STANDING IN PRIVATE LAW

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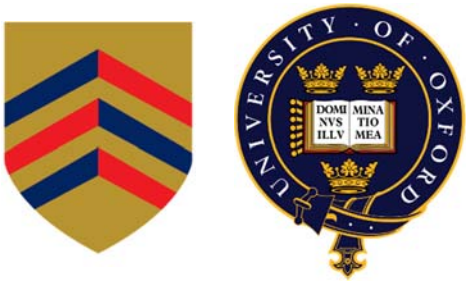

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ABSTRACT

This thesis is the first monograph-length work dedicated to investigating the idea of standing within private law. The overarching claim of this thesis is that standing is a separable concept that can, and should be distinguished more clearly from 'right'. Doing so is important for the rational development of private law doctrine.

In public law, standing rules are well-recognised. Yet, to private lawyers, standing seems a missing concept. It even appears to be conventional wisdom that private law does not have or need standing rules. In this thesis, it is argued that a key reason why standing has been a relatively overlooked concept, receiving meagre attention from private lawyers, is because it has been obscured from plain sight, submerged within the more dominant concept of a 'right'.

This is a situation ripe for confusion and error. The difficulty is compounded by the lack of a suitable vocabulary and conceptual apparatus to differentiate standing from 'rights'. In a wide range of contexts, what we might think of as standing has been variously referred to as a 'right to sue', 'right to enforce', or 'right of action'. For the unwary, these labels have proved misleading. Further, the role of standing has been subsumed within the broader umbrella of 'privity', itself an inadequately understood cluster of ideas.

Through extended analyses of case-law and statutory examples, the undesirable implications of this conceptual elision will be shown. A concept of standing is introduced, and then distinguished from neighbouring concepts which could obscure it from view. It is also argued that an implicit general standing rule exists across private law. Its content is defined, and questions about its justifiability, and the justifiability of its exceptions, are addressed.

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INTRODUCTION

> A plaintiff cannot win unless the defendant's conduct was a wrong relative to her, i.e., unless her right was violated. I shall call this principle the "substantive standing" rule and shall show that it is a fundamental feature of tort law.
> - Benjamin Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1, 4

> The difficulty is that 'standing' is mostly at home in legal contexts…. I find it difficult to imagine situations in which 'standing' would be used conversationally…. we do not have an unproblematic grasp of the phenomena referred to. Nor is it entirely clear what the term refers to in its legal use.
> - Joseph Raz, 'On Respect, Authority, and Neutrality: A Response' [2010] Ethics 279, 292-93.

STANDING: ABSENT IN PRIVATE LAW?

This thesis investigates the place of 'standing' in private law. Standing is a relatively neglected concept, apparently foreign to private lawyers.[1] As Peter Cane once said:

> 'The requirement of standing only applies to actions in respect of public law wrongs. The reason for this is not entirely clear. There are certain rules of private law which resemble rules of standing: for example, duty of care rules in the tort of negligence, and the rules of privity of contract. But these are not seen as separate from the rules which define the relevant wrong, but as part of the definition of the wrong.'[2]

Continuing, he argued that:

> 'In public law, on the other hand, rules of standing are seen as rules about entitlement to complain of a wrong rather than as part of the definition of the wrong. The explanation for this may be that public law wrongs are first and

1 Cf the extensive literature on standing in public law, taking up entire chapters in textbooks, eg Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016); Mark Elliott and Jason Varuhas, *Administrative Law*: Text and Materials (5th edn, OUP 2016). Also the subject of countless articles. For just a tiny sampling: Konrad Schiemann, 'Locus Standi' [1990] Public Law 342; Peter Cane, 'Standing up for the Public' [1995] Public Law 276; Carol Harlow, 'Public Law and Popular Justice' (2002) 65 The Modern Law Review 1; Sarah Hannett, 'Third Party Intervention: In the Public Interest?' [2003] Public Law 128; Mona Arshi and Colm O'Cinneide, 'Third-Party Interventions: The Public Interest Affirmed' [2004] Public Law 69; Farrah Ahmed and Adam Perry, 'Standing and Civic Virtue' (2018) 134 Law Quarterly Review 239.

2 Peter Cane, *An Introduction* to *Administrative Law* (2nd edn, OUP 1992) 44-45.

> foremost wrongs against the public; they infringe the public's right to be lawfully governed. The government, as representative of the public, is the proper guardian of the public interest, but the government allows certain individuals affected by the wrong to the public interest to bring action to redress the wrong. Thus the wrong is defined in terms of the public interest whereas the right to sue in respect of it is described in terms of the individual's interest in the matter. This explanation might be thought to fit in with the prerogative nature of the original public law remedies of *certiorari*, prohibition, and mandamus. It would also explain why the Attorney-General, as representative of both government and people, always has standing to protect public rights.'[3]

On the other hand, and from the other side of the Atlantic, Benjamin Zipursky has notably argued that standing requirements are in some sense 'buried' within the definition of our 'substantive' primary rights conferred by tort law, calling it a 'substantive standing' requirement.[4] This idea has been subsequently developed into a theory of Civil Recourse in his important joint work with John Goldberg.[5] It is in the backdrop of this landscape that this thesis enters the fray. Its primary aim is to clarify and refine the precise place of 'standing' within English private law, not just within tort law but across contract law and the law of unjust enrichment – the three main branches of 'the law of obligations'.

Overall argument

It will be argued that in private law, our view of standing has been obscured, submerged within the capacious concept of a 'right'. 'Right' is famously ambiguous. The question "who can enforce a right?" is commonly conflated with and collapsed into a separate question: "who has the right?". Two distinct questions are being asked here, but often only one answer is given. As things stand, a risk of confusion is quite real. Defusing it will aid our understanding of a key

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3 Ibid 45.

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

5 A restatement of which has been recently published: see Goldberg and Zipursky, Recognizing Wrongs (HUP 2020)

feature within what Gardner has called the 'remedial apparatus of private law',[6] a complex matter 'extremely hard to explain and defend'.[7]

The overarching claim of this thesis is that 'standing' can and should be distinguished more clearly from 'right', as a separable concept. Doing so, it is argued, is important for the rational development of private law. Through extended analyses of case law and statutory examples within each branch of private law doctrine, it is sought to show how and why it matters that we observe and maintain a clearer distinction between the two concepts.

Thesis structure

The overall argument is advanced in three broad steps, and so the thesis is correspondingly structured in three sequential parts. Part I unpacks the concept of 'standing' in private law (Chapter 2). Part II demonstrates the doctrinal importance of distinguishing standing from rights (Chapters 3-5). Part III moves on to justificatory questions about standing in private law (Chapter 6). Chapter 7 concludes.

Motivation and method

One motivating idea is that, to gain a fuller understanding of private law's remedial apparatus, understanding the rights and duties we have against one another is insufficient. We need to also understand the enforceability (or un-enforceability) of these duties and rights by a claimant against the duty-bearer. As indicated, the distinct part played by 'standing' here has been swallowed up within the concept of a 'right'. Contributing to this neglect is an excessive focus on 'liability' as a purely defendant-sided phenomenon, obscuring from our view the claimant's correlative power in enforcing these rights/duties.[8]

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6 John Gardner, From Personal Life to Private Law (OUP 2018) 4.

7 Ibid.

8 Most famously, Guido Calabresi & Arthur Douglas Melamed 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) Harvard LR 1089; discussed in eg Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 Georgetown Law Journal 695, 741-43.

This thesis is thus an attempt at a modest corrective. It does not start anew, but rather, builds upon an existing vein of literature providing 'rights-based' accounts of private law, seeking to complement and supplement that body of work. For example, this thesis develops in a different direction an insight traceable to Zipursky's work in tort law on 'substantive standing',[9] (which he in turn accredits to Weinrib's treatment of *Palsgraf v Long Island Railway Company*).[10] For our purposes, 'rights-based' is defined expansively. It includes any account which treats the rights that we have against, and duties that we owe each other, as indispensable to an understanding of private law.[11] To sharpen and deepen our understanding of fundamental legal concepts, a Hohfeldian analysis of 'rights' talk in private law doctrine is employed.[12]

Where appropriate, it has been sought to situate the analysis within its wider background context of recent literature in private law theory, a rapidly growing area of study and importance. For instance, in the over three years spent developing and writing this doctoral thesis, counting from its inception in October 2016 as an MPhil, several ground-breaking

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9 Benjamin Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1. It may be helpful here to foreshadow three points of departure. This thesis (i) eschews the labels 'substantive standing' and '(private) rights of action' in favour of 'standing' simpliciter, or 'power of enforcement'. It is suggested that this better keeps primary and secondary claim-rights conceptually distinct from 'standing', thereby reducing risks of error. It also (ii) doubts that 'standing' depends for its existence upon a genuine 'wrong' ie a 'violation of the plaintiff's right', deflecting the objection that tort law does not only 'redress wrongs' *ex post*, but also prevents wrongs *ex ante*: see eg Nicholas McBride, Review of Goldberg and Zipursky's *Recognizing Wrongs* (2020) 83 MLR (early view). Moreover, this thesis (iii) advances a two-power model, departing from a one-power model focussed on 'private rights of action' or a 'power to redress wrongs': most recently see Goldberg and Zipursky, *Recognizing Wrongs* (HUP 2020) 163-68, especially 165, 181. Details discussed in Chapter Two.

10 248 NY 339 (1928). Ernest Weinrib, *The Idea of Private Law* (OUP 1995) 159-64 is accredited by Zipursky at (n 9) 10-11. See fn 30.

11 Reviewing the field see Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011). Examples include Robert Stevens *Torts and Rights* (OUP 2007)*;* John Gardner, *From Personal Life to Private Law* (OUP 2018)*;* Gardner *Torts and Other Wrongs* (OUP 2020)*;* Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (HUP 2009); Arthur Ripstein, *Private Wrongs* (HUP 2016)*;* Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020); Ernest Weinrib, *The Idea of Private Law* (revised edn, OUP 2012); Ernest Weinrib, *Corrective Justice* (OUP 2012); Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007).

12 Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16.

monographs have been published, each engaging with those preceding it.[13] I have strived as far as possible to incorporate important developments, where relevant and necessary, within the final text of this thesis.

Although it may be impossible to completely sever the evaluative from the conceptual, matters of justification have been left mostly to a separate penultimate chapter, Chapter Six. This is by design. The hope is that, even if the reader were disinclined towards the justifications therein advanced, the analytic contributions made in Chapter Two, and the doctrinal analysis advanced in Chapters Three to Five, could still stand on their own feet, and hence be accepted by even a reader with radically opposing evaluative commitments. Even if disagreements arise, at the very least the points of contention could be better delineated, taking us a step forward in our collective understanding of private law's remedial apparatus.

PART I: CONCEPTUAL CLAIMS ABOUT STANDING

Part I (Chapter 2) sets the stage, advancing three conceptual claims about standing in private law. Their acceptance, it is argued, would enhance the analytical tool kit of the private lawyer, reducing chances of conceptual confusion and consequent error.

Claim 1: Standing is a power, not a claim-right

In a wide range of contexts, what we might think of as 'standing' has been referred to variously as a 'right to sue, 'right to enforce', or 'right of action'. These labels are unhelpful, and imprecision here has caused some confusion. Standing, it is argued in this thesis, is not a right 'most properly called'.[14] It has no correlative duty. Instead, standing is better understood and conceived of as a *power* to sue and enforce conceptually separate underlying rights/duties. It is argued that:

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13 Relevant works in (n 11), including Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019).

14 Hohfeld (n 12) 33.

> Standing is a power against another to hold him accountable before an adjudicative body (eg a court or tribunal), thereby subjecting him to its power (jurisdiction) to make an order against him.

While often exercised with the aim of enforcing a duty owed by the defendant, standing is a power, conceptually distinct from said duty. We can begin to better appreciate standing's significance within the remedial structure of private law only when standing is more clearly differentiated from its surrounding neighbour concepts. In particular, standing must be distinguished from any underlying rights/duties being enforced at civil trial. This is the principal distinction this thesis concerns, and the proposed concept of standing aids us in doing so.

Claim 2: An implicit standing rule relates standing to rights

Accepting the proposed distinction between rights and standing enables establishment of a general descriptive claim about private law. Contrary to the conventional wisdom that private law does not have standing rules,[15] it is argued that an implicit standing rule exists. The rule is that:

> It is only the primary right-holder who has the standing (ie power) to sue to enforce his underlying right

So if you punch me in the face, committing battery against me, only I get to decide whether or not to sue you in tort. [16] If I mistakenly pay you £10,000 thinking I owe it to you, nobody other than me can enforce my right to restitution from you, obtaining a court order compelling your repayment. Similarly if I contract with you to buy your car, in my mind planning it as a gift to

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15 Eg Cane (n 2); James Goudkamp, *Tort Law Defences* (Hart 2013) 30-31; James Goudkamp and Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment', Restatement Third: Restitution and Unjust Enrichment (Hart 2013) 140-41.

16 Zipursky (n 9) 17-37 argues that a similar rule holds true for American tort law doctrine. NB we depart in the need for the primary right to be violated, ie a wrong. This difference may explain and be reflected in our separate choice of terminology: I avoid the term 'substantive standing', a concept first coined by Benjamin Zipursky.

my fiancée, but you subsequently get cold feet by the time of delivery, only I can choose to sue you for damages for breach of contract.

We take this general rule for granted, so much so that often we do not bother articulating it. One reason for this is that the ambiguity of 'right' functions as a shortcut or heuristic in the paradigm 'bilateral' or two-party case; often we get the correct result simply by asking "who has the right?". Another reason for this is that this standing rule has often been subsumed under the broad label 'privity', and we have thus far been content to leave it embedded therein. But 'privity', I will show using the proposed distinction, is a cluster of at least three separable rules. Only one of these is a standing rule – implicit within 'privity'. The other is a rule about damages (and their direction), and the third is a cautionary rule concerning the acquisition or formation of primary rights. This rule about damages overlaps with some versions of 'continuity theses', and so for convenience I call the rule 'directional continuity'. Distinguishing the standing rule from its cousins, and acknowledging it more explicitly, brings valuable analytical pay-offs.

Claim 3: Standing without rights is exceptional

A second important consequence follows from the proposed distinction. Rights and standing, being conceptually separable, could as a logical possibility be held by different persons. In other words, the subject-matter of enforcement does not logically dictate an enforcer's identity. So, in principle, someone to whom the duty was not owed (and hence was not a correlative right-holder), could be conferred the standing (a power) to enforce another's right.

As a descriptive matter however, this does not seem to be the general case in English private law – there is resistance to a separation of the two. Their detachment is exceptional. The existence of a general standing rule, identified above, explains this feature of our positive law.

It will be shown how this analysis attains particular importance once we move beyond the paradigm 'bilateral' or 'bipolar' case of a singular claimant suing a singular defendant in respect of a duty owed to him, to cases involving the interactions of three or more legal persons. In

particular, if private law right/duties – the subject-matters of enforcement – are conceptually distinct from the powers to enforce them, then it follows that the post-enforcement result should not vary with an enforcer's identity, a point frequently overlooked, and under-appreciated. Underlying rights/duties remain invariant across different enforcers, whether the attorney-general, a state regulator, or some third-party individual.

PART II: THE DOCTRINAL IMPORTANCE OF DISTINGUISHING STANDING FROM RIGHTS

Part II (Chapters 3-5) comprises the bulk of the thesis. It illustrates the doctrinal importance of these conceptual claims. Undertaking extended analyses of several contentious doctrines within each branch of private law, it is shown how and why it matters for the contract lawyer, unjust enrichment lawyer, and tort lawyer, that a conceptual distinction between standing and rights is more clearly drawn.

Contract law

In contract law, loose reasoning about 'third party rights' has elided the three separate concepts of standing, primary contractual rights to performances, and secondary rights to damages for breach of contract, obscuring what is truly at stake. This has inhibited our understanding of privity of contract, resulting in a missed dimension to the debate over privity reform in England.

One general claim here is that 'privity' is an ambiguous cluster of several superficially similar but distinct component rules, so the conceptual distinction is necessary to unveiling privity's multiple aspects. Once unravelled, a novel angle towards privity reform is opened up. As an alternative, we could and probably should have reformed privity by conferring third party standing, instead of either free-standing or 'parasitic' third party rights. It will be shown how in three of the main problem cases motivating reform, namely (i) debt (ii) exemption clauses and (iii) damages, third party standing alone would have sufficed to achieve desired results of enabling third-parties to (i) directly compel payment of sums agreed to them, (ii) stop or

restrict their liability to suits against them, and (iii) recover damages in respect of their own consequential losses.

Third-party standing would have been a less drastic option to achieving reform objectives. It would have avoided anomalous results produced by the addition of third-party rights, and done less violence to accepted contract law principles, causing less normative incoherence and dilution of fundamental concepts. Moreover, a standing-only alternative would have had the benefit of more clearly separating out the distinct issues at stake, keeping distinct reform of the law on damages and the promisee's remedies for breach of contract, the rational development of which has arguably been stultified. In particular, the persistent unclarity over the doctrine of 'transferred loss' or recovery under the 'narrow ground' could have been averted. The difficulty today has been brought to light in two recent cases – the confused reasoning of the Court of Appeal in *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises,*[17] which sought to apply some difficult pronouncements of the UK Supreme Court in *Swynson Ltd v Lowick Rose LLP.*[18]

Restitution for unjust enrichment

In the law of restitution for unjust enrichment, making a distinction between having a right to restitution, versus having the standing to enforce those rights, is key to resolving a persistent debate over the best explanation of the 'special equitable action' in the 'monumental judgment'[19] of the House of Lords in *Re Diplock*,[20] and its purported trust law analogue – 'recipient liability'. On the orthodox view, *Re Diplock* is cast as a 'beachhead', a key plank in a wider argument aimed at reforming 'recipient liability' for assets dissipated in breach of trust. On this view, in which *Re Diplock* is explained as a 'three-party case' by analogy to 'knowing

17 [2019] EWCA Civ 596; [2019] 3 WLR 1113.

18 [2017] UKSC 32, [2017] 2 WLR 1161.

19 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 AC 337 [57] (Lord Walker).

20 *Ministry of Health v Simpson* [1951] AC 251 (HL).

receipt' in trust law, a much more expansive approach to 'enrichment at the expense of' is adopted, requiring only a loose nexus between right-holder and duty-bearer in unjust enrichment law.

This wide approach poses an apparent conflict with the recent landmark UKSC case of *ITC*,[21] which has held that a tighter nexus is generally required, reinstituting a 'direct transfer' rule. *ITC* has proved a controlling precedent for the future, stopping the line of expansionist cases preceding it, and – on its basis – causing the UKSC in *Prudential*[22] to overrule *Sempra Metals*[23] in its wake. However, despite the extensive reasoning in *ITC*, *Re Diplock* was not mentioned at all. As it stands, *Re Diplock* risks being overruled.

Distinguishing between standing versus rights to restitution, a 'two-party' explanation of *Re Diplock* is advanced in this chapter. This explanation reconciles *ITC* with *Re Diplock*. Moreover, it better captures the salient features of the 'special' action, explaining (i) the order and pleadings, (ii) the tracing result in the case, (iii) the infamous 'exhaustion' requirement, (iv) why the action was available to unpaid/underpaid personal creditors of the deceased. It also further (v) resolves a paradox created on the orthodox view.

Most importantly, it explains why an action of this kind is special or exceptional. *Re Diplock* is indeed exceptional, not because it involved a novel source of sui generis rights to restitution, but because it involved making an exception to the general standing rule in private law, which we have assumed applies also within the law of unjust enrichment (hints of which could be found in remarks about the role(s) of 'enrichment at the expense of', and in the old but later abandoned label 'privity of unjust enrichment'). In *Re Diplock*, the next-of-kin who initiated action only had the standing, but not a direct right to restitution themselves. Instead they were enforcing the estate's right to restitution from the defendant charities. So while it is true that an analogy can be drawn with modern trust law to better understand and rationalise the *Re*

21 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2017] 2 WLR 1200.

22 *Prudential Assurance Ltd v HMRC* [2018] UKSC 39, [2018] 3 WLR 652.

23 *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 AC 561.

Diplock 'special' action', the reason we were led astray is that we identified the wrong doctrine as analogue. Rather than 'knowing receipt', the better analogy is with the *Vandepitte*[24] procedure.

The law of torts

If we are to understand the law of torts through the lens of the primary rights we have against one another, there is no such thing as a tort 'in the air'.[25] Torts are wrongs *to* a victim: the person whose primary right was infringed. There are no victim-less torts. Emphasising the nexus between right-holder and duty-bearer, this is sometimes described as a 'bilateral' or 'relational' view of tort law. The tort victim, having been wronged by another, is assumed be in a special position when it comes to enforcement; he is assumed to have exclusive standing to sue. This phenomenon, it is suggested, is simply an instantiation of the general exclusivity required by private law's enforcement relations. The general standing rule extends also to tort law.

Posing a potential challenge to such views are cases where someone appears to be suing despite the absence of a wrong done personally *to* him. Call these 'trilateral' or three-party cases. To adapt a turn of phrase from Lord Wright in *Bourhill v Young*,[26] is it possible that under our tort law, a non-victim could obtain an award of damages by 'build[ing] on a wrong to someone else'? If so, what are the doctrinal implications?

This chapter demonstrates how making the requisite distinction between rights and standing will help us to re-examine some of these difficult problem cases. Three challenging examples will be reviewed: fatal torts and the Fatal Accidents Acts, *White v Jones*[27] and its associated line of cases, and pre-birth torts and the Congenital Disabilities (Civil Liability) Act

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24 *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 (PC).

25 Eg *Donoghue v Stevenson* [1932] 1 AC 562, 618 (Lord Macmillan); *Bourhill v Young* [1943] AC 92 (HL) 101-02 (Lord Russell).

26 [1943] AC 92 (HL).

27 *White v Jones* [1995] 2 AC 207 (HL).

1976. Deploying and building upon the analytical framework developed in Chapter 3, it will be shown how distinguishing between the general standing rule, and the rule about damages which I termed 'directional continuity', helps us to better understand the logic of what is going on in these cases, explaining more precisely how and why these cases are truly 'exceptional'.

PART III: JUSTIFYING STANDING IN PRIVATE LAW

Part III (Chapter 6) turns to justifications, addressing two main questions.

The first is whether the implicit standing rule, a general rule across the whole of private law, can be justified. This general standing rule explains why private law enforcement appears to take on a bilateral form, and why it is 'the basic feature of private law [that] a particular plaintiff sues a particular defendant';[28] the bilateral shape of the correlative claim-right and duty relation is generally accompanied by an equally bilaterally shaped correlative power and liability relation – the standing to sue and the liability to be sued. The rule has important practical implications. It entails that in private law, only right-holders and not anyone else – not even the state – get the prerogative to decide whether private law duties are enforced. Private lawyers have operated under the assumption of its existence, but a question remains whether such a general rule in our positive law is justifiable. *Should* right-holders occupy and continue to occupy a 'special place' in enforcing private law rights and duties? Justifications for the rule are canvassed and examined.

The second is what exceptions we could justifiably make to the general standing rule. This would depend on the best justifications for said rule. We might expect it to be easier to justify an exception in circumstances where the justifications for the general rule were removed, or defeasible. By looking across the borders of traditionally defined sub-areas of private law, perhaps we could get a broader picture of the state of play today, so that intelligible patterns might be discernible. It is suggested that the exceptions, which could be manifold and occur in

[28] Weinrib, *The Idea of Private Law* (n 11) 63. See also preface xi :'central and pervasive feature… whose explication is the fundamental task of theory'; xviii: 'the master feature of liability, that liability of a particular defendant is always liability to a particular plaintiff'.

different contexts, do not share one uniform justifying reason. However, this does not mean they should continue to be treated as disparate and divergent islands of law, developing in complete isolation from one another. The chapter concludes with an attempt to articulate some broad rationales and conditions, the hope being that the doctrinal development of this area might be guided in a more systematic fashion than before.

PART I

CONCEPTUAL CLAIMS ABOUT STANDING

2

CONCEPTS

GLENDOWER
I can call spirits from the vasty deep.
HOTSPUR
Why, so can I, or so can any man,
But will they come when you do call for them?
- HENRY IV Part 1 Act 3 Scene 1.

I. INTRODUCTION

In support of the overarching claim that 'standing' can and should be distinguished more clearly, as a separable concept from 'right', this chapter unpacks key concepts. To set the stage for a systematic study of standing within private law doctrine, standing is defined and distinguished from neighbouring concepts, laying the groundwork for the principal distinction advanced in this thesis.

Section II is a prelude to Section III, which defines 'standing' as a power. Section IV introduces our principal distinction, distinguishing standing from any underlying private law rights/duties being enforced at civil trial. Sections V to VII move on to other concepts neighbouring standing, making several subsidiary distinctions. Section V distinguishes a claimant's standing from the court's power ('jurisdiction') to make an order against a defendant, a clarification necessitated by recent literature in which the two powers appear to have been collapsed together. Section VI clarifies how standing is not just a right held by a litigant against a court. Section VII discusses a right which Civil Recourse theorists have proposed – a political right held against a state – distinguishing it from standing. Section VIII discusses the existence of standing rules in private law. Section IX concludes.

II. PRELIMINARIES AND APPROACH

Before an analysis of standing can be properly undertaken, some basic ideas must be introduced. In doing so, the general approach adopted in this thesis is also expanded upon.

A. Bilaterality in private law

As Lord Diplock once said in *Letang v Cooper*:

> In the context of civil actions a duty is merely the obverse of a right recognised by law. The fact that in the earlier cases the emphasis tended to be upon the right and in more modern cases the emphasis tends to be upon the duty merely reflects changing fashions in approach to juristic as to other social problems, and must not be allowed to disguise the fact that right and duty are but two sides of a single medal.[1]

Legal duties can come in various shapes and sizes, but private law only admits duties of a particular form. Only duties owed to other persons[2] can be private law duties.[3] I call these *directed duties* for short.

Not all duties are directed duties. 'The law of obligations', a common synonym for private law, is over-inclusive, and only convenient shorthand. Private law involves *interpersonal* obligations, hence 'the law of obligations owed to one another' is a more accurate descriptor. Consequently, many legal duties are not and could not be private law duties. A legal system could impose legal duties not to commit suicide,[4] not to consume cocaine,[5] not to litter on the streets, not to pollute the air,[6] or duties to clean up after ourselves after a music festival or a neighbourhood party.[7] On this criterion, such duties would fall outside private law's domain.

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1 [1965] 1 QB 232 (CA) 247.

2 Not limited to natural persons. Artificial legal persons, eg companies, also count.

3 eg HLA Hart, 'Legal Rights', *Essays on Bentham* (Clarendon 1982) 184: 'we speak of a breach of duty in the civil law, whether arising in contract or in tort, not only as wrong, or detrimental to the person who has the correlative right, but as *a wrong to* him and a breach of an obligation *owed* to him.' (emphasis original); John Gardner, 'Holding On' (2017) 15 Jerusalem Review of Legal Studies 182, 191: 'I agree that all the duties recognized by private law are duties owed to someone, and that the someone in question is, in each case, a rightholder'; John Goldberg, 'Introduction: Pragmatism and Private Law' (2012) 125 Harvard LR 1640. 1: 'Private law defines the rights and duties of individuals and private entities as they relate to one another'.

4 cf Suicide Act 1961, which made suicide no longer a crime.

5 Schedule 2, Misuse of Drugs Act 1971: a 'controlled drug'.

6 Clean Air Act 1993; Pollution Prevention and Control Act 1999.

7 Adapted from Arthur Ripstein, 'Private Authority and the Role of Rights: A Reply' (2016) 14 Jerusalem Review of Legal Studies 64, 74.

Equivalently, all private law duties are directed duties. In contract law, duties of performance are owed to one's counterparty ('the promisee'), with whom the contract was formed. In the law of unjust enrichment(s), duties of restitution are owed to the person at whose expense one was unjustly enriched. In the law of torts, duties are owed to potential victims, whose correlative rights are infringed by commission of a tort.

Most right-based theories take this feature to be core to private law, which any successful theory must account for. It has been referred to by various terms, such as 'bilaterality',[8] 'relationality',[9] or 'bipolarity',[10] all stressing the required interpersonal nexus between duty-bearer and right-holder. As is to be expected, rights-based theories vary in their finer detail, some proposing versions of 'bilaterality' more loaded than others.[11] To be as inclusive as possible, I adopt an evaluatively thin Hohfeldian correlativity of claim-rights and duties as constituting 'bilaterality', which it is hoped will be compatible with most rights-based accounts. It bears mentioning that, given its thin-ness, this is of course not meant as complete definition of a private law duty;[12] it is merely an attempt at identifying a relatively uncontroversial feature of private law duties that could unite and encompass most rights-based accounts, serving as a lowest common denominator.

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8 Arthur Ripstein, *Private Wrongs* (HUP 2016) 36; Ripstein 'Private Authority' (n 7) 75: 'bilateral structure'; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 581: 'bilateral nature of the necessary relation'.

9 Ripstein, 'Private Authority' (n 7) 75: 'irreducibly relational'; Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 4: 'relational wrongs'; John Gardner, *From Personal Life to Private Law* (OUP 2018) 20: 'relations of duty'.

10 Ernest Weinrib, *Idea of Private* Law 2: 'bipolar relationship of liability'; Ripstein *Private Wrongs* (n 8) 5: 'Both the dispute and its resolution are bipolar'; Stephen Darwall, 'Bipolar Obligation' in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics Volume 7* (OUP 2012).

11 An example where 'bipolarity' does heavier evaluative work is Ernest Weinrib, *Corrective Justice* (OUP 2012) 3: '…unless the norms that define the injustice themselves have a bipolar structure, the practice of correcting this injustice through bipolar adjudicative and remedial processes would make no sense'. Similarly, 19: 'the reasons that justify the protection of the plaintiff's right are the same as the reasons that justify the existence of the defendant's duty'.

12 So not all directed duties are private law duties. For instance, duties to pay one's taxes, or to perform military services as a conscript, are owed to the state, but not conventionally considered part of private law. Further features, deliberately unspecified, are required to exclude them.

B. Hohfeldian analysis

Hohfeld's scheme has been enormously influential, proving popular amongst many contemporary rights theorists.[13] Further, there are three reasons specific to the subject-matter of this thesis, commending its use.

First, the core confusion identified is one that has in part been generated by the ambiguity of the language of "right" in rights talk, and so Hohfeld's disambiguation is exactly on point.

Second, Hohfeldian analysis is analytically thin, and so possesses particular appeal in resolving evaluatively charged disputes.[14] For example, it stands usefully neutral over the long-standing debate between 'interest' theories and 'will' or 'choice' theories of rights,[15] a debate on which this thesis seeks, as far as possible, to stay neutral.

Third, and most relevantly for its deployment towards understanding private law doctrine and its structure, Hohfeld famously thought that only directed duties should be rights 'most properly called',[16] labelling them the technical term 'claim-rights'.[17] This may explain why Hohfeldian analysis has enjoyed a recent revival in private law scholarship.[18]

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13 eg John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 198-205; Matthew Kramer, Nigel Simmonds and Hillel Steiner, *A Debate over Rights* (OUP 2000); Leif Wenar, 'The Analysis of Rights' in Kramer, Grant, Colburn and Hatzistavrou (eds), *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (OUP 2008); Andrew Halpin, 'Choosing Axioms of Correlativity' (2019) 64 American Journal of Jurisprudence 225; Joseph Raz, 'Legal Rights' (1984) 4 OJLS 1 took Hohfeld as a starting point. Compare his Raz 'On the Nature of Rights' (1984) Mind 194.

14 Matthew Kramer, 'Rights without Trimmings' in Kramer, Simmonds & Steiner (eds), *A Debate over Rights* (OUP 2000) 61; similarly Andrew Halpin, "The Value of Hohfeldian Neutrality when Theorising about Legal Rights," in McBride (ed) *New Essays on the Nature of Rights* (Hart 2017).

15 Kramer, ibid.

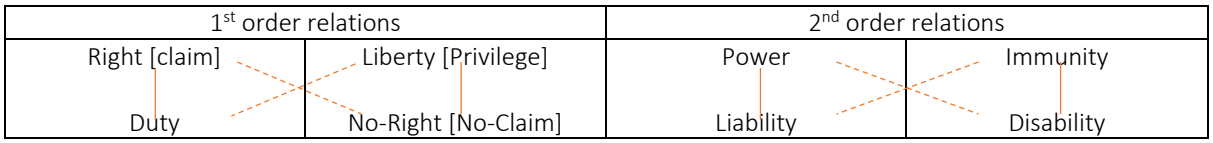
16 Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 33.

17 Hohfeld (n 16) 30-32.

18 See generally, Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Nolan and Robertson (eds), *Rights and Private Law* (Hart 2011); Kit Barker, 'Private Law, Analytical Philosophy and the Modern Value of Wesley Newcomb Hohfeld' (2018) 38 OJLS 585. Specifically, eg Robert Stevens, *Torts and Rights* (OUP 2007); Ben McFarlane, *The Structure of Property Law* (Hart 2008); Robert Stevens & Ben McFarlane, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1.

C. Correlativity

A very short primer. Hohfeld's analytic scheme[19] accounts for all assertions of "rights" as bilateral legal relations between two persons.[20] It allows us to disambiguate between four different senses of "right" in terms of four more basic deontic entities. Each entity has a correlative, hence the bilateral form of each legal relation.



The Hohfeldian scheme

Vertical lines represent relations of correlativity. Diagonal dotted lines represent relations of opposition. Hohfeldian correlativity simply means that one correlative is the counterpart, or flipside, of the other. The existence of one correlative in one person is a necessary and sufficient condition for the existence of the other correlative in another person, the same way a slope's downward direction and its upward direction mutually entail each other.[21] There is biconditional entailment.[22] As an example, duty and (claim-)right are correlatives, so:

D owes a duty to C to ø if and only if C has a (claim-)right that D ø	*Hohfeldian correlativity of duty & right*

Similarly, powers and liabilities are correlatives. Most helpfully for our purposes, the Hohfeldian scheme emphasises that power-liability relations are conceptually distinct from right-duty relations. One could exist without the other, so there could be power without claim-right, liability without duty, et cetera.

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19 A scheme of deontic logic: Kramer 'Rights Without Trimmings' (n 14) 22-25. Deontic logic is the study of the logic of normative notions: a system concerned with the validity of arguments employing 'ought' or 'may' terms. Generally, Theodore Sider, *Logic for Philosophy* (OUP 2010) 183-85.

20 Hohfeld (n 16) 30.

21 Kramer, 'Rights Without Trimmings' (n 14) 26.

22 Matthew Kramer, 'On No-Rights and No Rights' (2019) 64 American Journal of Jurisprudence 213, 213.

D. Powers

Given its importance here, the concept of a Hohfeldian power requires some brief elaboration. Duties and rights are first-order relations. They govern what we do to one another: acts, omissions, and their results. They are three-place relations that relate two persons to an act-description or state of affairs.[23] By contrast, a Hohfeldian power is a second-order relation. Unlike 'right', 'duty', or 'liberty', it is a meta-relation, governing how first-order or second-order relations may be changed *through* the voluntary control of another. So:

> C has a power if and only if C has the ability to change her own (C's) or another's (D's) Hohfeldian relations. Equivalently, D has a correlative liability to have her relations changed.
>
> *Hohfeldian correlativity of power & liability*

Explaining his scheme, Hohfeld mentioned that the nearest synonym for 'power' is an 'ability' (to *voluntarily change*), and the nearest synonym of 'liability' is a 'subjection' to such *change*.[24] As we shall soon see, subjection may be the clearer term in the remedial context. It allows us to cut through some of the ambiguities surrounding the word "liability", which has caused some difficulty in a recent debate over the remedial position of a defendant immediately post-breach, and the supposedly 'trilateral' shape of private law adjudication.[25]

Hohfeld defined a power as possessing two important features: (i) its successful/valid exercise effects a *change* in normative positions (ii) through the 'volitional control' of the power-holder.[26] It is relatively straightforward to see how this operates with first-order

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23 Finnis (n 13) 199.

24 Hohfeld (n 16) 45, 54.

25 Discussed Section V: 'Distinguished from the Court's Power'.

26 Hohfeld (n 16) 44. NB others have added more parameters to Hohfeld's definition, on grounds that his definition is too wide, possibly including some voluntary acts effecting legal changes not properly attributable to the exercise of a power (eg a crime, civil wrong, changing residence to a different jurisdiction). See eg Joseph Raz, 'Voluntary Obligations and Normative Powers' (1972) 46 Proceedings of the Aristotelian Society, Supplementary Volumes 79; Joseph Raz, 'Normative Powers (Revised)' [2019] Oxford Legal Studies Research Paper No. 36/2019 <https://ssrn.com/abstract=3379368>. These refinements could be incorporated. However for our limited purposes such level of detail would be an unnecessary distraction, hence its relegation to a footnote.

relations, so that a right, duty, or liberty is thereby created, extinguished, or modified. For example, an owner of a bike may exercise a power to abandon it – thereby extinguishing in everyone else in the world their duties not to take the bike.[27] A court may order D to pay C, creating in him a duty to pay a liquidated sum as a 'judgment creditor',[28] breach of which exposes him to new consequences (ie contempt proceedings).[29]

Importantly, not to be overlooked is the possibility that exercise of a power may also create or extinguish in another person new powers/liabilities, or new immunities/disabilities (ie second-order incidents). The doctrine of 'offer and acceptance' in the law of contractual formation is a straightforward example.[30] A person who exercises his power to make an offer creates in the offeree a power to accept that offer. This power to accept is something the offeree would and could not have had except through the offer. The offeree, in exercising the power to accept on offered terms, forms the contract, creating in the parties new contractual rights/duties to performance based on its terms.

Obviously, not *all* changes in our normative positions are caused by the exercise of powers. Hohfeld emphasised this, recognising that changes could also result from a 'superadded fact or group of facts not under the volitional control of a human being'.[31] So, contractual rights/duties could be discharged by frustrating events rendering performance radically different than originally envisaged at formation,[32] say the outbreak of war,[33] a global pandemic,[34] or destruction of the contractual subject-matter by natural disaster.[35] More mundanely but more pertinently, one's standing (a power) to sue, correlative to one's liability

27 Hohfeld (n 16) 45, *The Crystal* [1894] AC 508 (HL); *Moffatt v Kazana* [1969] 2 QB 152.

28 Civil Procedure Rules ('CPR') 70.1.

29 CPR 81.4.

30 Hohfeld (n 16) 49-51.

31 Hohfeld (n 16) 44.

32 *Krell v Henry* (1903) 2 KB 740 (CA) (king's coronation cancelled by serious illness).

33 *Fibrosa v Fairbairn* [1943] AC 32 (HL).

34 Lockdowns rendering performance of some contracts illegal. Compare Coronavirus Act 2020.

35 *Taylor v Caldwell* (1863) B & S 826 (concert hall).

to be sued, could be extinguished after the expiry of a limitation period,[36] rendering a once enforceable obligation no longer enforceable.[37]

III. STANDING

Having distinguished claim-rights and powers, we are now in a position to define with greater precision the sense in which 'standing' is used throughout this thesis. A prominent commentator on Hohfeld once observed that 'The relevance of "legal remedies" to the defining terms of his schema is left entirely undetermined by Hohfeld. Further stipulative definitions (which he never provided) are required before the schema can be applied to the analysis of any concrete legal situations'.[38] By providing a definition of standing compatible with the Hohfeldian scheme, this thesis can be seen as in part filling this gap.

A. Defined

Standing, it is argued in this thesis, is better understood and conceived of as a *power* to sue and enforce conceptually separate underlying rights/duties. To ease reference, 'a power of enforcement' or 'a power to enforce' may sometimes be used as shorthand for 'a power to sue and enforce'. Nothing is meant to turn on this.

More fully specified, this thesis adopts and advances a definition of standing as:

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36 Generally Limitation Act 1980.

37 *Letang v Cooper* [1965] 1 QB 232 (CA) 245-46 (Diplock LJ): 'The Act is a limitation Act; it relates only to procedure. It does not divest any person of rights recognised by law; it limits the period within which a person can obtain a remedy from the courts for infringement of them.'; *Iraqi Civilian Litigation v Ministry of Defence* [2016] UKSC 25; [2016] 1 WLR 2001 (Lord Sumption) [1]: 'Limitation, which deprives the litigant of a forensic remedy but does not extinguish his right, is for that reason classified by the English courts as procedural…the distinction on which it was based between barring the remedy and extinguishing the right.'; *Moses v Macferlan* (1760) 2 Burrow 1005; 97 ER 676 (Lord Mansfield): 'This kind of equitable action, to recover back money … does not lie for money paid by the plaintiff… as in payment of a debt barred by the Statute of Limitations…because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering'.

38 John Finnis, 'Some Professorial Fallacies about Rights' [1972] Adelaide Law Review 377, 380. See also Finnis, *Natural Rights* (n 13) 199-205.

> A power against another to hold him accountable before an adjudicative body (eg a court or tribunal), thereby subjecting him to its power (jurisdiction) to make an order against him.

What is left out matters. The proposed definition has the merit of keeping more clearly distinct the two separate concepts of (i) a private law duty/claim-right, and (ii) the standing to initiate legal proceedings aimed at the enforcement of such duties/rights, the central distinction with which this thesis is concerned.

To begin correcting our lapse, it would be best to avoid the label "right" when talking about standing. In a wide range of contexts, what we might think of as 'standing' has been referred to variously as a 'right to sue',[39] 'right to enforce',[40] or 'right of action'.[41] These labels are potentially misleading. They have caused the concept of 'standing' to be submerged within the more capacious and ambiguous term, 'right'. As a result, the role of 'standing' in private law has received relatively meagre attention, and has been relatively under-conceptualised.

For instance, take Lord Esher MR's dissent in *Lord Sudeley v Attorney General*, on whether a 'right of action' against an executor of an unadministered estate was an asset subject to probate duties:

> 'It cannot be applied to the suggested right of action. A lawsuit may be a suit in equity, or an action at law. In either case the question to be determined by it is—what were the rights of the parties before the suit or action was commenced? The

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39 eg *Do Carmo v Ford Excavations Pty Ltd* [1984] HCA 17; (1984) 154 CLR 234 (HCA) [13] (Wilson J); *Beswick v Beswick* [1968] AC 58 (HL) 73, 75 (Lord Reid), 80 (Lord Hodson), 87 (Lord Guest), 92-93 (Lord Pearce); *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero (The Albazero)* [1977] AC 774 (HL); Carriage of Goods by Sea Act 1992 s 2(1); Peter Kincaid, 'Third Parties: Rationalising a Right to Sue' (1989) 48 CLJ 243; Michael Tilbury, 'Remedy as Right', *Structure and Justification in Private Law* (Hart 2008) 425.

40 eg Contracts (Rights of Third Parties) Act 1999; Law Commission, *Privity of Contract* (Report No 242, 1996) paras 3.30-32; Robert Nozick, *Anarchy, State and Utopia* (Basic Books 2013), Ch 5 80-81.

41 eg *Blake v Midland Railway* (1852) 18 QB 93, 110 (Coleridge J); *Seward v Vera Cruz* (1884) 10 App. Cas. 59 (HL), 67 and 70 (Lord Selborne LC); *Lord Sudeley v Attorney General* [1896] 1 QB 354 (CA) (Esher MR), 359-60; *Donoghue v Stevenson* [1932] 1 AC 562 (HL), 609-10 (Lord Macmillan): 'negligence apart from contract gives a right of action to the party injured by that negligence - and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected.'; s1 Fatal Accidents Act 1976; *Davies v Powell Duffryn Associated Collieries* [1942] AC 601 (HL) 610 (Lord MacMillan), 614 (Lord Wright).

> lawsuit does not create the right; it determines authoritatively that there was, before it began, a right, and it determines what that right was and is. What is called a "right of action" is not the power of bringing an action. Anybody can bring an action, though he has no right at all. The meaning of the phrase is, that the person has a right or claim before the action which is determined by the action to be a valid right or claim. The action or suit does not confer a right which did not exist before it; it only declares that a right did exist before it. An action or suit is therefore mere procedure. An action with regard to a will is no part of the estate of the testator: it is a procedure, or a means of determining authoritatively what was or was not a part of his estate—what was or was not an asset of his estate. In this case, therefore, the right of action by her executors against the executors of A. G. Tollemache was no part of the estate of Frances Louisa Tollemache.[42]

The phrase 'right of action' caused elision here. Esher MR started off by insisting that the 'action or suit' itself is conceptually distinct from one's underlying private law 'rights or claims', and does not *eo ipso* create the very right a claimant is seeking to have enforced. This is correct. However, Esher MR appeared to also deny the existence of 'power[s] of bringing an action'. If so, he went a step too far.

As will be argued later, it is not true that '[a]nybody can [successfully] bring an action, though he has no right at all'; indeed in private law, the opposite seems true.[43] Private law is not a 'completely open system'. Not just anyone can obtain a ruling from a court on any subject upon which he or she desired a ruling.

B. Terminology: 'claim-rights', 'causes of action', and 'substance versus 'procedure'

Before proceeding further, some terminology caveats are in order. First, where the word "right" is used alone, then unless otherwise specified it is strived to be used only in 'the strictest sense'[44] of claim-right, to indicate the person to whom a correlative duty is owed. The truncation is meant purely to ease reading.

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42 [1896] 1 QB 354 (CA), 359-60 (dissenting). NB majority judgment upheld on appeal in [1897] AC 11 (HL).

43 Discussed Section VIII: 'Standing Rules'.

44 Hohfeld (n 16) 30.

Second, at some points it may be necessary to emphasise its conceptual separability from other Hohfeldian relations like powers, liberties, or immunities. Where this is so the technical term 'claim-right' may be employed.

Third, 'substance' versus 'procedure' are prefixes generally avoided. This is because they can introduce unneeded complications. While it is true that the remedial apparatus of private law involves both aspects,[45] namely, 'the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right',[46] the labels can come with baggage, and their indiscriminate use may occlude rather than illuminate.[47]

Fourth, to minimise confusion, the term "cause of action" is deliberately avoided. Wilson J has said that '[t]he concept of a "cause of action" would seem to be clear. It is simply the fact or combination of facts which gives rise to a right to sue'.[48] So, strictly, it refers to that set of minimally jointly sufficient *facts* in the physical world, as opposed to the *legal* 'rights' or 'powers' arising in response.[49] But our concern is with the latter, not former. It may also be doubted whether cause of action is indeed as 'clear' or stable a concept as Wilson J

45 Cf Stephen Smith, *Rights Wrongs Injustices* (OUP 2019) 2-4, 6-8 especially 3: 'Writers define 'remedy' in different way…'. Compare Birks 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1.

46 *Poyser v Minors* (1881) 7 QB 329, 333 (Lush LJ); *Li Tze Cho (No 3) v Ching Hua Co (HK) Ltd* [1961] HKLR 201: 'Whereas substantive law defines or creates legal rights and duties, the function of the rules of practice and procedure is to provide… the mode in which legal rights or obligations are enforced'. Similarly William Swadling, 'Substance and Procedure in Equity' (2016) 10 Journal of Equity 1.

47 Eg William Swadling, 'In Defence of Formalism' in Goudkamp and Robertson (eds), *Form and Substance in the Law of Obligations* (Hart 2019). NB the label 'substantive standing' is deliberately avoided. 'Standing' as defined above in this thesis, as a power of enforcement, ought not be merely conceived of as 'an element or combination of elements in each tort'. It is not argued that '[e]ach tort has a proper-plaintiff requirement built into its substantive elements': cf Goldberg and Zipursky, *Recognizing Wrongs* (HUP 2020) 201-02.

48 *Do Carmo v Ford Excavations Pty Ltd* [1984] [1984] HCA 17; (1984) 154 CLR 234 (HCA) [13] (Wilson J)

49 Eg Birks 'Rights, Wrongs, and Remedies' (n 45) 25: 'Causes of actions are aggregations of facts which happen in the world and suffice to trigger a legal response.'

suggested.[50] Cause is notoriously difficult.[51] Moreover, the 'action' so caused – a legal compound – can be rather ambiguous. Compare:

> 'When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce'[52]
>
> 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court'[53]
>
> 'A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.'[54]
>
> 'A cause of action is a series of facts… which triggers a legal right/remedy'[55]

It would appear that the 'action' caused or 'triggered' in the typical case comprises an enforceable legal right, ie *both* a component legal right correlative to a duty owed by another, and the standing (a power) to enforce that right. Hence explaining why having a 'cause of action' is sometimes spoken of synonymously and interchangeably with having a 'legal claim'.[56]

IV. DISTINGUISHED FROM PRIMARY AND SECONDARY RIGHTS

The distinctive role of standing has been occluded from our view, partly due to its conflation with neighbouring concepts. The analytical value of our definition can be demonstrated by deploying it to distinguish 'standing' from its neighbours.

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50 Eg Lionel Smith, 'Defences and the Disunity of Unjust Enrichment' in Dyson, Wilmot-Smith and Goudkamp (eds), *Defences in Unjust Enrichment* (Hart Publishing 2016); Lionel Smith, 'Restitution: A New Start?' in Devonshire and Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart 2018); Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 CLJ 521.

51 Eg Hart & Honore, *Causation in the Law* (2nd edn, OUP 1985); John Mackie, *The Cement of the Universe* (OUP 1980).

52 *Williams v Milotin* (1957) 97 CLR 465 (HCA) 474 (Dixon CJ, McTiernan J, Williams J, Webb J, Kitto J)

53 *Read v Brown* (1888) 22 QBD 128 (CA) 131 (Lord Esher MR); *Cooke v Gill* (1873) LR 8 CP 107, 116.

54 *Letang v Cooper* [1965] 1 QB 232 (CA) 242-43 (Diplock LJ).

55 Burrows (n 50) 526.

56 Eg *Gwinnuit v George and another* [2019] Ch 471 (CA) (Newey LJ) [20].

While standing is related to each of these concepts, we ought not to mix them up. To even begin clarifying their relationship, we first need the means to distinguish between them. The next sections thus seek to differentiate standing from possible false cognates.

We commence with our central and principal distinction. Our definition helps us to better differentiate between the enforcer (who has standing), and the subject-matter of enforcement. The subject-matter of enforcement in a civil suit is usually a duty by the defendant that is owed to another, who, in Hohfeldian terms, possesses a 'claim-right'. As hinted above, in private law these (claim-)rights could be of all manner, including rights to restitution, rights to our person or property conferred by tort law, or contractual rights to performance. They could be secondary rights to damages, arising after the breach of one's primary rights.[57] Despite the frequent terminology referring to standing as a 'right to enforce', 'right of action', or a 'right of suit', standing is, in very important senses, conceptually distinct from these rights.

A. Cannot be breached

'Rights of action' or 'rights of suit' are not the sorts of things that can be breached. They do not require of anyone an act, an outcome, or a standard of behaviour that must be complied with. Requiring no compliance of anyone, they cannot be uncomplied with.

This feature alone is enough to show that, unlike one's primary or secondary rights, they are not claim-rights, with duties as correlatives. The difference is a difference in kind. The dominant legal terminology obscures this important difference. Where possible, we should strive to avoid it.

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57 This is the orthodox understanding, but lately it has come under assault from Steve Smith, who has objected to the legal existence of secondary duties to pay damages on several grounds. Discussed Section V: 'Distinguished from the Court's Power'.

B. Exercisable

It is true that we sometimes do loosely speak of rights as capable of being 'exercised'. This usage, however, is a case of conceptual slippage.[58] Claim-rights are not the sorts of things that are exercisable. We do not exercise our rights to restitution, rights to an agreed performance from a contractual counter-party, or rights to our person or property protected by tort law.

What we can and do exercise, however, are powers. Powers are the sorts of things that are exercisable, not claim-rights with correlative duties. When exercised successfully, powers bring about a change in legal relations. The occurrence of this slippage can be explained. As Hohfeld painstakingly pointed out, in 'rights talk' we sometimes refer to what truly are powers by the looser umbrella term "right". Another reason for this natural slippage is the assumed existence of a standing rule, which, as argued below, confers upon claim-right holders the standing (a power) to sue and enforce these rights. So in the general case, the (legal) duties that are owed to us come along with the 'extra feature'[59] of a power to enforce them. And that is why, in insisting on compliance, we sometimes loosely say that we are 'exercising' our 'right(s)'.

C. Choice

It is this 'extra feature' which explains why we can *choose* whether to exercise it. In private law, standing is a power that usually comes unfettered or unconstrained. In Hohfeldian terms, the power comes accompanied with paired liberties (or 'privileges') as to their exercise, so there is no duty either to sue, or to not sue. In this way the claim-right-holder is thereby conveyed a choice, or discretion,[60] over whether or not to exercise his power to enforce it, and if so when to do so.[61] In private law generally, we are not normally duty-bound to exercise our powers of

58 See eg Gardner, *Personal Life* (n 9) 204.

59 Gardner ibid 204.

60 Leif Wenar, 'The Nature of Rights' (2005) 33 *Philosophy & Public Affairs* 223, 225-228.

61 Cf Benjamin Zipursky, 'Civil Recourse, Not Corrective Justice' [2003] Georgetown law Journal 695, 741 who, in favouring the terminology 'right' of action', combines *both* what I call standing with the paired privileges to exercise it or not into a compound entity: 'a right of action is a privilege and a power, and the state is not committed to the normative desirability of its exercise, only to the right to have it.'

suit. There are exceptions, and the trustee who owes duties to a trust-beneficiary in respect of the exercise of the trustee's own legal powers, including his power to sue, is one such example.[62] By contrast to the general position in private law however, the powers of a public official, of which court officials are an example, are almost always fettered with role or office-based duties. This becomes relevant once we consider and distinguish the claimant's standing from the court's power to issue orders.

Recognising that standing is conceptually a *power,* separate from the underlying rights/duties being enforced, has important practical consequences. It is a conceptual prerequisite to opening up further questions about whether there is a need to regulate the exercise of these powers, and if so in what manner. We could constrain these powers by setting up more hurdles as to their successful or valid exercise, specifying further conditions precedent that must be met.[63] For example, we could require formalities, 'proof of loss',[64] or 'no conflicting self-interest'.[65] Or we could fetter these powers by imposing on its holder separate legal duties as to the timing of its exercise,[66] or the purpose or motives for its exercise et

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62 Eg *Hayim v Citibank NA* [1987] AC 730; [1987] 3 WLR 83, 758; *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240 [53]; *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 (Ch); [1995] 1 All ER 43, 1224. Discussed Chapter Four, 'Restitution for Unjust Enrichment'.

63 HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 28: 'behind the power to make wills or contracts are rules relating to *capacity* or minimum personal qualification (such as being adult or sane) which those exercising the power must possess. Other rules detail the manner and form in which the power is to be exercised, and settle whether wills or contracts may be made orally or in writing, and if in writing the form of execution and attestation…' For theoretical discussion on conditions/formalities: Lars Lindahl and David Reidhav 'Legal Power: The Basic Definition' (2017) 30 Ratio Juris 158.

64 Hence some torts are 'actionable only on proof of loss' eg deceit *Derry v Peek* (1889) 14 App Cas 337, public slander: *Jones v Jones* [1916] 2 AC 481 (HL), misfeasance in public office: *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 WLR 807, as opposed to being 'actionable per se' eg trespass. Discussed further Stevens, *Torts and Rights* (OUP 2007) 88-91.

65 One plausible view of the 'no-conflict rules' applicable to fiduciaries, whether in interest-duty or duty-duty conflicts: Lionel Smith, 'Fiduciary Relationships: ensuring the loyal exercise of judgment on behalf of another' (2014) 130 LQR 608, 620-21, 623-625, 633. NB in Hohfeldian terms 'disability' just is to have no 'power'.

66 Eg an administrative receiver's powers of sale: *Downsview Nominees v First City Corporation* [1993] AC 295, [1993] 2 WLR 86; *Medforth v Blake* [2000] Ch 86, [1999] 3 WLR 922; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 WLR 1207.

cetera,[67] thereby restricting the liberties (or 'privileges'), and choice or discretion typically accompanying these powers.

For the avoidance of doubt it is important to emphasise here that my analysis does not entail a 'will' or 'choice' theory of rights, which *defines* a 'right' in terms of the powers one has over a duty owed to oneself, to 'waive or extinguish' or to 'enforce' it.[68] In fact it entails the very opposite – my analysis is aimed at showing that there is no necessary conceptual or analytical connection between claim-rights and powers. Briefly, HLA Hart, the best articulator of a will theory, described 'the idea [as] that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed.'[69] Continuing, Hart argued that:

> 'there are I think many signs of the centrality of those powers to the conception of a legal right. Thus it is hard to think of rights except as capable of *exercise* and this conception of rights correlative to obligations as containing legal powers accommodates this feature'.[70]

This, I think, takes a step too far. While a conceptual connection would explain this phenomenon, it is not necessary to resort to one. A legal rule about standing, taking the form of a power-conferring rule, does just as well, having also the further merit of accommodating justified exceptions. In fact, the will theory's influence could be identified as further reason why the distinction between standing and rights has been relatively obscured within private law.

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67 See eg *Willers v Joyce* [2016] UKSC 43, [2018] AC 779 which, by extending the tort of malicious prosecution to civil proceedings, imposes a legal duty not to exercise one's power to sue maliciously.

68 Hart, 'Legal Rights' (n 3) 183-84. Cf moral rights: HLA Hart, 'Are There Any Natural Rights?' (1955) 64 Philosophical Review 175.

69 Ibid 'Legal Rights'.

70 Ibid. Emphasis original.

D. Claims versus claim-rights

A final caveat, before moving on. Speculatively, another reason for the continued conflation of standing with rights might lie, ironically, in Hohfeld's own choice of terminology stipulated for the correlative of a duty – a right in its 'strictest sense'[71] – namely, 'claim-right'. He thought the word "claim" could be used as 'a synonym for the term "right" in this limited and proper meaning'.[72]

But as has been rightly pointed out, this has led to an 'extra layer of confusion in the theory of rights',[73] and the 'strange' view that a right just *is* a claim.[74] Taking claim in the lay sense of making an assertion about something, the right one has obviously cannot be identified with the claim that one has the right.[75] A claim is a speech-act, and a right is not.[76]

On the other hand, If we associate someone having a 'legal claim' as being synonymous with having an enforceable right, it would encompass *both* the assertion (and proof) that the defendant has a duty, and that the claimant has the power (ie standing) to enforce it. This would have the unfortunate consequence of confusing the enforceability of the legal duty, with the duty itself. Of which, an example in *Gwinnuit v George and another*:

> 'there is force in Mr Grant's comment that "unenforceable contract" has an "oxymoronic quality". If, Mr Grant asked, rhetorically, a contract is unenforceable from the outset, what right can there be to payment under the contract? In a contractual context, one would normally expect a "right" to connote an ability to mount a legal claim. The maxim "ubi ius ibi remedium" encapsulates the idea that, wherever there is a right, there is a remedy. Turning that round, one may wonder whether there can be a true legal right in the absence of a remedy.'[77]

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71 Hohfeld (n 16) 30.

72 Hohfeld (n 16) 32.

73 Gardner 'Holding on' (n 3) 192

74 Ibid. Joel Feinberg, 'The Nature and Value of Rights' [1970] Journal of Value Inquiry 243; Leif Wenar, *The Nature of Rights*, (2005) 33 Philosophy and Public Affairs 135. Discussed Chapter Six, 'Justifications'.

75 Ibid.

76 Ibid.

77 [2019] Ch 471 (CA) [20] (Newey LJ).

The answer is 'yes'. 'Void' is not the same as 'unenforceable'. Unenforceable legal obligations can and do exist; it may be that 'sanction' theories of law mislead us into thinking otherwise.[78] An 'unenforceable contract' may be rare or anomalous, but it is not 'oxymoronic' in the sense of being impossible. A time-barred debt is one example.[79] That a duty correlative to a right to performance exists, even if unenforceable, can be demonstrated by the fact restitution is barred if performance is rendered.[80] They are valid 'bases' or *causa* for retaining an enrichment.[81]

Unhappy choice of a stipulative label aside, Hohfeld's scheme remains useful and suitable for our purpose so long as a caveat is entered. In this thesis 'claim-right' is only used in its technical sense, to refer to what the holder of a correlative duty possesses (as distinct from say a power, liberty, or immunity). The term says nothing about the claim-ability of the duty in court.

V. DISTINGUISHED FROM THE COURT'S POWER

In the previous section, it was argued that standing is a power to sue and enforce conceptually distinct underlying duties/rights. This section demonstrates the importance of a different distinction.

Standing, a power of the claimant, needs to be better differentiated from another neighbouring concept – the *court's* powers to make orders. This is crucial to the conceptual space necessary for a deeper understanding of standing's place, and significance, within the remedial structure of private law. Recent developments in private law theory appear to have

78 Joseph Raz, 'Legal Rights' (n 13) 3; Robert Stevens, 'Private Rights and Public Wrongs' in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press 2014) 120.

79 (n 37).

80 *Moses v Macferlan* (1760) 2 Burr.1005, 97 E.R. 676, 1012 (Lord Mansfield): 'the defendant may retain it with a safe conscience, though by positive law he was barred from recovering'. Further, see Duncan Sheehan, 'Natural Obligations in English Law' [2004] LMCLQ 172.

81 Birke Haecker 'Unjust factors versus absence of juristic reason (causa)' in in Elise Bant, Kit Barker, and Simone Degeling (eds), *Unjust Enrichment and Restitution Handbook* (Edward Elgar Publishing, 2020) 309.

blurred these two powers together, causing some potential confusion. While the two powers are related, it matters that we recognise their conceptual independence. Neither power should be collapsed into the other.

A. Two powers, not one

The enforcement of private law rights and duties in the remedial process requires the engagement of at least three actors: a claimant, a defendant, and an adjudicative body (usually a court). In an important body of work spanning two decades,[82] Civil Recourse theorists John Goldberg and Benjamin Zipursky have argued that this 'triangle of relationships' needs to be accounted for.[83] Thus, they have argued, wrongs generate 'private rights of action'[84] which should be thought of as 'triangular'[85] or 'trilateral',[86] as a 'power to have the state alter the legal relations between the parties'.[87]

This move poses a challenge.[88] A triangular claimant 'right of action' appears distinctly non-Hohfeldian. Can Hohfeldian deontic logic, which is fundamentally bilateral, accommodate this

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82 Benjamin Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1; Benjamin Zipursky, 'Civil Recourse, Not Corrective Justice' (n 61); Benjamin Zipursky, 'Philosophy of Private Law' in Coleman, Kenneth and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004); Goldberg & Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917; Benjamin Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 Florida State University Law Review 299; Goldberg & Zipursky, 'Civil Recourse Revisited' (2011) 39 Florida State University Law Review 341; Goldberg & Zipursky, 'Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette' (2013) 88 Indiana Law Journal 569; Goldberg & Zipursky, 'Hohfeldian Analysis and the Separation of Rights and Powers' in Shyam Balganesh, Ted Sichelman and Henry Smith (eds), *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (CUP 2017); Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020).

83 Zipursky, 'Philosophy of Private Law' (n 82) 636-37.

84 Goldberg & Zipursky, 'Torts as Wrongs' (n 82) 918; Goldberg & Zipurksy, 'Civil Recourse Revisited' (n 82) 363.

85 Goldberg & Zipursky, *Recognizing Wrongs* (n 82) 124: 'the "right to civil recourse" refers to a particular kind of triangular right…'

86 Eg Zipursky, 'Civil Recourse, Not Corrective Justice' (n 82) 733. Discussing see eg Barker (n 18) 607-612

87 Zipursky, 'Philosophy of Private Law' (n 82) 633-37.

88 Nb that Goldberg and Zipursky both appear to say that a 'right of action', on their account, is a Hohfeldian power: Zipursky, 'Philosophy of Private Law' (n 82) 633. Endorsing Hohfeld, see also Goldberg and Zipursky 'Hohfeldian Analysis' (n 82); Goldberg & Zipursky, *Recognizing Wrongs* (n 82)

triangular phenomenon?[89] Building on aspects of Goldberg and Zipursky's account, but resisting this key move they make, I suggest here in this section that it can, and without the need for special modifications to the Hohfeldian scheme.

Instead of a trilateral 'right of action', I put forth a two-power model consistent with the Hohfeldian correlativity of powers and liabilities, and which, I shall argue, better accounts for the significance of the claimant's standing. Amongst other features, the two-power model better captures how and why the phenomenon of imposing 'liability' on private law defendants requires the active participation of *both* the claimant and the court, to successfully achieve the result of a damages award in the claimant's favour, converting the defendant into a judgment debtor.

B. Liability's ambiguity

This tendency for the two powers to be collapsed into one might be attributed to an ambiguity in the use of the word 'liability', to describe what happens in the remedial context of private law. There are (at least) two distinct senses of 'liability' here, which we must take care not to conflate. To illustrate the point more concretely, consider as a simple example a straightforward tort:

> Dan (D) punches Carl (C) on the nose, committing battery (a wrong) against Carl. Carl wishes to obtain damages against Dan.

Talk of 'liability' can prove rather confusing. Just a brief sampling of 'liability'-talk in the 'duty versus liability' debate will reveal the various formulations at play:

> 'The commission of a tort does not therefore create an affirmative legal duty to pay; instead, it creates a legal liability to the plaintiff. The concept of liability describes

98: 'a Hohfeldian power: a power to file a claim and, upon proof of claim, to obtain judicially ordered relief that corresponds to a liability in the person(s) against whom suit has been brought'. For particularly insightful criticism, see Ori Herstein, 'How Tort Law Empowers' (2015) 65 University of Toronto Law Journal 99.

89 See also Barker (n 18).

> one who is legally vulnerable to certain actions by another. A liability, as Hohfeld explained, is correlative to a power in another. In torts, the liability of a defendant to a plaintiff is correlative to a power of the plaintiff against the defendant.'[90]
>
> 'The tort defendant does not have a legal duty to pay… Instead, what the defendant has, under the law, is a liability to pay… injuring someone through medical malpractice does not generate a duty to pay the injured plaintiff. Instead, it creates a liability to have a damages judgment entered against one, assuming that the plaintiff can make her case.'[91]
>
> 'Rather than imposing ordinary or even inchoate duties to pay damages, the common law merely imposes liabilities to pay damages…. The most important feature of damage awards is that they are awards – that is, that courts issue them.'[92]
>
> 'The primary liability of tortfeasors is none other than a liability to be placed under a duty by the court to pay a liquidated sum in reparative damages.'[93]
>
> 'Strictly, there is no such thing as a liability to pay damages. That is an elliptical expression. It is a liability to be required to pay (a specified sum in) damages.'[94]

For convenience of illustration our example concerns tort, but a 'liability'-only view has been transplanted and generalised, *mutatis mutandis*, to other areas of private law, so:

> 'the liability model … supposes that the only legal consequence of a mistaken payment is that the recipient falls under a liability, in particular a liability to a court order'[95]

(i) Immediate liabilities to the court?

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90 Zipursky, 'Civil Recourse, Not Corrective Justice' (n 82) 720-21.

91 Goldberg & Zipursky 'Civil Recourse Revisited' (n 82) 363.

92 Stephen Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harvard Law Review 1727, 1727-78

93 John Gardner, 'Torts and Other Wrongs' (2011) 39 Florida State University Law Review 43, 57.

94 John Gardner, 'Damages Without Duty' [2019] University of Toronto Law Journal 412, 419-20

95 Stephen Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Journal of Law and Jurisprudence 157, 161. For breach of contract: Stephen Smith, 'Remedies for Breach of Contract: One Principle or Two?' in Klass, Letsas and Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014). More generally: Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019).

The recent debate over 'duty versus liability' has received and occupied the attention of many academics.[96] By advocating 'liability' as a replacement concept for a post-breach secondary duty to pay damages, the debate has skewed our focus. It might therefore be thought that, after Dan punches Carl on the nose, Dan is then immediately 'liable' to be ordered by the *court* to pay damages to Carl. This, however, would be a mistake.

It is a view which would entail that, post-wrong, Dan is immediately subject to the *court's* (correlative) power to directly order him to pay damages to Carl. This is a difficult view, and we have reason to doubt it. Such an account would appear overly defendant-sided, leaving no room for Carl's participation. Can it truly be, that Carl has no part to play in private law's remedial processes?

Key to resolving this puzzle is a conceptual distinction between two different senses in which Dan is 'liable' to someone, post-punch. Given the ambiguity of 'liability' here, it may be better to view things through their less ambiguous flipsides. Recall that Hohfeldian liabilities have correlative powers, and so we must always ask, 'liable to whom?'. Each sense of 'liability' identifies a different power, vested in a different power-holder, to whose exercise Dan is liable. One power is vested in the court. The other power – standing – is vested in the claimant, Carl. Distinguishing these two powers, we have:

i. *D's liability to be sued by C at t_1:* Before suit is commenced, Dan is liable to be sued by Carl, ie Dan is subject to the exercise of Carl's power (standing) to sue him.

ii. *D's liability to a court order at t_2:* Only after suit is commenced, is Dan liable to be ordered by the Court to pay damages to Carl, ie Dan is subject to the exercise of the Court's power (jurisdiction) to enter judgment against him, thereby converting Dan into a judgment debtor.

