LEABHARLANN CHOLÁISTE NA TRÍONÓIDE, BAILE ÁTHA CLIATH | TRINITY COLLEGE LIBRARY DUBLIN
Ollscoil Átha Cliath | The University of Dublin

Terms and Conditions of Use of Digitised Theses from Trinity College Library Dublin

Copyright statement

All material supplied by Trinity College Library is protected by copyright (under the Copyright and Related Rights Act, 2000 as amended) and other relevant Intellectual Property Rights. By accessing and using a Digitised Thesis from Trinity College Library you acknowledge that all Intellectual Property Rights in any Works supplied are the sole and exclusive property of the copyright and/or other IPR holder. Specific copyright holders may not be explicitly identified. Use of materials from other sources within a thesis should not be construed as a claim over them.

A non-exclusive, non-transferable licence is hereby granted to those using or reproducing, in whole or in part, the material for valid purposes, providing the copyright owners are acknowledged using the normal conventions. Where specific permission to use material is required, this is identified and such permission must be sought from the copyright holder or agency cited.

Liability statement

By using a Digitised Thesis, I accept that Trinity College Dublin bears no legal responsibility for the accuracy, legality or comprehensiveness of materials contained within the thesis, and that Trinity College Dublin accepts no liability for indirect, consequential, or incidental, damages or losses arising from use of the thesis for whatever reason. Information located in a thesis may be subject to specific use constraints, details of which may not be explicitly described. It is the responsibility of potential and actual users to be aware of such constraints and to abide by them. By making use of material from a digitised thesis, you accept these copyright and disclaimer provisions. Where it is brought to the attention of Trinity College Library that there may be a breach of copyright or other restraint, it is the policy to withdraw or take down access to a thesis while the issue is being resolved.

Access Agreement

By using a Digitised Thesis from Trinity College Library you are bound by the following Terms & Conditions. Please read them carefully.

I have read and I understand the following statement: All material supplied via a Digitised Thesis from Trinity College Library is protected by copyright and other intellectual property rights, and duplication or sale of all or part of any of a thesis is not permitted, except that material may be duplicated by you for your research use or for educational purposes in electronic or print form providing the copyright owners are acknowledged using the normal conventions. You must obtain permission for any other use. Electronic or print copies may not be offered, whether for sale or otherwise to anyone. This copy has been supplied on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

THE PROMOTION OF HUMAN DIGNITY:
A THEORY OF TORT LAW

Ph.D.

2017

Val Joseph Corbett

TRINITY LIBRARY
24 OCT 2017
DUBLIN
Thesis 11435

DECLARATION

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

I agree to deposit this thesis in the University's open access institutional repository or allow the library to do so on my behalf, subject to Irish Copyright Legislation and Trinity College Library conditions of use and acknowledgement.

SUMMARY

Tort law is viewed by many academic and practitioners as a mixed bag of legal rules with no coherent seam linking its different parts. This view can be traced back to its historical development where tort law became the State's primary solution to the social problem of what to do about losses caused by civil wrongdoing. The aim of this research is to determine if there is a unifying moral basis which justifies the continued existence of tort law and relationally, to consider whether Irish society would be any the poorer if it were replaced in its entirety with an alternative mechanism such as a statutory compensation scheme. In essence, the question is whether it is the Tort Law or the Law of Torts?

The importance of this question is two-fold. First, the identification of an underlying normative basis is essential if tort law is to remain fit for purpose as it will bring much needed coherence to the interpretation of current tort rules and the construction of new ones, thereby improving justice for its participants. Second, the identification of an underpinning normative value is critical as it will provide a metric by which the worth of the tort system can be measured against alternative compensation systems which might replace it.

The thesis structure involves an analysis of the dominant descriptive and prescriptive justifications of tort law. These theories are explored and their limitations as complete theories of tort law are exposed. In searching for the normative value which underpins tort law I embark on a journey not before undertaken in the Irish context. Through the course of this thesis I identify the moral underpinning of tort law to be the promotion of relational human dignity. Whether by accident or design, it is my contention that it is this norm which best represents our system of tort law and in this work I explain why its explicit pursuit in future decision making in this field is essential to the continued development of a just society.

Acknowledgements

In memory of my father, Stiofán, and for my mother, Mary.

To my daughters Jessica and Robyn,

and most of all, to my wife, Niamh,

Míle Buíochas

To my supervisor, Professor William Binchy, my eternal thanks.

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION 1

CHAPTER 2 THE CORRECTIVE JUSTICE THEORY OF TORT LAW

2.1 Introduction 14

2.2 Aristotle's Theory of Corrective Justice 14

2.3 Modern Theories of Corrective Justice 18

2.3.1 Weinrib's Theory of Corrective Justice 20

2.3.1.1 *Correlativity* 21

2.3.1.2 *Gains and Losses* 24

2.3.1.3 *Rights and Duties* 26

2.3.2 Coleman's Theory of Corrective Justice 36

2.3.2.1 *Annulment Theory of Corrective Justice* 38

2.3.2.2 *Mixed Conception of Corrective Justice* 39

2.4 Corrective Justice and Strict Liability 47

2.5 Corrective Justice and Remedies 54

2.6 Conclusion 64

CHAPTER 3 DISTRIBUTIVE JUSTICE THEORY AND TORT LAW

3.1 Introduction 65

3.2 Distributive Justice Theory 66

3.3 Enterprise Risk and Distributive Justice 70

3.4 Fault Liability or Strict Liability? 75

3.5 Enterprise Liability and Strict Liability 79

3.6 The Relationship between Corrective Justice and Distributive Justice 88

3.7 Conclusion 115

CHAPTER 4 THE ECONOMIC ANALYSIS OF TORT LAW

4.1 Introduction 117

4.2 The Economic Analysis of Tort Law 117

4.2.1 Pareto Efficiency 121

4.2.2 Kaldor-Hicks Efficiency 126

4.2.3 The Coase Theorem 130

4.2.4 Calabresi's '*The Costs of Accidents*' 141

4.2.5 Wealth Maximisation 146

4.2.5.1 *The Normative Basis for Wealth Maximisation* 147

4.2.5.2 *In-built bias?* 152

4.2.5.3 *How does Wealth Maximisation Operate?* 157

4.2.5.4 *Wealth Maximisation Explains the Structure of Tort Law* 159

4.2.5.5 *Wealth Maximisation and the Duty of Care* 161

4.2.5.6 *Wealth Maximisation and the Standard of Care* 166

4.2.5.7 *Wealth Maximisation and Causation* 173

4.2.5.8 *Wealth Maximisation and the "Fault Liability vs Strict Liability" Debate* 178

4.2.5.9 *Wealth Maximisation and Distributive Justice* 183

4.2.5.10 *Wealth Maximisation and Judicial Knowledge* 188

4.3 The Behavioral Economic Analysis of Law 189

4.4 Conclusion 191

CHAPTER 5 TORT LAW AND THE PROMOTION OF HUMAN DIGNITY

5.1 Introduction 194

5.2 The Role of Dignity in Tort Law 194

5.3 New Zealand's Statutory Compensation Scheme 201

5.4 Tort Law and the Search for Principle 210

5.5 The Promotion of Human Dignity 210

5.5.1 Different Conceptions of Dignity 212

5.5.1.1 *Dignity as Autonomy* 213

5.5.1.2 *Relational Dignity* 216

5.5.2 The Infringement of Human Dignity – A Constitutional or Tortious Violation? 224

5.5.3 The Role of Dignity in Tort Law 229

5.5.4 Tort Law and the Vindication of Relational Dignity 237

5.5.5 The Role of Insurance in Tort Law 256

5.6 Conclusion 260

CHAPTER 6 THE FUTURE OF TORT LAW

6.1 Introduction 261

6.2 The Role of Dignity in Interpreting Tort Rules 263

6.3 The Role of Dignity in Formulating Tort Rules 272

6.3.1 The Doctrine of Informed Consent 272

6.3.2 Procreative Torts 290

6.3.2.1 *Wrongful Conception Cases* 291

6.3.2.2 *Assisted Human Reproduction* 299

6.4 Conclusion 306

CHAPTER 7 CONCLUSION 308

Chapter 1

Introduction

The law did not begin with a theory. It has never worked one out.[1]

In 1969, Olivia Kearney was 18 years old and pregnant with her first child when admitted to Our Lady of Lourdes Hospital in Drogheda, County Louth. Having delivered the baby by caesarean section and while unconscious and anaesthetised, Dr Connolly, a consultant for the hospital, performed a symphysiotomy on Mrs Kearney without her consent. In Ireland, this procedure was sometimes utilised by certain maternity hospitals in circumstances where the diagnosis was that the baby's head was too large to pass through the mother's pelvis to allow for child birth which was a scenario known as 'absolute disproportion.' The procedure essentially involves cutting through the joint between the pubic bones of the mother in order to enlarge the diameter of the pelvis thereby easing the passage of the baby. Following the procedure and over the course of the next 33 years, Mrs Kearney suffered from continuous back pain, incontinence and depression as a consequence of the symphysiotomy. While she had wanted more children the prospect of pregnancy frightened her and sexual relations were difficult. She had no further children.

It transpired that this procedure, having fallen out of favour amongst maternity hospitals some years previously, had been re-introduced by a number of Irish teaching hospitals which observed a Roman Catholic ethos. The justification for the procedure was that were a mother to suffer from absolute disproportion then she might be inclined to consider having multiple caesarean sections in successive subsequent pregnancies rather than choosing a symphysiotomy. Having multiple caesarean sections at that time was not without risks for the mother and at a time of large families in Ireland there was a view amongst some members of the medical profession that these mothers would turn to artificial forms of contraception or sterilisation, contrary to natural law teaching. Mrs Kearney was never informed that this procedure had been performed on her and it was not until 2002 when she heard a radio

[1] Oliver Wendell Holmes, JR, *The Common Law* (Little Brown, 1909) 78.

broadcast on the subject that she realised that the symptoms she had suffered were related to this procedure.

In 2004, Mrs Kearney brought a claim in tort for medical negligence against the defendants. In bringing her case, Mrs Kearney faced enormous challenges involving powerful vested interests including the State; the Catholic Church; not to mention a patriarchal medical profession. Despite the challenge, this 60 year old woman prevailed in her quest for justice.[2] The Supreme Court held that there was no justification for the performance of the symphysiotomy in the circumstances in which Mrs Kearney had presented and found that the consultant was negligent in carrying out the procedure.[3] Mrs Kearney was awarded €325,000 as compensation for the pain and suffering that she had endured.[4] Probably just as importantly perhaps, she had been publicly vindicated in her actions by the highest court in the land and absolved of any responsibility for what had so tragically happened to her. While the wrong which had been done to her would never be undone, the tort system did provide an avenue where she was finally accorded the respectful recognition as a human being which had been so brutally denied her in 1969.

Prior to Mrs Kearney's successful litigation, survivors of symphysiotomy procedures had been calling on the government to establish and independent enquiry into the practice without success.[5] When a redress scheme was eventually put in place it proved deeply flawed and was subject to extensive criticism particularly as it sought to eliminate victims' entitlement to pursue claims in tort against certain named parties if they chose to accept payment under the scheme. Moreover, the scheme did not propose to hold anyone to account for the harm suffered by the victims of symphysiotomy.[6] Mrs Kearney's pursuit for justice when all other institutions

[2] *Kearney v McQuillan and North Eastern Health Board* [2012] IESC 43.

[3] Following the principles established in the leading medical negligence case of *Dunne v National Maternity Hospital* [1989] IR 91 (SC).

[4] The plaintiff had been originally awarded €450,000 damages for her pain and suffering by Ryan J of the High Court in *Kearney v McQuillan & Another* [2012] IEHC 127, but this was reduced on appeal to the Supreme Court although her substantive claim was upheld.

[5] Mitchell, Susan, 2011. Inquiry sought into brutal procedure of childbirth. *The Sunday Business Post*. June 18 2011. http://www.businesspost.ie/inquiry-sought-into-brutal-procedure-of-childbirth (accessed May 24, 2016).

[6] In 2014, a government commissioned report (Prof Oonagh Walsh, *Report on Symphysiotomy in Ireland, 1944-1984* (Department of Health, 2014) available at http://health.gov.ie/wp-content/uploads/2014/07/Final-Final-walsh-Report-on-Symphysiotomy1.pdf (accessed August 26, 2016) was completed which recommended the establishment of an *ex gratia* redress scheme (The Surgical Symphysiotomy Ex Gratia Payment Scheme available at http://www.payment-scheme.gov.ie/Symphyisotomy). Later that same year, the United Nations Human Rights Committee Report on Ireland (Concluding Observations on Ireland and the ICCPR, July 2014) criticised the government in its treatment of the victims and the proposed redress scheme. In particular, it criticised the failure of the redress scheme's failure to provide effective judicial remedies for those who opted under the scheme.

of the state had failed her represents why our tort system, flawed though it may be, is essential to the proper functioning of our democracy. Without it, we, as citizens, lose one of our most powerful weapons in holding others (including organs of the state) to account for their wrongdoing. It is the purpose of this thesis to defend the system of tort law on this moral basis. Before doing so, it is first necessary to put this research into context and to clearly set out the aims of this work.

The development of the modern law of private wrongs can be traced to the publication of Sir William Blackstone's *Commentaries on the Laws of England* where the author distinguished between private and public law categorising each into separate books.[7] Blackstone's conception of private wrongs was dominated by intentional torts derived from the Aristotelian conception of justice which was based on the notion that the purpose of tort law was to correct injustice between private parties and the role of judges was merely to act "as disinterested referees" in settling these disputes.[8] Towards the end of the nineteenth century, the law of negligence gained ascendancy within tort law.[9] Whether it was coincidental or the cause, the Industrial Revolution has been credited with giving rise to the modern negligence era.[10] With the onset of industrialisation and increased urbanisation, accidental injuries became more commonplace.[11] Tort law, based on the Blackstonian notion of private wrongs, was not best

---

Awards under the scheme are limited to the payment of €50,000 or in extreme cases €100,000. A final award category of €150,000 is reserved for those who suffered significant disability having undergone a symphysiotomy following a caesarean section. Participants in the scheme who accepted their award are required to sign a consent form agreeing to waive any claim or any other remedy whatsoever against named parties arising out of the symphysiotomy performed on them. The long list of named exempted parties includes various government bodies, hospitals, medical professionals and religious orders associated with the performance of the procedure.

[7] Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, Oxford 1765-69). For an excellent analysis of the historical development of tort law: Paul Mitchell, *A History of Tort Law 1900-1950* (Cambridge University Press, 2015); John C. P. Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 Yale Law Journal 524. See also John C.P. Goldberg, 'Tort Law at the Founding' (2011) 39 Florida State University Law Review 85.

[8] Alan Calnan, 'The Distorted Reality of Civil Recourse Theory' (2012) 60 Cleveland State Law Review 159.

[9] Steve Hedley, 'Tort and Personal Injuries, 1850 to the Present' in TT Arvind and Jenny Steele (eds.), *Tort Law and the Legislature* (Oxford: Hart, 2013) 249.

[10] Thomas H. Koenig & Michael L. Rustad, *In Defense of Tort Law* (New York University Press, 2001); G. Edward White, *Tort Law in America, An Intellectual History* (Oxford University Press, 2003); Morton J. Horwitz, *The Transformation of American Law 1780-1860* (New York: Oxford University Press, 1977). See also Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7th ed.) (Cambridge University Press, 2006) 36, where the author attributes the rise of negligence to developments in the insurance industry such as compulsory third party insurance for road accidents.

[11] For example, see Bryan M.E. McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013) para [1.01] where the authors explain:

> Since human beings are social animals they pursue their interests in a social context. Inevitably, this pursuit brings them into contact and into conflict with other persons pursuing their interests. This contact and conflict, of course, is not a new social phenomenon, but in the past century and a half, because of increased urbanisation, growth in

placed to handle the claims which were increasingly coming before the courts. Consequently, it developed from a system which essentially provided a lawful avenue for bloodless revenge - dealing with what in the main were intentional wrongs - to one which was now presented with issues of wider societal concern relating to how best to deal with what Calabresi famously referred to as "the costs of accidents."[12] The industrialisation era highlighted the deficiency of the current legal system in dealing with the explosion of claims arising from accidental losses.[13] Robinette argues that as a consequence of these developments the 'private wrongs' cause of action was reconceptualised from "what had been the adjudication of wrongdoing into a procedure focusing on deterrence, compensation or both."[14] As a result, the "obsession with accidents prompted mid-twentieth century jurists to emphasise the potential of tort law as a source for compensation while deemphasising its foundation in a notion of wrongs."[15] In essence, tort law became a vessel of regulation for the public good. It became public law.[16]

White observes that while the industrialisation era created more accidents, this alone would not have been sufficient to lead to a change in attitude "had it not come at a time when legal scholars were prepared to question and discard old bases of legal classification."[17] This period coincided with the birth of the legal realism movement which was seen as a reaction to the Blackstonian conception of wrongs. Proponents of realism believed that the application of the law could not be divorced from its social and political consequences.[18] The legendary American jurist Oliver Wendell Holmes Jr, one of the leaders of the legal realism movement, is credited with the development of modern tort law.[19] Holmes was of the view that the law needed to adapt to tackle the accident society which had emerged. Consequently, the law needed to be reengineered in order to better respond to this threat and to achieve this he urged judges to "break free of the law's formal restraints whenever social necessity and public policy so

---

population, greater and more sophisticated technology and deeper sensitivity, interpersonal conflicts have increased in numbers and have become more complex in nature.

[12] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).
[13] John C.P. Goldberg, 'Ten Half Truths About Tort Law' (2008) 42 Valparaiso University Law Review 1221.
[14] Christopher J. Robinette, 'Why Civil Recourse Theory is Incomplete' (2011) 78 Tennessee Law Review 431, 443.
[15] John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917.
[16] Michael L. Rustad, 'Torts as Public Wrongs' (2011) 38 Pepperdine Law Review 433; Steve Hedley, 'Making Sense of Negligence' (2016) 36 Legal Studies 491.
[17] G. Edward White, *Tort Law in America, An Intellectual History* (Oxford University Press, 2003) 3.
[18] Anne Barron et al (eds.), *Jurisprudence and Legal Theory: Commentary & Materials* (Oxford University Press, 2005) 284.
[19] Oliver Wendell Holmes, JR, *The Common Law* (Little Brown, 1909).

required."[20] Thus, in his view, not only was it part of the function of modern tort law to correct private wrongs, but by assessing "the desirability of the consequences that flow from one scheme of liability rules rather than another", to also apply collective solutions to the social problem of personal injury.[21] Supporters of this view, like the American author William Prosser, agreed, viewing tort law as having "grander aspirations than attending to the humdrum and faintly barbaric matter of settling accounts" and interpreted it as an instrument by which society could be regulated for the public good.[22]

In his highly influential essay, *The Path of the Law*,[23] Holmes rejected legal formalism which until then had held sway in favour of a more pragmatic approach towards the understanding of the law. Instead, in his view, tort law was to be used as vehicle by which the twin public policy aims of compensation and deterrence could be achieved. By focussing on the consequences of liability through the mythical "bad man" (who is motivated more by the consequences rather than the morality of his actions) Holmes endorsed an instrumentalist approach towards the interpretation and application of tort rules. In so doing, Holmes criticised a legal system which failed to account for wider societal issues when making judgments.[24] By emphasising the importance of weighing up the consequences arising from the application of different liability rules, Holmes observed that "the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[25] This approach signalled a move away from the essentially private nature of tort law to a position where it was viewed as a mechanism which could be used to cure the ills of the new accident society. Thus, tort law became an independent category of private law with a public policy angle which imposed "a duty imposed on all the world, in favour of all."[26]

This snapshot of tort law's history suggests a reactionary, ad hoc response by the institutions of the state towards civil wrongdoing rather than a principled, considered one.[27] This apparent

---

[20] Alan Calnan, 'What's Wrong with Torts as Wrongs (or Redirecting Civil Recourse Theory)' (2010) available at http://ssrn.com., accessed 13 May 2014.

