify asking whether the Cheetham Cricket Club ought to have moved its pitch southwards, or put up safety netting; that would tell one almost nothing about whether other cricket clubs, whose circumstances would be different, ought on balance to continue playing. It justified asking whether the activity of cricket in general was sufficiently valuable and worth playing that it should not be deterred, and, if so, to enact a general rule to make that the case. The conclusion presents itself, in short, that the best way to reduce tort liability's deterrent effects on the valuable activity of cricket is to have a general exemption from liability for all harms caused by cricket-playing.

In a way that is true, but the conclusion is nevertheless a naïve one. A rule of the kind imagined would indeed be the most credible way to guarantee cricket-playing's immunity from liability, and thus to eliminate the deterrent effects of liability or the fear of it. But that proposal would also be much too rigid, and perhaps epistemically immodest, since in effect it makes an *ex ante* judgement about the reasonableness of *all* instances of cricket-playing. In truth, some instances of cricket-playing will be unjustified, and the rule would exempt from liability even those. That is an intolerable result, given that the defendant has (we are assuming) a conclusive reason to compensate the claimant for harms he causes. Nor is this general rule finessed to provide the escape route mentioned earlier that the deterrence argument favours, namely to allow defendants to exempt themselves from liability by taking reasonable

precautionary steps while continuing to play cricket. And yet, finally, despite its blundering rigidity, the rule is also unhelpfully narrow, since it applies to cricket-playing only, leaving unmodulated the deterrent effect of liability on all other activities. So general exemptions of this kind would have a host of disadvantages.

The alternative response that presents itself is, of course, to introduce a generally applicable reasonableness standard. Rather than trying to judge *ex ante* what activities are reasonable, it can be left to the judge in each case as it arises. But one must *enact a rule* requiring judges to make that judgement, and to exempt defendants from liability on the basis of it. Absent the rule, no credible signal will be sent to future defendants of the kind needed to remove deterrent effects. This is the response that the common law has in fact taken through the deployment, in landmark cases like *Bolton v Stone*, of the tort of negligence. By making it the case that liability is always conditional upon unreasonable conduct, it adopts an all-purpose solution to the problem of deterrent effects, but one sufficiently discriminating so as to go no further than the deterrence argument justifies.

That solution has the signal advantages, relative to general exemptions, that I just identified. But it has the obvious disadvantage that the commitment it makes is less credible. It makes the incidence of liability more uncertain, since it now turns on what the future court judges to be reasonable. Its judgement may not match that of the potential defendant whom the law is seeking to reassure. And it may be that there is a general tendency amongst judges, when making their determination, to take the deterrent effects on valuable activities insufficiently seriously. If that is so—or if that is perceived to be so—then the law has reason to take steps to shore up its credibility, and reduce liability's deterrent effects, by enacting a rule such as that contained in the Compensation Act 2006, s 1.

A general reasonableness criterion for liability has, of course, a more serious disadvantage. It reminds us of Epstein's point: that insisting upon a negligence standard makes *Bolton v Stone* into a hard case. Although the reasonableness standard very ably mitigates the deterrent effects of liability, it fails to recognise that these effects were only ever of secondary importance. The defendant in *Bolton v Stone* had a conclusive reason to compensate the claimant, despite the reasonableness of his conduct. Though deterrence considerations matter, that is only by counting, *pro tanto*, against the complete reason the law had to impose liability. To give perfect effect to those considerations, therefore, is almost certainly unjustified. For it means giving *no* effect, where those considerations apply, to the complete reason the defendant had to compensate the claimant, and hence to the complete reason the law had to hold him liable. Doing that is bound to strike an unsatisfying balance between those competing sets of reasons, and hence to lead to the wrong result in at least some cases. For Richard Epstein and other critics, *Bolton v Stone* was one such case.

8.2.5. Nuisance, negligence, and trespass

Perhaps the smoothest way of adjudicating both sets of reasons would be to attend to the reasonableness of the defendant's conduct *within* the wrongfulness enquiry. That is what the tort of private nuisance does. The reasonableness of the defendant's conduct is taken into account in the wrongfulness enquiry, so that it bears on whether liability will be imposed, but with much latitude retained to impose liability even for conduct that is eminently reasonable. Hence we find that 'those acts necessary for the common and ordinary use and occupation of land' cannot attract liability 'if conveniently done',

which is ripe for interpretation as a reasonableness criterion;[28] and yet that '[l]iability in nuisance is strict in the sense that one has no right to carry on an activity … merely because one is doing it with all reasonable care'.[29] The perceived antinomy gives rise to a tedious debate about whether or not nuisance is genuinely strict, or in truth fault-based. The best answer is neither. There is rightly no fault element, since the defendant's being at fault is not why he is a candidate for liability, and yet courts need a doctrinal space within which to manage the reasons against imposing it—and these turn in important ways, as we have seen, on the reasonableness of his conduct.

That these countervailing reasons do not always win out is illustrated by the cases I emphasised in chapter 3, such as *Miller v Jackson*[30] and *Dennis v Ministry of Defence*,[31] where the defendants were held liable to compensate the claimant despite the reasonableness of their conduct. On my account, those results are fully rationally intelligible. But the conventional account, since it wrongly thinks of defendant fault not as a countervailing consideration but a component of the case in liability's favour, predicts that if the defendant has behaved reasonably then he should necessarily be relieved of liability. And accordingly it must reject the results in these cases, implausibly, as inexplicable and wrong.