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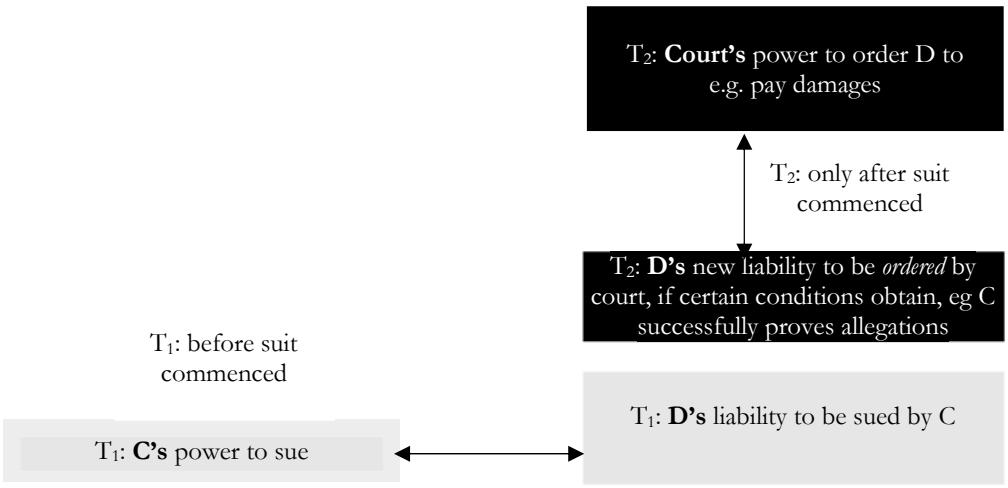
96 In addition to (nn 90-95), Nathan Oman, 'Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law' (2011) 39 Florida State University Law Review 138; Sandy Steel and Robert Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283; Barker (n 18); Nick McBride, *Humanity of Private Law* (Hart 2019) 54-63; James Penner and Karluis Quek, 'The Law's Remedial Norms' (2016) 28 Singapore Academy of Law Journal 768.



As a quick check, it may perhaps be helpful to substitute for 'liability' synonyms like 'subjection' or 'vulnerability'.[97] Hohfeld thought that the nearest synonym for 'power' was an 'ability' to change legal relations, and the nearest synonym for 'liability' a 'subjection' to such change.[98] Hohfeld himself hinted that his term 'indicates that specific form of liability (or complex of liabilities) that is correlative to a power (or complex of powers) vested in a party litigant *and* the various court officers'.[99]

(ii) Distinct but related

The two powers, each correlative to a different sense in which Dan is 'liable', are conceptually distinct. But that does not mean they are unrelated. The two powers are related in an important way. Under the two-power model, Carl's power (ie standing) to sue is both logically and temporally prior to the court's power (jurisdiction) to make an order against Dan. Hence, Dan is liable to a court order to eg pay damages only if, and only when, Carl decides to exercise his power to initiate suit.

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97 To better differentiate 'liability' from 'duties'. The terminology here can be rather unstable. Noting this see eg Hohfeld (n 16) 53: 'no doubt the term "liability" is often loosely used as a synonym for "duty" or "obligation…' For example, 'liabilities' are opposed to 'assets' in a balance sheet; a 'liability' is sometimes used to mean a debt or monetary sum, owed to a creditor. This adds a further layer of complexity to the area.

98 Hohfeld (n 16) 45, 54.

99 Hohfeld (n 16) 54.

In fact, Carl's exercise of his power to sue is what triggers or activates Dan's liability to the court's power (jurisdiction). Recall that Hohfeldian powers, when exercised, change the normative positions (ie legal relations) of the persons subject to their exercise. One distinctive feature of Carl's power to sue – a Hohfeldian power – is that it changes Dan's position by now exposing Dan to the power of the court, where prior to that, he was not so exposed. In other words, he is now 'liable' to the court in a way he was not before. Before Carl's suit, the court had no power to order Dan to pay damages of its own accord. Another example:

> Dan (D) punches Carl (C) on the nose, committing battery (a wrong) against Carl. Carl has not decided whether to sue Dan. The next day, Dan receives a court order to pay damages to Carl in the post. Carl has not done anything.

The court order has no legal effect, and Dan can ignore it without consequence. Before Carl's suit, the court had no jurisdiction to order damages against Dan. The order is void.[100]

So, post-punch, it is indeed true that Dan is 'liable' is some sense. But as the analysis above has shown, the only liability he is immediately under is a liability to be sued by Carl. He is not yet liable to a court order – that would be entirely contingent upon Carl's decision to sue, and is triggered or activated only after initiation of suit. Clarifying the relationship between the claimant's power to sue (standing) and the court's power (jurisdiction) over the defendant shows that at any given time, Dan is only under one liability, ie subject to the exercise of one person's power. First the claimant's, and only after, the court's. Both powers must be exercised in order for C to successfully obtain a damages award against D.

It is perhaps an overly unilateral focus on D's position only, causing a false appearance that D's 'liability' is continuous throughout, which has obscured our view that there are indeed two separate liabilities, each correlative to a different power-holder.

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100 *Sir Richard Newdigate v Davy* (1701) 1 Lord Raymond 742; 91 ER 1397 (money paid under a judgment could be recovered; judgment was void because the court had no jurisdiction); discussing see *Goff & Jones: The Law of Unjust Enrichment*, Mitchell, Watterson and Mitchell (eds) (9th edn, Sweet & Maxwell 2017) [2-40]; *Chitty on Contracts*, Hugh Beale (ed) (32nd edn, Sweet & Maxwell 2015) [29-104]. See also *Farrow v Mayes* (1852) 18 QB 516, 118 ER 195; *In Re Smith* (1888) 20 QBD 321 (CA); cf *O'Connor v Isaacs* [1956] 2 QB 288 (CA).

(iii) Standing's significance

The two-power model hence carves out the space necessary to accommodate standing's significance within the remedial structure of private law. It emphasises that in private law, Dan's 'liability' is never to the court, unless and until the claimant says so. Standing has logical and temporal priority. It is a concept independent of, but related to, the court's power. Interposed between Dan and the court's coercive powers lies someone: a person legally empowered with standing. Several important features can be captured by this model.

(a) *Right-holder control*

The two-power model captures a hallmark feature of private law litigation: exclusive right-holder control.[101] It is explained through Hohfeldian deontic logic, as the effect of conferring exclusive standing to right-holders, and how that standing relates to the court's power (jurisdiction) over the defendant.

As has been hinted above and elaborated later,[102] a general standing rule applies across the whole of private law, so that only right-holders have standing. So only Carl is vested with the unilateral[103] power to initiate legal proceedings, with the goal of enlisting the court's aid to coerce Dan into paying him damages by converting him into a judgment debtor. Having exclusive standing gives Carl exclusive control over the enforcement of the duty. Only he can set in motion the remedial processes of private law. He is the gateway to Dan's liability to the court's power (jurisdiction). He may choose to forgo enforcement, or to accept a settlement with Dan, with threat of enforcement hovering in the background. It is all up to Carl. Therein lies the truth in the proposition that '[t]he authority of the court to tackle and resolve the

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101 Zipursky, 'Philosophy of Private Law' (n 82) 655.

102 Section VIII: 'Standing Rules'.

103 Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) [4.1]-[4.6].

dispute, in private law cases, is subject to the authority of the plaintiff'.[104] By contrast, public law judicial review requires leave or permission from the High Court to proceed.[105] Furthermore, while standing in public law is also concerned with whether a particular person can invoke the jurisdiction of the court to obtain a variety of orders (eg quashing, mandatory, or prohibitory), the precise tests differ, reflecting a public interest model aimed more at controlling the abuse of public powers.[106]

(b) *Court not roving commission*

Relatedly, the two-power model also explains why in private law, the court is not a roving commission, with the unilateral initiative to investigate wrongs, enforce rights, and order damages awards. In private law the state stands by the side. It will not step in to resolve a private dispute or undo a wrong or injustice unless and until a private individual with standing initiates it. The court conceives of its role as passive; it must be convinced to do something, and it takes no position on matters not before it.[107] In private law it is not the courts, or any arm of the state, who have standing. The courts cannot unilaterally issue damages awards, ordering Dan to pay Carl in disregard of Carl's choice. To the extent that the court can bypass C's discretion over whether to exercise his standing, this would strip C of his control over the duties D owes him. In the extreme case where the court or a state body were simply a roving commission, roaming around and unilaterally ordering defendants to pay damages at its own

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104 Gardner, *Personal Life* (n 9) 199. On 'authority', contrast Arthur Ripstein, 'Private Authority and the Role of Rights: A Reply' (2016) 14 Jerusalem Review of Legal Studies 64 and John Gardner, 'Private Authority in Ripstein's Private Wrongs' (2016) 14 Jerusalem Review of Legal Studies 52.

105 S31(3) Senior Courts Act 1981; Before that: *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) 643-44 (Lord Diplock). On which see further Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) [25-001]; Zuckerman *Civil Procedure* (n 103) [4.69]-[4.80]

106 The test being one of "sufficient interest": s31(3) of the Senior Courts Act 1981. Though what is 'sufficient' may vary depending on order sought. Craig, *Administrative Law* (n 105) [25-034]; Joanna Miles, 'Standing in a Multi-Layered Constitution' in Bamford and Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart 2003).

107 Ripstein (n 8) *Private Wrongs* 272

initiative, whether on the basis of its own investigations or at the behest of whistle-blowers, C could no longer be said to have any control over the enforcement of the duty. The two powers would collapse into one, vested in the courts. Immediately post-breach, D would be liable only to the courts. We would then no longer be in the private law world.

The point can be accentuated by simple contrast to criminal law, where victims play a minimal role. Suppose a first-year law student walks into a shop prominently displaying a warning sign: 'shoplifters will be prosecuted'. He would know that the shopkeeper cannot follow through on this warning. In criminal law it is an arm of the state – the prosecutor – which has the standing to charge alleged shoplifters, not the victims. Hart once put it thus: '[t]he crucial distinction…. is the special manner in which the civil law as distinct from the criminal law provides for individuals: it recognizes or gives them a place or *locus standi* in relation to the law quite different from that given by the criminal law'.[108] Indeed, unlike prosecutors who are duty-bound public officials, a private law right-holder typically has 'radical discretion'. A 'special feature of private law, procedurally speaking, is that the most extensive legal powers to determine the powers of the court, those most akin to those of a criminal prosecutor, lies with the very person who claims to have been wronged. She is the plaintiff, a non-official who stands to profit personally…'[109]

(c) *Settlements*

Realising that Dan's immediate 'liability' post-punch is to be sued by Carl, and not to be ordered by a court, better explains the practice of settlements.[110] In private law Dan has to bargain with Carl for a settlement, and not the court. In a similar vein, those accused of crimes make plea bargains with prosecutors who have prosecutorial discretion, and not bargains with the court.

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108 Hart, 'Legal Rights' (n 3) 183. Compare Gardner *Personal Life* (n 9) 199-201

109 Gardner, *Personal Life* (n 9) 200.

110 See also Chapter Six, 'Justifications'.

The prosecutor gets to decide which charges to pursue, and which not to. The court cannot disregard that without usurping the prosecutor's standing and public functions.

(d) *Timing*

Another implication of the model is that exclusively empowering Carl with standing means that Carl gets to control when Dan's liability to the court begins. In private law, our 'liabilities' are not free-floating, always and forever hanging over our heads. They have start dates and end dates. Our liabilities to suit by particular claimants are extinguished after the expiry of the applicable limitation period, which renders a previously enforceable duty no longer enforceable.[111] To be effective, a claimant must bring suit within time. Dan starts becoming subject to the court's power (jurisdiction) to order him to pay damages only if, and when Carl sues in time.[112] If undefended by deadline, default judgment is entered against Dan.[113]

(e) *Unsuccessful suits*

The model emphasises that, to achieve the result of a damages award in the claimant's favour, two importantly distinct powers must be exercised, and not just one. However, it must be remembered that as an empirical fact, not all civil suits are successful. At civil trial, the court as fact-finder and law-applier ought to exercise its power to order damages in Carl's favour only if Carl has satisfactorily proved his allegations that his legal rights were infringed.[114] Carl may

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111 Limitation Act 1980. Similarly, laches in equity: cf s36 Limitation Act.

112 NB it ends once judgment has been entered ie "perfected" (CPR 40.2, 40.3). See generally, Zuckerman, *Civil Procedure* (n 103) 1066-77. Justice requires limits to the uncertainty created by legal disputes. Finality of litigation demands that once judgment is given, the matter in controversy is concluded, subject only to appeal. Once perfected court's jurisdiction is exhausted and court no longer possess power to vary or set side judgment, subject to certain exceptions (eg slips): *Taylor v Lawrence* [2002] EWCA Civ 90 [9]. Proper recourse for dissatisfied party is to appeal, otherwise no finality.

113 CPR, Part 12.

114 See eg Joseph Raz , 'The Rule of Law and its Virtue' in *The Authority of Law: Essays on Law and Morality* (OUP 1979): 'litigants can be guided by the law only if the judges apply the law correctly; it is futile to guide one's action on the basis of law if when the matter comes for adjudication the courts will not

fail at any of these hurdles. Unsuccessful civil suits happen all the time – a claimant can exercise his 'right of action' but without ultimate "liability" imposed on the defendant, contrary to the claimant's desires. On the two-power model, this outcome is accounted for as the court not exercising its correlative power to order in C's favour against D, *despite* C exercising his power to sue D. Unsuccessful civil suits are commonplace. A two-power model possesses the resources to easily explain these outcomes, whereas a single-power model – relying only upon a singular triangular relation – would struggle.

(f) *Successful suits*

The court's power, held by someone in a public judicial office, ought to be better differentiated from the claimant's standing. Each of the two powers when exercised, alter D's position, but in different ways. Suppose the civil suit is successful, ie the court decides in C's favour against D. In issuing judgment order against D, the court is exercising its own power (and not the claimant's), thereby changing D's normative position. Entering judgment against Dan converts Dan into a judgment debtor,[115] merging or modifying any pre-existing secondary duty to pay damages into a new judgment duty.[116] The court-ordered duty is a different duty as wholly new consequences, for example contempt of court,[117] are attached to its non-compliance,[118] and it may be directly enforced by the judgment creditor in execution via a whole host of coercive machinery provided by the state for the enforcement of judgment debts, e.g. third-party debt orders, charging orders, stop orders, or the seizure of goods.[119] This account is compatible with what Hohfeld himself thought, that '[i]f A brings an action for damages, and

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apply the law and will act for some other reasons. People will be left guessing what the courts are likely to do – but these guesses will not be based on the law but on other considerations'.

115 CPR 70.1.

116 Wesley Hohfeld, 'Nature of Stockholders' Individual Liability for Corporation Debts' (1909) IX Columbia Law Review 285, 294.

117 CPR 81.4; Zuckerman, *Civil Procedure* (n 103) 1098.

118 CPR 70.2A(4), s39 Senior Courts Act 1981.

119 CPR 69, 72,73.

the tribunal pronounces in his favor, the remedial obligation between A and X is discharged by, or, in legal terms, "merged in," the new legal relation or *vinculum juris* that results, – a judgment obligation. X is now under a judgment duty, and his liability, –"the ultimatum of the law"– now becomes even more threatening.'[120]

C. Are our liabilities created by our wrongs?

Having set out the two-power model, it may be helpful to emphasise at this juncture that, strictly speaking, accepting it does not require resolving the 'duty versus liability' debate. However, the model equips us with the conceptual tools to view the debate from a different angle, and to further interrogate a point of contention within that debate – it forces a more precise clarification of the nature of these supposed 'liabilities', and their putative relation to an underlying civil wrong (ie a rights-infringement, or any other right-creating event eg an unjust enrichment or contract). This sub-section now explores that pay-off.

As has been hinted at, the essence of the 'duty versus liability' debate is over the plausibility of replacing post-breach secondary duties to pay damages with a substitute concept – a 'liability'. Advocates of a 'liability-only' view have argued that wrongs generate only 'liabilities', instead of (also) generating duties to pay damages.[121] In doing so, doubt is cast on the orthodox understanding that such duties exist, while simultaneously asserting a relationship between these 'liabilities' and the underlying civil wrongs which purportedly generate them. While the debate has revolved around the legal effect of a civil wrong, the 'liability'-only view has also been generalised to other areas of private law, applying beyond torts and breaches of contracts to unjust enrichments.

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120 Hohfeld, 'Nature' (n 116) 285, 294.

121 Hohfeld himself appears to have thought that both co-existed complementarily: see 'Nature' (n 116), 293-94: 'If X fails to act under his remedial duty, A has *ab initio* the power, by action in the courts, to institute a process of compulsion against X. At this point, we reach, as the correlative of the power of A, the liability of X….' A similar claim, that a wrong generated *both* duty and liability, was advanced by Sandy Steel and Robert Stevens, 'Why there is a duty to pay damages' (Society of Legal Scholars, Oxford, 8th September 2016), now Sandy Steel and Robert Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283, 287-88.

It has been claimed that 'liability' is employed in a Hohfeldian sense.[122] Yet, having clarified and distinguished between the two conceptually distinct senses of liability at stake, a closer look reveals that Dan's wrong generates neither. Dan's wrong does not create in Dan a liability in the first sense, ie to the *court's* power (jurisdiction) to order him to pay damages. Neither does it create in Dan a liability in the second sense, ie to the *claimant's* power (standing) to sue. It thus seems a mistake to assume that a *new* 'liability' is created by the very wrong itself. To the extent that a 'liability-only' view is premised upon this assumption, we have reason to doubt its accuracy.

(i) To court

One implication of the analysis is that Dan's liability to the court's power (jurisdiction) does not vary according to his civil wrong. It is not triggered by his punching Carl on the nose. Instead, it turns upon whether Carl sues, a decision for him to take. If the two were friends and Dan were to apologise, Carl might well forgive him, in which case Dan's liability to the court never arises at all. As argued above, to think otherwise would be to ignore the significance of a claimant's standing, collapsing two distinct powers into one. There is a possible explanation for the prevalence of this view. The difficulty here seems to have been created, in the 'duty versus liability' debate, by a series of misleading analogues made to criminal law convictions, where the state rather than the victim is in the driving seat. So, damages have been analogised to fines in criminal law, and the state's role in punishment has been underscored:

> 'The most important feature of damage awards is… that courts issue them. Like orders to pay fines, their importance lie fundamentally not in what they do, but in what they represent… the law's recognition that the plaintiff was wronged by the defendant'.[123]

Similarly, it has been argued that:

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122 And so correlative to a power: see eg Zipursky, 'Philosophy of Private law' (n 82) 632; Zipursky, 'Civil Recourse, Not Corrective Justice' (n 82) 720-21, Goldberg and Zipursky, 'Hohfeldian Analysis' (n 82).

123 Smith, 'Duties, Liabilities, Damages' (n 92), 1728.

> '…to say that we have liabilities to X, means that X may be done or imposed upon us by another person or institution. Lawyers say that criminals are liable to be punished – not that they have duties to punish themselves – because punishment is imposed by the courts. Thus, to describe wrongdoers as liable to pay damages suggests that they do not have duties to make these payments, but only that they are liable to be ordered to pay them'.[124]

On a brief aside, it may be doubted how far these analogies can travel.[125] The justifiability of punishing through private law is controversial.[126] Punishment is rarely the avowed objective, as opposed to a side-effect. Even where present it typically involves punitive *damages,*[127] which could still take the form of a duty to pay an unliquidated monetary sum *to* the correlative right-holder, even if not calculated by reference to his exact consequential losses as with compensatory damages; though to intentionally punish one could award say a multiple of (say treble) the loss suffered, as some 'civil penalty' regimes do.[128] The language here of 'no duty to punish oneself' is misleadingly unilateral, meant to resemble a vow made to oneself as opposed to a promise made to another. Once clarified the objection loses much force.

(ii) To be sued

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124 Smith, *Rights, Wrongs and Injustices* (OUP 2019) 192. Further, see also Smith, 'Duties, Liabilities, Damages' (n 92) 1754: '…as criminal punishment illustrates - it is important, in order for the law's message to be brought home to specific victims and wrongdoers…. In private law, damages can serve a similar role, or at least they can serve this role if they are imposed as liabilities, not duties.'; Goldberg & Zipursky, 'Civil Recourse Revisited' (n 82) 363: 'A tort liability is in some ways like a criminal liability. The commission of an armed robbery does not generate a duty to go to jail; it creates a liability to be sent to jail, assuming the prosecution can make its case.'; Zipursky, 'Civil Recourse, Not Corrective Justice' (n 82) 722: '…this view leads us to recognize a similarity between tort law and criminal law, which is an area where legal norms contain serious normative force. The imposition of liability is in some ways like the imposition of a punishment.'

125 See eg Ripstein *Private Wrongs* (n 8) 276-285.

126 See eg Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (1997) Report no 247; compare Ripstein, *Equality, Responsibility and the Law* (CUP 1999) 147-160; Stevens, *Torts and Rights* 85-88; Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87.

127 eg *Rookes v Barnard* [1964] AC 1129 (HL); *Cassell v Broome* [1972] AC 1027 (HL); *Kuddus v Chief Constable of Leicesterchire Constabulary* [2001] UKHL 29, [2002] 2 AC 122; *Whiten v Pilot Insurance* [2002] 1 SCR 595 (Supreme Court of Canada); cf *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 197 ALR 626.

128 Discussed Timothy Liau, 'Is Criminalising Directorial Negligence a Good Idea?' (2014) 14(1) Journal of Corporate Law Studies 175, 206-09; see generally Kenneth Mann, "Punitive Civil Sanctions; the Middleground between Criminal and Civil Law" (1992) 101 Yale LJ 1795; Robin White, "'Civil Penalties": Oxymoron, Chimera and Stealth Sanction' (2010) 126 LQR 59.

Alternatively, it might be suggested that even if no new liability to the court is created by the wrong, Dan's punch generates in him a new liability to *Carl*'s power to sue. Goldberg and Zipursky appear to take this view. For them, torts are wrongs which 'generate for its victim a private right of action: a right to seek recourse through official channels against the wrongdoer'.[129]

One problem here is that Dan's liability to be sued by Carl is not a *new* liability, created by the very wrong itself. It seems possible for Carl to sue Dan even where no actual wrong occurs. Carl's power to sue Dan pre-exists the wrong, and so its existence cannot be explained by it. Consider a simple variant of our initial example:

> Carl and Dan quarrel on Twitter. Dan threatens Carl via private text that he will punch Carl on the nose tomorrow.

Even before the wrong occurs, if the threat of the wrong is imminent and highly probable,[130] Carl has the power to sue to enforce his primary right not to be punched in the nose, obtaining a *quia timet* prohibitory injunction from the court to restrain the wrong from occurring, in anticipation of the wrong. The court might even grant damages *in lieu* of an injunction.[131]

(iii) Final but fallible

More profoundly, there is a sense in which both a claimant's power to sue and the court's power to make an order are independent of the wrong. Recall that under the two-power model, that a claimant has standing is sufficient to activate the court's power (jurisdiction) over

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129 Goldberg and Zipursky, 'Torts as Wrongs' (n 82) 918. See also Zipursky, 'Civil Recourse, Not Corrective Justice' (n 82) 735. "Right of action" is a term sometimes used loosely to refer either to a claim-right, or a power, or both. In this case however, we can disambiguate it given Goldberg and Zipursky's avowal of a 'liability-only' view, having denied the existence of secondary duties to pay damages: see eg Goldberg and Zipursky, 'Civil Recourse Revisited' (n 82) 363; Benjamin Zipursky, 'Civil Recourse, Not Corrective Justice' (n 82 718-24

130 *Canada v Ritchie Contracting and Supply* [1919] AC 999 at 1005 (Lord Dunedin); *Redland Bricks v Morris* [1970] AC 652 (Lord Upjohn).

131 S50 Senior Courts Act. *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287*; Coventry v Lawrence* [2014] UKSC 13*; Morris-Garner v One Step* [2018] UKSC 20.

a defendant. To begin unpacking how wrongs stand in relation to both these powers, it may be helpful to consider the potential for a court to make errors. It has been said to be a 'truism about law' that 'legal authorities have the power to obligate even when their judgments are wrong', and that 'courts sometimes make mistakes when interpreting the law'.[132] Just because the judgment of an apex court is final, and so effective at creating or modifying the legal rights and duties of litigants, does not mean that a court is infallible.[133]

Courts are fallible as law-appliers. They could make mistakes, giving judgment for unmeritorious claimants. Even if a judge acts in utmost good faith, it is possible that contrary to best efforts he ends up misapplying the law or making an error in fact-finding. In other words, he may issue judgment contrary to the law applicable to the litigants before him. He may give judgment against a defendant, even if on the true facts the defendant had committed no applicable legal wrong against the claimant. Yet, such errors do not themselves invalidate the judgment. The judgment is a valid exercise of the court's power, effective at altering the legal rights and duties of the litigants, and capable of being further enforced in execution by the coercive machinery of the civil courts (seizure of assets, garnishment of earnings etc).[134] Until set aside by a superior court on appeal, the judgment remains binding.

This remains the case even if it is an apex court delivering the mistaken judgment. Even if fallible, a supreme tribunal's decision is final. Finality must be distinguished from fallibility.[135] Elaborating upon the point, Raz observed that courts, tribunals, and other judicial bodies are the 'most important example' of 'institutions with power to determine the normative situation of specified individuals, which are required to exercise these powers by applying existing

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132 Scott Shapiro, *Legality* (HUP 2011) 15.

133 HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 141-47. See also Herstein (n 88) 110-113, at 112: 'Courts… are fallible as norm appliers. That is, courts hold the power to change the legal rights and relations of litigants even in contradiction to the law and to the litigants' valid and controlling rights, which the courts are obligated to apply.'

134 (n 119).

135 Ibid.

norms, but whose decisions are binding even when wrong'.[136] Differentiating them from private individuals with legal expertise, 'Courts have power to make an *authoritative* determination of people's legal situation…. The fact that a court can make a binding decision does not mean that it cannot err. It means that its decision is binding even if it is mistaken. To be a binding application of a norm means to be binding even if wrong, even if it is in fact a misapplication of the norm'.[137]

Consistently, it is the general rule that money paid pursuant to a court order cannot be recovered as long as that order subsists.[138] This is so even if the court made a mistake. The court has the jurisdiction to decide correctly as well as incorrectly, and a mistaken judgment is conclusive between the parties until corrected by an appellate court.[139]

Accordingly, a genuine civil wrong on the true facts cannot be what creates in defendants their liability to a court order. So long as a claimant with standing sues, a legally effective court order can be made, independent of whether a wrong exists. To take another example, an unjust enrichment at another's expense is (by definition) a not-wrong,[140] but one can be 'liable' to be sued and 'liable' to a court order compelling restitution for unjust enrichment – a not-wrong. That does not mean a wrong if it does genuinely exist, or any secondary duty to pay damages generated by it, is normatively inert. Suits are often brought in respect of and with the aim of enforcing an underlying right or duty. The existence of a genuine wrong gives the court a good or justifiable basis for exercising its power over the defendant. It immunizes the judgment from appeal, where it otherwise would be subject to appeal. This follows from the

136 Joseph Raz, *Practical Reasons and Norms* (OUP 1999) 136.

137 Raz, Practical Reasons and Norms ibid 134-135

138 *Marriot v Hampton* (1797) 7 T.R. 269, 101 E.R 969; cf *Moses v Macferlan* (1760) 2 Burr.1005, 97 E.R. 676 (distinguished); *Wilson v Ray* (1839) 10 Ad. & El 82, 113 E.R. 32 (possible exception for fraud). Discussing, see *Goff & Jones: The Law of Unjust Enrichment* (n 100) [2-31]-[2-40].

139 *Philips v Bury* (1694) Skin 447 at 485; 90 ER 198 at 215; *Goff & Jones* (n 100) [2-37]. An illustration: *Minshall v HMRC* [2015] EWCA Civ 741, [2015] Lloyd's Rep F.C 515.

140 See eg Peter Birks, *Unjust Enrichment* (OUP 2005) 6,8: 'there is no contract and there is no wrong. This is crucial to the *independence* of the law of unjust enrichment…. The absence of both is evident in *Kelly v Solari*.'

court's role-based duty to apply the law to the true facts as between the litigants before it so that as far as possible only meritorious claims succeed. A court is a public body. It does not have free-wheeling discretion to exercise its powers however it likes;[141] it must exercise them by reference to legal rights and duties, which it is tasked to determine and enforce.[142] These powers have coercive effect, and the application of coercive force on private individuals must be justified; even more so where its application is not by private individuals but rather by a public body, an arm of the state.[143]

D. Points of departure

My account has built on Goldberg and Zipursky's pioneering work on 'rights of action' for Civil Recourse. In closing this sub-subsection, it may be useful to briefly summarize how and why we depart. Three points come to mind.

(i) Court not just 'agent'

The first is that I have explicitly identified at least two distinct liabilities at play, stressing the conceptual independence of the court's powers from the claimant's powers. I therefore resist any 'triangular' or trilateral account of a 'right of action'. By contrast, while C's standing is given a key role in Goldberg and Zipursky's analysis, they appear to have collapsed the court's power into C's right of action. This is because they have attempted to account for the engagement of

141 See eg Birks 'Rights, Wrongs, and Remedies' (n 45).

142 Compare John Gardner, 'Torts and Other Wrongs' (n 93) 58: 'the court has a legal duty to award a liquidated sum in reparative damages against her if the tort is proved. This legal duty exists because the successful plaintiff has a legal right to reparative (not taken to include nominally reparative) damages. The plaintiff's right grounds a legal duty on the court to impose a new legal duty on the tortfeasor, a legal duty that is also grounded (by the court and by the law) in the plaintiff's right', and John Gardner, 'Damages Without Duty' (n 94) 419-20: 'As we already have noted, the claim of wrongdoing by P grounds the right and power to litigate against D. 'On the ground that' means that the proceedings ought to succeed if and because (the proper process yields the verdict that) the assertion is true. The claim of wrongdoing grounds the power and right to litigate.'

143 Hence the need for constraints on the state like a 'harm principle', and its variants: see eg John Stuart Mill, *On Liberty* (Routledge 1991); Joseph Raz, *Morality of Freedom* (OUP 1986) 420-24; Ripstein, *Private Wrongs* (n 8) 288-95. But to delve any further into political philosophy here would be to wade too far off afield.

three distinct parties with only a singular relation. They have argued that C's power is 'mediated, rather than direct', as 'it is only by virtue of the acts of a third party – the state – that the legal relations are altered. However, the plaintiff with a right of action has the legal power to have the state change these legal relations. It is almost as if the state acts as an agent of the plaintiff, once the plaintiff is determined to have satisfied the requisite conditions.[144] One difficulty here is that this comes close to denying any Hohfeldian correlativity between C's power and D's liability, which they themselves claim to endorse. So elsewhere they have argued that:

> The commission of a tort confers on the victim a particular legal power; namely, a power to demand and (if certain conditions are met) to obtain responsive action from the tortfeasor. A legal liability is the Hohfeldian flipside of this kind of legal power. The commission of a tort leaves a **tortfeasor** vulnerable to a claim initiated by the **victim** and backed by the power of the **state**. Because the vulnerability is to the victim, the wrongdoer's fate is, to a substantial degree, in the victim's hands. The victim, not a government official, decides whether to press her claim or not, and the victim, in principle, also decides whether to accept a resolution of the claim short of judgment. If the claim is successful, of course, the victim can enlist the state's aid in her effort to enjoin ongoing wrongful conduct or to demand responsive action from the wrongdoer in recognition of the wrong done to her.[145]

For them, there is one liability, but two powers. This move strains their analysis. As has been criticised, this idea of a trilateral 'mediated power', invoking an agency metaphor, risks relegating courts to mere 'vending machines'.[146] Two difficulties follow.

(ii) Timing

The first can be illustrated using one of their own recent examples, a contract for the sale of goods:

> The contract between seller and buyer, for example, generates in seller and buyer not only claim rights but also certain powers, including the power of each to file a complaint in a court for breach of the contract that, if its allegations are proven,

144 Zipursky, 'Philosophy of Private Law' (n 82) 633.

145 Goldberg & Zipursky, 'Civil Recourse Defended' (n 82) (emphasis added).

146 Herstein (n 88) 115-17.

> entitles the complainant to a remedy for the breach. There is no legal duty correlative to this legal power: that seller or buyer can sue and potentially prevail on a breach of contract claim does not mean that merely by virtue of a breach, seller or buyer has a legal duty to bring suit or compensate the other for the breach. Instead, the correlate to this power is a legal liability. Thus, to say that contract law gives buyer a (conditional) power to pursue and obtain a remedy against seller for seller's breach of their contract is to say that, were seller to breach the contract, seller would face a liability to buyer.[147]

If C's 'right of action' is a 'mediated' or 'indirect' power, then when exactly is it exercised? (i) at time of initiation of suit (filing a complaint) pre-trial, or (ii) at time of judgment, at trial? These two events could be separated by what is possibly a very time-consuming civil trial. If the relevant liability in a 'right of action' is to have one's legal relations *altered by the state*, then that correlative power would be successfully exercised only at time of judgment, once the judge makes an order against the defendant-seller. But a year or two may have passed since the buyer filed a complaint. It seems less plausible to say that at the time of judgment, the relevant correlative power being exercised is the claimant-buyer's 'right of action', rather than the court's independent power.

Further, a court's fallibility, however rare, entails that a meritorious claimant (the buyer) who was genuinely wronged might still fail to get a favourable ruling against the defendant (the seller), despite having exercised his power to 'file a complaint'. The conceptual possibility of a court ruling against the genuine rights of claimants can only be accommodated if we recognise that a court's power is independent from the claimant's power.[148] A mistaken court can stall a claimant's attempt at vindicating his (claim-)rights, even if the claimant has exercised his 'right of action' and fulfilled the necessary conditions of evidence and procedure.

(iii) Unsuccessful suits

Last and relatedly, a singular trilateral relation struggles to explain unsuccessful suits, where a claimant sues but fails to achieve his goal of obtaining judgment order against the defendant.

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147 Goldberg and Zipursky, 'Hohfeldian Analysis' (n 82).

148 Herstein (n 88) 112-113.

Goldberg and Zipursky have argued that the 'right of action' C has is a 'conditioned power'[149] – so there are conditions attached to the successful exercise of the power. Failing to satisfy these conditions or hurdles, the power is unsuccessfully exercised. In their own words: 'the changing of the legal relation is something one can do only if one is able to satisfy certain conditions; typically, crossing certain procedural thresholds and meeting certain evidentiary standards to the satisfaction of a factfinder.'[150]

The problem here is that the conditions identified are attached to the *court*'s power, and not a claimant's power. If C's 'right of action' is exercised by 'filing a complaint in court for the breach of contract', these conditions of evidence and proof are hurdles that C must jump only *after* suit is commenced, ie after the exercise of C's power to sue. They therefore cannot be conditions attaching to this power, as the power's successful exercise entails that all its conditions have already been fulfilled.

On my model, unsuccessful civil suits happen because the courts refuse to exercise their powers over the defendant, to grant C the remedy C desired, and not because C fails to exercise her 'rights of action'. C loses despite suing, because the court remains unmoved to exercise its powers in her favour, if say C fails to prove her case on a balance of probabilities. It seems counter-intuitive to suggest that failed civil suits are the product of an unsuccessful attempt by claimants to exercise their 'rights of action'. If an analogy is needed, those accused of crimes can be ultimately acquitted, if the prosecutor fails to discharge its burden to prove its case beyond a reasonable doubt. But the acquittal happens because the court refuses to exercise its separate power to convict, despite the prosecutor's exercise of its power to charge the accused before the courts. It is not because the prosecutor has failed to successfully exercise its 'right of action'.

All these difficulties are overcome if we accept the two-liability, two-power model.

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149 Zipursky, 'Philosophy of Private Law' (n 82) 633; Goldberg and Zipursky, 'Hohfeldian Analysis' (n 82); Goldberg & Zipursky *Recognizing Wrongs* (n 82) 29.

150 Zipursky, 'Philosophy of Private Law' (n 82) 633.

VI. DISTINGUISHED FROM RIGHTS AGAINST A COURT

On courts, another point bears mentioning. To avoid confusion, it must be kept in mind that, as a power to sue and enforce some underlying right against a defendant, standing ought to be further distinguished from any (claim-)right a litigant might possess against a *court* or tribunal during trial, which may arise as a result of the exercise of his standing. Any such right would be simply the correlative of a duty owed by the court to the particular claimant(s) before the court.

The point here is not to engage in deeper examination of the nature of any such rights. Rather, it is to show that – consistently with the central distinction with which this thesis is concerned – to think of standing, we do not and should not need to think in terms of a claim-right against someone, whether against a defendant or a court. Such rights may be a downstream *consequence* of the exercise of a claimant's standing, but to accept that would require first accepting the conceptually separate existence of what I have called standing. Given that this is a relatively novel area, the developing terminology can be rather unstable. In the literature, such rights have been identified under different headings, some potentially more confusing than others, and it is important not to mistake them for what I have called standing. Several examples can be raised.

In his most recent book examining the remedial structure of private law,[151] Stephen Smith has argued for the existence of what he calls 'action rights', an abbreviation for 'cause-of-action right'.[152] Smith's 'action right' must not be confused with a 'right of action' – the more entrenched terminology sometimes used to refer to what I have called standing – a power.

At the core of Smith's argument is that, distinct from the rights held by individuals against other individuals ('substantive rights'), 'action rights' exist.[153] Defining 'remedy' as a judicial ruling or order,[154] Smith argues that claimants hold 'action-rights' against the *court* – rights

151 Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019).

152 Ibid 80.

153 Ibid 75-80.

154 Ibid preface ix-xi, 2-4, 74.

that the courts issue particular orders or ruling if they prove the set of facts their cause of action contains.[155] In essence, courts owe duties to issue particular orders, this duty is owed to the particular claimant before it, and the claimant is the source of this duty:

> The duty correlative to an action right is a duty to issue an order; accordingly, this duty is imposed on the court, the institution responsible for issuing the order (and prior to litigation, the claimant has a power, correlative to a liability on the court – not on the defendant – to put the court under a duty to issue an order).[156]

Smith adds qualifications that though courts are 'legally bound'[157] in the sense that they have 'no choice'[158] but to issue particular orders in some actions, say in an action on a debt for an agreed sum or breach of contract where damages are available 'as of right',[159] it is less straightforward how this works with 'discretionary remedies' historically originating from the Courts of Chancery.[160] So, 'it is not obvious how to describe the legal situation of claimants who have established a set of facts that allow – but do not require – a court to grant specific relief'.[161] Further, unlike other rights, 'action rights are not coercively enforceable' by the claimant; an inappropriate order will not ground a claim against said court for consequential losses thereby suffered. The 'only recourse to a disappointed claimant is an appeal to a higher court'.[162]

This thesis remains agnostic as to Smith's 'action rights'. While I have suggested above that a court is a public body with a role-based duty to apply the law to the true facts as between the litigants before it,[163] it does not follow that such duties are in fact owed to the particular claimants before the court, committing me to some version of Smith's 'action rights'. The

155 Ibid 80-82.

156 Ibid 81-82.

157 Ibid 81.

158 Ibid 80.

159 Ibid 319.

160 Ibid 82. See also 294-296, 319-322.

161 Ibid 81.

162 Ibid 81.

163 Text to (nn 141-142).

better explanation may well be that the court's relevant duties here are non-directed, and so 'public duties' owed to no one in particular. While these 'public duties' benefit the particular litigants coming before them from time to time, correctly applying the law to enforce legal rights benefits both actual and potential litigants, and is part of the courts' systemic role.

Elsewhere, a similar notion to Smith's 'action right' has been advanced under the header of a 'tertiary right to enforce'. It has been suggested that, apart from primary rights and the secondary rights of reparation arising after their breach, there are 'tertiary' 'rights to enforce either primary or secondary rights'.[164] This terminology is used to convey the idea of a state-supported system providing enforcement procedures as of right provided certain preconditions (say court fees)[165] are met.[166] So, unlike specific performance where no such 'tertiary' rights of enforcement exist, a claimant has a 'tertiary right to enforce' secondary duties to pay damages.[167] Such tertiary rights 'require judges to do things: to spend time hearing cases, to make orders, and so on'.[168] It may be doubted whether the label 'tertiary' is helpful here, as these rights do not stand in relation to secondary rights in the same manner that secondary rights stand in relation to primary rights. Contrast, for example, the possibility of a 'tertiary obligation to pay damages for the failure to pay damages'.[169] But the point here is not an in-depth examination of their nature. Again the point is that any such rights against the court, should they exist, should not be confused with standing.

As a final example, Gardner has suggested that, tentatively,[170] a claimant may have a 'tertiary right to assert and enforce her primary and secondary rights through the courts'[171]

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164 Eg Frederick Wilmot-Smith, 'Illegality as a Rationing Rule' in Green and Bogg (eds), *Illegality after Patel v Mirza* (Hart 2018) 107-110.

165 Ibid 111.

166 Ibid 108.

167 Ibid 108.

168 Ibid 111.

169 Sandy Steel and Robert Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283, 287, 289 discussing damages on damages, cf interest for late payment.

170 Gardner, *Personal Life* (n 9) 214

171 ibid 210.

However, for Gardner, these are not rights against the court, but rather a right that a claimant has against *all individuals* (other than the defendant).[172] It is discussed in Chapter Six. These 'tertiary' rights are to be distinguished from what he has labelled the 'remedial rights' of a claimant against a court.[173] Compatibly with my account, such remedial rights would arise only as a consequence of the exercise of a claimant's standing.

VII. DISTINGUISHED FROM RIGHTS AGAINST THE STATE TO PROVIDE COURTS

Our discussion on the concept of standing and its surrounding web of related concepts concludes here, in this penultimate section, with a final point of distinction. It should be noted, albeit only in brief, that a claimant's right against the court that they issue certain orders in litigation is different from the political right which Civil Recourse theorists have argued for, that individuals hold against a *state*. This, they argue, is correlative to a duty the state has to provide something like the civil courts we have today, applying the tort law we see.

Starting from a justification starting based in Lockean social-contractarianism,[174] they have argued that states owe duties to citizens 'to provide an avenue of civil recourse. The political (and constitutional) right of the plaintiff to the state-facilitated private power is correlative to a state duty to provide such a power.'[175] A state has peace-keeping functions. It generally prohibits private retaliation between citizens who have wronged one other, monopolising the legitimate use of coercive force.[176] Thus, as a *quid pro quo* for their 'natural right to redress

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172 Ibid 213: 'The right that we are discussing here, the plaintiff's tertiary right, is not a right of the plaintiff against the defendant. It is a right of the plaintiff against the rest of us, minimally a right of deference, maximally a right of support, in her action against the defendant, of which the defendant's non-performance of his duties forms the subject matter…. The tertiary right is principally a right against strangers to the litigation'. Compare Robert Nozick, *Anarchy, State and Utopia* (Basic Books 2013) 81: 'Yet rights of enforcement are themselves merely rights; that is, permissions to do something and obligations on others not to interfere.'

173 Gardner, 'Damages Without Duty' (n 94) 413.

174 Zipursky, 'Philosophy of Private Law' (n 82) 632, 637-641, 643-644. But see now chapter 4 of Goldberg & Zipursky, *Recognizing Wrongs* (n 82), 'updating' Lockean insights.

175 Goldberg and Zipursky, 'Civil Recourse Revisited' (n 82) 362.

176 Goldberg & Zipursky, *Recognizing Wrongs* (n 82) 122, 130

wrongs done to them'[177] in a state of nature, political society owes its citizens a duty to provide a substitute in the transition to civil society: 'civil recourse'.[178] This political claim-right against the state is one that Goldberg and Zipursky have located in a 'threefold ambiguity'[179] within the phrase 'right of action'. It is a core idea for them, refined in later works.[180]

It remains to clarify its place. Assuming there is such a political right against the state, it is important to distinguish it from any rights a claimant might have against a court. Unlike the latter, such a political right/duty could not possibly be a downstream consequence of the exercise of a claimant's standing. Indeed, to perform a justificatory role, this putative political right must be *prior* to both what I have called 'standing', and any consequential right a claimant might have against the court. This right against the state is grounded in political morality, based on the 'political principle' of Civil Recourse, the relevance of which is elaborated in Chapter Six.

VIII. STANDING RULES

To recapitulate, we started off with the contention that standing is better conceived of as a power, analytically separable and distinct from private law rights and duties, whether in contract, torts, or unjust enrichment. Several subsidiary distinctions with neighbouring concepts were then introduced, to better differentiate standing from possible false cognates, and to better understand standing's significance within the remedial structure of private law.

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177 Zipursky, 'Philosophy of Private Law' (n 82) 637-641. Though cf now Goldberg & Zipursky, *Recognizing Wrongs* (n 82) 121: 'A raw liberty to inflict harm on others is not the sort of thing for which the state, once formed, is obligated to provide a substitute. The natural rights rendition of Locke's argument would be more persuasive if it posits a claim-right to retaliate, rather than a mere liberty. The provision of an avenue of civil recourse would then be something like a *quid pro quo* for the right's elimination once the state is formed and issues a ban on most forms of self-help.'

178 Though recently distancing themselves from their initial justification, now eschewing a natural 'right to revenge or retaliation': Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (n 82) 314-5, 321.

179 Zipursky 'Civil Recourse, Not Corrective Justice' (n 82) 739.

180 Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (n 82) 306; Zipursky 'Civil Recourse, Not Corrective Justice' (n 82) 739; Goldberg and Zipursky, 'Civil Recourse Revisited' (n 82) 362; Goldberg & Zipursky, *Recognizing Wrongs* (n 82) 98-103

To round off, this section brings the focus back to our central conceptual distinction between standing, and private law rights. Establishing their conceptual separability was a necessary first step to asking further questions about the general relationship in which they stand, a question to which we now turn. The discussion here foreshadows and bridges to the next three chapters on contract, unjust enrichment, and torts, in which specific doctrinal examples where rights and standing might depart are interrogated in greater detail.

Two general claims can be sketched out here, at a higher level of abstraction. The first is that, as a general descriptive claim about private law doctrine, there appears to be an implicit standing rule which *relates* standing to private law rights. The second is that, following on from this, it is the instances of standing without rights, where the two are detached and held by different persons, that are exceptional. In a very real sense here, it is the exception that proves the general rule.

A. No standing rules?

In public law, elaborate standing rules abound. These can get rather complex, their exposition typically taking up a chapter or more in the general textbooks.[181] By contrast, it seems relatively unclear whether standing rules exist in private law, or whether they are necessary. It has even been said to be 'conventional wisdom' that standing rules do not exist in private law.[182]

The accuracy of this conventional or traditional view might be doubted. Even if traditional, a view that standing rules do not exist in private law seems rather implausible. If private law is obligation-imposing, there must be rules governing who can sue on these obligations, to hold

181 Eg Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016); Mark Elliott and Jason Varuhas, *Administrative Law*: Text and Materials (5th edn, OUP 2016); Peter Cane, *Administrative Law*, 5th edn (OUP 2011).

182 See eg James Goudkamp, *Tort Law Defences* (Hart 2013) 30-31; James Goudkamp and Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in Mitchell and Swadling (eds) *Restatement Third: Restitution and Unjust Enrichment* (Hart 2013) 140-41. Peter Cane, *Administrative Law*, 5th edn (OUP 2011) 281-82.

their bearers accountable before a court of law. Such rules are necessary, unless these obligations are enforceable by no one, or unless everyone can sue.

Neither case seems to be descriptively true of the private law we see today, whether in contract law, the law of torts, or the law of unjust enrichments. While it would be an error to deny the existence of unenforceable legal rights, such instances are generally considered to be the anomaly or outlier, rather than the norm.[183] Examples might include time-barred legal duties,[184] or a contractual duty unenforceable for want of formality.[185] Similarly, diplomats with immunities from suit still owe us duties not to trespass against our person, or duties to pay up on their contracts with service providers, even if they could not be sued upon them.

On the other extreme, private law is not a 'completely open system'.[186] While 'It is perfectly possible to imagine a legal system under which anyone could obtain a ruling from a court on any subject upon which he or she desired a ruling',[187] this is certainly not the case for private law. 'In such a system A could obtain a ruling as to whether B owed money to C; or as to whether D had committed a crime; or as to whether E Ltd. had purported to contract in a way not permitted by its articles; or as to whether a trade union or a club had wrongfully excluded one of its members from premises occupied by the union or club; or as to whether the marriage between F and G had been contracted under duress or whilst one of the parties was an infant; or as to whether a local authority in some part of the country with which A had no connections had acted beyond its powers; or as to whether a minister had acted beyond his powers in confirming a compulsory purchase order in respect of land with which A had no connections'.[188] This imagined system does not even come close to describing the private law we are familiar with.

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183 Raz, 'Legal Rights' (n 13) 3. Text to (n 78).

184 (n 37).

185 eg *Thomas v Brown* (1876) 1 QBD 714, s4 Statute of Frauds 1677 discussed Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 326; Smith, 'Rights, Wrongs, Injustices' (n 151) 277-78.

186 Konrad Schiemann, 'Locus Standi' [1990] Public Law 342.

187 Ibid, 342.

188 Ibid, 342.

The alternative answer – that we do have standing rules in private law but that they have thus far been *implicitly* assumed – appears much more plausible. Several questions then arise. Why have we overlooked the existence of this implicit rule within private law? What shape does it take? Can we articulate the content of this rule, and are there exceptions to it?

B. A general rule

It is suggested, in this thesis, that such an implicit standing rule does indeed exist. In fact, we have taken this rule for granted, so much so that often we do not bother articulating it out. Once the requisite conceptual distinction between rights and standing is better drawn however, the existence of such a rule and its content becomes fairly apparent. The rule is that:

> It is only the primary right-holder who has the standing (ie power) to sue to enforce his underlying right.

So, if you punch me in the face, committing battery against me, only I get to decide whether or not to sue you in tort. If I mistakenly pay you £10,000 thinking I owe it to you, nobody other than me can enforce my right to restitution from you, obtaining a court order compelling your repayment. Similarly, if I contract with you to buy your car, in my mind planning it as a gift to my fiancée, but you subsequently get cold feet by the time of delivery, only I can choose to sue you for damages for breach of contract.

As to why this rule has been relatively overlooked by private lawyers, one plausible explanation is that this just is a more general consequence of neglecting the conceptual distinction between standing and rights. In response to the question "why do we not have standing rules in private law?", it might be said that we do not need a separate concept of standing, because everything we would want to know about standing could be answered by asking questions about who has the 'right'. This, however, would be too hasty a conclusion. The ambiguity of 'right' might function as a shortcut or heuristic in the paradigm 'bilateral' or two-party case. There, often we get the correct result simply by asking "who has the right?". But a difficulty is introduced once we move beyond the paradigm 'bilateral' or 'bipolar' case of a singular plaintiff suing a singular defendant in respect of a duty owed to him, to cases

involving the interactions of three or more legal persons. Simple cases apart, therefore, to avoid the risk of confusion and error it matters that the distinction between rights and standing be more clearly observed and maintained.

Yet another plausible explanation for its being overlooked is that this standing rule has often been subsumed under the broad label of 'privity', principally by contract lawyers, and we have thus far been content to leave it embedded therein. But even 'privity' of contract, I shall later show in Chapter Three using the proposed distinction, is a cluster of at least three separable rules. Only one of these is a standing rule – implicit within 'privity'. The other is a rule about damages (and their direction), and the third is a cautionary rule concerning the acquisition or formation of primary rights. Acknowledging the standing rule more explicitly, as a rule distinct from these cousins, presents valuable analytical payoffs.

For one, we would begin to realise that this standing rule – implicit within 'privity' – is not limited to contract law, specifically applicable only to contractual rights to performances. The standing rule appears generalisable to the whole of private law. It extends also to rights to restitution for unjust enrichment, where a standing rule has been implicitly assumed within the difficult phrase – 'at the expense of'. As Goulding J said in *Chase Manhattan*: 'Unjust enrichment cannot be a complete cause of action in itself, for (short of the law giving an action to a common informer) it does not identify the plaintiff'.[189] So it has been said that '[t]he claimant and defendant in an action in unjust enrichment must necessarily be linked by that phrase. It is by bringing himself within that phrase that the claimant connects himself to the enrichment in question and identifies himself as having a prima facie title to sue.'[190] Similarly, it has been said that '[t]his requirement is of great importance, for it provides the plaintiff with the standing to sue by picking him out of the mass of potential complainants… if I have been unjustly enriched at your expense, and a stranger sues me seeking a judgment for the benefit

189 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, 125.

190 Peter Birks, "'At the Expense of the Claimant": Direct and Indirect Enrichment in English Law' 494-96. Similarly Birks, *An Introduction to* the *Law of Restitution* (OUP 1989), 132: 'The plaintiff must bring himself within these words. If he cannot he has not even a *prima facie* entitlement to sue.'

which I have acquired, then he will lose'.[191] In other words, if an 'unjust enrichment' is not 'at his expense', it is none of his business and he cannot intervene. It is not just coincidence that prominent commentators have labelled this requirement one of 'privity', though in modern times this term seems to have lost its currency.[192]

C. Standing without rights is exceptional

Moving on to the second general claim; it is another point of important general consequence, following on from the proposition that rights and standing are conceptually separable, that each could as a logical possibility be held by different persons. Accepting the distinction would therefore entail that, in principle, someone to whom the duty was not owed (and hence was not a correlative right-holder) could be conferred the standing (a power) to enforce *another's* right. In other words, there could be enforcement by a 'third-party' to the correlative right and duty. The subject-matter of enforcement does not logically or conceptually dictate an enforcer's identity.

As a descriptive matter however, this does not seem to be the general case in English private law. In fact there seems a marked resistance to a separation of claim-right and standing. Their detachment appears exceptional, precisely because this would constitute an exception to the general standing rule identified above. Fleshing out the point in more concrete detail, with specific doctrinal examples in contract, tort, and unjust enrichment, is part of the task to be undertaken in subsequent chapters. Here, we limit ourselves to emphasising that this is yet another important reason for drawing the conceptual distinction between rights and standing.

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191 Lionel Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 OJLS 481. Similarly, see eg Andrew Trotter, 'The Double Ceiling on Unjust Enrichment: Old Solutions for Old Problems' [2017] CLJ 168, 170: 'The nature of the claimant's "expense" has been the focus of some academic debate…. In each case, the question is directed to whether the particular claimant has standing to sue.'

192 Burrows, *The Law of Restitution* (Butterworths 1993) 45–54; Graham Virgo, *The Principles of the Law of Restitution* (OUP 1999) 106–13. Cf Peter Birks, 'Receipt' in Pretto and Birks (eds), *Breach of Trust* (Hart 2002) 234; Birks, 'At the Expense of the Claimant' (n 190) 494.

Without such a distinction, the possibility of third-party enforcement – in which the enforcer has standing, but no right – would be rendered impossible or incoherent.

Put another way, the proposed distinction matters, as it would equip us with the conceptual apparatus necessary to better differentiate between the identity of the enforcer and the subject-matter of enforcement, and to better analyse when such situations might potentially occur. Differentiating between "who can enforce these rights?" as opposed to "who has these rights?" is crucial to avoiding confusion, and to clearer analyses of these scenarios. A better understanding of the distinctiveness of these issues is important for the rational development of private law doctrine.

In sum, if I am correct and my proposed distinction between rights and standing accepted, several general implications follow. First, that since there is no necessary (analytic) connection between having a contractual right, tort right, or right to restitution and having the standing (a power) to sue and enforce it, right and standing can be held by different persons. Second, that should we observe that in the positive law of a legal system, they typically coincide in a package, and that there is resistance to their detachment, the easiest explanation is that a legal rule exists, explaining the observed convergence of these two distinct concepts in one single holder. Third, that it is because of this implicit rule, that in English private law it is generally right-holders, and only right-holders, who possess the power (standing) to sue and enforce their own rights against their correlative duty-bearers. Fourth, that since standing is a power, this rule is a 'power-conferring rule'.[193] Its conferees are identified by reference to the other duty-imposing rules within each branch of private law, each of which would identify the persons to whom these duties are owed.

IX. CONCLUSION

The idea of 'standing' has been relatively neglected within private law. It has been conflated with other surrounding concepts and swallowed up within the larger notion of a 'right', a

193 Hart, *The Concept of Law* (n 133) 27-29.

concept which by contrast has attracted extensive scholarly attention. As will be demonstrated in the next few chapters, this conceptual elision has had knock-on implications, hindering rational development of private law doctrine. As a general consequence, private lawyers have overlooked the existence of an implicit standing rule, a rule potentially extending across the whole of private law. This general rule is what relates standing to private law rights and duties. Drawing a clearer conceptual distinction between rights and standing would allow us to more explicitly acknowledge its existence within private law doctrine, define its content, and to better question whether any exceptions, existing or potential, could be adequately justified.

In private law, suits are often brought in respect of and with the aim of enforcing an underlying right or duty. Because standing is a significant legal power that one private citizen can exercise to subject another to the public power of the court, thereby exposing him or her to coercive state-backed sanctions, it is justifiable to limit the conferment of these powers. Not just anyone should have it. Here it has been argued that in private law, those powers are as a general rule afforded only to right-holders. Its justification is left to Chapter Six.

We conclude here by addressing a possible challenge to the rule proposed here: what about the extreme case of a claimant who sues, falsely alleging a legal right against a defendant, who for whatever reason does not respond to dispute those false allegations within time? In these circumstances the court appears to have the power to order default judgment against the unresponsive defendant, disposing the case without trial.[194] Thus, it seems that English civil procedure has made it possible for a claimant without a genuine legal right to obtain default judgment against unresponsive defendants.[195] The concern is that 'if a defendant were able to prevent court adjudication by simply staying silent, the defendant would effectively have a veto over the claimant's access to justice'.[196] Is this case of a false claimant, coupled with a silent defendant, sufficient to call into question private law's

194 CPR Part 12. This provides a powerful incentive for defendants to show up and address the allegations made against them in court.

195 CPR 12.3.

196 Zuckerman, *Civil Procedure* (n 103) [9.4]

commitment to the general standing rule advanced here? It is suggested not; a small refinement to elaborate upon the general rule suffices to accommodate this feature:

> It is only the *putative* primary right-holder who has the standing (ie power) to sue to enforce his underlying right.

It should be stressed that the limitation here is merely epistemic.[197] It cannot be eliminated, only reduced, and is to be expected given the practical realities of civil litigation. The civil trial is designed precisely for the claimant to produce evidence, to prove to the court that on the requisite standard ie a balance of probabilities, he indeed has the legal right he alleges on the facts pleaded, and so should succeed. It cannot be known before trial what is to be proven only during trial. So, faced with potential claimants, the court must make a guess without the benefit of firm evidence. Un-participative defendants make that task harder. There is obviously more room for error, and the court may be fooled by false claimants.

Importantly however, this does not mean a free pass. To successfully enforce a private law right or duty, one must still hold himself out to be the putative holder of a primary right. A claim form must state the nature of the claim and specify the remedy sought,[198] and the court has the power to strike out a statement of case if it appears to disclose no reasonable grounds for bringing the claim.[199] There are powerful disincentives against making false statements. Claim forms must be verified by a statement of truth,[200] which is a statement that the claimant

197 Or in economistic language if one prefers, 'imperfect information'

198 CPR 16.2(1).

199 CPR 3.4(2)(a). And also if it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings: CPR 3.4(2)(b), or there has been a failure to comply with a rule, practice direction or court order: CPR 3.4(2)(c).

200 CPR 16.2, CPR 22.

believes the facts he states are true.[201] He may be subject to contempt of court if he makes a false statement without an honest belief in its truth.[202]

[201] CPR 22.1(4): 'a statement of truth is a statement that – (a) the party putting forward the document… believes the facts stated in the document are true'.

[202] CPR 32.14(1): 'Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.'

PART II

THE DOCTRINAL IMPORTANCE OF DISTINGUISHING STANDING FROM RIGHTS

3

CONTRACT

> [C]ertainly some idea of privity, even if limited, is widely accepted in contract law. Yet, if we look to recent scholarly discussions, it is not sufficiently clear what privity means or whether any such idea can be rationally defended at all.
> - Peter Benson, Justice in Transactions: A Theory of Contract Law (HUP 2019) 69.

> The most significant doctrinal development in English contract law in the twentieth century was no doubt the outcome of what I shall call the battle over privity.
> - Guenter Treitel, 'The Battle Over Privity', Some Landmarks of Twentieth Century Contract Law (OUP 2002) 47.

I. INTRODUCTION

A century before Guenter Treitel, Samuel Williston commented that '[n]o one who examines the cases carefully can fail to note how much confusion has been caused by neglect of important distinctions.'[1] One such distinction is that between rights and standing. The literature discussing contractual rights to performance, and damages for their breach is legion.[2] By contrast, standing, as a distinct concept from rights, has been relatively overlooked.

This oversight has affected the rational development of contract law doctrine. The controversy over privity in English law provides a useful case study. It will be shown how loose reasoning about 'third party rights' and 'rights to enforce' has elided the separate concepts of standing (a power), primary contractual rights to performances, and secondary rights to damages for breach of contract, obscuring what was truly at stake.

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1 Samuel Williston, 'Contracts for the Benefit of a Third Person' (1902) 15 Harvard LR 767, 767.

2 Eg Oliver Wendell Holmes, 'The Path of the Law' (1897) Harvard LR 457, 462; Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628; Brian Coote, 'Contract Damages, Ruxley, and the Performance Interest' (1997) 56 CLJ 537; Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 OJLS 41; David Pearce and Roger Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 OJLS 73; Robert Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in Neyers, Bronaugh and Pitel (eds), *Exploring Contract Law* (Hart 2009); Stephen Smith, 'Remedies for Breach of Contract: One Principle or Two?' in Klass, Letsas, and Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014).

Section II demonstrates how 'privity' is a doctrine with multiple aspects, one of which is an implicit standing rule. Sections III argues that this complexity, having gone unnoticed, contributed to a missed dimension in the debate over privity and its English reform. A reform alternative, third-party standing only, was not considered. Sections IV to VIII re-examines three main problem cases that motivated reform, exploring their alternative resolution. Section VII turns toward the controversy generated by privity reform, reviewing four key justifications mooted. It is argued that these reasons, namely (i) promisee inability to sue, (ii) commercial necessity, (iii) parties' intentions, and (iv) avoiding 'blackholes', might be more consonantly treated as justifications for extending standing, rather than rights, to third-parties. In other words, they might be better conceived of as nascent attempts to introduce area-specific or 'localised' justifications for departing from the implicit standing rule across private law, particularly within the context of contractual rights and duties.[3] Section VIII concludes.

II. UNDERSTANDING PRIVITY

Privity of contract is supposedly a 'fundamental principle'.[4] Its controversial limb prevents the acquisition of 'third-party rights'. However, as Hohfeld taught us,[5] the word 'right' is notoriously ambiguous. Used here, the term could refer to at least two distinct fundamental legal concepts.

First, it could mean a right correlative to a duty owed. To distinguish this unique sense of right from others, Hohfeld labelled it a technical term, 'claim-right'. In this sense, the word 'right' might refer to a contractual claim-right to the promised performance. Its location indicates the person to whom the primary duty of performance is owed – one's contractual counter-party. It identifies also the person to whom a secondary duty to pay damages is owed

3 An attempt to generalise and chart out broader families of justifiable exceptions which could be made to the general standing rule across private law is left to Chapter Six.

4 *Dunlop Pneumatic Tyre v Selfridge* [1915] AC 847 (HL) 853 (VC Haldane).

5 Wesley Hohfeld, 'Some Fundamental Legal Conceptions as applied in Judicial Reasoning' (1913) 23 Yale LJ 16.

should that primary duty be breached, as generally it is only the victim of a breach of contract, a civil wrong,[6] who acquires a secondary claim-right to be paid damages for the breach.[7]

Second, 'right' could refer to 'right of action' or 'right of suit',[8] ie the standing to sue. Unlike in the first sense however, this 'right' cannot be breached, for it is truly a *power*. Standing is a power to enforce an underlying contractual duty of the promisor, which the power-holder may normally choose whether, and if so when, to *exercise*. As argued in Chapter Two, it is powers rather than claim-rights that are 'exercisable'. The claimant's decision to exercise his power (standing) is what subjects the defendant to the court's power (jurisdiction) to make an order against him.

A. Conceptual elision

In contract doctrine this distinction has been obscured. *Chitty on Contracts* states that '[t]he common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.'[9] Referring to privity's controversial limb, authoritative texts like *Anson's Law of Contract*[10] and *Treitel's The Law of Contract*[11] likewise describe it as forbidding simply the acquisition of 'rights'.

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6 Peter Birks, 'The Concept of a Civil Wrong' in David Owens (ed), *The Philosophical Foundations of Tort Law* (OUP 1997); John Gardner, 'Breach of Contract as a Special Case of Tort' in *Torts and Other Wrongs* (OUP 2019) 334, 336-339.

7 *Morris-Garner v One Step* [2018] UKSC 20 [34] (Lord Reed); *Cavendish v Makdessi* [2015] UKSC 67 [9]-[14], [32] (Lords Neuberger & Sumption), [241]-[242], [251] (Lord Hodge), [291] (Lord Clarke); *Photo Productions v Securicor* [1980] AC 827, 848–50 (Lord Diplock); *Moschi v Lep Air* [1972] 2 WLR 1175 (HL) 1185 (Lord Diplock).

8 eg *Beswick v Beswick* [1968] AC 58 (HL) 73, 75 (Lord Reid), 80 (Lord Hodson), 87 (Lord Guest), 92-93 (Lord Pearce); *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero (The Albazero)* [1977] AC 774 (HL); Carriage of Goods by Sea Act 1992 s 2(1); Peter Kincaid, 'Third Parties: Rationalising a Right to Sue' (1989) 48 CLJ 243.

9 Hugh Beale ed (32nd edn, Sweet & Maxwell 2015) [18-003].

10 Beatson, Burrows, and Cartwright eds (30th edn, OUP 2016), 647.

11 Edwin Peel ed (14th edn, Sweet & Maxwell 2015) [14-004].

A similar ambiguity has infected the Contract (Rights of Third Parties) Act 1999 ("CRTPA"), enacted as a 'wide-ranging' statutory exception to privity.[12] Its operative limb confers a single compound entity: a 'right' to 'enforce a term of the contract'.[13] Section 1(5) states that when this 'right' is 'exercised', 'there shall be available … any remedy that would have been available to him in an action for breach of contract as if he had been a party to the contract'. But it is powers, rather than claim-rights, that are truly exercisable.

This ambiguity comes across from the Law Commission Report behind the Act:

> [W]e need to clarify at the outset what we mean by the "right to enforce the contract" …. We explained that the first part of this recommendation states the central point that the third party beneficiary is to be entitled to performance of the promise, or damages for its non-performance. The second part of the recommendation allows third parties to be able to take advantage of exemption clauses agreed for their benefit, thus achieving the result reached in *The Eurymedon* and *The New York Star* more directly…[14]

> We therefore recommend that: … a right to enforce the contract means (1) a right to all remedies given by the courts for breach of contract (and with the standard rules applicable to those remedies applying by analogy) that would have been available to the third party had he been a party to the contract, including damages, awards of an agreed sum, specific performance and injunctions; **and** (2) a right to take advantage of a promised exclusion or restriction of the promisor's rights as if the third party were a party to the contract. (Draft Bill, clause 1(4) and 1(5)) [15]

The 'right to enforce' appears a mixed bag, the statutory wording equivocating between distinct concepts. (1) appears to be referring to a secondary claim-right to damages 'for breach of contract', arising only at time of 'non-performance' ie breach. By contrast, the (2) 'right to take advantage of a promised exclusion' seems to refer instead to the standing (a power) to enforce an agreed exclusion or restriction on a third-party's liability to suit – a problem arising from the *Eurymedon* line of carriage cases, discussed below. It would likely be invoked by the

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12 Law Commission, *Privity of Contract* (Report No 242, 1996) paras 3.30-32, 5.16, 13.12.

13 s1 CRTPA.

14 Law Commission (n 12) para 3.30.

15 Law Commission (n 12) para 3.32 (emphasis added). NB 1(4) and 1(5) of the draft bill were respectively enacted as s1(5) and s1(6) of the CRTPA 1999.

third-party to enforce the promised restriction or exclusion from liability to suit as a 'defence', at a timing different than breach.

Our understanding of the 'privity' doctrine and its reform has been hampered by loose talk of 'third party rights', and 'rights to enforce'. While a handy ellipsis at times, repeated usage and inattention could elide concepts, causing confusion and error. To begin their untying, clearer distinctions need to be made between standing (a power), primary contractual (claim-)rights to performances, and secondary (claim-)rights to damages for breach of contract. While not a panacea to resolve all privity-related issues, it is a necessary start, and an important step.

B. Privity's multiple aspects

The core difficulty is this: we seem generally accustomed to thinking of privity as simply one rule, comprising a 'burdens' limb, and a more controversial 'benefits' or 'rights' limb. This rendition of privity, however, is too simplistic. The controversial limb of 'privity' is an ambiguous cluster of superficially similar, but truly distinct rules. This, it is submitted, accounts for a key contributing source of the persistent complexity in the area.

Although a well-known critic has argued that the 'privity cases are a locus for a number of distinct problems in the law of obligations', the complexity pinpointed here is orthogonal to his diagnosis that 'expectation', 'reliance', and 'restitution' 'interests' were insufficiently distinguished.[16] So the problem is an added one, compounding the difficulty.

'Privity', it will now be shown, has multiple aspects. One aspect concerns claim-rights; another concerns standing (a power). Each is unravelled in turn.

16 Stephen Smith, 'Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule' (1997) 17 OJLS 643, 649-58, 660, arguing that failure to distinguish 'different possible sources of the third party's new right' resulted in a 'sophisticated, but ultimately ad hoc balancing of different interests'. NB the doubtful value of terminology introduced by Fuller & Perdue 'The Reliance Interest in Contract Damages' (1936) 46 Yale LJ 52. Cf Daniel Friedmann, 'Performance Interest' (n 2); Richard Craswell, 'Against Fuller and Perdue' (2000) University of Chicago LR 99.

C. A rule about claim-rights

Privity could be thought of as a rule about claim-rights, ie primary claim-rights to performance, or secondary claim-rights to damages for breach of contract. When textbooks introduce privity by opposing its benefits limb ('rights') to its burdens limb ('duty'), this opposition naturally focusses upon the right-duty relation, highlighting this aspect.