[21] Benjamin C. Zipursky, 'Rights, Wrongs, and Recourse in Tort Law' (1998) 51 Vanderbilt Law Review 1, 43.

[22] John C. P. Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 Yale Law Journal 524, 581.

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

[24] Ibid.

[25] Ibid., 469.

[26] Ibid., 660-661.

[27] This debate manifests itself in the different labels used by academics in describing this field of law. For some, the topic is underpinned by general principle and is labelled as 'Tort Law' or the 'Law of Tort'. For others, the

incoherence leaves the door open for those who call for tort law's abolishment or radical reform. Such critics would argue that our current system is not fit for purpose because some of the stated aims of tort law such as compensation, deterrence, or loss distribution are not adequately met by the current regime. These critics argue that the aims of tort would be more effectively achieved through the implementation of administrative schemes like a system of fines or through the creation of a no-fault state-sponsored compensation fund generated from taxation.[28] The reality is, however, that it is not possible to accurately gauge the efficacy of these arguments until we first identify a credible normative justification for the institution that is tort law. Only then can one make an informed decision as to its effectiveness and legitimacy. The difficulty presented here, and the central question of this thesis is to enquire whether there is a cohesive normative principle underpinning tort law as a system of justice, and if there is, to identify and air it.

In searching for this normative value I embark on a journey not before undertaken in the Irish context. Researchers in this field broadly fall into two groups. In the first, are the non-instrumentalists or moralists. These theorists would argue that tort law's primary function lies in serving private interests and insist that it has an independent existence (and internal coherence) premised on morality. This group would be dominated by corrective justice

---

topic is better described as the 'Law of Torts' implying that rather than bound by a single coherent principle, the field is nothing more than a collection of disparate torts with no discernible consistent theme linking them. Thus, there are leading academic titles in this field which refer to "Tort Law" in the singular such as Jenny Steele, *Tort Law, Text, Cases & Materials* (2nd ed.) (Oxford University Press, 2010); Simon Deakin, Angus Johnston, Basil Markesinis, *Markesinis & Deakin's Tort Law* (6th ed.) (Oxford University Press, 2008); W.V.H. Rogers, *Winfield & Jolowicz on Tort* (16th ed.) (Sweet & Maxwell, 2002); Kirsty Horsley & Erika Rackley, *Tort Law* (2nd ed.) (Oxford University Press, 2011); S.T. Strong & Liz Williams, *Tort Law, Text, Cases & Materials* (Oxford University Press, 2008); John Tully, *Tort Law in Ireland* (Clarus Press, 2014) and John Cooke, *Law of Tort* (9th ed.) (Pearson Longman, 2009). On the other hand, there are titles which refer to the plural "Torts" such as Bryan McMahon & William Binchy, *Law of Torts* (4th ed, Bloomsbury Professional, 2013); Eoin Quill, *Torts in Ireland* (4th ed.) (2014); John Healy, *Principles of Irish Torts* (Clarus Press, 2006) and John G. Fleming, *The Law of Torts* (9th ed.) (LBC Information Services, 1998). Ultimately, this may simply be a personal preference rather than revealing any deep ideological viewpoint as Eoin Quill, *Torts in Ireland* (4th ed.) (2014) 1-2; writes:

> At one time strong opinions were voiced on whether it was appropriate to describe the subject as 'tort' or 'torts', the former being preferred by those who saw the subject as a coherent body of law and the latter by those who saw it as a fragmented collection of discrete matters. Either term may be considered to be appropriate, since the subject has established a degree of common ground between the various causes of actions which distinguish it from other branches of law, while retaining many of the distinctions between the individual types of action. The choice of term is a matter of personal preference ...

[28] For example, see The Accident Compensation Act 1972 in New Zealand which created one such statutory compensation scheme funded from general taxation.

theorists who assert that tort law's morality is based on the notion of equalising injustices between the parties, usually through the payment of compensation by the wrongdoer to the victim. In the second grouping, are the instrumentalists who maintain that tort law is effectively a tool of social engineering whose primary function is to serve a specific societal goal such as the fairer distribution of losses (a form of distributive justice) or promoting efficient behaviour through the optimal deterrence of accidents (the economic analysis of tort law).

It is submitted here that to date, the purpose of tort law in Ireland has been assumed, but not explicitly articulated. The question of what tort law is doing or what it is supposed to do has not been properly ventilated. The theories that are put forward fail to provide a complete account of tort law; not only in explaining what it is, but also justifying what it should be trying to achieve. While each of these theories accurately describes certain aspects of tort law they ultimately fail to make sense of the bigger picture. Corrective justice theorists succeed in capturing the moral basis of tort law as a system revolving around rights and responsibilities and accurately describe the structure of tort law as one which directly links the plaintiff to the defendant in a bilateral relationship. However, corrective justice theory, as an all-encompassing rationale for tort law, is flawed and unrealistic. Specifically, it fails to adequately address the substantive question what qualifies as a 'wrong' which thereby triggers the intervention of tort law. Consequently, its logic is circular; tort law is about wrongs, wrongs are what tort law says they are. Hence, it is criticised for lacking in normative moral content. Furthermore, under its formalist incarnation, corrective justice theory utterly fails to account for the role that public policy plays in the application and development of tort rules. Moreover, as a moral theory, corrective justice, which purports to do justice by restoring the antecedent relationship between the parties, fails to consider whether, normatively, the relationship was fair to begin with and therefore only succeeds in perpetuating inequality and thereby injustice. Finally, because it is backward looking (correcting injustice) it is overly-conservative and lacks the dynamism necessary if tort law is to remain relevant in an increasingly complex society.

Distributive justice theories succeed on the other hand in accounting for wider public interests when determining what are ostensibly, private matters. Hence, they explain the prominence of public policy debates which are explicit within court judgments on the duty of care in negligence or the consideration of social utility issues in discussions on the standard of care in negligence or the tort of nuisance, for example. However, distributive justice theories of tort law also only tell part of the tort story. For example, these theorists are unable to account for

the bilateral relationship between the victim and the wrongdoer which is the bedrock of the tort system. If tort law is primarily a system for distributing losses, why is it that it requires that compensation be paid from the defendant to the plaintiff rather than through a state-sponsored fund instead? Also, because distributive justice involves what are effectively political decisions on the distribution of society's resources, its implementation raises constitutional questions about the justiciability of such matters and of the competence of judges in dealing with them.

Another category of theorists within the instrumentalist group are those theorists who assert that the purpose of tort law is the deterrence of harm. These theorists, steered by the law and economics movement, would contend that tort rules should be designed in such a way so as to minimise the costs of harm. Based on economic theory, and relying on the assumption that persons are rational, self-interested decision makers, these theorists argue that human behaviour is predictable and that individuals can be influenced and motivated by economic incentives to act in an efficient manner. In this way, tort rules should be designed in a manner which will efficiently deter people from causing harm. However, this theory too falls short in explaining the purpose of tort law. From a normative point of view, economic analysis is morally redundant. It dehumanises individuals by reducing their suffering to figures on a balance sheet. Moreover, its central claim – the assumption that people act in a rational manner and therefore their behaviour can be predicted and thereby influenced – has proven unsound, meaning its entire rationale is suspect.

While a review of the leading theories which purport to justify or explain tort law are enlightening and represent a major contribution to our understanding of the field, they fail to provide a complete picture of the tort phenomenon. The challenge of identifying and articulating the normative basis underpinning tort law as a system of justice remains.[29] It is a challenge that is deserving of deeper analysis than it has hitherto received in this jurisdiction. The failure to clearly articulate and understand the underlying rationale of tort law has major societal implications. How we, as a community, deal with the harm which results from our non-criminal interactions with others tells us something about the type of society in which we want

---

[29] Bailey Kulklin, 'Constructing Autonomy' (2015) 9 New York University Journal of Law & Liberty 375, 378, where the author highlights the challenge of identifying a coherent seam running through tort law:

> ... in light of its quirky and historically contingent origins, it would be amazing if the substantive principles and doctrines of the common law entirely harmonized. At best, the common law would take a very long time to evolve towards and achieve harmony because of the braking constraints of the doctrine of *stare decisis* and the ebb and flow of the moral and political inclinations of the law's agents.

to live in. Is it a society where the selfish interests of the atomistic individual take priority regardless of the social cost? Or is it a society where community values dictate what is in the individual's best interests with little or no regard for individual concerns? Or is it something else? The interpretation and application of tort rules, therefore, have significant moral worth. Without a clearly identified unifying normative value, tort law remains vulnerable to criticism as a system of justice. Without an adequate metric by which to measure tort law's performance it becomes too easy for interest groups to vilify tort plaintiffs and their claims and lobby for reforms which seek to restrict plaintiffs' rights.[30] Without such a yardstick, tort law, when measured against some of its stated functions – like compensation[31] or deterrence,[32] for example – is deemed a failed experiment. The identification of a normative value which provides a complete account of tort law provides a more accurate gauge by which its value to society can be assessed.[33] Were such a framework devised it would provide the basis not only for a more coherent and just development of the law, it would also provide a foundation for a more informed debate regarding the future of tort law in Ireland.

The central claim of this thesis is that there is a deeper rationality to tort that has not, heretofore, been explicitly acknowledged. That rationality has a moral basis which lies in the promotion of the notion of relational human dignity. This normative position is value-based and is premised on the ideal of respect for oneself and for others residing within the community. This notion of dignity does not refer to the ideal of the atomistic individual who seeks freedom from all interference so that he or she is free to pursue their own conception of the good life regardless. Instead, what is proposed here is that the guiding moral principle should be the promotion of human dignity as conceived through one's relationships with others in a given community. This form of dignity is inherent in each of us by virtue of our humanity and encapsulates who we are and how we are perceived while also placing demands on us regarding how we treat others. It therefore acknowledges that each of us is partly constituted by our

---

[30] In particular, note the reduction of the limitation period from three years to two in personal injury cases under section 7 of the Civil Liability and Courts Act 2004, by way of example.

[31] See Patrick Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld and Nicholson, 1970) for criticism of justifications of tort law as an effective system of accident compensation.

[32] Gary T. Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994) 42 University of California Los Angeles Law Review 377; W. Jonathan Cardi, Randy Penfield, Albert Yoon, 'Does Tort Law Deter?' (2011) Wake Forest University Legal Studies Paper No. 1851383 available at http:// ssrn.com accessed 23 May 2016.

[33] Mark A. Geistfield, 'Hidden in Plain Sight: The Normative Source of Modern Tort Law' (2016) 91 New York Univerisity Law Review 1517; Scott Hershovitz, 'The Search for a Grand Unified Theory of Tort Law' (2017) 130 Harvard Law Review 942.

surroundinghe relationships we have with others. At the same time, while acknowledging our interdepce as human persons the significance of individual will and autonomy is not to be devalWithout some freedom for self-determination, individual personality and agency will sumed into the communal melting pot thereby destroying individual identity and uniquen my conception, human dignity requires that we respect the individual by allowing hier to make decisions as regards his or her own life. However, while society should not cthese choices, its influence in such decisions must also be respected. In this interpretatiognity, primacy is given to individual autonomy which should be vindicated in all cases doing so would conflict with potent countervailing social considerations. Therefore, vhis proposal promotes individual rights it also recognises that as individuals co-existing ety we also have responsibilities to one another. It is an intuitive notion. In this way mys attempts to provide a broad normative justificatory framework by which tort rules manterpreted, evaluated and developed.

My assertiohe underlying normative basis to tort law lies in the promotion of the concept of relationaan dignity fits well within our constitutional system and best explains the reality of ctort law doctrine. At the same time, it provides a moral blueprint to be followed in ire development. In light of the challenges posed by advances in science and technology a guiding framework is essential.[34] Although, rarely articulated, it is my contention te promotion of relational human dignity represents the purpose of tort law while also kplaining the current practice. My central claim as regards what tort law "should be" ely, but not entirely, fulfilled in the "is" world. I say largely, because current tort doctrinenot fulfil this role as effectively as it perhaps could. The failure to clearly articulate tha of relational human dignity as a fundamental protected interest has led to tort law's ston rather than principled development. This torpor manifests itself in the

[34] For an interalysis of how tort law might approach these issues in the context of robotics see: Jack M. Balkin, 'The Robotics Law' (2015) 6 California Law Review 45, 48-49:

> ... whrs call "technology" is usually a shorthand for something far more complex. When we talk about "technwe are really talking about (1) how people interact with new inventions and (2) how people interact with ople using those new inventions or presupposing those new inventions. What we call the effects of techno not so much features of *things* as they are features of *social relations* that employ those things. Those social s include relationships of power and authority, forms of human organization and production, and featurnan sexuality, association, and family life.

almost stubborn reluctance to recognise less tangible i.e. non-physical, forharm.[35] This is evidenced by the fact that until relatively recently tort law did not recognims for pure economic loss[36] or psychiatric harm,[37] and when the courts eventually recd such harm they did so in a restrictive manner.[38] The narrowness of this approa problematic particularly when dealing with ligitation in emerging fields such aschnology,[39] nanotechnology[40] and the field of artificial intelligence and roboticor example. Consequently, the narrow interpretation of 'harm' represents a serious challo the notion of tort law as a system of justice and this thesis will highlight the injusticay cause by reference to emerging litigation relating to the doctrine of informed consent, sterilisation cases and procreative torts. It is my thesis that an adjustment in approaich seeks to vindicate the ideal of relational dignity as tort law's primary goal will allow v to develop

---

[35] For an analysis of tort law's pre-occupation with physical harm see discussion in: Nicky, 'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law' (2012) 33 Adela/ Review 177, 178, where the author observes:

> Attention to what kind of harms negligence embraces tells us much about the general o of law, and in particular, to whom negligence speaks and whose interests it protects. Insofar as negligence ated to generally exclude harms of a psycho-social character (an exclusion which in terms of formal equality to all), once we scratch below the formal surface of that policy, we find a less than universal impact or distFor example, an analysis of the damage concept illustrates a long-standing neglect of harms which women swomen ... In this respect then, if the aim is for a fair system, any reform agenda will need to pay close attenti general and the particular operation of legal policy.

See also, Marshall S. Shapo, *Tort Law and Culture* (Carolina Academic Press, 2003) 53-54 the author writes:

> In the case of physical injury, that right usually is the right to be free from unwanted or unble contact. This idea of right presupposes a protectible interest in the body. The cultural basis for that interestral foundations. Some will locate its roots pragmatically in the need to keep peace in society: to allow peovade the bodily integrity of others without legal sanctions is to invite retaliation and social breakdown. Oth suggest that the key to the protection of various interests that tort law vindicates is the desire to minimize unt of resources that people spend on defending things they value – in addition to their bodies, these things nde their tangible property and various intangibles. The definition of rights by the law varies with the tynterests that are involved, reflecting a range of attitudes that people have concerning the value of those intenally, many will subscribe to the idea that there are certain parts of our lives that simply are inviolable, requinpensation when others encroach on them because they are what define us as human beings. Some may spatural rights and others in terms of categorical imperatives; at some point these irreducibly protectible elemur existence are incapable of further definition.

[36] *Hedley, Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Securities Trust lugh Moore & Alexander Ltd* [1964] IR 417.
[37] *Kelly v Hennessy* [1996] 1 ILRM 321.
[38] *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84.
[39] Julie A. Davies and Lawrence C. Levine, 'Biotechnology's Challenge to the Law of Torts' 32 McGeorge Law Review 221.
[40] J. Philip Calabrese and Stephanie E. Niehaus, 'Nano-torts on the Horizon: A Jack antory' (2012) 9 Nanotechnology Law and Business 156.
[41] Jack M. Balkin, 'The Path of Robotics Law' (2015) 6 California Law Review 45.

in a principled way by providing the normative framework necessary to meet the challenges posed by our increasingly complex society.

This thesis consists of doctrinal and theoretical research which aims to provide a more thorough understanding of the conceptual basis of tort law in order to better assess its effectiveness as a system of justice. In order to carry out this research a literature review was conducted from both primary and secondary sources. Given the philosophical/jurisprudential approach that was adopted to the area the literature review concentrated mainly on secondary sources while the application of these theories was tested and analysed by reference to primary sources which were derived from, in the main, case law.

The primary sources which were mainly utilised in this work consist of relevant court judgments throughout the common law world. For comparative purposes, emphasis was placed on the United States, England & Wales, Australia and New Zealand in the course of the research. These jurisdictions were targeted due to the similarity between those legal systems and that which applies in Ireland. Particular emphasis was placed on Irish High Court, Court of Appeal and Supreme Court judgments for the purposes of analysing the application of the relevant legal principles and rules. Statutory and regulatory measures, which have an important, but secondary, role in shaping tort liability, were also analysed. Much of the research conducted revolved around a review of the literature on the theoretical underpinnings of the role and function of tort law. This included analysis of all the (somewhat sparse) Irish literature in this field, as well as a broader comparative analysis from other common law jurisdictions including England & Wales, the United States of America, Australia and New Zealand.

This thesis first examines the leading theorists of tort law for the purpose of determining the extent to which these works can fully account for our current tort system. Chaper two consists of a review of the work of Ernest J. Weinrib and Jules L. Coleman on the corrective justice theory of tort law. In particular, the limitations of this theory to satisfactorily capture the essence of tort law is exposed. This thesis then examines the nature of distributive justice and the relationship between it and corrective justice theory in chapter three. In particular, this chapter attempts to normatively rationalise the co-existence of strict and fault liability within our current system. Third, the discussion moves to a critique of one of the leading theories of deterrence driven by the law and economics movement in chapter four. In this regard, the work

of Ronald Coase, Guido Calabresi and Richard A. Posner is reviewed and analysed. Fourth, I present the thesis that the promotion of the ideal of relational human dignity is the fundamental purpose of tort law in chapter five. I highlight, through a critical analysis of the statutory compensation scheme which was introduced in New Zealand to replace the tort system and, in light of the competing theories of justice, how tort law remains the most effective way of protecting this critical moral value and how society will be much the poorer for its absence. I then outline how these various theories should be refined and developed in order to enable the achievement of the ultimate goal of tort law which is the promotion of relational dignity in chapter six.