There is also an instructive point here about malice. In the common law of nuisance, malice on the part of the defendant is often decisive in establishing liability.[32] It seems natural to offer a culpability-based explanation of this: does it not show that the law

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[28] *Bamford v Turnley* (1862) All ER 706 712; applied in *Southwark LBC v Mills* [1999] 4 All ER 449.

[29] *Transco plc v Stockport MBC* [2004] 2 AC 1 [26].

[30] *Miller v Jackson* (n 15).

[31] *Dennis v Ministry of Defence* [2003] EWHC 793.

[32] *Christie v Davey* [1893] 1 Ch 316; *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468.

readily imposes liability if it can establish a guilty mind on the part of the defendant?[33] But it may be readily explained, also, within the deterrence argument I have been developing.[34] Whether a defendant ought to be held liable for causing a harm depends, in part, on whether he caused it in the course of an activity which has value. If it does have value, then the court has a reason not to impose liability. It has to balance that reason, on the one hand, against the straightforward reason it has to make defendants conform to their reasons to repair their harms, on the other. Where the defendant has imposed harm maliciously, however, there is no question of balancing harm-avoidance against the value of the defendant's activity—for it has none.[35] Rather than participating in the valuable sport of cricket (say), he was peppering his neighbours' house with cricket balls in the hope it would upset them. Since *that* activity, unlike cricket-playing, has no value, there is nothing objectionable about deterring it; and hence the reason against imposing liability falls away. There is no delicate balancing exercise to perform. All that remains is the straightforward reason the court has to hold the defendant liable—and that is why liability, in these cases, is usually straightforwardly imposed.

There are also cases, on the opposite end of the spectrum, where the law of nuisance employs the first strategy I mentioned in the previous subsection: it conclusively rules out liability ahead of time, by the enactment of a rule that some activities by defendants

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[33] This greatly troubled Holmes, who saw in it a threat to his 'objective' theory which I discussed in chapter 3. He wrestled with the issue in Oliver Wendell Holmes, 'Privilege, Malice, and Intent' (1894) 8 Harvard Law Review 1.

[34] A similar argument is made (though in service of a different wider theory) in Robert Stevens, *Torts and Rights* (Oxford University Press 2007) 22–23.

[35] It is not *always* true that malicious actions have no value. For example, competitive business practices that cause pure economic loss to rivals may have (some) value, even when malicious, because competitive markets have desirable results. So it is no surprise such practices are relatively immune from liability.

are never wrongful, regardless of the prejudice to their neighbours. The classic examples are blocking light or air by the erection of buildings.[36] The defendant's liberty to use his own land would be unduly fettered if he were held liable—or even potentially held liable—merely for building on his land, which in urban conditions will almost invariably block light or air that was benefiting another. The law's ruling out of liability is, of course, a bold one, since it settles the balance of competing reasons in favour of the defendant ahead of time, across a class of cases. That inevitably creates a greater-than-usual risk of injustice in some cases. But it may be justified, exceptionally, by the more credible protection it offers to the defendant's liberty.

The law of nuisance thus uses a range of methods to adjudicate the complex interaction between the reasons in favour of liability and the reasons against it. It does not think the right way of dealing with it can be stated generally. To that extent, it has the advantage over the tort of negligence, which can take account of deterrence considerations, but is committed, by its ever-present fault element, to refusing to impose liability too readily. So it might have been better if Ms Stone had not been foreclosed, for doctrinal reasons, from bringing a claim in nuisance. It might have allowed her to succeed in holding the cricket club liable, though without ignoring the reasons against.[37]

The tort of negligence does better in this respect, however, than the tort of trespass, which does not allow for the reasons against imposing liability to be considered at all. Had this cause of action been available in *Bolton v Stone*, as Epstein thought it should

[36] eg *Aldred's case* (1610) 9 Co Rep 57b; *Chastey v Ackland* [1895] 2 Ch 389.

[37] The problem was that a nuisance claim was then (but is not now) available only for ongoing 'states of affairs', not 'isolated escapes'. The one-off flight of the cricket ball was of the latter kind. See *Bolton v Stone* (n 2) 868.

be,[38] it would have necessitated a finding of liability against the defendant no matter how crippling the court judged the deterrence concerns to be. If *that* were the alternative, then so much the better to adjudicate the claim in negligence.

So my argument in this section does not provide a conclusive case in favour of the fault standard. It provides a patchy and partial one. What it shows is that the courts have reason to balance the value of holding defendants to their duties of compensation against the disvalue of deterring activities that ought to continue. In doing this they have a choice of means. The argument does not establish that the means they should choose is the interposition of a fault standard. In fact I suggested that, ideally, they should not. But it does not follow that the argument provides no support for a fault standard. The argument shows that deterrence considerations require judges to attend to the reasonableness of the defendant's activity, which may be sufficient to justify refusing to impose liability. It counts in favour of having a fault standard that it allows courts to reach this conclusion where appropriate. That is why I said deploying negligence rather than trespass in *Bolton v Stone* has its advantages. Though other ways of considering it may be better, it is better to consider it than not. And, especially when one takes account of the 'path dependency' of the common law,[39] which sometimes rules out the otherwise optimal solution—as it did, perhaps, in *Bolton v Stone*—it is not surprising that the law rationally adopts a solution that is not the best one that rationality could come up with. Judges reach for the tool that is to hand, and are right to do so, even when it is a bit blunt.

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[38] Epstein (n 21) 171.

[39] Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 Iowa Law Review 601.