(i) Formation

In the first edition of his important text William Anson said:

> 'A contract is an agreement between two or more persons, by which an obligation is created, and those persons are bound together thereby. If the obligation takes the form of a promise, by A to X to confer a benefit on M, the legal relations of M are nonetheless unaffected by that obligation. He was not party to the agreement. He was not bound by the *vinculum juris* which it created and the breach of that legal bond cannot affect the rights of a party who was never included in it'.[17]

More recently it has been similarly argued that:

> 'The core idea at the heart of privity is that only persons who participate in the interaction required to give rise to contractual rights and duties acquire such rights or are subject to such duties'.[18]

These statements classify privity as a *formation rule*, preventing third-parties to a contract from acquiring primary contractual rights to performance. Privity is placed alongside requirements like agreement (offer and acceptance), intention to create legal relations, consideration, and certainty, as setting another necessary condition for the acquisition of a contractual right: namely, that one must be 'party' to the agreement.[19] However, this sense of privity heavily overlaps with the other formation requirements; it is already implicit that for a contractual right to the agreed performance to be constituted, an intent to undertake the correlative

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17 Sir William Anson, *Principles of the English law of Contract* (1st ed, Clarendon:Oxford 1879) 195.

18 Peter Benson, 'Should White v Jones Represent Canadian Law: A Return to First Principles', *Emerging Issues in Tort Law* (Hart 2007) 184-185. (emphasis removed); similarly Peter Benson, *Justice in Transactions: A Theory of Contract Law* (HUP 2019) 76: 'contract is conceived as an intrinsically bilateral relation… it is in virtue of being participants in the formation of the contract that individuals are juridically related to each other.'

19 Eg *Chitty* (n 9) [18-004]; *Treitel* (n 11) [14-005]; s1(1) CRTPA.

obligation to that person must be communicated to him. Secret, undeclared intentions do not count. Unlike unilateral vows, bilaterally manifested communications are necessary for an agreement,[20] or for a promise to be made.[21] To paraphrase Lord Diplock in *The Albazero*, contractual rights cannot 'spring up' between parties who have had 'no contact'.[22]

This sense of privity thus risks becoming otiose. Its main value appears cautionary, invocable by counsel as warning to judges to resist the temptation to deem contractual rights where formation requirements remain unmet.

(ii) Damages: directional continuity

There is a second sense in which privity concerns claim-rights: as a rule about how *damages* for breach of contract work. In this sense, privity prevents us from acquiring secondary rights to damages for breach of someone else's contractual right.

It is a well-known argument that if duties could be discharged simply by their breach, that would be absurd.[23] 'If I could unilaterally dissolve your entitlement to constrain my conduct, there would be no sense in which you were entitled to constrain it.'[24]

However, what is less often spelt out, but frequently assumed, is that what remains owing post-breach – eg apology, reparation, or recompense – is owed *only* to the victim of the breach. Thus where a breach of contract occurs, no one other than the promisee – the holder of the primary right to the promised performance – acquires a secondary right to damages. Everyone else is a 'third-party' not entitled to damages. As this rule overlaps with some versions of what has been popularly called a 'continuity thesis' in the literature,[25] we might coin it 'directional continuity':

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20 Stephen Smith, *Contract Theory* (OUP 1993) 180-83; James Penner, 'Promises, Agreements, and Contracts' in Klass, Letsas, and Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014).

21 Charles Fried, *Contract as Promise* (1st edn, HUP 1981).

22 *The Albazero* [1977] AC 774 (HL), 847 (Lord Diplock).

23 Ernest Weinrib, *The Idea of Private Law* (OUP 2012) 135.

24 Arthur Ripstein, *Private Wrongs* (HUP 2016) 4, 248.

25 John Gardner's terminology in his 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1. Cf Joseph Raz, 'Personal Practical Conflicts' in Baumann and Betler

> if I breach your primary right, then any secondary duty I owe to pay damages is owed only to you (and to no one else).

To breach a duty I owe you is to wrong you.[26] If breach of contract is a wrong, and torts are wrongs,[27] we can quite readily see how this rule might be generalisable, extending also to torts. In private law, it is a truism that an 'essential feature' of a damages award is a *wrong* done in relation to you.[28] No wrong, no damages.

The law of obligations is normally unconcerned with the fact alone that some third-party to the correlative right and duty has suffered a consequent loss. A relevant loss attracting the law of damages must be loss wrongfully caused. This proposition is so well-known we have reserved a convenient Latin aphorism to it; it is *damnum sine injuria*.[29] Put another way, my wronging you cannot alone justify my paying damages to someone else, even if that person then suffers some loss, consequent on the wrong done to you.

(eds), *Practical Conflicts: New Philosophical Essays* (CUP 2004). Compare 'rights-continuity' versions in eg Ernest Weinrib, 'Two Conceptions of Remedies' in C. Rickett (ed), *Justifying Private Law Remedies* (Hart 2008); Arthur Ripstein, 'As If It Had Never Happened' (2007) 48 William & Mary Law Review 1957.

26 Birks, 'The Concept of a Civil Wrong' in D. Owens (ed), *The Philosophical Foundations of Tort Law* (OUP 1997).

27 eg Peter Birks, 'Definition and Division: A Meditation on Institutes 3.13' in Peter Birks (ed), *The Classification of Obligations* (OUP 1998) 17-20; Gardner, 'Breach of Contract as a Special Case of Tort' (n 6). Discussed Chapter 5, 'Torts'.

28 Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [1-004]-[1-010], [1-018]-[1-019]; Peter Cane, *An Introduction to Administrative Law* (2nd edn, OUP 1992) 44: 'The only remedies which can be sought in private law actions are private law remedies, that is declarations, injunctions, and damages. Damages, as we will see, can only be sought in respect of wrongs recognized in private law; declarations and injunctions can also be sought in respect of public law wrongs…'

29 eg *Bourhill v Young* [1943] AC 92 (HL) 106 (Lord Wright); *O'Connor v Isaacs* [1956] 2 QB 288 (CA) 313 (Diplock J): 'If A, acting in perfectly good faith, orders B to do something, which order both A and B erroneously think A is entitled to give, and B does it, I know of no principle which makes A liable for any damage suffered by B as a result of doing it. It seems to me that it is damnum absque injuria'. NB Ripstein (n 24) 54-55, 59 explains instances of '*damnum absque iniuria,* loss without wrongdoing' by a misfeasance/nonfeasance distinction.

D. A standing rule

Talk of 'third party rights' casts the spotlight on privity's claim-rights aspect. It obscures a second aspect of privity, as an implicit rule about standing. Under this rule, introduced in Chapter Two:

> it is only the primary right-holder (here the promisee) who has the standing (ie power) to sue to enforce his underlying right.

So unlike in public law judicial review, having an interest in seeing a right enforced will not normally suffice.[30] No right, no standing. Exclusive right-holder standing entails that enforcement is entirely up to right-holders, and to no one else. This standing aspect of privity is distinct from, and cannot be reduced to, its other senses above. It is conceptually indispensable to explaining important intuitions about the doctrine's operation and significance. Four can be stated here.

First, it explains the mistaken but received wisdom that private law – and by extension contract law as one part of it – does not have or need standing rules. Consider Peter Cane's observation:

> Standing is not normally a requirement for bringing a "private-law claim" . . . There are certain private-law concepts that resemble rules of standing: for example, duty of care in the tort of negligence, the principle that breach of a statutory duty will be actionable in tort only if the duty is owed to the claimant as an individual (as opposed to the public generally), and the doctrine of **privity of contract**. However, these are not seen as separate from the rules that define the relevant wrong, but as part of the definition of the wrong.[31]

It is submitted that the reason why 'the doctrine of privity of contract' is a 'concept' that 'resembles a rule of standing' is precisely because it *contains* an implicit standing rule, embedded within it. This, we might infer, explains the absence of explicit standing rules playing the same role. If we had missed out on this, it is likely because of privity's ambiguity, hiding the rule in plain sight.

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30 S31(3) Senior Courts Act 1981.

31 Peter Cane, *Administrative Law* (5th edn, OUP 2011) 281–82 (emphasis added).

Second, Viscount Haldane's language in *Dunlop Pneumatic* expressing privity as a 'fundamental principle' that 'only a party to a contract can sue on it' supports this inference.[32] Historically, privity was entwined with consideration.[33] Where a third party sought to enforce a promise, his failure could be explained on the basis of either rule.[34] Authoritative judicial recognition of privity's conceptual independence came relatively late, in Viscount Haldane's statement.

Third, this standing rule vindicates the thought that privity *of contract* is a 'fundamental principle'. It is 'fundamental' in the sense of having taxonomical significance for contract law. The traditional view is that 'the law of contract is part of the law of obligations…English law is thus concerned with contracts as a source of obligations'.[35] The standing rule hidden within 'privity' is a feature providing strong reason for its classification as private law as opposed to public law, as it is both a distinctive and unifying feature of private law as a whole.

This feature *distinguishes* private law from public law and the criminal law.[36] The suggestion might be traced back to Hart.[37] Suppose I take a hammer to your knee, simultaneously committing a tort and crime against you. As victim, you are empowered with the standing to sue in tort: '[t]ort law is … plainly private law in the sense that it is about empowering private parties to initiate proceedings designed to hold tortfeasors accountable'.[38] In criminal law however, victims have no standing to charge alleged criminals. It is the state prosecutor who

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32 *Dunlop Pneumatic* [1915] AC 847 (HL) 853. Affirmed *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 (HL) 467 (VC Simonds).

33 eg *Tweddle v Atkinson* (1861) 1 B & S 393, 121 ER 762; David Ibbetson, *A Historical Introduction to the Law of Obligations* (1st edn, Oxford University Press 2006) 241; Williston (n 1) 771; On their overlap see *Kepong Prospecting Ltd v Schmidt* [1968] AC 810, 826; *Treitel* (n 11) [14-014]; Law Commission (n 12) paras 6.1-6.8.

34 eg *Price v Easton (*1833) 4 B & Ad 433; 110 ER 518; *Tweddle v Atkinson* (n 33).

35 *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL), 346 (Lord Diplock); Similarly *Banque Financière de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227 (Lord Steyn): 'unjust enrichment ranks next to contract and tort as part of the law of obligations. It is an independent source of rights and obligations.'

36. Similarly see John Gardner, *Torts and Other Wrongs* (OUP 2020) 333.

37 HLA Hart, 'Legal Rights' in *Essays on Bentham* (Clarendon 1982) 182-186.

38 Goldberg & Zipursky, 'Torts as Wrongs' (2010) 88 *Texas Law Review* 917, 946.

is so empowered.[39] '[C]ivil cases are appropriately brought by plaintiffs and ..criminal cases are brought by "the people" and their representatives.'[40] Hence, while alleged criminals make plea bargains with state prosecutors who have prosecutorial discretion, in private law tortfeasors make settlements with tort-victims.

It is also a *unifying* feature of private law, applicable across all sub-branches.[41] Only the victim of a threatened tort can decide to enforce his primary right by *quia timet* injunction,[42] or if post-tort, a secondary right to damages. Only the promisee can decide to sue and enforce his primary right to contractual performance, or, in case of breach, his secondary right to be paid damages.[43] Similarly, if I mistakenly pay you £1000 thinking I owe it to you, only I can enforce my right to restitution from you.[44] Privity *of contract* is only one instantiation of a feature applicable across the whole law of obligations, disclosing a more general structure of 'private rights of action'.[45]

Fourth, it affords us insight as to the fervent defence of privity by theoretically-minded contract lawyers, even if they have hitherto lacked the conceptual apparatus to articulate their objections in those exact terms. The fear might be that, if exceptions were made to this standing aspect of privity, contract law would lose an important private law characteristic, moving another step towards becoming public law. It is a single skirmish in a larger turf war. If standing were extended wholesale to public-officials for all contracts, contract law might

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39 Goldberg & Zipursky, 'Torts as Wrongs' (n 38) 946-947; John Gardner, 'Torts and other Wrongs' (2011) 39 Florida State University Law Review 43, 45; Robert Stevens, 'Private Rights and Public Wrongs' in M. Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 118-121.

40 Stephen Darwall and Julian Darwall, 'Civil Recourse as Mutual Accountability' [2011] Florida State University Law Review 17, 18-20.

41 Gardner (n 39) 44-46; Stevens (n 39) 119. Conceding, see Goldberg and Zipursky, *Recognizing Wrongs* (HUP 2020) 122-123, 125.

42 *Redland Bricks v Morris* [1970] AC 652 (HL) (Lord Upjohn).

43 *Morris-Garner* (n 7) above, [35] (Lord Reed).

44 *Kelly v Solari* (1841) 9 M&W 54. Your enrichment is 'at *my* expense', and not anyone else's. Discussed Chapter Four, 'Restitution for Unjust Enrichment'.

45 Benjamin Zipursky, 'Philosophy of Private Law' in Coleman, Himma, and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 632-636, 645; Ripstein n 24) 269-75; Gardner (n 39) 44-46; contrast Stevens, 'Private Rights and Public Wrongs' (n 39) 118-121.

entirely collapse into regulatory law. Under consumer contracts for example, a regulator is empowered with standing to initiate actions.[46] This matches up with objections raised by reform critics. Peter Kincaid has consistently derided the CRTPA as abandoning 'private justice'.[47] For him, employing a justification based on a 'public interest in seeing the contract carried out' moves English law towards a 'mixture of public and private'.[48] Stephen Smith has similarly described privity as a feature 'basic to private law', objecting to the reform as 'sever[ing] the most important feature of private law: the link between plaintiff and the defendant'.[49]

III. THIRD-PARTY STANDING: THE PATH NOT TAKEN

In the previous section, standing was distinguished from rights, to unveil an important source of conceptual complexity underlying the 'privity' doctrine and its scope: privity's multiple aspects.

This section introduces a general implication, namely, that an exception could be made to one aspect of privity, without exception to the other. Privity reform need not entail (A) third parties claim-rights. The conceptual possibility of a reform alternative is thereby opened up: (B) third-party standing only, a path not taken.

Subsequent sections explore this alternative route with reference to doctrinal examples. Before that however, these options bear some elaboration.

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46 Consumer Rights Act 2015, Part 3. See also Schedule 3.

47 Peter Kincaid, 'Privity and Private Justice in Contract' (1997) 12 Journal of Contract Law 47.

48 Peter Kincaid, 'Theoretical Issues Raised by the Privity Question' in Kincaid (ed), *Privity* (Ashgate 2001) 1-2.

49 Stephen Smith, 'Contract Law – The Law Commission's Proposals on Privity' [1997] *Amicus Curiae – Journal of the Institute of Advanced Studies* 13.

A. Rights

It seems relatively clear that the Act has provided the third-party a secondary right to damages, arising after breach of the main contract.[50] However it is more ambiguous whether the statute also deems in the third-party a primary right to performance, arising from time of contractual formation.

One test is to ask whether, under a relevant contractual term, the promisor owes only one or two duties from the outset. If it is the latter, then defective or non-performance would constitute a wrong against not just one person, but two – promisee and third-party. On its face, this goes against the bilaterality of right and duty.[51] A statutory deeming of primary rights is also difficult for other reasons.

(i) Primary

If what is sought to be done is to justify in the third-party his own primary right to contractual performance, then what really what we are trying to justify is an exception to the contractual *formation rules*, a drastic move. This was a notoriously contentious proposition, provoking forceful objections of principle.[52] Not having been a promisee, nor having given consideration, it is no easy task to justify such a right for a third-party. In a legal system that says contractual rights to performance are acquired by parties to agreements[53] who have provided

50 S1(5) grants 'any remedy that would have been available to him in an action for breach of contract'.

51 NB issues of individuation may arise, engaging more general difficulties in the philosophy of action which cannot be resolved here. Individuation may turn upon the description of actions or outcomes required by said duties. One question is whether a particular description may be more 'correct' than another, the role of the parties' agreement in adjudicating that, and whether one contractual duty can be owed to multiple persons and hence be correlative to two or more claim-rights.

52 Eg Stephen Smith (n 16); Peter Kincaid, 'The UK Law Commission's Privity Proposals and Contract Theory' (1995) 8 Journal of Contract Law 51; Catherine Mitchell, 'Privity Reform and the Nature of Contractual Obligations' [1999] Legal Studies 229; Robert Stevens, 'The Contracts (Rights of Third Parties) Act 1999' (2004) 120 LQR 292.

53 eg *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 (HL) 167 (Lord Wilberforce).

consideration,[54] justifying giving such rights to parties who satisfy neither condition requires some work. At the very least, it is difficult to explain why they get the same kind of rights.

Reform critics have thus quite rightly argued that to do so would upset the nature of a contractual obligation.[55] The idea being, very roughly, that we are making an insufficiently justifiable exception to a necessary requirement for the acquisition of a right that reflects something fundamentally important about its nature and justifying reason, for example its basis in promise,[56] agreement,[57] or a reciprocal bargain or exchange.[58]

Deeming primary rights for ad hoc remedial purposes moreover muddies the issues at stake, and so might be criticised as obscurantist. The objection cuts further if it is accepted that primary rights and secondary rights stand in some relation, under some version of a 'continuity thesis', so that the content and scope of the latter is in some way justified or defined by that of the former.[59] The technique could even prove self-defeating.

(ii) Secondary

If however the aim is merely to re-direct damages to another, by providing a third-party with a secondary right to damages for breach of someone else's primary right to contractual performance (the promisee's), then what is attempted is really an exception to a different rule, a rule about how *damages* for breach of contract work – 'directional continuity'.

Such an exception entails awarding damages for a wrong to someone else. The Fatal Accidents Act 1976 ("FAA"), analysed extensively in Chapter Five, does this, and is a helpful comparison. To briefly explain its gist here: suppose you knock me down on the street, instantly

54 A doctrine alive and well, even for contractual variations and not just formation: *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2018] 2 WLR 1603.

55 Cf Law Commission (n 12) para 6.13; eg Smith (n 16) 660; Mitchell (n 52) 229, 241-244; Stevens (n 52); Kincaid (n 52).

56 Fried (n 21).

57 Smith (n 20); Penner (n 20).

58 Kincaid (n 47).

59 (n 25); cf R. Craswell 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) *Michigan Law Review* 489, 516.

killing me. You have violated my primary right to bodily integrity. You have wronged only me, and not my dependants. I am victim to your tort, not my dependants. Very exceptionally however, the FAA grants my dependants their own 'parasitic' or 'derivative' secondary right to compensatory damages, to recover their own consequential loss from you.[60]

Note also that under the CRTPA 1999, said third-party may not even be a third-party-*beneficiary*. As long as the contract 'expressly provides'[61] so for an 'expressly identified'[62] person, the 'right to enforce' could even be conferred upon someone who would not benefit at all from due performance, consequentially or otherwise. The absence of even this rather loose nexus between duty-bearer and putative 'right-holder' amplifies the objections above. Stretched this far, it is hard to see what substance can be left behind in the idea of a contractual right, whether primary right to performance, or secondary right to damages for breach of contract.[63]

In contrast, these objections apply with less force to third-party standing only.

B. Standing

A conceptually distinct alternative is to extend to the third-party only the *standing* (a power) to enforce the promisee's contractual rights, without also his own free-standing or parasitic right. Thus the third-party could enforce the promisor's equivalent correlative duties, owed under the contract to the promisee. No new right or duty is thereby created. The exception is to the standing rule in 'privity', its standing aspect.[64] This was the missed dimension to the debate over privity reform in England.

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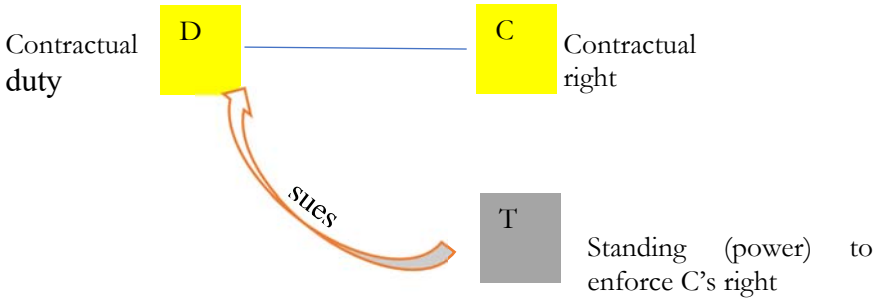
60 Sections 1 and 3 FAA.

61 S1(1)(a) CRTPA.

62 S1(3) CRTPA.

63 Fodder for rights-sceptics eg Holmes (n 2) 462: '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'.

64 Compare Benson (n 18); Melvin Eisenberg, 'Third-Party Beneficiaries' (1992) 92 Columbia Law Review 1358.



Subsequent sections, namely IV-VI, turn to demonstrating how it might have elegantly solved the three main problem cases motivating enactment of the Act. In each these cases – namely, (i) debts, (ii) exemption clauses, and (iii) damages, simply giving the third-party the power to enforce the promisee's rights would have sufficed to give them all that they might want.

So, if one party to a contract has agreed to pay a third-party a sum of money, simply giving them a power of enforcement will enable them to compel payment of this sum to them. Similarly, if one party has promised not to sue a third-party, or has promised to limit their liability to suit to a specified sum, all the third party needs to stop or limit that suit is a power to enforce that promise. Upon breach of contract, a third-party beneficiary might suffer consequential losses. To recover a sum representing that loss, all the third-party needed was the power to enforce the promisee's right to damages for the third-party's consequential loss under the doctrine of 'transferred loss', simultaneously enforcing also the promisee's duty to account to him in respect of its proceeds.

IV. CASE 1: DUTIES TO PAY LIQUIDATED SUMS TO A THIRD-PARTY

Suppose that in a contract between C and D, there is a term that D must pay T an agreed sum. All T really needs is the power (standing) to enforce C's right against D, that the agreed sum be

paid to T.[65] Two canonical 'privity' cases, *Beswick v Beswick*,[66] and *Tweddle v Atkinson*,[67] illustrate how third-party standing is all that was required to adequately implement the contracting parties' intentions.

In *Beswick v Beswick,* Peter Beswick agreed to transfer to his nephew the goodwill in his coal business, in exchange for the nephew's promise to pay his wife £5 a week until her death. Peter died. The nephew failed to pay his widow as agreed. Peter's widow sued the nephew in both a personal capacity, and in a separate capacity as administratrix of Peter's estate. The House of Lords held that privity of contract prevented her from personally enforcing her deceased husband's right against the nephew. Thankfully however, as administratrix of her husband's estate, she was able to do so. As was intended under the contract, Mrs Beswick could thereby compel the sums to be paid over to her.[68]

Suppose, however, that Mrs Beswick had not been so fortunately appointed the administratrix to her husband's estate. Her suit would have failed, and the reneging nephew would have won. Reform enthusiasts argue that this near miss in *Beswick v Beswick* demonstrates privity's "injustice".[69] By thwarting parties' intentions,[70] the argument goes, privity causes "perverse" or "unjust results".[71] *Tweddle v Atkinson* has been criticised on similar grounds.

Granting *arguendo* this objection for now, what would averting the alleged injustice justify? Free-standing rights would have been overkill. All that was needed, minimally, was an

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65 As opposed to the promisee's power to himself specifically enforce his right by compelling payment to the third-party: eg *Gurtner v Circuit* [1968] 2 QB 587. Compare *Coulls v Bagot's Executor and Trustee* [1967] HCA 3; (1967) 119 CLR 460, 502 (Windeyer J); *Treitel* (n 11) [21-051]. For specific performance *Keenan v Handley* (1864) 2 De GJ & Sm 283; *Peel v Peel* (1869) 17 WR 586; *Hohler v Aston* [1920] 2 Ch 420.

66 [1968] AC 58 (HL).

67 121 ER 762; (1861) 1 B & S 393.

68 *Beswick v Beswick* [1968] AC 58, 81-82 (Lord Hodson).

69 eg *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, 300 (Lord Scarman).

70 eg Law Commission (n 12) paras 3.1-3.4; *Darlington BC v Wiltshire Northern* Ltd [1995] 1 WLR 68, 76 (Steyn LJ).

71 eg Law Commission (n 12) paras 2.47, 3.3; *Beswick v Beswick* [1968] AC 58, 73 (Lord Reid).

exception to privity's standing aspect, that 'a third person cannot become entitled by the contract itself to demand the performance of any duty under the contract'.[72] If Mrs Beswick had her own standing to obtain a court order specifically compelling performance of the nephew's contractual duty, this would have achieved the same desired result.[73]

In *Tweddle v Atkinson* the claimant was less fortunate. The fathers of a couple-to-be-married had agreed between themselves that each would pay marriage portions to the groom, a third-party. The groom attempted to enforce this debt against his father-in-law. His action failed. This was despite the fathers' agreement in writing that:

> "It is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified."[74]

A closer look at the case demonstrates that third-party standing, applied to the facts of *Tweddle v Atkinson*, would have sufficed to achieve the desired result. In fact, no one in *Tweddle* had even mentioned or envisaged the creation of third-party claim-rights, the much more drastic move. All the parties had ever intended was the 'full power to sue… in any Court of law or equity for the aforesaid sums.'

V. CASE 2: TERMS RESTRICTING A THIRD-PARTY'S LIABILITY TO SUIT

A similar standing resolution applies for that line of classic cases involving exemption clauses in the carriage of goods, in which prominent judges had directed trenchant hostility at the doctrine of 'privity'.[75] This proved crucial to the motivation for privity reform. As with enforcing contractual duties to pay agreed sums to another, it can be shown how all that was required was third-party standing.

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72 Arthur Corbin, 'Contracts for the Benefit of Third Persons' (1930) 46 LQR 12, 12 citing from Salmond & Winfield, *Principles of the Law of Contracts* (1st edn, Sweet & Maxwell 1927).

73 Compare *Beswick v Beswick* [1966] Ch 538 (CA) 557 (Denning LJ).

74 121 ER 762, 762.

75 *Midland Silicones* (n 32) (Lord Denning); *The Eurymedon* (n 53) (Lord Wilberforce); *The Mahkutai* [1996] AC 650 (Lord Goff).

The obstacle here was posed by privity's standing aspect. However, at common law, the courts ended up creating artificial third-party rights. This caused knock-on anomalies, which could have been avoided with third-party standing. Moreover, statutory reform did not straightforwardly rectify the precise problem. Instead, broad and ambiguous 'right[s] to enforce a term'[76] were created. If this is to be interpreted as comprising free-standing claim-rights, they are not easy justify on the rationale provided for their creation here, namely, 'commercial necessity'.

A. Himalaya clauses, agency, and collateral contracts

In *Midland Silicones,*[77] shippers brought tort suits for negligent damage to cargo against third-party stevedores. Privity denied them the ability to enforce a liability-limiting clause in the bill of lading contract, and was thought to cause a 'serious gap in our commercial law'.[78] Its application meant that simply by suing the carrier's servants or independent contractors instead of the carrier, the shippers could easily circumvent the clause to which they had agreed.[79] This would upset the prior contractually agreed upon allocation of risk of damage to goods during transit, reflected in the rates of freight,[80] and any consequent insurance arrangements premised upon that pre-agreed allocation under the contract of carriage. It was generally thought that 'commercial necessity'[81] justified a 'fully-fledged exception' to privity,[82]

76 S1 CRTPA.

77 [1962] AC 446 (HL).

78 ibid, 491 (Lord Denning).

79 *Paterson Zochonis v Elder Dempster* [1923] 1 K.B. 420; (1922) 13 Lloyd's Rep 513 at 441–42 (Scrutton LJ); *Midland Silicones* (n 32) 491-92 (Lord Denning); *London Drugs v Kuehne & Nagel International* [1992] 3 S.C.R 299 (Supreme Court of Canada) 441 (Iacobucci J); *Carver on Bills of Lading,* Treitel and Reynolds (eds), (4th edn, Sweet & Maxwell 2017) [7-049].

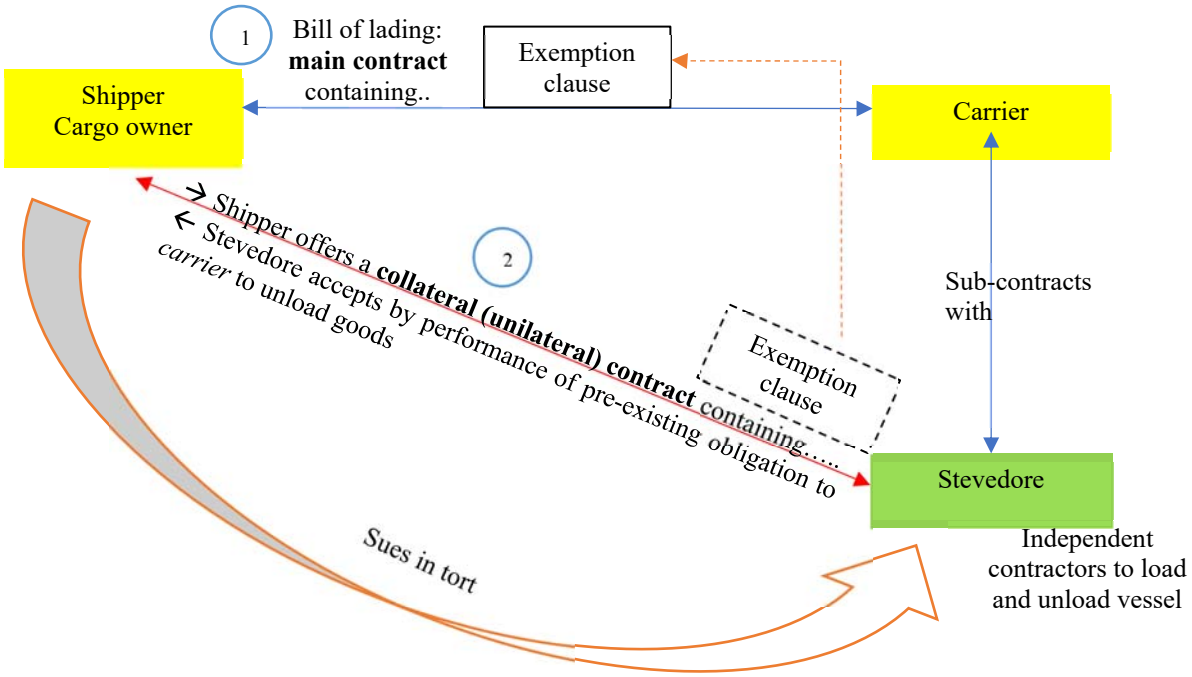
80 *The Eurymedon* [1975] AC 154, 169 (Lord Wilberforce); *The Mahkutai* [1996] AC 650, 661 (Lord Goff).

81 Law Commission (n 12) para 2.34. See also *Elder Dempster* [1923] 1 KB 420, 441–42 (Scrutton LJ); *Midland Silicones* [1962] A.C. 446 (Lord Denning); *The Eurymedon* [1975] AC 154, 169 (Lord Wilberforce); *The Mahkutai* [1996] AC 650, 664 (Lord Goff).

82 *The Mahkutai* [1996] AC 650 (Lord Goff).

to enable independent contractors to enforce these immunities from suit, agreed upon for their benefit.

The Eurymedon was a pivotal case. Third-party stevedores had been sued in tort for negligently damaging an expensive drilling machine while unloading. The question was whether they could enforce any of the liability-limiting terms extended to them under the bill of lading contract, including the Art III r 6 one-year time limitation.[83] To find in favour of the stevedores, the judicial strategy in *The Eurymedon* was to artificially create contractual rights in third-party stevedores. Building on Lord Reid's dictum in *Midland Silicones* that an agency device might succeed,[84] the key step involved creating a direct, independent contract between the shipper and the third-party stevedores – so that to *this* new collateral contract the stevedores would be party, and could thereby acquire a right.



83 Schedule to the Carriage of Goods by Sea Act 1971.

84 *Midland Silicones* [1962] AC 446, 474.

This technique popularised the use of the notoriously problematic 'Himalaya'[85] clauses.[86] It was rightly criticised that giving effect to these clauses in this way would be 'effectively rewriting' them.[87] The technique required substantial strain on the formation rules, which had to be stretched in a forced attempt to accommodate the finding of an agreement, and consideration.[88] "A search for fine distinctions" was explicitly discouraged.[89] The artificiality of the agency device and its problems are well-known.[90] Reading in an offer to the stevedores is fictitious,[91] the timing of the acceptance may make it ineffective,[92] and the stevedores may not have the requisite knowledge of the offer to accept it. Problems about authority may arise.[93]

Quite tellingly, this collateral contract would contain only a single term: the exemption clause,[94] and would exist solely for the purpose of availing the stevedores of its protection. It contained no executory obligations,[95] as "[t]he stevedore had never promised to do anything".[96] In its latest reincarnation in *The Starsin* it appears a whole new category of contractual formation rules is required to accommodate it. It is neither 'unilateral[97] nor

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85 The ship's name in *Adler v Dickson* [1955] 1 QB 158.

86 *The New York Star* [1981] 1 WLR 138 (PC) 144; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715 (HL).

87 Law Commission (n 12) para 2.27.

88 *The Eurymedon* [1975] AC 154 at 167 (Lord Wilberforce).

89 *Port Jackson Stevedoring Pte Ltd v Salmond and Spraggon (Australia) Pte Ltd (The New York Star)* [1981] 1 WLR 138 (Lord Wilberforce).

90 Law Commission (n 12) para 2.27. See also *Southern Water Authority v Carey* [1985] 2 All ER 1077 (QB) 1084; *The Starsin* (n 86) [34] (Lord Bingham).

91 *The Eurymedon* [1975] AC 154, 170 -72 (VC Dilhorne).

92 Eg *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155*:* stevedores not protected because they had damaged the goods while they were unloading goods stored on top of damaged goods, and thus before they had accepted the consignor's offer that they would have limited liability if they carried out the performance requested of them.

93 Eg *The New York Star* (n 89); *Southern Water Authority v Carey* (n 90) 1084-85.

94 *The Eurymedon* [1975] AC 154, 179 (Lord Simon); *The Starsin* (n 86) [59] (Lord Steyn), [205] (Lord Millett).

95 *The Starsin* (n 86) at [59] (Lord Steyn), [153] (Lord Hobhouse).

96 Ibid, [34] (Lord Bingham).

97 Not typically unilateral like in *Carlill v Carbolic Smoke Ball* [1893] 1 QB 256 where acceptance simultaneously provides consideration. Under the *Starsin* analysis, acceptance occurs first when the shipper accepts the bill of lading, before the provision of consideration by performance of the act. Contrast *The Eurymedon* (n 53) 167 (Lord Wilberforce): "bill of lading brought into existence a bargain

'bilateral',[98] but instead a tertium quid: an inchoate contract or 'arrangement' capable of only later becoming enforceable by the third parties upon actual performance of their pre-existing obligation to the carrier.[99]

B. Statute: more 'artificial stratagems' and 'complexity', not less

Unsurprisingly, the Law Commission criticised this state of affairs as artificial, complex, and prone to technical challenge. It entailed undesirable commercial uncertainty. An important goal of statutory reform was hence to "sweep away the technicalities",[100] to achieve more directly the "commercially workable results"[101] in *The Eurymedon* and *The New York Star*, without the "artificial stratagems and structures in order to give third-parties enforceable rights".[102]

Achieving this avowed goal was thought to require an outright exception to privity.[103] However, there seemed little expressed awareness of the underlying complexity behind 'privity', an ambiguous cluster of distinct rules. As the title of the Act – Contracts (*Rights* of Third Parties) – suggests, just as the common law had created third-party rights through collateral contracts, the drafters appear to have mistakenly thought that an exception to privity necessarily requires third-party rights, replicating the problem in statutory form. This legislative artifice was unnecessary. It could have quite easily been avoided, if not for the conceptual conflation of rights with standing.

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initially unilateral but capable of becoming mutual, between the shipper and the [stevedores], made through the carrier as agent."

98 Not bilateral because at no stage are the third party stevedores under an *obligation* to perform to the shipper: *Carver on Bills of Lading* (n 79) [7-052].

99 *The New York Star* [1979] 1 Lloyd's Rep 298 (High Court of Australia) 304 (Barwick CJ): "I find the descriptions 'unilateral and bilateral' or 'mutual' unhelpful in the resolution of this case. Indeed, the use of them seems to assume that they are mutually exclusive terms and together cover all possibilities. But I do not think they do." Similarly see *The Starsin* (n 86) [153] (Lord Hobhouse), and Stevens (n 52) 304.

100 Law Commission (n 12) para 2.35.

101 Ibid para 2.30.

102 Law Commission (n 12) para 3.6.

103 Law Commission (n 12) paras 2.34-35.

The neater solution would have been to grant the third-party stevedores the power to enforce the carrier's contractual right against the shippers under the liability-limiting term in the main contract, when faced with a tort suit by those shippers. In a straightforward and more transparent way, the third-parties could stop the claim brought against them, or limit their liability only to the extent specified in the term. The complexity would be reduced, avoiding the artificial intermediate steps of a collateral contract through straining agency law, or a difficult statutory deeming of fictional third-party rights.

C. Promises not to sue

Analogous cases might be similarly resolved. A parallel line of cases originating in the carriage of passengers,[104] eventually applied to the carriage of goods, recognised the possibility of a promisee stepping in to enforce a 'contractual promise not to sue' his third-party employee or independent contractor in a tort action.[105]

Having described the Himalaya device in the *Eurymedon* as 'strained interpretation to inept phraseology', Francis Reynolds had once suggested that a carrier who wished that the bill of lading holder not sue his employees or sub-contractors might simply procure from them a promise not to do so, which on authority of *Gore v Van der Lann* and *Snelling v Snelling*, might then be specifically enforced against them by the carrier applying for a joinder to stay any such tort action against his third-parties.[106] In a later carriage of goods case, the clause in *The Elbe Maru*[107] was given such effect. It was held, following *Gore v Van der Lann,* that to be joined to the suit to enforce this contractual promise not to sue, the promisee, as the only one with standing, needed to show that he had a 'sufficient interest' in doing so.[108]

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104 *Corsgrove v Horsfall* [1946] 62 TLR 140 (CA).

105 *Gore v Van der Lann* [1967] 1 QB 31 (CA), 45 (Salmon LJ). Followed *in Snelling v Snelling* [1973] QB 87 (QBD); *The Elbe Maru* [1978] 1 Lloyd's Rep 206; *The Starsin* [1999] 2 All ER (Comm) 591 (QB (Comm)); and *The Starsin* [2001] EWCA Civ 56; [2001] 1 All ER (Comm) 455.

106 Francis Reynolds, 'Himalaya Clause Resurgent' (1974) 90 LQR 301, 304. And also contract to indemnify the third-parties from any such claim, to dispel doubt about 'sufficient interest'.

107 [1978] 1 Lloyd's Rep 206.

108 Prompting circular indemnity clauses.

If the reform goal is to 'sweep away the technicalities', allowing enforcement 'more directly'[109], then again the neatest solution would be to extend to the third-party employee a power to enforce the liability-limiting term. This dispenses with the need for joinder to 'borrow' the promisee's standing to enforce it. Being sued in tort, clearly he has 'sufficient interest' in enforcing the liability-limiting term to protect himself.

Perhaps we had overlooked this resolution because we did not realise that there was a conceptual connection between promises not to sue, and terms limiting one's liability to be sued. In Hohfeldian terms, the *liability* to be sued is simply the correlative of one's *power* (standing) to sue.[110] In *Gore v Van der Lann,* Willmer LJ spoke of the promise not to sue as a 'promise by the plaintiff not to institute proceedings'.[111] Similarly, Salmon LJ thought that such a promise would 'negative or restrict the plaintiff's right to sue.'[112]

D. Knock-on anomalies: Hague Rules and Himalaya clauses

These conceptual oversights led to *The Starsin*.[113] It is problematic case from which a ratio is difficult to discern,[114] demonstrating how a general confusion over rights and standing has ultimately contributed to unexpected knock-on anomalies.

The Starsin involved a third-party actual carrier, the shipowner. A cargo of timber and plywood had deteriorated due to negligent stowage. A group of cargo owners with title at the time of damage sued them in tort.[115] To determine the extent of their liability to be sued in

109 Law Commission (n 12) para 3.30.

110 Chapter Two, 'Concepts'.

111 [1967] 1 QB 31 (CA) 42, 42.

112 Ibid 45. In *Gore* the clause had attempted complete exclusion rather than limitation of the third-party's liability to be sued, which, if effective, would completely exclude the tort victim's correlative standing (ie power) to enforce the tortfeasor's duty. Where the clause merely limits liability to a partial extent (by eg quantum or type of loss), what it does is restrict enforceability of the duty only to that extent.

113 [2004] 1 AC 715 (HL).

114 Edwin Peel, 'Actual carriers and the Hague Rules' (2004) 120 LQR 11, 16.

115 Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon) [1986] 1 AC 785 (HL).

tort, one question was whether a 'Himalaya clause' in the bill of lading applied to protect them, and if so what the impact of the Hague Rules would be.

On appeal, the House of Lords overturned the lower courts which had applied *The Elbe Maru* to construe the clause as a promise not to sue the third-party, enforceable only by the promisee. Instead, the House of Lords re-employed the strained construction used in *The Eurymedon* to create a collateral contract between the third-party actual carriers and the cargo owners based on agency reasoning, to avail the third-party actual carriers of the bill of lading immunities in the main contract of carriage.[116] In an attempt to invalidate the clause, each Law Lord then gave different reasons for subjecting this separate collateral contract to the Hague Rules. Their twofold aim was, first, to establish the commercially desirable position that third-parties could prima facie directly enforce any immunities expressly intended to cover them in the main contract, and second, to subject these immunities to the statutory controls preventing their abuse: Art III r 8 of the Hague Rules.[117]

The complication here arose because 'contracts of carriage' are subject to international regulation under the Hague Rules. To curb abuse of the carrier's stronger bargaining position against cargo owners, the Rules impose a mandatory framework setting maximum limits on the exemptions of liabilities or immunities that a carrier can stipulate as against a shipper.[118] Previous cases like *The Eurymedon* and *New York Star* involved third-party stevedores invoking an immunity which would also have been available to the carrier: a one year time-limitation to the suit.[119] It was not until *The Starsin* that it was noticed that the Himalaya clause came in two

116 See eg *The Starsin* (n 86) [34] (Lord Bingham): 'The Himalaya clause itself, and the undoubted artificiality of the reasoning relied on to uphold it in *The Eurymedon* [1975] AC 154 and *The New York Star* [1981] 1 WLR 138, were a deft and commercially-inspired response to technical English rules of contract, particularly those governing privity and consideration'.

117 Carriage of Goods by Sea Act 1971, Schedule.

118 Carriage of Goods by Sea Act 1971, ss 1(1)-1(2). The Hague Rules, as contained in the Schedule to the COGSA 1971, have 'force of law'.

119 Art III r 6, COGSA 1971.

parts,[120] and where the third party was instead an actual carrier and not stevedores,[121] a separate first part of the clause might extend to the third party actual carrier exemptions *beyond* that which would have been also available to a carrier under the Hague Rules.[122] The intellectual challenge was then to ensure that the Hague Rules should apply also to the actual carriers, who were third-parties to the main contract of carriage, but party to their own independent Himalaya contract with the shippers.[123]

However, the Hague Rules would only apply to a 'contract of carriage', and it was impossible to say that the 'Himalaya' collateral contract was indeed such a thing. To subject it to the Rules, the House of Lords had to resort to difficult legal reasoning. Lord Hobhouse thought that the Himalaya contract was itself a 'contract of carriage' once the actual carrier took possession of the goods. Lords Hoffmann and Millett latched onto a clause deeming them to be parties to the bill of lading contract, holding that this meant that the third party actual carriers agreed to abide by the Hague Rules incorporated in it. Lord Bingham thought that to not apply them would be to 'elevate form over substance and to invest what is essentially a legal device with a wholly disproportionate legal significance'.[124] There is no easy way out,[125] and it is telling how each judge recorded their difficulty in reaching their decision.[126] Francis Reynolds has commented how it must partly be a matter of taste which of the four lines of reasoning by the majority are deployed to secure the result.[127]

Only Lord Steyn, in dissent, was prepared to bite the bullet and give the actual carriers a complete exemption, following through on the logic established by Lord Wilberforce in *The*

120 *The Starsin* (n 86) [20] (Lord Bingham).

121 The counterparty being the charterer/contracting carrier.

122 Art III r 8, COGSA 1971.

123 Reynolds, 'Tangling in the Undergrowth' in Davies and Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2015) 247.

124 *The Starsin* (n 86) [24] (Lord Bingham).

125 Edwin Peel, 'Actual carriers and the Hague Rules' (2004) 120 LQR 11, 16.

126 *The Starsin* (n 86) [34] (Lord Bingham), [59] (Lord Steyn), [113] (Lord Hoffmann), [211] (Lord Millett).

127 Reynolds, 'Tangling in the Undergrowth' (n 123) 249.

Eurymedon and *The New York Star* – that the Himalaya clause is a separate and independent contract with the singular purpose of conferring an exemption on the third parties, used to facilitate the allocation of risks (of damage to goods and the burden of insurance) between commercial men.[128] This was simply an agreement for exemption, not an agreement to carry, even though the consideration for it involved performance by the vessel.[129] In no way therefore could it be a 'contract of carriage' to which the Art III r 8 of the Hague Rules applied.[130]

Subjecting the clause to the Hague Rules was complicated only because of the anomaly created by the *Eurymedon* technique, artificially duplicating in the third-party a right under an independent collateral contract – thus splitting it up from the main bill of lading contract of carriage.

However, had we simply extended to the third-party a power to enforce the clause in the contract of carriage, there would have been only one contract involved. All statutory regulation applicable to its enforcement (eg the Hague Rules) would be straightforwardly applicable. There would have been no need for the strained gymnastics in the *Starsin.* The consequent anomalies disappear.

The 'commercial necessity' for third-parties to enforce agreed liability-limiting terms for their protection was a justification so important that sections 1(6), 3(6), and 6(5) of the CRTPA were enacted solely to stress this reform aim. As indicated above,[131] the Law Commission sought to create '... (2) a right to take advantage of a promised exclusion or restriction of the promisor's rights as if the third-party were a party to the contract.'[132] However, 'a right to take advantage of' does not seem a species of 'claim-right'. More plausibly it is a *power* of enforcement, which, as argued, is all the third-party required.

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128 *The Starsin* (n 86) [57].

129 Ibid [60].

130 Ibid [59]-[62].

131 (n 15).

132 Law Commission (n 12) para 3.32.(emphasis added)

VI. CASE 3: DAMAGES FOR BREACH OF CONTRACT

Yet another distinct reform goal was to facilitate recovery by the third-party of a sum representing his own losses, consequent upon the breach of contract.[133]

As with the two cases above, it can be argued that to achieve this goal, free-standing third-party rights were not necessary. Instead a more moderate and conceptually neater alternative was possible: refining the then 'narrow ground' doctrine (synonymously 'transferred loss' today). As shall be seen, one of its key defining features is to re-direct damages towards a third-party beneficiary.

This may have been overlooked because the Law Commission thought that 'even if the promisee can obtain a satisfactory remedy for the third party, the promisee may not be able to, or wish to, sue.'[134] However, if the main defect with 'transferred loss' – a promisee's 'remedy' for breach – was that only the promisee could activate it, this reveals that the true difficulty lay with privity's 'standing' aspect.

To fix this defect, we could have simply extended to the third-party a power (standing) to enforce this promisee 'remedy'. Had we done so, perhaps its conditions of application would have also been clarified.

A. Two promisee remedies

We must clarify 'transferred loss'. To do so, two promisee 'remedies' must first be distinguished.

(i) 'Broad' versus 'narrow'

133 Law Commission (n 12) para 3.30.

134 Law Commission (n 12) para 3.4

The first is the promisee's secondary right to what Daniel Friedmann would call 'performance damages',[135] a possibility first hinted at by Lord Griffiths in *St Martins*[136] as a 'broader ground', and later developed by Brian Coote as a 'performance interest' approach.[137] This approach proved highly influential on the dissentients in the famous *Panatown* case,[138] Lords Goff and Millett.

'Transferred loss' is a second, conceptually distinct 'remedy'. It is commonly known as the 'narrower ground', which Hannes Unberath has extensively argued is based on a wider principle of 'transferred loss'.[139] It is based on a generalisation from the *Albazero*[140] rationalisation of the *Dunlop v Lambert*[141] exception in the carriage of goods,[142] to contracts for building services in the same *St Martins* case.[143]

Its precise boundaries remain uncertain. In *The Albazero*, Lord Diplock had confined it to situations where (i) the contracting parties contemplate that property in goods might be transferred from C to T before the breach, and (ii) T had no direct 'right of action' against C in respect of his consequential losses. Criterion (i) was thought to no longer exist since its expansion in *Darlington BC v Wiltshire Northern Ltd*,[144] a case in which no such transfer was present. However, some of the reasoning in *Swynson v Lowick*,[145] discussed later, appears to

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135 Friedmann, 'The Performance Interest' (n 2) 630. Similarly Charlie Webb, 'Performance Damages' in Worthington and Virgo (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017).

136 *St Martins v McAlpine* on joint appeal with *Linden Gardens v Lenesta Sludge* [1994] 1 AC 85 (HL).

137 Coote, 'Performance Interest' (n 2), adopting Friedmann's (n 2) terminology.

138 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL).

139 Hannes Unberath, *Transferred Loss: Claiming Third Party Loss in Contract Law* (Hart 2003); Hannes Unberath, 'Third Party Losses and Black Holes: Another View' (1999) 115 LQR 535. *Panatown* (n 138) 529 (Lord Clyde), 557 (Lord Goff). Cf the "tort" version raised in *The Aliakmon* [1985] QB 350 (CA), rejected on appeal: *The Aliakmon* (HL) (n 115).

140 [1977] AC 774 (HL).

141 (1839) 6 Cl & F 600.

142 Now statutorily enshrined: Carriage of Goods by Sea Act 1992, s 2(4).

143 (n 136).

144 [1995] 1 WLR 68 (CA).

145 *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 2 WLR 1161. Noted Peter Watts, 'Lucky Escapes' (2017) 133 LQR 542; Andrew Trotter, 'Reconsidering Transferred Loss' (2019) 82 MLR 727, 728 criticising *Swynson* as 'leav[ing] its 'scope and basis uncertain'.

revive it.[146] Clearer today is criterion (ii), that it will not apply if the 'third-party has a direct right of action for the same loss, on whatever basis'.[147] Substantial damages were denied in *McAlpine Construction v Panatown* due to the duty of care deed between the defendant builders McAlpine and the third-party landowner UIPL.[148] From this result, we know that a relevant 'right of action' or 'remedy' need not be co-extensive with the recovery provided by 'transferred loss' in order to entirely exclude its application.[149] Specifically, we might infer from *Panatown* that if the CRTPA applies to the situation at hand, then the narrow ground cannot, despite its wording implying quite the contrary.[150]

(ii) Performance damages: distinguishing features

Two features distinguish performance damages from 'transferred loss': (i) it is not based on consequential loss, and (ii) the promisee owes no duty to account in respect of them.

Performance damages vindicate the promisee's 'performance interest',[151] independent and regardless of any consequential losses that he might suffer as an effect of breach. A commentator has put this pithily: the 'performance interest' is distinct from one's 'compensatory interest'.[152] He can therefore recover them independently of whether he actually incurs, or intends to incur, any (reasonable) expense in consequence of the breach, to confer the initially intended benefit through alternative means. Unlike under the 'narrow

146 *Swynson* (n 145) [14] (Lord Sumption), [52] (Lord Mance), [104] (Lord Neuberger).

147 *Swynson* (n 145) [16] (Lord Sumption). By 'right of action' what Lord Sumption appears to be referring to is an enforceable claim-right to damages, by shorthand.

148 Contractually replicating the old tort law in *Anns v Merton* [1978] AC 728 (HL), overruled *D&F Estates v Church Commissioners* [1989] AC 177 (HL) and *Murphy v Brentwood* [1991] 1 AC 398.

149 Criticised Andrew Burrows, 'No Damages for a Third Party's Loss' (2001) 1 OUCLJ 107, 112, concerned that a third-party might be left worse off under the duty-of-care-deed, than if 'transferred loss' could apply.

150 s5(1)(a); s4 CRTPA.

151 (n 137).

152 Webb, 'Performance and Compensation' (n 2).

ground', performance damages are not based on a claim that the contract-breaker make good one's consequential losses,[153] flowing from the breach.

The second feature follows from the first. The promisee may accordingly retain such damages beneficially, for his own uses and purposes. Unlike the narrow ground, where a duty to account is an 'essential feature'.[154] the promisee is under no duty to account for them to another. He might wish to put them towards executing his initial plans to benefit the third-party. If their relationship has changed significantly, he might not.[155] In *Coulls v Bagot* Windeyer J said:

> Suppose that A does recover substantial damages for B's failure to perform his promise to A to pay C $500—the next question is does he recover these damages for himself or for C. Notwithstanding the statements in *Beswick v. Beswick* suggesting that he would recover them for C, I do not see why this should be. On the hypothesis of a purely contractual right with no trust attached, why should A hold for C the proceeds of his action? He sued at law for damages he himself suffered, not as the representative of C. …. Why then is it said that proceedings brought by A to enforce his legal right give C a right against A when previously he had none?... Of course A, whose purpose had miscarried because of B's breach of contract, might make over any damages he recovered to C: but that would not be because C had a right to them, but because A still wished to give effect to his plan to confer a benefit on him.[156]

There is admittedly some 'division of opinion'[157] over whether a promisee owes a duty to account for 'performance damages', or whether he must first intend to apply them to cure the breach. This is due, I suspect, to a muddying of the waters by an erroneous tendency to describe this species of damages as 'loss'-based. Lord Griffiths in *St Martins* and Brian Coote both did so, relying on an expansion of the traditional concept of loss in contract law beyond a

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153 *Swynson* (n 145) [53] (Lord Mance); *Panatown* (n 138) 533-34 (Lord Clyde), 573 (Lord Jauncey), cf 587 (Lord Millett). The extent to which one is worse off now, as compared counterfactually to if the term-breached had been properly performed.

154 *Swynson* (n 145) [14], [16] (Lord Sumption), [52] (Lord Mance); *Panatown* (n 138) 580 (Lord Millett).

155 Compare Trotter (n 145) 733.

156 (1967) 119 CLR 460 (HCA), 502.

157 *Panatown* (n 138) 577 (Lord Browne-Wilkinson). Compare eg *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468, 1473 (Denning LJ); *St Martins* (n 136) 97 (Lord Griffiths)*; Darlington BC* (n 70) (Lord Steyn).

balance-sheet or patrimonial loss,[158] to recognise as a distinct species of 'loss' what occurs simply in virtue of a 'lost… performance of the bargain'.[159] But this is 'loss' in an importantly different sense from consequential loss. As Lord Clyde had recognised in *Panatown*, saying that the right itself is lost by breach amounts simply to recognising that we are awarding damages for the breach of contract itself, ie the wrong.[160]

Reflecting this division is a live debate over whether such damages are better described as non-compensatory, and 'substitutive' or 'substitutionary' for the infringed right to performance,[161] aimed at redressing the infringement of the right rather than making good its consequences (affecting their prima facie quantification, [162] and what limiting rules apply[163]). It is impossible to resolve this here, but perhaps the better view is that we should distinguish between the contractual right to performance, versus a supposed 'promisor's obligation not to cause consequential loss to third parties where such loss is within the contemplation of the contracting parties', recognizing explicitly that the two 'operate at two levels',[164] even if the obligations are owed only to one person: the contractual counterparty. An analogous or cognate debate in tort law is the precise content of a duty of care, and whether there may be more than one duty of care (to not impose unreasonable risks? To not cause loss through want to care?)[165]

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158 *Panatown* (n 138) 587-588 (Lord Millett), cf 534 (Lord Clyde).

159 *St Martins* (n 136) 97 (Lord Griffiths); Coote,'Performance Interest' (n 2) 549: 'the right to performance… ha[s] intrinsic economic worth'.

160 *Panatown* (n 138) 534 (Lord Clyde).

161 eg Webb, 'Performance and Compensation' (n 2); Stevens, 'Damages and the Right to Performance (n 2); Stephen Smith, 'Substitutionary Damages' in Rickett (ed), *Justifying Private Law Remedies* (Hart 2008); Pearce and Halson (n 2).

162 Most think cost of cure eg Coote, 'Performance Interest' (n 2). Some, difference in value: *Panatown* (n 138) 534 (Lord Clyde); Stevens, 'Damages and the Right to Performance (n 2).

163 eg mitigation, 'reasonableness', remoteness.

164 Brian Coote, 'The Performance Interest, Panatown, and the Problem of Loss' (2001) 117 LQR 81, 94.

165 Eg John Gardner, *Personal Life to Private Law* (OUP 2018) 58-59. More in Chapter Five, 'Torts'.

B. Re-directing damages through 'transferred loss'

In contrast, 'transferred loss' re-directs damages towards a third-party beneficiary. To unpack and clarify its operation, three questions might be asked.

First, *what* kind of right is being enforced? As 'transferred *loss*' suggests, the secondary right is to compensatory damages for consequential losses.

Second, *whose* rights are they? They are the promisee's and not the third-party's. Thus the standing rule within privity entails that only the promisee can sue to enforce it. The 'narrow ground' is conventionally classified a promisee's 'remedy', 'remedy' here referring to and locating both claim-right and power of enforcement.

Third, *how* is this right to damages quantified? This is the doctrine's special feature. Unusually, consequential loss is quantified not by reference to the right-holder (promisee's) financial position, but instead the third-party's financial position. This is the relevant sense in which the law of damages 'transfers' a 'loss' – the law looks not to the right-holder's balance-sheet, but the balance-sheet of another. 'Attributed loss' may be the better label in future. This is implicit in Lord Clyde's majority judgment in *Panatown.* Through a 'juristic subterfuge… If the entitlement to sue is not to be permitted to the party who has suffered the loss, the law has to treat the person who is entitle[d] to sue as doing so on behalf of the third-party.'[166]

Crucially, an 'essential feature'[167] of the doctrine is that the promisee's right to damages is encumbered with a duty to account for its proceeds to the third-party. The promisee cannot retain them beneficially.[168] Thus, regardless of what was later added by the CRTPA, the third-party already possessed a correlative *claim-right* to an account from the promisee, in respect of the promisee's own claim-right to damages. This important fact was overlooked.

What the third-party lacked and needed was not another claim-right, but rather, the power (standing) to enforce both these rights simultaneously, the main defect with the 'transferred loss' doctrine. Extending to the third-party standing would have elegantly short-circuited an

166 (n 138) 535 (emphasis added).

167 *Swynson* (n 145) [14], [16] (Lord Sumption), [52] (Lord Mance); *Panatown* (n 138) 580 (Lord Millett).

168 *Panatown* (n 138) 580 (Lord Millett).

otherwise circuitous process. Rather than having to wait for the promisee to sue, and then insist upon the promisee's duty to account for its proceeds to him, the third-party would be able to directly enforce both rights.

The precise difficulty identified here by the Law Commission, that the 'promisee may not be able to sue',[169] would be neatly and surgically overcome, without further adding to the complexity in the law of damages, an already convoluted area.

C. Avoiding anomalies

Instead, distinct issues were run together under 'privity', introducing further layers of remedial complexity in the law of contract damages. By adding rights, the Act produced 'anomalous results'.[170] Two examples:[171]

> D agrees to build a house for C for £1m, the going market rate for work of that kind. Upon completion, the building would enhance the value of C's land by £1m. In breach of contract, D fails to do the work.

The normal measure of damages is the sum that will make the aggrieved party's position as nearly as possible what it would have been had the contract been duly performed.[172] Here, damages are on its face nominal. C has not received a building that would have been worth £1m, but as a result he has not had to pay £1m. His net position is no worse off (although he may potentially suffer some consequential loss in arranging for another to do the work). Contrast:

> D agrees with C to build a house for T for £1m, the going market rate for work of that kind. Upon completion, the building would enhance the value of T's land by £1m. In breach of contract, D fails to do the work.

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169 Law Commission (n 12) para 3.4.

170 Stevens (n 52) 301-03. Compare Smith (n 16) 661-62: 'Abolition will inevitably produce anomalies and injustices.'

171 Variations on Stevens (n 52) 301.

172 *Robinson v Harman* 154 E.R. 363; (1848) 1 Ex Rep 850. The Law Commission (n 12) refers to this as the "expectation measure", "the normal contractual measure of recovery": para 9.33.

What is the position T would have been in had the contract been performed? He would have acquired a building worth £1m, for nothing. He is therefore £1m worse off than he would have been if the contract had been performed. Is he therefore entitled to damages of £1m? If T has his own free-standing right, the answer would appear to be "yes". This is anomalous.[173]

No anomaly arises however if C can enforce the promisee's 'remedy' of transferred loss here. As will be argued, the 'transfer' in 'transferred loss' attributes T's consequential losses to C, for quantification purposes. Since C would have had to pay £1m, we end up with nominal damages again, the correct result.

Were we to extend to T the power (standing) to enforce C's transferred loss 'remedy', the same result obtains. This is because, as argued in Chapter Two, private law rights/duties – the subject-matter of enforcement – are conceptually distinct from the powers to enforce them. It follows that the post-enforcement result should not change with the enforcer's identity; underlying rights/duties remain invariant across different enforcers. Whether enforced by a public regulator, the attorney-general, or some other third-party individual, does not change the fact that it is a *promisee's* right to damages that is being enforced.

D. Case-law confusion

In hindsight the CRTPA may indeed have stultified rational development of this area of law, as a critic previously predicted.[174] We conclude this section with two recent cases, indicating a persistent confusion over 'transferred loss', and its relation to the 'broad' ground (ie performance damages).

In *Swynson Ltd v Lowick Rose LLP*,[175] Swynson was a business engaged in high-risk lending. Swynson's controlling shareholder, Hunt, attempted to sue Swynson's accountants for breach

173 eg Hugh Beale, 'A Review of the Contracts (Rights of Third Parties) Act 1999' in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (Oxford University Press 2010) 229-30.

174 Stevens (n 52) 299.

175 [2017] UKSC 32, [2017] 2 WLR 1161.

of contract with Swynson by negligent preparation of a due diligence report, which Swynson had relied on to make a bad loan. As Hunt eventually paid the borrower to take the bad debt off Swynson's books, he argued that he ought to recover his own personal loss on the basis of a 'transferred loss' principle, amongst others.[176] The Supreme Court rejected this argument, unanimously holding that Swynson did not contract with their accountants intending to or for the object of benefitting the third-party, Hunt.[177]

In doing so the UKSC briefly reviewed *Panatown*, a difficult decision on the promisee's two 'remedies', which split the House of Lords on the issue. There are hints in the reasoning of Lords Sumption, Mance, and Neuberger that the two are just slightly different versions of a principle of 'transferred loss', one broader and the other narrower.[178] More controversially, Lord Sumption even stated that *both* broad ground and narrow ground were 'limited exceptions' to a 'fundamental principle of the law of obligations' – the 'general rule that a claimant can recover only loss which he has himself suffered'.[179]

To put these two conceptually distinct 'remedies' under one umbrella of 'transferred loss' would be highly distortionary. Performance-based damages under the broad ground cannot be sensibly forced within 'transferred loss'.[180] Moreover it may be doubted how 'fundamental' this supposed 'general rule' really is; not too long ago its very existence was doubted.[181]

These difficult propositions were unfortunately picked up in *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises*,[182] resulting in further confusion. US-based Rembrandt

176 That it was a 'collateral benefit' to be ignored in assessing Swynson's loss, or that to prevent the accountants' unjust enrichment at Hunt's expense he could be subrogated to Swynson's rights against them.

177 *Swynson* (n 175) [17] (Lord Sumption), [54] (Lord Mance), [108] (Lord Neuberger).

178 Ibid especially [16] (Lord Sumption), [54] (Lord Mance), [106] (Lord Neuberger).

179 *Swynson* (n 175) [14]-[16] (Lord Sumption), [53] (Lord Mance): "the normal principle", [102] (Lord Neuberger):"well-established conventional rule". Compare Lord Sumption's recent minority judgement in *Morris-Garner* (n 7) [106]-[109], [123].

180 *Panatown* (n 138) 594-95 (Lord Millett), 544-548 (Lord Goff)

181 Guenter Treitel, 'Damages in Respect of a Third Party's Loss' (1998) 114 LQR 527; *Panatown* (n 138) 538-39 (Lord Goff), 580-581 (Lord Millett). The first statement of this supposed rule was only in 1977, in *The Albazero* case itself (n 140).

182 [2019] EWCA Civ 596; [2019] 3 WLR 1113.

contracted to buy egg-white powder from Netherlands supplier NIVE during a domestic shortage, caused by the US Avian Flu epidemic.[183] Six months later the price dropped, and Rembrandt repudiated.[184] The supplier sued, attempting to also recover the loss of profits a sister-company would have earned, had the contract been duly performed.[185] The buyer did even not know of this third-party sister-company's existence at time of contracting.[186] This was a long shot. The suppliers only realised the possibility of this claim mid-litigation, and asked to amend its pleadings to run a *Swynson*-style argument.[187] This failed at trial, Teare J giving judgment.[188] The CA unanimously affirmed his judgment on appeal,[189] Coulson LJ giving sole reasoned judgment on the issue.

After an extensive review,[190] he held that 'following the clear guidance in *Swynson*',[191] 'the broader ground was still good law, notwithstanding what was said about it in *Panatown'*.[192] The confusion is most evident in his statement that he had:

> 'no hesitation in concluding that, as a matter of law, **for a successful claim for transferred loss that seeks to rely on the so-called broader ground**, as explained in *Linden Gardens* and *Panatown*, the claimant must show that, at the time that the underlying contract was made, there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged.'[193]

183 (n 182) [3].

184 (n 182) [4]-[7].

185 (n 182) [55].

186 (n 182) [53]-[55], [73]-[74], [80].

187 (n 182) [56].

188 [2019] 1 All ER (Comm) 543, [161]-[164]. *Rembrandt* (CA) (n 182) [11], [57].

189 (n 182) [50] (Longmore LJ), [51] (Peter Jackson LJ), [81] (Coulson LJ).

190 (n 182) [58]-[69]. Including *Linden Gardens* (n 136); *Panatown* (n 138)*; And So To Bed Limited v Dixon* [2001] FSR 47; *Smithkline Beecham PLC v Apotex Europe Limited* [2006] EWCA Civ 658, [2007] Ch 71; *DRC Distribution Limited v Ulva Limited* [2007] EWHC 1716 (QB).

191 (n 182) [70].

192 (n 182) [70].

193 (n 182) [73] (emphasis added).

To reiterate, we cannot force the 'broad ground' within the umbrella of 'transferred *loss*'. The whole point of the 'broad ground' is in contradistinction to consequential loss. Indeed, Coulson LJ himself acknowledged that the '"performance interest" of party A… is no more than the obverse of the positive obligations assumed by the other party B', and that 'it is the benefit inherent in the performance of those obligations itself to the exclusion of any further consequential loss'.[194]

The idea of 'transferred loss' applies only to a generalised version of the 'narrow ground'.[195] This distortion was caused partly by supplier's counsel accepting that the 'narrow ground did not apply on the facts'.[196] Thus it was (erroneously) thought that 'in order for NIVE to succeed in its claim for transferred loss, they needed to bring themselves within the broader ground'.[197]

VII. JUSTIFYING REFORM

As a minimal threshold for normative coherence, justificans must match justificandum. Conceptual elision meant a persistent unclarity over what exactly law reformers were attempting to justify. Was the object-of-justification third-party standing, or third-party rights? "Rights to enforce" could plausibly refer to either. The wording of the CRTPA glides between the two. This may have created a justificatory mis-match.

Unlike third-party rights to performance, or damages, it is much easier to justify extending standing to third-parties on pragmatic, regulatory grounds. Doing so leaves the underlying subject-matters of enforcement – private law rights and duties – intact. This final section reviews four mooted reform justifications, to consider whether they better support third-party standing, rather than third-party rights. If so, reform could have been less drastic, meeting the concerns of principle raised by reform critics. Normative incoherence, and a dilution of

194 (n 182) [68]. Citing *And So To Bed* (n 190) (Donaldson QC) [54]. In fact, Coulson LJ explicitly decided *Rembrandt* (n 182) on analogous grounds [74]: 'the present claim for transferred loss is perhaps closest to the claim for loss of profits in *And So To Bed*. It must fail for the same underlying reasons.'

195 (n 139).

196 (n 182) [69].

197 (n 182) [69].

fundamental legal concepts, could have been avoided. It is argued that these four reasons might be more consonantly treated as justifications for extending standing to third-parties, rather than rights. Put together, these reasons for third-party enforcement would also further a value central to contract law – that 'agreements must be kept'. By shoring up 'enforcement gaps', legitimate agreements would be better upheld, preventing the reneging and circumvention of risks allocated by such agreements.

As to scope, the 'expectation' argument has been convincingly debunked elsewhere.[198] It is implausible to claim that because a third-party 'expects' a right, or even lesser, 'expects' to be benefitted as a consequence of the contract's due performance, that somehow then justifies him having that very right. The stronger articulation is circular, assuming the existence of the right it seeks to prove. The weaker proves too much, including rights to 'incidental benefits'.[199] Reliance by the third-party upon this 'expectation' does not add much to the case for a contractual right, especially if non-detrimental.[200] If the 'expectation' is unreasonable it needs no protecting, reliance irrespective. If the expectation is 'reasonable', then 'reasonable' is what does any justificatory work, albeit unsatisfactorily. Reliance-based arguments more closely resemble misrepresentation claims,[201] or estoppel as a sword.[202]

A. What could a promisee's inability to sue justify?

As pointed out above, the Law Commission argued that 'even if the promisee can obtain a satisfactory remedy for the third party, the promisee may not be able to, or wish to, sue'.[203]

198 Mitchell (n 52); Stevens (n 52) 296.

199 Law Commission (n 12) paras 4.16-4.19; compare s302 *US Restatement (Second) of Contracts*. NB role of 'intentions', discussed below.

200 Similarly Smith (n 16) 654-57, 659 footnote 60.

201 *Derry v Peek* (1889) 14 App Cas 337 (deceit)*; Hedley Byrne v Heller* [1964] A.C. 465; [1963] 2 All E.R. 575 (HL) (negligent misstatement)*;* s2(1) Misrepresentation Act 1967 (entering contract after misrepresentation).

202 *Waltons Stores v Maher* [1988] HCA 7; 164 C.L.R. 387.

203 Law Commission (n 12) para 3.4.

On this basis, the option of strengthening the promisee's 'remedies' was prematurely ruled out.