My thesis focuses on the importance of the central question: why should we retain tort law as a system of civil justice? Given that there has been limited research in this field from the Irish context, this thesis brings together international research from other common law jurisdictions and applies it to the Irish context in order to assess its validity. In this thesis I attempt to set out a credible defence for tort law as a means of safeguarding the relational ideal of human dignity. Ultimately, the system of justice we adopt and the interests and values we seek to promote through that system says everything about our culture and the society we choose to live in. Tort law is not perfect but it provides society, and every citizen within it, the power to hold others to account. As Mrs Kearney proved, it communicates a message about respect; for oneself and for others. This power allows us to maintain our sense of dignity and allows us to manage our relationships with others, in and out of the court system. It is, as Shapo writes, "a mirror of culture" which is an indispensable aspect of civilised society.[42]

[42] Marshall S. Shapo, *Tort Law and Culture* (Carolina Academic Press, 2003) 97.

Chapter 2

The Corrective Justice Theory of Tort Law

2.1 Introduction

In the opening chapter of this thesis I stated that my research question was to enquire whether there is a normative basis underpinning tort law as a system of justice which is complete, and if so, to identify what it is. The first step in answering this question is to examine the theoretical justifications for tort law which currently exist. In this chapter, I will examine one of the dominant moral theories of tort law known as corrective justice theory.

This chapter focuses on the leading theorists in this field. The philosophical basis of corrective justice theory derived from Aristotle is elucidated. Modern day theories in this field including Ernest J. Weinrib's formalist conception and Jules L. Coleman's more pragmatic approach are then analysed. The credibility of these theories in supplying a coherent normative justification for the entirety of tort law is then tested in light of current tort practice. First, Weinrib's claims justifying the structure of tort law based on the bilateral relationship between plaintiff and defendant, his thesis on the normative content of tort law, and his formalist conception of tort law as divorced from considerations outside the relationship between the private parties is discussed. Second, Coleman's mixed conception of corrective justice, which accounts for policy considerations in determining private disputes, is examined. Third, corrective justice theory's failure to adequately account for strict liability and its approach to remedies is also evaluated.

2.2 Aristotle's Theory of Corrective Justice

Corrective justice is the leading non-instrumental theory of tort law and represents the biggest challenge to competing instrumental theories such as distributive justice and economic efficiency. There are many variations of corrective justice theory with each ever so slightly different from the next and with no universal agreement as to its precise content. Each version is agreed, however, that it is a moral theory of justice primarily derived from Aristotle's work on ethics outlined in the fifth book of the *Nicomachean Ethics*.[43] In his examination of ethics

[43] Aristotle, *Nicomachean Ethics*, *Book V* (J.A.K. Thomson, trans) (Penguin Books, 2004) 119.

in this work, Aristotle identifies the ultimate goal in human life as a "life well lived". Aristotle writes that the highest good is happiness and living well, to which all other goods are secondary. In pursuing this goal, humans are distinguishable from animals "because a human being can act, not only by appetite, but by reason and will. He can understand that an action contributes to the distinctively human life he should live, and he can choose it for that reason."[44]

In *Ethics*, Aristotle investigates how one can achieve the highest good of happiness. Human beings have the capacity to live a better life because, unlike animals, they have a soul and the ability to act rationally. Each human is presented with a set of virtues which show him or her how to live his or her life well. The ability to regulate his or her desires in order to live a better life through rational agency is uniquely human and is identified as moral virtue. Central to Aristotle's concept of moral virtue is the doctrine of mean.[45] Good character (which leads to a life well lived) results by meeting the mean between the excess and deficiency of the character traits that we all possess. One is of good character and therefore morally virtuous when one strikes a balance between such excess and deficiency.[46]

Aristotle identified "justice" as one such moral virtue. However, unlike like other forms of virtue which are internal to the individual (such as courage, for example), justice has an external existence and "the mean of particular justice articulates a standard that is proper to an external relation *between* persons."[47] Justice is then conceived as a "social virtue" because uniquely it involves one's relationship with others rather than being something which is internal to oneself.[48] In *Nicomachean Ethics,* Aristotle identified particular justice of two kinds, distributive and corrective justice. These forms of justice are concerned with justice in "holdings" i.e. "things" we own such as money or our person. To live a life well, man needs "not only virtues but some external things. A person should try to acquire what he needs and to help others to do so."[49] Parties should not own in excess of, or less than, their entitlement i.e. greater or lesser than the mean. Distributive justice, according to Aristotle, concerns itself

---

[44] James Gordley, 'The Moral Foundations of Private Law' (2002) 47 American Journal of Jurisprudence 1.
[45] Aristotle, *Nicomachean Ethics*, *Book II* (J.A.K. Thomson, trans) (Penguin Books, 2004) 42.
[46] Ibid., 46-47; for example, "courage" is an ideal characteristic representing the virtuous mean between being a "coward" (a character deficiency) and being "rash" (a character excess). Similarly, "proper pride" is a characteristic of which the deficiency is "undue humility" and the excess is "empty vanity."
[47] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, 534.
[48] Anton-Hermann Chroust & David L. Osborn, 'Aristotle's Conception of Justice' (1959) Notre Dame Lawyer 129, 134.
[49] James Gordley, 'The Moral Foundations of Private Law' (2002) 47 American Journal of Jurisprudence 2.

with the "distributions of honour for money or such other assets as are divisible among members of the community."[50] By contrast, corrective justice is that which between man and man, "rectifies the conditions of a transaction.[51] Thus, the central feature of corrective justice as identified by Aristotle involves a bipolar, correlative, transactional relationship between two parties.

Corrective justice can be said to be a form of transactional justice or "a theory of exchange."[52] It essentially involves justice in transactions between parties. In an Aristotelian context, a "transaction" is a normative description of the interaction between two parties whereupon holdings are transferred between them.[53] The mean is represented by equality between the holdings of the parties before and after the transaction. Therefore, in Aristotelian terms, "Justice signifies Equality".[54] The mean is the preservation of the status quo between the parties and the initial holdings between the parties are viewed "as an entitlement."[55] When a transaction is voluntary issues of corrective justice do not arise because the parties have consented to the transfer of holdings between them. However, a transaction is said to be involuntary when one of the parties does not authorise the depletion of their holdings by the other side e.g. where one is injured by the wrongful conduct of the other. It is these transactions that require correction through the restoration of the mean. Consequently, justice is done when the previous equality that existed between the parties is restored or rectified. The entitlements (or holdings) of each party are altered as a result of the interaction between them and it should be the purpose of the law to "preserve the share of resources that belongs to each person."[56]

In this way, Aristotle viewed corrective justice as the mean between what is just and what is unjust in accordance with "arithmetical proportion."[57] The role of the judge is to mediate between the two parties in the relationship, find the mean, and thereby restore equality. Aristotle describes the task of the judge in arithmetical terms, "when the whole has been equally

---

[50] Aristotle, *Nicomachean Ethics*, *Book V* (J.A.K. Thomson, trans) (Penguin Books, 2004) 118.
[51] Ibid.
[52] James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587, 1588.
[53] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, 539.
[54] Anton-Hermann Chroust & David L. Osborn, 'Aristotle's Conception of Justice' (1959) Notre Dame Lawyer 129, 134.
[55] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, 541.
[56] James Gordley, 'The Moral Foundations of Private Law' (2002) 47 American Journal of Jurisprudence 12.
[57] Aristotle, *Nicomachean Ethics*, *Book V* (J.A.K. Thomson, trans) (Penguin Books, 2004) 121.

divided, then they have 'their own' – i.e. when they have got what is equal. The equal is intermediate between the greater and the lesser line according to arithmetical proportion."[58] Where the equilibrium between the wrongdoer and victim is disturbed e.g. where one has inflicted harm on another, then that is an injustice which creates an inequality between the parties. It is for the judge to equalise that disturbance by subtracting the wrongdoer's "gain" from the victim's "loss".[59] Justice is secured when the parties have "an equal amount before and after the transaction."[60]

With its focus on the relationship between wrongdoer and victim and rectifying wrongs which occurred between them, Aristotle's theory intuitively seems to fit well within much of the structure of tort doctrine. [61] In arithmetical terms, we know that justice is achieved when the parties are restored to the position where both parties have an amount equal to that which they both held before the involuntary transaction (the commission of the tort) which created the imbalance. It therefore explains why the plaintiff may bring an action against the party who wronged him or her and why it is the wrongdoer who must correct the imbalance, usually by way of monetary payment in the form of damages. At the moral heart of the theory lies the imposition of responsibility for wrongful human agency.

Corrective justice has been criticised for providing an incomplete theory of tort law in that it only sketches a broad outline of what might be considered an adequate theory of justice and has been described as a theory which is "empty" of content.[62] Other than to state that the transaction is involuntary when one party is left with less than that which the other party received, it fails to identify fully the types of transactions which are deemed involuntary and therefore require the intervention of corrective justice. That is to say, it does not tell us anything about the wrongs that require the intervention of corrective justice. The closest Aristotle comes to identifying the nature of wrongs in his work is when he describes wrongful conduct as arising

---

[58] Aristotle, *Nicomachean Ethics*, *Book V* (J.A.K. Thomson, trans) (Penguin Books, 2004) 122.

[59] Ibid.

[60] Ibid.

[61] Ibid., 121, where the author wrote:

> It makes no difference whether a decent man has defrauded a bad man or vice versa, nor whether a good man or a bad one has committed adultery; all that the law considers is the difference caused by the injury; and it treats the parties as equals, only asking whether one has committed and the other suffered a hurt.

[62] Mark C. Modak-Truran, 'Corrective Justice and the Revival of Judicial Virtue' (2000) Yale Journal of Law & the Humanities 249, 253.

from voluntary human agency.[63] Aristotle's theory fails to adequately explain what creates the need for corrective action and also fails to justify why it is that the wrongdoer who must take the corrective action. Thus, it may be said that while the theory accounts for much of the structure of tort law, it fails to articulate its substance. Furthermore, as "it does not state a normative requirement which must be followed or pursued," it can be considered to be incomplete as an explanatory theory of tort law.[64] Moreover, its status as a moral theory is doubtful because corrective justice is only concerned with restoring the "antecedent equality" between the parties.[65] It does not address the question as to whether the holdings each of the parties had prior to the wrongful transaction were just to begin with.[66] As a result, corrective justice theory can be accused of perpetuating ingrained inequalities.

2.3 Modern Theories of Corrective Justice

There are many different understandings of corrective justice theory and how it applies to private law.[67] As Schroder notes, this is "because corrective justice is itself a contested concept,

---

[63] Aristotle, *Nicomachean Ethics*, *Book V* (J.A.K. Thomson, trans) (Penguin Books, 2004), where the author said: "... if a man were to seize the hand of another and with it strike a third party, the second man would not be a voluntary agent, because he could not help himself."

[64] Ibid.

[65] Ernest J. Weinrib, 'Toward a Moral Theory of Negligence Law' (1983) 2 Law & Philosophy 37, 38.

[66] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 Oxford Journal of Legal Studies 471, 472.

[67] Some of the key proponents of corrective justice theory include: Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995); Ernest J. Weinrib, *Corrective Justice* (Oxford University Press, 2012); Jules L Coleman, *Risks and Wrongs* (Cambridge University Press, 1992); Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007) Jules L Coleman, *The Practice of Principle* (Oxford, 2001); Allan Beever, *Forgottten Justice: Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, 2013); Allan Beever, *The Law of Private Nuisance* (Hart Publishing, 2013); Richard Epstein, 'A Theory of Strict Liability' (1973) 2 Journal of Legal Studies 151; George P. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537; Steve Hedley 'Corrective Justice - An Idea Whose Time Has Gone?' in Maksymilian Del Mar and Michael Lobban (eds.), *Law in Theory and History: New Essays on a Neglected Dialogue* (Oxford, Hart, 2016) 305. Another version of corrective justice theory is that known as commutative justice. Because corrective justice is by its very nature backward looking, it tends to prioritise the secondary duty to repair harmful losses over the primary duty not to cause those losses in the first place. St. Thomas Aquinas was convinced that Aristotle's theory of corrective justice was unduly restrictive because of its emphasis on the remedial aspects of correction while saying little about the treatment of persons in their relations with others *before* the occurrence of an event which required correction. He first coined the term "commutative justice" to describe a theory of justice which incorporated corrective justice but which was broader and also included considerations of fairness not limited to the remedial aspects of corrective justice theory. Commutative justice as defined by Aquinas is a much broader theory than corrective justice as it allows one to assess how a person should be fairly treated in his transactions with others. While corrective justice focuses on the nature of the relationship after a breach has occurred, commutative justice is primarily concerned with factors prior to that breach and thus seeks to secure proper behaviour between individuals. Thus, commutative justice focuses on the rights of the individual in their interactions with others but is not dependent on the occurrence of a transaction between persons which requires

loose enough to invite continual debate, valuable enough to be worth fighting over, and comprehended enough to produce some shared agreement on its content."[68] These theories can be loosely grouped together under the corrective justice banner and are thematically similar in that each version believes that corrective justice theory reflects, what Green described, as a "deep sense of common law morality that one who hurts another should compensate him."[69] That is why notions of human agency, obligations to rectify or repair and a correlative link between the wrongdoer and the victim are all considered essential aspects to the theory.[70] Corrective justice theory is based on non-instrumental notions of tort law and is not based on achieving some external societal goal. Thus, "corrective justice founds liability on moral principles of individual responsibility and defends liability on non-instrumental grounds, freed from consideration of purposes external to the tort process, such as distributive justice."[71] This concentration on correlativity and individual responsibility is what distinguishes corrective justice from distributive justice.

The leading modern proponents of corrective justice theory are Ernest J. Weinrib and Jules L. Coleman. While both proclaim that principles of corrective justice lie at the heart of tort law, they differ in their interpretation of the theory. Weinrib's theory offers an extreme version of formalism whereas Coleman's approach has been described as functional.[72] For example, Weinrib contends that the structure of tort law can only be explained through the prism of corrective justice without reference to external factors such as politics or economics.[73] In his own words, "formalism demands that we appeal to *the law*, and not to some extralegal goal,

---

correction. John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011) (2nd ed.); Sandy Steel, 'Private Law and Justice' (2013) 33 Oxford Journal of Legal Studies 607; Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401; Jason NE Varuhas, 'The Concept of 'Vindication' in Tort Law: Rights, Interests and Damages' (2014) Oxford Journal of Legal Studies 1; Jonathan M. Cockfield, 'Commutative Justice in Tort: Towards a 'Pure' Rights-Based Theory' (2011) III King's Student Law Review 53; Gregory C. Keating, 'The Priority of Respect Over Repair' (2012) 18 Legal Theory 293.

[68] Christopher J. Schroeder, 'Corrective Justice, Liability for Risks, and Tort Law' (1990) 38 UCLA Law Review 143, 146.

[69] Leon Green, 'Foreseeability in Negligence Law' (1961) 61 Columbia Law Review 1401, 1412.

[70] Jules L. Coleman, 'The Practice of Corrective Justice' (1995) 37 Arizona Law Review 15, 26.

[71] Christopher J. Schroeder, 'Corrective Justice, Liability for Risks, and Tort Law' (1990) 38 UCLA Law Review 143, 147.

[72] Matthew S. O'Connell, 'Correcting Corrective Justice: Unscrambling the Mixed Conception of Tort Law' (1997) 85 Geo. Law Journal 1717, 1718. Although, some commentators do not believe the distinction is as clear and have argued that Coleman's 'mixed conception' approach towards corrective justice is de facto formalism. See: Richard W. Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625, 665.

[73] Ken Kress, 'Formalism, Corrective Justice and Tort Law' (1992) 77 Iowa Law Review I, II.

whatever its merits are as a goal."[74] In essence, form defeats substance. By contrast, Coleman's approach to corrective justice is functional in that its substantive content is not governed by form but rather reflects tort practice i.e. its contents "depends on human practices, beliefs and evidence."[75] In other words, it does not profess, unlike Weinrib's approach, to operate in a vacuum. In order to evaluate the differences in approach, it is necessary to examine each theory in detail.

2.3.1 Wenrib's Theory of Corrective Justice

Ernest J. Weinrib's central thesis is that the structure of tort law is best explained by corrective justice theory. In his first book on the subject, *The Idea of Private Law*,[76] Weinrib proposes that the structure of all private law (including tort law) can be traced back to Aristotle's theory of corrective justice. Weinrib views corrective justice as comprising three inter-connected elements. First, central to the idea of corrective justice is the correlative or bipolar relationship between the parties "as the doer and sufferer of the same injustice."[77] Secondly, this personal relationship is structured around a Kantian notion of the victim's right to self-determination "in relation to others" and the wrongdoer's corresponding duty. Thus, tort law consists of individual rights and duties.[78] Finally, justice is imposed in a backward-looking sense by the legal system, particularly, the courts, whose function it is to restore the balance which existed in the relationship between the parties prior to the wrongful transaction.[79] Hence, "[c]orrective justice provides the formal structure of the legal relationship between the parties, and Kantian right provides the morality to be understood within the context of that relationship."[80]

Weinrib is a formalist who considers that private law is "internally coherent" and as such, need not be validated by reference to outside factors, whether such influences are politically, economically or otherwise policy-orientated.[81] In his view, "the [only] purpose of private law

---

[74] John Oberdiek, 'Method and Morality in the New Private Law Torts' (2012) 125 Harvard Law Review Forum 189, 190.
[75] Jules L. Coleman, 'The Practice of Corrective Justice' (1995) 37 Arizona Law Review 15, 22.
[76] See, Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995); Ernest J. Weinrib, *Corrective Justice* (Oxford University Press, 2012).
[77] Ernest J. Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University Law Review 273.
[78] Ibid., 273-274.
[79] Ibid., 274.
[80] Martin Allcock, 'Corrective Justice and Kantian Right as a Mechanism to Reconcile 'Substantially Clashing Interests' in Cases of Negligently Inflicted Psychiatric Injury (2015) 40 Australian Journal of Legal Philosophy 17, 29.
[81] Ernest J. Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 Yale Law Journal 949; Ken Kress, 'Formalism, Corrective Justice and Tort Law' (1992) 77 Iowa Law Review I.

is to be private law."[82] Tort law, according to Weinrib, like all private law, can be understood on its own terms without reference to external goals as such:

> ... the fact that one or other of parties to a tort action is insured against the loss which forms the subject of the action would not provide a sound basis for deciding whether or not to impose tort liability on the defendant, however desirable loss spreading by insurance might be as a social goal, because insurance is not based on a reciprocal relationship between the two parties.[83]

To the formalist, tort law is coherent, independent and free from political or economic influence.[84] At its heart lies the co-dependent relationship between the defendant and the plaintiff. According to this account, external goals such as fair compensation and deterrence do not accurately reflect the moral underpinning of tort doctrine because they fail to account for the interdependence of the relationship between the parties. Such factors are one-sided considerations that do not link the doer and sufferer of the wrong. For example, while "[c]ompensation addresses the needs of the injured party ... [it] ... is indifferent to deterrence. Similarly, deterrence looks to the conduct of the injurer and is indifferent to compensation."[85] Moreover, if compensation is the sole or primary aim of tort law why does tort doctrine insist that it is the defendant who must compensate the victim? Why not simply provide that the victim receive compensation from public funds? Similarly, if deterrence is the sole or primary aim of tort law why is it that under tort doctrine the defendant is only liable where he or she has committed a wrong that has invaded the rights of another and not simply where he or she has acted wrongfully alone? It is for these reasons that theorists such as Weinrib view the correlative relationship between plaintiff and defendant to be at the moral heart of tort law.