8.3. Avoidability

Deterrence arguments are peculiar. They are simultaneously appealing and tenuous. They are appealing for the same reason that all instrumental arguments are. They avoid difficult questions about value by fixing upon something whose value is uncontroversial, and pointing out that the thing sought to be justified is an instrument to achieving it. That is what I did in the previous section, by saying (uncontroversially, I hope) that some activities in the course of which harms are caused to others are valuable. That being so, tort law has reason not to reduce the incidence of them. I was able to pass the buck to something plainly of value—just as consequentialists have always been able to avoid difficult questions about the intrinsic value of actions by passing the buck to the plainly desirable states of affairs that the actions bring about.

At the same time, deterrence arguments are tenuous, because they depend upon a largely untested empirical claim. Like all instrumental arguments, they benefit from being able to pass the buck to something of uncontroversial value, but at the cost of having to show that the thing sought to be justified is an instrument to it. Deterrence arguments are sound, in particular, only insofar as the imposition of liability will in fact have a deterrent effect. It may not. As section 8.2.1 emphasised, the empirical link upon which deterrence arguments rely is a doubtful one. True, it is not plausible, as I also said in that section, to think there is no empirical link at all. And what empirical link there is sufficed, I thought, to justify pursuing my argument to see where it would lead. The argument counts for something, though I left it open how much.

There was, however, a second reason to proceed in the way I did. Beginning with deterrence allowed us to see how the mechanics of the argument play out, with the difficult questions of value suspended. I could place deterrence considerations in their

context, ranged alongside the other reasons with which they compete, and see what exactly they would count for, insofar as they count. That generated some important conclusions that will continue to have relevance in this next section—which will replace the doubtful empirical foundation of the deterrence argument with a different one. For much of what I said in the previous section can be repurposed, in short, to show that the fault standard helps to constitute a kind of value that is intrinsic.

8.3.1. The case for control

Why might that be? Because respect for a person's liberty means giving him control over how his life goes. We all have reason to give others control over all sorts of aspects of their life. But, for the law, there are special reasons to give its subjects control over their incurrence of liability. Hence the ideal of the rule of law, which derives its value (in part) from the importance of respecting people's 'right to control their future'.[40] 'People should not be ambushed by the law; it should be possible for them reliably to anticipate the legal consequences of their actions and reliably to … avoid [them]'.[41] The implications for the imposition of tort liability are plain. The law has reason to ensure that tort liability is imposed on a defendant only when he was in control of whether that would happen. Obversely stated, the law has reason to give him a reasonably opportunity to avoid incurring liability.[42]

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[40] Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law* (Oxford University Press 1979) 221.

[41] John Gardner, 'Some Rule-of-Law Anxieties about Strict Liability in Private Law' in Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014) 209.

[42] This is the way Emmanuel Voyiakis puts it in his book: *Private Law and the Value of Choice* (Bloomsbury 2017).

I have described this as a manifestation of respect for the defendant's liberty, as indeed it is. But it is a different kind of respect for liberty to that considered in the previous section, in which I developed my deterrence argument. There the defendant's liberty was a reason not to impose liability if doing so would in fact cause the defendant to give up a valuable activity. His liberty was impacted in the sense that the liability goaded him into giving up something he would otherwise have chosen to do. The case against liability rests on the consequences it will actually bring about. This section is different. Here I am saying the defendant's liberty is a reason not to impose liability unless he had control over its imposition. It is not essential to this argument that the defendant will in fact take steps to avoid the liability. It is enough that the defendant could have done so.[43] This is because the value of being in control of something is not reducible to the value of that which, in exercising the control, one will bring about. Hence the argument of this section establishes that one's having control over the incidence of liability has value that is (at least partly) intrinsic. It counts in favour of a legal arrangement that it helps to constitute that value.

Despite that difference, some lessons of the previous section apply also in this one. Two stand out. The first comes as no surprise, given that it has underpinned not only the previous section but this entire part of my thesis. It is that, although the law has reason to respect the defendant's liberty, that reason does not form part of the complete reason the law has to impose liability on him. It forms part only of the set of countervailing reasons that count against imposing liability, notwithstanding the complete reason in its favour that is established on other grounds. That the defendant had control, therefore, may not be a 'necessary condition' for liability; its absence

[43] ibid 69–70.

'lacks the force of a veto'.[44] Nevertheless, it may give the defendant a legitimate complaint, which we ought to address before deciding that the imposition of liability is fair, all things considered.[45] It is plain that on my account, moreover, we would not want the defendant's liberty to be perfectly accommodated. This is because it is always pitted against important rivals—especially the complete case that exists in favour of compelling the defendant to compensate the claimant. Hence respect for the defendant's liberty, through conformity to the rule-of-law requirements I mentioned, cannot but detract from other values. 'The defendant's rule-of-law gain is [the claimant's] loss *in other ways*; most obviously, it deprives them of a remedy for wrongdoing that the law would otherwise grant'.[46] For that reason, 'we may sometimes have to swallow our rule-of-law scruples'.[47]

How strong are the reasons provided by the defendant's liberty? How valuable is it to give the defendant control over the incidence of liability, relative to the values with which it competes? That question will have to go unanswered. I can only say: the more value it has, the stronger will be the case for the fault standard.

The second lesson is that there are (at least) two ways in which a defendant may be able to avoid incurring liability to repair a harm he has caused:

(1) The first is to ensure that, although one causes harm to another person, one does not, in doing so, meet the (other) requirements for being liable to compensate him.

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[44] ibid 68.

[45] ibid.

[46] Gardner (n 41) 213.

[47] ibid 218–219.