If the promisee is unable to sue because he is bankrupt and unable to finance enforcement,[204] or is 'ill or outside the jurisdiction',[205] or 'has died',[206] these are strange justifications for someone else acquiring contractual rights. The relevant complaint here is with privity's standing aspect. More plausibly, it is justification for extending standing to third-parties.

In particular, if 'the promisee has died, [and] his or her personal representatives may reasonably take the view that it is not in the interests of the estate to seek to enforce a contract for the benefit of the third party.'[207] If the third-party is not also the personal representative of the deceased estate, unlike in *Beswick v Beswick*, the right might otherwise go unenforced, (and the duty-bearer might escape 'scot-free').[208] This justification for extending standing to that third-party is particularly strong, especially if the promisee would have taken a different view from his estate's executor or administrator, wishing for its enforcement.

If the promisee is alive and able but unwilling to sue, then unless he is under a duty to sue or in some way involved in wrongdoing,[209] that is his autonomous choice, which should be respected.[210] If the promisee withholds consent to enforcement, third-parties should not be permitted to exercise their extended standing to enforce the promisee's rights. The promisee should retain a prerogative over enforcement. There are legitimate reasons for not wanting

204 Ibid.

205 Ibid.

206 Ibid.

207 Ibid. Referring to *Beswick v Beswick* (n 66).

208 *G.U.S. Property Management v Littlewoods Mail Order Stores* (1982) S.L.T. 533, 538 (Lord Keith). 'Blackholes' discussed below.

209 eg if the promise is held on trust: Chapter Four, 'Restitution for Unjust Enrichment'.

210 Compare (n 156).

one's rights enforced. A promisee might for instance have intended a conditional gift, and a subsequent change in the promisee-third-party relationship may have occurred.[211]

B. What could commercial necessity justify?

Recall a key motivation driving reform: facilitating easy enforcement of exemption clauses agreed to protect one's third-party independent contractors.[212] Referring to Lord Wilberforce's circumvention technique in *The Eurymedon*,[213] Lord Goff in *The Mahkutai* had said that 'there can be no doubt of the commercial need of some such principle as this', and that this might justify a 'fully-fledged exception' to privity of contract.[214] But which aspect of privity?

Where the clause agrees a legitimate allocation of risks of eg property damage while in transit and the incidence of insurance, its exceptional enforcement by a third-party might well be justified on purely pragmatic grounds, as a policy against anti-circumvention. Scrutton LJ, one of the most influential English commercial lawyers of his time, noted that:

> Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer.[215]

'Commercial necessity' more appropriately justifies third-party standing.[216] It is a straightforward way of ensuring that legitimate agreements are upheld. Here it would justify the independent contractor enforcing the carrier's right to what was agreed under the contract, preventing reneging and circumvention of risks pre-allocated by it.

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211 Further Chapter Six, 'Justifications'.

212 Law Commission (n 12) paras 2.34-2.35, 3.6.

213 (n 81).

214 *The Mahkutai* (n 82) 663-665.

215 *Paterson Zochonis and Co Ltd v Elder Dempster and Co Ltd* [1923] 1 KB 420 (CA) 441–42 (Scrutton LJ). See also *Scruttons v Midland* [1962] AC 446 (HL) 491-92 (Lord Denning) ; *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299 (Supreme Court of Canada) 441 (Iacobucci J); *Carver on Bills of Lading* (Guenter Treitel and Francis Reynolds eds, 4th edn, Sweet & Maxwell 2017) [7-049].

216 Law Commission (n 12) para 2.34.

As purported justification for contractual rights, however, it is wanting. It is difficult to justify ad hoc contractual rights on basis of a 'gap', or 'commercial necessity'. This would require creating contractual rights in the absence of agreement, either by artificially discovering an agreement where none existed, or – more radically – by outright resort to a legislative fiction. If its justificatory basis in a genuine agreement is removed, it might be doubted whether there is any justification for remedying its breach as if it were a genuine contractual right. This cannot avoid doing violence to the normative coherence of English contract law.

Unsurprisingly, an assumption that privity reform necessarily involved third party claim-rights caused reform sceptics to attack the CRTPA as unjustifiable. Here are two examples:

> The bifurcation of right and duty is fatal. It is basic to private law that a successful plaintiff must show that the defendant breached his duty and that this breach infringed the plaintiff's rights. Duties are correlative to rights: that is why we have plaintiffs suing defendants, not plaintiffs suing the state and the state suing defendants. Granting third parties contractual rights would sever the most important feature of private law: the link between plaintiff and defendant. [217]

> …if a right in personam is alleged, a question which must precede that of breach is: if a duty is owed, is it owed by the defendant to the plaintiff? …. Privity and consideration are the rules which the common law of contract uses for this purpose. If rights in personam are to be extended to third parties benefited by contracts, the rules must be altered or supplemented to include third parties. [218]

C. What could parties' intentions justify?

One of the central claims of the Law Commission was that 'the general justifying theory of contract' is 'the intention of the contracting parties'.[219]

(i) Impasse

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217 Smith, 'The Law Commission's Proposals on Privity' (n 49) 13 (emphasis added), summarizing Smith, 'In Defence' (n 16).

218 Kincaid, 'Third Parties: Rationalising a Right to Sue' (n 8), 262-63. Similarly Kincaid, 'The UK Law Commission's Privity Proposals' (n 52); Kincaid, 'Privity and Private Justice in Contract' (n 47).

219 Law Commission (n 12) para 3.1; Similarly *Darlington BC v Wiltshire* [1995] 1 WLR 68, 75 (Steyn LJ).

This drew objections of principle about the appropriate role of 'parties' intentions' in English contract law.[220]

The phrase 'parties' intentions' is misleading, as the mere coincidence of intentions in the minds of two persons is insufficient. More is required, namely, an *agreement*. The coincidence must be brought about by externally manifested communications between them, hence 'offer', and 'acceptance', indicating bilateral agreement between right-holder and duty-bearer. "Parties' intentions" might be relevant to identifying the existence and terms of a contract, but parties' intentions alone are insufficient to justify a contractual right. Other formation requirements exist. Consideration, for instance, insists upon the need for reciprocity between right-holder and duty-bearer.[221] However, law reformers explicitly deferred "deeper policy questions" about its "relaxation" for a future day on "practical" grounds.[222] This traded on the conceptual ambiguity surrounding 'privity'. Hence critics have argued that as a purely "pragmatic" and "ad hoc" reform,[223] the Act has left contract law "incoherent".[224]

To illustrate, even though the law reformers claim the third-party is not conferred a "full contractual right",[225] for remedial purposes it is fictionally treated as such,[226] creating anomalous results such as windfall damages for the third-party, discussed above.[227] These ad hoc techniques resemble the "fiction of fraud"[228] in section 2(1) of the Misrepresentation Act

220 Smith, 'In Defence' (n 16) 648; Kincaid, 'Privity Reform in England' (2000) 116 LQR 43, 46-47; Kincaid, "Private Justice in Contract' (n 47) 57 and 62; Stevens (n 52) 293.

221 eg Brian Coote 'The Essence of Contract' in R. Bigwood (ed), *Contract as Assumption: Essays on a Theme* (Hart 2010) 15-18, comparing will theory to bargain theory.

222 Law Commission (n 12) paras 6.1-6.17.

223 Smith, 'in Defence' (n 16) 661, Mitchell (n 52) 230-231

224 Stevens (n 52) 323; Mitchell (n 52) 230-31; Smith, 'in Defence' (n 16) 661; Kincaid, 'Private Justice in Contract' (n 47) 61-63.

225 Law Commission (n 12) paras 13.2, 13.4, 14.6; Smith, 'in Defence' (n 16) 660.

226 Law Commission (n 12) para 14.6; *Treitel* (n 11) [14-097].

227 Text to (n 170) onwards.

228 Patrick Atiyah and Guenter Treitel, 'Misrepresentation Act 1967' (1967) 30 MLR 369, 373.

1967.[229] They raise practical difficulties. To understand what is required remedially, say what is the default measure, what limiting rules apply, which conflicts of laws and jurisdiction rules apply, and whether time-barred et cetera, questions about the nature of the right – determined by the reasons for its existence – must arise. However, even those who support the conferment of third party 'rights' are not agreed as to their nature.[230] Calling it *'sui generis'* admits that it defies rational categorisation.[231] 'Quasi-contractual' fares no better. Like the old phrasing *quasi-ex contractu* ("as though upon a contract"), all this tells us is that it is non-contractual.[232] These 'rationalisations' do nothing to resolve the difficulty at heart: if the right is non-contractual, why should a rational legal system treat its breach as though a breach of *contract*? Why give damages *for* breach of contract, and why apply contractual limiting rules? Why tack-on a "supplementary provision" time-barring it as though a genuine contractual right, et cetera?[233] Bent classifications are dangerous.[234] Like should be treated alike. It is irrational, not to mention potentially unjust,[235] to treat as alike what is unlike.

Concerns of principle have been dismissed as peculiar anxieties of theorists. It is said that we should not "sacrifice obvious commercial convenience on the altar of doctrinal purity",[236] and that a *sui generis* third-party claim-right could be justified as a useful "will-based exception

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229 *Royscot Trust v Rogerson* [1991] 2 QB 297; [1991] 3 WLR 57; Timothy Liau, "Abolishing the fiction of fraud in the Misrepresentation Act' [2015] LMCLQ 464.

230 Peter Kincaid, 'Theoretical Issues Raised by the Privity Question' in Kincaid (ed), *Privity* (Ashgate 2001) 5. Eg Law Commission (n 12) para 14.6: not a 'full contractual right' but "closely analogous to a contract right"; Beale (n 173) 249: "a form of property"; Anthony Waters, 'Privity, Property, and Pragmatism' in Kincaid (ed), *Privity* (Ashgate 2001): 333-336: 'a form of intangible property… if we can think trust rather than contract, we may sensibly speak of the beneficiary's right, although created by the contract, as a right to the benefit so created rather than as a right to enforce the contract. A little awkward perhaps, but less so than calling it a contract right'.

231 *Treitel* (n 11) [14-119].

232 Peter Birks, Introduction to the Law of Restitution (OUP 1989) 34

233 Section 7(3). Referring to s.5 and s.8 of the Limitation Act 1980. Law Commission (n 12) paras 13.14-13.15.

234 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australia Law Review 1.

235 Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 CLJ 521, 524: '[an] indisputable proposition…. a fundamental principle of justice'.

236 Beale (n 173) 249.

to the bargain principle".[237] Similarly, that "practicality" and "pragmatism" justifies this,[238] and that the normative coherence of contract law is not too high a price to pay. Thus, the incoherence introduced appears to stem from rather ad hoc appeal to a theory of contractual rights foreign to the common law, to justify a supposedly "non-contractual" statutory claim-right. But its remedial treatment as though a full-blooded contractual right reveals an outright contradiction.

In the early days, a critic concluded by predicting that '[p]ragmatic arguments for legislative reform are not as strong as might be thought. In the long run, the principled approach is usually the most practical.'[239] Years later, given empirical evidence that parties have displayed limited appetite for the CRTPA, routinely excluding its operation wholesale,[240] we can no longer dismiss objections of principle off-hand. At the very least, the purportedly 'pragmatic' pay-offs appear questionable, so it is timely to ask whether the price was worth paying.

(ii) A resolution?

Thankfully, clarifying the object of justification points a potential way out – perhaps "parties' intentions" does indeed have justificatory role to play, but more appropriately, in relation to third-party standing. Three points can be made here.

First, extending to a third-party the standing to enforce a contractual right and correlative duty as between contractual parties is generally justified only if *both* parties agree, and not just one. Both promisor and promisee give up something under this arrangement. The promisor meets increased prospects of enforcement. The promisee gives up exclusive standing; the decision to enforce his rights is no longer entirely his. Outsider intervention undermines this

237 Ibid 247.

238 Sir Anthony Mason, 'Privity - A Rule in Search of Decent Burial?' in Kincaid (ed), *Privity* (Ashgate 2001) 98-99, 103.

239 Smith (n 16) 661-62

240 Beale (n 173) 230-31, 241, 243, 250.

valuable choice, so promisee consent must be obtained, and present.[241] Here it is helpful to distinguish negative and positive justificatory roles, a distinction Raz drew:

> "Customs duties are… justified only if those who incur them know that they incur them. But that knowledge fulfills a negative justificatory role. It provides no reason for imposing a duty. The positive reason for the duty is, let us say, the need to protect local industries or local wages. The state of mind of those who incur the duties is relevant only to remove a reason against the existence of the duties."[242]

Consent from the promisor and promisee each similarly removes an objection to third-party standing. Namely, the promisor's additional liability to be sued by another, and the promisee's loss of exclusive control over the duty owed.

Second, whether parties' agreement positively justifies third-party standing is a distinct issue.[243] Non-agreement-based justifications could also positively justify third-party enforcers. As already suggested, there could be pragmatic or regulatory grounds for extending standing, such as a policy against anti-circumvention. The value that 'agreements must be kept'[244] supports this policy. To preserve the valuable practice of agreement-keeping, it may be necessary for a legal system to facilitate enforcement of these agreements, even by other enforcers (so long as the promisee consents). In certain situations, empowering someone else with better incentives to enforce the contractual agreement may be necessary to uphold this value. Perhaps helpful analogies could be drawn to the statute-facilitated option of appointing additional trust enforcers under a trust deed in some jurisdictions, to police the trustees.[245] The notion is captured in references to the 'contractualisation' of the trust by trust scholars.[246]

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241 Discussed Chapter Six, 'Justifications'.

242 Joseph Raz, 'Promises in Morality and Law' (1981) 95 Harvard L.R. 916, 930.

243 Talk of 'default rules' obfuscates this distinction. On 'default rules' see Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 Yale LJ 87.

244 *Pacta sunt servanda;* see e.g. *AB v CD* [2014] EWCA Civ 229; [2015] 1 W.L.R. 771 at [21], [27]-[29] (Underhill LJ), [32] (Ryder LJ); *Cavendish v Makdessi* [2015] UKSC 67 at [257] (Lord Hodge).

245 David Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 LQR 96.

246 Famously John Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale LJ 625. Cf Henry Hansmann and Ugo Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis" [1998] New York University LR 47.

In this way, William Guy and John Tweddle's agreement to opt-out of private law's exclusive standing rule in *Tweddle v Atkinson* might have been given effect.

Third, it is one thing to fill an 'enforcement gap', leaving pre-existing rights and duties intact. It is a very separate thing, much more drastic, to declare a 'rights gap' as a basis for deeming or conjuring up rights and duty. it is easier to see how parties' agreement could play a justifying role for localised exceptions to the general standing rule. It is much harder – even paradoxical – to justify how persons who are not parties to an agreement can somehow acquire agreement-based rights. It is a contradiction to assert that parties can somehow by agreement, opt-out of the need for agreement to acquire an agreement-based right.

D. What could avoiding blackholes justify?

In contract law doctrine the language of 'blackholes' has surfaced as a substitute term for 'gap', or 'lacuna'. A 'blackhole' exists because 'the third-party suffers the loss but cannot sue, while the promisee who can sue suffers no loss', leaving the promisee with only a right to nominal damages against the promisor. This was thought to follow from the combined operation of the privity rule, and the method by which damages for breach of contract were quantified.[247]

Avoiding 'blackholes' is a label with pragmatic flavour, like 'commercial necessity', connoting anti-circumvention or anti-avoidance. It could justify third-party standing, which as argued, was the main defect with the 'transferred loss' doctrine. After *Swynson*, it was argued that if 'transferred loss' is a 'principle designed as a remedy for the injustice caused by privity of contract, the 'blackhole' it is intended to cover' requires flipping 'transferred loss' into the general rule, applying wherever 'the promisee has covenanted for the benefit of a third party'[248]. If adopted, then in conjunction with third-party standing this would readily achieve the reform goal of giving every intended and sufficiently clearly identified third-party beneficiary damages for his consequential losses. We conclude with two caveats.

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247 If *Robinson v Harman* 154 ER 363; (1848) 1 Ex Rep 850 is narrowly read as permitting *only* compensatory damages for consequential *loss*. Discussing: Coote, 'Performance Interest' (n 2) 540.

248 Trotter (n 145) 735. Cf *Rembrandt Enterprises* [2019] EWCA Civ 596 at [75]

(i) An incidental debate

The first is that some have however doubted whether this reform goal is even justifiable to begin with. I had assumed for the sake of argument above that it was, and that the only relevant question was how best achieve that goal. But there is a strong case for the contrary view that clearer, authoritative recognition of a promisee's right to 'performance damages' or 'substitutive damages' was and is what is truly needed to completely avoid any 'blackhole'.[249] If giving a third-party damages is an aim with inadequate justification, then there never was a problem that needed fixing in the first place. Resolving this dispute here would take us too far afield. Fortunately, we can remain comfortably agnostic. Whichever the superior position, the central claims of this chapter would be made out: privity's standing aspect ought to have been better distinguished from its (rights to) damages aspect.

(ii) Language

Second and finally, a caution must be sounded about the language of 'blackhole', as the modern term for a lacuna.[250] The need to avoid 'blackholes' was raised as justification for third-party claim-rights.[251] The orthodox justification for 'transferred loss' rests upon avoiding a 'blackhole'.[252] In *St Martins*, it was precisely to avoid a 'blackhole' of nominal damages – "so unjust a result that the law cannot tolerate it."[253] – that the House of Lords discussed the broader and narrower grounds as routes to substantial damages against the contract-breaker.[254]

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249 Eg Brian Coote, 'The performance interest, Panatown, and the problem of loss' (2001) 117 LQR 81; Stevens (n 52) 297-302

250 Nicholas Davidson, 'The Law of Black Holes?' (2006) 22(1) Professional Negligence 53.

251 Law Commission (n 12) paras 3.3-3.4.

252 *Swynson* [2017] UKSC 32 [16] (Lord Sumption), [104] (Lord Neuberger); *St Martins* [1994] 1 AC 85, 114-115 (Lord Browne-Wilkinson).

253 [1994] 1 AC 85, 97 (Lord Griffiths).

254 Ibid, 109 (Lord Browne-Wilkinson).

To progress on this front, 'blackhole' language may be better abandoned. It is only a placeholder word. *Why* a lacuna exists must be articulated. *Rembrandt Enterprises*[255] reveals this difficulty. After denying the supplier's 'transferred loss' claim, Coulson LJ acknowledged that it could well be argued both ways whether there is "the necessary blackhole for these purposes".[256] He prescinded from deciding this sub-issue, correctly concluding that 'the position is far from clear-cut'.[257] There is a risk that the debate as to the relative merits of the 'narrow' versus 'broad' ground in avoiding blackholes is being conducted at cross-purposes. The existing disagreement on how to avoid blackholes may reflect different presuppositions about why a 'blackhole' exists.

There are at least two types of 'blackholes'. Those who believe the third-party should be given damages appear to be subscribing to a loss-based version, focussing on the incidence of consequential losses flowing from breach. The destination of damages matters on this version – they must be directed to the third-party. Paying damages to the promisee is not enough. This is most explicit in Lord Clyde's leading majority judgement in *Panatown*.[258] Hints appear in *St Martins*.[259] Quoting Lord Diplock, Lord Browne-Wilkinson applied the *Albazero* exception, which he thought 'would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.'[260]

Contrast a second defendant-focussed version, Lord Keith's original formulation of a 'blackhole'. His concern was that 'the claim to damages would disappear… into some legal black hole, so that the wrongdoer escaped scot-free',[261] breaching 'with impunity'.[262] This may

255 [2019] EWCA Civ 596 at [79].

256 Ibid at [79].

257 Ibid at [79].

258 [2001] 1 AC 518, 535.

259 [1994] 1 AC 85, 114.

260 [1977] AC 774, 847.

261 *G.U.S. Property Management v Littlewoods Mail Order Stores* (1982) SLT 533, 538 (emphasis added).

262 E.g. *Panatown* [2001] 1 A.C. 518, 546 (Lord Goff).

have been driven by a sense that if one owes a duty, one ought not be able to discharge that duty simply by breaching it; a duty to pay substantial damages must survive the breach. It does not appear to matter whom damages are paid to, only that they are paid by him. There appears no special reason, beyond convenience,[263] that the third-party is singled out as recipient of damages. Compensatory damages are not the only way to achieve this. Why not punitive? Or gain-based? Or perhaps neither? If the promisee had a more clearly recognised right to substantial 'performance-damages'[264], this latter type of blackhole would not exist.

VIII. CONCLUSION

To paraphrase Einstein; everything should be made as simple as possible, but no simpler. It matters for the rational development of contract law doctrine that we distinguish standing from rights, as separate concepts. Justifying reform of 'fundamental' rules is no easy task. Neglecting distinctions between fundamental legal concepts compounds the difficulty.

Had we observed these conceptual distinctions, it might have been more readily apparent that 'privity' was an ambiguous cluster, of which only one aspect is a general standing rule, implicitly embedded within privity of contract. Alerted to this underlying source of complexity, we might have achieved cleaner separation of the distinct issues at stake, avoiding their running together under a broad umbrella. Confusion and counter-productive dispute might have perhaps been averted.

We might even have sailed down alternate waters – third-party standing, a less drastic route to similar objectives. Anomalous results produced by the addition of free-standing or 'parasitic' third-party rights might have been cleanly sidestepped, and less violence done to accepted contract law principles, preserving its normative coherence. Remedial complexity could have been avoided, or at least its case-law development not prematurely stultified. Indeed, it was argued that four key justifications mooted for privity reform in contract law

263 Davidson (n 250) at 57.

264 Friedmann (n 2); Stevens (n 2); Pearce and Halson (n 2).

might have in fact been more consonantly treated as justifications for extending standing to third-parties. Put together, these reasons present a good case for the view that third-party standing could justifiably uphold a central value of contract law – that 'agreements must be kept'. The ship might have left the dock, but it is never too late to revise course and make amendments.[265]

To briefly foreshadow what comes next, the next two chapters are aimed primarily at demonstrating the doctrinal importance of distinguishing standing and rights for unjust enrichment law and tort law. The possibility of generalising beyond contract law to articulate broader conditions which if met, could help justify third-party powers to enforce rights to restitution or tort rights as well, will be dealt with after, in Chapter Six.

265 Eg Singapore has a Contracts (Rights of Third Parties) Act 2002, in pari materia to the English 1999 Act. There is precedent for this practice of refining and updating private law legislation in Singapore. In 2014, Singapore amended its Frustrated Contracts Act, previously in pari materia to the UK Frustrated Contracts Act 1943, in an attempt to improve and clarify its wording.

4

RESTITUTION FOR UNJUST ENRICHMENT

> The first inquiry is directed to discovering what the English law of unjust enrichment might understand by the requirement of 'privity' or 'directness' to which it is supposed to subscribe. Who counts as a direct recipient or, in the contractual language, who satisfies the requirement of privity? This inquiry will identify the immediate enrichee. No leapfrogging question can arise till that job is done. The second inquiry then asks when, if ever, English law allows a claimant to leapfrog the immediate enrichee in order to sue someone who received from or through him – a remoter recipient – at his expense… The claimant and defendant in an action in unjust enrichment must necessarily be linked by that phrase. It is by bringing himself within that phrase that the claimant connects himself to the enrichment in question and identifies himself as having a prima facie title to sue.
> - Peter Birks, '"At the Expense of the Claimant": Direct and Indirect Enrichment in English Law' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment* (CUP 2002) 495.

> [T]he other ingredients of the cause of action, enrichment and injustice, are widely understood in unilateral terms. We can ask whether the defendant has been enriched without examining the claimant's acts in detail, and unilateral mistakes of the claimant (for instance) are generally held sufficient for liability. So if there is to be a connection between the parties such that the defendant can be held responsible to the claimant, it seems that it must be at the "at the expense of" stage.
> - Frederick Wilmot-Smith, 'Taxing Questions' (2015) 131 LQR 531, 534.

I. INTRODUCTION

This chapter demonstrates how distinguishing conceptually between rights to restitution versus the standing (power) to enforce them resolves a long-standing controversy within the law of restitution for unjust enrichment: the 'special equitable action'[1] in *Re Diplock.*[2]

1 *Re Diplock* [1947] Ch 716, 733 (Wynn-Parry J): 'special principle of equity relating to the recovery of a trust fund by one cestui que trust from another, where it has been wrongly dealt with by the trustee'; Simon Whittaker, 'An Historical Perspective to the Special Equitable Action in Re Diplock' (1983) 4 Journal of Legal History 3; Tim Akkouh and Sarah Worthington, 'Re Diplock (1948)' in C. Mitchell and P. Mitchell (eds), Landmark *Cases in the Law of Restitution* (Hart 2006).

2 *Re Diplock* [1948] Ch 465 (CA), on appeal from [1947] Ch 716 (Ch), resolved on appeal as *Ministry of Health v Simpson* [1951] AC 251 (HL). Cited subsequently as 'Re Diplock' in eg *GL Baker v Medway Building & Supplies* [1958] 1 WLR 1216 (CA); *Butler v Broadhead* [1975] Ch 97; *In Re J Leslie Engineers* [1976] 1 WLR 292 (Ch).

Section II sets the stage, explaining how recent legal developments pose a serious challenge to restitution orthodoxy (subsequently 'orthodoxy'), which draws an analogy to the doctrine of 'knowing (or unconscionable) receipt' in trust law. Section III explores three ways the orthodoxy might meet that challenge, concluding that all are unsuccessful. Section IV suggests a better solution to the challenge. It puts forth a 'two-party' analysis of *Re Diplock*, premised upon the argued-for conceptual distinction, which better captures salient features of the special action, explaining (i) the order and pleadings, (ii) the tracing result in the case, (iii) why the action was available to unpaid/underpaid personal creditors of the deceased (pure debt claimants). It also (iv) resolves a paradox created by the orthodox view, and (v) rationalises the infamous 'exhaustion' precondition to enforcement.

Section V offers an explanation as to why we were led into error. A misleading analogy was drawn because we had conceptually conflated rights to restitution with standing. To guide future development of this area of law, a more helpful analogy with the *Vandepitte* procedure is proposed. It better explains why *Re Diplock* is exceptional; on the better view, the case involved an exception to the general standing rule in private law, which also applies within the law of restitution for unjust enrichment. Section VI concludes.

II. A NEW CHALLENGE: *ITC* AND 'AT THE EXPENSE OF ANOTHER'

Re Diplock was a 'monumental judgment'.[3] On the restitution orthodoxy it is cast as a beachhead,[4] a key plank[5] in a wider argument aimed at reforming 'recipient liability' for assets dissipated in breach of trust. On this view, in which *Re Diplock* is explained as a 'three-party' case and analogised to knowing receipt in trust law, a much more expansive approach is taken to 'enrichment at the expense of', requiring only a loose nexus between right-holder and duty-bearer in unjust enrichment law.

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3 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19; [2012] 2 AC 337 [57] (Lord Walker).

4 Lionel Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 LQR 412, 437.

5 Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 430.

This wide approach conflicts with the recent landmark UKSC case of *ITC,*[6] which has held that a tighter nexus is generally required, reinstituting a 'direct transfer' (or its 'legal equivalents')[7] rule. However, despite the extensive reasoning of *ITC*, *Re Diplock* was not mentioned at all. The stakes are high. If we cannot reconcile these two apex cases, we may be forced to admit either that *Re Diplock* was wrongly decided all along, or that *ITC* is wrong. Both are drastic steps which must cause us pause. The significance of each is explained in turn.

A. *Re Diplock*

In 1936 Caleb Diplock died aged ninety-five, leaving behind over a substantial fortune of half-a-million pounds.[8] He had had a serious heart attack twenty years before, prompting him to draw up his will.[9] He was a miser who hated his relatives, and sought to disinherit them.[10] He told his lawyer he wanted his money to go to charity, leaving it to his executors to choose the most deserving charities. Clause 6 of the will stated that Caleb's residuary estate was to be divided among 'such charitable institutions or other charitable or benevolent object or objects as his executors might in their absolute discretion direct'.[11] It was badly drafted, springing a series of complex litigation going up twice to the House of Lords, spanning fifteen years.[12]

Between 1936 to 1938 the executors had, in accordance with the clause, distributed most of Caleb's estate through cheques to a-hundred-and-thirty-nine charitable institutions – mainly hospitals.[13] When one of Caleb's next-of-kin – his cousin John Henry Diplock – learned about

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6 [2017] UKSC 29, [2017] 2 WLR 1200.

7 Ibid [48], [50].

8 CE Morris, 'The Testament of Caleb Diplock' [1948] South African Law Journal 578.

9 Ibid 578-79.

10 Ibid 578.

11 *Re Diplock* [1947] Ch 716, 718.

12 First *Chichester Diocesan Fund v Simpson* [1944] AC 341 (HL), then *Ministry of Health v Simpson* [1951] AC 251 (HL).

13 *Re Diplock* [1948] Ch 465 (CA), 470.

Caleb's death and will in late 1939, he informed the executors of his intention to challenge its validity.[14] In 1940 he initiated actions against Caleb's executors, the charitable institutions, and the Attorney-General.[15] He sought to first, invalidate the clause so the residuary estate would fall into intestacy, and second, claw distributed funds back into the estate, for re-administration by the judicial trustee[16] under the Administration of Estates Act 1925.[17]

In *Chichester Diocesan Fund v Simpson* the House of Lords found in John's favour, declaring the clause void.[18] This meant the executors had operated under a mistake of law, improperly distributing the residuary estate to charitable institutions. By that time the executors, themselves being sued by the next-of-kin in *devastatit* for misapplying the estate,[19] had been displaced and a judicial trustee appointed. Soon after, this claim was compromised for £15,000,[20] a sum paid back to the judicial trustee to be put back into the estate.[21] The compromise was approved by court order.[22]

The matter quickly gained publicity.[23] 'A numerous body'[24] of Caleb's next-of-kin, eventually totalling forty-eight persons',[25] joined the clawback attempt. Eighteen more actions were filed and heard together at trial.[26] The next-of-kins' personal claim for restitution from

14 *Diplock* (HC) (n 11) 719. Morris (n 8) 579.

15 *Diplock* (HC) (n 11) 719-20.

16 Who replaced the executors in 1943: see *Diplock* (HC) (n 11) 720; *Diplock* (CA) (n 13) 472; Further David Hayton, Paul Matthews, and Charles Mitchell (eds), *Underhill and Hayton: Law of Trusts and Trustees* (19th edn, LexisNexis 2016) [74.3].

17 S 46(1)-(2).

18 [1944] AC 341 (HL). Further Lionel Smith, 'What Is Left of the Non-Delegation Principle?' in Birke Haecker and Charles Mitchell (eds), *Current Issues in* Succession *Law* (Hart 2016) discussing three possible reasons for void-ness.

19 *Diplock* (CA) (n 13), 475, 504.

20 Incidentally the very same amount Caleb Diplock had willed them.

21 *Diplock* (CA) (n 13), 474-75.

22 *Diplock* (HC) (n 11), 720.

23 Morris (n 8).

24 *Ministry of Health v Simpson* [1951] AC 251 (HL), 277.

25 *Diplock* (CA) (n 13), 506.

26 Ibid.

the charities failed before the trial judge Wynn-Parry J.[27] But they succeeded on appeal, Lord Greene MR delivering the sole judgment.[28] Their claim was ultimately upheld at the House of Lords.[29]

These 'landmark' judgments are notoriously difficult. For now we highlight just one aspect, the linchpin for unjust enrichment lawyers. The innocent charities were ordered to repay the estate regardless of their lack of fault. Both appellate courts found a strict duty of restitution. Lord Greene MR held:

> 'as regards the conscience of the defendant upon which in this as in other jurisdictions equity is said to act, it is prima facie at least a sufficient circumstance that the defendant, as events have proved, has received some share of the estate to which he was not entitled. "A party" … "claiming under such circumstances has no great reason to complain that he is called upon to replace what he has received against his right." [30]

On appeal the charities protested that they had received in good faith without knowledge of any flaw in the bequest. There was no room for a strict approach in equity, they pleaded.[31] This failed. Lord Simonds retorted:

> …I find little help in such generalities… the Court of Chancery… established the rule of equity which I have described and this rule did not excuse the wrongly paid legatee from **repayment** because he had spent what he had been wrongly paid.[32]

To stress an often-overlooked point, the pleadings and relief sought was not that the distributed sums be directly paid to the next-of-kin, who had initiated suit. Instead it was that the sums should be *repaid* back to their source, the estate from whence the payment had

27 [1947] Ch 716 (Ch).

28 [1948] Ch 465 (CA).

29 [1951] AC 251 (HL).

30 *Diplock* (CA) (n 13), 503.

31 *Ministry of Health v Simpson* (n 24) 276.

32 Ibid. (emphasis added).

come.[33] On which more below. The in rem attempt to 'follow' into the hospitals' bank accounts, and to 'trace' their subsequent use of it, is similarly left to a later discussion.[34]

(i) Significance

On the orthodox view however, the charities' unjust enrichment is said to be at the expense of the next-of-kin, rather than the estate. *Re Diplock* is classified and explained as a 'three-party' case, involving a right to restitution held by the next-of-kin against the charities – indirect recipients. While strictly concerning 'misdirection from a deceased's estate'[35], *Re Diplock* has been deployed as crucial House of Lords authority in the debate over 'knowing' or 'unconscionable receipt' of trust assets, and primed to 'become the lead player'.[36] It is held out as a case of milestone significance, supporting a more expansive approach to strict restitution in 'three-party' scenarios where funds are misdirected from a trust.[37]

The argument was first made by Peter Birks.[38] His key move was to juxtapose *Re Diplock* alongside the trust cases following *Re Montagu* requiring knowing (or unconscionable) receipt.[39] 'According to equity (leaving Re Diplock aside) the volunteer will incur no personal liability unless at fault'.[40] Thus compared, 'the confusion of approaches is a discredit to the

33 *Ministry of Health v Simpson* (n 24) 277 (Lord Simonds); *Diplock* (CA) (n 13), 505-06 (Lord Greene MR); *Diplock* (HC) (n 11) 721 (Wynn-Parry J).

34 *Diplock* (HC) (n 11) 743 onwards; *Diplock* (CA) (n 13) 517 onwards.

35 Peter Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] LMCLQ 296; Peter Birks, 'Receipt' in A. Pretto and Peter Birks (eds), *Breach of Trust* (Hart 2002).

36 Burrows, *Restitution* (n 5) 426.

37 Eg Charles Mitchell, Stephen Watterson and Paul Mitchell (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2017) [8-132].

38 (n 35).

39 Following *Re Montagu* [1987] Ch 264, cases like *Belmont Finance Corp v Williams Furniture Ltd* (No.2) [1980] 1 All ER 393 (CA) and *BCCI v Akindele* [2001] Ch 437; [2000] 3 WLR 1423 introduced broad notions of 'unconscionability', unhelpfully further confusing the precise level of fault required by the recipient.

40 Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australia Law Review 1, 72.

law.'[41] Once this analogy was drawn, the 'inconsistency within the Chancery cases'[42] appeared rationally intolerable. Birks contended that the trusts cases were 'anomalous';[43] 'whatever the historical and analytical peculiarities of the *Re Diplock* claim… The only acceptable thing to do is to overwhelm the anomaly by extending to beneficiaries under a trust the same kind of claim as is available both to legal owners and to beneficiaries under a will or intestacy.'[44] If Caleb Diplock's next-of-kin had strict personal rights to restitution against the hospitals, all the more so should beneficiaries under an inter vivos trust have an analogously strict personal right to restitution against recipients of trust assets. The traditional learning of trust law requiring at least some form of fault was confused, wrong, and therefore ought to be reformed.

(ii) From estates to trusts

On this approach *Re Montagu's Settlement Trusts* might be condemned.[45] The case involved a 'careless' but 'honest muddle'.[46] The tenth Duke of Manchester had received and sold off a number of chattels (including furniture, plates, and pictures) that were carelessly transferred to him by the trustees in breach of trust. The question was whether the eleventh Duke could hold him to account as 'constructive trustee' for their value.[47] Going through the classic authorities, including the *Baden* case,[48] Megarry VC held that 'in a case of the knowing receipt of trust property, the basic question is whether the conscience of the recipient is sufficiently affected to justify the imposition of such a trust', a question of 'want of probity' primarily depending 'on the knowledge of the recipient'.[49] Since the tenth Duke did not have any

41 Ibid.

42 Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 157.

43 Ibid.

44 Birks, 'Receipt' (n 35) 236-37 (emphasis added)

45 [1987] Ch 264. Birks, 'Receipt' (n 35) 239.

46 Ibid 275 (Megarry VC).

47 Ibid 276.

48 *Baden, Delvaux and Lecuit v. Société General pour Favoriser le Développement du Commerce et de l'industrie en France S.A.* [1983] BCLC 325.

49 (n 46) 285.

knowledge of the breach of trust in receiving and selling the chattels whatsoever, the claim failed.[50] On the orthodoxy, the eleventh Duke should have had a right to restitution for unjust enrichment against the tenth Duke regardless of his lack of fault or knowledge, subject to proof of a possible change of position defence.

Faced with resistance from the Court of Appeal in *BCCI v Akindele,* which thought the strict approach 'commercially unworkable',[51] the claim was toned down.[52] Rather than replacing knowing receipt, a strict right to restitution would co-exist alongside it, as an independent concurrent right for unjust enrichment, subject to a change of position defence.[53] Where trust funds were misdirected in breach of trust, two rights would arise against the recipient, not just one.[54] This too is the current stance taken by the editors of *Goff and Jones*,[55] who note that 'authoritative support for the imposition of strict restitutionary liability, other than the *Re Diplock* liability, is hard to find. Indeed, the dominant assumption is that, outside of the *Re Diplock* line of cases, the only personal liability that a recipient of misapplied assets can incur is a fault-based equitable liability for "knowing receipt" – at least in the sphere of misapplied trust assets.'[56]

It has therefore been remarked that proponents of this approach view *Re Diplock* as a 'kind of beachhead',[57] a fortress from which the assault is launched. Birks' argument attained great traction, quickly becoming restitution orthodoxy. Among its proponents are Professors

50 (n 46) 271, 286

51 (n 39) 456.

52 Birks, 'Receipt' (n 35) 223-24, 239.

53 Birks, Receipt' (n 35); Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] New Zealand Law Review 623, 651.

54 Ibid.

55 (n 37) [8-137], [8-197]. Going so far as to disavow as 'wrong' the stronger claim to base knowing receipt on unjust enrichment: [8-201]. See further, Mitchell and Watterson (n 60) 154-58.

56 [8-127]. Generally see [8-120]-[8-137].

57 Smith, 'Structure' (n 4) 437.

Burrows,[58] Edelman, and Bant,[59] and the current editors of *Goff & Jones*.[60] Eminent judges have supported it, including Lords Millett,[61] Hoffmann,[62] Walker,[63] and particularly Lord Nicholls, who argued it was a 'strong decision' which 'cannot be brushed aside as an anomaly',[64] advocating another 'landmark' decision 'fashioning the *Diplock* principle into an improved remedy of general application'.[65]

B. *Investment Trust Companies v HMRC*

Today a new challenge is posed. The landmark UKSC case *Investment Trust Companies v HMRC* renders the 'three-party' explanation of *Re Diplock* increasingly implausible. *ITC* must be taken seriously. It was a considered and extensively reasoned unanimous judgment, and cannot be easily 'read down'.[66] It stopped a spate of contentious expansionist cases dead in its tracks,[67]

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58 Burrows, *Restitution* (n 5) 416-31. Compare Burrows, '"At the Expense of the Claimant": A Fresh Look' [2018] Restitution Law Review 167, 175-76.

59 James Edelman & Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 288. Also James Edelman, 'Marsh v Keating (1834)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006).

60 *Goff & Jones* (n 37); C. Mitchell and S. Watterson, 'Remedies for Knowing Receipt' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) 129, 136-38, 154-58.

61 *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, 194; *Dubai Aluminium Co Ltd v Salaam* [2003] UKHL 48, [2003] 2 AC 366 [87]; Lord Millett, 'Proprietary Restitution' in Degeling and Edelman, *Equity in Commercial Law* (Lawbook Co, 2005) 309, 311.

62 Lord Hoffmann, 'The Redundancy of Knowing Assistance' in P Birks (ed), *The Frontiers of Liability*, vol 1 (OUP 1989) 477-78.

63 Lord Walker, 'Dishonesty and Unconscionable Conduct in Commercial Life—Some Reflections on Accessory Liability and Knowing Receipt' (2005) 27 Sydney Law Review 187, 202.

64 Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark', *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 240; *Royal Brunei v Tan* [1995] 2 AC 378, 386: 'Different considerations apply to the two heads of liability. Recipient liability is restitution-based; accessory liability is not.'

65 Ibid 244-45.

66 Eg *Rice v Great Yarmouth BC* [2003] TCLR 1 (CA), cf *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. See *Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services* [2009] 3 SLR 925 (SGCA) [36].

67 *Relfo Ltd (in Liquidation) v Varsani* [2014] EWCA Civ 360; *Investment Trust Companies v HMRC* [2015] EWCA Civ 82 [42], [50], [55], [66]-[69] (Patten LJ); *Menelaou v Bank of Cyprus* [2015] UKSC 66, [2015] 3 WLR 1334 [27]-[33] (Lord Clarke).

in its wake causing the overruling of another House of Lords decision.[68] Unless we can reconcile it with *ITC, Re Diplock* risks being also overruled.

(i) Direct transfers

ITC securely reinstated the 'general rule, possibly subject to exceptions' that as a starting point, there must be a tighter nexus between duty-bearer and right-holder.[69] An 'indirect provision of a benefit' will not suffice.[70] There must be 'direct transfer', so the 'enrichment [is] directly at his expense.[71]

In *ITC* the claimants, investment trust companies, had employed fund managers to supply them investment management services. The fund managers charged them the standard rate of value-added-tax (VAT), accounting to HMRC quarterly for the net-sum of that VAT charged (output-tax), deducting VAT paid on their own supplies (input-tax).[72] This was in accord with the usual way VAT is collected. A consumer never pays the HMRC directly. VAT is a consumption tax collected indirectly, from each of the suppliers down the value chain, for their value added to the service or good. Each supplier must pay HMRC, regardless of whether its incidence is passed on to consumers, or is instead absorbed by the supplier to sell at lower prices in competition with rivals.

Because of a CJEU decision it later transpired that,[73] contrary to previous beliefs, these services were VAT-exempt.[74] The fund managers recovered from HMRC the overpaid sums to the maximum extent permitted by statute, returning them to customers.[75] However, because

68 *Sempra Metals v IRC* [2007] UKHL 34, [2008] 1 AC 561, overruled by *Prudential Assurance v HMRC* [2018] UKSC 39, [2018] 3 WLR 652.

69 *ITC* (UKSC) (n 6) [50], [59]-[60].

70 Ibid [46]-[51].

71 Ibid.

72 *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch) [40]-[46].

73 *JP Morgan Fleming Claverhouse Investment Trust Plc v HMRC* (C-363/05) [2007] E.C.R. I-5517; [2008] S.T.C. 1180.

74 *ITC* (HC) (n 72) [3]-[8].

75 s80 Value Added Tax Act 1994.

of a three-year time bar, and because the managers had deducted input-tax from sums accounted to HMRC, these fell short of the full amount the customers had paid.

Hence arose the issue: could the law of unjust enrichment let them 'leapfrog' their managers, acquiring a direct right to restitution of the remainder sum from the HMRC? As consumers, could any enrichment be said to be at their expense, even though they had only ever dealt with their managers? And HMRC had, in turn, only ever dealt with these managers?

(ii) Expansionism arrested

The trial judge, Henderson J, held that there remained a 'general requirement of direct enrichment',[76] rejecting Birks' suggestion that the 'rule and exception' might swap places.[77] The authority was too 'flimsy' to invert the general rule,[78] and he warned of 'difficulty in framing the general rule in acceptable terms'.[79]

Henderson J also rejected the applicability of a 'causation' test. '[T]here is no strict causal connection between' the payment of the VAT element in the contract price by consumers to suppliers, and the payment of VAT by suppliers to HMRC. Neither was there a 'but for' connection between the two.[80] Although it is true that VAT is a consumption tax, Henderson J warned against the 'dangers in pressing' such economic 'metaphors' too far.[81] Indeed he rejected the 'conduit metaphor', which he was 'not happy with'; there was no 'relationship of agency, or anything resembling agency'.[82] As a matter of legal rights, C's obligation to pay a sum representing chargeable VAT is purely contractual, owed only to his supplier, X.[83] The only

76 *ITC* (HC) (n 72) [67].

77 Peter Birks, "'At the Expense of the Claimant": Direct and Indirect Enrichment in English Law' in D, Johnston and R. Zimmermann (eds), *Unjustified Enrichment* (CUP 2002); *ITC* (HC) (n 72) [51]-[67].

78 Ibid [67].

79 Ibid [67].

80 *ITC* (HC) (n 72) [71].

81 Ibid [50].

82 Ibid [50].

83 Ibid [50], [71].

taxable person upon a taxable supply is the supplier, never the consumer.[84] Had the services not been tax-exempt, the supplier-X's 'primary' tax obligation to pay output-tax would be owed only to HMRC, whether or not its economic incidence was passed on via contract to the consumers C.[85]

However, Henderson J rather confusingly held that the facts merited an exception because the 'economic reality' of the VAT legislation had to be given 'due weight',[86] and thus the consumers had direct rights to restitution from HMRC for its unjust enrichment at their expense.[87] The Court of Appeal upheld this.

In unanimous judgment the UKSC overruled the lower courts. Their holdings were inconsistent with the 'direct transfer' rule.[88] The 'two transfers cannot be collapsed into a single transfer of value from the lead claimants to the commissioners'.[89] Furthermore, *ITC* could not be regarded as 'exceptional'.[90] 'The fact that, as a matter of economic or commercial reality, the lead claimants bore the cost of the undue tax paid by the managers to the commissioners did not in itself entitle them to restitution from the commissioners.'[91]

The UKSC found the invocation of 'economic reality' by Henderson J as a deus ex machina perplexing.[92] This seems right. Henderson J did not apply the very test he had set out; 'economic reality' was not one of his four-factors for identifying exceptions to the 'direct transfer' rule.[93] Further, it seemed internally inconsistent with the rest of his reasoning.

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84 Ibid.

85 Ibid.

86 Ibid [72].

87 Leaving aside the added complication of whether the VAT statute would exclude any such non-statutory right to restitution.

88 *ITC* (UKSC) (n 6) [71].

89 Ibid [71].

90 Ibid [32],[35].

91 Ibid [72]. See also [32], [59]-[60].

92 *ITC* (HC) (n 72) [65], [72]. Adopting the language of *Filby v Mortgage Express (No. 2) Ltd* [2004] EWCA Civ 759 [46], [50], [62] (May LJ).

93 Compare *ITC* (HC) (n 72) [68] with [72].

ITC (HC) had initiated a trend of expansionist cases in the intervening period,[94] culminating in the widely criticised case of *Menelaou*,[95] where the 'economic reality' approach had effectively swallowed up any rule. There, Lord Clarke had held that a 'direct' connection between the claimant-bank and the defendant-Melissa Menelaou 'while sufficient, is not in [their] view necessary because it would be too rigid… whether a particular enrichment is at the expense of the claimant depends on the facts of the case',[96] deprecating alternative rule-based approaches as 'pure formalism'.[97] This was the high-watermark of 'economic reality', arrested in *ITC* (UKSC).

ITC came close to, but stopped just short of overruling *Menelaou*. So a slight difficulty remains. Lord Reed tried to rationalise *Menelaou* as an exceptional instance of a 'coordinated transaction'… 'forming a single scheme or transaction'. [98] This rescue attempt may however be doubted. It could be applied to the facts of *ITC*, and yet in *ITC* the claim failed. It is moreover vulnerable to the same critique to which 'economic reality' was subject, that this 'somewhat fuzzy concept… is difficult to apply with any rigour or certainty in this context'.[99]

(iii) The aftermath

94 (n 67)

95 See eg Peter Watts 'Unjust Enrichment' – The Potion that Induces Well-Meaning Sloppiness of Thought' [2016] 69 CLP 289; William Swadling, 'In Defence of Formalism' in James Goudkamp and Andrew Robertson (eds), *Form and Substance in the Law of Obligations* (Hart 2019); Graham Virgo, 'Restitution of Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*' (January 28, 2016). University of Cambridge Faculty of Law Research Paper No. 10/2016.

96 (n 67) [27] (Clarke).

97 (n 67) [26], [33] (Lord Clarke), [99] (Lord Neuberger). Citing *Banque Financière de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL), 227 (Lord Steyn).

98 (n 6) [61], [63]-[66].

99 (n 6) [59].

Soon after, the UKSC in *Prudential Assurance v HMRC*[100] overruled *Sempra Metals*,[101] a difficult decision of the House of Lords, as inconsistent with the 'direct transfer' rule reinstituted by *ITC*.

Sempra concerned the recoverability of compound interest on money paid as advance corporation tax contrary to EC law. Part of the difficulty lay in the confused way the case was pleaded. The amended writ read: 'Restitution of, and/or compensation for, and/or compensation for the loss of use of, monies paid pursuant to unlawful demands by [the revenue] and/or under a mistake of law.'[102] So even though the interest claim in *Sempra* succeeded, it was not clear exactly on what basis one could understand the decision – whether loss-based, gain-based, or neither.

In *Prudential,* a case with similar facts, a unanimous panel denied Prudential Assurance Ltd's attempt to claim compound interest from HMRC in restitution for alleged unjust enrichment at its expense, overruling *Sempra.* Referring to *ITC* as a 'development of greatest significance',[103] providing 'a more detailed analysis of the "at the expense of" question',[104] the UKSC said that 'there have been some significant developments in the law of unjust enrichment', and therefore the court had to analyse 'the reasoning in *Sempra Metals*, [which] unavoidably requires the court to consider whether that reasoning is consistent with the approach which it has more recently adopted, so as to form part of a coherent body of law'.[105]

The claim was disallowed because a necessary element – a direct transfer of the opportunity to use the money – was absent:

> If on 1 April the claimant mistakenly pays the defendant £1,000, with the result that the defendant is on that date obliged to repay the claimant £1,000, the defendant's repayment of £1,000 on that date will effect complete restitution. Restitution of

100 (n 68) [79]. Vindicating Lord Scott's dissent in *Sempra Metals* (n 68) [145]-[146].

101 Ibid. For extensive analysis of difficulties see eg A. Burrows 'Interest' in S. Worthington and G. Virgo (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017).

102 Ibid [143].

103 (n 68) [67]

104 Ibid.

105 Ibid [40].

> the amount mistakenly paid in itself restores to the claimant the opportunity to use the money: there is no additional amount due in restitution. That is because there has been only one direct transfer of value, namely the payment of the £1,000. The opportunity to use the money mistakenly paid can arise as a consequence of that transfer, but a causal link is not sufficient to constitute a further, independent, transfer of value. Contrary to the analysis of Lord Nicholls in *Sempra Metals* [2008] AC 561, para 102, the recipient's possession of the money mistakenly paid to him, and his consequent opportunity to use it, is not a distinct and additional transfer of value.[106]

Presumably, *Re Diplock* would be subject to the same consistency check against *ITC*, should a case with similar facts arise.

III. OLD WAYS OF MEETING THE CHALLENGE

Could the orthodox analysis of *Re Diplock* overcome this challenge? This section attempts to consider the best case for the restitution orthodoxy, steel-manning their position.[107] It examines three arguments to which one might resort, to maintain an explanation of *Re Diplock* as analogous to a trust-beneficiary's knowing receipt claim. It is concluded that they all run into difficulties, which a superior 'two-party' view, introduced and defended in Section IV, can avoid.

A. An exception?

It might be straightforwardly claimed that *Re Diplock* is just a 'genuine exception' to *ITC*, and hence no clash exists. We should hesitate from so stipulating, as it could be self-defeating, providing more fodder for sceptics.

Without a further good justification for such an exception, this 'fix' might prove dangerously ad hoc. For a taxonomical project like unjust enrichment, this cuts deep. The whole point of unjust enrichment is that it is a useful and distinct general 'causative event', or

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106 Ibid [71]; R. Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574; cf Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 CLJ 521.

107 The opposite of setting up a 'straw-man', ie the caricaturing of an opposing viewpoint. Coined by Daniel Dennett, 'Intuition Pumps and other tools for thinking' (Penguin Books, 2014). Also known as 'Rapaport's rules', after game theorist Anatol Rapoport.

source of legal obligations, alongside tort and contract. Ad hoc exceptions to the general framework just to fit in isolated cases would threaten the generality and integrity of the framework. If under this 'refined' analysis, *Re Diplock* still turns out to be a *sui generis* claim, we end up with the motivating problem we began with. This would only cause more doubt about the adequacy of unjust enrichment's 'general organising role', one of its main analytic pay-offs.[108]

To be clear, *ITC* did not say no exceptions to 'direct transfers' could exist. However we might expect any such exception to be rigorously defined and justified, or face potential overruling. The 'purpose of the law of unjust enrichment',[109] it was said, is 'to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions.'[110] Emphasising that its justifying reason would inform and constrain the shape of any rights thereby arising, Lord Reed said that '[t]he nature of the various legal requirements indicated by the "at the expense of" question follows from that principle of corrective justice.'[111]

Thus, even though the 'possibility of genuine exceptions' was acknowledged,[112] *ITC* insisted that putative exceptions in past cases were 'more apparent than real'.[113] Most situations involving agency,[114] shams,[115] or tracing 'an interest' in 'property',[116] were reconcilable with the direct transfer rule, so that 'for the purposes of the rule, the law treats [it] as equivalent to a direct transfer, in the sense that there is no substantive or real difference'.[117]

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108 Birks 'At the Expense' (n 77) 496.

109 *ITC* (UKSC) (n 6) [42].

110 Ibid [40]. Cited and applied in *Prudential* [2018] UKSC 39, [2018] 3 WLR 652 [68].

111 *ITC* (UKSC) (n 6)[43].

112 Ibid [50].

113 Ibid [47],[50].

114 Ibid [48], [51].

115 Ibid.

116 Ibid [51].

117 Ibid [50].

By contrast, the three-party situation where a 'claimant discharges a debt owed by the defendant to a third party [X]' would constitute 'a different type of situation', and there – 'the remedy differs from restitution, in that it does not have the effect of restoring the parties to their pre-transfer positions'[118] Similarly, no right to restitution would exist for 'a claimant who makes a mistaken payment to a third party, who in consequence makes a gift to the defendant out of property in which the claimant has no interest, and into which he is unable to trace.'[119]

Could it claimed that *Re Diplock* is only an 'apparent exception', so even though it misleadingly appears as if a 'three-party' case, it is 'legally equivalent'[120] to a 'two-party' case involving a direct transfer? Two strategies, 'interceptive subtraction' and 'tracing and title', are examined.

B. Interceptive subtraction

Birks once sought to accommodate *Re Diplock* by expanding the sense in which 'at the expense of' required a 'subtraction' from the right-holder (as opposed to a civil wrong).[121] The key idea was that one (D) could subtract from another (C) by intercepting *en route* a payment from someone else (X), a payment which would have otherwise been 'certainly' due to him (C).[122] So, if intending a gift of your wallet to me, you throw it towards me from across one end of a

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118 Ibid [49]. See eg Timothy Liau & Rachel Leow, 'Proprietary Restitution' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Unjust Enrichment and Restitution Handbook* (Edward Elgar Publishing 2020).

119 Ibid [51]. Citing *Relfo* (n 67) [78] (Arden LJ), [114] (Floyd LJ).

120 (n 6) [48], [50].

121 Nb this was what *ITC* (UKSC) was driving at when they said 'loss' was required. This unfortunate terminology is misleading and should be abandoned. See [45]: 'It should be emphasised that there need not be a loss in the same sense as in the law of damages: restitution is not a compensatory remedy. For that reason, some commentators have preferred to use different terms, referring for example to a subtraction from, or diminution in, the claimant's wealth, or simply to a transfer of value. But the word "loss" is used in the authorities, and it is perfectly apposite, provided it is understood that it does not bear the same meaning as in the law of damages. The loss to the claimant may, for example, be incurred through the gratuitous provision of services which could otherwise have been provided for reward, where there was no intention of donation'.

122 Birks, *An Introduction to the Law of Restitution* (OUP 1989) 138, 143. Whether factually or legally – see Lionel Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 OJLS 481, 486-87

room with deadly accuracy, a stranger might grab it in mid-air, intercepting and diverting its trajectory. That stranger would be enriched at my expense, rather than at yours.

Through 'interceptive subtraction', Birks thought C could 'leapfrog' the payor (X), reducing a 'three-party situation' into a 'two-party' one.[123] He stuck to this in his last book:

> "If …. the money [had] been paid out under the invalid will, the mispaid beneficiaries would have been held to have intercepted money destined to those who were indisputably entitled as a matter of law, as in *Ministry of Health v Simpson*. There, failing to notice the nullity of the bequest, the executors of Caleb Diplock had paid to charities sums which ought as a matter of law to have gone to the next of kin. The next of kin recovered directly from the charities. The money which the charities received was, as a matter of law, destined to go to them."[124]

It seems quite a stretch to say the money was 'destined' for the next-of-kin. It was only the poor drafting of Caleb Diplock's will that caused its unexpected invalidation.[125] The next-of-kin got their hands on Caleb Diplock's inheritance almost by sheer luck, by the estate falling unexpectedly into intestacy. Caleb Diplock was a well-known miser who despised his relatives, and would have rather had his fortune go to charity than them.[126] Given the importance of 'certainty' to establishing 'interceptive subtraction',[127] this flaw may prove fatal. The intuition behind 'interceptive subtraction' does not quite so cleanly translate from 'factual' to 'legal certainty'.[128]

One problem with 'interceptive subtraction' was always in its absence of authoritative support.[129] Given *ITC*'s strong insistence on 'direct transfers', this looks unlikely to be forthcoming. In light of recent important developments in the subject,[130] Burrows has criticised

123 Birks, *Introduction* (n 122) 138.

124 Birks, *Unjust Enrichment* (n 42) 76.

125 *Chichester Diocesan Fund v Simpson* (n 18).

126 Morris (n 8) 578.

127 Smith, 'Critique' (n 122) 485-86.

128 (n 122).

129 Smith, 'Critique' (n 122). See also Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 51-52, agreeing.

130 Watts (n 95); Burrows, 'Fresh Look' (n 58); Stevens (n 106); Lionel Smith, 'Restitution: A New Start?' in P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart 2018); cf Burrows, 'In Defence' (n 106).

'interceptive subtraction' as 'an unacceptable extension'.[131] Birks' concession in 2002 appears particularly relevant here:

> It is a difficult question, and one of great importance to the common law, whether rationality ultimately requires this distinction between enrichment by performance and enrichment in other modes. Suffice it to say here that, without any equivalent text on which to hang it, English law has not so far found it necessary to draw any such line. If and so long as it is not insisted upon, the discussion of the essential link between the claimant and the defendant must focus immediately on 'at the expense of'. It is certainly true, however, that in the discussion a line similar but not identical to that between performance and other modes may increasingly assert itself in English law, namely the line between ordinary and interceptive subtractions.[132]

C. Tracing or following title

The 'title and tracing'[133] route is also unpromising. If it did work, it could reduce *Re Diplock* from a three-party situation involving the next-of-kin, estate and its executors, and the recipient-hospitals, into a two-party case involving only the next-of-kin having direct rights to restitution from the hospitals.

It is worth briefly clarifying how 'title and tracing' is only an 'apparent exception', and thus consistent with *ITC*'s pronouncement on the necessity of a direct transfer. Birks described tracing as an 'exercise of identifying the surviving enrichment', its 'product', or 'some substituted form'.[134]

> If C drops a £50 note and X picks it up and gives it to D, C can sue D leapfrogging X…. The truth underlying the "exception" may be that it is not an exception at all but rather a reflection of the fact that D has exactly the same relationship to C as has X. That is to say, if that which is received is the property of C and remains the property of C, every subsequent recipient is enriched directly from C. X and D are both immediate enrichees from C, despite the distracting physical fact that D

131 Burrows, 'Fresh Look' (n 58) 171: 'controversial and, on the better view, an unacceptable extension'.

132 (n 77) 496

133 Burrows, *Restitution* (n 5) 73, 75-6; Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412, 415-23.

134 Birks, *Introduction* (n 122) 358-59.

> received from X. He received C's property and therefore enriched himself directly from C.[135]

In 'following' the key premise is that C initially has 'property'[136] in the thing ultimately received by D, and in 'tracing' that D receives a product of, or transactional substitute for it. To 'trace', it is therefore necessary to at least show that, prior to the executors' 'misdirections' of the estate through cheques to the hospitals, the next-of-kin initially had some form of 'property' in the estate. Birks coined this necessary condition to 'tracing' a 'proprietary base',[137] a compendious term I adopt here.[138] As shall be seen I need not and cannot resolve here debates over what 'property' positively means,[139] exactly what kind of right trust-beneficiaries have,[140] or the normative foundation for 'tracing'.[141] To make out my argument all I need claim is that to 'trace', something more than a purely personal right is needed.

(i) Estate-beneficiaries are not trust-beneficiaries

But the next-of-kin, as estate-beneficiaries, would never have had the requisite 'proprietary base' in the estate at any material time. Estate-beneficiaries do not have a trust-beneficiary's

135 Birks, 'Receipt' (n 35) 234.

136 *ITC*'s terminology (n 6) [48], [51].

137 Birks, *Introduction* (n 122) 378-79. Also Birks, 'Establishing a Proprietary Base' (1995) 3 Restitution Law Review 83. Wider adoption in eg Graham Virgo, *The Principles of Equity & Trusts* (2nd edn, OUP 2015) 700.

138 Birks, 'Proprietary Base' (n 137) 84; Birks *Introduction* (n 122) 380.

139 Eg Tony Honoré, 'Ownership' in *Oxford Essays in Jurisprudence* in Guest (ed) (1961 OUP); Henry Smith, 'Property as the Law of Things' (2012) 125 Harvard Law Review 1691; Jeremy Waldron, *The Right to Private Property* (OUP 1990), Jim Harris, *Property and Justice* (OUP 2002).

140 Most recently *Akers v Samba* [2017] UKSC 6, [2017] AC 424 [82]-[84] (Lord Mance). Compare *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705 (Lord Browne-Wilkinson). See eg McFarlane and Stevens, 'The Nature of Equitable Property' [2010] Journal of Equity 28; cf Richard Nolan, 'Equitable Property' (2006) 122 LQR 232.

141 See eg Tatiana Cutts, 'Tracing, Value and Transactions' (2016) 79 MLR 381. Entire monographs have been written on 'tracing' alone: most recently Aruna Nair, *Claims to Traceable Proceeds* (OUP 2018), and Magda Raczynska, *The Law of Tracing in Commercial Transactions* (OUP 2018).

'equitable interest' in a trust fund. It is false to assume both have the same type of 'interest' or 'right' in the estate or trust-fund.[142]

Despite the controversy over the precise nature of a trust-beneficiary's rights, what remains clear is that the two are conceptually distinct, at least for this purpose of forming the requisite 'proprietary base'. The difference is conceptual. It cannot be dismissed as purely historical.[143] This proposition is abundantly clear from the post-*Re Diplock* case-law. Several decades after the *Re Diplock* litigation, it was subsequently established beyond peradventure that the next-of-kin, as estate-beneficiaries, have no 'proprietary' right in the deceased's estate, akin to a trust-beneficiary's in the fund.

All they have is a purely *personal right* against the executor or administrator of the estate (often referred to compendiously as "personal representatives"),[144] correlative to his duty to duly administer the estate in accordance with a will or intestate laws, amongst other things.[145] The estate is fully vested in the personal representative by virtue of his office, for due administration, 'without distinction between legal and equitable interests.'[146] The term 'personal representative' originated when the executor or administrator was concerned only with the deceased's *personal* property, but it has been a misnomer for more than a hundred years[147] – clearly they now deal with realty as well.[148]

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142 See eg Lionel Smith, 'Scottish Trusts in the Common Law' (2013) 17 Edinburgh Law Review 283; Lionel Smith, 'Trust and Patrimony' (2008) 38 Revue générale de droit 379.

143 Cf Birks, 'Receipt' (n 35) 239-40.

144 The executor is appointed by the testator while the administrator is appointed by court.

145 See specifically, s25 Administration of Estates Act 1925: '*Duty of personal representatives*. The personal representative of a deceased person shall be under a duty to— (a) collect and get in the real and personal estate of the deceased and administer it according to law…'

146 *Commissioner of Stamp Duties v Livingston* [1965] AC 694; [1964] 3 WLR 963 (PC), 707

147 Roger Kerridge, 'Succession' in Burrows (ed), *English Private Law* (OUP 2013) [7.200]

148 Ibid. Land Transfer Act 1897. See also s25(a) Administration of Estates Act 1925.

(ii) *Livingston* etc

The case-law on this is clear, but frequently ignored. The classic authority is *Livingston*,[149] where it was unanimously held that Mrs Coulson, who had 'the interest of a residuary legatee in the testator's [Mr Livingston] unadministered estate' did not have to pay Succession Duty,[150] as whatever she had could not possibly be considered a 'beneficial interest in property'. In a unanimous judgment their Lordships emphasised that 'what equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration'.[151]

This proposition has been clearly, and repeatedly accepted.[152] It was straightforwardly applied by the House of Lords to a capital gains tax case, where Lord Browne-Wilkinson described it as 'well settled'.[153] Beyond tax, it has also been applied in many other contexts. For example, to deny a claim for statutory compensation after a compulsory acquisition order.[154] Similarly, in the context of a winding up order, to analyse the statutory *Ayerst* 'trust' a liquidator holds for the company's creditors,[155] who themselves have no 'interest in specie in the company's assets'.[156] Most recently, in 2010 the UKSC re-affirmed the proposition in yet another extensively reasoned estates and succession case, *Roberts v Gill*.[157] Lord Walker

149 (n 146). Before that *Dr. Barnado's Homes v. Special Income Tax Commissioners* [1921] 2 AC 1; *Lord Sudeley v. Attorney-General* [1897] AC 11. For a recent discussion of *Livingston* and how it compares to the position of trust beneficiaries, see Charles Mitchell, '*Commissioner of Stamp Duties (Queensland) v Livingston* (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared' in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart 2019).

150 Under s3 of the Succession and Probate Duties Act 1892 to 1955 of Queensland.

151 (n 146) 708.

152 Eg *In re Leigh's Will Trusts* [1970] Ch 277, 281-82 (Buckley J).

153 *Marshall v Kerr* [1995] 1 AC 148, 157 (Lord Templeman), 165-166 (Lord Browne-Wilkinson). See also *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch); [2004] Ch 19.

154 *Eastbourne Mutual Building Society v Hasting Corporation* [1965] 1 WLR 861.

155 *Ayerst v C&K (Construction) Ltd* [1976] AC 167 (HL), 177-79 (Lord Diplock).

156 See further R. Goode, *Principles of Insolvency Law* (4th edn, 2011 Sweet & Maxwell) [3-09]–[3-10].

157 [2010] UKSC 22, [68] (Lord Collins), [102]-[103] (Lord Walker).

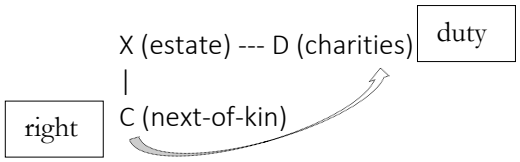
considered it an 'elementary point' that 'no residuary beneficiary has an equitable interest in the assets, only the right to have them properly administered'.[158]

In fact, this proposition is so uncontentious and well-entrenched that the main practitioner texts are all in agreement on the matter, namely, *Williams, Mortimer & Sunnucks on Executors, Administrators and Probates*,[159] *Megarry & Wade's Law of Real Property,*[160] *Lewin on Trusts*,[161] and *Snell's Equity*.[162] It is a rare thing in trusts law, where even fundamentals are sometimes hotly contested.

IV. A BETTER SOLUTION: THE NEXT-OF-KIN HAVE STANDING, BUT NO RIGHT TO RESTITUTION

In truth, the right to restitution in *Re Diplock*, if any at all, belonged not to the next-of-kin but to the estate. Or so I will argue, defending as superior a 'two-party' analysis of *Re Diplock*, fortifying a suggestion once made by Lionel Smith.[163] This analysis is predicated upon a conceptual distinction between claim-rights to restitution, and standing.

On the orthodoxy the next-of-kin are said to possess a right to restitution from the innocent charities, hence the analogy drawn to 'knowing receipt' actions in trust law:



158 Ibid [102].

159 Learmonth, Ford, Clark and Martyn (eds), *Williams, Mortimer & Sunnucks - Executors, Administrators and Probate* (21st edn, Sweet & Maxwell 2018) [52-06].

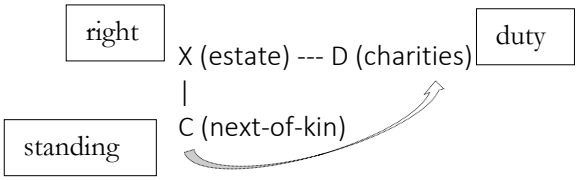
160 Cooke, Dixon and Bridge (eds) *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) [14-147].

161 Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) [1-008].

162 McGhee and Elliott (ed) *Snell's Equity* (34th edn, Sweet & Maxwell 2020) [2-012].

163 Smith, 'Structure' (n 4).

On the two-party analysis, the right to restitution enforced in *Re Diplock* belonged to the estate. All the next-of-kin had was merely, in exceptional circumstances, the standing (a power) to enforce the estate's right to restitution:



This simple but neglected conceptual distinction allows a reconciliation of *Re Diplock* with *ITC*. The estate was the direct payor, the source from whence the innocent charities received the distributions, which they were ultimately ordered to repay. *Re Diplock* is rescued from potential overruling. The analysis is moreover superior to the orthodox account, better capturing salient features of the *Re Diplock* special action on at least five counts.

A. Explains the order and pleadings

The content of the pleadings, and the final order, give us a clue as to the nature of the claim-rights being enforced, and the important question of to whom they truly belong. The nature of the right constrains the form of remedy that a court can legitimately or justifiably order, so the form of the remedy illuminates the shape of the right.