2.3.1.1 *Correlativity*

Like Aristotle's conception of corrective justice, Weinrib structures private law around the transactional relationship between plaintiff and defendant. The parties to such a transaction are inextricably linked to one another such that "the reason the plaintiff wins ought to be the same as the reason the defendant loses."[86] Thus, according to theorists such as Weinrib, any theory of tort law which cannot account for correlativity is destined to fall short in adequately

---

[82] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 5.
[83] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 Oxford Journal of Legal Studies 471, 472.
[84] Ken Kress, 'Formalism, Corrective Justice and Tort Law' (1992) 77 Iowa Law Review I, I-II.
[85] Ernest J. Weinrib, 'The Jurisprudence of Legal Formalism' (1993) 16 Harvard Journal Law & Public Policy 583, 586.
[86] Ernest J. Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 University of Toronto Law Journal 349, 351.

explaining its structure.[87] It is the doing of harm by the defendant and the reciprocal suffering of the plaintiff as a result of that harm that relates the parties to one another.[88]

The interdependency between plaintiff and defendant does account for much of the structure of tort doctrine. It explains why it is the case that, if a plaintiff is carelessly injured by the defendant's actions, the plaintiff will seek recompense from the defendant rather than a possibly more solvent target like the State, for example.[89] The bipolar relationship at the centre of corrective justice theory also explains the importance of causation to tort doctrine. Proof that the defendant caused the plaintiff's injuries is an essential feature of establishing many torts, including negligence. The establishment of this factual link between the defendant's actions and the plaintiff's injuries encapsulates the bipolarity of the relationship between the parties

---

[87] Ernest J. Weinrib, 'The Jurisprudence of Legal Formalism' (1993) 16 Harvard Journal of Law & Public Policy 583, 588. There are other schools of corrective justice theory such as that proposed by John C.P. Goldberg and Benjamin Zipursky called 'Civil Recourse Theory.' This theory is closely related to Weinrib's theory of corrective justice in that it puts forward a non-instrumental theory of tort law, separate to distributive justice considerations, based on wrongful behaviour between defendant and plaintiff. While both theories envisage a correlative relationship between the parties, civil recourse differs from corrective justice in that it separates the wrong from the remedy. In this way, it claims to better explain the diversity of remedies available in tort law. Civil recourse provides a descriptive theory of tort law which interprets tort doctrine as the law of private relational legal wrongs. According to civil recourse theory, the state - via the court system - provides the victim with the right to seek recourse against the wrongdoer when he or she claims that a relational wrong has been committed against him or her by the wrongdoer. If the victim establishes that such wrong has been committed, then the victim is entitled to recourse. It is a monistic theory of torts that seeks to explain tort law as a system of wrongs rather than losses. The theory is most closely associated with the work of the American scholars John C.P. Goldberg and Benjamin C. Zipursky. See generally John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (2010) 88 Texas Law Review 917; John C.P. Goldberg & Benjamin C. Zipursky, 'Tort Law and Moral Luck' (2007) 92 Cornell Law Review 1123; John C. P. Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 Yale Law Journal 524; Benjamin C. Zipursky, 'Civil Recourse Not Corrective Justice' (2003) 91 Georgetown Law Journal 695, 736-737; Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in Tort Law' (1998) 51 Vanderbilt Law Review 1; John C.P. Goldberg & Benjamin C. Zipursky, 'The Moral of MacPherson' (1998) 146 University of Pennsylvania Law Review 1733. Ernest J. Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University Law Review 273; Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2012) 39 Florida State University Law Review 107; Benjamin C. Zipursky, 'Rights, Wrongs, and Recourse in Tort Law' (1998) 51 Vanderbilt Law Review 1; John C.P. Goldberg & Benjamin C. Zipursky, 'Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette' (2013) 88 Indiana Law Journal 569, 577; John C. P. Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 Yale Law Journal 524.

[88] Ernest J. Weinrib, 'The Structure of Unjustness' (2012) 92 Boston University Law Review 1067, 1068, where the author explains:

> ... the liability of a particular defendant is always a liability to a particular plaintiff. In holding the defendant liable to the plaintiff, the court is not making two separate judgments (one that awards something to the plaintiff and the other that coincidentally takes the same thing from the defendant), but a single judgment that embraces both parties in their interrelationship. Each party's position is intelligible only in the light of the position of the other.

[89] William Lucy, 'Method and Fit: Two Problems for Contemporary Philosophies of Tort Law' (2007) 52 McGill Law Journal 605, 612.

and without it the defendant cannot be made liable for the plaintiff's injuries no matter how badly he or she has behaved.[90]

Some commentators, such as Wright, do not agree that causation necessarily implies a correlative relationship. In his view, such an interpretation is simplistic because "[c]auses and effects do not occur as discrete bipolar pairs, but rather as nodes in a vast network of causes and effects, with each node being the effect of an ever-expanding progression of subsequent nodes."[91] Consequently, causation alone cannot justify the exclusive relationship between the parties. Nor can causation explain why it is that in most tort cases it is the defendant who is ordered to pay the plaintiff compensation in the form of damages equivalent to the loss that he or she has suffered or why it is that compensation is the primary remedy for such bad behaviour.[92]

Critics of Weinrib's interpretation of corrective justice, and his theory of correlativity in particular, would argue that there is nothing within the remedial process that requires that it is the wrongdoer who must administer the remedy to the victim.[93] The traditional view of tort remedies is that they are designed to simply put the victim back into the position, insofar as possible, that he or she was in before the wrong was committed. However, if that aim can be achieved by other methods – by a state-sponsored compensation scheme for example - why impose the obligation on the wrongdoer to remedy the wrong? Thus, while corrective justice theory might explain why the remedy can flow from the wrongdoer to the victim, it cannot justify why it must be so.

Dorfman has sought to explain why it is that the correlative relationship between the parties justifies the requirement that it is the defendant who must remedy the plaintiff's harm. He views the tort remedy as serving a valuable function by engaging "the wrongdoer and victim in a truly

---

[90] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 154-158.
[91] Richard W. Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625, 636.
[92] Ibid., 637, where the author explains:

> Why not, instead, have a fine paid by the defendant to the plaintiff, the plaintiff's imprisonment of the defendant, an apology from the defendant to the plaintiff, or even the plaintiff's payment to the defendant of damages, a fine, loss of liberty, and an apology? None of these remedies is excluded or disfavoured as a matter of implication from the concepts of causation or a bipolar remedial procedure

[93] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 Oxford Journal of Legal Studies 471.

social relation."[94] He notes that the primary duty of care in tort law requires one to have a "respectful recognition"[95] for others. It is an acknowledgement of the dignity of others, if you will. When the wrongdoer disrespects this right by breaching the duty and committing a wrong:

> ... the morality of tort law requires, in the case breaching a primary duty, a remedial effort that must not only undo the transition from the ex-ante status of being mere strangers to the post-breach of being disconnected. It must also *reestablish* respectful recognition ...
>
> Because this solidaristic value is intrinsic to the relation of the carer to the cared-for ... *no other person or institution besides the two can bring this remedy about*. All that others, including the state, can do is support the two by facilitating their engagement concerning the remedying of alienation.[96]

Thus, the morality of the remedial process in tort law lies in its ability to acknowledge the wrong done to the victim and its attempt to re-establish a relationship of respectful recognition between the two. In this way, "the tort remedy operates on a past wrong but, crucially, looks forward to the society it thereby forms between the two."[97] As such, tort law is more than simply a vehicle by which compensation is transferred; it is a system by which the victim's dignity can be restored.

Aristotle's notion of "justice as equality" also explains why the remedy from the defendant should not exceed the costs of remedying the wrong suffered by the plaintiff and meets one of the central tenets of tort law: the remedy should be such as puts the plaintiff back into the position he or she was in before the commission of the wrong. Quite evidently, in cases involving physical harm in particular, it will not always be possible to make the victim whole. However, a remedy in the form of financial compensation can do the next best thing by making life somewhat more comfortable for the victim. It equalises the relationship between the parties and restores the victim's dignity.

2.3.1.2 *Gains & Losses*

While the concept of correlativity explains much of the structure of tort doctrine, it tells us very little about the substantive content of tort law. Aristotle simply explained that corrective justice

---

[94] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 53 American Journal of Jurisprudence 105, 124.
[95] Ibid., 129.
[96] Ibid., 132.
[97] Ibid., 139.

intervened where "one is in the wrong and the other is being wronged."[98] However, he did not detail what would qualify as a wrong or injustice other than to state that an unjust act was, "any act lying in the agent's power that he does knowingly" i.e. that was done voluntarily.[99] Thus, Aristotle appeared to emphasise "intention" as being an essential aspect of wrongful behaviour. Aristotle referred once again to the language of arithmetic and described "wrongs" as arising where the defendant obtained a "gain" which directly led to the plaintiff's "loss".[100] In this way, Aristotle measured the suffering caused to the plaintiff by the defendant, "to have more than one's own is called gaining, and to have less than one had at the start, losing."[101]

However, even Aristotle himself acknowledged that the terminology of "gains" and "losses" did not always accurately describe the suffering of the plaintiff which may be caused by the defendant's wrongdoing and explained that such terms were to be applied "generally."[102] While Aristotle's theory of corrective justice did provide a normative account of how a wrong committed by one party against another could be rectified and also identified who should be held responsible for rectification, it was incomplete as it failed to provide a detailed account of the circumstances under which such intervention would occur. Thus, "[t]he challenge has been to develop a normative foundation based on the event which caused the inequality."[103]

Weinrib acknowledges that a literal interpretation of Aristotle's notion of "gains and losses" would be inappropriate because it would fail to account for large swathes of tort doctrine. For example, under what circumstances can a motorist "gain" from injuring a pedestrian as a result of his or her careless driving? Or how does a victim suffer a "loss" because of an assault simply because a fist is raised towards them but they are not struck? A literal interpretation of "gain" would possibly only accurately explain the tort of conversion.[104] However, such terminology makes little sense in the vast majority of tort cases which involve loss caused by the defendant and suffered by the plaintiff without any tangible gain accruing to the defendant. [105]

---

[98] Aristotle, *Nicomachean Ethics*, *Book V* (J.A.K. Thomson, trans) (Penguin Books, 2004) 121.
[99] Ibid., 132.
[100] Ibid., 122.
[101] Ibid.
[102] Ibid., 121.
[103] Michael Bryan, 'Justice Callinan's Judgments in Private Law: Story Telling, Legal Coherence and Corrective Justice' (2008) 27 University of Queensland Law Journal 29, 31.
[104] Where the defendant wrongfully "gains" the goods of the plaintiff who suffers a corresponding "loss" of those same goods.
[105] Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277, 278.

Accordingly, in Weinrib's view, it is a mistake to presume that "gains and losses" refer only to the material holdings of the parties before and after the involuntary transaction.[106] It is his contention that when discussing the concept of "gains and losses" Aristotle was referencing "some notional equivalence of gain and loss that obtains even if commission of the wrong has not materially enriched the wrongdoer."[107] Gordley finds similar support from Aquinas and notes that to receive a gain, in this context, "means to fulfil one's will. He who harms another for his own ends "gains" by doing or getting something he wants, or by trying to do so."[108] Similarly, it has been noted that, "the injury becomes a measure of the defendant's surplus freedom."[109] According to Weinrib, therefore, Aristotle's "justice as equality" account of private law "is merely a formal representation of the norm that ought to obtain between doer and sufferer" and an involuntary transaction which disrupts that equality or violates the applicable norm resulting in a gain to the wrongdoer and a corresponding loss to the victim is actionable.[110]

Weinrib justifies his stance that gains and losses relate to normative gains and losses on the basis that, if it were otherwise, Aristotle's notion of equality would require that the parties be equal in terms of material holdings before corrective justice would be available to them. In Weinrib's view, because equality in material resources is the subject of distributive justice and because Aristotle viewed corrective justice as an independent form of justice, it could not be the case that his theory required that the material holdings of the parties be equal if corrective justice was to apply.[111] Hence, the normative interpretation of gains and losses is to be preferred.

2.3.1.3 *Rights and Duties*

In Weinrib's view, tort law can be better explained in terms of correlative "rights and duties" rather than "gains and losses". In so doing, Weinrib links Aristotle's conception of "justice as equality" to Kant's "principle of right" in order to provide a fuller picture of tort law and the

---

[106] Ernest J. Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 University of Toronto Law Journal 349, 350.
[107] Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277, 279. The author is supported in this interpretation by the writings of Aristotle himself who wrote, "[t]he term 'gain' is used generally in such cases, even though it is not the appropriate word for some offences, e.g. in the case of assault." (Aristotle, *Nicomachean Ethics*, *Book V* (J.A.K. Thomson, trans) (Penguin Books, 2004) 121).
[108] James Gordley, 'The Moral Foundations of Private Law' (2002) 47 American Journal of Jurisprudence 12.
[109] Anita L. Allen & Maria H. Morales, 'Hobbes, Formalism, and Corrective Justice' (1992) 77 Iowa Law Review 713.
[110] Ibid.
[111] Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277, 285

nature of wrongful behaviour. [112] Weinrib equates Kant's notion of "rights and duties" with Aristotle's notion of "gains and losses", arguing that the only difference between the two is one of terminology. The lexicon of "gains and losses" simply predates that of "rights and duties," and that is why Aristotle used different language to describe what in effect are rights and duties. [113] Thus, the language of "gains and losses" becomes that of "rights and duties."[114]

In this way, Weinrib utilises Kant's notion of right to provide a normative basis of tort law based on recognition of the autonomy of will inherent in individual dignity.[115] In his view, the wrongs of private law are "explained by their inconsistency with individuals' freedom."[116] Weinrib utilises Kant's work to develop his theory. Like Aristotle, Kant sees justice in equality between individuals. However, Kant, unlike Aristotle, defines that equality as existing where the individual is allowed to exercise his or her free will to act in accordance with a universal law as long as such actions do not violate another's freedom to so act.[117] Keating has described this interrelationship as involving a balance between one party's fundamental interest in liberty with another's fundamental interest in security.[118]

Inequality, according to Kant, arises where one party acts without regard to the rights of others – one is free because one is not "other-determined."[119] One party's freedom to act is restrained by the other's right not to be wrongfully interfered with. Thus, the right of others creates a reciprocal obligation or duty and vice versa. In this way the parties are inextricably linked to one another through a right and a duty; "the existence of the right is the reason for the existence

---

[112] Immanual Kant, *The Methaphysics of Morals,* (Mary Gregor (ed.) (Cambridge University Press, 1996).
[113] Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277, 293
[114] Ernest J. Weinrib, 'The Jurisprudence of Legal Formalism' (1993) 16 Harvard Journal of Law & Public Policy 583, 596, where the author notes:

> Corrective justice is an expression of what Kant called the principle of right, under which the action of one freely willing person is conjoined to the freedom of another in accordance with a universal law. Because freedom manifests itself juridically in rights that others are obligated not to violate, the bipolarity of corrective justice emerges in a normative regime of correlative right and duty.

[115] However, it has been argued by some commentators that Weinrib in his later work rowed back from this interpretation of private law. See Richard W. Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625, 633, where the author observes that "... building on a presumed radical disjunction between law and ethics in Kant's philosophy, Weinrib has insisted that law and justice ... are completely autonomous from any external principles or policies, even those inspired by Kant's ethics. For Weinrib, the essence of law is its inner intelligibility or "immanent rationality" – the internally coherent universal unity of its interdependent essential concepts."
[116] Sandy Steel, 'Private Law and Justice' (2013) 33 (3) Oxford Journal of Legal Studies 607, 618.
[117] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995), 104.
[118] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 196-197.
[119] Zoe Sinel, 'Concerns about Corrective Justice' (2013) Canadian Journal of Law and Jurisprudence 137, 143.

of the duty."[120] Kant's theory of right and duty therefore corresponds with the notion of correlativity which is at the heart of corrective justice; "[t]he right represents the moral position of the plaintiff; the duty represents the moral position of the defendant."[121] Weinrib thus translates the Kantian principle of right into Aristotle's theory of gains and losses.[122] Consequently, the defendant need not have materially gained from his or her wrongful behaviour, but, by unjustifiably interfering with the autonomy, and thereby undermining the dignity of the plaintiff, he or she has normatively gained in that he or she has pursued his or her own ends without regard for the plaintiff. Conversely, the plaintiff has suffered a normative loss in that his or her autonomy has been curtailed by the acts of the defendant. Under this formulation, tort law may be viewed as protecting the atomistic version of human dignity.

Weinrib's interpretation of corrective justice can provide a normative explanation of torts which are actionable *per se*. For example, the tort of assault can be explained on the basis that threatening physical harm to another involves an unjust encroachment on that other's right to bodily integrity and peace of mind. While no tangible harm might result from the defendant's actions, he or she has committed a wrong by interfering in this way with that party's freedom and well-being. Thus, the allocation back which occurs as part of corrective justice is the award of nominal damages to the victim to compensate them for the unlawful infringement on their freedom imposed by the defendant.

Kant's concept of right also fits with Aristotle's interpretation of corrective justice in that wrongful behaviour is not based on internal motivations but on the external manifestation of the actions of individuals as those actions might impact on the freedom of others. Moreover, the right is not dependent, determined or restricted by the wishes of others.[123] The Kantian notion of right therefore involves an exercise of individual autonomy manifesting itself in one's

---

[120] Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277, 291.

[121] Ibid; this connection between right and duty can be gleaned from Cardozo CJ's famous judgment in *Palsgraf v Long Island Railroad Co* 248 NY 339 (NY CA 1928), 343-344, where he observed that, "[w]hat the plaintiff must show is a "wrong" to herself; i.e., a violation of her own right, and not merely a wrong to someone else ..."

[122] James Gordley, 'Tort Law in the Aristotelian Tradition' in David Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, Oxford (1995), where the author observes, "one who has voluntarily harmed another, even if he has acquired nothing, has gained in the sense that he has pursued his own objectives at another's expense. He must pay for any loss he has caused."