(2) Another is to avoid altogether the kinds of activities in the course of which the liability-incurring harm might be caused.

These points emerged in the previous section when I contrasted two ways of mitigating tort liability's deterrent effects: one might introduce a fault standard to allow defendants to escape liability even when they cause harm, which helps to make the first kind of liability-avoidance possible; or one might exempt some line of activities (like cricket-playing) from liability altogether, which facilitates the second.

The cognate conclusions for which this section will argue can be summarised as follows.[48] It counts in favour of having a fault standard that it greatly assists the first kind of liability-avoidance. But it does not count as much as one might think, because that is not the *only* way for the defendant to control the incidence of liability: there is also the possibility of avoiding it with the second kind.

8.3.2. Ways of avoiding

Take as an example the rule in *Rylands v Fletcher*,[49] the canonical case of strict liability. The defendant was held liable for property damage caused when a reservoir on his land burst and flooded the land of the claimant. No unreasonable conduct by the defendant was at issue—neither in having the reservoir built nor in the cause of the burst. Yet liability descended upon him even so. That looks like an objectionable result, not only for fault-liability fetishists, but for anyone who values the defendant's liberty as I have just explained it. The rule established in *Rylands* seems to leave a defendant powerless

[48] They are indebted to Gardner: ibid 219–221.

[49] *Rylands v Fletcher* (1868) LR 3 HL 330.

to avoid incurring the liability, which now lies in ambush. Whether he incurs it depends on the fortuities of the dam wall.

It is tempting to say a fault standard is necessary to solve this problem. Whether a defendant causes a harm is not itself in his control. For one thing, he may not have foreseen that his course of action would or might cause the harm. Then there was no way for him to avoid it through the exercise of choice. Or it may be that, second, even though he foresaw it, it was not possible for him to do anything about it. In that case, too, the avoidance of harm was not in his control. And it looks like liability for the causing of harm fails both of these conditions: liability was imposed on Mr Rylands, for example, merely because something on his land caused harm to another. He may not have foreseen that harm, and, even if he had, the court made no claim there was something more he should have done to avoid it. It is the essence of the judgment that there was not.

A fault standard would seem to address both problems. The first and foundational requirement to establish fault in the tort of negligence is that a reasonable person in the defendant's position would have foreseen the risk of the harm that befell the claimant.[50] That does much to ensure satisfaction of the first, foresight condition that I mentioned. Over time the negligence standard has come to require, in addition, that there were reasonable steps available to the defendant to avoid the harm which he did not in fact take.[51] So in this respect, too, the defendant is given considerable control over the incidence of his liability. The law offers him something he might have done to avoid liability. And he is liable, oppositely stated, only if he chose, in a meaningful sense of

[50] eg *Glasgow Corporation v Muir* [1943] AC 448.

[51] See again, for eg, *Bolton v Stone* (n 2); *Tomlinson* (n 8).

that word, not to do it. Hence the tort of negligence has twin advantages over strict liability in offering the defendant control over whether liability descends upon him.

Certainly, however, one could go further in protecting the defendant's liberty than does the negligence standard. One could require not only that the risk in question was foreseeable by a reasonable person, but that the defendant himself in fact foresaw it. Criminal law, when it deals with this problem, tends to go this extra step, as Hart explained.[52] It tends to be reluctant to impose negligence liability, requiring instead actual intention or foresight.[53] In this sense it goes further than tort law in ensuring that 'the individual's choice [is] one of the operative factors determining whether or not [the criminal law's] sanctions will be applied to him'.[54] That can be readily understood, since in criminal law the stakes for the defendant are higher than in tort; and in tort, but not in crime, there is a claimant with whose interest in compensation the defendant's liberty is in a 'zero-sum' competition.[55] So we come back to the point that, even if the defendant's liberty matters a great deal, we would not expect, and we would not want, tort law to give it perfect protection. Nevertheless, the fault standard plainly gives some protection. And one is tempted to say *Rylands v Fletcher* is deficient because it does not give even that.

But that would be too hasty. To see why, we should revisit *Rylands*, which is not quite as crude as I first presented it. The rule laid down was that, if one knowingly brings onto one's land something that is 'not naturally there', which then escapes and

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[52] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon 1968) ch 2; also ch 5.

[53] ibid 132–133.

[54] ibid 47.

[55] Gardner (n 41) 211–214.

damages one's neighbour's land, one may be liable for the resulting harm quite apart from fault.[56] So the liability is strict, but it arises only conditionally. One is at risk of incurring it only if one knowingly brought onto one's land something that is unnatural. In fact one must have known, in addition, that it would be 'likely to do mischief if it escapes'.[57] This is very significant for our topic. It means that *Rylands* liability does not come off the shelf at all unless the defendant could foresee that it would.

And once he foresees the liability, he has a very simple way to avoid it: all he needs to do is refrain from bringing the mischievous thing onto his land. So, even absent a fault standard, defendants have control over whether they incur liability in *Rylands*. It can be both foreseen and avoided. The same is true even in jurisdictions that have expanded *Rylands* considerably, such as the United States. It applies there to 'abnormally dangerous' activities (paradigmatically, using explosives for blasting operations).[58] Provided one can predict the activities that will be classified as abnormally dangerous,[59] the incidence of liability can be foreseen—and then avoided. So yes, the fault standard makes it possible to avoid the liability in the most familiar way: that is, at the point the tort was committed. But there are also ways of making it possible to avoid the liability 'prophylactic[ally]'—by ensuring that point is never reached.[60]

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[56] *Fletcher v Rylands* (1866) LR 1 Exch 265, 280. And see now *Transco* (n 29).