(i) The puzzle

Recall that the original executors responsible for the initial distribution had been displaced, and a judicial trustee appointed over the estate. In the clawback action, the writ at trial claimed:

> declarations that the respective defendant institutions were liable to refund to the testator's estate the moneys respectively paid to them; alternatively, that the judicial trustee of the testator's will had a charge on the assets of the respective defendant institutions for the money so paid and the enforcement of such charge.[164]

164 *Diplock* (HC) (n 11) 721.

As the next-of-kin eventually succeeded on the first basis, the court order was accordingly to repay the judicial trustee, for a 'refund to the testator's estate'. Lord Greene MR ordered the charities to repay the estate:

> in all the actions the prayer under this branch of the claim is for payment of the sums received by the defendants to the judicial trustee - in no case do the plaintiffs ask for payment direct to themselves of what is alleged to be due to them.[165]

The order was upheld by the House of Lords:

> their claim was not that their share of the 4,000l. wrongfully paid away should be paid to them but that the whole of that sum should be paid to their co-plaintiff the judicial trustee to be dealt with by him in due course of administration of the estate.[166]

On the orthodox view this would be an odd result. The court appears to be ordering repayment to the wrong persons. If the next-of-kin themselves indeed possessed their own free-standing independent rights to restitution from the hospitals, then the precise content of the court order in *Re Diplock* calls for explanation.

(ii) An answer

In light of *ITC,* the best way of explaining the 'special equitable action' in *Re Diplock* is that the hospitals' duty of restitution was never owed to the next-of-kin. Instead the duty of repayment was owed directly to the estate. So it was the estate's correlative claim-right to restitution which, exceptionally, was being enforced by another – the 'third-party' next-of-kin.[167] It would then be up to the judicial trustee to re-administer the estate in accordance with the Administration of Estates Act 1925, explaining why each next-of-kin would not ultimately

165 Ibid 505-06.

166 *Ministry of Health v Simpson* (n 24) 277.

167 Similarly see Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 644-45: '…the beneficiary could not have benefited personally from this claim. If the claim was successful, the recipient would be liable to repay the money to the trust fund rather than to the beneficiary directly'.

'recover more than the sum which he would have received, had the estate been properly administered', one of Lord Greene MR's 'further limitations'.[168]

This analysis is supported by the trial judge Wynn-Parry J's understanding of the nature of the action he was hearing:

> the authorities establish that… where the executor or administrator has paid money or transferred property part of the estate of the deceased to a person not entitled thereto in such circumstances as not to make the recipient an express trustee, the only remedy open to the legatee or next of kin rightfully entitled against the recipient is either to pursue a common law claim for money had and received in the name of the executor or administrator, or to pursue in equity a claim analogous to the common law action for money had and received, in which it would be unnecessary to join the executor or administrator as plaintiff. In either case… it would be essential to demonstrate that the money was paid under a mistake of fact and not a mistake of law, a mistake in construing a will being regarded for this purpose as a mistake of law.[169]

Wynn-Parry J had correctly understood the relevant claim-right being enforced as belonging to the estate, not the 'legatee or next of kin'. That is why he thought the suit could be thwarted by the notorious mistake of law bar.[170] He thought that the mistake of law bar must apply to any alternative concurrent equitable claim, because 'analogous'. For the next-of-kin to succeed through an equitable action, the Court of Appeal had to overrule this point, holding that the mistake of law bar was inapplicable to it.[171] This point was upheld by the House of Lords.[172]

This reconciliation with *ITC* also has the further merit of explaining why Lord Greene MR stated that the quantum of the money award was not to be 'limited by reference to the individual interest of any next-of-kin'.[173] The simple answer is that it is not even their right to restitution to begin with.

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168 *Diplock* (CA) 506

169 *Diplock* (HC) (n 11) 742-43.

170 *Bilbie v Lumley* 2 East 469, 102 ER 448; cf *Kleinwort Benson v Lincoln CC* [1999] 2 AC 348 (HL).

171 *Diplock* (CA) (n 13) 480-81; 488-89.

172 *Ministry of Health v Simpson* (n 24) 266, 269, 270, 273, 275.

173 *Diplock* (CA) 506

Hence, the 'loss' suffered by the next-of-kin is irrelevant. It is not a loss-based claim in the sense that the next-of-kin is saying: 'I'm this much worse off because of this improper distribution of the executor, pay me the losses personally suffered as a consequence.' Neither does it act as a ceiling on the maximum quantification of his right to restitution, either by way of requiring some 'correspondence' between claimant-loss and defendant-gain,[174] or the *ITC* 'transfer of value' requirement.[175]

B. Explains the tracing result

Lionel Smith admitted that the '"in rem" part of the decision in *Re Diplock* … is difficult to understand in light of the principle that the next-of-kin had only personal rights against the executors'.[176] On the unjust enrichment orthodoxy, the in rem aspect of the decision is generally ignored, the focus being only on the in personam claim. This difficulty, as we have seen above, plagues that account. In contrast, the two-party analysis advanced here is well capable of explaining the 'in rem' aspect. It is therefore a superior explanation on this count.

(i) The problem

174 Usually cited in support: *Greenwood v Bennett* [1973] QB 195 (CA) cf rejection of 'passing on' in *Kleinwort Benson v Birmingham CC* [1997] QB 380. Today, *Benedetti v Sawiris* [2013] UKSC 50. Used by eg Andrew Trotter, 'The Double Ceiling on Unjust Enrichment: Old Solutions for Old Problems' (2017) 76 CLJ 168, 184-85 to argue that *Benedetti's* starting point of an objective market valuation for services rendered is best explained as 'the best estimation of what the claimant has lost by parting with his goods or rendering his services'. On 'correspondence' generally see Mitchell McInnes, '"At the Plantiff's Expense": Quantifying Restitutionary Relief' (1998) 57 CLJ 472; Virgo *Restitution* (n 167) 116-18.

175 (n 6) [43]-[45] (Lord Reed): 'The expression "transfer of value" is, however, also too general to serve as a legal test. More precisely, it means in the first place that the defendant has received a benefit from the claimant. But that is not in itself enough. The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the claimant's also having suffered a loss through his provision of the benefit…It should be emphasised that there need not be a loss in the same sense as in the law of damages: restitution is not a compensatory remedy…. the claimant has given up something of economic value through the provision of the benefit, and has in that sense incurred a loss.'

176 Smith, 'Structure' (n 4) 438.

In *Re Diplock*, the Court of Appeal discussed at length the difficult case of *Sinclair v Brougham*,[177] and the purported 'fiduciary' requirement for tracing.[178] Indeed, before *Foskett v McKeown,*[179] *Re Diplock* was the leading case for its extended discussion on 'tracing'. The CA held that for the recipient-charities which had used the money to alter and improve their own pre-existing land, 'tracing' was disallowed.[180] To 'disentangle his money…to withdraw it from the complex', this meant compelling sale of the charged land, which was thought 'inequitable' to the innocent charities.[181]

Importantly however, 'tracing' succeeded against some of the innocent hospitals/charities who had directly deposited the cheques they had received from the executors into their own bank accounts. Some remained unmixed, but some were, thereby creating 'mixed funds'. In case of 'mixed funds', the next-of-kin were able to recover pari passu with the innocent charities, because they could 'trace' into the mixed funds. So orders for restitution were made against the National Institute for the Deaf, the Royal Sailors Orphan Girls' School and Home, Dr Barnado's Homes, and St George's Hospital, amongst others.[182] These rights to restitution were secured by a charge on the mixed funds.[183]

However as clarified by *Livingston* and its subsequent line of cases, recall that the next-of-kin entitled to the residuary estate have only a purely personal right to due administration as against their executors. They lack the necessary 'proprietary base' in the estate to initiate any following or tracing into substitutes. This appears to straightforwardly contradict the result in *Re Diplock*, that some form of 'tracing' was available, and indeed successful, on the facts.

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177 [1914] AC 398 (HL). A 'fiduciary' relationship between the Birkbeck Bank and its depositors; deposits were *ultra vires*.

178 *Diplock* (CA) (n 13) 540, 551 (Lord Greene MR).

179 [2001] 1 A.C. 102 (HL). See eg Birks, *Introduction* (n 122) 363-67, 373, 380-83; Akkouh and Worthington (n 1); Burrows, *Restitution* (n 5) 132; Andreas Televantos, 'Losing the Fiduciary Requirement for Equitable Tracing Claims' (2017) 133 LQR 492.

180 *Diplock* (CA) (n 13) 546-48.

181 Ibid.

182 Either wholly or partially, depending on whether unmixed or mixed. *Diplock* (CA) (n 13) 556 (Lord Greene MR).

183 *Diplock* (CA) (n 13) 467, 546-48, 556-58.

Again, we have two inconsistent apex cases headed for a collision course. *Re Diplock* pre-dated *Livingston* by some fifteen-odd years, before the next-of-kin's position became clear beyond a doubt. In light of subsequent case law following *Livingston*, are we now bound to say that the 'tracing' result in *Re Diplock* was wrong? Is the 'tracing' point inexplicable, and indefensible?

We must either reconcile the two, or risk declaring one line of cases as incorrect. A commentator has suggested abandoning the well-settled *Livingston* proposition, arguing that '[t]his right to trace is inconsistent with the proposition that full ownership is in the personal representatives. An equitable proprietary claim consequent on tracing vindicates property rights; it is about the tracing of property rights from one asset to another… It would seem that the equitable interest is in the ''estate''…The ''estate'' must surely be the beneficiaries as a whole, since the fiduciary relationship is with them. Therefore, perhaps the beneficiaries can be seen as having proprietary rights in the totality of the assets, though not having beneficial ownership of individual assets.'[184]

Equating the 'estate' to 'the [estate]-beneficiaries as a whole' would warrant a conceptual overhaul. We must be wary of appeals to substance as licence to disregard rules or concepts.[185] *Goff & Jones* has suggested a similar move by analogical extension from estates, to trusts, arguing in paragraph [8-136] that:

> 'the basis of the beneficiaries' claim would be that the defendant was enriched at the expense of the trust beneficiaries collectively, and the remedy being sought would, in the ordinary course, be an order requiring the defendant to make restitution of the value received to the trust…This way of proceeding would neither "collapse" the trust, nor ignore the derivative status of the beneficiaries' rights. Individual beneficiaries would not obtain an order requiring the defendant to make restitution to them individually, regardless of the quality and quantum of their entitlements as trust beneficiaries'.[186]

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184 Christine Davis, 'Floating Rights' (2002) 61 CLJ 423, 425. Esp footnote 7, citing *Re Diplock*.

185 Swadling 'Formalism' (n 95)

186 *Goff & Jones* (n 37) [8-136].

There is however a genuine risk of contradiction. Contrast the immediately preceding paragraph, [8-135]:

> '[An] objection is that to afford trust beneficiaries a direct claim in unjust enrichment against a third-party recipient would be "unorthodox"….The answer to this is that the law has long afforded trust beneficiaries a direct claim against such recipients – albeit via the device of holding recipients personally liable to account as constructive trustees on the basis of their "knowing receipt"… the facts remains that this is in substance a direct claim, which the beneficiaries are afforded in their own right'.[187]

It is either the case that trust-beneficiaries have 'rights' with only a 'derivative status', and so remote-recipients would owe them no duty to 'make restitution to them individually',[188]or that trust-beneficiaries have 'in substance a direct claim… afforded in their own right', and so remote-recipients would owe them a correlative duty of restitution. [189]

Note the conceptual fudging as to precisely what "right" a trust-beneficiary has, trading dangerously on the ambiguity of the word "right". In [8-135], *Goff & Jones* appears to be really suggesting that trust-beneficiaries should have only the standing (a power of enforcement) to enforce the trustee's claim-right against the recipient, but not their own direct independent claim-right against the recipient – hence 'derivative' – a variant of my two-party view. With the requisite conceptual distinction, this could have been articulated much more clearly.

(ii) A solution

On the two-party analysis *Re Diplock* and the *Livingston* line are easily reconcilable. If the true right-holder at play in *Re Diplock* is not the next-of-kin, but the estate, then of course the estate has the 'proprietary base' necessary to follow or trace. The next-of-kin who initiated suit have standing only; they are merely enforcing the estate's rights to restitution from the recipient hospitals. A closer reading of *Livingston* vindicates this.

In a unanimous judgment Viscount Radcliffe held:

187 *Goff & Jones* (n 37) [8-135].

188 *Goff & Jones* (n 37) [8-136].

189 *Goff & Jones* (n 37) [8-135].

> while it may well be said in a general way that a residuary legatee has an interest in the totality of the assets (though that proposition in itself raises the question what is the local situation of the "totality"), it is in their Lordships' opinion inadmissible to proceed from that to the statement that such a person has an equitable interest in any particular one of those assets, for such a statement is in conflict with the authority of both *Sudeley* and *Barnardo* and is excluded by the very premise on which those decisions were based.[190]

Crucially:

> Nor can the solution of the difficulty be advanced by referring to those cases in Equity Courts in which a creditor or a pecuniary or residuary legatee has been allowed to follow and recover assets which have been improperly abstracted from an estate. The basis of such proceedings is that they are taken on behalf of the estate and, if they are successful, they can only result in the lost property being restored to the estate for use in the due course of administration. Thus, **while they assert the beneficiary's right of remedy, they assert the estate's right of property, not the property right of creditor or legatee**; indeed, the usual situation in which such an action has to be launched is that in which the executor himself, the proper guardian of the estate, is in default, and thus his rights have to be put in motion by some other person on behalf of the estate.[191]

Four notable points arise. First, it is the estate's 'property right' that forms the necessary 'proprietary base' for following or tracing, not the creditor's or the legatee's.

Second, the estate-beneficiaries have something conceptually distinct – a 'right of remedy' – which in this context must mean a power of enforcement (ie standing), not a claim-right.

Third, this dislocation of standing from the underlying claim-right being enforced naturally explains the content of the court order, and why payment is not ordered to the next-of-kin: it is not their claim-right. The next-of-kin's suit is ''taken on behalf of the estate… if they are successful, they can only result in the lost property being restored to the estate for use in the due course of administration.'

Fourth, a clue as to *when* this exceptional situation might be available is provided. This helps rationalise the infamous 'exhaustion' requirement.[192]

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190 *Livingston* (n 146) 713.

191 *Livingston* (n 146) 713-14.

192 Compare the recent essay by Charles Mitchell, '*Commissioner of Stamp Duties (Queensland) v Livingston* (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared' in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart 2019) 278-82, arguing that the position ought to extend by analogy also to

(iii) An implication

Before proceeding, a novel, wider implication might be briefly raised. The 'exact circumstances in which a restitutionary proprietary claim may exist is a controversial question which has given rise to a considerable body of judicial comment and academic literature'.[193]

It is difficult to find strong English authority definitively proving that 'proprietary restitution' is available for 'unjust enrichment'.[194] Potentially, *Re Diplock* could stand for good House of Lords authority that is pro-'proprietary restitution', strengthening the case for those who think *Chase Manhattan*[195] is rightly decided, advancing that debate. Part of the difficulty surrounding this area is that alternative explanations are often available. We could re-explain the relevant proprietary award (whether a charge, trust, power to revest, or subrogation to a discharged security right) as a 'response' to a different 'event' or 'source'.[196] Hence, proponents of proprietary restitution often latch on to mistaken payments – the 'core case' of unjust enrichment – as best evidence. The classic case remains *Chase Manhattan*, in which Goulding

beneficiaries of a discretionary *trust*. At 281: 'It follows that in cases where trustees have improperly transferred trust property to third parties it should sometimes be possible for the beneficiaries to bring derivative proceedings against the recipients with a view to obtaining an order that the misapplied property must be restored to the trust fund. Such proceedings would be materially identical to derivative proceedings brought by estate beneficiaries to recover misapplied estate assets, suggesting that we do not need to explain the right of trust beneficiaries to bring such actions by pointing to their beneficial ownership of the trust property. Turning the Davies/*Snell* argument on its head, we can argue instead that they have the right to do this as an incident of their rights to enforce compliance with the trust terms.'. Relatedly, it might also be noted that the precise 'rights' of such a beneficiary is a matter of current debate, especially when it comes to 'enforcement rights', on which see eg Lionel Smith, 'Massively Discretionary Trusts' (2017) 70 Current Legal Problems 17; Richard Nolan, 'Invoking the Administrative Jurisdiction: Enforcement of Modern Trust Structures', *Equity, Trusts and Commerce* (Hart 2017); Peter Turner, 'The Entitlements of Objects as Defining Features of Discretionary Trusts' in Richard Nolan, Kelvin Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (1st edn, CUP 2018); Lusina Ho and Richard Nolan, 'The Performance Interest in the Law of Trusts' (2020) 136 LQR 402.

193 *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [30] (Lord Sumption).

194 Liau & Leow (n 118).

195 [1981] Ch 105, 125.

196 Ibid. Eg *Foskett v McKeown* (n 179) (Lord Millett); *Menelaou* (n 67) (Lord Carnwath); *Car and Universal Finance v Caldwell* [1965] 1 QB 525.

J imposed a trust over a $2 million mistaken payment from a New York bank to an insolvent English bank account.[197]

C. Resolves a paradox: stronger protection for weaker rights?

Having distinguished the rights of an estate-beneficiary from the trust-beneficiary, this exposes another paradox created on the orthodoxy; if we assume that in *Re Diplock* the strict right to restitution enforced belonged to the next-of-kin, the argument seems to go in the wrong direction. Compare the relative strength of these rights. If as estate-beneficiaries, the next-of-kin have much weaker rights than trust-beneficiaries, why are they afforded stronger protection against third-party stranger-recipients?

On the orthodox analysis of *Re Diplock*, the next-of-kins' right to restitution against stranger-recipients is strict, ie arising regardless of fault or knowledge. Whereas on the same facts, except substituted with a trust-beneficiary instead, further proof of fault must be required before a right against the stranger for 'knowing receipt' would even arise.

This produces a paradoxical position, difficult to justify. If anything the argument should go the other way around. As against a third-party stranger, the trust-beneficiary ought to be more strongly protected than the estate-beneficiary, given the latter's weaker, purely personal right. On this basis we might even justify a reform going the other way: strict for the trust-beneficiary, fault-based for estate-beneficiaries.

The faulty premise can be located. It is in the attempt at drawing a blunt analogy between *Re Diplock* and the 'knowing-receipt' cases (like *Re Montagu*). While the latter is a three-party case, the better view is that the former is not. It is a two-party case. The strict right to restitution in *Re Diplock* belonged to the estate, not the next-of-kin. Once this is made clear, the apparent contradiction disappears.

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197 Subject to the point on knowledge and timing: *Westdeutsche* (n 140) (Lord Browne-Wilkinson).

D. Explains availability to pure debt claimants

The point could be advanced even more forcefully.[198] Considering its historical origins from the ecclesiastical courts, both Court of Appeal and the House of Lords had thought the 'special action' available to not just next-of-kin, but to unpaid or underpaid creditors of the deceased.[199] The House of Lords strongly endorsed *Harrison v Kirk*,[200] a case involving a personal creditor. So having a pure debt, a paradigm in personam right with nothing 'proprietary' about it, was sufficient for the action. This renders any purported analogy to knowing receipt by a trust-beneficiary even more implausible.

It was only in the *Re Diplock* case itself that this 'equitable remedy' was extended for the first time, from personal creditors of the deceased, to the residuary legatees, on grounds that:

> It would be strange if a court of equity, whose self-sought duty it was to see that the assets of a deceased person were duly administered and came into the right hands and not into the wrong hands, devised a remedy for the protection of the unpaid creditor but left the unpaid legatee or next of kin unprotected.[201]

E. Rationalises 'exhaustion' precondition to enforcement

Lord Greene MR thought 'the absence or exhaustion of the beneficiary's right to go against the wrongdoing executor or administrator ought properly to be regarded as the justification for calling upon equity'.[202] His infamous 'exhaustion' precondition is a persistent difficulty on the orthodoxy,[203] 'not easy to square with this rationalisation',[204] an 'unusual feature… difficult to

198 Smith 'Structure' (n 4) 438.

199 eg *Noel v Robinson* 1 Vern. 90, 93; *Peter v Peterson* L. R. 3 Eq. 111; *In Re Rivers* [1920] 1 Ch. 320; *Ministry of Health v Simpson* (n 24) 267-69.

200 [1904] AC 1 (HL). See also *Noel v Robinson* (n 199).

201 *Ministry of Health v Simpson* (n 24) Ibid 266, also 267-79.

202 *Diplock* (CA) (n 13) 503-04.

203 Burrows, *Restitution* (n 5) 426; Nicholls (n 64) 241.

204 *Goff & Jones* (n 37) [8-123].

defend'.[205] No similar requirement exists on the purported trust law analogue, 'knowing receipt'. A two-party analysis can however rationalise its significance.

The 'exhaustion' precondition appears to have originated from *Orr v Kaines*[206] and its re-statement in *Roper on Legacies*,[207] on which both Court of Appeal and House of Lords heavily relied:

> Authority for this qualification is to be found in the judgment of Sir J. Strange in the case of Orr v. Kaines where he observed that, if the executor is insolvent, an unpaid legatee is admitted to claim direct from the wrongly paid recipient because "there is no other way." It is true that no direct authority for the qualification is to be found in any of the other decided cases'.[208]

This 'one important qualification' was tacked on by Lord Greene MR to the right to restitution recognized and enforced in *Re Diplock*. It was affirmed by the House of Lords.[209] On the facts this was 'deemed'[210] satisfied by the payment of £15,000 from the executors to the judicial trustee, a compromise ordered to be 'binding on all persons beneficially entitled to the property of the testator'.[211] The compromise was for a separate suit by the next-of-kin against the executors for *devastit*, a 'wasting of the assets'.[212] The sum was deemed a 'fair estimate' of what might have been recovered from the executors,[213] credited rateably to all one-hundred-and-thirty recipient-charities.[214]

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205 Virgo, *Restitution* (n 167) 644.

206 28 ER 540; (1750) 1 Ves Sen 324; 28 ER 125 (1751) 2 Ves Sen 194. See also the discussion in *Diplock* (CA) (n 13) 487-88.

207 (4th edn, W Benning 1847).

208 *Diplock* (CA) (n 13) 483, 503 (Lord Greene MR); similarly *Ministry of Health v Simpson* (n 24) 267

209 *Ministry of Health v Simpson* (n 24) 267.

210 *Diplock* (CA) (n 13) 504; *Ministry of Health v Simpson* (n 24) 252, 267.

211 *Ministry of Health v Simpson* (n 24) 252.

212 *Diplock* (CA) (n 13) 475; *Williams, Mortimer & Sunnucks* (n 159) [52-02]. A devastatit is 'a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators must answer out of their own pockets, as far as they had, or might have had, assets of the deceased': *Re Stevens* [1898] 1 Ch 162 at 177. See further, *Williams, Mortimer & Sunnucks* (n 159) Ch 52; Compare *Re Dawson* [1966] 2 NSWR 211,216 (Street J).

213 *Diplock* (CA) (n 13) 504.

214 ibid 504.

(i) Inexplicable in principle?

On the orthodoxy, it is the next-of-kin who have free-standing rights to restitution from the charities. The 'exhaustion' precondition appears a bizarre and irrational qualification on the right itself. In general, when we enforce our private law rights against one another, no precondition exists that we must first 'exhaust' some separate right we hold against another (here the executor). So why here?

On the orthodoxy this precondition cannot be explained. Birks declared it 'inexplicable in principle',[215] to be amputated. Lord Nicholls thought that in 'reshap[ing]' *Re Diplock* to be 'extended to all trusts but in a form modified', the exhaustion precondition should be abolished, as 'justice requires the recipient to disgorge the gain before the defaulting trustees are compelled to put their hands into their own pockets and personally bear the loss'.[216] *Goff & Jones* argues that 'once the *Re Diplock* claim is situated within the general law of unjust enrichment, this looks unjustified, since it results in an improper distribution of liability, and should be discarded'.[217]

Note the objections on two distinct grounds, frequently run together. The first is that, if implemented literally, it makes the wrong party bear the burden of improper distribution.[218] On this view 'exhaustion' requires the personal representatives to first bear the primary burden of restoring the estate to the status quo ante, with the third-party recipient bearing only the residual burden.[219] It is not clearly articulated exactly *why* this is a problem. If the objection is that the executors were 'innocent' and therefore ought not be treated so 'strictly', this objection applies with similar force to the third-party charities – who too were 'innocent' and yet owed 'strict' duties to make restitution. It is not clear how the orthodoxy could justify,

215 Birks, 'Misdirected funds' (n 35) 313 fn 63.

216 Nicholls (n 64) 241.

217 Birks, 'Misdirected funds' (n 35) 313 fn 63; Nicholls (n 64) 241; Burrows, *Restitution* (n 5) 426; Akkouh & Worthington (n 1) 292-93; 303.

218 *Goff & Jones* (n 37) [8-124].

219 Ibid.

as between the two, requiring the latter to bear a-hundred-percent burden.[220] Especially when the estate-beneficiaries would have, on any view, independent rights against the executor to an account for *devastatit*, in a manner akin to a trustee.[221] Breach of trust is similarly 'strict', hence ameliorated somewhat by the possibility of statutory relief.[222] The most that can be said to be wrong with this position is that it goes against the general position on concurrent private law rights[223]– the next-of-kin can in effect elect who bears the ultimate burden, where he has two alternative rights that cannot both be enforced without excessive cumulation ie 'double recovery'.

The second objection is that this requirement 'lacks any obvious parallel in the law of unjust enrichment'.[224] But this is a difficulty the orthodoxy creates for itself, by classifying it as a three-party case.

(ii) An explanation

Seen as a two-party case however, this precondition starts making sense. Suing the executor as co-defendant can be seen as a step one must take to invoke an exception to a general rule, in order to be empowered to enforce another's (the estate's) right to restitution.[225] The reason *Re Diplock* has always been thought of as 'exceptional' or 'special' is not because it is a sui generis source of novel free-standing rights to restitution. It is exceptional because it truly does involve an exception.

The real question is: exception to what rule? The answer is the general standing rule in private law, that rights and powers of enforcement usually come together as a package deal. It is submitted that, in modern terms, the 'exhaustion' requirement is best regarded as an

220 Subject to possible defences e.g. a pro tanto deduction for change of position.

221 *Williams, Mortimer & Sunnucks* (n 159) [52-02], [52-06].

222 s61 Trustee Act 1925: 'has acted honestly and reasonably, and ought fairly to be excused'.

223 *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL).

224 *Goff & Jones* (n 37) [8-123].

225 Eg Smith, 'Structure' (n 4) 441.

earlier attempt at articulating *when* a non-right-holder might, in exceptional circumstances, sue to enforce another's right, discussed further below. In *Re Diplock* it was the estate's right to restitution from the innocent charities.

V. A MORE HELPFUL ANALOGY

This penultimate section draws the threads together. Having shown the weaknesses in the orthodox view and defended a two-party analysis as superior, one main implication is that *Re Diplock* does not really provide good doctrinal support for the orthodox unjust enrichment analysis of recipient liability, and its extension to trust law.[226] Hinging the case on *Re Diplock* was therefore a mis-step, attributable to an inadequate conceptual apparatus, a neglect of the distinction between claim-rights to restitution versus powers of enforcement (standing).

We might suggest a further explanation as to *why* we were drawn into error. In rationalising *Re Diplock,* a deceased estates case, the orthodoxy was correct in thinking that helpful analogies might be drawn with trust law. The mistake was analogising to the wrong doctrine. This took us down a wrong path. Knowing receipt is not the appropriate comparator. Instead, it is what is popularly known as the *Vandepitte*[227] procedure in trust law, that can help us better understand the 'special equitable action' in *Re Diplock*, and the general phenomenon of which it is merely one instantiation.

The '*Vandepitte* procedure' is the label we have given it in trust law, but it is really best conceived of as an exception to a general standing rule that applies not just within trust law, or in unjust enrichment, but across the whole spectrum of private law. This has the further merit of situating *Re Diplock* within a wider general phenomenon in private law, in modern terms. *Re Diplock* is not just a peculiar sui generis claim, an excrescence of history to be disregarded by the modern mind.[228] The two-party view better achieves the primary pay-off

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226 Compare Duncan Sheehan, 'Disentangling Equitable Personal Liability for Receipt and Assistance' (2008) 16 Restitution Law Review 41, 62.

227 *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 (PC).

228 Paraphrasing N. McBride *Humanity of Private Law* (Hart 2019), 264, compare 194-98.

that an orthodox unjust enrichment explanation promises (but ultimately failed to deliver). In fact, it shows us that while the *Re Diplock* case itself was indeed concerned with the enforcement of the estate's right to restitution, the general phenomenon is not at all specific to unjust enrichment. The estate could have many different types of rights – e.g. contractual rights against debtors to the estate, or say tort rights – a right to restitution for unjust enrichment only being one type of right it could possibly possess.

This insight would help us to rationalise in modern terms Viscount Radcliffe's important but oft-overlooked statement in *Livingston*, that 'the basis of such proceedings is that they are taken on behalf of the estate', and that:

> 'the usual situation in which such an action has to be launched is that in which the executor himself, the proper guardian of the estate, is in default, and thus his rights have to be put in motion by some other person on behalf of the estate'.[229]

A. An exception to exclusive right-holder enforcement, ie privity

As unjust enrichment lawyers, we had sought to rationalise *Re Diplock* using the wrong source analogy from trust law. It is not the three-party knowing receipt claim that is helpful in advancing our understanding, but rather, this procedure through which a trust-beneficiary can, exceptionally, enforce the trustee's legal rights against strangers to the trust.

This better analogy, the '*Vandepitte* procedure', is a procedure better known to modern trust lawyers primarily by the eponymous case in which Lord Wright most clearly and succinctly re-stated it.[230] This label's currency is evident from its repeated use as shorthand in *Barbados Trust*, a recent controversial case on the effect of anti-assignment clauses.[231] Remarkably, this

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229 *Livingston* (n 146) 713-14. In full above (n 191).

230 So see eg *Harmer v Armstrong* [1934] Ch 65 (CA) 82 (Lord Hanworth MR), 87 (Lawrence LJ), 91 (Romer LJ). Hanworth MR cites Lord Wright's statement in *Vandepitte* for the proposition that 'beneficiaries are entitled to have their rights enforced: if the trustee will not enforce them for them the beneficiaries can come before the Court but they must bring before the Court the trustee also'.

231 *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 CLC 434 (CA). Noted Marcus Smith, 'Equitable Owners Enforcing Legal Rights?' (2008) 124 LQR 517.

trust law procedure originated by analogy from the law of estates.[232] Documenting its history, Marcus Smith concluded that '[t]he procedure did not begin with the *Vandepitte* decision, but has its origin in case law describing the circumstances in which a person other than a deceased's personal representative would be allowed to bring an action against a third party'.[233] Being of similar historical origin and structure, their justifying rationale might overlap.

(i) *Vandepitte* and privity

The context of Lord Wright's well-known statement in *Vandepitte* is helpful here. Before stating the 'equitable principle', he made it a point to first articulate the rule to which he thought this was an exception – 'privity'. He started by quoting Viscount Haldane's canonical statement in *Dunlop Pneumatic Tyre,*[234] then *Tweddle v Atkinson*,[235] before going on:

> Lord Haldane states the equitable principle which qualifies the legal rule, and which has received effect in many cases, as, for instance, *Robertson v. Wait ; Affréteurs Réunis Société Anonyme v. Leopold Walford (London), Ld. ; Lloyd's v. Harper* - namely, that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant. [236]

Contract lawyers will immediately recognise these cases as standing for the famous 'trust of a chose in action'[237] 'exception' to privity, which has since fallen out of currency in England after

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232 See eg discussion of the authorities in *Hayim v Citibank NA* [1987] AC 730, 748 (Lord Templeman) – a good number of which were estates cases rather than trust cases. In particular *Travis v. Milne* (1851) 9 Hare 141; *Yeatman v. Yeatman* (1877) 7 Ch.D. 210; *In re Field, decd.* [1971] 1 WLR. 555.

233 Marcus Smith, 'Locus Standi and the Enforcement of Legal Claims by Cestuis Que Trust and Assignees' [2008] Trust Law International 140, 143.

234 [1915] AC 847 (HL).

235 (1861) 1 B & S 393, 121 ER 762 (QB).

236 *Vandepitte* (n 227) 79.

237 *Vandepitte* (n 227) 79.

the Contracts (Rights of Third Parties) Act 1999.[238] The transition of this exceptional procedure from the context of personal representatives, to enforce instead the legal rights of trustees, appears to have happened in an early 'trust of a promise' case *Fletcher v Fletcher*[239] where Vice-Chancellor Wigram said:

> 'where the transaction is of such a nature that there is no doubt of the intention of A., while dealing with his own property, to constitute B. a trustee for C., and B. has accepted the trust, may not C. be in a condition to compel B. to enforce the legal right which the trust deed confers upon him?'[240]
>
> '…There is a debt created and existing… if in such a case the trustee will not sue without the sanction of the Court, I think it is right to allow the *cestui que trust* to sue for himself, in the name of the trustee, either at law, or in this Court, as the case may require. The rights of the parties cannot depend upon mere accident and caprice. Having come to this conclusion upon abstract reasoning, it was satisfactory to me to find that this view of the case is not only consistent with, but is supported by, the cases of *Clough v. Lambert* (10 Sim. 174) and *Williamson v. Codrington* (1 Ves. sen. 511).'[241]

More precisely, it is the entire *Vandepitte* procedure itself, that constitutes an exception to 'privity', in its sense as a standing rule. As argued in Chapter Three, 'privity' is an ambiguous notion, comprising a cluster of several distinct concepts. Here, what is being captured is the idea that, where an express trust of the contractual promise is constituted, the trustee-promisee remains the one who has the *legal* right to contractual performance, held on a bare trust for the beneficiary.[242] In accord with the general rule of standing across private law, generally only the trustee-promisee has the power to enforce that contractual right – he is the 'proper plaintiff'.[243]

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238 Compare Chee Ho Tham, 'Trust, Not Contract' (2005) 21 Journal of Contract Law 107; cf Brian Coote, 'Contract Not Trust' (2006) 22 Journal of Contract Law 72.

239 (1844) 4 Hare 67; 67 ER 564; Smith, 'Locus Standi' (n 233) 154.

240 Ibid 75.

241 Ibid 77-78.

242 Nb the settlor is the promisee himself, who declares himself trustee of the promise owed to him to be held on trust for another.

243 *Lewin on Trusts* (n 161) [43-001]; *Underhill & Hayton* (n 161) [18.1]

Hence Lord Wright's point in *Vandepitte*, that exceptionally however, if the trustee himself 'refuses to sue', it may be possible for the *beneficiary* to (also) be conferred the standing to enforce the promisee-trustee's *legal* right to performance. By constituting a trust of the contractual promise, a trust-beneficiary could access this procedure, which exceptionally confers upon someone other the person to whom the duty is owed (the personal representative or trustee) the power to enforce that duty.

The *Vandepitte* case itself concerned a debt owed by an insurer. By taking a second simultaneous step of collapsing or terminating the bare trust, the beneficiary can have the proceeds paid to him directly.[244]

(ii) Pre-*Vandepitte* history

Despite its label, a trust-beneficiary's exceptional power to enforce his trustee's legal rights against another goes back a long way, pre-dating the *Vandepitte* case itself.[245] A trust-beneficiary could sue his trustee in a court of equity to compel him to lend his name for an action in law. James LJ explained this idea more fully in *Sharpe v San Paulo Railway Co*:

> ..a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; ..if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the cestui que trust was to file his bill against the trustee for the execution of the trust, or for the realization of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action, or the proper suit in this Court….[246]

Particularly applicable to *Re Diplock* where the next-of-kin were 'a numerous body',[247] James LJ commented on the especial merit of this procedure for a 'complex trust' with multiple beneficiaries (cf a 'bare trust'):

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244 Exercising a *Saunders v Vautier* power: (1941) 4 Beav 115, 49 Eng Rep 282

245 *Underhill v Hayton* (n 161) [68.5]; *Lewin on Trusts* (n 161) [43-001], [43-006]-[43-010]; Smith 'Locus Standi' (n 233).

246 (1873) LR 8 Ch App 597, 609-610.

247 *Ministry of Health v Simpson* (n 24) 277.

> It would be monstrous to hold that wherever there is a fund payable to trustees for the purpose of distribution amongst a great number of persons, every one of those persons could file a separate bill in equity, merely on the allegation that the trustees would not sue.[248]

(iii) *Vandepitte,* derivative actions, and administration actions

Some clarifications are in order. Today, the label '*Vandepitte* procedure' is generally associated with bare trusts. For 'complex trusts' the comparable modern procedure is the 'power of a beneficiary to bring a derivative action on behalf of the trust'.[249] 'Derivative action' is not a particularly informative term, raising questions about what exactly is being 'derived'. For our purposes, what is important here is to stress that both are exceptions to private law's general standing rule. The essence of what is done is the same in both procedures – the rights enforced are one and the same – it is the trustee's (legal)[250] right against the third-party that is being enforced, and not the trust-beneficiary's right. Hence Nourse LJ's reminder in *Parker-Tweedale*:[251]

> 'It is important to emphasise that when a beneficiary sues under the exception he does so in right of the trust and in the room of the trustee. He does not enforce a right reciprocal to some duty owed directly to him by the third party.'

On a brief aside, a 'derivative action' might also be distinguished from an 'administration action'.[252] *Lewin on Trusts* describes this as an 'action against the trustees to compel them to take proceedings to enforce the claim' that they themselves should be enforcing, should they

248 *Sharpe v San Paulo* (n 246)

249 See the header in *Underhill v Hayton* (n 161) Article 68. Similarly, *Lewin on Trusts* (n 161) [43-006] is titled 'Derivative action by beneficiaries'.

250 In a sub-trust, the sub-trustee has an equitable right.

251 *Parker-Tweedale v Dunbar Bank Plc* (No1) [1991] Ch 12, 19 (Nourse LJ)

252 CPR 64.2.

fail to do so.[253] Trustees are under a 'duty to protect and preserve the trust estate',[254] and this can extend to a specific duty to exercise their power to sue to enforce their legal rights against third-party strangers.[255] For a 'complex trust' with more than one beneficiary, the 'administration action' may be preferred, so long as the trustee can still be relied upon to perform his duties satisfactorily, and to safeguard and protect the beneficiaries' interests. However, the trustee's ability to do so may be doubted for a variety of reasons in many cases. His refusal to sue may be because he is for instance, colluding with someone else, or in a position of conflict of interest and duty, thus satisfying the 'special circumstances'[256] required for a 'derivative action'.

Under a 'derivative action', a beneficiary may simply join the trustee as a defendant,[257] suing in his own name in a streamlined procedure to 'stand in place of the trustee and sue in right of the trust'.[258] This is a procedural short-cut to reduce into one-single suit what would

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253 (n 161) [43-005]. Especially footnote 23. See also Civil Procedure Rules, Part 64 and Practice Direction 64A—Estates, Trusts and Charities, para.1(2)(a)(iii) and (c): '1 The following are examples of the types of claims which may be made under rule 64.2(a) –(2) a claim for any of the following remedies –(a) an order requiring a trustee (iii) to do or not to do any particular act; (c) an order directing any act to be done which the court could order to be done if the estate or trust in question were being administered or executed under the direction of the court.'

254 *Hayim v Citibank* (n 232) 748 (Lord Templeman); *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 (Ch), 1224 (Lightman J): 'Trustees have a duty to protect and preserve the trust estate for the benefit of the beneficiaries and accordingly to represent the trust in a third party dispute'

255 So eg Smith, 'Locus Standi' (n 233) argues that 'the failure to bring the suit must amount to a breach of trust'. He argues further that it ought to be a necessary condition for activating the *Vandepitte* procedure. See also Smith, 'Structure' (n 4) 163.

256 *Hayim v Citibank* (n 232) 748 (Lord Templeman): 'a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate'. Similarly, *Davies v Davies* (1837) 2 Keen 534; *Travis v Milne* (1851) 9 Hare 141, 149-150; *Stainton v Carron Co.* (1854) 18 Beav. 146; *Sharpe v San Paulo Rly Co* (1873) LR 8 Ch App 597,609–10; *Re Forest of Dean Coal Mining Co* (1878) 10 Ch D 450, 453–54; *Yeatman v Yeatman* (1877) 7 Ch.D. 210; *Beningfield v Baxter* (1886) 12 App. Cas. 167, 178-179; *Meldrum v Scorer* (1887) 56 L.T. 471; *Rae v Meek* (1889) 14 App. Cas. 558, 569, *Re Field* [1971] 1 WLR 555; *Parker-Tweedale v Dunbar Bank plc (No 1)* [1991] Ch 12 (CA) 19–20; *Young v Murphy* [1996] 1 VLR 279, 281–82; *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 4, (2004) 216 CLR 109 [55]–[56]; *Roberts v Gill & Co.* [2010] UKSC 22; [2011] 1 AC 240. Discussing see *Lewin on Trusts* (n 161) [43-008].

257 eg *Harmer v Armstrong* (n 230) 82-83; *Gandy v Gandy* (1885) 30 Ch D 57*; cf Performing Right Society v London Theatre of Varieties* [1924] AC 1. *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240 [62].

258 *Lewin on Trusts* (n 161) [43-006], [43-012]. Today: *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240 [60].

otherwise take two separate suits – first, against the trustee (for his failure to sue), and second, against the stranger owing the duty to the trustee, to enforce that very duty.[259] This avoids circuity of action.[260] Joining the trustee to be sued as a co-defendant in addition is the way of alleging that, by failing to enforce his (legal) right himself, the trustee has failed to perform a duty owed to the beneficiaries to protect the trust estate, or the interests of the beneficiaries in the trust estate.[261] 'The process is short-circuited by allowing the beneficiary/person interested in the estate to do what the trustee/personal representative should have done'.[262]

B. Significance of 'exhaustion'

This helps us rationalise the significance, in modern terms, of that part of the 'exhaustion' precondition requiring that the next-of-kin sue the executors. Given subsequent legal developments, its significance today might be understood as:

(1) satisfying a step to be extended the exceptional power (standing) to enforce the estate's right to restitution, because

(2) it is a right the executors ought to have enforced themselves, as the proper claimants, on behalf of and in the interest of the estate.

As an example, this might apply where an executor, despite his duty to sue to enforce a right of the estate, for some reason refuses to do it (say due to a collusion where the improper distribution is to his wife). 'Special circumstances' like these could justify exceptional enforcement by the next-of-kin.

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259 *Harmer v Armstrong* (n 230) (Hanworth MR): 'It would seem almost absurd to send these parties away and to force them to incur greater costs, more circuity of action', 90 (Romer LJ).

260 Smith, 'Locus Standi' (n 233) 155.

261 To paraphrase *Hayim v Citibank* (n 232) 748 (Lord Templeman). *Lewin On Trusts* (n 161) [43-008]. Approved of in *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240 [53]. There are 'two claims', not just one. The suit against the trustee is for 'failure to take action': see [60].

262 Smith 'Locus Standi' (n 233) 158.

The subject-matter of enforcement is the estate's right to restitution. Hence, the necessity of the personal representatives (in *Re Diplock* the judicial trustees) being party to the suit in order for the estate to (i) be bound by the judgment, and to (ii) receive the fruits or proceeds of the enforced right.[263]

This analysis draws further support from *Roberts v Gill*,[264] an extensively reasoned case concerning an attempt by an estate-beneficiary to enforce in a 'derivative action' his deceased grandmother's estate tort rights, as against solicitors owing correlative duties of care, where Lord Collins clarified that:

> 'joinder also has a substantive basis, since the beneficiary has no personal right to sue, and is suing on behalf of the estate, or more accurately, the trustee.'[265]

Except for infelicitous terminology, this is absolutely correct. The supposed 'right to sue' is truly a power, and should be so phrased in future to avoid further confusion with claim-rights which by definition have correlative duties.

C. Grounds for restitution

What 'grounds'[266] could justify the estate's right to restitution? There are two disjunctive alternatives: mistake, or a policy-motivated unjust-factor. We need not choose between them as concurrent grounds, and hence rights to restitution, could co-exist. It is up to the right-holder to elect to enforce whichever is most advantageous.[267]

(i) An absent or invalid basis

263 *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240 [57] (Lord Collins), [125] (Lord Clarke). Compare *Shell v Total* [2010] EWCA Civ 180, [2010] 3 WLR 1192, discussed: Swadling 'Formalism' (n 95).

264 *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240.

265 Ibid [62].

266 Terminology from *Goff & Jones* (n 37): 'Part 5 – Grounds for Restitution'.

267 *Deutsche Morgan Grenfell v IRC* [2006] UKHL 48, [2007] 1 AC 558 [13]-[18] (Hoffmann), [43], [50]-[51] (Hope), [136], [140]-[142] (Walker)*; Test Claimants in the* FII *Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19; [2012] 2 AC 337 [16] (Hope), [41], [84]-[85] (Walker), (Sumption) [196]. Citing *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL).

First, demonstrating an absent or invalid basis is a necessary for a right to restitution to even arise. This is sometimes referred to as a 'legal entitlement rule',[268] or a 'presence of basis bar'.[269] A recent line of difficult cases[270] appear to accept that there could be 'limited exceptions',[271] but it is not necessary to resort to one here, as clearly the gifts to the charities lacked a basis. The relevant clause of Caleb Diplock's will was void.[272]

In fact, *Re Diplock* supports the *sufficiency* of an absence-of-basis, Lord Greene MR holding that 'it is prima facie at least a sufficient circumstance that the defendant, as events have proved, has received some share of the estate to which he was not entitled.' [273] But the 'absence-of-basis' view is not current orthodoxy in the English courts.[274]

(ii) Mistake

Mistake, the 'core case' of impaired-consent,[275] is the obvious candidate. If applicable the estate's right in *Re Diplock* would resolve itself as a token of *Kelly v Solari*-type, the only 'special' feature being its enforcement by the next-of-kin, in exception to the general standing rule. Since *Kleinwort Benson* overruled the mistake of law bar,[276] *Goff & Jones* sees this unjust-factor as the 'uncontroversial' way forward, as the 'law has since moved on'.[277]

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268 Burrows, *Restatement* (n 129) section 3(6) 32-35. Burrows, *Restitution* (n 5) 88.

269 Virgo, 'Demolishing the Pyramid – The Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in Robertson and Tang (eds), *The Goals of Private Law* (Hart 2009).

270 Eg *DMG* (n 267) [32] (Hoffmann), [62] (Hope), [143] (Walker), [81-82] (Scott), [161]-[162], [172] (Brown) noted R. Stevens 'Justified Enrichment' (2005) OUCLJ 141; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

271 *Zurich Insurance v International Energy Group* [2015] UKSC 33 [68]: Burrows, *Restatement* (n 129) 33: justifications 'not easy to pinpoint'

272 *Chichester Diocesan Fund v Simpson* (n 18).

273 *Diplock* (CA) (n 13) 503.

274 *Woolwich Equitable BS v IRC* [1993] AC 70 (HL), 172 (Lord Goff); *DMG* (n 267) [21] (Hoffmann), [152]-[158] (Walker); *FII* (n 267) [60]-[61], [81] (Hope), [188], [190] (Sumption).

275 *Kelly v Solari* (1841) 9 M & W 54. Birks, *Introduction* (n 122) 3-9; Frederick Wilmot-Smith, 'Should the Payee Pay?' [2017] OJLS 1: the 'anchor'.

276 [1999] 2 AC 348 (HL).

277 *Goff & Jones* (n 37) [8-129], [8-189]. Nb conflation of trust with estate-beneficiaries.

(a) Mistake of law

It might be objected that the executor's mistake was of law, and pre-existed *Kleinwort Benson*. There are two possible responses.

First it could be argued, as Sir William Evans did in opposition to Pothier, that there never was a mistake of law bar.[278] Cases like *Biblie v Lumley*[279] and *Brisbane v Dacres,*[280] cited by Lord Simonds, never really stood for it. In short, Lord Greene MR's reasoning in *Re Diplock* on this point was wrong, and Lord Simonds was incorrect in not overruling it.

The second is that the objection does not bite to begin with, for it misunderstands the *legal effect* of the mistake of law bar. It assumes that a mistake, if it is one of law and not of fact, voids the claim-right to restitution itself, so that it never existed. However, because the better understanding of the mistake of law bar may well be that it operates like a time-limitation bar.[281] Instead of voiding the underlying right to restitution itself, it only bars the executor's *power* to enforce the right, rendering it unenforceable by the executor.

This understanding simultaneously embraces two opposing concerns, each of which point in different directions. The first is that, whether a mistake of fact or a mistake of law, the mistaken party's consent is impaired. If we accept an impaired-consent justification as the 'core case' for rights to restitution, the fact/law distinction cannot be relevant to the existence of the right – a claim-right to restitution ought to pro tanto arise. On the other hand, its character as a mistake of *law* provides a countervailing reason against its enforceability, 'the most satisfactory reason for [which] rests in the maxim, itself probably taken from the criminal law, ignorantia juris neminem excusat.'[282]

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278 'An Essay on the Action for Moneys Had and Received' (1998) 6 Restitution Law Review 1,2, 5-8 accounting for the law preceding *Bilbie* (n 170).

279 (n 170).

280 (n 289).

281 *Iraqi Civilian Litigation v Ministry of Defence* [2016] UKSC 25; [2016] 1 WLR 2001 (Lord Sumption) [1]: 'Limitation… deprives the litigant of a forensic remedy but does not extinguish his right'.

282 *Ministry of Health v Simpson* (n 24), 270 (Lord Simonds).

Additionally, this rationalisation explains *why* an exception to the standing rule was activated in *Re Diplock*. Bearing in mind an executor's duty to protect and preserve the estate,[283] this right to restitution ought to have been enforced by a loyal executor in performance of said duty, were it enforceable by him. However, because the (unmeritorious) mistake of law bar extinguished the executor's power to enforce the estate's right to restitution, the executor was unable to sue and enforce it. The 'special circumstances'[284] test for the *Vandepitte* procedure to be activated was thus satisfied, giving the next-of-kin their own power (standing) to exceptionally enforce the estate's right to restitution. The next-of-kin were not barred from having a power of enforcement as they were not operating under the same mistake of law. They were 'ignorant' of the misdistributions when they happened.[285]

Though overruled, the mistake of law bar, entrenched at the time, bears large responsibility for severely distorting our understanding of the true structure of rights involved.[286] It was thought from trial to House of Lords, that the notorious mistake of law bar applied to a common law money had and received action, rendering this right unenforceable by the executor himself. It was in fact, precisely to circumvent the mistake of law bar that the courts had to invoke a 'special equity' to do in equity what they had difficulty doing outright at common law. Much of the reasoning in the Court of Appeal and House of Lords was geared at circumventing its application, which if applied would deny the claim, as at trial.[287] Although he did not take Lord Goff's bold step in *Kleinwort Benson,*[288] Lord Simonds was hostile to the

283 *Hayim v Citibank* (n 232) 748 (Lord Templeman); *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 (Ch), 1224 (Lightman J): 'Trustees have a duty to protect and preserve the trust estate for the benefit of the beneficiaries and accordingly to represent the trust in a third party dispute'.

284 The test for the *Vandepitte* procedure. See eg *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240 [62], accepting *Lewin on Trusts* (n 161).

285 *Farah v Say-Dee* [2007] HCA 22 (2007) CLR 89 [156]: 'No case, even in England, has treated ignorance as a reason for restitution.' Though a recent Singapore case appears to have accepted the possibility of 'lack of consent' as an unjust factor: *AAHG, LLC v Hong Hin Kay Albert* [2016] SGHC 274. Further R Chambers and J Penner, 'Ignorance' in J Edelman and S Degeling (eds), *Unjust Enrichment in Commercial Law* (Sydney Lawbook Co 2008).

286 *Goff & Jones* (n 37) [8-129].

287 (n 169)

288 [1999] 2 AC 348 (HL).

mistake of law bar. He tried to cast doubt on its existence by citing a series of cases[289] for the proposition that 'up to the end of the eighteenth century there were in high places doubt as to the validity of the distinction in the common law',[290] repeating that 'it would be a strange thing if the Court of Chancery, having taken upon itself to see that the assets of a deceased person were duly administered, was deterred from doing justice to creditor, legatee or next of kin because the executor had done him wrong under a mistake of law'.[291]

(b) Avoiding double 'liability'

Since the mistake of law bar has anyway been overruled, were *Re Diplock* to recur again today on the exact same facts, we would anyway be presented with a straightforward and 'uncontroversial'[292] *Kelly v Solari* type case.[293] In which case the two-party analysis would straightforwardly avoid potential problems of 'double liability'. By contrast, an orthodox 'three-party' analysis would prove too much – the estate-beneficiaries would also have concurrent, free-standing and independent rights to restitution from the same remote-recipients, creating further problems of 'double liability'. Ad hoc cut-backs could be stipulated but the rationalisation would be much clumsier.[294]

(iii) Policy-motivated unjust factor

A popular view,[295] originating from Lionel Smith, is that *Re Diplock* is based not on defective or impaired consent, but instead a 'policy'-motivated unjust-factor of ensuring 'correct

289 *Farmer v Arundel* 2 W Bl 824; *Bize v Dickason* 1 Term Rep 285; *Brisbane v Dacres* 5 Taunt 143, 128 ER 641; *Bilbie v Lumley* 102 ER 448, 2 East 469.

290 [1951] AC 251, 270.

291 Ibid.

292 *Goff & Jones* (n 37) [8-129].

293 Compare ibid.

294 Compare s 5 CRTPA 1999.

295 See also McFarlane, *The Structure of Property Law* (Hart 2008) 337-39; McFarlane 'Equity, Obligations and Third Parties' (2008) SJLS 302, 320 footnote 58; Virgo, *Equity & Trusts* (n 137) 717-19; Virgo, *Restitution* (n 167) 644; Sheehan (n 226) 61.

distribution of the estate',[296] or equivalently, 'vindicat[ing] the distribution scheme'.[297] In the case of intestacy or corporate insolvency the scheme determining priority is statutory.[298] In short, the mischief targeted here is one of queue-jumping. 'The priority list, once set up, must be respected or it is no priority list at all'.[299] This draws support from Lords Simonds' reasoning on 'the basis of the jurisdiction, the evil to be avoided and its remedy'.[300] '[T]he remedy was one … devised by the Court of Chancery in the administration of assets of a deceased person to avoid the evil of allowing one man to retain money legally payable to another and was applicable wherever it could appropriately be applied.'[301]

In thinking of the policy as protecting an ideal stipulated distribution (and hence targeted only at correcting mis-distributions as between those on the priority list inter se), Smith latched on to the analogy of a liquidator's power to unwind creditor preferences in the twilight of insolvency.[302] Section 239 of the Insolvency Act 1986 empowers a company liquidator or administrator to avoid a preference *given to a creditor* six months before the onset of insolvency,[303] in violation of the priority they would have had in an insolvent liquidation.[304] This may tie the claim too tightly to the section 239 creditor-preference avoidance power, which has a purely distributive rationale. To avoid a creditor-preference the recipient-defendant must be on the priority list ie a creditor, legatee, or intestate-beneficiary, for it to constitute a

296 Smith, 'Structure' (n 4) 442.

297 Virgo, *Restitution* (n 167) 644.

298 Administration of Estates Act 1925; Insolvency Act 1986; Small Business, Enterprise and Employment Act 2015.

299 Sheehan (n 226) 61.

300 *Ministry of Health v Simpson* (n 24), 266.

301 Ibid 268.

302 Smith, 'Structure' (n 4) 442-443. See s 239(2). One important function of liquidation is to collectivise proceedings to ensure order, preventing creditor grab races and free-for-alls: see eg Fidelis Oditah, 'Assets and the Treatment of Claims in Insolvency' (1992) 108 LQR 459, 461-63; Jackson, *The Logic and Limits of Bankruptcy Law*, Ch 1.

303 s240(1)(b). two-years for a 'connected person': 240(1)(a).

304 s239 (4)(b).

'violation of the priority rules'.[305] But section 239 is only one of an array of transaction-avoidance powers a liquidator has.[306] Some are aimed at asset-protection, to preserve the value of the assets for those truly entitled, and thus can also correct mis-directions to non-creditors.[307]

My hesitation here is that an overly narrow articulation of the 'policy' may sell the two-party analysis short. An overly narrow view would entail the right to restitution is only capable of rectifying inter-creditor, or inter-beneficiary injustice due to a misdistribution of the pie. This only ensures a proper distribution of the assets as between people on the list. it cannot protect the assets itself from complete dissipation to those not on the 'priority list' ie a non-creditor or non-legatee,[308] which very arguably, it also should.[309] Two examples:

> *Wife:* A variation on *Re Diplock*, where by mistake, the personal representative pays £10,000 from the estate to his wife.

Restitution should follow. It should not matter that the PR's wife was not a creditor or intended legatee of the deceased. The 'assets of a deceased person' are in 'the wrong hands'. The policy-motivates a right to restitution to 'avoid the evil of allowing one [wo]man to retain money legally payable to another'.

> *Rogue:* Intentionally and to defraud the creditors, the personal presentative pays £10,000 from the estate to his wife.

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305 Smith, 'Structure' (n 4) 442.

306 Notably: s238 enables avoidance of 'transactions at undervalue'. Another asset-protection rule is the anti-deprivation rule in *Belmont Park Investments v BNY Corporate Trustee Services* [2011] UKSC 38, [2012] 1 All ER 505; *British Eagle v Air France* [1975] 1 WLR 758 (HL). Compare also sections, 127, 244, 245, 423 of the Insolvency Act 1986, and s874 Companies Act 2006.

307 Compare R. Goode (n 156) [13-02]-[13-05].

308 Compare R. Goode (n 156) [13-04]-[13-05].

309 Smith thought it 'available only against overpaid legatees': 'Structure' (n 4) 442.

Restitution should similarly follow. Since the 'policy' is not based on impaired consent, it should not matter that the personal representative was not mistaken, and in fact deliberately defrauding the estate-beneficiaries.[310]

In short, if the underlying policy is to ensure that assets are distributed only to those entitled to them, then to prevent its frustration this policy must include *protecting* the assets for distribution, preventing their improper dissipation to 'those not on the priority list'. If the assets are lost or de-valued there would be nothing left to distribute.

D. Potentially applicable to all private law rights

While the *right* to restitution in *Re Diplock* arose 'in the very specific context of a defective transfer of property in the administration of an estate', [311] it is important to stress here that exceptional *enforcement* of an estate's rights by a next-of-kin is not only narrowly applicable to rights to restitution. One key merit of our explanation is that *Re Diplock* is no longer an awkward or sui generis island of law. The explanation locates *Re Diplock* as one branch of a wider general phenomenon, potentially applicable across different private law rights.

The analogy to exceptional enforcement of a trustee's legal rights (ie the *Vandepitte* procedure) helps us to see more clearly that while *Re Diplock* concerned third-party enforcement of the estate's right to restitution, third-party enforcement of the estate's rights of other kinds, eg contractual or tort rights, is possible. To illustrate, take two simple examples raised by Ben McFarlane:[312]

> *Careless driver*: A owns a bicycle and declares that he holds the bicycle on trust for B. X carelessly damages the bicycle.

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310 Nb *Goff & Jones* posit an alternative unjust-factor of 'want of authority' [8-02], [8-07]-[8-11]; Robert Chambers & James Penner, 'Ignorance' in James Edelman and Simone Degeling (eds), *Unjust Enrichment in Commercial Law* (Sydney Lawbook Co 2008). However this may reduce simply to showing sufficiency of absence-of-basis, as 'want-of-authority' does not seem an instance of impaired consent: see noting *Criterion Properties* [2004] UKHL 28, Robert Stevens 'The Proper Scope of Knowing Receipt' [2004] LMCLQ 421.

311 Virgo, *Restitution* (n 167) 644 footnote 86 cites Sheehan (n 226), who attributes this to Lionel Smith.

312 McFarlane, *Structure* (n 295) 29. McFarlane & Stevens 'Nature' (n 140) 4.

Bicycle thief: A owns a bicycle and declares that he holds the bicycle on trust for B. X steals the bicycle.

In each case, the value of the trust assets are diminished. In both cases, the (legal) right to possession belongs to trustee A. Similarly, the tort rights arising in conversion[313] or negligently causing loss,[314] belong to the trustee.[315] If enforced, they would go towards restoring the diminution in value of the trust assets.

(i) The general rule

The general standing rule entails that the power to enforce these rights belongs *exclusively* to the trustee – he is the 'proper plaintiff'.[316] As Lord Rodger emphasised, 'unquestionably, the general rule is that the beneficiary of a trust cannot sue a debtor of the trust: the relevant right of action is vested in the trustees and it is for them to enforce that right by raising an action, if appropriate'.[317] There are good justifications for this rule, so that it is only in 'special circumstances' that the trust-beneficiary can displace the trustee's decision-making on whether to sue. Some apply to the administration of deceased's estates as well.

Thus '[t]he beneficiaries under a trust are, in the first instance, protected by the trustee who acts for them; and, in the second instance, by their right to hold the trustee to account, and ultimately, to seek the trustee's removal'.[318] This is especially so where we are concerned with a 'complex trust' and not just a 'bare trust',[319] with multiple different beneficiaries, who have potentially conflicting interests. 'In such a case it is for the trustee to balance those

313 *MCC Proceeds v Lehman Bros* [1998] 4 All ER 675.

314 *Leigh & Sullivan Ltd v Aliakmon Shipping* [1986] AC 785.

315 Cf *Shell v Total* (n 263).

316 *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch); [2004] Ch 19. Further Emma Hargreaves, 'The Nature of Beneficiaries' Rights under Trusts' [2011] Trust Law International 163.

317 *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240 [87].

318 Smith, 'Locus Standi' (n 233) 142.

319 Where there is a clearly one class of absolutely entitled beneficiaries.

interests and to decide whether to sue for the trust as a whole. It [is] therefore necessary to find a special reason to take the decision away from the trustee.'[320]

This consideration is especially applicable to the administration of deceased's estates, where like a company liquidator who has to deal with numerous creditors, the personal representative plays an important collectivising function. One important function of liquidation is to collectivise proceedings to ensure orderly distribution, preventing creditor grab races and litigation free-for-alls.[321]

In *Re Diplock* there were an estimated total of 120 next-of-kin.[322] If the orthodox view were right, so each had his own independent free-standing right to restitution from each of the 39 innocent charities, it would be a 'monstrous' situation.[323] There would be the analogous problem of 'collapsing' a 'complex trust' with multiple strata of beneficiaries with staggered entitlements,[324] and the potential queue-jumping involved. 'The problem is, in the case of a deceased's estate, this would - as has been described - result in a litigation free-for-all, with creditors of the deceased, expectant legatees and debtors of the deceased all having to be represented. Given the need first to collect the deceased's estate, and then the need to distribute it properly, it makes far more sense for a single person (owing fiduciary duties to the parties interested in the estate) to undertake these exercises'.[325]

(ii) 'Special circumstances'

320 *Underhill & Hayton* (n 161) [68.3].

321 See eg Fidelis Oditah, 'Assets and the Treatment of Claims in Insolvency' (1992) 108 LQR 459, 461-63. Jackson, *The Logic and Limits of Bankruptcy Law*, Ch 1.

322 *Diplock* (HC) (n 11) 722.

323 *Sharpe v San Paulo Rly Co* (1873) LR 8 Ch App 597, 609-610; (n 248).

324 *Goff & Jones* (n 37) [8-136].

325 Smith, 'Locus Standi' (n 233) 149.

There are other cases of attempted 'derivative actions' by estate-beneficiaries to enforce an *estate*'s rights, beyond just rights to restitution.[326] *Roberts v Gill*[327] is a convenient recent example. It concerned the residual will-beneficiary of an estate who wanted to commence a 'derivative' or 'representative' action'.[328] He wanted to enforce the concurrent tort and contract rights of his deceased grandmother's estate against two firms of solicitors, which had allegedly negligently advised the estate's former personal representatives.[329] Lord Collins emphasised that:

> Mark Roberts seeks to bring a derivative action in his own name on behalf of the estate against a third party. The action is a derivative action in which the beneficiary stands in the place of the administrator and sues in right of the estate, and does not enforce duties owed to him rather than to the administrator.[330]

In an extensively reasoned decision, the UKSC reviewed the 'special circumstances' test, originating in *Travis v Milne*.[331] While Mark Robert's attempt ultimately failed for defective pleadings and time-limitation,[332] they affirmed that the established 'special circumstances' test remains good law today.[333]

As restitution lawyers continue working out the implications of *ITC,* and the finer details of 'at the expense of', this may prove the more profitable analogy. To reiterate in closing, this phenomenon is not new to deceased's estates. In 1853 Romilly MR held in *Stainton v The Carron Company* that:

> the persons interested in the estate of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which

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326 Eg *Gandy v Gandy* (1885) 30 Ch D 57; *Yeatman v Yeatman* (1877) 7 Ch D 210; *Re Field* [1971] 1 WLR 555 (Ch D) 555; *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240.

327 [2010] UKSC 22, [2011] 1 AC 240.

328 Ibid [1]-[2], [22].

329 Ibid [12]-[17].

330 Ibid [22].

331 (1851) 9 Hare 141, 68 ER 449.

332 [2010] UKSC 22, [2011] 1 AC 240 [15]-[16], [21], [38]-[39].

333 ibid [45]-[77] (Lord Collins), [78] (Lord Hope), [86] (Lord Rodger), [110] (Lord Walker), [114], [135] (Lord Clarke).

> might be recovered, and which, but for such suit, would probably be lost to the estate.[334]

The debate today concerns whether this is sufficient for a 'special circumstance'.[335] Lord Walker has quite boldly suggested that: '[t]here is ample authority… as to the need for special circumstances before the court will countenance a derivative action... in all these cases the unifying factor—what has to be special about the circumstances—is that the derivative action is needed to avoid injustice'.[336]

VI. CONCLUSION

Concepts structure our thinking. Loose reasoning leads the law astray. We misunderstood what *Re Diplock* stood for because we misunderstood what the next-of-kin had: standing, not rights. This created further misleading analogies between estate-beneficiaries and trust-beneficiaries. Similarities between the two allow helpful analogies, but as we have seen, not all are. We might sharpen their differences. Here are four.

The first is that unlike companies,[337] neither trusts nor estates have separate legal personality.[338] Unlike trusts however, estates like companies involve a separate patrimony: a

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334 (1853) 18 Beav 146; 52 ER 58, 63.

335 *Hayim v Citibank* (n 232) 748 (Lord Templeman): 'a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate'. Similarly, *Davies v Davies* (1837) 2 Keen 534; *Travis v Milne* (1851) 9 Hare 141, 149-150; *Stainton v Carron Co.* (1854) 18 Beav. 146; *Sharpe v San Paulo Rly Co* (1873) LR 8 Ch App 597,609–10; *Re Forest of Dean Coal Mining Co* (1878) 10 Ch D 450, 453–54; *Yeatman v Yeatman* (1877) 7 Ch.D. 210; *Beningfield v Baxter* (1886) 12 App. Cas. 167, 178-179; *Meldrum v Scorer* (1887) 56 L.T. 471; *Rae v Meek* (1889) 14 App. Cas. 558, 569, *Re Field* [1971] 1 WLR 555; *Parker-Tweedale v Dunbar Bank plc (No 1)* [1991] Ch 12 (CA) 19–20; *Young v Murphy* [1996] 1 VLR 279, 281–82; *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 4, (2004) 216 CLR 109 [55]–[56]; *Roberts v Gill & Co.* [2010] UKSC 22; [2011] 1 AC 240. Discussing see *Lewin on Trusts* (n 161) [43-008]. Further, Smith, 'Locus Standi' (n 233).

336 *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240 [110]. Reminiscent of the test for the availability of *Wrotham Park* damages laid down in *Morris-Garner v One-Step* [2016] EWCA Civ 180; [2016] 3 WLR 1281, overruled on this point in *Morris Garner v One-Step* [2018] UKSC 20; [2018] 2 WLR 1353.

337 *Salomon v Salomon* [1897] AC 22 (HL).

338 Smith, 'Trust and Patrimony' (n 142) [2], [24], [28].

collection of its own assets to answer its own liabilities.[339] Generally, every person has his own patrimony. Incorporation is hence one convenient way of creating a separate patrimony. When natural persons die, their estates persist. If you negligently knock me down on the street, this does not extinguish my tort right against you. It survives, in my estate.[340] Like the right to restitution in *Re Diplock,* the estate can hold rights. A personal representative, tasked with its administration, can decide whether it is worth enforcing. In doing so, he gathers in the *assets* constituting the estate. Conversely, the estate can owe debts on which it is *liable*. A principal task of the personal representative is to pay off the debts of the deceased, before distributing what's left according to a priority list. The estate's debts are its own. The personal representatives do not owe them, so estate creditors cannot attach to a personal representative's personal assets. Here the comparison with corporations, which also have separate patrimonies, is helpful. Corporations too can die – they can be wound up, liquidated, their assets dismembered by creditors. The position of a personal representative of a deceased's estate hence resembles that of a liquidator.[341] The company's debts are its own; the company's creditors cannot execute against the liquidator's personal assets.

The second point is related. Unlike a deceased's estate, however, the trust is not a holder of its own rights, nor are duties owed directly to a trust. Both are intermediated through a *trustee*. It is the trustee who holds any rights against 'trust-debtors' (whether in contract, tort, etc), and who conversely owes any duties to 'trust-creditors'. Hence it is the trustee, as holder of legal rights, who usually has exclusive standing to sue to enforce them against 'trust-debtors'; he is the 'proper plaintiff'.[342] Thus the primary recourse a 'trust-creditor' has is

339 Smith, 'Trust and Patrimony' (n 142); Smith, 'Scottish Trusts' (n 142). Cf Pierre Lepaulle, 'An Outsider's View Point of the Nature of Trusts' (1928) 14 Cornell Law Quarterly 52.

340 In 1943 the rule that personal actions did not survive to a deceased's plaintiff's estate was abolished: Law Reform (Miscellaneous Provisions) Act 1934. Discussed Chapter 5 'Torts'.

341 *Ayerst* (n 155) 177-79 (Lord Diplock).