[123] Immanual Kant, *The Science of Right*, (BiblioBazaar, 2009). See also Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, 571, where the author notes, "the normative validity of an action is decided, not by reference to its author's subjective intentions, purposes and understandings as such, but in terms of conditions of respect that one ought reasonably to subscribe to when one's actions impinge on another."

external actions. The right is subject to a corresponding duty i.e. that its exercise does not interfere with the freedom of others. Thus, in an equal relationship one cannot act without regard to the rights of others, consequently, "arbitrary self-preference" is impermissible.[124] In Biblical terms, Kantian right can be summarised as imposing a duty on individuals to do to others as you would wish them to do to you.[125] That is why non-correlative considerations of welfare (such as deterring the wrongdoer or the fact that the defendant is insured for the loss and the plaintiff is not, for example) are not relevant to the question of corrective justice. While this right is not based on community welfare considerations, Weinrib acknowledges that the protection of the right increases the welfare of the individual who holds it. However, such considerations are not the basis of the right and are of secondary importance.[126]

The lack of consideration for welfare issues is also exhibited on the duty side of the equation which is manifest in tort law's reluctance to impose affirmative duties to act.[127] As an agent of free will, it is the individual's choice of actions that is to be protected and consequently, in general, one cannot force another to act contrary to his or her will. In this way, the duties in question are negative only. Benson, borrowing heavily from Hegel's theory of personality, explains rational choice through the individual's "capacity to use things".[128] Thus, to respect personality is to respect the individual's freedom to choose to use things.[129]

---

[124] Ernest J. Weinrib, 'Toward a Moral Theory of Negligence Law' (1983) 2 Law and Philosophy 37, 50, where the author notes: "[a]s he acts in the world, a person must not grant to himself an advantage that he would deny to others."

[125] King James Bible, (Cambridge ed.), Luke 6:31, "And as ye would that men should do to you, do ye also to them likewise."

[126] Ernest J. Weinrib, 'Correlavity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 Theoretical Inquiries in Law 107, 120, where the author said:

> In the law's contemplation, the increase in welfare through having a right and the decrease through the infringement of a right are the consequences rather than the grounds of the right. That is why (as in the cases of negligently caused economic loss) a decrease in welfare that does not violate the plaintiff's rights is not actionable, and conversely (as in the case of nominal damages), a violation of a right that does not decrease the plaintiff's welfare is. Welfare serves only the secondary function of concretizing rights and making them quantifiable in particular cases.

[127] Ibid.

[128] Georg W.F. Hegel, *Philosophy of Right*, (Thomas M. Knox, trans), (Oxford University Press, 1967).

[129] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, 572, where the author observes:

> It is crucial to keep in mind that the capacity to use things is conceived from the specific moral standpoint of personality, the essential character of which is independence from everything in particular. Given this standpoint, ends or purposes ... have no intrinsic worth; they are not constitutive of freedom. The requirement to respect personality does not therefore entail any obligatory ends. Accordingly, I am not under a positive duty to use things, nor must I assist others to do so. For the same reason, I need not facilitate in any way the efforts of others or sacrifice so that they can succeed.

Accordingly, the theory justifies the legislature's and courts' reticence in imposing affirmative duties in negligence such as compelling an individual to come to the aid of an endangered stranger, for example.[130] Under Kant's concept of right, imposing a duty on an individual to act in such situations would represent an unjust imposition on that individual's autonomy by exposing him or her to a risk not of his or her making. Thus, the law refuses to impose such responsibility.[131] It might be argued that the individual should at the very least be required to carry out an "easy rescue" which would not expose the rescuer to the risk of serious harm.[132] However, this argument has been met with the countervailing view that such a rule would be difficult to implement. Assessing what is or is not an easy rescue would be a difficult thing to do and requiring an individual to weigh up the different considerations in any given case would also represent an unjust encroachment on the liberty of the individual in such circumstances. In turn, this interpretation has been criticised as highly individualistic, concerned only with the autonomy of the putative rescuer.[133]

The issue of affirmative duties arose in the Irish High Court decision of *Flanagan v Houlihan*.[134] Specifically, the case examined the extent to which an individual may be held responsible to third parties for the wrongdoing of another independent party. In that case, the

---

[130] See the Civil Law (Miscellaneous Provisions) Act 2011 and case law such as *Barrett v Ministry for Defence* [1995] 3 All ER 87; *Kent v Griffiths* [2001] QB 36; *Stovin v Wise* [1996] AC 923.

[131] See Marshall S. Shapo, *Tort Law and Culture* (Carolina Academic Press, 2003) 139, where the author writes:

> This no-duty rule points to an interesting cultural split. The defendant's refusal to help in such a case would undoubtedly receive strong moral condemnation ... Yet, the continued vitality of the common law rule signals some interesting attitudinal distinctions. Under a relevant set of paired viewpoints, we encourage heroism, but we regard the imposition of a financial burden for a failure to rescue as an inappropriate interference with personal autonomy, even if it is a very slight one. It is further indicative of attitudes that the first of the few statutes that make the failure to aid even a lightly penalized misdemeanour specifies that the defendant must have been able to render aid "without danger or peril to himself or without interference with important duties owed to others." "I don't want to get involved" and "I want to get on with my life" are modern aphorisms that apply to law as well as to people's governance of their ordinary lives on many occasions (footnotes omitted).

[132] See Ernest J. Weinrib, 'Case for a Duty to Rescue' (1980) 90 Yale Law Journal 247, where the author makes a legal and philosophical justification for a duty to perform an easy rescue in cases of emergencies.

[133] Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 Journal of Legal Education 3, 34-35, where the authors states:

> If we put abstract reasoning and autonomy aside momentarily, we can see what else matters. In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action. That seems more urgent, more imperative, more important than any possible infringement of individual autonomy by the imposition of an affirmative duty. If we think about the stranger as a human being for a moment, we may realize that much more is involved than balancing one person's interest in having his life saved and another's interest in not having affirmative duties imposed upon him in the absence of a special relationship, although even then the balance seems to me to weigh in favor of imposing a duty or standard of care that requires action.

[134] *Flanagan v Houlihan* [2011] IEHC 105.

plaintiff was severely injured when she was involved in a collision with another car the driver of which had been under the influence of alcohol. The second named defendants were joined to the proceedings on the basis that it was alleged that they were negligent in serving alcohol to the driver in a public house immediately prior to the accident in circumstances where they knew or ought to have known that, having consumed the alcohol he would drive his car on the public roadway and would thereby constitute a danger to other road-users. The essential question therefore was whether a duty of care in negligence should be imposed on the second named defendants as suppliers of alcohol to protect a customer or, as in this case, foreseeable third parties, from risk resulting from the self-induced intoxication of that customer. In examining whether such a duty should exist in these circumstances, Feeney J. reiterated:

> Notwithstanding the development of the tort of negligence and its increased scope, the common law continues to apply an individualistic position in relation to the question of affirmative duties. The courts have consistently recognised and enforced an approach that there is a difference between doing something and merely letting something happen. This is most clearly demonstrated by the approach adopted that there is no general duty to go to the assistance of another who is in danger.[135]

Thus, the High Court concluded that, in the circumstances, no duty should be imposed on the publicans. To do so would represent undue interference with the autonomy of the individual. Feeney J did acknowledge that no such duty existed under Irish law unless there was some kind of affirmative act or assumption of responsibility on the part of the defendant – what Weinrib has termed, relationships of "particular dependency."[136] In order to create such a duty it was necessary to establish therefore that the defendant publicans had assumed responsibility for the actions of the drunken customer. On the facts there was no evidence that the customer was so incapacitated by his consumption of alcohol that he was incapable of taking care of himself or making sensible decisions. Neither of the publicans was present when the customer left the premises and while they were present they did not observe any of the customary signs of drunkenness. Consequently, it could not be proven that the publicans had assumed responsibility for the customer's safety.

In finding that the there was no duty of care in such circumstances, Feeney J approved the words of Gleeson CJ of the High Court of Australia in *Cole v South Tweed Heads Rugby*

---

[135] *Flanagan v Houlihan* [2011] IEHC 105, [4.3] (Feeney J.).
[136] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 154.

League Football Club Ltd. and Another[137] who said that the imposition of such a duty would "... involve both an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice."[138] Moreover, to impose such a duty on the second named defendants could result in a situation which would require them to commit a tort or criminal offence. For example, if it were established that the second named defendants were aware of the customer's drunkenness and his intention to drive, the imposition of a duty could conceivably result in a situation whereby they would be compelled to physically restrain the customer in order to prevent him from leaving the premises.

Cane does not accept that Weinrib's corrective justice explanation justifies the failure to attach liability for non-feasance in negligence. In particular, he points to the many exceptions to the general rule where liability is imposed for non-feasance e.g. employer's liability to employees for failing to act, occupier's liability towards visitors,[139] parents' duty as regards their children.[140] Nor does Cane accept Weinrib's dismissal of such cases as being unique in that they involve a "particular dependency". Instead, he argues that such cases can be explained only on distributional grounds and not by corrective justice alone.[141] Such an interpretation of course undermines Weinrib's central thesis regarding the independence of corrective justice from distributive justice.

The Aristotelian, Kantian-infused notion of corrective justice, according to Weinrib, is illustrated throughout tort doctrine and in negligence in particular. The Kantian notion of rights and duties forms the moral basis of determining the standard of care expected of the defendant *vis-a-vis* the plaintiff and correlativity manifests itself through the doctrine of causation which links the defendant's wrongful act to the suffering of the plaintiff. For example, Weinrib would argue that the objective standard of care applicable in negligence supports the view that tort law is based on Kantian notions of corrective justice.[142] The assessment of a person's behaviour

---

[137] *Cole v South Tweed Heads Rugby League Football Club Ltd. and Another* [2004] HCA 29.
[138] Ibid., [17] (Gleeson C.J.).
[139] Section 3(1) of the Occupier's Liability Act 1995.
[140] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 Oxford Journal of Legal Studies 471, 485.
[141] Ibid.
[142] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 201, where the author observes:

> Negligence is the failure to prevent a risk imposition that should have been prevented. Negligent risks are ones whose imposition it is fair to ask injurers to prevent; their prevention strikes a fair balance between the competing claims of liberty and security. The imposition of a negligent risk expresses inadequate respect for the security of the victim; it is an "affront to personality" in this sense.

in accordance, not with his or her own best efforts or abilities, but instead with those of the objective reasonable person might seem at odds with any moral justification of tort law.[143] If tort law is based on moral theory, how does one account for the fact that, despite what might be his or her best efforts, a clumsy defendant will be held liable for injury caused by his or her behaviour even though he or she does his or her best but nevertheless fails to meet the required standard?[144]

The case of *Vaughan v Menlove*[145] is often cited as evidence of what some might perceive to be the potential harshness of the objective standard of care rule. In that case, the defendant built a haystack on his property near the boundary bordering the plaintiff's property. He had been warned that to do so might be dangerous given the propensity of haystacks to overheat and combust. The haystack ignited and burned down two cottages which were owned by the plaintiff and which were located nearby. The defendant argued that he should not be held liable for failing to foresee that the haystack might ignite in such circumstances. He had acted bona fide and to the best of his abilities and therefore it would be unfair to hold him to a higher standard (a standard he could not attain) in the circumstances. In a landmark judgment, the court held that the defendant should have acted to the standard that a reasonably prudent person would have acted in the circumstances. Failure to do so rendered him negligent. Irrespective of his bona fides, he had been repeatedly warned that the haystack was a fire hazard and yet chose to ignore those warnings.

While intuitively it might seem immoral to blame a defendant in circumstances where he or she personally did his or her best to avoid the adverse outcome, Weinrib argues that the principle fits very well into the Kantian notion of rights.[146] Had the defendant in *Vaughan* succeeded in his argument that his ineptitude should provide him with a defence, Weinrib notes, it would give rise to a situation where the defendant's subjective view of matters was the baseline for determining the rights of the plaintiff i.e. the plaintiff would be "other

---

[143] See, Omri Ben-Shahar & Ariel Porat, 'Personalizing Negligence Law' (2016) 91 New York University Law Review 1, where the authors put forward what they claim is a morally superior subjective account of the standard of care.

[144] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881) 108, where the author noted, even "if a man is born hasty and awkward ... his slips are no less troublesome to his neighbours than if they sprang from guilty neglect."

[145] *Vaughan v Menlove* (1837) 132 E.R. 490 (CP).

[146] Ernest J. Weinrib, 'Toward a Moral Theory of Negligence Law' (1983) 2 Law and Philosophy 37, 51.

determined". Such an approach would be contrary to the plaintiff's Kantian right.[147] In this way, the adoption of a subjective standard in these circumstances would have been inconsistent with the rule against individual self-preference i.e. acting in a manner which does not have regard for the rights of others. It would essentially allow the defendant to "unilaterally set the terms for the whole relationship"[148] and thereby undermine the dignity of the plaintiff.

Moreover, the logic of the decision in *Vaughan v Menlove* accords with Kantian rights as it is concerned with an individual's actions and the consequences thereof, rather than the subjective thoughts of that individual. Because "[t]he principle of right judges people according to their external interactions,"[149] their intentions are not relevant. Morally, the defendant was liable because his external actions were self-preferential and without regard to the rights of his neighbour. Randall criticises this view noting that, "[t]he failure to do what is impossible surely cannot support an imputation of fault, however attenuated. If tort law's morality is based on fault, this doctrine of tort law is unquestionably immoral."[150]

While Kantian-right continues to lie at the heart of Weinrib's corrective justice account of tort law, in his later work he develops the theory based on the concept of personality and the person's ability to choose their own ends.[151] Similarly, Benson, in adopting a constructivist conception of corrective justice,[152] holds that it is only through such external interactions with others that it is possible to give specificity to "personality."[153] Benson argues that Hegel's conception of personality[154] "represents a specific way of understanding ourselves as fully accountable agents, in keeping with a constructive interpretation of the moral point of view."[155]

---

[147] Ernest J. Weinrib, 'Toward a Moral Theory of Negligence Law' (1983) 2 Law and Philosophy 37, 52, where the author notes, "[b]y claiming the right to be the subjective arbiter of another's rights, the defendant was giving himself a preference which, if universalized, would destroy the very concept of right and, with it, his own claim."
[148] Ernest J. Weinrib, 'Understanding Tort Law' (1989) 23 Valparaiso University Law Review 485, 519
[149] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 Oxford Journal of Legal Studies 471, 473
[150] Susan Randall, 'Corrective Justice and the Torts Process' (1993) 27 Indiana Law Review 1, 19.
[151] Ernest J. Weinrib, *Corrective Justice* (Oxford University Press, 2012).
[152] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, 552, where the author argues that "[i]n a constructive conception, the content of the normative is worked out or "constructed" from a standpoint that is immanent in and constitutive of responsible agency: normative conceptions, such as the right or the good, are not even partly viewed as objects that are fixed prior and given to the choosing of self, independent of its activity; rather, they are conceived exclusively as entailments of that activity; rather, they are conceived exclusively as entailments of that activity, as posited by and expressive of the choosing self in its capacity for responsible agency."
[153] Ibid., 562.
[154] Georg W.F. Hegel, *Philosophy of Right* (Thomas M. Knox, trans), (Oxford University Press, 1967).
[155] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, 550.

In particular, personality is given effect by our capacity as moral agents to use things.[156] Such capacity may be limited by our external interactions with others. Thus, the moral capacity of the individual to use things will only be considered legitimate where it respects the rights of others to use things. Hence, we have a duty not to interfere with the rights of others as "such interference counts as an external imposition that restricts his will. By impinging on it without the other's consent, I *can* affect his capacity to use things."[157]

Weinrib's formalistic approach explaining the internal rationality of tort law through the Kantian notion of right certainly accords with much of tort doctrine. However, it is also open to the criticism that it is reductionist and circular in its thinking. What exactly are the "wrongs" that require the intervention of corrective justice? As an answer to this question, Stapleton notes, we are left in a situation where we are relying on the "boundaries of the particular tort"[158] to identify when corrective justice should intervene. This in turn raises a number of other questions as to the basis for these boundaries:

> ... *why* is the victim of negligence only able to recover when the defendant has been careless, while the victim of defamation need not prove this; *why* is the victim of negligence only able to recover, in general, when the defendant has caused physical harm to the victim's person or property, while damage is irrelevant in defamation? *Why* cannot the victim threatened by negligent conduct claim the protection of an injunction when such a remedy is available for certain other torts?[159]

Corrective justice requires the correction of wrongful behaviour by allocating back from the wrongdoer to the victim. But what are the wrongs that require correction? According to Weinrib the question is one of correcting normative gains and losses and it is corrective justice which tells us which gains and losses must be corrected. This logic, as many commentators have pointed out, is circular: corrective justice corrects wrongs and wrongs are those to be corrected by corrective justice.[160]

---

[156] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515, 563.
[157] Ibid., 568.
[158] Jane Stapleton, *Product Liability* (Butterworths, 1994) 176.
[159] Ibid.
[160] Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2012) 39 Florida State University Law Review 107, 114. See also Richard A. Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 Journal of Legal Studies 187; for further criticism of corrective justice's account of wrongs.

While Weinrib does offer some explanation as to why the courts should not involve themselves in consideration of policy factors beyond the correlative relationship between the parties (particularly because of their lack of democratic accountability) his internal approach would appear to discount all such interference if it affects the bipolar relationship between the parties even if introduced by way of legislation. [161]

The theory that private law - especially tort law - can be hermetically-sealed from outside influences is somewhat incredible. Nor, does it lend any coherence to the content or structure of the law.[162] Moreover, to ignore community welfare considerations is to ignore the fact that the individual resides within a community. While the protection of individual autonomy might be a strong moral basis for the justification of tort law it cannot solely centre on the 'atomistic individual.' It simply does not meet with the reality of practice. Humans are social animals and cannot attain "a life well lived" without participating in society. As Heyman observes, "[a]n individual exists "for himself," therefore, insofar as he belongs to the community. For Aristotle, freedom is ultimately political to be a free man is to be a citizen of the polis."[163]

2.3.2 Coleman's Theory of Corrective Justice

Together with Ernest Weinrib, Jules Coleman is one of the leading exponents of corrective justice theory. Underpinning Coleman's theory of corrective justice is the principle that "any

---

[161] Sandy Steel, 'Private Law and Justice' (2013) 33 Oxford Journal of Legal Studies 607, 619-620, where the author points out, that reliance on correlativity and Kantian right as the only normative basis of private law is inadequate:

> If we endorse corrective justice monism, we endorse (according to Weinrib): not tortious liability for pure omissions; highly restrictive negligence liability for pure economic loss; extensive property rights ... Moreover, the monistic position can lead to results which are intuitively very unfair. Consider the causation rule that a defendant who has wrongfully caused the claimant loss cannot reduce its liability in damages by proving that the loss or part of it would have happened anyway due to the actual or hypothetical wrongdoing of another person. This plausible rule which prevents an innocent claimant being worse off for having been wronged successively is probably impossible to rationalize on corrective justice grounds.

[162] Richard W. Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625, 664.