[57] *Fletcher v Rylands* (n 56) 279–280.

[58] See especially the Restatement (Second) of Torts (American Law Institute 1977) § 519.

[59] The factors to be considered are in § 520 of the Restatement. But the main reason the activities are predictable is that only a few have been so designated by the courts: see for discussion John CP Goldberg and Benjamin C Zipursky, *Torts* (Oxford University Press 2010) 258–259.

[60] Gardner (n 41) 220.

It might be objected that offering this 'prophylactic assurance device'[61] is not the best way of protecting the defendant's liberty. It would better enhance his liberty if he (also) had the control, at the point of contact with the claimant, that is afforded by the fault standard. And that is true. But it is beside the point. We were not looking for the most comprehensive way of protecting the defendant's liberty. We were looking for a way of giving it a reasonable amount of protection in light of the many other values with which it competes. And, after all, the negligence standard is itself a compromise, doing less to protect the defendant's liberty than it could. I mentioned one respect in which it stops short a moment ago. Another lies in the notorious fact that it results in the imposition of liability even on defendants who were incapable, through dim-wittedness, deprivation, or ineptitude, of taking the avoidance steps it prescribes. And indeed even competent defendants are bound to make mistakes. For these reasons, the negligence standard is hardly a perfect guarantor, and moreover there remain considerable advantages to defendants in avoiding, prophylactically, the kinds of activity where the possibility of a mistake can even arise. It gives them more sweeping protection from liability than can the negligence standard. And in doing so they also confer an advantage, finally, on claimants, now spared the risks associated with the activity the defendant has chosen prophylactically not to undertake.[62] In that sense they resolve the tension between the parties' respective interests much better than the fault standard could.

[61] ibid.

[62] ibid.

In any event, the avoidability of an outcome is not, as it were, absolute. It is 'a matter of degree, determined by the costs involved in avoiding the outcome'.[63] It depends on what other options one had, and how easy it was to take them. So the real question is *when*—in what contexts—is a prophylactic assurance device sufficiently protective of the defendant's liberty? The answer, broadly speaking, is that it is sufficient when the activities that attract strict liability exist in relatively small pockets, leaving defendants with plenty of valuable options besides. But if the areas of strict liability are very encompassing, then having to remain outside them comes at too great a cost—and leaves defendants with no real choice at all. As Gardner puts it:

> Want to avoid strict liability for injuring people with your blasting operations? Fine: just don't go into the blasting business. Want to avoid strict liability for flooding your neighbour's land? Fine: just don't transport water onto your land. Want to avoid strict liability for breaches of contract? Fine: just don't enter into contracts that impose strict duties on you; undertake contractual duties only when they are of a 'best endeavours' variety.[64]

Generally speaking, where the activities that attract strict liability are very specialised, 'it is relatively easy to steer clear of strict liability' for doing them.[65] 'There are plenty of other ways left to make a living, get around, engage in social activities, etc.'[66] Not so, however, as the activity 'gets less specific and the associated pockets of strict liability grow':

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[63] Adam Slavny, 'Nonreciprocity and the Moral Basis of Liability to Compensate' (2014) 34 Oxford Journal of Legal Studies 417, 427.

[64] Gardner (n 41) 220.

[65] ibid.

[66] ibid.

> It is one thing to say: If you want to steer clear of strict liability, don't go into the blasting business. It is quite another to say: If you want to steer clear of strict liability, don't go into business at all. ... Activity-specific strict liability helps to satisfy the rule-of-law demand for assurance because and to the extent that it is genuinely specific.[67]

As these examples suggest, the argument predicts the incidence of strict liability in private law as we in fact find it. It exists only in narrow pockets, confined to activities that can be relatively easily avoided.

In sum, there is a general (though not necessarily conclusive) case for a foreseeability condition in respect of all tort liability; the defendant needs to have foresight to exercise any kind of control. But one should not slide unthinkingly from there to a general endorsement of the negligence standard. That conclusion should be particularistic and, even then, it requires hard work. A prophylactic assurance device may be sufficient. Whether it is depends on the activity concerned, the other options available in the society, the wider liability regime, and so on. There are plenty of stopping points, then, between endorsing the foresight condition and endorsing a negligence standard.

8.3.3. Giving fault an excuse

Many of my conclusions here echo those of the previous section about deterrence. Both give reasons to enact a fault standard, notwithstanding the logical primacy of strict liability; but those reasons are patchy, partial, and context-dependent. Both confirmed

[67] ibid 220–221.

that sometimes, or in some respects, the defendant's liberty would be *better* served by something other than the negligence standard. Both turn in important ways on the value of the defendant's activities, and on how the expectation of liability will affect their pursuit. And so on.

But there is one very important respect in which the argument of this section establishes something new. Recall that the other arguments I have given establish a case for giving defendants a justification only. This was true of both the continuity thesis-derived argument of section 7.1 in the previous chapter, and the deterrence argument of section 8.2 in this one. In both I explained that my arguments did not support a knowledge condition. They give a reason to impose liability only for defendant conduct that is unreasonable, regardless of whether or not the defendant knew of either his likely liability or his conduct's unreasonableness. The avoidability argument of the present section is different. The foresight condition is fundamental to it. So now, for the first time, we have an argument that supports the enactment not only of a justification but also an excuse.

In many respects, then, my diverse arguments are mutually reinforcing. But in some respects they come apart, and start to pull in different directions. Hence, once again, these arguments help to show the advantages of having a fault standard, and yet also the impossibility of any unitary and general case for it.