342 *Lewin on Trusts* (n 161) [43-001]; *Underhill & Hayton* (n 161) [18.1].

against the trustee's personal assets,[343] not the trust-fund.[344] Put another way, all 'trust-creditors' are personal creditors of the trustee. If the trustee goes bankrupt, unsatisfied creditors have only indirect access to the trust fund. They must deploy a legal rule allowing 'subrogation' to the trustee's indemnity from the trust-funds.[345] This feature affects the degree to which a trust exhibits 'asset-partitioning',[346] thereby affecting the extent to which 'trusts' can trade effectively, limiting its 'secret life'[347] as an 'organisational entity'.[348]

Thirdly, this illuminates the nature of a beneficiary's rights under a trust,[349] explaining as an implication why the trust is not a separate patrimony. The trust-beneficiary's 'equitable' right cannot be adequately understood as a direct relationship between beneficiary and trust property. It is the *trustee* who has legal rights in the subject-matter constituting the trust-fund.[350] The beneficiary's rights are simply the correlative duties that the trustee owes the beneficiary, in respect of those specific rights the trustee holds. 'The trust is the obligation that is owed by the trustee'.[351] The contrast with deceased's estates becomes obvious once we

343 *Muir v City of Glasgow Bank* (1879) 4 AC 337.

344 *Jennings v Mather* [1902] 1 KB 1 (CA).

345 *In Re Johnson* (1880) 15 Ch D 548. See further Smith 'Scottish Trusts' (n 142) 287. Aleksi Ollikainen-Read, 'Creditors' Claims against Trustees and Trust Funds' (2018) 24 Trusts & Trustees 177; Hans Tjio "Lending to a Trust" (2005) 19 Trust Law International 75.

346 Henry Hansmann & Reiner Kraakman, 'The Essential Role of Organizational Law' (2000) 110 Yale LJ 387; Henry Hansmann & Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' [1998] New York University Law Review 434.

347 John Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 Yale LJ 165.

348 Hansmann & Mattei (n 346) 470: 'in effect, trust law provides for the creation of an entity – the trust – that is separate from the three principal parties'. Cf Smith (n 142)[28] 'The "entification" of the trust spells, in the long run, the end of the law of trusts by assimilation'.

349 Smith, 'Trust and Patrimony' (n 142) [16]; Further see McFarlane & Stevens 'Nature' (n 140); Smith, "Transfers" in Birks & Pretto (eds) *Breach of Trust* (Hart 2002) 213; Lionel Smith, "Philosophical Foundations of Proprietary Remedies" in Chambers, Mitchell, and Penner (eds) *Philosophical Foundations of Unjust Enrichment* (OUP 2009) 281.

350 In sub-trusts, the right is 'equitable'.

351 Smith, 'Trust and Patrimony' (n 142) [18]; *Underhill and Hayton* (n 161) [1.1]: 'A trust is an equitable fiduciary obligation, binding a person (called a trustee)…. for the benefit of persons (called beneficiaries…)'.

contrast 'assets' (rights) with 'liabilities' (duties).[352] 'The common law trust is not a patrimony because only rights, and never obligations, are held in trust.'[353] While assets can be held on trust for another, it seems conceptually impossible to say the same of duties or 'liabilities';[354] I can owe you a duty not to use a (legal) right I have in my car for my benefit. But the same cannot be said of my duties, or debts. Yet another important practical implication is that, unlike corporations or deceased's estates where the debts/liabilities owed by the corporation/estate remain constant despite replacing management, there is no 'automatic' succession of debts/liabilities between successor trustees. Unlike rights, 'liabilities' cannot be assigned.[355] Trustee succession must be otherwise facilitated, eg by a chain of indemnities.[356]

Fourth, conceptual differences lead to important practical differences. An estate-beneficiary (eg the next-of-kin in *Re Diplock*) and a trust-beneficiary have entirely different priorities in debtor-insolvency, where the assets of the deceased are insufficient to satisfy all creditors. An example:

> *Generous pauper:* A, a rich businessman, declares a trust over his vintage Ferrari for his son B. Separately, he writes in his will that his wife C is to get his fortune after his death. A few months after, his business suffers huge capital and trading losses because of a pandemic. Dismayed, he dies.

Who is entitled to what in this scenario? The first thing any insolvency lawyer will tell you is that B, ranking first, gets the Ferrari, free from A's creditors. In a sense B has 'super-priority', but more accurately, the Ferrari is not even part of the 'assets' available for distribution to A's creditors in the first place. B can sweep it clean away from A's estate. By contrast, C, the residuary-legatee, stands all the way at the end of the queue. C ranks last. Like the shareholder

352 Ibid Smith.

353 Ibid 286.

354 Smith, 'Scottish Trusts' (n 142) 288.

355 *Tolhurst v The Associated Portland Cement Manufacturers 1990 Ltd* [1902] 2 KB 660 (CA), 668 (Collins MR); affirmed [1903] AC 414 (HL).

356 Smith, 'Trust and Patrimony' (n 142) [20].

in a corporate insolvency, C is the residual claimant.[357] If there is not enough to satisfy creditors ranking ahead, then that is too bad. C is out of the money:

> 'Persons interested in the estate have no actual legal or equitable interest in the deceased's assets at all: the most that they have is a chose in action, comprising the right to require that the deceased's estate is properly administered. This is no doubt because, if the deceased's debts outweigh his assets, some persons 'interested' in the estate will actually be *entitled* to nothing at the end of the day. There is therefore, a significant difference between the position of the beneficiary under a trust (who has a property interest recognised in equity and, as a result of that interest, has certain rights against the trustee) and a person interested in the deceased's estate (who, until assent, has nothing but his rights against the deceased's personal representative).' [358]

Yes, the next-of-kin in *Re Diplock* had economic interests in the deceased's estate, and were residual beneficiaries. But so too do shareholders of a corporation, in the company's assets. Neither however have property rights in the assets.[359] Like a corporation, a deceased's estate is a separate patrimony.[360]

357 Smith, 'Scottish Trusts' (n 142) 293.

358 Smith, 'Locus Standi' (n 233) 145-46.

359 Ibid 294.

360 Ibid 296.

5

TORTS

> When courts or legislatures recognize new causes of action in tort, or extend existing causes of action, they are distributing legal rights and duties to new classes of potential plaintiffs and potential defendants….in making the breaches of primary duty tortious—courts and legislatures also unavoidably distribute associated secondary duties. These are legal duties of corrective justice—to be more exact, duties of repair—that arise from breach of the primary legal duties and are owed to the same rightholder. As already noted, these duties are bundled with generous powers on the part of the rightholder to concretize and enforce them through the courts.
>
> -John Gardner, 'What Is Tort Law For? Part 2. The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 333-34.

I. INTRODUCTION

By advocating the importance of distinguishing conceptually between claim-rights and powers of enforcement (standing), I have implicitly assumed that tort law might be usefully understood through the lens of the primary rights we have against each other. Rights-based accounts of tort law stress its interpersonal dimension, having in common an emphasis on the nexus between right-holder and duty-bearer. For them, the 'bipolarity', 'bilaterality', or 'relationality' between tortfeasor and tort-victim is a core or defining feature of tort law. Thus three-party or 'trilateral' cases – where a non-victim is suing despite not having been wronged by the tortfeasor – pose an apparent challenge.

This chapter demonstrates how our conceptual distinction assists analysis of these difficult trilateral cases. Section II sets the stage by introducing the challenge to be met and its significance: trilateral cases of third-party 'rights of action', purportedly 'parasitic' or 'derivative' in nature. Three examples will be reviewed: fatal torts in section III, negligent will-drafters in section IV, and torts causing congenital disabilities in section V. Section VI concludes by setting out the three indicia of a 'trilateral' case involving a 'parasitic' or 'derivative' claim: (i) the destination of damages, (ii) its prima facie quantification, and (ii) the exceptional way in which defences could apply. These features can be neatly accounted for by the existence of

secondary rights or duties to pay damages, a legal concept which has come under recent attack by prominent theorists.[1]

II. UNDERSTANDING THIRD-PARTY 'RIGHTS OF ACTION'

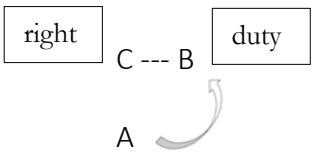
This section unpacks and distinguishes the legal concepts and rules engaged.

A. 'Derivative' or 'parasitic' in nature?

Commenting on counsel's invocation of *Bourhill v Young*[2] in *Letang v Cooper*[3] to analyse trespass to a person, Diplock LJ observed that:

> A has a cause of action against B for any infringement by B of a right of A which is recognised by law. Ubi jus, ibi remedium. B has a corresponding duty owed to A not to infringe any right of A which is recognised by law. A has no cause of action against B for an infringement by B of a right of C which is recognised by law.[4]

This describes the general 'bilateral' case. Cases where a 'third-party' A appears to be suing in respect of B's tort to C, in what looks like a 'derivative' or 'parasitic' claim, are thus counterexamples to the general case.



They are a challenge for anyone who subscribes to (a version of) the general standing rule I have identified in this thesis, under which standing is accorded exclusively to tort-victims. The peculiarity here is in the absence of B's tort to A. A's role, and what he truly has, might therefore be questioned. Tort lawyers have described A as having a 'right of action' which is

1 See the 'duty' versus 'liability' debate, discussed in Chapter Two.

2 [1943] AC 92 (HL).

3 [1965] 1 QB 232 (CA) (Car negligently running over both legs of a sunbather).

4 [1965] 1 QB 232 (CA) 246-47.

'parasitic' or 'derivative',[5] but the precise senses in which this is true, and its implications, require clarification.

B. Tort law's bundle of 'rights'

'Anyone attempting to provide a rights-based account of tort law has to deal with the difficulty that lawyers use the term 'right' and 'rights' in different ways on different occasions'.[6] For us, it is necessary first to distinguish between tort law's triplet bundle of 'rights':

(i) ('substantive') primary claim-rights conferred by tort law rules, the infringement of which constitute a tort

(ii) ('remedial') secondary claim-rights to damages arising post-tort, versus

(iii) the power (standing) to sue and enforce these rights, correlative to the tortfeasor's liability to be sued.

It appears a widespread assumption that in the paradigm case, all three coincide in a single-holder as a bundle. To emphasise this coincidence, standing is sometimes even referred to as 'tertiary right'.[7]

It is argued that, to successfully grasp the structure of these trilateral cases, we need to keep more clearly distinct two general rules, often conflated. The first is a standing rule, requiring the coincidence of (i) + (iii). The second is a rule about damages, requiring the coincidence of (i) + (ii), which I earlier coined 'directional continuity'.[8] Recognising and

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5 Eg Roderick Bagshaw and Nick McBride, *Tort Law* (6th edn, Pearson 2018) 811; *Winfield & Jolowicz: Tort*, Peel & Goudkamp (eds) (19th edn, Sweet & Maxwell 2014) [25-017], [25-018]; Robert Stevens, *Torts and Rights* (OUP 2007) 185; Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [39-011]; Ontario Law Reform Commission, 'Report on Compensation for Personal Injuries and Death' (1987) 30.

6 Nick McBride, 'Rights and the Basis of Tort Law' in Donal Nolan and Andrew Robertson (eds), *Rights in Private Law* (Hart 2011) 341.

7 Eg Frederick Wilmot-Smith, 'Illegality as a Rationing Rule' in Sarah Green and Alan Bogg (eds), *Illegality after Patel v Mirza* (Hart 2018) 107-110; see also Chapter Two, 'Concepts' and Chapter Six, 'Justifications'.

8 Chapter Three, 'Contract'.

distinguishing between these two general rules is key to explaining the doubly 'anomalous' or 'exceptional' nature of these cases. Their exceptionality proves the general rule(s).

These analytical tools equip us to ask whether one of the three could exceptionally be detached from the others, and what their implications might be. For example, can a third-party to the primary duty and correlative right acquire a power of enforcement (standing), enforcing a right he does not himself own? Or perhaps a secondary right to damages for the infringement of another's primary right, thereby being entitled to obtain and retain a sum awarded as damages?

C. Right and duty: correlativity versus enforceability

The two general rules require some elaboration.

(i) Torts are wrongs to a victim, whose primary right was infringed

As a preliminary, it bears reiterating that on a 'rights-based' approach, torts are bilateral in structure. A tort is a breach of a legal duty owed to another.[9] Thus we can speak equivalently of primary (claim-)rights in tort. A tort victim is one whose primary rights were infringed by a tortfeasor. As Lord Diplock said in *Letang v Cooper*, '[i]n the context of civil actions a duty is merely the obverse of a right recognised by law…right and duty are but two sides of a single medal'.[10]

"Tort" derives from the Latin tortus, meaning twisted or crooked, and found its way, via the French, into the English language as a synonym for "wrong", later acquiring a technical meaning.[11] But torts are not just wrongs, simpliciter. Torts are wrongs *to a victim.* A victim-less

9 Peter Birks, 'The Concept of a Civil Wrong' in David Owens (ed), *The Philosophical Foundations of Tort Law* (OUP 1997) 34-35, 52; Stevens (n 5) 2; McBride & Bagshaw (n 5) 7-8.

10 [1965] 1 QB 232 (CA) 247.

11 John Fleming, *The Law of Torts* (8th edn, Lawbook Co 1992) 1.

tort is a contradiction.[12] That is why a wrong committed 'in the air'[13] cannot be a tort. No tort is or can be committed in consuming a prohibited drug like heroin, or by recklessly exceeding the highway speed limit, with luck avoiding any collision.[14]

Hence Hart once observed that 'we speak of a breach of duty in the civil law, whether arising in contract or in tort, not only as wrong, or detrimental to the person who has the correlative right, but as *a wrong to* him and a breach of an obligation *owed* to him'.[15]

(ii) Secondary rights to damages: directional continuity

Whole books can and have been written to prove that '[t]he law of torts is concerned with the secondary obligations generated by the infringement of primary rights.'[16] This view, and its 'continuity theses'[17] variants, is admittedly disputed.[18] But its plausibility cannot be feasibly defended here, only assumed. Assuming tort law indeed recognises secondary duties, the question to be grappled with here is anyway distinct, concerning their *direction*: to whom are these post-wrong (legal) secondary obligations owed?

The answer put forth here is that typically, the tortfeasor owes a duty to pay damages only to the victim of the tort, and to no one else – tort damages are exclusively for tort victims. It is only the victim of the wrong, whose primary right was infringed, who acquires a secondary right to damages from the tortfeasor. Introducing this rule in Chapter Three, I called it 'directional continuity':

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12 eg Peter Cane, *Key Ideas in Law: Tort Law* (Hart 2017) 22.

13 eg *Donoghue v Stevenson* [1932] 1 AC 562. 618 (Lord Macmillan): 'The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage'; *Bourhill v Young* [1943] AC 92 (HL) 101-02 (Lord Russell): 'A man is not liable for negligence in the air'.

14 Birks (n 9) 38. Compare *Palsgraf v Long Island Railway Company* 248 NY 339 (1928) 344 (Cardozo CJ), cf 349 (Andrews J dissenting).

15 HLA Hart, 'Legal Rights', *Essays on Bentham* (Clarendon 1982) 184 (emphasis original).

16 Stevens (n 5) 2.

17 Chapter Three, 'Contract' text to footnote 24.

18 Discussed Chapter Two, 'Concepts'.

> if I breach your primary right, then any secondary duty I owe to pay damages is owed only to you (and to no one else).

It applies equally here, within the law of torts. Although the rule has sometimes travelled under the banner of 'privity', a broad church, it is really a rule about damages, conceptually distinct from the standing rule. It should not be overlooked.

(iii) The standing rule within tort law

What about enforcement? Not just anyone can sue a tortfeasor. As stated in Chapter Two, this thesis argues that a general standing rule stretches across the whole of private law, so:

> it is only the primary right-holder who has the standing (ie power) to sue to enforce his underlying right.

Within tort law, one branch of our private law, this rule puts tort-victims in a special position. The general rule explains why in our legal system, bar exceptional circumstances, the only person capable of suing a tortfeasor is the person whose primary right was infringed by him, the tort-victim.

The standing rule is a significant pillar amongst tort theorists. Despite their disagreements, for many it is a feature commonly foundational to tort law's structure, giving the subject its unity.

Perhaps most prominently, earlier iterations of Goldberg and Zipursky's 'Civil Recourse' theory articulated what they initially called a 'substantive standing rule',[19] recently re-labelling it 'tort law's proper-plaintiff principle'.[20] Under this rule, 'a person is not entitled to a right of action in tort against another unless that other committed a legal wrong against her'.[21] Nick

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19 Benjamin Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review 1, 15-17; John Goldberg & Benjamin Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917, 958-60; John Goldberg & Benjamin Zipursky, 'Civil Recourse Revisited' (2011) 39 Florida State University Law Review 341.

20 John Goldberg & Ben Zipursky, *Recognizing Wrongs* (HUP 2020) 61.

21 Benjamin Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 Florida State University Law Review 299, 306; Similarly, John Goldberg & Benjamin Zipursky, 'Hohfeldian

McBride and Roderick Bagshaw have similarly contended that 'where a tort has been committed, usually only the victim of the tort will be entitled to seek a remedy'.[22]

Generalising, John Gardner adopted this as an 'aspect of private law', under which the person wronged 'gets to make them pay'.[23] So too Arthur Ripstein:

> 'If I violate your private right, you in particular have a distinctive entitlement to demand that I give you back what you already had. Neither you nor anyone else has the standing to do so in other cases in which I fail to do what I have a reason, or even a duty to which you have no correlative right, to do. You can remind me to take my medicine or change my tires, but you cannot demand that I do so. The distinctiveness of your claim to constrain me follows from the way in which I wronged you. You are not simply holding me to the reasons that apply to me; you are exercising the surviving form of the very right against you that I violated. That is why you can constrain my conduct, but others – such as people who depended on the availability of you or your property – might also legitimately complain about my indifference to your interests, and hold me accountable in various informal ways, while (sic) cannot demand anything'.[24]

In similar vein Robert Stevens has argued that 'the only person who can enforce a right is the right-holder, and persons who suffer loss because of the infringement of someone else's rights do not have standing to sue'.[25] Note that for Stevens this is a 'privity doctrine in the law of torts' disclosing 'the structure of the law of torts',[26] as privity is a principle 'applicable to all rights',[27] not just contractual rights. Note also that Stevens does not differentiate privity's multiple aspects; at least not in the way I do.[28]

Analysis and the Separation of Rights and Powers' in Balganesh, Sichelman and Smith (eds), *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (CUP 2017) 21; Goldberg & Zipursky (n 20) *Recognizing Wrongs* 61.

22 McBride & Bagshaw (n 5) 8-11: 'Who is the victim of A's tort? It's the person who had a right that A not do X. Or to put it another, exactly equivalent way, it's the person to whom A owed a duty not to do X'

23 John Gardner, *From Personal Life to Private Law* (OUP 2018) 5; John Gardner, *Torts and Other Wrongs* (OUP 2020) 21, 85-87, 333-34.

24 Arthur Ripstein, *Private Wrongs*, (HUP 2016) 250-51.

25 Stevens (n 5) 173.

26 Ibid 174.

27 Ibid 173.

28 Hence, text to (n 188) et seq.

(iv) Two illustrative cases

The most well-known judicial statement of the standing rule within tort law is in a famous American case, *Palsgraf v Long Island Railway Company*.[29] A traveller, being late, ran to board a train departing its platform. A nearby railway employee ('guard') assisted him, pushing him from behind. This dislodged a newspaper-wrapped small package the traveller was holding. The concealed package contained fireworks, exploding upon falling. Its impact caused a weight scale to fall and hit a bystander at the other end of the platform, many feet away – Helen Palsgraf. Palsgraf sued the train company for her injuries, alleging negligence.

Palsgraf lost. Delivering the majority judgment, Chief Judge Cardozo held that 'The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away.…Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.'[30]

Even if the employee had committed a tort against the traveller in negligently damaging his property, Palsgraf could not exercise a 'derivative' 'right of action', suing for the wrong done to another. Cardozo CJ went on to hold that:

> The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another… The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary…. Out of this wrong to property…. there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security… What a plaintiff must show is "a wrong" to herself; i.e. a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial… The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another… He sues for breach of a duty owing to himself.[31]

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29 248 NY 339 (1928).

30 (n 29) 341.

31 (n 29) 342-46.

In English law, *Bourhill v Young*[32] is a near equivalent. A motorcyclist John Young, driving at excessive speed, sped past a tram car, collided into a motorcar, and was thrown onto the street, later dying of his injuries. Mrs Bourhill was a bystander who had alighted from the tramcar, 45 to 50 feet away, so there was no risk of immediate bodily injury to her. She heard but could not and did not see the crash, although she later saw the blood left on the road after Young was removed. She sustained 'nervous shock' and was unable to operate business for some time. She sued Young's estate, alleging negligence.

A unanimous House of Lords dismissed Bourhill's claim, holding that Young was not negligent in relation to Mrs Bourhill as he owed her no duty of care.[33] Suffering a consequential loss is not enough. The loss must be wrongfully caused, Lord Wright emphasising that 'the infliction of damage on a plaintiff does not in itself give a cause of action…. It is damnum absque injuria. The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff'.[34]

Had Young committed a tort, it was only in relation to the motor-car driver, into whom he had negligently collided.[35] As in *Palsgraf*, Mrs Bourhill could not sue for the wrong done by Young to someone else:[36]

> Young was certainly negligent in an issue between himself and the owner of the car which he ran into, but it is another question whether he was negligent vis-à-vis the appellant. In such cases terms like "derivative" and "original" and "primary" and "secondary" have been applied to define and distinguish the type of the negligence. If, however, the appellant has a cause of action it is because of a wrong to herself. She cannot build on a wrong to someone else. Her interest, which was in her own bodily security, was of a different order from the interest of the owner of the car.[37]

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32 [1943] AC 92 (HL).

33 Ibid 98 (Lord Thankerton), 101 (Lord Russell), 105 (Lord Macmillan), 108, 111 (Lord Wright), 116, 119 (Lord Porter).

34 Ibid 106 (Lord Wright).

35 Ibid 101 (Lord Russell), 104 (Lord Macmillan), 108 (Lord Wright).

36 Ibid 98 (Lord Thankerton), 101 (Lord Russell), 105 (Lord Macmillan), 108, 111 (Lord Wright), 116, 119 (Lord Porter).

37 Ibid 108 (Lord Wright).

III. FATAL WRONGS AND DEPENDANTS

Our first challenging case concerns fatal torts, torts which cause their victims' death. Consider first a standard personal injury tort:

> You run me down on the street.

Both general rules about standing and damages apply. If your tort renders me unable to work for a year, only I have the secondary right to obtain damages from you to compensate me for my earnings thereby lost. You have wronged only me, breaching a primary duty owed only to me. Even if I had wholly-dependent children and a spouse, on whom I would have substantially spent my earnings, and who would hence suffer knock-on losses of financial support from me, they are third-parties to the wrong between us. None of them can sue you for this sum. Curiously, if the tort is fatal however, the Fatal Accidents Acts changes their legal position:

> You run me down on the street, instantly killing me.

Patrick Atiyah commented that 'the Fatal Accidents Act 1976… creates an exception to a basic principle of tort law that damages may not be recovered for financial loss arising out of harm to another person or another person's property'.[38]

> 1 Right of action for wrongful act causing death.
>
> (1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.
>
> (2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ("the deceased") whose death has been so caused.

The Fatal Accidents Act ('FAA') was first enacted in 1846 as Lord Campbell's Act, overturning the rule in *Baker v Bolton* that 'in a civil court the death of a human being cannot be complained

[38] Atiyah's Accidents, Compensation and the Law, Peter Cane ed (7th ed, CUP 2006) 91.

of as an injury'.[39] It was later 'repeatedly amended, elaborated and re-enacted'.[40] It has been widely and powerfully criticised.[41] A Law Commission review concluded that it is unsatisfactory as it stands: [42]

> it should be recognised that, both historically and as a matter of principle, the Act is strongly tied to dependency. Historically, since 1959 the Act has described the class of persons entitled to claim under the Act as "dependants" …. We would also emphasise that the Act creates an exception to the general principles of tort law, in that an action is made available to a person other than the *primary* victim of a breach of duty (and the recovery is therefore of pure economic loss). This exception requires a powerful justification…the history of the Act indicates that the compensation of "losses of dependency" is a broadly accepted justification for the Act. (emphasis original).[43]

To understand the FAA and its legal effects, a first conceptual question is what, precisely, third-party 'dependants'[44] acquire under the Act, a difficulty concealed by the ambiguous label 'right of action'.[45]

It is not only one 'general principle of tort law' that is threatened. For my wife to independently 'recover [damages] for financial loss arising out of harm to [me]', the victim, two conceptually distinct exceptions are needed. Each is to a different general rule, each rule possessing its own significance.

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39 (1808) 1 Camp 493 (Lord Ellenborough); *Osborne v Gillett* (1873) LR 8 Ex 88; *Admiralty Commissioners v S S Amerika* [1917] AC 38 (HL), 42. Overturning eg *Higgins v Butcher* (1606) Yelverton 89; 80 E.R. 61 (husband's action in trespass for wrongfully causing wife's death dismissed).

40 *Cox v Ergo Versicherung AG* [2014] UKSC 22; [2014] AC 1379 [6] (Lord Sumption).

41 Eg Atiyah (2006) (n 38) 89 described s1A as 'highly objectionable', and at 134: s3(3) 'one of the most irrational pieces of law "reform" ever passed by Parliament'. Generally Stephen Waddams, 'Damages for Wrongful Death: Has Lord Campbell's Act Outlived Its Usefulness?' (1984) 47 The Modern Law Review 437; R Kidner 'A History of the Fatal Accidents Acts' (1999) 50 *Northern Ireland Law Quarterly* 318; Richard Geraghty, 'The Fatal Accidents Act: Is It at the End of Its Life?' [2019] Journal of Personal Injury Litigation 118; and literature surveyed in Donal Nolan, 'The Fatal Accidents Act 1846' in Jenny Steele and TT Arvind (eds), *Tort Law and the Legislature* (Hart 2013) 131-32.

42 Law Commission, 'Claims for Wrongful Death Consultation Paper' (1997) CP No 148; Law Commission, 'Claims for Wrongful Death' (1999) Report No 263.

43 Law Commission Report (n 42) paras 3.29-3.30.

44 S1(3)-(5) FAA 1976.

45 Terminology used in s1 FAA 1976; Law Comm Report (n 42) paras 2.1-2.6, 3.5-3.11, 7.2-7.4; *Davies v Powell Duffryn Associated Collieries* [1942] AC 601; *Blake v Midland Railway Co* [1852] 118 ER 35; (1852) 18 QB 93; *Pym v Great Northern Railway* 4 B&S 396.

To be entitled to damages for her own consequential losses, my wife needs her own *claim-right* to compensatory damages in exception to 'directional continuity', 'build[ing] on a wrong to someone else', to adapt Lord Wright's phrasing in *Bourhill v Young*.[46] Moreover, to enforce it in her own capacity, she also needs a *power* of enforcement (ie standing), in exception to the general standing rule. Neither secondary right, nor standing, is independently sufficient. The FAA is doubly anomalous, or 'exceptional' in nature; the conceptual challenge posed is at least twofold.

We analyse primary rights, secondary rights, and then standing under the FAA, concluding with its justifiability.

A. Dependants not tort-victims

The FAA is a 'trilateral' case, hence a genuine challenge. It presupposes the deceased was sole victim. His dependants are not themselves tort-victims. At all material times there is usually only one wrong in play, not two or more.

(i) FAA does not confer primary rights

While the FAA re-directs damages towards third-party dependants for their loss of financial support, it does not grant them free-standing primary rights.

The third-party dependants' claim for financial or pecuniary losses from the tortfeasor does not rest on an 'original and primary'[47] tort to them. Suppose I had children I was financially supporting. You knock me down on the street, killing me. The only (primary) bodily right you infringed is mine. If any physical pain and suffering or loss of amenity follows,[48] it is mine alone. My dependants may not even have been present at the scene of the accident, so evidently, you cannot have infringed any of their bodily rights. My children may be emotionally, or

46 (n 37).

47 *Palsgraf* (Cardozo CJ) (n 31); *Bourhill* (Lord Wright) (n 37).

48 In the case of immediate death my pain and suffering might be reduced to an instantaneous zero, my neurones not quite catching up: eg *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65 (football stadium stampede); *Kandalla v British European Airways* [1981] QB 158 (airplane crash); Weir 213

financially harmed as an ultimate consequence,[49] but the wrong itself is done to me, not my children.

The timing of a dependant's potential involvement indicates this. Unless death is instantaneous, dependants cannot intervene immediately post-tort. Any intervention is triggered only post-death, at a possibly much later stage. Their late involvement implies that they themselves were not wronged earlier on. Even if the tort later proves fatal in its effects, the victim's death cannot retrospectively alter this fact.

Contrast Ripstein, who has contended that wrongful death statutes 'characterised the death of a family member as a wrong personal to (normally his) dependants. As such they do not suppose that the deceased's right survives its own violation'.[50] Gardner's first example in *Personal Life* might similarly indicate that if you kill my wife, you (also) wrong me.[51]

These propositions may be doubted. Any such 'wrong' seems of a different kind or order, and the law does not recognise in us purely derivative rights that others not infringe our spouses', or children's' bodily rights, as rightly it should not. Their bodies are theirs alone. It would come too close to a form of ownership over another person. The old actions for lost services of a child or lost consortium of a wife have since been rightly abolished.[52]

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49 Law Comm Report (n 42) para 3.12: 'The Fatal Accidents Act is an exception to the general irrecoverability of damages for pure economic loss in the law of torts'. Similarly a gratuitous carer to the injured victim as a result of the tort suffers only purely financial losses: Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) 206. Otherwise he would have a straightforward claim against the tortfeasor for consequential financial losses cf *Hunt v Severs* [1944] 2 All ER 385.

50 *Private Wrongs* (n 24) 13 footnote 20.

51 (n 23) 1: 'They murdered his wife. They destroyed his future. Now they have to pay…What is alleged on behalf of the claimant is a wrong against him ("they murdered his wife").' But surely the question must be, pay whom? The deceased wife's estate, or her husband?

52 *Per quod servitium amisit,* and *per quod consortium amisit*: *Stone and Wife v Jackson* (1855) 16 C.B. 199, 139 ER 732; *Lynch v Knight* (1861) 9 H.L. Cas. 577, 11 ER 854 (HL) discussed *Best v Samuel Fox & Co* [1952] AC 716 (HL).

It may even be doubted whether parents have independent moral rights that their children not be killed.[53] To adapt an example,[54] suppose a pyrotechnics enthusiast forgets to sound a safety alarm before setting off fireworks in a park, on Guy Fawkes night. This poses risks of imminent death to two children – one parentless, the other with two parents. Suppose we could choose to save only one. It would be a difficult moral dilemma. As between an orphan and a child with parents, do we have additional reason to save the latter? It does not appear so. The reasons are balanced, hence the dilemma. If such a right did exist, the decision should be more straightforward; the right would serve as tie-breaker. Ditch the orphan to save the other, minimize the number of rights infringements in the world. Fortunately for orphans, this right might be questioned.

(ii) Non-pecuniary losses and bereavement damages

We cannot adequately explain a dependants' damages for lost financial support by hypothesising a right not to be emotionally distressed.[55] At common law, we do not have general independent rights against others not to be caused distress.[56] 'The general principle embedded in the common law [is] that mental suffering caused by grief, fear, anguish and the like is not assessable'.[57]

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53 Nicolas Cornell, 'Wrongs, Rights, and Third Parties' (2015) 43 Philosophy & Public Affairs 109, 127-134. Nb Cornell thinks parents have 'standing to be wronged'. But this is neither 'wrong', nor 'standing', in legally relevant senses. For Cornell 'wrongs' are detachable from a breach of duty; the 'wrong' can occur after the breach.

54 Ibid.

55 Compare, discussing the position in America, Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 204: 'The statutes that created [wrongful death actions] were not aiming to create, and did not create, new tort claims. Instead the goal was to empower certain nonvictims…. The hope was to provide them with economic support from a source other than governmental or charitable largesse.

56 *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281 (HL); *Hicks v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL), 401 (Lord Ackner), 408-10, 416 (Lord Oliver); *Hinz v Berry* [1970] 2 QB 40 (CA), 42 (Denning MR); *McLoughlin v O'Brian* [1983] 1 AC 410, 43 1 (Lord Bridge). McGregor (n 5) [5-012]-[5-014]; Stevens (n 5) 51-56. Cf psychiatric illness: Law Commission, Liability for Psychiatric Illness (1995) Consultation Paper No 137, paras 2.4-2.8.

57 *Behrens v Bertram Mills Circus* [1957] 2 QB 1, 28 (Devlin J).

In 1982 an amendment was made to the Fatal Accidents Act 1976,[58] providing that 'an action under this Act may consist of or include a claim for damages for bereavement',[59] for a defined list of immediate relatives narrower than 'dependants.'[60] The statutory wording indicates that only *secondary* rights to bereavement damages are given to dependants, for a fatal wrong to the deceased victim.

Atiyah rightly thought this amendment 'highly objectionable', and in light of the wider legal landscape, 'arbitrary'.[61] Noting that these damages are fixed,[62] and cannot vary according to how upset the third-parties are, Tony Weir argued that these are 'not designed as compensation for grief but [are] simply… a replacement in money for a life lost. The lump sum is standard because people are equal, not because they are equally regrettable.'[63]

A later Law Commission review acknowledged its controversial nature.[64] It sought to re-explain these awards as compensatory in nature, for post-death grief as a form of non-pecuniary loss,[65] of 'subsidiary importance' to the claim for pecuniary losses.[66] However, this explanation may be doubted. Bereavement damages seem 'compensatory' only in name, as loss is not proved but presumed, and even then, the absence of loss caused (ie absence of grief) is not provable by the tortfeasor. There is an 'irrebuttable presumption that those on the list have been caused grief by the deceased's death',[67] potentially leading to 'windfalls… where a father … has never known his child recovers bereavement damages'.[68]

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58 Administration of Justice Act 1982. Before, only pecuniary loss recoverable: *Blake v Midland Railway* (n 45).

59 s1A(1) FAA 1976.

60 s1A(2), cf s1(2) FAA 1976.

61 *Atiyah* (n 38) 89-91.

62 Today at £12,980: s1A(3).

63 Weir, *Introduction* (n 49) 215; McBride and Bagshaw (n 5) 817.

64 Law Commission Report (n 42) paras 6.1-6.3.

65 Ibid para 6.3.

66 Ibid para 6.1.

67 Ibid para 6.32.

68 Ibid para 6.33.

B. A secondary right to damages for a tort to someone else

For third-party dependants to recover from tortfeasors a sum representing their loss of financial support from the deceased victim, simply extending standing to them will not suffice. They must also be granted secondary claim-rights to compensatory damages, to (i) have an entitlement to be awarded any sums at trial, as opposed to any random stranger, and (ii) for damages to be prima facie quantified by reference to their consequential losses.

In exception to 'directional continuity', the FAA provides dependants these rights. They are secondary rights to damages for the infringement of someone else's primary rights, hence 'parasitic' or 'derived' from the wrong to him, the deceased-breadwinner.

(i) Redirecting damages

An illustration:[69]

> I have a wife and two children I am currently financially supporting. My will states that posthumously, my wealth shall go towards establishing BCL scholarships to Oxford, my alma mater. You run me down on the street, instantly killing me.

Without their own FAA claim-right to damages from the tortfeasor, my wife or children would not receive a penny from my estate. After my executor pays off my creditors, he must distribute my estate to the University of Oxford. The result is to deviate quite sharply from the world had the fatal tort not occurred. Had I not so unexpectedly died, I would have continued supporting them during my working life, Oxford to benefit only afterwards, from what is leftover.

Even if we extended to them standing (a power) to enforce my *estate's* right to damages, this would not suffice to change the outcome, no matter how substantial damages might be.[70] Any sums so recovered would again go first to satisfying my creditors, then Oxford. Unlike

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69 Compare Ontario Law Commission (n 5) 60-63.

70 Nb s1(2)c LRMPA 1934 severely restricts the quantum by abolishing damages for 'lost years'. Below, text to (n 109) onwards.

contracts for third-party beneficiaries, discussed earlier, no analogous principle of 'transferred loss' exists to redirect damages to the dependant, through a duty to account to the third-party in respect of the promisee's right to damages.[71]

Absent the FAA, my wife and children's only recourse would be to apply to court under another statute imposing restrictions on the free disposition of assets, pleading that the court exercise its discretionary power to supersede the will, or clawback distributed sums,[72] on grounds that it did not make 'reasonable financial provision' for them.[73] By granting my dependants their own secondary (claim)-rights to damages from the tortfeasor directly, for ultimately causing their lost dependency,[74] the FAA better secures their position. It remains to stress again its exceptional nature: the third-party dependants' rights to damages are discontinuous in two senses. As has been said, they are directionally discontinuous. Moreover, these rights are discontinuous in a second, temporal sense. They arise not at the time of the tort, but only at the time of death.[75] A substantial time-interval may have lapsed between the tort, and its subsequent acquisition.

(ii) Differently assessed

As dependants are granted their own secondary rights to compensatory damages for 'lost dependency' under the FAA, this explains why they are differently assessed – they are distinct

71 Chapter Three, 'Contract'.

72 ss2-3 Inheritance (Provision for Family and Dependants) Act 1975.

73 Inheritance (Provision for Family and Dependants) Act 1975. See eg *Pickett v British Rail Engineering* [1980] AC 136 (HL), 170; *Gammell v Wilson* [1982] AC 27 (HL), 54. See further Stephen Cretney, 'Reform of Intestacy: The Best We Can Do?' [1995] LQR 77; Roger Kerridge, *Parry and Kerridge: The Law of Succession* (13th edn, Sweet & Maxwell 2016) [8-12]-[8-78]; *Distribution on Intestacy* (Law Com. No. 187, 1989) para 27. Compare Ontario Law Commission (n 5) 60-63 especially 60: 'an exception to the general theory is warranted in order to avoid possible unexpected dispositions, according to the general law of succession, to persons other than those to whom the deceased would have devoted a portion of her productive capacity.'

74 S3(1) FAA 1976.

75 S1(1) FAA 1976.

from the victim's (or his deceased's estate)'s secondary rights to damages for 'loss of earning capacity',[76] gains consequentially prevented by the tort.[77]

A dependant's *loss*, in the sense of consequentially lost financial support[78] from her deceased breadwinner,[79] is moreover 'derivative and contingent'[80] in a different sense. It is 'pure economic loss',[81] contingent upon two counterfactuals. First, about what the deceased would have earned had he survived, and second, about what the deceased would have chosen to spend those earnings on.[82] So in principle, family members incur such loss only to the extent that the victim would have chosen to spend the proceeds of his labour on them.[83] Thus the sum total cannot exceed the victim's own lost earnings. The delimited kind of loss envisioned sets a natural ceiling.[84]

C. Exceptional standing arrangements

How, and by whom, are the dependants' rights enforced?

(i) Personal representative first, dependants exceptionally

In the first instance, they are statutorily channelled through the personal representative (PR) of the deceased's estate, to piggyback on the enforcement regime provided by succession law, which serves a collectivising function.[85] This allows coordinated enforcement of the possibly

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76 McGregor (n 5) [38-061]-[38-077].

77 McGregor (n 5) [4-053]-[4-055].

78 S3 FAA 1976, deriving from s2 FAA 1846. Only pecuniary loss: *Blake v Midland Railway* (n 45).

79 *Pickett* (n 73) 146 (Wilberforce), 153 (Salmon).

80 Ontario Law Commission (n 5) 30.

81 Law Commission Report (n 42) para 3.12.

82 Eg *Oliver v Ashman* [1962] 2 QB 210 (CA) 226 (Holroyd-Pearce LJ); *Kandalla v British European Airways* [1981] QB 158, 167.

83 Ibid. Eg *Gray v Barr* [1971] 2 QB 554 (CA) 570-71 (Denning MR), 582 (Salmon LJ), *Cookson v Knowles* [1979] AC 556 (HL), 568-9 (Lord Diplock).

84 Nolan (n 41) 156: 'it would surely have been anomalous if the legislation had put the dependants in a better position than the deceased himself would have been in had he survived'.

85 S2(1) FAA 1976.

numerous dependants' (not deceased's) rights to damages by a single office-holder, putting the deceased's PR primarily in charge of their enforcement..

The deceased's PR has 'right of first action', with third-parties only able to intervene should he fail to do so. If the PR does not sue within six months, the third-parties are then exceptionally empowered with the standing to themselves enforce these rights against the tortfeasor, to do what the PR ought to have done.[86] Their exceptional standing is on condition that, alike a PR, they must collectively enforce the rights of other dependants,[87] as only one suit in total can be brought against the tortfeasor.[88]

This legislative device was first enacted by the FAA 1864,[89] amending the FAA 1846[90] to guard against the 'inability or default of any person to obtain probate of the will or letters of administration… or…unwillingness or neglect of the Executor or Administrator'.[91] The exception made here to the general standing rule may be justifiable on similar grounds to the rationale for a *Vandepitte* procedure, as with Chapter Four.

The exceptional nature of this entire arrangement must be emphasised. Piggybacking is unusual; the deceased's personal representatives usually enforce only the deceased's *estate*'s rights. There are multiple moving parts here. Without clear and precise terminology, it is a recipe for confusion.

(ii) Confusion over FAA 'right of action'

86 S2(2) FAA 1976.

87 S2(4) FAA 1976.

88 S2(3) FAA 1976. Waddams (n 41) 449 raises 'difficult procedural problems' with the FAA scheme, eg discovery costs (an information problem) and 'severe conflict of interest between the various claimants that will make the conduct and settlement of a single action difficult'. Standard difficulties associated with class actions: see eg Robert Cooter & Daniel Rubinfeld, 'An economic model of legal discovery' (1994) 23(1) Journal of Legal Studies 435; Geoffrey Miller 'Some agency problems in settlement' (1987) 16(1) Journal of Legal Studies 189; Kenneth Dam, 'Class actions: Efficiency, compensation, deterrence, and conflict of interest' (1975) 4(1) Journal of Legal Studies 47.

89 27 & 28 Vict, c.95.

90 9 & 10 Vict, c.93.

91 Preamble to FAA 1864 (n 89) (29th Jul 1864), amending FAA 1846 (n 90).

Given how the FAA splits up standing, primary rights, and secondary rights to damages, it should be unsurprising that '[t]he character of the right given by Lord Campbell's Act has been the subject of much judicial decision.'[92]

The confusion may be fairly attributed to the ambiguous terminology 'right of action' or 'cause of action', equivocating between claim-rights and powers of enforcement.[93] This imprecision has proved troublesome. Some examples of their rather unilluminating use include *Blake v Midland Railway*,[94] where Coleridge J said of the FAA that 'this Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles.' Then in *Pym v Great Northern Railway,*[95] Erle CJ said 'The statute gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on a different principle'. In *Seward v Vera Cruz*[96] Lord Selborne L.C. said: 'Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim action personalis moritur cum persona,' because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor.'

All this could have been articulated much more clearly, and unnecessary litigation, avoided. For instance, in *Davies v Powell Duffryn Associated Collieries* two miners died intestate in an explosion, without creditors.[97] Their widows were administratrixes of their estates, also

92 *British Columbia Electric Railway Co Ltd v Violet Gentile* [1914] AC 1034 (PC), 1040. Eg *Markey v Tolworth Joint Isolation Hospital* District *Board* [1900] 2 QB 454; *Read v Great Eastern Railway Co* L.R. 3 QB 555; *Griffiths v Earl of Dudley* 9 Q.B.D. 357.

93 Chapter Two, 'Concepts'.

94 (1852) 18 QB 93, 110.

95 4 B. & S. 396, 406.

96 10 App. Cas. 59, 67 and 70.

97 [1942] AC 601 (HL).

inheriting under intestacy.[98] They sued the Colliery, hoping to cumulate damages under both FAA and the Law Reform (Miscellaneous Provisions) Act 1934,[99] of which s1(5) read:

> 'The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts 1846 to 1908…'

Relying on the ambiguity counsel submitted that 'the causes of action are distinct and independent, and the word "rights" in [s.1(5)] includes all rights, including the right to recover a sum of damages, and that this right is not to be derogated from or diminished by reason of the new right of action or damages recovered under it'.[100]

The argument was rejected, but laboriously. 'The rights of action in the two cases are quite distinct and independent…inasmuch as the basis of both causes of action may be the same, namely, negligence of a third party which has caused the deceased's death, it was natural to provide that the rights of action should be without prejudice the one to the other.''[101] The provision 'deal[s] with the cause of action under the Fatal Accidents Acts, not with the assessment of damages…. The two causes of action are, however, independent, though a duplication of damages is to be avoided'.[102]

The analysis proposed above will hopefully help clarify muddied waters.

D. Justifiability

We conclude by asking whether the FAA, which is doubly anomalous or exceptional on the proposed analysis, could be justified.

(i) Amputation?

98 Ibid 613 (Lord Wright).

99 Text to (n 107) onwards.

100 [1942] AC 601 (HL) 614.

101 Ibid 610 (Lord MacMillan).

102 Ibid 614 (Lord Wright).

If it could be claimed that wrongful death statutes are unjustifiable, then the FAA might be defensibly abolished. One reason wrongful death statutes are anomalous is because they 'override tort law's proper-plaintiff principle',[103] therefore lacking a typical feature a 'full-blown' tort might possess. But this ought not mean that the entire statute, and the numerous cases applying it, ought to amputated from tort law's domain.[104]

Faced with a counterexample, one might of course hive it off to some other legal compartment, to keep the theory clean. This may however come across as ad hoc or unconvincing.[105] It implies that one could be accused of misleading readers by discussing the statute, and the cases applying it, in a tort law textbook.[106]

(ii) Overlap with deceased victim's rights

The debate on the FAA's justifiability must be understood in light of its overlap with the LRMPA 1934, abolishing the old rule that extinguished one's rights upon death (*actio personalis moritur cum persona*).[107] The act allowed a deceased victim's rights to survive to his estate,[108] for enforcement by his personal representative when 'collect[ing] and get[ting] in the real and personal estate of the deceased'.[109]

After 1934, a tortfeasor was concurrently liable to suit under both LRMPA and FAA. The victim's own right to damages, surviving to his estate, was 'in addition to and not in derogation

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103 *Recognizing Wrongs* (n 20) 204.

104 Ibid. Cf eg Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 LQR 232, 235, 240, 252, 255, 258: 'statutes and common law must be seen as integrated parts of the whole law of obligations. To view them as if unmixed oil and water is a profound mistake.'

105 eg Guido Calabresi, 'A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension' (2014) 77 Law and Contemporary Problems 1, 12-13: 'The privatists would, I suppose, not want what remains to be called torts. But that is just fighting over words.'

106 Eg McBride & Bagshaw (n 5) Ch 28; McGregor (n 5) Ch 39*;* Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, OUP 2019) Ch 12.

107 *Gammell* (n 73) 63 (Lord Diplock), 77-78, 80-81 (Lord Scarman).

108 S1(1) LRMPA 1934.

109 S25(a) Administration of Estates Act 1925.

of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act'.[110] This created potential overlaps where an FAA-'dependant' was also an heir of the deceased, inheriting as estate-beneficiary. A 'duplication of damages' was avoided by deducting 'pound for pound from the Fatal Accidents Acts claim if they pass under the estate to the dependant making the claim'.[111] Where the dependant was not an heir, the tortfeasor might be held twice for the same upstream loss.[112]

Consequently, controversy ensued over the recoverability of the victim's lost earnings in respect of his 'lost years' due to the tort.[113] In *Pickett v BRE*,[114] the House of Lords firmly established its recoverability, holding that the appropriate calculation was by reference to the victim's life expectancy had the tort not occurred, rather than the victim's shortened working life post-tort. Lord Scarman emphasised that this was an application of the basic principle in *Livingstone v Rawyard Coals*:[115] damages are aimed at putting the victim as nearly as possible in the position had he not been wronged.[116] Had he not been wronged by the tortfeasor, he would have continued working and earning income during the 'lost years'.

But it was not long before an equally controversial statutory amendment to the LRMPA followed, removing this right from the deceased's estate but not from a living claimant.[117] This partially reinstated the *actio personalis* rule, re-extinguishing this right upon his death. The deceased estate' right to damages for lost earnings was hence restricted, the third-party dependants' FAA-right for lost dependency prioritised at its expense.

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110 S 1(5) LMRPA. *Davies v Collieries* (n 97), 610 (Lord MacMillan); 614 (Lord Wright).

111 *Kandalla* (n 48) 169 (Griffiths J); *Davies v Collieries* (n 97).

112 *Kandalla* (n 48) 169-70 (Griffiths J).

113 *Pickett* (n 73); *Kandalla* (n 48); *Gammell* (n 73).

114 (n 73). Overruling *Oliver v Ashman* [1962] 2 QB 210 (CA).

115 (1880) 5 App. Cas. 25.

116 *Pickett* (n 73) 169 (Lord Scarman).

117 Administration of Justice Act 1982 s4(2), inserting s1(2)c LRMPA 1934. Criticising, see Peter Cane and Donald Harris, 'Administration of Justice Act 1982 Section 4(2): A Lesson in How Not to Reform the Law' (1983) 46 MLR 478; McGregor (n 5) [38-0108]; Waddams (n 41) 442: 'new anomalies are created'.

Stephen Waddams influentially argued for the opposite position. The FAA should be abolished, and the deceased's estate should retain its right to lost earnings. The dependants should be left to claim through the deceased's estate (as heirs or otherwise), rather than directly against the wrongdoer. These issues should be sorted out through succession law, not torts, and 'courts would have to deal only with one kind of action for wrongful death and only one kind of action for lost earning capacity'.[118] Waddams' view was accepted by the Ontario Law Reform Commission,[119] but rejected by the English Law Commission. Whatever their precise disagreements, the consensus is that the FAA is unjustifiable in its current form.

(iii) Justifying improved versions

Thus the question becomes whether one can justify an improved version of something like the FAA. The Law Commission's main argument for it was that abolition might mean dependants' losses would go under-compensated.[120] However, this argument may be question-begging, assuming what it is trying to prove.

There is a more promising justification we can expand and refine.[121] If we believe, following *Livingstone,* that damages are awarded as a 'next best' to the wrong not having occurred in the first place,[122] then here – the exceptional grant of secondary claim-rights to damages to the third-party dependants, instead of the deceased's estate, may actually achieve a closer position to the world in which no wrong had occurred.[123] Had the victim stayed alive, the dependants would have continued receiving financial support from him. Had he not been

118 Waddams (n 41) 441.

119 Ontario Law Commission (n 5) 14-36, 59-66.

120 Law Commission Report (n 42) paras 3.1-3.4.

121 Stevens (n 5) 175-76. Adopting: Nolan (n 41) 156-157.

122 Eg Ripstein (n 24) 4, 12-13, 233-262.

123 Ibid, cf (n 24) 13 footnote 20.: 'even where the rightholder is permanently unable to enforce a right, the right itself need not disappear… The sense in which the deceased person's own right survives its own violation is captured in statutes giving the estate the power to sue for wrongful death'.

killed, the victim's heirs (if different) would not have received anything; succession would not have been prematurely activated.

In the standard case of a non-fatal personal injury tort, the right-holder remains alive and able to choose how to spend any damages recovered; he can choose to apply his 'lost earnings' damages towards financially supporting his dependants. Where the tort is fatal however, his discretion and control over the recoveries is lost. Succession law takes over: the personal representative must gather in the deceased's estate for re-distribution. He has no discretion over damages recovered. He must pay off the deceased's creditors,[124] and if a will exists, implement its terms. Where it does not, the estate must be distributed in the order dictated by intestacy law.[125] The exceptional situation here is created by the right-holder's death, hence justifying a wrongful *death* statute.

If this is the best justification, the Act we have might be under-inclusive. Whenever a tort victim is permanently deprived of his physical capacity to choose how to spend any damages recovered, for example where he is rendered an unconscious vegetable for four-years before death as in *Lim Poh Choo*,[126] a similar justification may also obtain for carving out the victim's right to lost earnings in that four-year period, and granting a 'parasitic' right to dependants.

(iv) Choice, autonomy, and death

A right-holder's discretion over how he chooses to spend damages recovered follows from another established general rule in the law of damages: 'the law is not concerned with how a plaintiff spends the damages awarded to him'.[127] Private law leaves it up to him whether he would like to return to his previous life trajectory, by spending it making good wrongfully

124 S32 Administration of Estates Act 1925; *Re Tankard* [1942] Ch 69, 72 (Uthwatt J).

125 S46 Administration of Estates Act 1925.

126 *Lim Poh Choo v Camden and Islington AHA* [1980] AC 174 (HL).

127 See *Pickett* (n 73) 170 (Lord Scarman); *Lim Poh Choo* (n 126), 191 (Lord Scarman); *Ruxley v Forsyth* [1996] AC 344 (HL) 259 (Lord Jauncey), 372-373 (Lord Lloyd); *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 (CA) 80 (Steyn LJ); Cane and Harris (n 117) 480-81; Solène Rowan, 'Cost of Cure Damages and the Relevance of the Injured Promisee's Intention to Cure' (2017) 76 CLJ 616.

caused losses. Having a choice means he could change his mind about initial life plans, calling it split milk post-disruption. He might decide to re-direct future efforts, putting recoveries to a better use, say towards tuition fees for an MSc in Data Science, or a PhD in Philosophy.

This choice, which may be stripped by a tortfeasor, is valuable. To emphasise that the law of damages facilitates it, the more precise legal position is that damages are awarded to *enable* the right-holder, whose right has been infringed, to achieve a next-best position to the wrong not having occurred.

The law gives him the wherewithal, but leaves it up to him whether to actually return to his pre-wrong life trajectory. The contrary position could be perverse: it would be to 'fix' or 'crystallize' a victim's life choices upon his suffering a wrong, over which he may have had absolutely no control. Where relationships[128] and circumstances have changed, the freedom to change one's mind on life plans[129] can be especially valuable.

A more banal justification is possible, namely, finality in litigation.[130] Any condition imposed upon a damages award might be said to create satellite litigation on its fulfilment or not, and associated costs.[131] However we must disagree with Atiyah that '[w]hile there are certainly pragmatic arguments in favour of allowing recipients to use their damages as they wish – notably, the difficulty of monitoring and enforcing restrictions on the use to which damages are put – it is hard to think of good reasons of principle or fairness to justify such freedom'.[132]

The justification for the legal position presented here is tied to the normative significance of the right-holder's choice, and the value of his personal autonomy. This specific freedom of the right-holder to dispose of post-trial recoveries might be said to follow from a more general freedom one has to allocate one's resources and earnings, which one would have retained had

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128 eg *Gray v Barr* (n 83) (deceased had affair, on verge of leaving wife and children); *Davies v Taylor* [1974] AC 207 (HL) (widow had affair and had left deceased, deceased had instituted divorce proceedings).

129 eg Anthony Kronman, 'Paternalism and the Law of Contracts' (1983) 92 Yale LJ 763; Stephen Waddams, *Sanctity of Contracts in a Secular Age* (CUP 2017) 7.

130 Burrows (n 106) 199; Gardner *Personal Life* 226-31.

131 Burrows (n 106) 197; Rowan (n 127).

132 *Atiyah* (n 38) 139.

the wrong not occurred. If, following *Livingstone,* damages are meant to facilitate or enable a return of the victim to the no-wrong position,[133] then this freedom must survive, albeit in substitute form, extending to any damages recovered. This justification is especially powerful for the FAA, which traditionally concerned only pecuniary losses, vindicating its initial scope.

Where a victim is unexpectedly killed by a fatal tort (including fatal *accidents*), it may leave behind evidential vacuums. The tort may have disrupted his life plans, drastically shortening his lifespan. A pre-tort will is at best indication only of how he would have chosen to dispose of his wealth posthumously, after a normal life expectancy. It may tell us nothing of what he would have done in the 'lost years' he was deprived of. Tort law could step in here, albeit in exceptional form. The exceptional grant of third-party claim-rights to damages for 'lost dependency' could perhaps be justified as the most socially acceptable[134] reconstruction of the victim's obligations during this lost period, frustrated by the tortfeasor. The victim would have owed moral (and legal) obligations to his children to maintain them.[135] By wrongfully killing the victim, the tortfeasor has made it now impossible for the dead victim to fulfil these obligations personally. The tortfeasor's duty to pay them sums representing their 'lost dependency' may be a deficient substitute to personal fulfilment by the duty-bearer, but it is a substitute nonetheless, and perhaps the best he can be legally coerced to do.[136]

IV. NEGLIGENT WILL-DRAFTERS AND WOULD-BE LEGATEES

The second example concerns the difficult lines of cases exemplified by *White v Jones*.[137]

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133 For application to this context see eg *Cox v Ergo* (n 40) [10], [21] (Lord Sumption): 'The relevant English law principle of assessment, which applies in the absence of any statute to the contrary, is that Mrs Cox must be put in the same financial position, neither better nor worse, as she would have been in if her husband had not been fatally injured.'

134 Compare *Gammell* (n 73) (Lord Scarman) 80-81.

135 eg Child Support Act 1991, s1, s3; Children Act 1989 s2, s3. Compare s3(4) FAA 1976.

136 Compare Ripstein (n 24) 13 footnote 20, and s844(2) BGB (Burgerliches Gezetzbuch), discussed *Cox v Ergo* (n 40) especially [21]: 'The principal head of loss for which he was liable to compensate Major Cox's widow was the deprivation of the net financial benefit to her of her legal right to maintenance from him. This is entirely cognate with the corresponding remedy in English law' (Lord Sumption).

137 [1995] 2 AC 207 (HL).

White v Jones was decided on a bare majority, comprising Lords Goff, Browne-Wilkinson, and Nolan. Lords Keith and Mustill dissented. Its basis remains difficult, with a 'copious'[138] 'surfeit'[139] of academic commentary both preceding,[140] and following it.[141] Treitel thought it *sui generis*: defying classification.[142] In a subsequent case trying to apply the ratio of *White v Jones*, Justice Neuberger (as he was then) frankly acknowledged that 'normal principles do not necessarily apply in a case such as this',[143] 'as the right of a beneficiary to sue at all can be said to be anomalous',[144] citing Lord Mustill's 'powerful' dissent. Lord Mustill's concern holds true today: 'rationalisation there must be, and it does not conduce to the orderly development of the law… if duties are simply conjured up as a matter of positive law, to answer the apparent justice of an individual case'.[145]

Distinguishing claim-rights from standing reveals three potential alternative explanations for the right to damages in *White v Jones*, each to be examined in turn. It will be argued that the third explanation, which frankly acknowledges that *White v Jones* is an exceptional

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138 *White* (n 137) (Lord Mustill) 292.

139 Ibid.

140 Eg Harold Luntz, 'Solicitor's Liability to Third Parties' (1983) 3 OJLS 284; Basil Markesinis, 'An Expanding Tort Law - the Price of a Rigid Contract Law' (1987) 103 LQR 354; John Fleming, 'Comparative Law of Torts' (1986) 4 OJLS 235; John G Fleming, 'Once More—Economic Loss' (1992) 12 OJLS 558. A large portion compared the law of other jurisdictions to *Ross v Caunters* [1980] Ch 297 (HC). Nb *Ross* was decided using the reasoning in *Anns v Merton* [1978] AC 728 (HL), imposing a 'prima facie duty' in virtue of reasonably foreseeable loss, subject to countervailing policy reasons 'why not': *Ross* 320-322 (Megarry VC): 'I can see no reason for excluding liability'. *Anns* was later discredited: *Murphy v Brentwood DC* [1991] 1 AC 398 (HL); *Caparo v Dickman* [1990] 2 AC 605 (HL).

141 Eg Kit Barker, 'Are We up to Expectations? Solicitors, Beneficiaries and the Tort/Contract Divide' (1994) 14 OJLS 137; Werner Lorenz & Basil Markesinis, 'Solicitors' Liability towards Third Parties' (1993) 56 MLR 558; Simon Whittaker, 'Privity of Contract and the Tort of Negligence: Future Directions' (1996) 16 OJLS 191; Jane Stapleton, 'The Normal Expectancies Measure in Tort Damages' (1997) 113 LQR 257; Peter Benson, 'Should White v Jones Represent Canadian Law: A Return to First Principles' in Neyers, Pitel, and Chamberlain (eds), *Emerging Issues in Tort Law* (Hart 2007); Stephen Waddams, 'Breaches of Contracts and Claims by Third Parties' in Neyers, Pitel, and Chamberlain (eds), *Emerging Issues in Tort Law* (Hart 2007).

142 Guenter Treitel, *The Law of Contract* (10th ed, Sweet & Maxwell 1999) 569; Guenter Treitel, *The Law of Contract* (11th ed, Sweet & Maxwell 2003) 618. Nb text subsequently changed by Peel, editor of 12th ed.

143 *X (A Child) v Woollcombe Yonge (A Firm)* [2001] Lloyd's Rep PN 274, 13.

144 Ibid.

145 *White* (n 137) 291 (Lord Mustill).

'trilateral' case, is preferable. It is a chestnut because the almost-legatee's right to damages was a 'parasitic' claim',[146] thus its 'anomalous'[147] or 'exceptional'[148] nature. Like the FAA, *White v Jones* involved an exception to 'directional continuity', a secondary right to damages for a wrong done to someone else, except that the relevant wrong here is truly a breach of contract rather than a tort[149]:

> 'The proper analysis of the decision of the House of Lords in *White v. Jones* is that, in a case such as this, the only duty owed by a solicitor is to the testator, but… the claimant may have a claim for damages arising out of the defendant's breach of duty to the testator'.[150]

A. *White v Jones*

White v Jones involved a 78-year-old testator who, after quarrelling with his two daughters, disinherited them in his will.[151] They soon reconciled, so the testator instructed his solicitor, Mr Jones, to supersede the old will and give his daughters £9,000 each. Mr Jones did nothing for a month, missing three successive weekly appointments before going on holiday.[152] Before he could make the next appointment scheduled upon his return, the testator fell, hit his head, and died soon after of a heart attack.[153] Because the letter of instructions for a new will had not been witnessed, it could not take effect.[154]

The two daughters sued Mr Jones, alleging that his delay caused them to lose out on the £18,000 they would have obtained under the will, if amended. The trial judge dismissed their

146 Ibid 277 (Lord Mustill).

147 *X (A Child)* (n 143) (Neuberger LJ); Stevens (n 5) 178.

148 Stevens (n 5) 180.

149 On which eg Gardner, 'Breach of Contract as a Special Case of Tort' in his *Torts and Other Wrongs* (OUP 2019).

150 *X (A Child)* (n 143) (Neuberger LJ) 8.

151 *White* (n 137) 217-18.

152 Ibid.

153 Ibid.

154 S9 Wills Act 1837.

claim. On appeal, both the Court of Appeal and the House of Lords, by a bare majority, gave judgment for them, awarding them damages of £9,000.

The majority reasoning to reach this result was notoriously difficult, raising numerous 'conceptual difficulties'.[155] Lord Keith thought them 'too formidable' to surmount. Similarly, Lord Mustill warned that 'a remedy... granted on an ad hoc basis' here might cause 'serious harm to the general structure of the law'.[156] Even Lord Goff, who in his leading majority judgment devoted large sections to discussing these difficulties,[157] concluded that the reasoning in *Ross v Caunters,*[158] a prior case on the issue, was 'inappropriate, because it does not meet any of the conceptual problems which have been raised.'[159]

B. Explanation 1: A 'direct and free-standing duty'[160]

'[L]egal fault cannot exist in a vacuum; the person who complains of it must do so by virtue of a legal right.'[161]Any plausible explanation must 'fit the usual tort pattern of a wrongful act that damages a prior right of the claimant'.[162] The apparent orthodoxy bases it on a correlative free-standing duty of care in tort owed by the solicitors to would-be legatees, running concurrently with their contractual duty owed to the client-testator.

(i) Conceptual difficulties

This route was paved with conceptual obstacles. First, the claim was for a purely economic loss, not consequent on damage to person to property.[163] Second, to ground it upon any supposed

155 *White* (n 137) 252 (Lord Keith), 255-58 (Lord Goff).

156 Ibid 291 (Lord Mustill).

157 Ibid 255-67 (Lord Goff).

158 (n 140).

159 *White* (n 137) (Lord Goff), cf 293 (Lord Nolan).

160 ibid 277 (Lord Mustill).

161 ibid 276.

162 Waddams 'Breaches of Contracts' (n 141) 191.

163 *White* (n 137) 257, 261 (Lord Goff); Law Commission, 'Privity of Contract: Contracts for the Benefit of Third Parties' Report No 242 (1996) para 7.27.

'reliance' would be fictional,[164] as indeed a potential donee (eg a charity) might not even have been aware of the testator's (and his solicitor's) intentions or existence,[165] and the majority so acknowledged.[166] Third, despite its invocation by the majority, *Hedley Byrne* was of little relevance, and therefore a red herring. The solicitors never undertook a task for the potential donees. He did so exclusively for the testator, his client, via contract. Lord Goff nevertheless tried to bridge this impossible gap, by 'holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary'.[167] This deeming explains little.[168] Even worse, it is unhelpful, 'add[ing] a layer of fiction to an already difficult concept'.[169] In fact, *White v Jones* is 'arguably the single most illuminating case on the assumption of responsibility concept', by way of a negative example, demonstrating its absence.[170] Fourth, the complaint – that the solicitors did nothing until it was too late – was really of a 'pure omission'[171] or non-performance, rather than a defective performance.[172] Fifth, and relatedly, the almost-legatees only has a *spes successionis* – a pure 'expectation'[173] falling short of a legal right. Paradigmatically, tort law protects pre-existing interests,[174] so we have rights that others not injure our persons or property, independent of agreement. Yet here, the only plausible 'interest' is in the performance of another's contract (the testator-client's), through which one expects to be made better off. Sixth, and giving the game away,

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164 *White* (n 137) 219 (HC) (Sir Donald Nicholls VC); *Ross v Caunters* (n 140) (Megarry VC); Peter Cane, *Tort Law and Economic Interests* (2nd edn, OUP 1995) 184.

165 *White* (n 137) 289 (Lord Mustill).

166 Ibid 262 (Lord Goff), 272, 275 (Lord Browne-Wilkinson).

167 Ibid 268 (Lord Goff). Cf 289 (Lord Mustill): 'he undertakes nothing towards the charity in the sense of doing something on its behalf…. The reasoning in *Hedley Byrne and Henderson* does not apply in such a case'.

168 Stevens (n 5) 179; Cane (n 164) 184-85; Whittaker (n 141) 205.

169 Whittaker (n 141 205.

170 Donal Nolan, 'Assumption of Responsibility: Four Questions' [2019] Current Legal Problems 1, 8.

171 *White* (n 137) 258, 261 (Lord Goff).

172 *Smith v Littlewoods* [1987] AC 241; *Treitel's The Law of Contract*, Peel ed (14th edn, Sweet & Maxwell 2015) [14-046]; Law *Commission*, 'Privity' para 7.27.

173 *White* (n 137) 251 (Lord Keith), 256-57 (Lord Goff); Cane (n 164) 183.

174 *White* (n 137) 257 (Lord Goff).

advocates of the tort of negligence agree that its content and scope must mimic the contractual duty owed by the solicitor to his client.[175] But the tort of *negligence* is, by definition, tied to a standard of reasonable care.[176] If the parties had contracted for the solicitor to ensure an outcome for a higher price, then if the outcome failed to eventuate, this is a breach of contract regardless of his having taken reasonable care, such risk of 'strict liability' having been contractually allocated to him. In reverse, parties could even agree to reduce the standard to one of honesty, so a negligent (but not dishonest) solicitor would not be in his breach of contract with his client. One might vary the standard of care in the tort of negligence to embrace all possible variations, but to do this would effectively denude it of any conceptual content.

(ii) No primary contractual right to performance

And so the Law Commission thought 'the decision is best analysed as allowing a third party to enforce a contract by pursuing an action in tort',[177] '[b]ut given the decision in *White v Jones* the practical need for such a provision [in the Contract (Rights of Third Parties Act) 1999] has been obviated'.[178] Many commentators have also offered contractual explanations of the disappointed beneficiaries' right to damages in *White v Jones*.[179] However it must be stressed that this should not entail deeming in the would-be legatees free-standing primary rights to contractual performance against the solicitors.

Doing so would be overkill. '[T]he main problem here is not how to give the third party (in the instant case the beneficiary) the right to demand *performance* from the promisor (in this

175 Eg Barker (n 141) 148-49; Lorenz & Markesinis (n 141) 560-61.

176 Whittaker (n 141) 205.

177 Law Commission, 'Privity' (n 163) para 2.14.

178 Ibid para 7.27.

179 Lorenz & Markesinis (n 141); Whittaker (n 141); Benson (n 141); Waddams (n 141); Barker (n 141).

case the lawyer), but how to *protect* the third party against the 'promisor's' negligent performance of his duties towards his promisee (here, the testator).'[180]

It would also attract its own set of conceptual difficulties. '[R]elations of rights and duties arise through and apply to conduct inter se and only those who engage in this way are related through such rights and duties'.[181] '[W]hat the testator intended to confer on the new beneficiaries was the benefit of his assets after his death; not the benefit of the solicitor's promise to draft the will'.[182] Furthermore, a primary right would clash with the 'testator's undoubted power to change his will', so that any 'right of enforceability (sic) could only come into play once the testator had died without having changed his mind'.[183] No such right does, and should exist for an *inter vivos* gift.[184] If the testator is still alive when the defect is discovered, it should be up to him whether he wants to rectify the situation by eg executing a new document.[185]

It is fictitious to invent a primary contractual duty owed by solicitors to would-be-legatees; the testator is their client, not the legatees. Similarly, an explanation based in a 'direct and free-standing duty'[186]of care in tort may consign the concept to a fig leaf, or 'fifth wheel'.[187] We can rule them out.

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180 Lorenz & Markesinins (n 141) 561.