[163] Steven J. Heyman, 'Aristotle on Political Justice' (1992) 77 Iowa Law Review 851, 860-861. Similarly, in Richard W. Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625, 646, the author observes:

> ... if all internal or personal attributes are irrelevant to the normativity of the interaction, how can criminal law consider, as it does, the defendant's volition, state of mind, excuses, and justifications? How can tort law consider, as it does, the defendant's volition, intent, physical capacities, knowledge, special expertise, and necessity-based justifications, or the plaintiff's knowledge, physical and mental capacities, and consent? How can either area of law consider the particular pre-interaction and post-interaction holdings of an interacting party or the difference between them that is claimed to be an injury? Indeed, how can any particular person be identified as one of the interacting parties?

body of law must coherent and consistent" and must be buttressed by norms "worthy of respect" which "provide justifiable grounds for political action."[164] Coleman's approach has been to examine the current practice of tort law and assess whether that practice built up over generations, can be organised in such a way that gives effect to a guiding principle or theory.[165]Coleman adopts a very different methodology to that of Weinrib's formalist approach which was to view the moral theory underpinning tort law to be independent of the practice itself. Thus, the difference in approach can be summarised from the fact that, "[i]n Coleman's corrective justice, the form is a consequence of the substantive requirements, while in Weinrib's the form precedes the substance."[166] Coleman is therefore not a monist. He does not believe that tort law can be viewed as a "unified whole."[167] Rather, in his conception it is a mixture of factors, some "economic, others moral."[168] Essentially, Coleman considers what the current practice of tort law is and then attempts to derive a moral principle from it. Coleman is a pragmatist - in his view the principle must fit the practice. [169]

Although claiming to be a corrective justice theorist, Coleman does not reference Aristotle in his work.[170] Instead, Coleman concentrates on developing a modern version of the theory. Coleman, like Weinrib, sees morality as providing the necessary foundation to tort law and that corrective justice provides the structure by which these aims can be achieved. Coleman's thinking on corrective justice has evolved from his original "annulment theory"[171] to a position in his "mixed conception theory"[172] which brings him closer to Weinrib's formalist view.[173] Despite their differences both theorists share sufficient similarities in approach, at a macro-level at least, such that they can be considered to fall within the corrective justice family.

---

[164] Jules L. Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 Indiana Law Journal 349.
[165] Jules L. Coleman, *Risks and Wrongs* (New York: Cambridge University Press, 1992) 8.
[166] Matthew S. O'Connell, 'Correcting Corrective Justice: Unscrambling the Mixed Conception of Tort Law' (1997) 85 Georgetown Law Journal 1717, 1726.
[167] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 303.
[168] Ibid.
[169] Richard Arneson, 'Metaethics and Corrective Justice' (1995) 37 Arizona Law Review 33, 33-34, where the author opines:

> He is not saying that the human agents who established tort law as we know it over a long span of time consciously aimed to achieve corrective justice, but rather that corrective justice norms hypothetically explain tort practices in the sense that if someone were to design a set of institutions with the aim of achieving corrective justice, she might achieve this aim by establishing (for the most part) the tort institutions we actually have.

[170] George P. Fletcher, 'Corrective Justice for Moderns' (1993) 106 Harvard Law Review 1658, 1667.
[171] Ibid.
[172] Jules L. Coleman, 'The Mixed Conception of Corrective Justice' (1992) 77 Iowa Law Review 427.
[173] Although some might say that Coleman has regressed his thinking in recent works. See Jules L. Coleman, 'Epilogue to *Risks and Wrongs* (Marcial Pons, Spanish Translation 2010)'. The English translation is available at http://ssrn.com., accessed 12 May 2014.

Both theorists believe that tort law must primarily be interpreted from a non-instrumental point of view and not with external goals in mind. Moreover, both believe that at the heart of tort law is the moral principle that individuals should be held responsible for their actions.[174] Furthermore, both claim that corrective justice is separate and distinct from distributive justice in that it is the function of corrective justice to restore the holdings of the parties prior to the wrong even where the preservation of the prior holdings was distributively unjust.[175]

2.3.2.1 *Annulment Theory of Corrective Justice*

Coleman's initial thoughts on corrective justice are encapsulated by what is called the "annulment" theory.[176] Central to Coleman's annulment thesis was the notion that the grounds of rectification and the modes of rectification are separate and distinct. Corrective justice determines the grounds of rectification whereas it does not provide for a particular mode of rectification. Under this conception of corrective justice, it is not necessary that it is the injurer who pays compensation to the victim in order to annul the loss. It might be more economically efficient if such compensation is not paid by the injurer to the victim directly but instead is made from a statutory compensation scheme of some kind, for example. While Coleman's theory does not specify who compensates the victim or how that compensation is funded, any form of compensation that does not impose additional wrongful gains or losses satisfied his principle of corrective justice.[177]

---

[174] Christopher J. Schroeder, 'Corrective Justice, Liability for Risks, and Tort Law' (1990) 38 UCLA Law Review 143, 147.

[175] Jules L. Coleman, 'Moral Theories of Torts: Their Scope and Limits: Part II' (1983) 2 Law & Philosophy 5, 7.

[176] Jules L. Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 Indiana Law Journal 349; in essence, the annulment thesis requires "that wrongful (or unjust) gains and losses be rectified, eliminated, or annulled." Crucially, the annulment conception differs from Weinrib's formalist approach in that in Coleman's view "tort law is a mixture of markets and morals" although he regarded that it was "a matter of morals primarily." Throughout his work, Coleman has sought to uncover the conception of justice that lies at the heart of tort law that, in his view, is necessary if the law is to be respected and one that is defensible on moral grounds. He finds that moral heart in his conception of corrective justice. The focus of the annulment conception is on the rectification of wrongful losses. In this way the theory is backward looking in that it emphasises the *loss* and not the *wrong* that creates the loss. Coleman, like Weinrib, identifies that it is *wrongful* losses that call for the intervention of corrective justice. Thus, it is *wrongfulness* that calls for the intervention of corrective justice.

[177] Ultimately, Coleman concluded that corrective justice could not explain all of tort law; however, it did provide the best explanation for much of the practices that existed within the law. The fact that Coleman interpreted tort law as a mixture of markets and morals and not a single self-sustaining theory put him at odds with Weinrib's interpretation of corrective justice. Coleman believed that corrective justice explained much of tort law's structure. However, unlike Weinrib, he did not believe that it was necessary to explain all of tort law. Thus, under Coleman's annulment thesis recovery for the victim's loss was "governed by other considerations, including administrative ones." (Christopher J. Schroeder, 'Corrective Justice, Liability for Risks, and Tort Law' (1990) 38 UCLA Law Review 143, 149). From Coleman's point of view it was not necessary that the funds required to compensate the victim come from the wrongdoer. The source of compensation was irrelevant. Thus, Coleman's conception was

However, this approach was criticised on the basis that it undermines the independence of corrective justice as a form of justice because, if the victim's losses are to be funded on principles which are non-corrective and instead rely on factors outside of the relationship with the wrongdoer, then it is not a non-instrumental theory and is virtually indistinguishable from distributive justice.[178]The focal point of attack for many commentators was Coleman's contention that liability and recovery needed to be separated. The rejection of correlativity i.e. that the wrongdoer's conduct gives the victim a reason to act against the wrongdoer, led to accusations that his version of corrective justice was indistinguishable from distributive justice.[179] Because the payment of compensation to a wronged victim was based on non-corrective justice principles, "then corrective justice theory cannot typically explain the complete cycle of compensating the plaintiff while holding the defendant liable."[180]

2.3.1.2 *Mixed Conception of Corrective Justice*

The criticism of Coleman's annulment thesis, particularly the observations about its indistinguishability from distributive justice, has led him to reversing his position on certain aspects of it and to develop what has become known as the "mixed conception" of corrective justice.[181] Coleman recognised that the annulment thesis failed to provide for the correlativity of rights and responsibilities which is at the heart of corrective justice. This led him to conclude that the thesis was so deficient that it had to either "be augmented or abandoned."[182] The aim of this new approach is to borrow from the best parts of Coleman's annulment thesis and

---

mixture of "markets and morals" (Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 428) i.e. the moral principle of corrective justice explained the grounds for a tort action, but economic efficiency could decide who was responsible for rectifying those wrongs. The dominant feature of his theory was a moral one augmented by economic factors. Thus, Coleman's conception of corrective justice did not require the institution of tort law be the only method by which justice can be achieved: general compensation schemes from which the victim's losses could be compensated would be just as suitable.

[178] Stephen R. Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa Law Review 449, 473; Christopher J. Schroeder, 'Corrective Justice, Liability for Risks, and Tort Law' (1990) 38 UCLA Law Review 143, 149.

[179] Stephen R. Perry, 'Comment on Coleman: Corrective Justice' (1992) 67 Indiana Law Journal 381, 386.

[180] Christopher J. Schroeder, 'Corrective Justice, Liability for Risks, and Tort Law' (1990) 38 UCLA Law Review 143, 149; Richard W. Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625; Stephen R. Perry, 'Comment on Coleman: Corrective Justice' (1992) 67 Indiana Law Journal 381.

[181] Jules L. Coleman, 'The Mixed Conception of Corrective Justice' (1992) 77 Iowa Law Review 427. See also, Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 433, where the author admits:

> At the outset, I suggested one might appeal to corrective justice in ways that might sustain distributive injustices. That means that corrective justice must be distinct from distributive justice ... if corrective justice is understood in terms of the annulment thesis, it creates reasons for acting in the same way (and of the same type) that distributive justice does. If the difference between the two is to be reflected in terms of the reasons for acting each creates, the annulment view appears unable to distinguish corrective from distributive justice. I would fail, therefore, as a defensible conception of corrective justice.

[182] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 433.

combine them with the best parts of Weinrib's relational view of corrective justice, hence, the mixed conception.

Coleman maintains that his theory remains distinguishable from that of Weinrib on the basis that, rather than focusing on the wrong, it concentrates on the loss arising from it. Under Coleman's interpretation, losses involve diminution of the individual's well-being. It is the purpose of corrective justice to vindicate the well-being of every individual by rectifying adverse impacts on individual welfare and "by sustaining a system of norms that provide legitimate expectations ... about the behaviour of others."[183]

Coleman believes that the core of tort law is governed by the "practice of holding people liable for the wrongful losses their conduct has occasioned."[184]At the heart of Coleman's new theory is the moral principle that it is fair that an individual should be held responsible for the wrongful losses that his or her conduct causes. Corrective justice is the institution which determines the situations in which losses create a duty to repair by distinguishing wrongful losses e.g. "... the claims of individuals injured by neighbours, physicians, and manufacturers but not hurricanes, earthquakes, and volcanoes," from those which are the domain of distributive justice e.g. harms which result from misfortune or natural disasters.[185]

There are two key elements to Coleman's theory of corrective justice, namely, a theory of *wrongfulness* and a theory of *responsibility*.[186] Central to the morality of Coleman's theory is his emphasis on the requirement that it is wrongful behaviour which justifies the intervention of corrective justice. Coleman's notion of wrongfulness focuses on the losses incurred by the plaintiff. Under Coleman's theory of corrective justice, such losses give rise to liability only where they arise from either *wrongdoing* or the commission of a *wrong*.[187]

Coleman has defined wrongdoing as "the unjustifiable or otherwise impermissible injuring of others' legitimate interests. Wrongdoing is unjustifiable harming."[188] Wrongdoing involves a failure by the defendant to abide by community standards of normal behaviour which results

---

[183] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 352.
[184] Ibid., 198.
[185] Timothy D. Lytton, 'Smashing the Idols of Efficiency' (1993) 79 Virginia Law Review 275, 284.
[186] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 329.
[187] Ibid., 330.
[188] Ibid., 331.

in unjustifiable loss to another.[189] In essence, it represents the fault liability standard.[190] In determining whether certain behaviour is wrongful for the purposes of corrective justice, Coleman rejects the idea of retributive justice i.e. the notion that wrongfulness incorporates moral culpability.[191] Because corrective justice is concerned with rectifying wrongful losses or gains, its moral emphasis is on the consequences of human agency rather than on the character of the agent in the doing and in this way distinguishes liability in tort from criminal responsibility.[192] Thus, in cases of negligence for example, corrective justice distinguishes between "fault in the doing and fault in the doer."[193]This interpretation of wrongful behaviour explains the standard of care in negligence where the injurer's behaviour is measured objectively by reference to external factors.[194] Whether the injurer "did his best" does not matter if that "best" falls below the standard of behaviour reasonably expected of the injurer.[195] Thus, corrective justice, in trying to eliminate wrongful losses is concerned with "consequences, not character."[196] Similarly, the objective standard of care in negligence is not concerned with the moral fibre of the actor, but rather the outcomes of his or her actions and whether they result in a wrongful loss to the victim.[197] Excuses of the "I didn't mean it" variety which seek to prove there was no ill will are not acceptable.[198] Thus, culpability and blame are not necessary for wrongdoing. Consequently, excuses which seek to absolve the defendant from moral blame are irrelevant. [199] The test is whether the defendant failed "to abide by governing *community* norms" [200] regardless of motive. [201]

---

[189] Jules L. Coleman, Doing Away with Tort Law' (2008) 41 Loyola of Los Angeles Law Review 1149, 1156.
[190] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 218, where the author writes that one is at fault when one acts "negligently, carelessly or with wrongful intent."
[191] Jules L. Coleman, 'Moral Theories of Torts: Their Scope and Limits: Part I" (1982) 1 Law & Philosophy 371.
[192] Ibid., 370.
[193] Ibid.
[194] Ibid., 371.
[195] *Vaughan v Menlove* (1837) 132 E.R. 490 (CP).
[196] Jules L. Coleman, 'Moral Theories of Torts: Their Scope and Limits: Part I" (1982) 1 Law & Philosophy 370.
[197] Some commentators disagree with the "wrong in the doing and not the doer" conception pointing out that there can be "wrong in the doing" without liability, citing cases of battery based upon a reasonable but mistaken belief that it was necessary in self defence, for example. See Larry Alexander, 'Foreword: Coleman and Corrective Justice' (1992) 15 Harvard Journal of Law & Public Policy 621, 628.
[198] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 217.
[199] George P. Fletcher, 'Corrective Justice for Moderns' (1993) 106 Harvard Law Review 1658, where the author is highly critical of this aspect of Coleman's theory.
[200] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 334.
[201] Ibid., 358, where the author makes an effort at explaining what these norms of wrongful behaviour are. Essentially, Coleman believes that wrongful conduct or wrongdoing arises particularly in circumstances where individuals act contrary to local norms or conventions which prohibit unreasonable risk taking. The notion of unreasonable risk taking borrows heavily from George Fletcher's theory of non-reciprocal risk taking (George L. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537). When risk taking activity occurs within a local community it gives rise to a moral duty of repair in corrective justice. This is so, Coleman maintains, because social norms of behaviour provide members of a community with the ability to coordinate

While Coleman holds that corrective justice creates a moral duty to act, his theory of a mixed conception of corrective justice recognises the fact that other institutions or instruments may be available by which justice may be done.[202] Thus, Coleman's view of corrective justice is not contradicted by alternative compensation schemes like New Zealand's no-fault state compensation plan, for example. Coleman believes "that the nature and scope of the duties depend on the prevailing practices."[203] Thus, corrective justice is conditional, if an alternative compensation scheme is made available to the victim there is no need for the application of corrective justice. Consequently, Coleman believes that "a market-oriented approach may be as morally legitimate as a corrective justice approach, and can legitimately supplement, or even supplant, corrective justice."[204]

Coleman's definition of wrongdoing, i.e. fault in the doing, provides an incomplete account of the type of behaviour that can give rise to the intervention of corrective justice and tort law. Tort law not only recognises losses which arise from unjustifiable harming of another's legitimate interests, it also acknowledges that losses may be wrongful even when justified e.g. cases of necessity where the defendant damages property belonging to the plaintiff in order to prevent more serious harm to another.[205] In such cases, compensation is recoverable by the plaintiff for the harm caused by the defendant. In order to deal with cases where the defendant has acted in a wrongful, albeit justified, manner Coleman has created a second category of wrongfulness, which he describes as 'wrongs', in which to absorb such cases. [206]

---

their activities in such a way that is beneficial to all. Members of such a community benefit from these norms because they provide for compensation when losses contrary to those norms are imposed and they are forward looking in that the norms indicate how individuals should behave. As such, these norms create a moral obligation on the part of the members of that community to comply with them. According to Coleman, because corrective justice involves "justice between the parties" it is circumscribed to those existing within a local community. Consequently, global norms such as economic efficiency or distributive justice principles cannot apply.

[202] Jules L. Coleman, 'The Practice of Corrective Justice' (1995) 37 Arizona Law Review 16, 20, where the author notes that, "whether one has a duty in corrective justice within a particular community can depend on the other practices in place for allocating losses."

[203] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 403.

[204] Gerald J. Postema, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) 103 Yale Law Journal 861, 872.

[205] *Vincent v Lake Erie Transport Co.*, 124 N.W. 221 (Minn. 1910).

[206] Gerald J. Postema, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) 103 Yale Law Journal 861, 876, where the author made the following observation of Coleman's approach to the issue:

> If, according to the principles of corrective justice, an injurer acting with full justification nevertheless has a duty to compensate victims for any resulting losses, then it seems that we must abandon the idea that corrective justice is concerned only with redress of wrongful losses. Any attempt to charge the injurer with wrongdoing will be defeated by his justification on the grounds of necessity. However, Coleman rejects this way of adjusting his theory; he

Losses arising from wrongs also require the intervention of corrective justice according to Coleman and are defined as "actions contrary to rights."[207] Wrongs are concerned more with the nature of the interest affected than with conduct which results in harm. Thus, a wrong can be committed even in the absence of wrongful conduct. That is why "the victim's right to recover can be separated from the moral character of the injurer's conduct"[208] and explains why losses which are the result of "permissible or praiseworthy, not culpable" behaviour may be the subject of corrective justice as well.[209]

Thus, in order to determine whether the injurer's actions are a "wrong" it is first necessary to examine what Coleman means by a "right" because under his formulation wrongs are invasions of rights. Coleman defends a conception of rights which set out the normative framework which governs the legitimate transfer of property from one party to another. A failure to respect these norms of transfer is a failure to respect the rights of others.[210] Coleman identifies the content of such rights in two ways i.e. property rules and liability rules.[211] Property rules grant "the power to exclude and alienate."[212] Under property rules, an individual is entitled to require that his or her consent is first obtained before a transfer can be legitimate. Liability rules entitle the victim to compensation where his or her rights have been violated. Under liability rules, an individual does not have the authority to demand consent before the transfer but is entitled to compensation should his or her property be transferred without his or her prior consent.[213] In Coleman's view, property and liability rules provide a framework regarding the norms to be protected within any transaction between parties. Thus, whether an action is a wrong depends on the transaction rule to be applied. Which transaction rule to be applied (property rule, liability rule or combination of the two) will depend on the underlying norms governing the particular transaction.[214]

---

proposes to recognize a category of "wrongs that are not always wrongs," that is, rights invasions which are "wrong" but do not count as full-fledged wrongdoings because they are justified.

[207] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 332.
[208] Ibid.
[209] Ibid., 334.
[210] Ibid., 339.
[211] Drawing inspiration from Guido Calabresi & A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089.
[212] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 336.
[213] Ibid.
[214] Ibid., 340. See also 341-342, where the author summarises the position as follows:

> The underlying normative theory of rights tells us what the appropriate transaction rule should be in various empirical circumstances. The transaction rule in turn specifies the conditions of legitimate transfer and in doing so gives content to particular entitlements. Only then can we determine whether compensation is owed, and, if it is, whether

A victim's rights can be invaded in two ways, unjustifiably and justifiably.[215] An unjustifiable invasion of a victim's rights is considered a "violation" and a justifiable invasion of a victim's rights, an "infringement.[216] Wronging can occur even in circumstances where the wrongdoer is not morally culpable or his or her actions are justified. The right to repair arises if the conduct is invasive of a right, regardless of the wrongdoer's motivations.