8.4. Negligence: An alternative history

I have done very little to try and settle the contest between the competing considerations that my preceding arguments identify. That was, of course, deliberate. I doubt the contest can be settled. Rather, I tried to show how several competing imperatives are

at play when a legal system decides whether to deploy a fault standard, that they are shot through with value judgements, and that any attempt to balance them is somewhat unstable. And I also tried to suggest this account is truer than the simplistic orthodoxy to the messiness of tort law as we find it. But I did try to identify some general principles, some sets of circumstances in which there is a strong case for having a negligence standard, and some where the case is weak.

8.4.1. Second-order benefits

Here is another general principle we can identify about this choice facing the legal system. Or perhaps we should call it a meta-principle. The fact that numerous competing reasons bear on the choice is itself a consideration in favour of choosing the fault standard. The more unstable the case for or against the imposition of strict liability, the more perilous it will be to adopt a rigid, all-purpose solution. Or, perhaps more pertinently, whatever solution is adopted ought to leave judges maximal latitude to adjudicate the competing considerations in each individual case as it arises.

This is a point that I drew upon in relation to both the deterrence and avoidability arguments: I said there is reason to favour the fault standard because it allows the determination of which considerations win out—the defendant's liberty? or his complete reason to compensate? etc—to be decided case-by-case. And, as I also said there, preserving that kind of adjudicatory latitude is what the negligence standard does. These points return now as a meta-principle, in the sense that they count in favour of the fault standard not only because it allows for the proper adjudication of the first-order considerations that bear on whether liability ought to be imposed, *but also*

because it affords flexibility in answering the second-order question of whether—and to what extent, and in what sense—liability ought to be fault-based at all.

That sounds like I've mangled the point, which has collapsed into circularity: how can having a fault standard be recommended on the basis that it allows one to decide whether to impose fault-based liability? There are two reasons. The first, and most fundamental, is that the negligence standard is highly versatile.[68] Behind this supposedly unitary fault element, judges can reach diverse conclusions. As I suggested in chapter 3, the fault standard hovers ambiguously between a justificatory standard and an excusatory one.[69] The law tends not to take a position on precisely what the standard is. And that can be very helpful, given that there are some reasons to favour one, and some reasons to favour the other. Judges deciding particular cases can take their pick. They can also shift the locus of the reasonableness assessment to reach opposite results. Hitting someone on the head with a cricket ball: surely an unreasonable act, when the balance of reasons is judged objectively, but perhaps liability is unfair because it was not easily avoidable; and that result can be seamlessly achieved, within the tort of negligence, on the basis that the *activity* in the course of which one did it was reasonable to continue. By contrast, a person whose foot slips off the brake pedal while driving a car, thus causing an accident, gets no equivalent reprieve. But car-driving is at least as reasonable as cricket-playing, and even the objectively unreasonable slip he made in the course of it was one a reasonable person would occasionally make. (It may not have been a reason-responsive action at all.)

[68] See further John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 Law Quarterly Review 563.

[69] See section 3.1.4 above.

These subtleties can be conveniently glossed over by the ambiguities of the negligence standard.

The second benefit, which was perhaps implicit in the first, flows from the distinction between questions of law (such as wrongfulness) and questions of fact (which include fault). That distinction derives from the historical separation between judge and jury. But the usefully different roles of wrongfulness and fault transcend this. Even where judges are tasked with deciding both questions, a decision on wrongfulness creates a precedent, whereas a decision on fault does not. So deciding a matter in terms of wrongfulness, rather than fault, would have very different legal effects. And often those effects will be unwanted. It requires great certainty, and perhaps epistemic immodesty, for a court to decide that liability in a whole class of cases should be ruled out *a priori*, as it were—though that would be the effect of a negative judgement on wrongfulness.

The appeal, instead, of a closely tailored decision on fault, which entails only a revisable suggestion rather than a binding rule for future cases, is always likely to be strong. As Gardner puts it, 'passing the buck like this from "law" to "fact" mitigates the awesome responsibility, for judges, of having to set legal standards that are fit for re-use in future cases.'[70] So the negligence standard, in short, allows much latitude to judges in deciding cases, and allows them to keep it that way.

Moreover, when we widen the domain across which the choice is being made, the case for the supple fault standard becomes stronger still. That, again, follows from the fact that the force of the competing considerations waxes and wanes depending on

[70] Gardner (n 68) 571.

context. The more contexts that the choice of liability regime has to straddle, the less likely a general choice of strict liability is to be satisfactory—or, by the indeterminacy argument of chapter 7, even logically possible. When the defendant's conduct has resulted in a 'boundary crossing' from his land onto the claimant's, there is a ready means, within causation, to say that the former is solely responsible for the resulting harm. Not so, however, when we are faced with two vehicles colliding on the highway. Here the resolution of the case through causation alone is impossible, and so considerations of fault are inevitably deployed.[71]

And once the tort of negligence has been steeled in situations of that kind, it can begin its march across other terrains.[72] It is readily adaptable to new factual settings. In this respect it signally differs from the law of nuisance, which was built to contend only with boundary crossings from one plot of land to another, and whose solution cannot transcend that narrow context (as perhaps *Bolton v Stone*, in which the tort of negligence was available, but the tort of nuisance doctrinally foreclosed, helps to show). And the need for a suppler standard is self-fulfilling. As the law opts for more general principles of liability, as it did in the twentieth century, the wider the variety of contexts in which they need to be applied, and the harder it is to specify any precise rules in advance. The success of the tort of negligence, with its highly adaptable breach test, thus breeds success.