181 Benson (n 141) 184. More recently: Benson, *Justice in Transactions: A Theory of Contract Law* (HUP 2019) 75-83. Nb for Benson this is a 'doctrine of privity' and the 'organising idea' behind *Palsgraf* (n 29) 100-01 (Cardozo CJ); Chapter Three, 'Contract'.

182 *White* (n 137) 281 (Lord Mustill). Law Commission, 'Privity' (n 163) paras 7.19-7.27. Also *White* (n 137) 262-263 (Lord Goff); Barker (n 141) 142.

183 Law Commission (n 163) para 7.20 footnote 14.

184 *Hemmens v Wilson Browne* [1995] Ch 223.

185 Law Commission (n 163) para 7.26; *White* (n 137) 262, 268 (Lord Goff), 276 (Lord Browne-Wilkinson).

186 *White* (n 137) 277 (Lord Mustill).

187 William Buckland, 'The Duty to Take Care' (1935) 51 LQR 637, 639; Percy Winfield, 'Duty in Tortious Negligence' (1934) 34 Columbia LR 41, 61–65; John Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 Canadian Bar Review 471. See also Donal Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 30; Dan Priel, 'Tort Law for Cynics' (2014) 77 MLR 703.

C. Explanation 2: Standing to enforce the testator's right to damages?

We must furthermore dissent from Stevens' suggestion that: '*White v Jones* is therefore best explained as a (controversial) attempt to vindicate the testator's contractual right against the solicitor to performance… Like the Contract (Rights of Third Parties) Act 1999, properly understood, it represents an exception to the principle that only a contracting party has standing to sue for the loss caused by a breach of contract'.[188]

Extending to would-be legatees the standing (a power) to enforce the deceased testator's *estate's* right to damages, against his defaulting solicitor for breach of contract, would not be sufficient to aid them.[189]

(i) Diminution versus misdirection

The first obstacle is that even if the estate's right to damages were enforced, it might be nominal, as the solicitor's breach causes the testator's estate no pecuniary loss.[190] His net estate is no worse off as result. This does not change whoever the enforcer, whether an attorney-general, regulator, or the would-be legatees.

Moreover, the complaint here is not that the estate has been diminished, so that the total size of the pie is reduced, but rather that executing the old will would mis-distribute it to the wrong persons, contrary to the testator's intentions. Even if the estate could somehow obtain substantial damages, by way of an expanded concept of 'loss' or otherwise,[191] the ultimate destination of the recoveries would not change. It would only inflate the estate for the benefit of the legatees under the old will.

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188 Stevens (n 5) 181.

189 Cf eg Benson (n 141) 183-89; *Anwar Patrick Adrian v Ng Chong* [2014] 3 SLR 761; [2014] SGCA 34 [79], [96]-[101].

190 *White* (n 137) 259, 265 (Lord Goff); 282 (Lord Mustill); *Worby v Rosser* [2000] PNLR 140, 149 (Chadwick LJ).

191 By analogy to something like the 'broad ground' in *Linden Gardens* [1994] 1 AC 85 (HL) and *McAlpine v Panatown* [2001] 1 AC 518 (HL). Compare eg Benson (n 141) 172-76; Barker (n 141) 140-41. Chapter Three, 'Contract'.

This second point is usefully illustrated by *Carr-Glynn v Frearsons*,[192] a subsequent case that 'extended the principle of *White v Jones*',[193] *even though* the estate had a right to substantial damages against the solicitors for breach of contract. The facts were similar to *White v Jones*, except for one material fact – the solicitors' negligence had caused a diminution in the size of the testatrix's estate, upon her death.

In *Carr-Glynn* the testatrix held property on joint tenancy, which she wanted to bequeath to her niece in her will. 'A competent solicitor, acting reasonably'[194] would have advised her to sever the joint tenancy so that this could be effected. The solicitor did not. As a result, the property did not even fall into her estate upon death. Instead it vested in someone else – the surviving joint tenant – her nephew.

Delivering the unanimous judgment, Chadwick LJ noted that 'At first sight the facts in the present case take it outside the principle as stated by Lord Goff. This is a case in which the estate itself would have a remedy.'[195] However, 'any recovery by the personal representatives would not benefit the plaintiff. The damages would form part of the residue; and she is not the residuary beneficiary under the 1989 will.'[196] Hence, in order to allow the niece to recover for her own consequential loss, Chadwick LJ 'further extended'[197] *White v Jones* to 'fashion a remedy'[198] for the niece, granting the niece her own right to damages.[199]

(ii) Inapplicability of 'transferred loss'

As argued in the contract chapter, third-party standing might enable the third-party to obtain damages if something additional like 'transferred loss' was applicable in conjunction. If so the

192 [1999] 2 WLR 1046, [1999] Ch 326 (CA).

193 *Richards v Hughes* [2004] PNLR 35 [25].

194 (n 192) 332.

195 Ibid 333.

196 Ibid 332-33.

197 Ibid 333.

198 Ibid 336.

199 Subject to a pound-for-pound deduction from the estate's claim: Ibid 337-38.

intended legatees could then simultaneously enforce the deceased-promisee's duty to account to them, in respect of his right to damages against the solicitor, quantified by reference to the third-party's consequential loss through a 'fiction'.[200]

But *White v Jones* may not be an appropriate situation to apply 'transferred loss',[201] and moreover recent developments have proved the doctrine is far from stable.[202] Lords Goff and Mustill recognised this, and hence excluded its applicability. On one powerful rationalisation of 'transferred loss' as a unifiable principle applicable throughout English law,[203] one necessary condition is that 'the third party suffers the loss *instead of* the promisee by reason of a special relationship between the promisee and the third party'.[204]

White v Jones does not satisfy this condition.[205] Lord Mustill thought the case 'far distant' from the *Albazero*[206] or *Linden Gardens,*[207] 'where there was a single loss which might have been suffered indifferently by the obligee or by someone else, and which the courts were content to attribute to the obligee. Here, by contrast, to enable the estate, in title of the deceased testator, to recover a sum equivalent to the disappointed expectations of the beneficiaries would be to compensate it for a loss which it not only had not, *but could not have, suffered*'.[208] Agreeing, Lord Goff held that 'the relevant loss could never fall on the testator to whom the solicitor owed a duty, but only on another; and the loss which is suffered by that

200 *White* (n 137) 282 (Lord Mustill).

201 Cf Markesinis (n 140) 368-69; Lorenz and Markesinis (n 141) 561-63.

202 *Bv Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596.

203 From the carriage and sale of goods cases, eg *The Albazero* [1977] AC 774 (HL) and *The Aliakmon* [1985] QB 350 (CA), and the construction cases, eg *Linden Gardens* [1994] 1 AC 85 and *Panatown* [2001] 1 AC 518.

204 Hannes Unberath, *Transferred Loss: Claiming Third Party Loss in Contract Law* (Hart 2003), 211-14, esp 211 (emphasis added).

205 Where the third party 'suffers loss in addition to the promisee… the loss is not transferred but multiplied': Ibid 213.

206 (n 203).

207 (n 203).

208 *White* (n 137) 282 (emphasis added).

other, i.e. an expectation loss, is of a character which in any event could never have been suffered by the testator. Strictly speaking, therefore, this is not a case of transferred loss.'[209]

(iii) 'Lacunas in the law': rights-gap or enforcement-gap?

The difficulty was introduced when Lord Goff nevertheless sought to 'extend' *Hedley Byrne* to 'fashion a remedy to fill a lacuna in the law',[210] 'in the sense that practical justice requires that the disappointed beneficiary should have a remedy against the testator's solicitor in circumstances in which neither the testator nor his estate has in law suffered a loss.'[211]

Subsequent cases seeking to apply the ratio of *White v Jones* have therefore focussed, like Lord Goff did, on finding a 'lacuna' or 'gap' to be filled.[212] On this sense of a 'lacuna', *White v Jones* is irreconciliable with *Carr-Glynn v Frearsons*. In *Carr-Glynn v Frearsons* the solicitor's negligence caused the estate a substantial loss. As the estate had a right to substantial damages against the solicitor, no such 'lacuna' in the sense of a 'rights-gap' or 'damages-gap' existed.[213] Yet, an additional 'remedy' – ie a right to damages - was 'fashioned' for the disappointed niece. This was no mere 'incremental extension'.[214] An entirely different sense of a 'lacuna' was invoked.

The term 'lacuna' is ambiguous and malleable, so much so to the extent of being unhelpful. We must tread warily here. To raise another example, Benson has, in arguing for a standing-only solution in *White v Jones,*[215] attempted to rationalise Lord Goff's 'lacuna' reasoning by suggesting that the true 'lacuna' lies 'in the fact that the representative of one who has a valid

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209 Ibid 265.

210 *White* (n 137) 260, 268 (Lord Goff): 'of cardinal importance'.

211 Ibid 265, 268 (Lord Goff). Compare *Ross v Caunters* (n 140) 302 (Megarry VC): 'The only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim. However grave the negligence, and however great the loss, the solicitors would be under no liability to pay substantial damages to anyone.'

212 See eg *X (A Child)* (n 143) 11-13 (claim failed because solicitors non-negligent); *Carr-Glynn* (n 192) 333 ('lacuna' extended for claim to succeed); *Worby v Rosser* (n 190) 147-49 (claim failed because no 'lacuna').

213 Stevens (n 5) 179-80.

214 (n 192), cf 399 (Thorpe LJ).

215 Benson (n 141) 180.

claim for substantial damages may not have an incentive to enforce it'. In other words, that there is an 'enforcement-gap' or 'standing-gap'. But as demonstrated above, extending standing alone is not enough.

D. Explanation 3: A right to damages for breach of a contractual duty owed to another

It is of course an option to condemn *White v Jones* as unjustifiable and wrongly decided, and therefore to be overruled. But this would be a drastic move.

This bring us to the third rationalisation of *White v Jones*, which is our most promising way out. It vindicates the call by numerous commentators to adopt a 'contractual solution' to these lines of cases. At the same time, it acknowledges that *White v Jones* is a limited exception. It is 'anomalous' or 'exceptional' precisely because it is truly a trilateral case, akin to the FAA, and should be acknowledged as such.

On this view the relevant wrong is a breach of contract. At all material times, primary contractual rights to performance belonged solely to the deceased testator. But a limited exception is made to a general rule about damages – 'directional continuity'. Secondary right is detached from primary right. Even though the solicitor had breached its contractual duty owed only to its client, the testator, the would-be legatees are third-parties who exceptionally acquire secondary right to damages for breach of contract, instead of the client. They have rights to damages that are 'parasitic' upon or 'derived' from the wrong done to their father. This was the subject-matter of enforcement in the daughters' suit. It is only in this limited, specific sense that *White v Jones* involved any 'transferred rights',[216] or correlatively, a 'transfer of obligations'.[217]

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216 Stevens (n 5) 178.

217 Waddams 'Breaches of Contracts and Claims by Third Parties' (n 41) 198.

(i) Justification

The comparison to fatal torts is helpful here because the FAA involves a structurally similar exception to the same rule about damages, and the most promising justification for an exception here is similar.

Again, if following *Livingston* damages are awarded as a 'next best' to the wrong not having occurred in the first place, then here, an exceptional grant of the secondary right to damages to the intended legatees, rather than the testator's estate, would achieve a closer approximation to the world in which the wrong had not occurred.[218] By contrast, if in the usual manner the right to damages survives to the deceased testator's estate, any recoveries would ultimately accrue to the residual legatees under the old will. Executors of the deceased's estate are duty-bound to execute the old will, and have no discretion in applying the recoveries.

It was the very purpose of the contract to amend the old will, but simply applying the general rules on damages in this situation would thwart that purpose, rather than help address the breach of contract. A limited exception is hence warranted. This analysis draws support from Chadwick LJ's reasoning in *Carr-Glynn v Frearsons*, whose motivating idea appeared to be that:

> 'If the law in this field is to reflect what would generally be recognised as acceptable and just the application of the relevant principles should lead to the result that the estate and its beneficiaries are restored to the position in which they would have been if the solicitors had not failed in their duty to the testatrix.'[219]

(ii) Delimited scope

The subsequent cases are consistent with this explanation, further delineating its scope. Two necessary conditions must be satisfied.

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218 Stevens (n 5) 180.

219 (n 192) 334.

First, and as both Lords Goff and Mustill emphasised, the primary-right-holder (ie the testator) must no longer be able to put things right.[220] Post-death, the will can no longer be changed.[221] As with the situation involving fatal torts, the exceptional situation here is created by the primary right-holder's death. If the testator is still alive when the defect is discovered, it is entirely up to him whether he still wants to make the gift. If yes, he can still take steps to rectify the situation. If not, his change of mind should be respected.

Hence why it does not apply to an *inter vivos* gift, a point unexplainable were there a free-standing duty of care in tort, the orthodox view. *Hemmens v Wilson Browne*[222] confirms this. A client had instructed his solicitors to execute a document gifting his mistress a right to £110,000, for the purpose of buying a house when she found a suitable one. Through the solicitor's negligence the document drafted gave her no enforceable rights.[223] The client later changed his mind about the gift, refusing to put it right despite having the means to do so.[224] The mistress sued the solicitors on grounds that the solicitors' negligence had caused her loss. The claim failed. Moseley QC emphasised that the only breach was of a contractual duty owed to the client.[225] It was up to him whether to sue his solicitors for breach of contract, for the cost of getting another solicitor to draft the document properly to put things right.[226]

Second, the testator's intentions must be satisfactorily proved, in order to establish the claimant's status as a 'would-be-legatee'. In *White v Jones* the two daughters were 'fortunate'

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220 *White* (n 137) 262, 268 (Lord Goff) 276 (Lord Browne-Wilkinson). See also *Hemmens v Wilson Browne* (n 184) 235-238.

221 Subject to the court's jurisdiction to rectify the will in circumstances defined by statute, ie if it fails to carry out the testator's intentions in consequence of either a clerical error, or by a failure to understand his instructions: s20 Administration of Justice Act 1982. See also *Walker v Geo H Medlicott And Son* [1999] 1 WLR 727 (CA), 741-742; Stephen Cretney, 'Negligent Solicitors and Wills - a Footnote' (1996) 112 LQR 54, cf Tony Weir, 'A Damnosa Hereditas' (1995) 111 LQR 357.

222 [1995] Ch 223; cf *Richards v Hughes* (n 193) (strike out declined, because 'relevant area of law still subject to some uncertainty and developing' [30] (Gibson LJ)).

223 Ibid 226, 232.

224 Ibid 233.

225 Ibid 239.

226 Ibid 237.

as they could prove that the testators' final intentions were 'firm, clear and attainable'.[227] Without sufficiently unequivocal evidence of the testator's intentions, the claim should fail.[228]

(iii) Standing

Like the FAA, *White v Jones* is doubly exceptional, also constituting an exception to the general standing rule. Although the would-be legatees were not primary right-holders and hence non-victims, they had the standing (a power) to enforce their also exceptional secondary rights. The dissimilarity is that their standing arises from the get-go. Enforcement is not in the first instance channelled through the deceased's personal representatives, by way of piggyback.

There may be a good case for unifying the two 'trilateral' cases, to facilitate coordinated enforcement in a single-enforcer, especially where there are numerous would-be legatees. The main obstacle is that in these situations, a new will should have superseded the old arrangements, the nub of the complaint, so the executors appointed under the old will might be unsuitable.[229] The new will might have appointed different executors, with interests more aligned with the would-be legatees, perhaps even the legatees themselves.

V. PRE-BIRTH TORTS AND INFANTS BORN DISABLED

One final example of a 'trilateral' case. Where a child is born disabled due to someone's past conduct, at a time preceding the child's birth, can the child later sue him in tort for causing its disabilities?

To answer 'yes', English law took two distinct routes. The common law position was later replaced by the Congenital Disabilities (Civil Liability) Act 1976 ("CDCLA"),[230] enacted because of prevailing doubt about the common law position,[231] and the 'prevalence of abnormal births'

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227 *White* (n 137) 292 (Lord Nolan).

228 *Gibbons v Nelsons (A Firm)* [2000] PNLR 734; *Walker* (n 221) (both distinguishing *White v Jones*).

229 Alluding see: *White* (n 137) 281 (Lord Mustill).

230 S4(5).

231 Law Commission, '*Report on Injuries to Unborn Children*' (1974) No 60 para 110.

in the UK due to pre-natal causes, including trauma, injury during birth, drugs (eg the thalidomide tragedy),[232] abortifacients, irradiation, and diseases.[233]

The CDCLA granted a 'parasitic' or 'derivative' third-party 'right of action' to the child,[234] for a tort done to its *parent.* It was thought necessary because 'there is no nexus of legal duty, whether at common law or under statute, as between the defendant and the child "in utero".'[235] The statute is doubly exceptional, granting the child both a secondary right to damages and standing for a tort to its parent, in exception to both the general standing rule and 'directional continuity':

> 1 Civil liability to child born disabled.
> (1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.
> (2) An occurrence to which this section applies is one which—
> (a) affected either parent of the child in his or her ability to have a normal, healthy child; or
> (b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.
> (3) Subject to the following subsections, a person (here referred to as "the defendant") is answerable to the child if he was liable in tort to the parent or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.

232 Marketed as a cure for morning sickness in pregnant women.

233 Law Commission, 'Unborn Children' (n 231) paras 19-27.

234 Ibid para 45; *Winfield & Jolowicz* (n 5) [25-018]; Christopher Walton (ed), *Charlesworth & Percy on Negligence* (14th edn, Sweet & Maxwell 2018) [2-301]; Michael Jones (ed), *Clerk and Lindsell on Torts* (22nd edn, Sweet & Maxwell 2019) [5-58].

235 Explanatory note 4 to s1 CDCLA: Law Commission, 'Unborn Children' (n 231) 47.

Can the statutory position be justified? It will be suggested that it can. In these cases, it is more plausible that any tort is truly to the parent, which then has negative effects on the child subsequently born. Having a child born disabled 'derive' its rights from a wrong done by the tortfeasor to its parent is thus the conceptually neater way of resolving these issues, 'avoid[ing] the possibility that the defendant might owe two levels of duty in respect of one incident'.[236]

A. The common law

The common law, by contrast, strained to find the 'nexus of legal duty' between alleged tortfeasor and unborn child necessary to identify it as tort-victim. The position was only clarified after the CDCLA's enactment, on a joint appeal from *Burton v Islington Health Authority*[237] and *De Martell v Merton and Sutton Health Authority*.[238]

Both cases involved negligence of medical staff. In *Burton* a woman who, unknown to herself was 5-weeks pregnant, underwent a 'dilation and curettage' procedure to remove tissue from her uterus. The medical staff failed to carry out a pregnancy test and to heed her symptoms of nausea. She gave birth in 1967 to a child – Tina Burton – with numerous abnormalities, e.g. deformation and underdevelopment in her ribs and uterus, a displaced heart to the right, which she underwent surgery to correct. Burton was unable to conceive, and greatly embarrassed by her appearance. Aged 21 she sued the defendant health authority for damages in the tort of negligence. As her birth had preceded the CDCLA, her claim was under English common law. *De Martell* involved similar facts, except that the alleged negligence of medical staff occurred while his mother was in labour. He was born 2 months before Tina Burton, with severe physical disabilities.

In both cases the child won. On combined appeal, the judgments of the trial judges, Potts J in *Burton* and Phillips J in *De Martell*,[239] were unanimously affirmed by the Court of Appeal.

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236 *Charlesworth & Percy on Negligence* (n 234) [2-301].

237 [1991] 1 QB 638.

238 [1992] 3 WLR 637 (CA).

239 Ibid 232: 'both Potts J and Phillips J came to the right conclusions for the right reasons' (Balcombe LJ), 232: 'Potts J has illuminated the way for the definitive judgment of Phillips J' (Leggatt LJ); 224 'in his

Following the Australian decision in *Watt v Rama,*[240] the courts found free-standing primary duties owed to the unborn child.

However, they struggled in their reasoning. Noting that 'at the time of the negligent act or omission there was in law no specific person towards whom the duty could be said to exist',[241] Potts J held that 'there is no requirement in this branch of English law for the plaintiff and defendant to possess correlative rights and duties at the time of the wrongful act'.[242] Phillips J in *Martell* noted that 'the concept of the breach of a contingent or potential duty which crystallises into an actual duty after the act or neglect has occurred is not an easy one.''[243] On its face, their reasoning appears inconsistent with a rights-based view of tort law.

B. Duties to unborn children with no separate legal existence

A child (foetus) is physically identified with its mother before birth, acquiring a legal personality distinct from its mother only from time of birth.[244] Whether a child born disabled can possess a 'right of action for pre-natal injuries'[245] has thus proved difficult for those seeking to identify the unborn child as tort victim.[246]

'What creates the difficulty is that such act or omission preceded and was, therefore, separated in point of time from the birth of the plaintiff in her injured condition'.[247] The two

careful and extremely clear judgment, which I would gladly adopt as my own, Phillips J dealt with all those points entirely correctly' (Dillon LJ).

240 [1972] VR 353 (Sup Ct of Victoria).I

241 (n 237) 647.

242 Ibid 648.

243 (n 238) 216.

244 *St Georges Healthcare NHS Trust v S* [1998] 3 WLR 936; *Burton v Islington Health Authority* [1991] 1 QB 638; *Paton v British Pregnancy Advisory Service Trustees and Another* [1979] QB 276; [1978] 3 WLR 687; *C v S* [1988] QB 135; [1987] 2 WLR 1108 (CA); *In re F (In Utero)* [1988] 2 WLR 1288 (CA). See also Law Commission, 'Unborn Children' (n 231) para 33.

245 *Montreal Tramways Co v Leveille* [1933] 4 DLR 337, 345.

246 Exploring the issue in criminal law, property law and contract law see also Percy Winfield, 'The Unborn Child' (1942) 8 CLJ 76.

247 *Watt v Rama* (n 240) 359 (Sup Ct of Victoria)) (Winneke CJ and Pape J).

non-contemporaneous events are: (i) the defendant's (careless) act, and the (ii) legal existence of the child only when she is later born disabled.

Two strategies, both strained, have been deployed to make them coincide in law. The first pushes child's existence back in time. The second suspends the duty's existence until the child is born, so it is only then retrospectively breached by the past careless act of the defendant.

(i) Deeming child's existence

In a Canadian case interpreting the Quebec Civil Code, *Montreal Tramways,* Lamond J held that applying 'the fiction of the civil law…. The child will, therefore, be deemed to have been born at the time of the accident to the mother.'[248]

It was probably for the best that Potts J declined to apply this outright fiction to English law:

> 'No authority has been cited to me to the effect that such a fiction was "of general application" in English law. The succession cases are referred to in the judgment of Lamont J. but they are of limited assistance: see Elliot v. Lord Joicey [1935] A.C. 209 . In my view it is one thing for a child to have succession rights from conception by means of a "fictional construction." It is another thing to adjudge a defendant guilty of negligence for breach of a fictional duty'.[249]

Granting a pre-birth foetus legal personality is one thing. It is another thing to deem a child to exist even before conception, when a potential parent's reproductive capacity is impaired by a tort.

(ii) 'Contingent or potential' duty 'crystallizing' only at birth

Potts J instead preferred the majority reasoning in *Watt v Rama*.

In *Watt v Rama* a driver collided into a woman while she was pregnant, causing her to become a quadriplegic, unable to go into labour and deliver her baby in a normal manner. Her child was later born with brain damage and epilepsy. The child sued the driver in the tort of

248 (n 245).

249 (n 237) 649.

negligence, and was successfully awarded 'loss and expense incurred in treatment of the child'. The majority, Winneke CJ and Pape J, 'solve[d] this problem' by resort to 'basal principles' of tort law, holding it of 'utmost importance to define the precise nature of the duty involved in the tort of negligence in such a case':

> '..as the child could not in the very nature of things acquire rights correlative to a duty until it became by birth a living person, and as it was not until then that it could sustain injuries as a living person, it was, we think, at that stage that the duty arising out of the relationship was attached to the defendant, and it was at that stage that the defendant was, on the assumption that his act or omission in the driving of the car constituted a failure to take reasonable care, in breach of the duty to take reasonable care to avoid injury to the child.'[250]

Adopting this reasoning in *Burton,* Potts J held:

> 'The circumstances created a contingent or potential duty on the defendants which crystallised on birth of the injured child. The wrong to the child was then complete, she having been born alive physically damaged as a result of the defendants earlier neglect. On birth, the child acquired legal status and legal rights. Thus her cause of action in negligence was complete and accrued to her when she was, "a legal person who could sue or be sued," and when, "she was a legal person having a legal right," to whom another "legal person" could owe at that time a corresponding legal duty.'[251]

The language of 'contingent or potential duty', appearing fictitious and ad hoc, has bred more duty of care scepticism. On this view the duty does not exist at the time of the driver's careless act. Thus, it could not plausibly have guided his action. Instead it is somehow in suspense, 'crystallizing' only at time of birth, upon which it is immediately breached by the 'damage' or 'injury' the child is born with (the disability), along with his legal rights and powers.

Unsurprisingly, Atiyah criticised the judgment as 'legalistic', 'abstract', 'conceptual', and for saying 'no word…. about policy',[252] even arguing that:

> '[t]he fact is that the 'duty' of care is not a legal duty in any strict analytical sense at all. There is no logical reason why this type of 'duty' should have any correlative

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250 (n 240) 359.

251 (n 237) 649.

252 Patrick Atiyah, 'Negligence, Unborn Infants, and the Duty of Care' (1971) 10 University of Western Australia Law Review 159. Cf Douglas Brown, 'Rights of an Unborn Child' (1972) 21 ICLQ 789.

> right and there is not the slightest difficulty involved in the concept of A owing a duty of care (sc., being liable to pay damages to anyone injured by his negligence) without a correlative right'.

(iii) Duties owed to member of a future class?

Can a rights-based view of tort law be salvaged? A potential way out is Gillard J's minority reasoning in *Watt v Rama*. Preferring it, Phillips J in *De Martell* held:

> 'if a manufacturer negligently makes and markets defective goods, for instance a car with defective brakes, or a soothing syrup for babies which is negligently contaminated with corrosive acid, and the defective goods are put on the market and sold to a member of the public, and the predictable accident follows and a young baby is injured, for instance if the baby is a passenger in the car when the brakes fail and the car crashes, or is given the syrup, it is no defence to an action for damages, by or on behalf of the baby, for the manufacturer to prove that the baby was only born after the defective goods had left the manufacturer's premises or even had passed to the member of the public by purchase from the retailer'[253]

Consider in finer detail the 'baby food' problem:

> Manufacturer of baby food, A, negligently contaminates food produced in June 2001. The food is later eaten by B, a baby born in April 2002, who falls ill as a result.[254]

253 (n 238) 225-26.

254 Adapted from Nick McBride, 'Duties of Care - Do They Really Exist?' (2004) 24 OJLS 417, 434.

How could A have owed B a duty of care in June 2001, when B was only born in April 2002? Gillard J's answer, relying on *Grant*[255] and *Watson,*[256] is that the duty is owed to a 'member of a class which might reasonably and probably be affected by the act of carelessness'.[257]

Nick McBride's answer is similarly that the duty is either owed to "whoever eats the tin of baby food in the future",[258] or alternatively 'to no one in particular', like 'duties which are imposed for the benefit of the community as a whole'.[259] For rights-based theorists this may show a possible way out. However, there is yet another conceptual difficulty, to which no easy answer may be so forthcoming.

C. Birth defects a 'damage' or 'injury'?

As Allan Beever points out, distinguishing the complaint here ('you caused me to be born disabled') from 'wrongful life' claims: [260]

> 'Moreover, when the claimant was born, it had rights to its person and (counterfactually) the property, etc, it had when it was born. But the claimant was born with her disabilities and so those disabilities cannot be regarded as arising from the violation of the claimant's rights. The claimant's position is like that of the person who purchases a badly constructed building. Again, this does not mean that the claimant should not be supported in other ways. It does not mean, for instance,

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255 *Grant v Australian Knitting Mills Ltd* [1936] AC 85, 104 (Lord Wright): 'It may be said that the duty is difficult to define, because when the act of negligence in manufacture occurred there was no specific person towards whom the duty could be said to exist: the thing might never be used: it might be destroyed by accident, or it might be scrapped, or in many ways fail to come into use in the normal way: in other words the duty cannot at the time of manufacture be other than potential or contingent, and only can become vested by the fact of actual use by a particular person.'

256 *Watson v. Fram Reinforced Concrete Co. (Scotland) Ltd* (1960) S.C. 92 (HL), 115 (Lord Denning), 109-110 (Lord Reid): 'default in the sense of breach of duty must persist after the act or neglect until the damage is suffered. The ground of any action based on negligence is the concurrence of breach of duty and damage, and I cannot see how there can be that concurrence unless the duty still exists and is breached when the damage occurs.'

257 (n 240) 373.

258 (n 254).

259 (n 254) 419 footnote 9, 435 footnote 60: eg if tin destroyed in transit or not used by anyone.

260 Claiming a right not to be born, which the CDCLA does not address: Law Comm para 91; cf *McKay v Essex Health Authority* [1982] 1 QB 1166, 1178 (Stephenson LJ), 1186-87 (Ackner LJ), 1191 (Griffiths LJ)

> that the state has no obligation to meet the claimant's needs. It means only that the claimant is not the victim of a tort committed by the defendant.' [261]

The argument is that the child's body, the subject of the right, was never free from the relevant defect from the moment of the right's inception (for him, birth). Hence, the body from birth could never be subsequently 'damaged' or 'injured'.[262] Any such right could never be infringed, as there never was point in time when the child had an 'undamaged' body, ie a body free from the complained of defect, or disability.

The objection here is that, if the relevant 'damage' is the congenital disability, it is impossible to breach a duty not to cause 'damage' through want of care.[263] It remains admittedly difficult whether 'damage' or 'injury', though occurring at moments in time, are concepts requiring comparison of two states-of-the-world at different times,[264] a dispute that we cannot resolve here.

To get around these potential difficulties, s.4(3)(b) was enacted with the aim that '[d]amages… should be assessed as if the injuries had been inflicted upon the child at birth; damages should be assessed as if the child had been born without the disabilities due to the pre-natal fault and those disabilities had been inflicted tortiously immediately after its birth.'[265]

The statute is justifiable, especially in hindsight. Its main benefit is that these conceptual obstacles are resolved rather neatly, through 'parasitic' rights 'derived' from the tort against the parent, deftly skirting politically sensitive and intractable debates surrounding when life begins, abortion, and self-harm.[266] Whether this is to be recognized as part of tort law, albeit

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261 *Rediscovering the Law of Negligence* (Hart 2007) 385-86. Discussing *Harriton v Stephens* [2006] HCA 15 (child born seriously disabled because mother caught rubella virus while child *in* utero, defendants allegedly negligent in failing to diagnose).

262 Used interchangeably, on which see: Donal Nolan, 'Rights, Damage and Loss' (2017) 37 OJLS 255, 258.

263 Eg *Browning v The War Office* [1963] 1 QB 750 (CA) 765 (Diplock LJ): 'He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff.'

264 Compare Robert Stevens, "Rights and Other Things" in Nolan and Robertson (eds), *Rights and Private Law* (Hart 2012) 119: 'A wrong, or injury, occurs in a moment of time… If loss is suffered, it is a consequence of a breach of a duty'; Nolan (n 262).

265 Law Commission, 'Unborn Children' (n 231) paras 97, 100.

266 Except s2 for insurance-related reasons: ibid paras 53-71, esp 60.

exceptional and on the fringes because of its 'trilateral' form, depends on the extent to which one thinks *tort law* can admit exceptions to the general rules it is committed to. Not all typical features are definitional, even if all definitional features are typical.

VI. CONCLUSION

The general standing rule is a close cousin to 'directional continuity', a distinct rule about damages. Both have been identified as aspects of 'privity', so it is understandably easy to confuse the two. However, we should not. Conceptual hygiene aside, their practical implications could differ.

First, conceptually distinguishing powers of enforcement from the underlying subject-matter of enforcement demonstrates that private law rights/duties are invariant across different enforcers. So a mere change in enforcer cannot change the post-enforcement result – here in particular – the destination of damages. If it is desired to alter that we need to extend not just standing to third-parties, but also a secondary right to damages. We miss this out if we rule out the existence of secondary rights or duties to pay damages. 'Liability' is not an adequate conceptual substitute. 'Rights of action' and 'remedy' are overly broad and ambiguous labels. More precision is needed to uncover the structure of 'trilateral' cases, a task made more difficult if important legal concepts are prematurely discarded.

Second, the prima facie quantification of the right to damages might differ, depending on whose right it is. If the right to damages is to compensation for consequential losses, this would prima facie be calculated by reference to that right-holder's own loss, here, the third-party's. The quid pro quo is that, as these are secondary rights 'derived' from or 'parasitic' upon a wrong done to someone else – the victim with the primary right – they can be cut-back in exceptional ways. So it has been said that the 'derivative nature of the child's action… "identify" the child with the parents for the purposes of defences',[267] setting additional limits on the

267 *Winfield & Jolowicz* (n 5) [25-018]; similarly Law Commission, 'Unborn Children' (n 231) para 70; *Charlesworth & Percy on Negligence* (n 234) [2-301].

third-parties' maximum recovery.[268] A defence might apply even if attributable solely to the victim's shoddy behaviour, including his contributory negligence,[269] acceptance of a risk (*volenti non fit injuria*),[270] and very possibly, illegality. At first glance this looks odd, even unjustifiable. The sins of parents are visited upon the child,[271] the testator's upon would-be legatees, and the breadwinner's upon dependants. But once their exceptional 'trilateral' structure is unveiled, this becomes more comprehensible.

One weakness of a pure 'loss'-based model is its difficulty in explaining the relevance of the victim's conduct in these cases. If all a tort requires is A's fault causing loss to C, why does B not 'drop out' entirely? The answer, on a rights-based' model, is rather more straightforward. Wrongs are normatively and legally significant. Even if standing and a right to damages are exceptionally extended to a third-party, B's primary right was infringed by A; B remains the victim of A's wrong. Even if they cause loss to others, torts are bilateral wrongs.

268 Compare Nolan (n 84) 156.

269 S1(7) CDCLA 1976; s5 FAA 1976.

270 S1(4) CDCLA 1976.

271 Paraphrasing Stevens (n 5) 185.

PART III

JUSTIFYING STANDING

6

JUSTIFICATIONS

> [C]ourts will not issue orders at the request of just any claimant: claimants must have 'standing' to request the relevant order…. The main question raised by the rules on standing is why courts grant standing to these, and only to these, just-described individuals. In particular, the main question raised by these rules, is why the state is denied standing to request private law orders.
> - Stephen Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (OUP 2019) 129

I. INTRODUCTION

I have argued throughout that, having a duty owed by another (ie a claim-right), is distinct from having the standing to enforce said duty before an adjudicative body. If rights and standing are conceptually separable, one could exist without the other. But in private law the two are related through the existence of a general standing rule, granting to only right-holders the power to sue to enforce these rights. Hence in the general case, the two coincide, and rights and standing go hand in hand.

This general standing rule explains why private law enforcement appears to take on a bilateral form, and why it is 'the basic feature of private law [that] a particular plaintiff sues a particular defendant'.[1] The bilateral shape of the correlative claim-right and duty relation is generally accompanied by an equally bilaterally shaped correlative power and liability relation – the standing to sue and the liability to be sued. The rule also shows that standing without rights is exceptional. It explains the resistance we have encountered in doctrinal instances where the two entities might, or have, come apart, the topic of the past three chapters.

This chapter turns towards justifications, asking evaluative questions of both the general rule, and its exceptions. As a preliminary, Section II clarifies separate issues, providing a framework for proceeding. In Section III, the object of justification is the implicit standing rule, the elephant in the room. To identify promising justifications for the rule as we find it, multiple

[1] Ernest Weinrib, *The Idea of Private Law* (OUP 2012) 63. See also, preface xi: 'central and pervasive feature… whose explication is the fundamental task of theory' and xviii: 'the master feature of liability, that liability of a particular defendant is always liability to a particular plaintiff'.

reasons are canvassed. These reasons must influence the scope and shape of possible exceptions to said general rule. Thus, considering the best justifications for the rule put forth in Section III, Section IV asks what exceptions we could justifiably make to the standing rule.. The attempt here is to articulate a set of broader rationales or conditions that, if met, would meet or outweigh the reasons against third-party standing. Section V concludes.

II. THREE DISTINGUISHABLE ISSUES AND A FRAMEWORK

A word on scope from the outset. 'An argument for an enforceable obligation has two stages: the first leads to the existence of the obligation, and the second, to its enforceability.'[2] I do not delve here into the first stage. Neither do I into the second stage, except to distinguish it, Goldberg and Zipursky's influential joint work being a good example of such an argument. Tort law, they say, is 'redress for relational legal wrongs', a form of 'civil recourse'.[3]

Our inquiry here concerns a third stage: given an enforceable obligation, *who* should be the one to enforce it? If private law's duties are aimed at undoing wrongs or injustices, why not let just anyone enforce them?[4] If preventing or correcting wrongs or injustices is a good thing, why set limits? Why should a bystander, indignant at seeing an injustice done, be left powerless to intervene? These are questions as to the enforcer's identity. Their answers are revealing of the values upheld within private law's remedial structure.

A. Civil Recourse and *ubi ius*

To clearly separate out the issues, 'civil recourse' merits brief mention. If we shut the courts temporarily during a pandemic, that does not extinguish our interpersonal obligations in private law. It merely halts their enforceability, or 'civil recourse'.[5]

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2 Robert Nozick, *Anarchy, State and Utopia* (Basic Books 2013), 82.

3 Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 122-124, 116.

4 Compare Arthur Ripstein, *Private Wrongs* (HUP 2016) 269-71.

5 Robert Stevens, 'Private Rights and Public Wrongs' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 120.

Civil Recourse is a constitutional or 'political principle',[6] primarily an extended argument aimed at justifying the maxim *ubi ius, ibi remedium*, said to be an expression of the principle.[7] It means '[t]he bearer of a certain kind of legal right is one who, by virtue of being a bearer of that right, also enjoys a related legal power. This is *ubi jus* in its substantive, non-circular rendition.'[8] Thus:

> 'When a right of this sort is violated, the victim should be able to demand certain things from the wrongdoer. Yet a demand of this kind would be hollow if the wrongdoer were simply free to ignore it. Thus, the state renders the victim's demand legally enforceable, so long as it is authenticated through the judicial process. In opening courthouse doors, government gives victims an avenue of *civil recourse*.'[9]

This is just to say that in private law, legal rights are 'normally' or 'typically' enforceable by their holders,[10] rather than being unenforceable rights enforceable by no one. It is a one-way entailment in the bi-conditional:

> You get standing to enforce a right if and only if you have a right (S↔R).

Ubi ius ibi remedium means you get standing to enforce a right *if* you are a right-holder (S←R). Call this the 'enforceable rights' limb of the biconditional. Goldberg and Zipursky justify *ubi ius*

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6 Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 30, 341, 113: 'The principle of civil recourse is part of our positive law. It also has a counterpart in political morality. In granting to the victims of injurious legal wrongs a right of action…. Government complies with the political principle of civil recourse'.

7 Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 31, 83, 99, 102; Goldberg & Zipursky, 'Hohfeldian Analysis and the Separation of Rights and Powers' in Balganesh, Sichelman and Smith (eds), *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (Cambridge University Press 2017); Benjamin Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 Florida State University Law Review 299, 309 labelling this a 'Right of Action Principle' in tort law: 'an individual who was legally wronged is prima facie entitled to a right of action against the wrongdoer'.

8 Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 102; compare John Gardner, *From Personal Life to Private Law* (OUP 2018) 203-05, esp 204: 'the law says *ubi ius, ibi remedium*…. It says that when there is a right recognized by the law, a legal right, there ought to be a remedy for its breach. It is not a conceptual truth, and nor is it advanced as one'

9 Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 31.

10 Joseph Raz, 'Legal Rights' (1984) 4 OJLS 1, 3, 4: 'typically, though not invariably'; Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 102: 'the extent to which the maxim admits of qualifications or exceptions is a separate question'.

by arguing that a liberal-democratic *state* owes a political obligation to its citizens to provide them with access to something like the civil courts we have today, applying the tort law we see, and indeed the whole range of private law.[11] This is their 'core normative claim'.[12] An analogy is drawn to 'voting rights'.[13] Three main claims are advanced:

[1] Citizens can reasonably demand these powers from a liberal-democratic state as a condition of recognizing its authority to use coercive force.[14]

[2] A state would be 'unjust'[15] or illegitimate if it conferred its citizens legal (claim-)rights against one another, but without the means to enforce these rights.[16]

[3] Values of equality,[17] fairness,[18] and independence[19] 'underwrite'[20] the obligation in 'political morality'[21] of states to provide an avenue of civil recourse.[22]

In contrast, what we want to justify in this section is why you get standing to enforce the right *only if* you are the right-holder (S→R) ie private law's general standing rule. Our object of interest is the *exclusivity* of private law's enforcement relations, entailed by this rule. Why right-holders only, and no one else? Goldberg and Zipursky do not take a stance on this question, which they term the 'converse' of *ubi ius*:

> 'We do not purport to have established on the basis of these two examples that U.S. law consistently adheres to the *ubi jus* principle. Likewise, the extent to which the maxim admits of qualifications or exceptions is a separate question. So too is

11 Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 122-123, 125.

12 Ibid, 125.

13 Ibid, 125-130.

14 Ibid, 116.

15 Ibid, 116.

16 Ibid, 130-135.

17 Ibid, 133,138-139.

18 Ibid, 134, 139-140.

19 Ibid, 134-35.

20 Ibid, 116, 131.

21 Ibid, 146.

22 Ibid, 130-146.

> the question of whether its converse holds— that is, whether, in the absence of the requisite kind of legal right, one cannot have a right of action.'[23]

The general standing rule bundles together standing with rights in an exclusive package deal. Through this feature, private law generally requires an exclusivity of enforcement relations as between right-holder and duty-bearer. Thus, right-holders occupy a 'special place'.[24] They hold exclusive powers of enforcement, possessing the prerogative to decide whether private law duties are enforced.

B. Kinds of justifications

Even though the general rule is applicable across the whole of private law, conceived here as including the traditional sub-categories of contract, torts, and unjust enrichment, there need not be one global justification for the rule. Multiple reasons, each with different scope, could together justify having a general rule.[25]

To aid us, we might classify them along the following lines: (a) non-instrumental reasons, (b) instrumental reasons, and (c) purely analytic answers, each discussed in turn. Each category excludes the other, and there is no guarantee that our categories jointly exhaust the set of all possible justifications. Granted, in some instances it may be difficult to tell precisely which side of the line a particular reason falls, and some simplification may be warranted. But at least our thinking about the *kinds* of reasons one could plausibly give as possible justifications will be provided some structure. So, even if one remained unmoved by my preferred justifications, at the very least I would have taken us a step forward, paving the foundations for structured thinking about these questions.

'Purely analytic' answers are distinguished from other reasons to emphasise that 'one cannot short-circuit this process of explanation by bundling everything together under the

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23 Ibid, 102.

24 Zipursky, 'Substantive Standing' (n 7), 340.

25 Even if all private law duties/claim-rights shared a united form or structure, sub-sets of rights/duties could be justified by a range of values.

heading of right'.[26] We cannot just assume that rights and standing 'stand or fall as a package deal'.[27] If there is an implicit general standing rule in our positive law bundling them together, further reasons are needed to justify this rule.

III. JUSTIFYING THE STANDING RULE

The implicit standing rule is a general rule running across the whole of private law. Private lawyers have operated under the assumption of its existence, but are there good reasons for this general rule? What values could possibly justify this bundling? Why standing only for the right-holder, and no one else?

A. Non-instrumental reasons

Non-instrumental reasons, a class of possible justifications, are enumerated and discussed first. Within this set, we commence with the value of being in charge as it presents a neat example of a more general genus or kind of justification applicable here – namely, it is the sort of value which would be undermined if standing were extended to others.

(i) Private authority: being in charge

Recall how it was argued in Chapter Two that the standing rule grants a claim-right holder exclusive control over the duties owed to him; only he can make the choice to subject a defendant to the court's public power.[28] The rule might thus be justified by the value of having exclusive choice over the decision to stand on one's own rights. This, in short, is the value of being in charge. This value may well be what lay behind Hart's well-known intuition, that it is

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26 Gardner, *Personal Life* (n 8) 55. This 'invites a good deal of confusion…. inflat[ing] the sense in which duties owed to others are relational, or bipolar, or second-personal'.

27 Ibid 55. Further, 216: '[t]he mere fact that the duty is owed to her does not entail that she has authority over whether it is to be performed. An argument is needed to link having been wronged with having such authority'.

28 Chapter Two, 'Concepts' Section V:'Distinguished from the Court's Power'.

as though one were a 'small-scale sovereign'.[29] This idea was articulated most influentially by Arthur Ripstein, who described it as having 'private authority', as opposed to the public authority that say a court, an arm of the state, has.[30]The core contention here is that Ripstein's defence of the value in 'private authority' could be adopted, without also adopting all aspects of his fuller Kantian architecture,[31] eg Kantian right as a 'title to coerce'.[32] Put another way, the suggestion here is that non-Kantians could also accept its value as a good reason in favour of the general standing rule, without also accepting that it must ultimately be grounded in a Kantian framework.

That said, the basic argument is still best fleshed out in Ripstein's words. The core moral idea here is that 'no person is in charge of another'.[33] Tort law, he argues, gives effect to this morality of interpersonal interaction.[34] This value could explain and justify 'why legal concepts that are analytically distinct typically appear together',[35] and specifically here, why claim-rights and standing (a power of enforcement) go hand in hand:

> …tort law's only "policy" is doing justice between private persons. You have both claim rights (correlative to duties on the part of others) and powers (correlative to liabilities to enforcement on the part of others) with respect to your body and property. Although the claim right and power can be distinguished, they come as a package: If you are entitled to constrain my conduct, I owe you a duty to conduct

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29 HLA Hart, 'Legal Rights', *Essays on Bentham* (Clarendon 1982) 183-84. In endorsing a 'will theory' of rights, to which I do not commit, Hart took an unnecessary extra step: discussed Chapter Two.

30 Arthur Ripstein, 'Private Authority and the Role of Rights: A Reply' (2016) 14 Jerusalem Review of Legal Studies 64. Cf John Gardner, 'Private Authority in Ripstein's Private Wrongs' (2016) 14 Jerusalem Review of Legal Studies 52; Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota Law Review 1003; David Owens, 'Private Authority' (2018) 19 Jerusalem Review of Legal Studies 1.

31 Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (HUP 2009); see also Arthur Ripstein, 'Civil Recourse and Separation of Wrongs and Remedies' [2011] Florida State University Law Review 163, 200-201: '…Kantian right regards the right to damages as having the structure of every other right, and so something that plaintiff can invoke or decline to invoke'.

32 Ripstein, *Force and Freedom Kant's Legal and Political Philosophy* (HUP 2009) 30-56. Compare Stephen Darwall and Julian Darwall, 'Civil Recourse as Mutual Accountability' [2011] Florida State University Law Review 17, 31-35.

33 Ripstein, *Private Wrongs* (HUP 2016) 6.

34 ibid 8.

35 ibid 10.

> myself in certain ways – not entering your home without your permission, avoiding damaging your body and property through my carelessness, and so on. You also have various powers to enforce those rights – you can ask me to leave if I overstay my welcome, you can seek an injunction to make me abate a nuisance, and you can take me to court to demand damages if I violate a right.
>
> Although these formulations might make it appear that the power is in the service of the right, both are coordinate components of a system in which no person is in charge of another; both the constraint and the power to enforce are essential to that system. It is up to you whether to enforce your right, as it must be if you are the one who determines the purposes you pursue. Moreover, the justification of the right and power does not look to benefits to you and burdens to me; it looks only to the negative relationship between us: Neither of us is in charge of the other, so each of us must restrict our conduct, but each of us is also entitled to decide whether to stand on our own rights.'[36]

More fully, Ripstein's key steps are that:

[1] Humans are active beings who are entitled to set and pursue their own purposes, restricted only by the like entitlement of others to do the same.[37] Using means is the only way in which a person can pursue purposes.[38] Your body and property are protected because they are the means through which you set and pursue your own purposes.[39]

[2] If 'no person is in charge of another', then 'it is up to you, rather than others, what purposes you pursue'.[40] (This is just what it is for you to be your own person, rather than to be another person's slave, serf, or subordinate.)[41]

[3] Your rights to your body and property can be characterized as a kind of authority relation. Each person's rights are members of a system of rights. You are in charge of your own body and property, but other people are in charge of their bodies and property. You are not entitled to determine the purposes for which they use what is theirs.[42]

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36 ibid 11-12 (emphasis added)

37 ibid 8

38 ibid 9

39 ibid 39

40 Ibid 33

41 ibid 33

42 Ibid 33-34, 37.

[4] Since it is up to you alone to determine the purposes you pursue, it is uniquely up to you to decide whether to stand on or enforce your rights.

[5] This is a general feature of every 'private right', including contractual rights.[43]

[6] *Conclusion*: thus, giving to anyone else the standing to decide whether to enforce *your* rights would be to put him in charge of you. It would strip you of 'private authority'.

It is important to emphasise how this value of being in charge could be undercut were third-party standing introduced. To specifically illustrate the point more forcefully, consider also the separate power to waive a right/duty. It is a helpful analogy here, as powers to waive are also generally exclusive to right-holders, its exclusivity also potentially justifiable by this same value.[44] Both these legal powers are ways in which a legal system might confer modes of control over a duty.[45]

If private law were committed to each of us are being in charge of our own bodies, then only you could decide whether to let me run my fingers through your hair.[46] Suppose now that in a legal system of some counterfactual world, someone else – a third-party – could waive your primary bodily right to be free from unwanted touching. That person does so. Now, anyone could touch you. This arrangement would severely undercut your being in charge of yourself, one of the main values in having that right.

The argument about third-party standing runs in the same vein. If it were up to someone else whether to stand on and enforce your right, then they could decide for you whether or not to forbid my touching you. If I touched you without your consent in a legal system that facilitated third-party enforcement generally, then they could decide for you to enforce a

43 Ibid 271

44 Eg ibid 271: 'if you and I have a contract, you can relieve me of the duty to perform'.

45 NB a general rule against third-party powers of waiver is consistent with the general standing rule – similarly displaying private law's commitment to a right-holder's exclusive control over a duty owed to them.

46 Adapting Arthur Ripstein, 'Private Authority and the Role of Rights: A Reply' (2016) 14 Jerusalem Review of Legal Studies 64, 67.

secondary right to damages from me.[47] The value in your having 'private authority' would be undermined. It would no longer be up to you to forgive me, and to forgo enforcement. You might very much wish to do so, if for instance, I were your over-enthusiastic lover, apologising profusely for my offbeat eagerness. As Raz put it, '[p]owers, normative and otherwise, are not valuable unless some of their uses are. But their value is not in the value of their uses. It is in the value of the *option* to use them. Refraining from using them is one of the options that possession of powers provides, and indeed not using a power can be to the advantage of those who have it as much as using it'.[48]

(ii) Personal autonomy

Much of the core argument above could be translated into the value of personal autonomy.[49] In other words, the value of a right-holder's personal autonomy could also justify a general rule granting exclusive standing to a right-holder. Autonomy-based objections could be raised against the extension of standing to others, as to do so might undermine that value.

Independence is an important component of the conditions of autonomy.[50] Autonomy is a constituent element of the good life. Slaves lack autonomy. A person's life is autonomous if it is to a considerable extent his own creation, so naturally the autonomous person has the capacity to control and create his own life.[51] Coercion and manipulation invade autonomy.[52] I

47 For Ripstein this secondary right just is a continuation of the primary right, albeit surviving its violation in altered form as a substitute for the violated right: *Private Wrongs* (HUP 2016) 3-4, 7-8, 13, 233-262.

48 Joseph Raz, 'Is There a Reason to Keep a Promise?' in Gregory Klass and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014) 66-67. See also James Edwards and Adam Perry, 'The Power to Forgive' (December 29, 2019) Oxford Legal Studies Research Paper No 59/2019 <https://ssrn.com/abstract=3511010> 13-14.

49 See eg Joseph Raz, *Morality of Freedom* (OUP 1986) 369-399.

50 Ibid 372, 377

51 ibid 408

52 ibid 377-378: 'It is commonplace to say that coercing or manipulating a person treats him as an object rather than an autonomous person. Coercion is said to diminish options below adequacy. Manipulation is said to pervert the way in which a person reaches decisions, forms preferences, or adopts goals.'

invade your personal autonomy if I run my fingers through your hair against your wishes, or if I stroke your palms without your consent.

(iii) Right-holder cooperation

If we consider more precisely what performing and enforcing a private law duty entails, the autonomy-based justification proves even more salient. To enforce a duty owed to me ie my claim-right, frequently my cooperation may be required. Hence in *White and Carter Ltd v McGregor* Lord Reid observed that 'in most cases [one] party cannot complete the contract himself without the other party doing, allowing or accepting something, and that it is purely fortuitous that [the advertising contractors] can do so in this case'.[53]

Some duties can be performed unilaterally by a duty-bearer, but a good number cannot. They require the right-holder's cooperation to be successfully performed. Letting someone else enforce it might thus invade the right-holder's autonomy. It would force the right-holder's involvement, which he might not want. The interference might vary in its severity. Being made to constantly refuse or disclaim what one does not want is burdensome and could be very disruptive, especially if one's attention is required at inopportune times.

A duty to pay damages,[54] to pay an agreed sum under a debt, or to make restitution to the right-holder, are examples of duties requiring an acceptance by the right-holder.[55] Such duties, 'remedial' in nature, are sometimes described as obligations of (corrective) justice.[56] Thus, injustices could not be corrected without right-holder participation. Without their cooperation,

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53 [1962] AC 413, 428.

54 Or his authorised agent, usually a bank. Discussed Sandy Steel and Robert Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283, 286-287; cf Stephen Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harvard LR 1727. On pre-payment and 'tender' see *Edmunds v Lloyds Italico And l'Ancora Compagnia di Assicurazioni And Riassicurazione S.pA* [1986] 1 WLR 492 (CA); *Ayton v RSM Bentley Jennison* [2015] EWCA Civ 1120; [2016] 1 WLR 1281.

55 Steel & Stevens 'Damages' (n 54) 286-87; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 582-583. On disclaiming gifts: *Standing v Bowring* (1885) 31 Ch D 382 (CA); cf *Dewar v Dewar* [1975] 2 All ER 728; Jonathan Hill, "The Role of the Donee's Consent in the Law of Gift" (2001) 117 LQR 127.

56 John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 9-17; cf Weinrib (n 1) *Idea of Private Law* 63-66.

justice could not be done. Rightly so. While justice is good and valuable,[57] like apologies,[58] charity, kindness, and other good things, it ought not and cannot be foisted upon one against his or her choice.

In all these cases there is no duty to accept. There could be all sorts of legitimate reasons for refusing to accept or disclaiming a prima facie benefit. It might attract various negative consequences one might wish to avoid, such as falling into a higher tax bracket, disclosure duties imposed by an employment contract, or a regulatory regime. It could remove benefits one might otherwise be entitled to, such as welfare from the state, or tax exemptions, et cetera. A right-holder has a general liberty or privilege to refuse an attempt to benefit her.

This is made plain in contrast to a statute regulating contracts of sale of goods,[59] stipulating that buyers under contracts of sale have a statutory duty to accept conforming goods delivered by sellers.[60] It is a pro tanto interference with personal autonomy to force an acceptance in the public interest or for some collective good. Whether that interference is justifiable all things considered, despite the interference, is a separate question.

The need for right-holder cooperation could thus be generalised. Duties to confer a positive benefit upon another are a general case. Most 'remedial' duties take this form. By themselves, these would cover a rather wide field across the whole of private law.

And they are by no means the only examples. Non-remedial duties of this form are rather commonplace. I have a right to doctoral supervision from my supervisors, but they cannot discharge their duties owed to me without my active cooperation; for them to succeed in performing their duties I must also play my part. If I hire a painter to repaint the peeling walls of my house, he would at least require my 'passive' cooperation in granting him a licence to be

57 Stephen Smith, *Rights*, *Wrongs*, *and Injustices* (OUP 2019) 131.

58 Gardner, *Personal Life* (n 8) 219-220: 'your apology is an imposition on me. By apologizing, you activate my authority, as the person wronged, to accept or reject your apology…. giv[ing] me a new decision to worry about'

59 s1, s2, s61 Sale of Goods Act 1979

60 s27, s35, s37, s50 Sale of Goods Act 1979. Non-acceptance can be a breach, for which damages are payable.

on my land.[61] If I go to a barber to get my hair cut, I must cooperate by sitting still. If midway through he cuts it contrary to my instructions, as a joke, I could withdraw my cooperation and leave to fix the botched cut elsewhere.[62]

(iv) Self-defence versus other-defence

Self-defence has been touted as an example of when right-holders could have justifiable priority in deciding the propriety of enforcing their rights, which they do when resisting a potential or continuing wrongdoer.[63] The analogy proves rather illuminating here.[64] For us, the relevant contrast is between the position of the self-defender, versus the other-defender.

As between the two, the self-defender has the prerogative. He is the 'owner of his own battle (and hence [has] authority over others who would come to his defence).'[65] Thus 'the permissibility of any attempt to assist the rightholder in her self-defensive acts [is] subject to her veto, giving her a power to determine the normative position of her assisters'.[66]

This seems an offshoot of the intuition that a right-holder must have exclusive control over the enforcement of his or her rights. Provided certain conditions obtain, the law grants you a

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61 *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch 233, 253 (Megarry J); Steel & Stevens 'Damages' (n 54) 286

62 As to whether he has earned his fee, interesting questions about 'entire contracts' and 'partially' or 'substantially performed' obligations arise: *Sumpter v Hedges* (1898) S & T 348; *Hoenig v Isaacs* [1952] 2 All ER 176; *Bolton v Mahadeva* [1972] 1 WLR 1009.

63 Gardner, *Personal Life* (n 8) 215; compare Zipurksy, 'Substantive Standing' (n 7) 314-15, 327-28; Goldberg & Zipursky, *Recognizing Wrongs* (HUP 2020) 14-15, 116-122

64 My point here is limited, but NB that the background literature on 'self-defence' is legion. In the philosophy of criminal law, the traditional view is that self-defence is at least permissible, and so a justification which denies wrongdoing. Indeed self-defence might even be required, or praiseworthy. See eg George Fletcher, 'The Nature of Justification' in Shute et al (eds) *Action and Value in Criminal Law* (OUP 1993); Paul Robinson, 'Competing Theories of Justification: Deed versus Reasons' in Simester and Smith (eds) *Harm and Culpability* (OUP 1996); Arthur Ripstein, *Equality, Responsibility, and the Law* (CUP 1999) 163-169, 190-201. Cf eg John Gardner 'In Defence of Defences' in *Offences and Defences* (OUP 2007); Andrew Simester 'On Justifications and Excuses' in Zedner and Roberts (eds) *Principles and Values in Criminal Justice* (OUP 2012). In general moral philosophy see eg: Judith Jarvis Thomson, 'Self-Defense' (1991) 20 Philosophy & Public Affairs 283; Michael Otsuka, 'Killing the Innocent in Self-Defense' (1994) 23 Philosophy & Public Affairs 74; Jeff McMahan, 'The Basis of Moral Liability to Defensive Killing' (2005) 15 Philosophical Issues 386.

65 Gardner, *Personal Life* (n 8) 54-55, 215.

66 Gardner, *Personal Life* (n 8) 54-55.

privilege or permission to protect your rights against potential infringement by another ('a threat'). To prevent or resist the infringement, you can thus do to the threat what would otherwise be a wrong to them; you are acting in 'self-defence' of your rights.

But that privilege is bilateral. It is only you, the potential victim of a wrong, who is relieved from your duty not to trespass against the threat's person.[67] It does not automatically entail that someone else can valiantly leap to your defence without or against your permission. It takes an extra step to say that the threat's rights against the whole world are forfeit or relaxed.[68] You as right-holder have a valuable choice or option here – an additional power – to decide whether to extend a 'vicarious' privilege to any would-be defender. Through this valuable choice, you can control the normative relevance of your right, as available justification for an other-defender's intervention. Bailiffs who assist landowners in enforcement by evicting trespassers are covered by the privilege, because they are authorised by the landowner. If however someone purports to engage in 'other-defence' without your say so, he does so of his own accord and without a privilege, thus wronging the person who would wrong you.

To illustrate, consider the right to exclusive possession over one's land. Suppose you are sole proprietor of a business with a shopfront, and overnight a homeless person sets up shelter on your premises. He is trespassing on your land. The idea here is that it should be exclusively up to you whether to turf that person out. No one else can decide for you by claiming to enforce or defend your rights. They would be wronging the homeless person. Only if you let them, are they permitted to intervene in 'other-defence'. There may be good reasons to forgo standing on one's rights, so this is a valuable option for the law to protect. As an example, for compassionate reasons you might very well wish to let the homeless person stay for a while,

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67 Within specified limits of reasonableness or proportionality etc. Discussing 'specification' versus 'forfeiture' see eg Judith Jarvis Thomson, 'Self-Defense and Rights' (The Lindley Lecture, University of Kansas, 1976).

68 Cf criminal law, where other-defence may be easier to justify. Victims have no analogous control. Moreover it is one thing to convict an other-defender of a crime, and another to require him to pay damages. Cf Criminal Justice and Immigration Act 2008 s76(10)(b); James Goudkamp, *Tort Law Defences* (Hart 2013) 116; *Winfield & Jolowicz on Tort*, Peel & Goudkamp (eds) (19th ed, 2014 Sweet & Maxwell) [26-047]-[26-048].

even at significant personal or financial cost to you. Unless you say so, avoiding a wrong or harm to you is not a reason available to the other-defender, invocable by him as justification for intervening.

A similar idea could explain why a doctor cannot force treatment on an unwilling patient without wronging him, even if treatment would be beneficial.[69] We control the normative significance of benefits to us. If a patient refuses medical treatment, he takes that potential benefit to him off the table. It cannot be used to counterbalance the invasion of autonomy forced medical treatment would entail. Unless you say so, avoiding a harm to you is not a reason available to the doctor. Thus, paternalistic interventions require justification.[70]

(v) Forgiveness

Extending standing to others could also undercut the right-holder's option to forgive, a valuable option. An exclusive standing general rule could thus be defended or justified by its value, which would otherwise be lost.

Forgiveness is primarily an extra-legal phenomenon, altering one's *moral* relations with another.[71] The extra-legal moral power to forgive[72] does not directly alter one's legal relations. However, the option to forgive could be incompatible with the exercise of legal standing, thereby setting a consistency constraint.

The argument goes thus – to fully and genuinely forgive someone, it seems the case that the forgiver must also follow it through within the legal domain. Namely, he must refrain from exercising his legal powers in ways which contradict his forgiveness given outside the law. One of these powers is his legal standing. For instance, if I say to you 'I forgive you that £1000 you

69 Sandy Steel, 'On the Moral Necessity of Tort Law: the Fairness Argument' (in draft, March 2020).

70 Cf Raz, *Morality of Freedom* (OUP 1986) 422-24.

71 Christopher Bennett 'The Alteration Thesis: Forgiveness as a Normative Power' (2018) Philosophy & Public Affairs, 46, 207; Edwards & Perry, 'The Power to Forgive' (n 48)

72 Bennett ibid.

owe me', but then sue you the next day for the sum, you could validly accuse me of not genuinely forgiving you, amongst a great many other things (eg 'liar' or 'snake').

Hence, forgiveness might impact upon one's standing, in the sense that the standing to enforce a legal duty could be exercised incompatibly with the option to forgive that duty-bearer.[73] The valuable option to forgive would be open to and preserved for the right-holder only if legal standing were exclusive to him. If standing were extended to someone else, forgiveness would no longer be a matter up to him. The existence of a third-party enforcer, standing in a different personal relationship to the duty-bearer, introduces complications. Outsider intervention might foreclose the right-holder's option to forgive. In its shadow, [74] forgiveness might be left no room. The valuable option of forgiving, and its more general practice, might thus be undermined.

It might be noted that forgiveness cannot be so simply equated to the exclusive legal power to waive or release legal duties owed to oneself.[75] A release by eg a creditor of a debt due to him need not involve the accompanying emotional change arguably necessary to genuine forgiveness: a cessation of 'hostile feelings' towards the forgiven.[76] Perhaps the release of one's legal duties could be a way of forgiving, but that does not seem necessary in all cases. It may be awkward and potentially distortionary to construe all instances of forgiveness as simultaneously exercising a legal power to waive legal duties. Moreover, it seems that forgiveness could leave legal duties untouched – one could 'pre-emptively' forgive an action

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73 Cf Nicolas Cornell, 'The Possibility of Preemptive Forgiving' (2017) 126 Philosophical Review 241, who refers to 'standing to complain'.

74 On shadows and 'private ordering': Mnookin & Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale Law Journal 950.

75 Gardner *Personal Life* (n 8) 203, 216. (In contrast, settlements are bilateral, based in the agreement of both parties, though an analogy may be possible where forgiveness is in response to an accepted apology).

76 Lucy Allais, 'Wiping the Slate Clean: The Heart of Forgiveness' (2008) 36 Philosophy & Public Affairs 33, 37; cf Edwards & Perry, 'The Power to Forgive' (n 48), adopting a 'pluralistic' view of forgiveness by going disjunctive.

before it is done, or a duty before it comes due, so in these cases its effect must be other than to waive a duty.[77]

(vi) Privacy

Exclusive standing also protects the right-holder's privacy. Enforcement may involve publicity. Affairs are discussed in open court. To enforce his or her right, a right-holder must endure publicity. Exclusive standing leaves that choice up to her. If standing were extended to someone else, the decision would no longer be hers to take. It could thus undermine her privacy.

'Publicity', Bentham wrote, 'is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial'.[78] In English law it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[79] Thus justice is generally dispensed in open courts, by judges who take an oath to do justice according to law. Litigation and hearings are public processes,[80] and courts are public symbols of justice. The principle of publicity or open justice is a 'cornerstone' of the administration of justice.[81] Secret trials violate this; we could legitimately fear that people and things might 'disappear into the hole of oblivion'.[82] Private hearings and party anonymity are justifiable if and only if 'necessary… to secure the proper administration of justice', and only to that extent.[83] It may not apply in many cases for many kinds of rights.

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77 Nicolas Cornell, 'Preemptive Forgiving' (n 73)

78 Quoting see *Home Office v Harman* [1982] 1 All ER 532, 537 (Lord Diplock). Bentham, *Draught for the Organization of Judicial Establishments* in *The Works of Jeremy Bentham* J Bowring (ed) (William Tait 1843) 4:136.

79 *R v Sussex Justices Ex p. McCarthy* [1924] 1 KB 256, 259. See also s67 Senior Courts Act 1981; CPR 39.2(1)-39.2(2A); CPR 32.2(1)(a).

80 CPR 39.2(1).

81 Zuckerman *Civil Procedure* [3.108]-[3.151]. See also Wilmot-Smith, *Equal Justice* (HUP 2019) 144-151

82 Discussing the Soviet Union after Stalin's rule: Wilmot-Smith (n 81) 150-51; Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace 1979).

83 CPR 39.2(3), CPR 39.2(3)(a)-(g); 39.2(4).

(vii) Concerns for the duty-bearer

Lastly, it might be noted how exclusive standing could also be supported by a set of concerns for a defendant duty-bearer. Standing is a significant legal power to wield over another. For every additional person who is extended a power to sue and enforce his duty, the duty-bearer is put under a correlative liability to suit. This exposes them to potential state-backed coercion. It may prove harsh on potential defendants,[84] especially if a legal system's civil procedure is overly claimant-friendly, and fault is inessential to a private law wrong.[85]

Thus, in their recent monograph, Goldberg and Zipursky argue that there is a 'norm delimiting the power of the state to fashion private rights of action for plaintiffs against tortfeasors.'[86] Recall how for them, '[a] right of action is a legal power to make a demand upon a tortfeasor, which demand the victim is entitled to have validated by a court upon proof of claim,'[87] and thus '[t]ort law in its own way renders us vulnerable… not to state power per se, but to other citizens who, under the right circumstances, can harness the courts to validate their claims and demands against us'.[88] The idea here is that, by default, 'one is not vulnerable to legal demands or claims made by others.'[89]

B. Instrumental reasons

'Limiting access to courts', it has been said, is 'normally a very sound policy'.[90] Some claim that law is 'institutional',[91] and that the special place of right-holders is partly 'reflective of its

84 Goldberg and Zipursky, *Recognizing Wrongs* (HUP 2020) 205.

85 Ibid 206. Similarly Peter Birks, 'The Concept of a Civil Wrong' in David Owens (ed), *The Philosophical Foundations of Tort Law* (Oxford University Press 1997).

86 ibid 204.

87 ibid 181.

88 Ibid 207.

89 Ibid 202.

90 Raz, 'Legal Rights' (n 10) 3. Similarly Stephen Smith, *Rights, Wrongs, Injustices* (OUP 2019) 130: citing 'practical reasons' of 'costs', preventing 'waste' etc.

91 Raz, 'Legal Rights' (n 10) 1-5; Gardner *Personal Life* (n 8) 5, 18, 214-16; John Gardner, *Torts and Other Wrongs* (OUP 2020) 84-85: 'Rights and duties must be used, observed, or adopted by someone in order

specialized institutional arrangements of private law'.[92] Thus, they claim, we must also 'think instrumentally'.[93] Five instrumental reasons are briefly discussed.

(i) Sieving inappropriate motivations

It might be argued that generally, only right-holders have the appropriate motivations for enforcing their rights and are hence 'proper plaintiffs'. Other motivations are not worthwhile for the legal system to be supporting or facilitating, and thus 'improper'.[94] Here, the 'second-person' resentment experienced by a victim of an injustice or wrongdoing could be usefully contrasted to 'third-person' indignation.[95]

The articulated disdain against 'frivolous'[96] or 'malicious'[97] suits, 'officious speculative intermeddlers'[98] and 'interfering busybod[ies]',[99] might track a generally held view that the enforcement motivations of a non-right-holder are more likely to be suspect. However, motivations are hard, or at least more costly to police. Here a correlation seems plausible. So perhaps a general rule denying the power to everyone else may be a decent proxy, even if somewhat blunt. The more costly alternative is to extend standing to a wider class of people, but to require close scrutiny of motives for exercising said powers each time.[100]

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to be part of the law. I will call the process of making them part of the law, intentionally or accidentally, their 'institutionalization'.