Common to both wrongdoing and wrongs is the requirement that the losses which arise therefrom be brought about by human agency i.e. they must be the result of the injurer's conduct if they are to invoke corrective justice. According to Coleman, it is the act of human agency, not necessarily *culpable* human agency, which is the essential feature of corrective justice.[217] Establishing that the loss was caused by the injurer's agency is critical in Coleman's view for two reasons. First, wrongful losses can only arise from human agency. Second, establishing human agency fulfils the requirement that that loss is the injurer's responsibility.[218] Hence, "agency-defeating excuses are relevant in corrective justice because they bear on the "injurer's" responsibility as well as on the moral character of the victim's loss."[219]

It is through his conception of wrongdoing and wrongs that Coleman explains the notions of fault liability and strict liability in tort. Cases of fault liability involve wrongdoing or are an unjustifiable invasion of the victim's rights. Cases of strict liability on the other hand are explicable on the basis that they are rights infringements i.e. justifiable wrongs.[220] Thus, while one can suffer a wrongful loss through wrongdoing or by the violation of a right (fault liability) one can also suffer a wrongful loss by suffering a rights infringement even though such an infringement does not involve wrongdoing or the violation of a right (strict liability). Furthermore, Coleman distinguishes between wrongdoing and wrongs on the basis that wrongdoing is non-relational in the sense that it is the conduct that is a wrong but not to anyone in particular. Wrongs on the other hand are relational in the sense that they are wrongs but they

---

it is owed because a right had been invaded, or because rendering compensation is part of what one has to do in order to respect the constraints that rights impose. The conceptual framework provides the meaning of analysis of rights; it helps us understand what wrongs are. The normative framework determines which of a person's actions wrong the rights of others.

[215] Jules L. Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 Indiana Law Journal 349, 369.
[216] Ibid.
[217] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 334.
[218] Ibid., 335.
[219] Ibid.
[220] Jules L. Coleman, 'Moral Theories of Torts: Their Scope and Limits: Part II" (1983) 2 Law & Philosophy 5, 10.

constitute invasion of a right owed to someone in particular.[221] In a sense, therefore, wrongdoing is omnilateral and wrongs are bilateral.[222]

Coleman's theory of corrective justice holds that individuals have a moral duty to repair the wrongful losses for which they are *responsible*.[223] Coleman's theory of responsibility premised on corrective justice. Coleman believes that one is responsible for wrongful losses which result from autonomous human agency. Responsibility is established on the basis of proving that the acts of the wrongdoer caused the victim's wrongful losses. However, according to Coleman, while "[l]iability may require responsibility ... responsibility does not require causation."[224] Establishing causal agency between the wrongdoer's actions and the harm may not be sufficient. Because wrongful losses can be created in one of two ways, wrongdoing and wrongs, Coleman's theory of responsibility will depend on the wrongful loss created. For example, where the loss is occasioned by wrongdoing, responsibility for it may require fault, whereas fault may not be required where the loss is occasioned by infringement of a right.[225] One must not confuse mere "authorship" in terms of causation with moral/legal responsibility.[226] Being an author of an act involves a "morally neutral notion of casual responsibility" and simply

---

[221] Jules L. Coleman, 'Epilogue to *Risks and Wrongs* (Marcial Pons, Spanish Translation 2010)'. The English translation is available at http://ssrn.com., accessed 12 May 2014..

[222] Coleman identifies the decision of *Palsgraf v Long Island Railroad* 162 N.E. 99, 101 (N.Y. 1928); as an example of this distinction. In that case, employees of the defendant had tried to assist a passenger board a train which was moving at the time. One railway employee who was situated on the platform tried to assist the passenger by pushing him onto the train while another, who was standing on the train, tried to pull him on board. In so doing, they caused the passenger to drop a package he was carrying. The contents of the package were not identifiable to the railway employees but contained fireworks which caused a small explosion when it fell to the ground during the incident. The plaintiff, who was standing some ten feet down the platform, was injured when heavy weighing scales fell on her during the ensuing panic. The question before the court was whether the plaintiff was entitled to recovery from the defendant in negligence. Under Coleman's interpretation, Cardozo CJ held for the majority that Mrs Palsgraf was not owed a duty of care by the defendant railroad. While the behaviour of the employees of the railroad may have been wrongful, it did not create a duty as it was not a wrong to her. In other words, wrongful behaviour, a failure to meet a norm of good and proper behaviour cannot by itself give rise to a duty. Many commentators have criticised Coleman's account of wrongfulness on the basis that it fails to adequately articulate the appropriate norms of behaviour, it is formal and is devoid of content. In Gregory Keating, 'The Priority of Respect Over Repair' (2012) Legal Theory 293, 316; the author writes:

> ... it does not contain within itself any criterion of wrongfulness. It latches onto many torts because we have independent reasons for thinking of torts as wrongs, and many tortious wrongs cause losses. We supply the content that the principle requires without remarking to ourselves that the principle is otherwise empty. This is perfectly natural. We already know that tort is the canonical law of wrongs. Without that subconscious sleight of hand, however, the principle of corrective justice would wander the law looking for wrongful losses to repair.

[223] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 345.
[224] Ibid., 274.
[225] Ibid., 346.
[226] Ibid., 274.

implies that the act is yours and no-one else's.[227] However, such authorship is not necessarily sufficient to establishing responsibility for the loss. Additionally, what is required to accompany this "thin" form of responsibility, as Postema describes it, is a "thick" form of responsibility.[228] While the "thin" form of responsibility which Postema refers is free from moral analysis, the "thick" form of responsibility requires that the wrongful loss connected to that aspect of the injurer's conduct that is at fault.

In order to be subject to correction, the wrongful loss must "fall within the scope of risks that make the conduct at fault."[229] In other words, Coleman believes that the losses which result must satisfy the rules on legal causation sometimes known as proximate cause or remoteness. In cases of wrongful losses arising from wrongs, Coleman acknowledges that his theory of responsibility will not apply in the same way because such losses which arise from rights infringements do not require faulty action. In such situations, therefore, it is sufficient in his view if it can be established "that the loss be causally or otherwise connected in the appropriate way with those aspects of the agent's conduct that make it rights invasive."[230]

However, notwithstanding his acceptance of the centrality of corrective justice giving special reasons for an individual to act as a result of his actions, Coleman does not wholeheartedly endorse all aspects of the relational view. In particular, he continues to reject the aspect of the relational view which emphasises that it is the *wrong*, as opposed to the *loss*, which must be annulled by the wrongdoer.[231] Thus, Coleman endorses a mixed conception approach to corrective justice and supplements his annulment view that the focus of corrective justice is on annulling the loss with the relational view that corrective justice gives the wrongdoers special reason for acting because of the consequences of his or her actions. In summary, the relational view provides us with an answer as to who owns the losses – those who are responsible for them, while the annulment view tells us that the wrongful losses which result should be

---

[227] Gerald J. Postema, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) Yale Law Journal 861, 878.
[228] Ibid., 879.
[229] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 347.
[230] Ibid. See also, Richard W. Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625, 681. This approach to causation has been criticised by the author who observes that in terms of liability it fails to distinguish between omissions and positive acts, "[t]hus the duty to repair, being based solely on volitional causation, extends not only to losses that you affirmatively cause, but also to those that you fail to prevent-that is, it extends to *all* losses. In this way, therefore, it does not accord with actual tort practice."
[231] Richard W. Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625, 681.

annulled. Consequently, Coleman, while accepting the relational aspect of Weinrib's view, ultimately rejects the central aspect of his approach which is the annulment of wrongs. Thus, under the mixed conception we each have primary rights and duties which if invaded or violated give rise to secondary rights, "... when I harm you in a way that violates your first-order right, you have a second-order right against me to repair the resulting damage and I have a corresponding second-order duty to provide it."[232] Coleman, therefore, very much rejects Weinrib's strict version of formalism.[233]

2.4 Corrective Justice and Strict Liability

Both Weinrib and Coleman come somewhat unstuck in their analysis of tort law when seeking to explain, what Weinrib describes as, "the pockets of strict liability found in the common law."[234] This failure to adequately account for strict liability is a damaging blow to the legitimacy of corrective justice theory as an explanatory moral theory of tort law. As strict liability forms so much of tort law an inability to account for its existence severely weakens their claims. Keating summarises the difficulties faced by these theorists when dealing with the challenge of strict liability:

> Because of the emphasis that they place on wrongdoing, corrective justice conceptions are attracted to negligence liability and uneasy with strict liability. Negligence liability is attractive to corrective justice conceptions because (and to the extent that) it grounds the injurer's duty to repair in wrongdoing by the injurer. Strict liability is unattractive because (and to the extent that) it relaxes the requirement of wrongdoing on which corrective justice theories pitch the duty to repair.[235]

In accounting for the pockets of strict liability which exist within tort law, Coleman's approach has been to minimise the significance of strict liability. First, he argues that two core areas of strict liability, namely, vicarious liability and product liability lie outside corrective justice

---

[232] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 437.
[233] Ibid., where the author concludes:

> Whether or not corrective justice imposes moral duties in a particular community depends, in my view, on the existence of other social or legal practices. My view, then, is that in a New Zealand-like situation corrective justice imposes no moral duty to repair! Whereas standard legal theory presupposes that a just legal system enforces rights and responsibilities derived from moral principles whose status is independent of law, I argue for the very different thesis that the status of corrective justice is not necessarily independent of legal or other relevant social practices. In other words, legal practices can affect the existence and scope of moral principles.

[234] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995).
[235] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 202.

theory and tort law. Essentially, Coleman somewhat implausibly attempts to banish two of the most significant aspects of tort doctrine entirely. He argues that while the "core" of tort law is based on the morality of corrective justice, its "penumbra"[236] is based on market principles, hence, the description of Coleman's theory as "a mixture of markets and morals."[237]Coleman separates cases involving product liability, "from the general discussion of accident law" on the basis that it is an "unsettled doctrine" which "should be governed by distinct principles."[238] Instead, Coleman attempts to justify the strict liability nature of product liability on the basis of "a hypothetical contract model."[239]

Second, Coleman argues that other areas of strict liability such as that of liability for ultra-hazardous activities[240] or private necessity[241] can be explained within normal corrective justice principles. For example, Coleman's approach towards cases such as *Rylands v Fletcher*[242] is to reinterpret them as cases actually involving fault. In *Rylands*, the defendant was found liable for flooding caused to neighbouring property when a reservoir he had constructed on his property burst. The water from the reservoir found its way into some abandoned mine shafts beneath his property and flooded the plaintiff's adjacent property. Despite an absence of negligence on the part of the defendant, he was found liable for creating a risk resulting in damage which arose from the "non-natural" use of his property. In explaining the decision, Coleman offers two theories both of which bring it within the ambit of fault liability. First, it could be said, or so Coleman argues, that the very construction of the reservoir by the defendant, given the attendant risks, was negligent particularly when one considers that "[r[ainfall in the United Kingdom is adequate for all reasonable uses."[243] Second, the very act of storing water in this manner is an ultra-hazardous activity. No matter how carefully done, it represents an unreasonable risk to others. Thus, the very act of storing the water is negligent: "[t]he negligence is not in the manner of doing, but in the very doing itself."[244] Essentially, Coleman's approach is to re-interpret a traditionally well-known strict liability tort as one of

---

[236] Gerald J. Postema, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) Yale Law Journal 861, 871.
[237] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 428.
[238] Ibid., 407.
[239] Ibid., 419.
[240] *Rylands v Fletcher* (1868) LR 3 HL 330.
[241] *Vincent v Lake Erie Transportation Co* 124 N.W. 221 (Minn 1910).
[242] *Rylands v Fletcher* (1868) LR 3 HL 330.
[243] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 368.
[244] Ibid., 369.

negligence.[245] This analysis, as Postema acknowledges, "strains credibility, and the credibility it has turns on the plausibility of Coleman's notion of fault in the action."[246]

Cases of strict liability other than *Rylands v Fletcher* or product liability are interpreted by Coleman as "rights-invasions" which, although justified, can still amount to "wrongs requiring repair" under corrective justice principles. According to Coleman's theory of corrective justice, harming can occur with the invasion of another's rights whether or not the conduct in question is wrongful or not. Such rights protect the autonomy of the individual by securing compensation for the victim in circumstances where his or her rights have not been respected. In this way "strict liability is understood as the result of conduct contrary to the demands of rights ownership in which compensation ex post redresses the wrong of failing to secure consent ex ante."[247] Thus, the wrong is the invasion of the right. The failure to obtain the rights holder's consent gives rise to the wrong and compensation is awarded for that wrong. This is so in some cases, regardless of whether the conduct in question is otherwise considered reasonable or justified.[248]

Coleman in his later work seeks to equate strict liability with fault liability on the basis that both involve a "duty not to harm" and, thus, the only difference between the forms of liability lies in the content of each. According to this interpretation, in order to discharge the duty not to harm in strict liability one must simply not harm another. To discharge the duty under fault liability one must not harm another *negligently*. Once again, Coleman's efforts to explain strict liability fall somewhat short. If corrective justice is based on wrongful conduct it is difficult to

---

[245] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 371.

[246] Gerald J. Postema, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) Yale Law Journal 861, 895.

[247] Jules L. Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 Indiana Law Journal 349, 376.

[248] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 371. This is how Coleman rationalises private necessity cases in tort like the famous U.S. decision in *Vincent v Lake Erie Transportation Co.* 124 N.W. 221 (Minn 1910). In that case, the owner of a dock refused to allow the captain of a ship to continue mooring his vessel at the dock after the expiration of the contract between them. The captain refused to move his ship because of his fear of an impending storm. The ship remained and caused significant damage to the dock during the course of the storm. The court held that the dock owner was entitled to compensation from the captain of the ship for the damage caused to the dock. Notwithstanding the fact that the captain's behaviour was reasonable in the circumstances i.e. deciding that it was much riskier to leave the dock in the middle of a storm than to remain, the dock-owner was entitled to compensation for the damage suffered on the basis that his rights had been invaded by the captain's refusal to move. The refusal to remove the ship was contrary to the dock-owner's rights. Even if this was a rational and justifiable decision on the captain's part (given the impending storm) it was, nevertheless, an invasion of the dock owner's rights. Failure to obtain consent initially, justified the requirement to pay compensation afterwards.

envisage cases of strict liability where a defendant acts justifiably but is nevertheless held liable for his or her conduct.[249]

Keating fundamentally disagrees with Coleman's approach towards strict liability. He forcefully points out that strict liability and fault liability are completely distinct. While fault liability imposes liability only for unreasonable conduct, strict liability "imposes liability on *reasonable* conduct."[250] As an alternative, Keating suggests that a superior interpretation of tort law would better explain the role of strict liability in a field dominated by fault-based torts. He argues that strict liability (like all of torts) can best be explained on the basis of primary and secondary duties owed to others. In cases of strict liability, the defendant owes a duty to carry out activities in a reasonable manner. Where he or she does so, but causes physical harm to another, he or she is under a secondary duty to repair that harm. Thus, Keating concludes:

> Whereas negligence liability is predicated on primary criticism of conduct, strict liability is predicated on a secondary criticism of conduct. In negligence, the infliction of harm is wrongful; in strict liability, the failure to step forward and repair a harm faultlessly inflicted is wrongful. Strict liability asserts that the costs of necessary or justified harms should be borne by those who benefit from their infliction, not by those whose misfortune it is to find themselves in the path of valuable activity.[251]

Keating has been very critical of Coleman's explanation of strict liability, noting that any theory of tort law which does not adequately account for its existence is deeply flawed. He observes that, because Coleman's approach has been to either equate strict liability with fault or in the alternative, to exclude it from corrective justice theory entirely, this basically means that it "flunks this test" of being a credible theory of tort law. [252]

If Coleman's efforts at explaining strict liability fall short, Weinrib's approach does not fare much better as, within his work, he spends even less time at attempting to rationalise it. In *The Idea of Private Law*, Weinrib initially attempts to align strict liability with corrective justice principles on the basis that as "[u]nder strict liability *causa*, not *culpa*, is paramount: liability follows from the occurrence of the damage at the defendant's hands, regardless of whether the

---

[249] For example, in *Vincent,* it could be argued that when faced with the alternative of untying his ship and allowing it be destroyed in the storm or leave it where it was contrary to the dock owner's wishes, the captain could not be said to be acting wrongfully.
[250] Gregory Keating, 'The Priority of Respect Over Repair' (2012) Legal Theory 293, 324.
[251] Ibid.
[252] Ibid., 323.

defendant's behavior was faulty."[253] The emphasis, he argues, on the correlative relationship between the parties, means that distributive considerations outside of that private relationship do not enter the fray, thereby supporting the pre-eminence of corrective justice considerations in line with his central thesis.

However, Weinrib refuses to classify strict liability as falling within the realms of corrective justice theory. First, he argues that it is incompatible with his concept of the Aristotelian notion of equality between the parties. In Weinrib's view this is so because strict liability tends to focus unilaterally on the interests of the plaintiff and does so at the expense of consideration of the defendant's interests and autonomy. This approach is contrary to the corrective justice approach, which "is supposed to be a bilateral relationship of equals."[254] Because the rights of the plaintiff under strict liability are engaged simply on the basis of causation of injury and because the right is only engaged when harm results, it cannot be linked to a duty by the defendant to avoid that harm at the time the plaintiff's right is invaded. In this way, strict liability reinforces its "one-sideness: strict liability has right without duty."[255] Additionally, this one-sided inequality, according to Weinrib, "fails to respect agency as a normative phenomenon."[256] The basis of liability in negligence is the absence of reasonable care. Morally speaking, this standard is in line with corrective justice principles. This standard implies a certain "choice" on the part of the defendant regarding the consequences of his or her actions. Strict liability undermines this "choice" on the basis that "a choice which entails a concealed consequence is as to that consequence no choice."[257] Thus, the actions of the defendant in such circumstances cannot be considered wrongful. Similarly, the difficulty can be explained in Kantian terms in that "the protection of the plaintiff's rights cuts off the defendant's moral power to actualize his purposive capacity, so that the vindication of the plaintiff's agency comes at the price of denying the defendant's."[258]

Having undermined the theoretical basis of strict liability as an instance of corrective justice, Weinrib then seeks to explain the existence of what he labels "problematic doctrines" such as vicarious liability, nuisance and cases of private necessity.[259] Essentially, Weinrib finds a home

---

[253] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 171.
[254] Ibid., 177.
[255] Ibid., 178.
[256] Ibid., 180.
[257] Ibid.
[258] Ibid., 182-183.
[259] Ibid., 183.

for each of these doctrines within fault liability. He posits, that because vicarious liability imposes liability on an employer for the wrongful acts of his or her employees, it generates liability for the employer as an imputed form of negligence.[260] He cites, for example, the requirement that the injured party prove that the individual who inflicted the harm was an employee (or in a relationship akin to that of an employee) of the defendant.[261] Establishing the employer/employee relationship in this regard is dominated, in Weinrib's view, by the need to establish the employee's integration in the employer's business or "control" over the employee's activities.[262] Secondly, a close connection between the work of the employee and his or her wrongful actions must be satisfied under the doctrine. This requirement of establishing a closeness between the act done and the work of the employee results in the creation of a "legal persona, the-employer-acting-through-the-employee"[263] who can be fixed with liability for the injuries suffered by the plaintiff. While Weinrib almost concedes that this interpretation of the practice strains credulity, he dismisses such concerns somewhat unconvincingly on the basis that "the law is full of fictions, as well as concepts that cannot be empirically validated."[264] Hardly a satisfactory response for a monist supporting theory of tort law.