So we are readily able to understand how the tort of negligence comes to predominate, notwithstanding the logical primacy of strict liability, by reflecting on the

[71] Morton J Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford University Press 1992) 95.

[72] ibid 95–97.

usefulness of versatility when one is trying to solve a number of problems, each morally complex. When we do so, a different story of the development of tort liability starts to come into focus, one that contrasts with the familiar Whiggish account of the rise of negligence. The fault standard comes to be seen less as the just moral principle towards which the arc of legal history has been bending, and more as a useful technique on which the law, in its pragmatism, has found itself relying—and perhaps over-relying. Sometimes a claimant who would and should have been compensated under a strict liability standard, like Ms Stone, has to pay the price.

8.4.2. The heaviness of burdens

Another general lesson we can draw is that the force of the arguments in this chapter depend on how much the defendant, if held liable, would have to pay. The deterrent effect of liability will be considerable if its incurrence would be ruinous. But if the liability would be for a trifling sum, it will be much less likely to deter the activities that might attract it. And the imperative to ensure that the defendant was reasonably able to avoid the liability will likewise be diminished: there is greater reason to give a person control over the consequential things in his life than over the inconsequential ones.

In short, the case for imposing liability, and the case for imposing liability even for reasonable conduct, are weaker if the liability will be, or will potentially be, for a very large sum. It follows that courts ought to be more reluctant to impose strict liability where the quantum, if they do, will be very large, and less so if it will not. There are some claims where the quantum is likely to be very large. Negligence claims for damages corresponding to an actual loss are an example. Not only is the liability in

this case potentially catastrophic, it is largely out of the court's control. It can do something to modulate the quantum through the rules of remoteness, mitigation, etc, but by and large it must award a sum equivalent to the factual loss the claimant happens to have sustained. By contrast, claims in private nuisance for the diminution of amenity value are not like this. There is no usually no loss associated with the diminution, and the general damages that are awarded tend to be modest, and subject to the court's control. So the worries about imposing strict liability in these cases are lessened. Even once liability is imposed, there is room to ameliorate any unfairness.

And this helps to explain, perhaps, the seemingly paradoxical liability results in *Bolton v Stone* and *Miller v Jackson*: the defendant who by his cricket-playing impaired the claimant's most fundamental interest, her bodily integrity, escapes liability, even where the defendant who by the same modality caused the claimant the mere displeasure of being unable to enter her garden, incurs it. The court in *Bolton* baulked at the imposition of liability that would have been rigidly large, but in *Miller* the stakes were not so high, and so the court did not.[73] Similar points can be made about private nuisance for material injury, where the loss suffered can be very large, and courts have unsurprisingly imported a negligence-like foreseeability cap to eliminate liability, at least for some of the losses;[74] and in defamation, where, although special damages can

[73] The actual sums awarded in the two cases are almost identical when adjusted for inflation (£104 would have been awarded in *Bolton* in 1948; £400 was awarded in *Miller* in 1975). But the relevant issue is the sums likely to be awarded in the general run of cases of the respective kind, and they are likely to be much higher in the first, where catastrophic personal injury might be at issue. In *Miller* the Court of Appeal in fact tripled the award that the trial court had made, which illustrates well the control the court retains over general damages.

[74] *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

be claimed, the usual award is a modest sum for general damages, and hence we see a willingness to impose liability strictly.

Of course, it would be more accurate to say that the force of the arguments against imposing (strict) liability depends on how much the defendant would have to pay *relative to his capacity to pay it*. A sum that is ruinous to a person of modest means may be trifling to Bill Gates—for whom the deterrence and other liberty-impairing effects, and for whom the reasons that countervail against his paying that sum, will be correspondingly diminished.

That raises the question of insurance, the availability of which does much to lessen the burden of liability for those who incur it. That cricket clubs were able to take out liability insurance at the time of the *Bolton* litigation, and frenetically did so as a result of the Court of Appeal judgment, would weaken those arguments I offered to justify the House of Lords' decision.[75] But, on the other hand, insurance premiums themselves cost money, and some cricket clubs (including possibly the Cheetham Cricket Club) were unable to afford them.[76] The point is that on judgements about these sorts of questions the force of the reasons against imposing (strict) liability depend.

But that reminds us of the objection I considered in chapter 5: Why does the law not draw distinctions between defendants based on their wealth?[77] And why do courts routinely say, as Jenkins LJ did in *Bolton*,[78] that the defendant's insurance status bears

[75] Lunney (n 10) especially at 13.

[76] ibid 13 fn 83.

[77] See section 5.3.3 above.

[78] *Stone v Bolton* (n 26) 214.

in no way on their decision? This seems to cut against my account, which predicts that there is very good reason for the law to consider these things.

As I also said in chapter 6, however, the law plainly (though usually implicitly) does draw distinctions between different *classes* of defendants based on their general capacity to bear their liabilities. Can there be any serious doubt that the growth of employer vicarious liability and strict product liability would not have taken place but for the recognition that the defendants who would typically be subject to them are large corporations with deep pockets and the capacity to insure against, or otherwise spread, the losses? Only because of these facts are the objections to strict liability drained of much of their force. If our economy were still structured in such a way that these forms of liability tended to lead to the personal ruin of the local butcher, baker, or candlestick-maker, then we would regard them as intolerable. But it is not, so we do not.