92 Gardner, *Personal Life* (n 8) 5, 205.

93 Gardner, *Personal Life* (n 8) 18-19.

94 compare Zipursky 'Substantive Standing' (n 7) 311-12: 'an institutional game plan'.

95 Peter Strawson, 'Freedom and Resentment' (1962) Proceedings of the British Academy 48, 1–25 distinguishes personal and impersonal 'reactive attitudes'.

96 Eg Raz, 'Legal Rights' (n 10) 4.

97 eg *Willers v Joyce* [2016] UKSC 43; [2018] AC 779.

98 *Adams v Roper* [2012] 1 WLR 3211 (CA) [46] (Toulson LJ).

99 Ibid [64] (Arden LJ).

100 Through eg technique of 'abuse of process'. Under CPR 3.4(2): 'The court may strike out a statement of case if it appears to the court (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings'. Discussed *Adams v Roper* [2012] 1 WLR 3211 (CA) [39]-[41] (Toulson LJ): 'it would not be right to lay down a categorical rule that the issue of proceedings without valid authority from the claimant must necessarily amount to an abuse of the

(ii) Facilitating settlements

Enforcement through courts can be slow and expensive. To reduce costs and delays, and to avoid the possibility of judicial error,[101] parties still willing to deal despite growing relational frictions might bargain in the shadow of the law. Claims are sometimes settled out of court.[102] English civil procedure adopts a twin strategy here, facilitating inter-party communications and exchange of information through pre-action protocols, and the provision of economic incentives for settlement (eg adverse costs orders).[103]

An exclusive standing rule helps facilitate settlements. Were standing extended to others, one might predict that transaction costs of settlements would increase,[104] and in many individual cases prove prohibitive, thus reducing their general incidence. As more parties (enforcers) are put around the bargaining table, negotiation costs would rise, also introducing possible collective action and strategic problems like 'free-riding' and 'hold-outs'.[105]

Settlements are a mode of 'alternative dispute resolution'. They are not primarily aimed at doing justice (or undoing injustice). Justice may not be done under a settlement. Their

process of the court… Determining whether there has been an abuse of process requires sensitivity to the facts of the particular case.'

101 Louis Kaplow, 'The value of accuracy in adjudication: An economic analysis' (1994) 23(1) The Journal of Legal Studies 307-401; Louis Kaplow and Steven Shavell, 'Accuracy in the Determination of Liability.' (1994) 37(1) The Journal of Law and Economics 1-15; Robert Rhee, 'A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty' (2006) 56 Emory LJ 619.

102 Theodore Eisenberg and Charlotte Lanvers, 'What Is the Settlement Rate and Why Should We Care?' (2009) 6 Journal of Empirical Legal Studies 111.

103 CPR 1.4(2)(e)-(f); CPR 36; Lord Woolf, *Access to Justice*: *Woolf Final Report to the Lord Chancellor on the Civil Justice System in England and* Wales (1996), 4; Adrian Zuckerman, *Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) [1.124]-[1.136]; Gardner *Personal Life* (n 8) 208.

104 On 'transaction costs' the classic is Ronald Coase, 'The Problem of Social Cost' (1960), 3 Journal of Law & Economics 1-44, encouraging us to think first about how parties with perfect information would engage in 'Coasean' bargaining in a costless world to extract gains from trade, before considering law's role.

105 On impediments to bargaining see eg Ivan Png, 'Strategic behavior in suit, settlement, and trial' (1983) The Bell Journal of Economics 539-550; Lucian Bebchuk, 'Litigation and settlement under imperfect information' (1984) The RAND Journal of Economics 404-415; cf Ian Ayres and Eric Talley, 'Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade' (1995) 104 Yale LJ 1027.

outcomes largely depend on relative bargaining power, and this could be very imbalanced, say in the case of employees, consumers or monopsonies. An agreement to settle may merely restrict the enforceability of an obligation, rather than discharge the underlying obligation itself. If 'remedial' duties truly are obligations of justice, settling does not seem a plausible mode of alternative performance, having the effect of discharging these obligations. Rather settlements appear more of a concession to resource constraints; pursuing and dispensing justice is costly, so parties are permitted to by agreement forgo judicial supervision of the obligation's performance.[106]

The value of settlements as a practice could of course be doubted, in which case this instrumental justification would be weakened.[107] One could point, for example, to patent trolls which buy up vaguely worded patents and exploit higher litigation costs to pressure settlements, while themselves not conducting the research and development that patents are aimed at encouraging and rewarding.[108]

(iii) Information costs

A private law right-holder could also be singled out as most likely able to gather evidence of the facts required to prove his case at the lowest costs.[109] Thus it is arguable that a system of exclusive right-holder enforcement generally involves the lowest information costs. Extending standing to others might create additional coordination costs and duplicative costs, including

106 This is consistent with it being the case that only authoritative arbiters can resolve factual disputes with finality (eg uncertainty over quantum of loss): discussed Chapter Two, 'Concepts'.

107 eg Owen Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073, 1075: 'highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining…. And should be neither encouraged nor praised'; H Genn, *Judging Civil Justice* (CUP 2009) 52-56; Wilmot-Smith (n 81) 135-36.

108 John Golden, "Patent Trolls" and Patent Remedies' (2007) 85 Texas Law Review 2111; Michael Meurer, James Bessen & Jennifer Ford, 'The Private and Social Costs of Patent Trolls' (2012) 34 Regulation 26.

109 Eg Steven Shavell, 'The Optimal Structure of Law Enforcement' [1993] Journal of Law and Economics 255, 267-70, 273-74.

ex ante costs of identifying, detecting, and monitoring the duty-bearer, and ex post discovery costs. Excluding standing to others might reduce overall 'waste'.[110]

This may be a fair assumption were private law mostly concerned with compensating victim loss, as the victim himself would likely be most able to prove his extent of loss. For pecuniary loss, say, he can most easily retrieve his balance-sheets and profit-and-loss-statements. Thus '[h]arm suffered is that which most obviously gives the individual the locus standi to complain of conduct disapproved by the law',[111] wrote Birks, however 'there are cases which show that harm is not essential'[112] and 'standing can be recognized on grounds other than harm suffered'.[113] While Birks was concerned to carve out conceptual space for gain-based damages for wrongs,[114] a controversial area even today,[115] his general point stands.

This justification is contingent on the facts, and thus evidence required, to prove an enforceable legal right against another. So, if tomorrow private law were to shift wholesale to a gain-based model of stripping wrongdoer gains, this justification would weaken. Right-holders may no longer be the lowest information-cost-bearers. It may be easier for them to prove the wrong or injustice to them, but it would be easiest for defendants to prove their wrongfully or unjustly obtained consequential gains.

(iv) Public enforcement

Enforcement by public bodies might be objected to on rule of law grounds, of 'avoiding unhealthy concentrations of power in public officials and agencies'.[116] Unlike in the case of

110 Eg Smith (n 57) 130.

111 Peter Birks, 'The Concept of a Civil Wrong' in David Owens (ed), *The Philosophical Foundations of Tort Law* (OUP 1997) 41.

112 Birks ibid 41.

113 Birks ibid 52.

114 See generally P Birks, 'Civil Wrongs: A New World' in *Butterworths Lectures 1990-91* (Butterworths 1992); James Edelman, *Gain-Based Damages* (Hart 2002).

115 eg *Morris Garner v One-Step* [2018] UKSC 20; [2018] 2 WLR 1353 (breach of contract); criticised Andrew Burrows, 'One Step Forward?' (2018) 134 LQR 515.

116 Gardner, *Personal Life* (n 8) 210; compare Joseph Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (OUP 1979).

crimes, it might be said, deciding which private law rights/duties are enforced should not be up to the government or the state. Even in the case of crimes, '[t]he discretion of the crime-preventing agencies should not be allowed to pervert the law'.[117] Given resource constraints it is unlikely that all duties could be enforced, in which case scarcity demands selection. However, any basis of selection by the state might legitimately be questioned. Why these cases? Why not those? What only some within this category, but not others? So on and so forth.

On a similar note, there is a wealth of literature investigating the relative 'optimality' of 'private enforcement' over 'public enforcement' (eg by official regulators) on economic-efficiency grounds.[118] This comparison does not point exclusively to right-holders,[119] but it may suggest a set of possible enforcers, namely public officials, to be less desirable. For one, public enforcers are subject to regulatory capture.[120] However, without further specification and context, it is not easy to draw a firm or conclusive answer at a general level.

(v) Maintenance and Champerty

Finally, the public policies behind the common law rules against champerty and maintenance, historically criminal offences,[121] might also be said to justify a general exclusive standing rule.

As Hobhouse LJ said in *Camden International Ltd v Bank of Zambia*: 'A person is guilty of maintenance if he supports litigation in which he has no legitimate interest without just cause

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117 Raz ibid 218.

118 Eg Steven Shavell (n 109); William Landes and Richard Posner, 'The Private Enforcement of Law' [1975] Journal of Legal Studies 1; Gary Becker and George Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 The Journal of Legal Studies 1; John Coffee, 'Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions' [1986] Columbia Law Review 669.

119 Compare Ehud Guttel, Alon Harel and Shay Lavie, 'Torts for Nonvictims: The Case for Third-Party Litigation' (2018) 2018 University of Illinois Law Review 1049.

120 Dal Bó Ernesto, 'Regulatory Capture: A Review' (2006) 22 Oxford Review of Economic Policy 203; Jean-Jacques Laffont and Jean Tirole, 'The Politics of Government Decision-Making: A Theory of Regulatory Capture' (1991) 106 The Quarterly Journal of Economics 1089.

121 Statute of Westminster I (1275) (3 Edw. I, C 25, 28 and 33). Discussing, Percy Winfield, 'The History of Maintenance and Champerty' (1919) 35 LQR 50; Lord Neuberger, 'From Barretry, Maintenance and Champerty to Litigation Funding' (Harbour Litigation Funding First Annual Lecture, Gray's Inn, 8 May 2013).

or excuse. Champerty is an aggravated form of maintenance and occurs when a person maintaining another's litigation stipulates for a share of the proceeds of the action or suit.'[122]

'[T]he general character of the mischief against which it is directed is … wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse.'[123] The 'public policy' has also been described alternatively, as being 'designed to protect the purity of justice and the interests of vulnerable litigants'.[124] In modern times however, the force and currency of this objection has waned.[125]

C. Purely analytic answers

The third class of reasons are to be cautioned against: a good candidate justification cannot be 'purely analytic'.[126] Accounts stipulating an enforceable right/duty as a single, analytically indivisible unit can thus be ruled out for not abiding by this criterion. The criterion can be defended by the need to avoid further collapse of standing into 'right', the very phenomenon argued against in this thesis. Moreover, it must be stressed, 'analytic connections'[127] would render any exceptions to the general rule impossible or incoherent.

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122 [1998] QB 22 (CA), 29.

123 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 (CA), 1014 (Fletcher Moulton LJ).

124 *Giles v Thompson* [1994] 1 AC 142 (HL), 164 (Lord Mustill): 'the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants'; similarly *Massai Aviation Services v Attorney General of the Bahamas* [2007] UKPC 12 [13] (Lady Hale)

125 Eg Lord Neuberger (n 121); *JEB Recoveries LLP v Binstock* [2015] EWHC 1063 (Ch) [13]: 'it is ironic that the original medieval rationale for the prohibition (protecting the weak and the poor from exploitation by the rich and powerful) now has the opposite effect of affording wealth a monopoly of justice against poverty'. On the general relation of champerty and maintenance to assignment, *The Law of Personal Property*, Bridge, Gullifer, Low, and McMeel (eds) (2nd edn, Sweet & Maxwell 2018) [23-002].

126 Terminology from Zipursky, 'Substantive Standing' (n 7) 330; Goldberg & Zipursky, 'Hohfeldian Analysis' (n 7).

127 Ibid.

Sanction theories of law defining 'duty' in terms of 'sanction' are a relatively straightforward example.[128] Accounts simply stipulating that to have a 'private law right' is to have a duty owed by another which, *by definition,* one also has the power to enforce, are another. They might even prove tautologous, circumventing our question of interest: *why* should private law treat these persons specially?

(i) Two potential examples

For private lawyers, Ernest Weinrib's influential account is likely the most familiar example, coming closest to one. This comes across from his treatment of 'correlativity', which Weinrib argues is required by corrective justice.[129] He argues that '[t]he intrinsic unity of the private law relationship can be seen in private law's embodying in its structure, procedure, and remedy the correlativity of right and duty.'[130]

The distinct power-liability relation I call 'standing' is simply included within his notion of 'correlativity' between right-holder and duty-bearer.[131] Weinrib-ian correlativity:

> 'highlights the moral reason for singling out the defendant for liability… also indicat[ing] why the plaintiff in particular is entitled to recover. The defendant violates a normative bond not with the world at large but specifically with the person to whom the defendant owed the duty. In bringing an action, the plaintiff does not step forward as the representative of the public interest in economic efficiency or in any other condition of general welfare. The plaintiff sues literally in his or her own right as the victim of the defendant's unjust act'.[132]

Accordingly,

> 'This conception of liability assigns the court a properly adjudicative function…. a court intervenes at the stance at the instance of the wronged party to undo the

128 Most famously John L Austin, *The Province of Jurisprudence Determined* (2000 Prometheus Books), especially Lecture I. See generally PMS Hacker, 'Sanction Theories of Duty' in AWB Simpson (ed), *Oxford Essays in Jurisprudence*, vol 2 (Clarendon 1973).

129 Weinrib, *Idea of Private Law* (n 1) Ch 5.

130 ibid 144.

131 ibid 134-135, 143,144.

132 ibid 143.

> unjust harm. Adjudication thus conceived gives public and authoritative expression to what is implicit in the correlativity of right and duty.'[133]

The difficulty, to reiterate, is that what is stipulated as the fundamental or basic normative unit to be explained is treated as an analytically indivisible whole, simultaneously encompassing what I refer to as 'standing' and 'claim-rights'.

A second example is Joel Feinberg's influential argument that the 'activity of claiming' is analytically essential to the notion of a right.[134] Observing that 'the word "duty" has come to be used for *any* action understood to be *required*, whether by the rights of others, or by law, or by higher authority, or by conscience, or whatever',[135] Feinberg introduced a thought experiment – a world in which no one was in a position to *demand* or *claim* the due performance of any of these duties – Nowheresville.

Nowheresville, Feinberg claimed, would be a 'world without rights'.[136] Thus, Feinberg concluded, 'a right *is a* kind of claim',[137] and '[t]he legal power to claim (performatively) one's right or the things to which one has a right seems to be essential to the very notion of a right'.[138] Many have followed his lead.[139]

(ii) Claim-rights versus claims or demands

My assumption here, for the avoidance of doubt, is that a directed duty is analytically independent of the power to enforce it. I took this to be one of Hohfeld's lessons.[140] Rather than its enforceability, directed duties could perhaps be understood by reference to its effect

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133 ibid 144.

134 Joel Feinberg 'The Nature and Value of Rights' [1970] Journal of Value Inquiry 243, 249.

135 ibid, 243-44. (emphasis original).

136 ibid 249.

137 ibid 250 (emphasis original).

138 ibid 251.

139 Eg Stephen Darwall, The Second-Person Standpoint (HUP 2009) 18, 121, 138; Stephen Darwall and Julian Darwall, 'Civil Recourse as Mutual Accountability' [2011] Florida State University Law Review 17, 17, 20; Margaret Gilbert, Rights and Demands: A Foundational Inquiry (OUP 2018) 70-74, 79; R Jay Wallace, The Moral Nexus (Princeton University Press 2019) 103-4, 253, 260.

140 Discussed Chapter Two, 'Concepts'. Cf those influenced by Feinberg, eg Darwall, *Second-Person Standpoint* (n 139) 18-19; Gilbert, *Rights and Demands* (n 139) 47-57.

on the practical reasoning of those who bear them. One feature of duties is that, regardless of enforceability, their bearers *have* to do what it prescribes regardless of whether they *want* to or not (hence 'categorical'[141]). Countervailing desires or reasons are excluded and thus 'pre-empted' by the duty.[142] So if you promised to return your students their marked tutorial essays by Tuesday, then even if it is a rare sunny day outside and you would like nothing better than to go for a walk in the English countryside, you have to stay in and finish marking them.[143] To be owed a duty just is to have a claim-right. Your having a claim-right exerts some force on the deliberations of the duty-bearer, so that person has categorical reason to do or not do what the duty requires, having you in mind.[144]

Hohfeld's unfortunate choice of technical label – '*claim*-right' – has proven a source of difficulty here.[145] Again it bears emphasis that to be owed a duty and thus possess a correlative claim-right, is not the same thing as requesting, demanding, or claiming – all utterances – what that duty requires. Whatever a duty might be, it is not just an utterance or speech-act.[146] Such utterances might draw the duty-bearer's attention to what he already had to do. But, importantly, that would be merely to state and remind him of the duty's existence, not create or alter the very duty itself. Future generations yet unborn, infants unable to speak, adults temporarily comatose, animals, and the environment could all be owed duties and have

141 See eg Joseph Raz, 'On Respect, Authority, and Neutrality: A Response' [2010] Ethics 279, 291: 'not conditional on the agents' inclinations or preferences'; Gardner *Personal Life* (n 8) 21-22.

142 On 'protected reasons': the combination of the first-order reason to Ø, and the second-order reason to not act on a reason to not-Ø see eg Raz, *Practical Reasons and Norms* (OUP 1999) 35-48, 62-73; Raz, *The Authority of Law* (2nd edn, OUP 2009) 17-18,21; Raz, 'On Respect' (n 141) 291.

143 Adapted from Stephen Darwall, 'Reasons, Motives, and the Demands of Morality: An Introduction' in *Moral Discourse and Practice: Some Philosophical* Approaches (OUP 1997) 305

144 'You' or your moral significance is not reducible to just an aspect of your well-being, or 'interest', even if your 'interest' justifies my having regard to you in my practical deliberations: Raz, *The Morality of Freedom* (OUP 1986) Ch 6; Raz 'On the Nature of Rights' (1984) 93 *Mind* 215.

145 Also Chapter Two, 'Concepts'.

146 John Gardner, 'Holding On' (2017) 15 Jerusalem Review of Legal Studies 182, 192

correlative claim-rights,[147] even if they cannot request, demand, or claim their performance.[148] Members of a polite society owe duties to one another even if outrightly requesting or demanding's one due might be rude or taboo. A recipient of kindness could owe a debt of gratitude to the benefactor, even if the benefactor could not demand his gratitude.[149] So too for rights or duties between friends: 'it does not follow from the fact that we avoid or postpone talking about something that comes between us in the language of rights that we do not have rights in respect of that thing'.[150]

D. Moral standing to claim or demand

We conclude this section, for completeness, with a discussion of moral standing, and its possible relation to legal standing. Zipursky has argued that:

> '[a] victim of a relational legal wrong is entitled to demand that the wrongdoer engage in certain responsive conduct toward her, just as a victim of a relational moral wrong is entitled to demand responsive conduct. The presence of courts and law permits plaintiffs to make enforceable legal demands for such responsive conduct'.[151]

147 Whether they can themselves *owe* duties, is an interesting but separate question; if the capacity for duty-bearing requires the capacity to engage in practical reasoning, and respond to reasons, the answer is likely 'no'. This curious asymmetry might explain the opposition some hold towards say, animal 'rights', the objection being something along the lines of moral norms being impartial; this state of affairs being partial or one-sided.

148 Cf Christopher Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (3rd edn, OUP 2010) 4-13, esp 8: 'It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak, either; nor can states, estates, infants, incompetents, municipalities, or universities.'

149 Discussed Wallace, *Moral Nexus* (n 139) 201-04. Some might deny this a 'right'. But however 'imperfect', being owed a duty the benefactor would *eo ipso* have a 'right' in this sense. Demanded gratitude, as opposed to gratitude voluntarily given, may lose its value if demanded from the benefactor, but this seems distinct from not having a 'right' altogether. Consider, however, how this may not hold if instead it is a third-party mutual friend who reminds the beneficiary of the benefactor's kindness and thus his debt of gratitude to the benefactor.

150 Gardner, *Personal Life* (n 8) 53.

151 Zipursky, 'Substantive Standing' (n 7) 336. Cf Goldberg & Zipursky, *Recognizing Wrongs* (n 11).

In justifying contract law, much work has honed in on its supposed moral counterpart, promises.[152] It is a natural reaction to search for counterparts of legal standing from the moral domain,[153] from 'personal'[154] or 'ordinary life'.[155] But while comparisons with accountability relations between right-holder and duty-bearer in morality yield helpful insights, some features of legal standing remain distinctively 'institutional', so the analogy has limits.

First: standing to do what? People often complain about other people's conduct without asserting a duty or a wrong.[156] The standing to complain that someone was petty, or a joke was not funny,[157] is not our concern. Our inquiry concerns the legal standing to enforce underlying private law duties and rights. Its closest moral parallel is thus the standing to hold another accountable, in respect of his moral duty or wrong. Claiming or demanding the compliance with a moral duty, or complaining of its non-compliance, are just specific examples of such holdings to account.

A caveat. The literature has focussed mostly on the moral standing to blame, criticise, or condemn someone.[158] But private law duties can be strict, and so private wrongs are not

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152 Eg Charles Fried, *Contract as Promise* (HUP 1981); Joseph Raz, 'Promises in Morality and Law' (1982) Harvard LR 916; Dori Kimel *From Promise to Contract* (Hart 2003); Seana Shriffin, 'The Divergence of Contract and Promise' (2007) 120 Harvard LR 708; Judith Jarvis Thomson, 'Giving One's Word' in *The Realm of Rights* (HUP 1990) 294-321.

153 Raz, 'Legal Rights' (n 10) 4.

154 Gardner, *Personal Life* (n 8) 8: 'I will generally avoid the word 'morality' and its cognates… Roughly, "personal life" is my name for what people do (as well as what they think, believe, want, etc.) quite apart from the law'.

155 Zipursky, 'Substantive Standing' (n 7) 323-340, especially 335: 'Once one sees the possibility of a right to demand ameliorative conduct, it is easily observed in a wide range of domains in ordinary life.'

156 Arthur Ripstein, 'Private Authority and the Role of Rights: A Reply' (2016) 14 Jerusalem Review of Legal Studies 64, 74.

157 Ibid.

158 Eg Gerald A Cohen, 'Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?' (2006) 58 Royal Institute of Philosophy Supplement 113; Thomas M Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (HUP, 2008) 175; Antony Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial' (2010) 23 Ratio 123; R Jay Wallace, 'Hypocrisy, Moral Address, and the Equal Standing of Persons' (2010) 38 Philosophy & Public Affairs 307–341; Macalester Bell, 'The Standing to Blame: A Critique' in Coates & Tognazzini (eds) *Blame: Its Nature and Norms* (OUP 2013); Patrick Todd, 'A Unified Account of the Moral Standing to Blame: A Unified Account of the Moral Standing to Blame' [2017] Noûs 1.

always blameworthy wrongs.[159] Some tort duties are strict.[160] Duties of restitution are strict.[161] So too contractual duties, by default.[162] Suitably adapted however, some points do carry over to the standing to claim or demand.

(i) Similarities

Raised first by GA Cohen, standing in moral discourse and the 'interpersonal dimension of moral utterances' deals with 'who can say what to whom'.[163] It is sometimes possible for a listener to effectively deny a speaker's 'right' (ie standing) to make a criticism, without confronting the *content* of the critic's judgment, simply by citing some disabling fact about the speaker.[164] Central to the phenomenon here is that its content may be true and well-founded, but because he lacks the 'requisite standing' to assert it, he can be effectively 'silenced'.[165]

This aspect tracks how legal standing operates. It helps us to comprehend why challenges to standing might be viewed as technical, or even unmeritorious. An absence of moral (and legal) standing can be invoked in a *content insensitive* way,[166] without engaging the contents or merits of the underlying assertion. This is a feature, not a bug.

In the terminology of criminal law philosophers, an attack on standing is not a 'denial' of the allegation's content ('no, I didn't do it; here's my alibi). Neither is it a 'justification', or an 'excuse'. It does not accept the allegation, simultaneously deflecting its force ('yes I did it, but

159 Discussing, see eg Dori Kimel, 'The Morality of Contract and Moral Culpability in Breach', (2010) King's Law Journal 21; Tony Honore, 'Responsibility and Luck: The Moral Basis of Strict Liability' in *Responsibility and Fault* (Hart 1999); Peter Birks, *Unjust Enrichment* (OUP 2005) 7.

160 Eg Conversion, Torts (Interference with Goods) Act 1977, the tort in *Rylands v Fletcher* (1868) LR 3 HL 330.

161 Eg Birks (n 159) 7; *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24.

162 Hence the need for 'reasonable endeavours' clauses: see eg *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch); *Sainsbury's Supermarkets Ltd v Bristol Rovers (1883)* Ltd [2015] EWHC 2002 (Ch); *Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd* [2019] EWCA Civ 823.

163 Cohen, 'Casting the First Stone' (n 158) 118 footnote 9.

164 Ibid 119.

165 Ibid 119-121, 124.

166 James Edwards, 'Standing to Hold Responsible' [2018] Journal of Moral Philosophy 1, 12.

here's why').[167] Instead, it is a form of *ad hominem*, aimed at the intervener rather than the intervention.[168] It is a third way of 'resisting liability',[169] so a bipartite taxonomy of 'denials' and 'defences' is inadequate to accommodate the phenomenon.[170]

In daily speech, an absence of standing could be raised by retorts like "mind your own business", "you too" (*tu quoque*), "know your place", or "who do you think you are?".[171] These retorts, implying a lack of standing to claim or demand, effectively silence hypocrites,[172] busybodies,[173] and meddlers. Three examples:

> *Friends:* Amy and Barbara are friends. On Amy's birthday, Barbara neglects to wish Amy happy birthday. Clara asks her: "Why didn't you buy Amy a birthday card? Friends wish each other happy birthday". Barbara could simply say in response: "mind your own business". She does not need to dispute what friends truly owe each other. Even if she did accept that their friendship entailed these duties, she does not need to explain her lapse by providing some justification or excuse. [174]
>
> *Supervisor:* A doctoral supervisor fails to meet his supervisee for a year, despite repeated attempts at contact, and university requirements imposing minimum termly meeting frequencies. For reasons unknown, the supervisee covers up his breach, signing off on university monitoring reports that they met the required times. Another doctoral student – a friend of the supervisee's – discovers this. Out

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167 ibid 11-12.

168 Ori Herstein, 'Understanding Standing: Permission to Deflect Reasons' (2017) 174 Philosophical Studies 3109, 3110.

169 Indicating the absence of a correlative liability to be sued, and thus an absence of liability to the court's jurisdiction to issue an order: Chapter Two, 'Concepts'.

170 James Goudkamp and Charles Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in Mitchell and Swadling (eds), *Restatement Third: Restitution and Unjust Enrichment* (Hart 2013) 140-141; see also James Goudkamp, *Tort Law Defences* (Hart 2013) 30-31. Cf Steve Smith's taxonomy of 'substantive' versus 'remedial defence' in Smith (n 57) 274-294.

171 Herstein, 'Understanding Standing' (n 168); Ori Herstein, 'Justifying Standing to Give Reasons: Hypocrisy, Minding Your Own Business, and Knowing One's Place', (2020) *Philosopher's Imprint* (forthcoming).

172 Eg R Jay Wallace, "Hypocrisy, Moral Address, and the Equal Standing of Persons," (2010) Philosophy & Public Affairs 38. Hypocrisy and inconsistency are of less relevance to third-party intervention, though potentially helpful for 'defences' like 'clean hands', and 'illegality' in two-party cases: see eg Ori Herstein, 'A Normative Theory of the Clean Hands Defense' (2011) 17(3) Legal Theory 171; Goudkamp *Tort Law Defences* (Hart 2013) 30-31.

173 Eg Linda Radzik, 'On the Virtue of Minding Our Own Business' (2012) 46 The Journal of Value Inquiry 173.

174 Adapted from Edwards, 'Standing' (n 166) 10.

> of concern, she is about to confront the negligent supervisor to demand he live up to his supervisory duties. The supervisee could well stop her by saying: "it's not your place", or "mind your own business".
>
> *Rascal*: A boy is picking on another at a playground. Seeing this a stranger demands that he stop and apologize immediately. The boy might retort: "well who do you think you are?".[175] (His parents might say: "You had no right to say that; that's our job").

By contrast, if the claims or demands were made by the person to whom the duty was owed, in none of these cases could the retorts be effectively used to circumvent engagement with the content of his claims; he is specially situated with the standing to hold the duty-bearer to account. Arguably therefore, a legal rule which puts legal right-holders in a special position to the exclusion of others, is simply tracking the parallel position in morality, or ordinary life. The *values* justifying the moral position could perhaps also justify the legal position.[176]

This is an evolving area,[177] but briefly, it appears that some values are dependent for their realisation on being sheltered from outsider intervention.[178] First, personal flourishing may call for a measure of seclusion from others.[179] Second, some values associated with a sense of self-worth can only be fostered through standing up for oneself. Thus Feinberg concluded that 'the activity of claiming… makes for self-respect and respect for others [and] gives a sense to the notion of personal dignity'.[180] Becoming resigned to mistreatment by others is to lose all self-respect and dignity. Third is the development of our moral agency, which requires space to explore and make mistakes, and to decide for ourselves whether to hold others responsible, and how reciprocally to take responsibility for our acts and outcomes. Paternalistic

175 Adapted from Herstein, 'Understanding Standing' (n 168) 3114.

176 Cf the 'purely analytic' conceptual entailment in both law and morality argued for by Darwall, *Second-Person Standpoint* (n 139); Stephen Darwall and Julian Darwall, 'Civil Recourse as Mutual Accountability' [2011] Florida State University Law Review 17, 17-20, 34.

177 Eg Herstein, 'Justifying Standing' (n 171); Radzik (n 173); Edwards 'Standing' (n 166) 21-25.

178 Herstein, 'Justifying Standing' (n 171).

179 Ibid.

180 Feinberg (n 134) 257. See also Jason Solomon, 'Equal Accountability Through Tort Law' [2009] Northwestern University Law Review 1766, 1794-1796; Zipursky, 'Substantive Standing' (n 7) 327.

interventions can have infantilising effects, and thus require special justification.[181] Excessive outsider intervention could also crowd out opportunities to apologise to those we wrong, and to forgive those who wrong us. Fourth, exclusive privileges to intervene could be constitutive of valuable personal and social ties, it is an important feature of bonds of fraternity, friendship, love, parenthood, and mentorship, that we make parts of our lives 'their business', and their lives 'our business'.[182] These relationships may require degrees of privacy, intimacy and trust to flourish, and can be undermined by outside interference. Fifth, epistemic barriers aside, a tendency to be partial towards ourselves and to find fault with others may entail a systematic over-indulgence in indignation, and feelings of our own moral superiority.[183] Outsiders may be excessively judgmental; they might exercise more caution, and humility.

(ii) Differences

The analogy is not straightforward, however. Those who argue that law is 'institutional' have contended that legal standing is an 'institutional' feature,[184] and thus has 'limited parallels'.[185]

Compounding the difficulty is moral standing's unclear conceptual structure. Raz thought 'we do not have an unproblematic grasp of the phenomena referred to'.[186] Is moral standing reducible to a familiar deontic concept, or of independent significance? Darwall uses the term interchangeably with individual 'authority'.[187] For Herstein it is 'exclusionary permission',[188] for

181 Linda Radzik, 'On Minding Your Own Business' (2011) 37 Social Theory and Practice 574; similarly Solomon (n 180) 1796-97.

182 Herstein, 'Justifying Standing' (n 171); Radzik ibid; Edwards, 'Standing' (n 166) 21-23.

183 Radzick (n 173) 81.

184 Raz, 'Legal Rights' (n 10) 1-5; Gardner, *Personal Life* (n 8) 5, 18, 214-16.

185 Gardner, *Personal Life* (n 8) 205.

186 Raz, 'On Respect' (n 141) 292-93.

187 Darwall *Second-Person Standpoint* (n 139); Stephen Darwall, 'Authority and Reasons: Exclusionary and Second-Personal' [2010] Ethics 22 (individual authority to make a claim or demand).

188 Herstein 'Understanding Standing' (n 168) (an exclusionary permission); compare Raz, 'On Respect' (n 141) 292-293 (a permission implying an exception to a general prohibition).

Edwards, an 'agent-relative privilege' plus 'power'.[189] These disputes cannot possibly be satisfactorily resolved here.

Whatever moral standing's precise structure, one difference stands out – unlike in law, our holdings to account in morality do not require the existence of an adjudicative organ, additional to the bilateral right-duty relation. This may prove an important distinguishing feature. Recall my argument in Chapter Two that legal standing is a power against another to hold him accountable before an *adjudicative body* (eg a court or tribunal), thereby subjecting him to its power (jurisdiction) to make an order against him. To capture the significance of an individual's standing within private law's remedial structure, I argued, we needed to more clearly distinguish the court's public power, to which a defendant – usually a duty-bearer – would be subjected to in virtue of the exercise of a claimant's standing. There are at least two powers, not just one. Legal standing is precisely a power because it is through its exercise that the court's power over the defendant is activated or triggered. Rather than modifying legal rights or duties as between claimant and defendant, what is altered is the normative relation between the defendant and the court.

My analysis thus vindicates Raz's suggestion, that 'outside the law it is hard to apply the term [standing] to any normative power since there are no formalised processes which one initiates relying on the standing. One is simply engaging in an act of communication'.[190] As hinted earlier above, to be owed a duty is not the same thing as requesting, demanding, or claiming what the duty requires. Such utterances might draw the duty-bearer's attention to what he already had to do or refrain from doing. But that would be merely to state and remind him of the duty's existence, not create or alter the duty itself.[191]

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189 Edwards, 'Standing' (n 166) (a power plus a privilege).

190 Raz, 'On Respect' (n 141) 293 makes a very brief speculation about legal standing. Its contrapositive supports my account, namely: 'if standing does refer to a normative power, then a courts' decision, given in an action where plaintiff had no standing to initiate, is likely to be voidable, and even, void on that ground'.

191 Compare Raz, 'Legal Rights' (n 10) 5: 'Many conventions about the propriety of poking one's nose in other people's affairs are mere matters of etiquette or of good manners and cannot affect underlying moral rights'.

Absent adjudicative bodies in the moral domain, demanding or claiming compliance with a moral duty cannot alter the defendant's normative position in relation to that body – so moral standing cannot be a power in the same way. It may be a truism about law that 'all legal systems have judges',[192] but this does not hold for morality.

(iii) Tertiary rights

A final point, referred to in Chapter Two, remains outstanding. This concerns what Gardner termed a claimant's 'tertiary right to assert and enforce her primary and secondary rights through the courts',[193] about which I remain agnostic. The standing rule already demonstrates private law's commitment to right-holders taking the lead. Conferring an additional tertiary 'private-law right against strangers to the litigation'[194] would further cement their special position, reinforcing the exclusivity of enforcement relations between right-holder and duty-bearer.

This does not appear to be the position in English law today, but Gardner put forth a case for it. He thought this tertiary legal right could parallel a similar right in personal life, justifiable by the value of 'respect for someone's personal autonomy, understood as a valuable constituent of her life'.[195] Moreover, wider 'instrumental'[196] values or 'public goods'[197] inapplicable to personal life could also justify a parallel legal right. Thus, the case for a tertiary legal right would be stronger than its parallel moral right.[198]

He illustrated with an example of bickering children, suggesting that apart from a mistreated sibling's primary right not to be treated disagreeably, and her secondary right to an apology from the mistreating sibling, she might also possess a 'tertiary right as against nearby

192 Scott Shapiro, *Legality* (HUP 2011) 15.

193 Gardner, *Personal Life* (n 8) 214.

194 ibid 214.

195 ibid 208.

196 ibid 212.

197 ibid 210.

198 ibid 214.

busybodies that they not usurp her in asserting or enforcing the right to an apology that she holds as against [her sibling]',[199] correlative to their duty 'not to meddle in the disputes of strangers'.[200] This tertiary right would thus be a right against everyone else – all potential meddlers – 'minimally a right of deference, maximally a right of support',[201] in extracting the apology she is owed.

To reiterate, any such tertiary claim-rights would be conceptually distinct from legal standing (a power). Even if the same values justified them, the overlap is merely justificatory, and not conceptual. Each concept is distinct, having different legal ramifications.

IV. STANDING WITHOUT RIGHTS: JUSTIFIABLE EXCEPTIONS

This section addresses the second question of our chapter. In light of the most promising justifications for the general standing rule, which creates an exclusivity of enforcement relations as between right-holder and duty-bearer, what exceptions could we justifiably make, so that standing is extended to another?

At this juncture, it may help to clarify again the structure of the previous chapters. In Part II, comprising Chapters Three to Five, some exceptions the law might already have made to the standing rule were raised. But by no means was the discussion there exhaustive of all exceptions that exist or could exist in our positive law, nor was it meant to be so. The main point was to, through specific case law and statutory examples, concretely prove to contract, unjust enrichment, and tort lawyers the general doctrinal importance of distinguishing standing, as a separable concept from private law rights. To buttress the main claims within each chapter, area-specific justifications for extending standing to third-parties were raised along the way. Given how the exceptions occurred in diverse contexts, no one 'global' exception was posited – that prospect seems implausible. More plausibly, there are a family of exceptions, each 'local', with its own justifications.

199 ibid 207.

200 ibid 207.

201 ibid 213.

Looking to the future however, it might be doubted whether compartmentalized development along such lines would be a viable path for the rational development of private law doctrine. The danger is that each family of exceptions might be treated as entirely unrelated, disparate islands of law, developing in complete isolation from one another.

Thus we conclude this chapter by sketching out an alternative path. Given prevailing uncertainty this exercise cannot but be speculative. If I am correct in suggesting that the standing rule extends generally across the three main branches of English private law, then perhaps we could uncover some broader rationales or conditions for exceptions to said general rule, that generalize beyond each individual compartment. Helpful analogies and disanalogies could then be drawn by reference to these rationales and conditions, sharpening what is distinctive about each family of exceptions. Hopefully, this might guide the future development of private law doctrine in a slightly more systematic and coherent fashion.

To generalise in this manner, the strategy here necessarily involves looking across the borders of traditionally defined compartments of private law. The key idea is that the justifiability of any new or existing exception (or defeater) to the general rule must hinge upon the (best) justifications for the general rule, articulated in Section III. Each justification was a reason against, or an objection to, third-party standing. But any justifiable exception to the general standing rule must meet or outweigh the concerns and values which justify said general rule. The challenge posed here, then, is to articulate broad conditions or circumstances which if obtained, would either remove, or defeat most of these concerns. Three are suggested in turn, namely: (i) right-holder consent, (ii) incapacity, and (iii) duty-bound standing.

A. Right-holder consent

For a right to be justifiably enforced by someone else, it seems that right-holder consent to enforcement must be generally required.[202] (Note that this condition is subject to qualifiers,

[202] Its role is confined not only to the enforcement of contractual rights, discussed in Chapter Three where the point comes up naturally. Recall how, in interrogating the role of 'parties intentions', it was argued that consent from the promisor and promisee each remove an objection to third-party standing, namely,

discussed below. Where consent is impossible to obtain due to incapacity, or is refused for illegitimate reasons, it may be dispensed with.)

As his consent to enforcement is generally necessary, the right-holder retains some control. He could withhold or refuse his support, effectively having a 'veto'.[203] Without this safeguard, outsider intervention could be objected to as unjustifiable paternalism: 'his own good, either physical or moral, is not a sufficient warrant. He cannot be rightfully compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right.'[204]

So it has been argued that '[i]f there were a simple method by which courts could determine, prior to issuing orders, whether the parties directly affected desired those orders, it might be acceptable in principle to allow the state or anyone else to bring a private law action. The courts could simply refuse to issue a requested order if it determined that the directly affected party did not desire the order.'[205]

This seems broadly correct, subject to a necessary refinement. To 'prevent wasteful or unnecessary litigation',[206] the relevant timing to determine right-holder consent should not be 'prior to [the court] issuing orders', but way before that, at the time proceedings are initiated. Without evidenced right-holder consent then, any putative enforcer would not and should not even have the power (ie standing) to trigger the court's jurisdiction (power) over the alleged defendant. The courts should refuse to even commence proceedings unless the enforcer has identified the right-holder and there is evidence of his consent, for example by requiring it in writing.

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the promisor's additional liability to be sued by another, and the promisee's loss of exclusive control over the duty owed. Here we are concerned only with the *right-holder's* consent, as emphasised below.

203 Ibid 54-55; Similarly, Guttel, Harel and Lavie (n 119) 1062-63, 1069, emphasising 'legitimate interests of the victim'.

204 John Stuart Mill, *On Liberty*, Gray & Smith (eds) (Routledge 1991) 30, as argued in formulating his famous 'harm principle'.

205 Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019) 130.

206 ibid 130.

(i) Why generally required

Recall a key justification for the exclusive standing rule. There is a general objection to others enforcing my rights if I have a valuable 'innate'[207] or 'private authority' over them. Alternately phrased, this would undercut the right-holder's independence or personal autonomy. if the right-holder consents to third-party enforcement, however, these autonomy-based objections could be defused.

The self-defence versus other-defence analogy may also be helpful here. It was suggested that part of personal autonomy consists in being able to control the normative significance of benefits or harms avoided to me, and thus 'determine the normative position of [my] assisters'.[208] My consent seems necessary for a third-party 'assister' to be also extended a 'vicarious' legal power to enforce my legal claim-rights against another who owes me correlative legal duties, especially where the claim-rights were justified by its protecting some aspect of my well-being.[209]

Right-holder consent is also needed to address other more specific difficulties, such as the concerns for his privacy, his option to forgive the duty-bearer, and the fact that right-holder cooperation may often be required in order for the underlying rights/duties to be performed, and thus also required for the right-holder to obtain the benefits of enforcement. For example, where the subject-matter is a right to restitution or a right to damages, there must be right-holder acceptance; he cannot be forced or coerced into receiving the damages awarded by the state without violating his autonomy. Practically speaking, the right-holder must be made party to suit via joinder, to (i) be bound by the judgment and to (ii) receive the fruits or proceeds of the enforced right.[210]

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207 Eg Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (HUP 2009) 30-40, drawing on Immanuel Kant's 'Doctrine of Right' in his *Metaphysics of Morals*, translated by Mary Gregor (ed) (CUP 1998) [6:238]: 'there is only one innate right'.

208 Gardner, *Personal Life* (n 8) 54-55.

209 eg Raz 'On the Nature of Rights' (n 144).

210 Discussed Chapter Four. *Roberts v Gill* [57] (Lord Collins), [125] (Lord Clarke). Compare *McAlpine v Panatown* [2001] 1 AC 518 (HL) 561 (Lord Goff), 595-96 (Lord Millett).

Without a right-holder's consent and cooperation to enforcement, third-party intervention would be an objectionable invasion of his autonomy.[211] 'Invasively interfering with the activities of another competent person is to fail to pay due respect to that person as a moral equal. Competent persons are centers of cognition and originators of decision, decisions affecting the welfare and life-direction of the decision-maker… if we are to respect persons as decision-makers then we ought not to disrupt their deciding or render it impotent.'[212]

(ii) Revocable

A more difficult question is whether consent must be continuing. People change their minds. If I have consented to grant you a power over my rights against another, can I then withdraw or revoke it? In the usual case this seems perfectly unobjectionable. Consent to a wrestling match, or sexual intercourse, can at any time be revoked by either participant. My consent to licence entry into my house, to eat with my cutlery at my table, can be revoked from a rude guest, *a fortiori* a power extended to you, to enforce my rights.

Does it make a difference where contracts, involving reciprocal commitments as to future conduct or events, are involved? It is suggested not. Here again it is important to distinguish rights and correlative duties from powers and correlative liabilities, which the English Contract (Rights of Third-Parties) Act 1999 does not adequately do, as argued in Chapter Three.

Suppose *arguendo* that it was justifiable to confer third-party claim-rights, correlative to a duty owed by the promisor. In the case of contractual rights and duties authored by the parties and created by the agreement, *both* promisee and promisor consent can be located at the time of creation, ie contract formation, in the specification of an identified or identifiable third-party within the terms of the agreement.

If parties do not expressly reserve their power to revoke or vary any third-party claim-right conferred, the Act by default strips them of that power once the third-party communicates an

211 See generally Donald VanDeVeer, *Paternalistic Intervention*: *The Moral Bounds of Benevolence* (Princeton University Press 1986).

212 Ibid 5.

acceptance, or has relied on it.[213] This 'crystallisation' is rightly controversial, and difficult to justify.[214] As between promisee and promisor, it is relatively easier to justify preventing the *promisor*'s change of mind – a duty/right, we might say as above, is something one *has* to do, regardless of whether one *wants* to do it. Just as children quickly learn that if they give their toys away they cannot expect to get them back,[215] similarly a promisor who has undertaken a duty owed to a third-party cannot at any time revoke that undertaking. A "duty" revocable at any time by a duty-bearer is no duty at all, [216] for it does not truly bind.

However, this argument does not hold where we are concerned instead with the *promisee* revoking his consent, and an express term conferring a power (standing) on a third-party. Consent should be subsequently revocable by the promisee unilaterally, even against the wishes of that third-party. If the promisee's 'intentions' have changed, so he no longer wants enforcement of the promisor's promise, the third party should not be able to sue. The decision is a practical matter to be worked out as between promisee and third-party, taking into account any changes in their relationship, and circumstances. (Of course, if the promisee so wished, it was always open to him to independently contract with the third-party to agree a constraint on revocation, making unilateral revocation a breach of that separate contract,[217] possibly even preventable by prohibitive injunction. There are other, possibly better ways for a promisee to pre-commit to an irrevocable gift for a third-party, say by outright assignment of his contractual right to the third-party.)

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213 s 2 Contracts (Rights of Third Parties) Act 1999.

214 Eg Robert Stevens, 'The Contracts (Rights of Third Parties) Act 1999' (2004) 120 LQR 292, 293-94, 296, 309; Catherine Mitchell, 'Privity Reform and the Nature of Contractual Obligations' [1999] Legal Studies 229, 238-43.

215 Peter Birks, An Introduction to the Law of Restitution (OUP 1989) 9.

216 Though it may legitimately be queried whether there is truly any undertaking at all, rather than merely a statutorily deemed or fictional one.

217 Compare a general principle of agency law: an agent's actual authority may be revoked by the principal any time even though it may be a breach of the internal contract to do so: Francis Reynolds, 'Agency' in *Principles of English Commercial Law,* Andrew Burrows (ed) (OUP 2015) [1.07]

B. Incapacity: physical and legal incompetence

However, the general requirement for right-holder consent to enforcement could be dispensed with in cases of physical incapacity, where he or she is unable to meet the physical conditions necessary for exercising his or her powers, for instance where the right-holder is comatose, or dead.[218]

The position is arguably similar where a right-holder is not physically incapacitated, but instead legally incompetent, for example an infant or minor not sui juris.

This position may also extend to an analogous class of cases, where the right-holder is especially weak or vulnerable, and is rendered unable to consent to outside intervention aimed at protecting his interests precisely because of that vulnerability.

(i) Dependence on a guardian may be valuable

Where the right-holder is incompetent or dead, objections of autonomy bite less. Consequently, paternalism-based objections are deprived of their force in these cases. Third-party enforcement is easier to justify.

It is not objectionable to 'infantilise' an infant. Indeed, that seems the appropriate treatment for infants. The parent-child relationship is precisely a paradigm case where it is justifiable for one person to be in charge of another. The parent-child relationship is a prime token of the wider category of legal incompetence,[219] in which the moral objection to having someone in charge of another might be absent or removed. In this category, it may be that dependence on someone, rather than independence from everyone, is valuable.[220]

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218 Encompassing many of the cases discussed in Chapter Five, Torts.

219 Compare Arthur Ripstein, *Private Wrongs* (HUP 2016) 12 footnote 19.

220 Pursuing a 'relational account of fiduciary relationships', see Lionel Smith, 'Parenthood Is a Fiduciary Relationship' [2017] SSRN Electronic Journal <https://www.ssrn.com/abstract=3007812>, forthcoming in the University of Toronto Law Journal, defending *M (K) v M (H)* [1992] 3 SCR 6 (Supreme Court of Canada). Similarly Michael Bryan, 'Parents as Fiduciaries: A Special Place in Equity' (1995) 3 International Journal of Children's Rights 227.

Thus cases of 'children and protected parties'[221] provides a relatively clear example of how rights and standing might justifiably depart. This already seems the case in our positive law. A protected party is someone who 'lacks capacity to conduct proceedings'.[222] Children do not themselves possess the standing (power) to sue to enforce their own rights. Instead, this power is conferred upon and must be exercised by a 'litigation friend',[223] someone who can fairly and competently conduct proceedings on behalf of the child,[224] has no interest adverse to the child,[225] and undertakes to pay costs (subject to any right to be repaid from the assets of the child).[226] Any step taken before a child has a litigation friend has no effect.[227]

In practice this is usually one of the child's parents,[228] or relatives.[229] Infant-beneficiaries under a trust can be protected by 'guardians ad litems'[230] In tort law the duties we owe one another are owed alike to minors and majors.[231] Children can be tort victims. Tort law recognizes that children have rights which can be infringed. By parity, children can be tortfeasors; they owe duties and are liable to sued in respect of their wrongs to others,[232] and infancy is no defence.[233]

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221 Civil Procedure Rules, Part 21

222 CPR 21.1 (2)(d).

223 CPR 21.2. Unless the court orders otherwise: CPR 21.2 (2)-(3)

224 CPR 21.4 (3)(a).

225 CPR 21.4 (3)(b).

226 CPR 21.4 (3)(c).

227 CPR 21.3(4): unless the court orders otherwise.

228 Christopher Walton (ed), *Charlesworth & Percy on Negligence* (14th edn, Sweet & Maxwell 2018) [3-66].

229 If the tortfeasor is a parent: see eg *XA v YA* [2011] PIQR P1 (allegations of assault by the child's father and a negligent failure by his mother to protect him).

230 eg *In re Whittall* [1973] 1 WLR 1027; *Re Barbour's Settlement Trusts* [1974] 1 WLR 1198. See further Learmonth and others (eds), *Williams, Mortimer & Sunnucks - Executors, Administrators and Probate* (21st edn, Sweet & Maxwell 2018) [56-11]

231 In England the age of majority was lowered from 21 to 18: s1 Family Law Reform Act 1969.

232 *Jennings v Rundall* (1799) 8 TR 335, 337 101 ER 1419: 'if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a Court of Justice' (Lord Kenyon CJ).

233 Though age features in making the duty or standard inquiry more lenient for children: *Mullin v Richards* [1998] 1 WLR 1304. See generally Goudkamp, *Tort Law Defences* (Hart 2013) 103.

(ii) Accompanying constraints on enforcer

A child has rights against others, but requires an adult or guardian to exercise any powers in relation to those rights.[234] However, it is important to realise that such a power over another comes at a price, and justifiably so.[235] They do not come unfettered, with the usual 'radical discretion'[236] that a right-holder has accompanying his own power to sue.

Multiple ways of regulating these powers exist.[237] Legal powers can be regulated by setting conditions precedent for its valid exercise, so that in certain situations its legal effects might be void or voidable, say a 'conflicting self-interest'.[238] Often the power comes duty-bound, so that the power-holder owes the right-holder independent duties which fetter the purposes for which such powers may be exercised.

(iii) Protecting the vulnerable

When Ripstein wrote that it is only 'the unusual class of cases in which the right and power reside in separate persons',[239] he had in mind 'cases of third party beneficiaries to contract'.[240]

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234 Ripstein, *Private Wrongs* (n 219) 12 footnote 19: 'Although right and power sometimes come apart. For example, a child has rights against others but requires an adult parent or guardian to exercise any powers in relation to those rights…' cf HLA Hart, 'Legal Rights', *Essays on Bentham* (Clarendon 1982) 184 footnote 86, suggesting that a third-party exercises a child's power. As a general proposition this seems a stretch, even fictitious, for eg an unborn beneficiary under a trust. While it may be plausible to claim that non-existent persons have claim-rights, it is a lot less so to claim that they have powers that could be exercised by another before they exist.

235 (n 220).

236 Gardner, *Personal Life* (n 8) 201-02, 215. Compare Gardner, *Torts and Other Wrongs* (OUP 2020) 85, and Raz's terminology of an 'undirected legal power' – a legal power not coupled with legal duties regulating its exercise: Raz, 'The Inner Logic of the Law' in *Ethics in the Public Domain* (OUP 1994) 238, 241 onwards.

237 Also discussed in Chapter Two, 'Concepts'.

238 One plausible view of the 'no-conflict rules' applicable to fiduciaries, whether in interest-duty or duty-duty conflicts: Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (2014) 130 LQR 608, 620-21, 623-625, 633.

239 Arthur Ripstein, 'Civil Recourse and Separation of Wrongs and Remedies' [2011] Florida State University Law Review 163, 203 footnote 89.

240 Ibid. NB his point was to emphasise that '[t]here is a doctrinal puzzle about how this can be so, but the puzzle cannot even be formulated unless the power is understood to be the power to enforce a right.'

These were cases, he argued, where 'the third party has a power to enforce a right that resides in another person.'[241]

However, as was pointed out in Chapter Three, under the English Act the third-party need not be a *beneficiary* from due performance of the contract in order to be extended standing. So long as he is expressly identified in the contract's terms, that is enough. To the extent that a 'right to enforce' under the Act comprises standing, it thus seems that party agreement would be sufficient for the extension of standing to a third-party under the Act.

Could third-party standing be justified, even where the 'consent' of the parties to appoint that third-party is absent? The answer seems to be 'yes', although as indicated, if the third-party is a public actor this may come at a taxonomical cost. The arrangement might be pushed across the taxonomical line, into the domain of public law.

For example, with consumer contracts, a state-regulator is statutorily empowered with the standing to initiate actions.[242] There may be good reasons for carving out defined regulatory regimes like these, overseen by a state-body.[243] The justification for doing so may be pragmatic or regulatory, and is independent and regardless of the parties' agreement or consent. A state-body could be appointed to fill in 'enforcement gaps' as a public enforcer or regulator. Here, to pursue a legislative policy of consumer protection, a legal system might justifiably dispense with right-holder consent. The vulnerable party might be reluctant to consent to outside intervention meant to protect him, precisely because of the power wielded over him by the stronger party. The superior or monopolistic bargaining power of some contracting parties might enable them to pressure vulnerable parties into unfair settlements, unilaterally dictate one-sided terms, and threaten 'retaliation' on future contracts with even more unfavourable terms.

241 Ibid.

242 Consumer Rights Act 2015, Part 3. See also Schedule 3.

243 Ibid.

A similar argument has been advanced more generally for torts, albeit on efficiency-based grounds.[244] It has been argued that efficiency can be served by 'expanding the scope of plaintiffs', just as it can be served by 'expanding the scope of defendants'.[245] The central argument is that standing (together with 'the right to… collect damages')[246] should be extended to 'cheapest compensation seekers', who are 'cheapest' in the sense that they may be less risk-averse, have better information, access to the legal system, and stronger incentive to sue. The argument is meant to parallel the well-known concept of imposing 'liability to pay damages' on 'cheapest cost avoiders', who have deep pockets and can most easily insure.[247]

The stated premise is that there is a 'problem' of under-enforcement in tort law by victims in cases where they are unable or unwilling to sue, and hence a 'chronic' problem of under-deterrence. The examples given are of dead victims, victims of child abuse or medical malpractice, or relationships where there is a fear of defendant retaliation (eg employee-employer). The extent to which one finds these arguments convincing depends on how far one accepts that tort law can be a valuable instrument of deterrence.

(iv) Death

In the case of right-holder death, succession law is activated, engaging different values accommodated for within the regime, for example freedom of testation versus forced heirship, and the policy that 'agreements must be kept' and so one's debts must be paid. In English law the personal representative must gather in the deceased's estate for re-distribution. He has no discretion over damages recovered. He must pay off the deceased's creditors,[248] and if a will

244 Ehud Guttel, Alon Harel and Shay Lavie, 'Torts for Nonvictims: The Case for Third-Party Litigation' (2018) University of Illinois Law Review 1049.

245 ibid 1051

246 Ibid 1051

247 Guido Calabresi, *The Cost of Accidents* (Yale University Press 1970) 135-173.

248 S32 Administration of Estates Act 1925; *Re Tankard* [1942] Ch 69, 72 (Uthwatt J).

exists, implement its terms. Where it does not, the estate must be distributed in the order dictated by intestacy law.[249]

However, as was argued at more length in previous chapters, there may be reasons for nevertheless extending standing to a third-party, so that they may enforce the deceased's victim's rights. For instance, referring to *Beswick v Beswick*,[250] the Law Commission Report behind the Third Parties Act noted that if 'the promisee has died, his or her personal representatives may reasonably take the view that it is not in the interests of the estate to seek to enforce a contract for the benefit of the third party.'[251]

Thus the contractual right might otherwise go unenforced, and the duty-bearer might escape 'scot-free'.[252] In such a case, the justification for extending standing to that third-party is particularly strong, especially if the promisee would also have wished for its enforcement were he alive, in contrast to his estate's personal representatives. The reason this point was overlooked in *Beswick v Beswick* was because the third-party widow Mrs Beswick was, fortunately, also appointed personal representative of her husband's estate. Not every third-party will be so lucky.

C. Duty-bound standing

On to the last family of cases. There may be a particularly strong justification for extending standing to a third-party where the right-holder does not hold his right beneficially for himself, as with the typical tort right or contractual right.

249 S46 Administration of Estates Act 1925.

250 [1968] AC 58 (HL).

251 Law Commission, 'Privity of Contract: Contracts for the Benefit of Third Parties' (1996) Report No 242 para 3.4.

252 *G.U.S. Property Management v Littlewoods Mail Order Stores* (1982) S.L.T. 533, 538 (Lord Keith).

(i) Unfettered standing and 'radical discretion'

In the typical case of a tort right or contractual right, it may be difficult to justify letting someone else enforce it where the justification for the right lies in the valuable autonomy of the right-holder. In such cases, the right-holder has been described as having 'radical discretion' over the decision to sue.[253] The state takes no position on the normative desirability of its exercise,[254] leaving that decision entirely up to the right-holder. Ripstein has even elevated this as a 'general feature of a right as between private parties'.

As argued in Chapter Two, this seems generally correct; in private law, standing is a power that usually comes unfettered or unconstrained. In Hohfeldian terms, the power comes accompanied with paired liberties (or 'privileges') as to their exercise, so there is no duty either to sue, or to not sue. In this way the claim-right-holder is thereby conveyed a choice, or discretion, over whether or not to exercise his power to enforce it, and if so when to do so. Thus, in private law generally, we are not normally duty-bound to exercise our powers of suit. By contrast to the general position in private law however, the powers of a public official, of which court officials are an example, are almost always fettered with role or office-based duties. Such duties may be owed to no one in particular, although they may be owed to the public as a collective whole.

(ii) Rights held not for one's own benefit, but for the benefit of another

However, as was argued in Chapter Four, English private law clearly envisages instances or arrangements of right-holding where, like a trustee or a personal representative of an estate, the right-holder is holding those rights not for their own benefit, but for the benefit of someone else. (Some might call a person in these circumstances a 'fiduciary', but to steer away from unnecessary controversy that language is avoided. It not needed to establish the point here). In such cases, it is much easier to justify the possibility that the right can be enforced by

253 Gardner (n 236)

254 Ripstein, *Private Wrongs* (HUP 2016) 271, citing Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' [2003] Georgetown Law Journal 695, 765.

another, *especially* if that other is the very person on whose behalf the right is held, as in the *Re Diplock* or *Vandepitte* procedure type of case.[255]

It is necessary to stress the key conceptual difference between these cases and the general case – it is that standing comes duty-bound. The right-holder's standing (a power) here is encumbered with a duty to exercise it, should certain circumstances obtain. It may be noted that such a duty need not be owed to anyone in particular. Where it is, however, it rather conveniently identifies a candidate to whom standing might be extended. For instance, a trustee can owe duties to a trust-beneficiary in respect of the exercise of the trustee's own legal powers, including his power to sue.[256]

That is why these family of cases are unlike the typical situation in private law – taking tort rights as a paradigm – where the right-holder has 'radical discretion' over the decision to sue. Indeed, here the opposite holds true. The right-holder is under a duty to exercise his power to enforce it, taking into account the interests of others. But he may fail to do so for all sorts of reasons, such as collusion or fraud.[257] In these cases, right-holder consent to enforcement might be justifiably dispensed with. To require it would lead to a perverse situation; it would mean the defaulting trustee could stop any suit against himself, refusing his consent to enforcement for all sorts of illegitimate reasons.

And so here, the state might take a position on the normative desirability of the power's exercise. It could do so by empowering someone else. Since the 'proper plaintiff' right-holder has failed to sue as he was duty-bound to, there is a strong justification for giving someone else the standing to enforce that right. Where that duty is owed to someone in particular, eg an identifiable trust-beneficiary, it conveniently singles him out as the natural candidate to be so empowered.

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255 Discussed Chapter Four, Restitution.

256 See *Hayim v Citibank* [1987] AC 730, 748 (Lord Templeman); *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 (Ch), 1224 (Lightman J): 'Trustees have a duty to protect and preserve the trust estate for the benefit of the beneficiaries and accordingly to represent the trust in a third party dispute.' Also *Roberts v Gill* [53], [60]: trustee joined and sued for 'failure to take action'.

257 Potentially constituting the 'special circumstances' alluded to in Chapter Four, Restitution.

V. CONCLUSION

This chapter sought to answer '[t]he main question raised by the rules on standing…. why courts grant standing to these, and only to these, just-described individuals.'.[258] It did so by canvassing promising justifications for the general standing rule. To proceed with a structured framework, candidate justifications were sorted into three distinct kinds, namely (a) non-instrumental reasons, (b) instrumental reasons, and (c) purely analytic answers. Moral standing was then compared to legal standing, the contrast sharpening our understanding of both.

It was then asked then when exceptions to that general rule might be justifiable, so that standing might be extended to a third-party to the correlative right and duty. The attempt was to articulate broad rationales and conditions that, if met, would go some way towards justifying both existing and new exceptions. Three were discussed, namely (a) right-holder consent, (b) incapacity, and (c) duty-bound standing. The motivation was that each family of exceptions, though 'local' rather than 'global', would no longer be treated as entirely unconnected pockets of law. But that instead, a scaffolding for drawing helpful analogies and disanalogies between them might be provided, facilitating doctrinal development of the area in a slightly more rational and systematic fashion than before.

The state of our positive law may as yet permit no easy answers. But it is hoped that the answers suggested here, even if not exhaustive or definitive, will have paved the groundwork towards a deeper and more structured understanding of how standing works within private law.

258 Stephen Smith, *Rights, Wrongs, and Injustices* (OUP 2019) 129.

7

CONCLUSION

> So, you see, I have come to grasp over the years that the remedial apparatus of private law is itself extremely hard to explain and defend. I had underestimated the scale of the ethical and the philosophical challenges.
> - John Gardner, From Personal Life to Private Law (OUP 2018) 4

To foreshadow our destination, most of the claims defended in this thesis were stated at the outset, in Chapter One. Convention however demands an accounting of the journey, and the key steps traversed.

I. BACKGROUND

Standing seemed a missing concept in the arsenal of the private lawyer. A motivating mystery of this thesis was in its apparent absence, in stark contrast to public law, where standing rules abound. In this thesis it has been argued that a key reason why 'standing' has been a relatively overlooked concept, receiving meagre attention from private lawyers, is because it has been obscured from plain sight, submerged within the more dominant concept of a 'right'.

In the paradigm 'bilateral' private law case involving only two-parties, asking 'who has the right?' served a useful heuristic. Most questions about 'who can enforce a right?', whether contractual, tortious, or restitutionary, could be conveniently answered by simply asking 'who has the right?'. As with most heuristics, it is not a good substitute for a proper grasp of the concepts involved. It fails us in more complicated cases, involving interactions of two or more parties, leading us into error.

This phenomenon was compounded by the lack of suitable vocabulary and conceptual apparatus to adequately comprehend the idea of 'standing' within private law. In a wide range of contexts, what we might think of as 'standing' had been variously referred to as a 'right to sue', 'right to enforce', or 'right of action'. For the unwary, these labels proved misleading. Further, the role of 'standing' had been subsumed within the broad umbrella of 'privity', itself an inadequately understood cluster of ideas. This was a situation ripe for confusion.

II. SUMMARY

Hence the need for and contribution of this thesis, the first dedicated monograph-length work investigating the place and significance of standing within the remedial apparatus of private law. Its overarching claim, stated at the outset in Chapter One, is that 'standing' can and should be distinguished more clearly from 'right', as a separable concept, and that doing so is important for our understanding of private law's structure, and for its rational doctrinal development.

Part I, comprising Chapter Two, set the stage, laying the groundwork for the principal conceptual claims of the thesis. It introduced the Hohfeldian scheme, a useful tool to cut through the fog. Standing was defined as a power, and then distinguished from neighbouring concepts which could obscure it from our view. Standing was distinguished from primary rights and secondary rights, the court's power to make orders against a defendant, a litigant's right against a court, and a citizen's right against the state to provide courts.

It was then argued that, contrary to the conventional wisdom that private law did not have or need standing rules, there already exists an implicit general standing rule in our positive law, albeit overlooked. This rule runs across private law, applying within the law of contract, torts, and restitution for unjust enrichment(s). By bundling together rights and standing in a 'package', the general standing rule explains why private law enforcement appears to take on a typically bilateral form. It further explains why even though rights and standing are distinct and separable concepts, in principle detachable in two different holders, their detachment within private law doctrine is met with resistance, and remains an exceptional circumstance.

Part II, comprising Chapters Three, Four and Five, moved on to demonstrate the importance of distinguishing standing from rights within each branch of private law doctrine.

Chapter Three proved the importance of the distinction for the contract lawyer – loose reasoning about 'third party rights' had elided distinct concepts, inhibiting our understanding of the doctrine of privity of contract, causing unnecessary confusion and dispute over privity reform in England. In truth, 'privity' is an ambiguous cluster, a doctrine with multiple aspects, of which only one aspect is a standing rule. Because we had not noticed this underlying complexity within 'privity', this meant a missed dimension in the debate over privity and its

English reform. The chapter then went on to demonstrate the viability of this reform alternative – third-party standing only – and how the justifications for 'privity' reform might have been more suitably conceived as justifications for extending third-party standing, rather than the creation of third-party rights.

Chapter Four argued that it was important for unjust enrichment lawyers to conceptually distinguish between having a right to restitution, versus the standing to enforce these rights. This would neatly resolve a persistent debate over the best rationalisation of *Re Diplock*, a landmark restitution case, reconciling it with another recent landmark UK Supreme Court case instituting a 'direct transfer' rule. A better reconciliation of *Re Diplock* was put forth in the chapter. It was argued that the key error we had committed, on the restitution orthodoxy, was in conflating standing with rights to restitution. The next-of-kin who had initiated action in *Re Diplock* did not have their own rights to restitution, but rather only the standing to enforce the estate's right to restitution. Thus, *Re Diplock* was indeed an exceptional case, not because it involved a novel source of sui generis rights to restitution, but because it involved an exception to the general standing rule in private law, applicable also within the law of unjust enrichment.

Chapter Five distinguished between tort law's bundle of 'rights': primary rights, the infringement of which constitute a tort, secondary rights to damages arising post-tort, and the standing (a power) to sue and enforce these rights. While all of these typically coincide in a single holder, corresponding to two general rules in private law demanding their coincidence ('directional continuity' and the general standing rule), it was conceptually possible, even if only exceptionally so, for them to be split up across different holders. It was argued that this realisation is necessary to understanding a series of 'trilateral' cases within the law of torts, where non-victims appear to possess 'parasitic' or 'derivative' 'rights of action'. The chapter examined fatal torts and the Fatal Accidents Acts, *White v Jones* and its associated line of cases, and pre-birth torts and the Congenital Disabilities (Civil Liability) Act 1976. Their exceptional nature proved again the existence of the general rule(s), as with the previous two chapters.

Part III, comprising Chapter Six, turned from private law doctrine to address explicitly evaluative questions about the general standing rule, and the justifiability of making exceptions to it. The general standing rule entails an exclusivity of enforcement relations between duty-

bearer and right-holder in private law. *Should* this be the case, given that the rule puts rights-holders in a 'special place', affording them a prerogative over enforcement? Candidate justifications for the rule were canvassed, divided into three main classes (a) non-instrumental reasons, (b) instrumental reasons, and (c) purely analytic answers. It was argued that we should not be content with purely analytic answers, and that more promising justifications are ones which identify the value (whether instrumentally or not) of the rule. No firm view was taken on which justifications were the best. However, it was further argued that the best justifications of the general rule must and would influence the shape of the exceptions one could justifiably make to our private law. It would be easier to justify extending standing to a non-right holder where those justifications were removed, or defeasible. Thus the chapter concluded on a more speculative note, with the final substantive section dedicated to articulating some broad conditions or circumstances under which this might obtain. The attempt was to discern some wider intelligible patterns, looking across the borders of traditionally defined compartments of private law. In light of the coverage in previous chapters, three conditions which might go towards justifying third-party standing were discussed, namely (a) right-holder consent (b) incapacity, and (c) duty-bound standing.

III. CONCLUSION

This thesis began, in Chapter One, with Raz's observation on standing: 'we do not have an unproblematic grasp of the phenomena referred to. Nor is it entirely clear what the term refers to in its legal use'.

It is hoped that at journey's end, its reader would have been afforded a firmer handle on the concept, related phenomena, and its significance within the wider structure of private law's remedial apparatus.

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