Of course, some might think even large industrial undertakings will be deterred from valuable activities by the fear of liability. Hence 'subsidization theory', espoused famously by Morton Horwitz as an explanation of the early attraction of the negligence standard.[79] If one thought, like judges of that earlier era, that industry would be unacceptably hindered if it were not given some relief from (strict) liability, then that would strengthen the case, as some thought it did then, for a regime of negligence liability only. Those judges may have made a moral mistake in assessing the value of encouraging industry relative to the interests of the potential claimants to whom it caused harm. But that this kind of relative assessment is necessary is, on my account, hard to deny (and the name of 'subsidization theory' is an apt one, since the idea of a

[79] Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press 1977) ch 3.

'subsidy' rightly implies that the introduction of a negligence standard reduces defendants' liability to pay that which, in the ordinary course, they should).

The general lesson is that, when the burden of tort liability is very large relative to the defendant's capacity to meet it, both deterrence effects and the need to give defendants a fair opportunity to avoid liability are acute. That is why, very often, we see that there are reasons for tort liability to be conditional upon fault, notwithstanding strict liability's logical primacy. This has the effect—by the back door, as it were—of making tort law seem as though it is fundamentally concerned with defendant fault. But it matters a great deal that the case for the fault standard enters via the back door, not the front. Rather than forming part of the positive case for liability, these considerations constitute objections to the imposition of liability the positive case for which rests on other grounds. Moreover, when the force of these objections is dulled, as they are when the liabilities can be easily borne, or spread, by the defendants subject to them, then we should not expect to find the fault standard appealing in the way that, in other contexts, we do. The defendant's duties of repair can, in these contexts, retake their natural shape.

From these insights a provocatively different story emerges, once again, of twentieth century tort law. According to the standard story, fault-based liability is properly supportable by moralistic tort theory, and strict liability is anomalous and adventitious, needing explanation in some other way. Most commonly it is explained as a postmodern concession to 'policy', a means of shifting burdens to wealthy parties who are capable of spreading losses, with only a thin veneer preserved of tort law's true basis in moral responsibility. Hence strict liability is depicted as a sign of tort law's disintegration.

In my telling, by contrast, strict liability is where tort law's true moral basis is laid bare. It is there that the various objections to liability, which justify the fault standard but in doing so cloud understanding, suddenly clear. The essential case for tort liability is revealed, without distortion from the reasons that countervail. So the increasing availability and sophistication of insurance, the accumulation of resources by corporate defendants, and the concomitant growth of strict liability, rather than causing tort law's disintegration, has revealed its distinctive nature in a way that the tort of negligence never could.

9. Conclusion

The previous chapter argued that there are very good reasons to deploy the fault standard much of the time. That conclusion may seem almost anticlimactic after my pro-strict liability arguments of earlier chapters. But it was never my intention to make the case for a liability regime radically removed from that recommended by other moralists. The novelty of my account, such as it is, lies in the logically secondary position occupied by the considerations that favour a fault requirement. I defended a relatively thin account of how reasons of repair arise, using the continuity thesis, which ascribes no role to fault (and only a contingent role to primary duties). It was at the next step—when it falls to be determined whether the defendant's reason to repair is conclusive, and whether the law should hold him to it—that the fault standard finds its justification. Providing that justification, as I did over the previous two chapters, serves to reconcile my account with the preponderance of fault-based liability in tort law as we find it. But the justification I offered is patchy and context-sensitive; sometimes the difficult balance of competing considerations does not lie in favour of a fault standard. Hence the instances of strict liability that I emphasised in chapter 3.

In this way, I have closed an argumentative circle I first began to draw in Part I, when I rejected the view that tort liability is conditional upon unreasonable conduct by the defendant, and said that instances of strict liability share a common explanation with liability that is fault-based. Part II provided the common explanation. Now we

have seen, thanks to Part III, that this common explanation is entirely consistent with (and indeed in part predicts) the relative frequency of fault-based liability.

In these last two chapters I was, in the same breath, showing why tort law often has reason to impose liability only for conduct that is unjustified. That was the implication of some of my arguments in chapter 8, and also of my argument in the first section of chapter 7. I thus established a strong contingent connection between unjustified conduct and liability, while denying any necessary one. And before that, in chapter 6, I had explained why a reason that has mandatory force is an especially secure basis upon which to justify the imposition of tort liability, but not the only kind of reason that can do the job. In these ways, I closed a second argumentative circle that I began to draw in Part I, when I set out to falsify the propositions I called DC_O and DC. The arguments of Parts II and III have confirmed that it is very often—but not always—the case that tort liability can be justified only when the defendant has failed to conform to a conclusive reason (as DC_O has it) and/or to a mandatory one (as the best account of DC has it).

I hope I have done something, then, to recover the sizeable grain of truth in my rival positions: those of the duty-lovers, and of those who see fault as integral to the case for liability. Torts are often faulty, and they are often breaches of duty—and that is so, I have argued, for good reasons. But these are contingent truths, not necessary ones. Whether and when the relevant contingencies hold rest on complex questions, which should not be flattened out into supposed axioms about the indispensable role of wrongs and fault. That underrates the complexity of the normative arguments at issue—and may suggest no normative arguments are needed at all. But they are needed, and in some cases they will not favour tying liability to either fault or wrongdoing. When that happens, however, we need not gloomily chalk it up to the imperial march of the

economists. For duties and fault are not essential to moralism. They are not even part of the logically primary case. That is because, even absent fault and wrongdoing, the defendant's liability can still be justified non-instrumentally by what he has done.

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