Weinrib also argues that liability for abnormally dangerous activities is not a case of strict liability but instead is an extension of fault liability principles.[265] Weinrib puts forward three reasons why liability for such harm is fault-based. First, he notes that the availability of defences such as acts of God or acts of third parties shows that an element of culpability must exist in order to create liability.[266] Second, he argues that liability, therefore, for such harm is a limited form of negligence based on the fact that the activities in question are so risky that the defendant must be expected to take greater care. Consequently:

> Because each increase in the riskiness of the defendant's conduct brings a corresponding decrease in the court's receptivity to exonerating considerations, there must be some point on this continuum where activity is sufficiently risky that lack of care can be imputed from the

---

[260] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 184–187.
[261] *The Catholic Welfare Society & Others v Various Claimants & The Institute of the Brothers of the Christian Schools* [2012] UKSC 56.
[262] *O'Keeffe v Hickey & Others* [2008] IESC 72.
[263] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 186.
[264] Ibid.
[265] Ibid., 187
[266] Ibid.

> very materialization of the risk. Strict liability for abnormally dangerous activities represents the law's judgment that such activities are at that point.[267]

Weinrib notes that strict liability applies to the activity itself rather than particular acts related to that activity.[268] Such activity is permissible because although abnormally dangerous, it is deemed to be improbable. Thus, when such activity does result in harm then the law assumes that the defendant failed to carry out the activity in a reasonably safe manner. That is why "[t]he effect of liability "without fault" is only to relive the plaintiff of the need to locate the specific faulty act."[269]

One would imagine that Weinrib would have greater difficulty in fitting the nuisance action into his conception of corrective justice. Unlike other instances of strict liability, nuisance does not focus on the creation of unjustified risks of harm. Instead, its focus is on the parties' entitlements to property. However, Weinrib disagrees. He justifies the law of nuisance on the basis of Kantian right. That is to say, the plaintiff's interest in his or her property is an external manifestation of his or her right to exist as a self-determining agent. This notion of a Hegelian property right includes the right to the use and enjoyment of one's property. This notion accords with the Kantian idea of equality – one should be entitled to use one's property to the extent that it does not unduly interfere with one's neighbour. Thus, "[p]arties whose uses conform to what is ordinary treat each other equally as owners, because each use allows the other what it takes for itself."[270]

---

[267] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 188.
[268] Ibid.
[269] Ibid.
[270] Ibid., 192. Weinrib seeks to justify cases of private necessity or what he terms cases of "incomplete privilege regarding the preservation of property." (195). Essentially, Weinrib explains the ship owner's actions in *Vincent v Lake Erie Transportation Co.* on the basis that the law recognises a privilege which allows one to lawfully use the property of another as long as the property protected is of greater value than the potential damage to the property used. Weinrib views this privilege as incomplete because, while the use is so recognised, one is still obliged to pay compensation for the damage caused from the use. (196). The *Vincent* case represents a peculiar challenge – the boat owner's actions were deemed lawful and yet he was liable for the harm. If there is no wrongful conduct how does one justify the imposition of liability on the boat owner on the basis of tort principles? In Weinrib's view, you do not. Instead, he relies on restitutionary principles to explain it. (197). The owner of the boat was unjustly enriched from his actions not because he preserved his property but because he benefited from his use of the plaintiff's property. Weinrib goes on to justify the privilege on corrective justice principles relating to property. The privilege can be justified in two parts. First, one must justify the boat owner's privilege of using the property of another in order to preserve his own property. Weinrib finds a basis for such a privilege in his Kantian notion of rights. Second, the use of the dock owner's property can be lawful only where the value in preserving the boat exceeds the value in the potential damage done to the dock. Weinrib justifies this aspect of the privilege on the basis that for the privilege to accord with Kantian right the use of the dock by the owner of the boat must respect the plaintiff's ownership of the dock and, "[s]ince value is an aspect of property, it would

2.5 Corrective Justice and Remedies

Critics of corrective justice theory would contend that it fails to adequately explain the role of the varied remedies available in tort law. The Aristotelian notion of corrective justice requires that, where an involuntary transaction occurs between the defendant and the plaintiff, the transaction must be undone or the inequality created be equalised. In Aristotelian arithmetical terms, the defendant has wrongfully gained at the expense of the plaintiff. Those gains must be subtracted from the defendant's holdings and added to the plaintiff's in order to restore the equality, and thereby justice, between the parties. Perfect equality would result when the things taken from the plaintiff are fully returned by the defendant. However, much of tort law does not involve the actual taking of goods which can then be easily returned to the plaintiff in full. Conversion probably represents the closest tort which fits this notion and even then the return of the goods taken does not involve compensation for the lost opportunity of dealing with those goods.[271] Most torts involve taking things which can never be given back such as damaging another's reputation (defamation) or causing physical injury to another (negligence). It is a reality that, in most cases, tort law cannot achieve its stated primary aim which is to make the plaintiff whole by returning to him that which was taken away.

Thus, the credibility of corrective justice theory suffers in that it is unable to account for the nature and range of remedies available to a plaintiff in tort. First, it fails to explain the role of compensatory damages in tort law. Aristotle identified money as the "one standard by which all commodities are measured" and therefore should be the standard which regulates the exchange between the parties.[272] Thus, in Aristotelian terms financial compensation is the method by which an involuntary exchange could be equalised, thereby restoring justice between the parties. However, while the stated aim of corrective justice theory is to make right

---

not be an affirmation of property to save the less valuable at the expense of the more valuable." (202). Thus, the privilege to use the dock can be justified in Kantian terms when the value of the preserved property exceeds the value of the potential damage to the dock. In this way Weinrib seeks to rationalise private necessity cases on the basis of corrective justice. The use of the property of another in cases of emergency is considered a privilege and is justified under Kantian right if the property preserved is greater in value than the value of the potential damage to the property of the other. However, notwithstanding that the act was justified on the basis of a Kantian right, the plaintiff will be entitled to compensation for the damage incurred on the basis of an unjust enrichment.

[271] Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2012) 39 Florida State University Law Review 107, 112.

[272] Aristotle, *The Nicomachean Ethics, Book V: Justice* (Penguin Books: London 2004) 125.

by erasing the wrong or repairing the wrong through the payment of compensation, in the vast majority of cases this will not be possible.[273]

Instead, tort law is forced to acknowledge the fact that financial compensation is a second best way of remedying the wrong. That is why corrective justice theorists focus on compensating the "loss" rather than erasing or repairing the "injury". However, the notion that financial compensation can replace the loss of one's limbs, for example, as if balancing the books like an accountant is unrealistic because, "broken legs don't zero out."[274]

Weinrib's approach to this criticism is to speak of normative gains and losses and not material ones.[275] In his view, wrongful gains result when one party has more after the transaction than he or she should have according to the relevant norm governing the transactional relationship between the parties.[276] However, while this approach "has a certain elegance to it ... it is circular."[277] In other words, corrective justice requires that we undo wrongful normative gains. These normative gains are those that corrective justice indicates we must undo.[278] Nor does Weinrib's interpretation explain how we can undo the wrongful losses by the payment of financial compensation. All the money in the world cannot replace the use of one's limbs, for example.[279]

---

[273] Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2012) 39 Florida State University Law Review 107, 110, where the author observes:

> ... what if Tom breaks Jerry's leg? Jerry still has his leg, so it can't be allocated back. If Tom could unbreak Jerry's leg, that would seem in order, and we might think of it as an allocating back of sorts. Healing Jerry's leg restores what he started with. But already we are one step removed from an allocation of a good back from one person to another. Repair is not the same as return.

[274] Ibid.
[275] Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277.
[276] Ibid., 289.
[277] Scott Hershovitz, 'Corrective Justice for Civil Recourse Theorists' (2012) 39 Florida State University Law Review 107, 114.
[278] Ibid.
[279] Ibid., 117, where Hershovitz points out:

> The Aristotelian picture is seductive because it holds out the promise that we can go back. We can return, and when that doesn't work, we can repair, and when that doesn't work, we can replace, and when that doesn't work, we can make whole by rendering indifferent. It may be that we should do these things when we can. But the fundamental demand of corrective justice cannot be that we allocate back, reverse wrongful transactions, or return a victim to the position she would have been in absent the wrong. All too often we can't do anything like that, and we can never do it completely. Yet, we still must find a way to right wrongs.

In his later work, Weinrib sought to explain the conundrum by instead viewing the invasion of the victim's rights as being of a "qualitative" or "quantitative" character.[280] When the injury is "qualitative" then the victim is entitled to the return of the very thing lost i.e. the return of the goods, the granting of an injunction preventing the continuation of a nuisance, for example. On the other hand, when the right invaded is "quantitative" then an award of financial compensation equivalent in value to the damage is more appropriate.[281]

Nevertheless, and despite Weinrib's attempts to argue otherwise, the role of remedies in tort law is somewhat aspirational in that it is quite often impossible to restore the parties to their former positions post the injury by the award of financial compensation alone.[282] Kelly highlights the inadequacy of awarding pecuniary compensation for non-pecuniary harm noting that it lies on a flawed assumption that "a relationship of some kind can be established between two things which are *ex hypothesi* unrelated: money and non-pecuniary injury."[283] Consequently, the next best option is to financially compensate the victim. While compensation cannot change the past it can "reshape the present (and, by implication, the future)" by easing the suffering of the plaintiff through the award of financial compensation.[284] Awarding damages to the paralysed victim of the defendant's negligence will never replace what the victim has lost but it can provide some solace and comfort to the victim by easing the financial burden he or she has incurred because of the defendant's wrongful behaviour. The victim can be restored, "economically if not anatomically", to the position he or she was in before the defendant's wrongdoing.[285] Kelly criticises this notion that financial compensation can ever replace what the plaintiff may have lost by way of physical injury:

> To assume an inherent capacity in money to cancel pain in even approximately, even remotely the same way as it cancels pecuniary loss, is not unlike assuming that a defect in height can be remedied in some way by increasing width, or a defect in volume by increasing weight. The two scales-injury on the one hand, money on the other-are entirely different; and if, as a matter of actual practice, we find them brought into association, it cannot be because of the notion of "compensation", but must be, rather, because of some factor which lies deeper and is perhaps no longer consciously felt.[286]

---

[280] Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277, 287.
[281] Ibid.
[282] Erik Encarnacion, 'Corrective Justice as Making Amends' (2013) available at http://ssrn.com., accessed 16 May 2014.
[283] J. M. Kelly, 'The Inner Nature of the Tort Action' (1967) 2 Irish Jurist 279, 284.
[284] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 108.
[285] Ibid., 114.
[286] J. M. Kelly, 'The Inner Nature of the Tort Action' (1967) 2 Irish Jurist 279, 285.

Hieronymi acknowledges that damages cannot always put the victim back into the position he or she was in before the wrong was committed. However, she contends, that, when the courts award such damages, they are not only attempting to compensate the victim: they are also making a declarative statement that the harm is the wrongdoer's responsibility and in so doing is restoring the victim's social standing – it sends out the message that you should not be treated in this way and thereby protects the dignity of the victim.[287] Hershovitz notes that this interpretation also explains awards made for damages which are not easily valued in monetary terms such as pain and suffering. In some instances, there is no amount of money that a victim will agree to in order to endure pain and suffering. However, the award of damages for such loss highlights the significance of such harm and identifies the defendant as being responsible for causing it. Thus, "when a tort suit is successful, representatives of the community hold the wrongdoer responsible. That public vindication may abate the threat that wrongdoing poses to its victim more effectively than any action the victim might take on her own."[288]

Second, corrective justice theory cannot explain the role of punitive/exemplary damages in tort law and any interpretation of tort law that fails to make "conceptual space for punitive damages as a remedial response to wrongdoing fails to capture the actual practice."[289] Weinrib, for example, views damages in tort law as serving an entirely compensatory function.[290] Corrective justice essentially views tort as a remedial institution and the concept of punitive damages does not sit well within that structure.[291] Punitive damages or exemplary damages play an instrumentalist role in tort law. It could be argued that they are designed to deter similar future behaviour from recurring by making an example of the defendant through a financial form of punishment.[292] Corrective justice theory, particularly that of Weinrib, eschews instrumentalism and therefore such damages are anomaly that requires explanation.[293]

---

[287] Pamela Hieronymi, 'Articulating an Uncompromising Forgiveness' (2001) 62(3) Philosophy and Penomenological Research 529.

[288] Scott Hershovitz, 'Tort as a Substitute for Revenge' (2013) available at http://ssrn.com accessed on 11 May 2014.

[289] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 141.

[290] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 135. See also, Ernest J. Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University Law Review 273, 290, where the author observes, "[s]o far as content is concerned, punitive damages are inconsistent with the role of rights in corrective justice."

[291] Law Reform Commission, Report on Aggravated, Exemplary and Restitutionary Damages (LRC 60-2000).

[292] Ernest J. Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University Law Review 273, 290.

[293] Ibid., where Weinrib notes:

When awarding punitive damages, the courts are essentially punishing the defendant for his or her wrongdoing by way of a civil action in tort. This punishment takes the form of the imposition of a monetary fine which results in the plaintiff receiving an undeserved financial windfall. Rather than restoring equality by awarding damages financially equivalent to the loss suffered, the plaintiff is awarded more than he or she is entitled to. The imbalance in the relationship between the parties is essentially over-corrected. The wrong is corrected by another wrong. That is why the Irish courts have traditionally awarded such damages only in the most exceptional of cases involving egregious breaches of citizens' rights.[294]Such awards are separate to the compensatory function of damages and serve a public function in that their award sends a signal to the rest of society that the defendant's behaviour will not be tolerated.[295]

Clearly, then exemplary or punitive damages do not sit easily within the correlativity principle of corrective justice. The award of such damages communicates a message to those other than the plaintiff and defendant alone. That message is one of punishment and deterrence which are classically instrumentalist characteristics. In the words of Hardiman J of the Supreme Court in *Shortt v Commissioner of An Garda Siochana*,[296] such damages are "sufficient 'truly to make an example' of the wrongdoers and that it be effective to deter a repetition."[297]

As a private form of punishment, the award of punitive damages also raises constitutional concerns regarding natural justice and fair procedures, burdens of proof and the laws of evidence which are made available to any defendant in a criminal trial. Notwithstanding the constitutional concerns for the rights of the defendant, Dorfman also identifies a bigger conceptual problem with the recognition of such awards and that is the notion of providing

---

> The place of such considerations is not private law but criminal law, because criminal law is concerned not with whether the accused has injured someone's particular right, but with whether the accused has acted inconsistently with the existence of a regime of rights in general.

[294] *Kennedy & Arnold v Ireland* [1988] ILRM 472 (HC); *McIntyre v Lewis* [1991] 1 IR 121.
[295] In *Conway v Irish National Teachers Organisation* [1991] 2 IR 305, 316-317. Finlay CJ of the Supreme Court outlined the Irish position towards such damages as follows:

> Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation, where it may exist in the same case, to compensate the plaintiff for the damage which he suffered.

[296] *Shortt v Commissioner of An Garda Síochána* [2007] 4 IR 587.
[297] Ibid., 663.

private citizens with power to impose punishment on other private parties.[298] Moreover, there is a danger of the defendant being punished twice for the same offence e.g. suffering once by way of a criminal conviction and being financially punished by way of a financial penalty in the form of an award of damages.[299]

Various approaches have been adopted by theorists to explain the place of punitive damages in tort law.[300] Some commentators, like Weinrib, argue that punitive damages are in fact a form of compensatory damages. Under this approach, punitive damages are designed to compensate the victim for intangible losses. For example, Wright observes that, when the victim is deliberately harmed by the defendant, in addition to possible tangible personal injury "the victim has also suffered a discrete dignitary injury, which can be rectified through the imposition of private retribution in the form of punitive damages in tort law."[301] More particularly, commentators such as Murphy view the harm resulting from such injuries as sending a message or "symbolic communication" to the rest of society. It is a way of "saying to us, "I count but you do not," "I can use you for my purposes," or "I am here up high and you are there down below."[302] The award of punitive damages compensates you for your loss of social standing as a result of the defendant's wrong within the community; it recognises the dignitary wrong. Through the damages award the normative equality between the victim and defendant is restored in line with the requirements of corrective justice.

That punitive damages can be explained under a compensation rationale does not stand up to closer scrutiny. First, the label for such damages is "punitive" or "exemplary" which does not correspond to a compensatory function. Second, Irish law already compensates the plaintiff for the harm caused by the outrageous manner in which the wrong was committed, the conduct of the defendant after the wrong has been committed or the conduct of the defendant in the defence

---

[298] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 143.

[299] John P.M. White, 'Exemplary Damages in Irish Tort Law' (1987) Irish Law Times 60.

[300] Instrumentalists, for example, would argue that punitive damages represent a cost efficient way of prosecuting certain criminal behaviour. See Edward L. Rubin, 'Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law' (1998) Wisconsin Law Review 131, 155. Economists would also justify such damages on the basis that they are necessary in order to incentivise safety. See, A. Mitchell Polinsky & Steven Shavell, 'Punitive Damages: An Economic Analysis' (1998) 111 Harvard Law Review 887.

[301] Richard W. Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 40 San Diego Law Review 1425, 1431.

[302] Jeffrie G. Murphy, 'Forgiveness and Resentment', in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge UK: Cambridge, 1990) 25; Val Corbett, 'Why It's Better to be Sorry than Safe: The Case for Apology Protection Legislation' (2013) 36 Dublin University Law Journal 127.

of the claim. This is done by an award of compensation known as aggravated damages. In the Supreme Court decision of *Conway v Irish National Teachers Organisation*,[303] it was held that this form of compensation is in part awarded as "a recognition of the added hurt or insult to a plaintiff who is being wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant."[304] While the recognition of aggravated damages as a compensatory class of damages undermines the "punitive damages as compensation" theory it too is not without its difficulties. In particular, the distinction between aggravated and exemplary damages remains somewhat blurred; as McMahon & Binchy opine, "[i]n spite of the consistent judicial characterisation in recent decades of aggravated damages as falling within the category of compensatory damages, in truth they strain against this confinement and seek to attain goals that are frankly punitive in nature."[305] Thus, the authors conclude that the introduction of another category of compensation in the form of aggravated damages in order to deal with cases of particularly egregious or insolent behaviour by the defendant serves "the pragmatic purpose of taming exemplary damages."[306] Consequently, the compensatory function of aggravated damages may be simply interpreted as a means of limiting the circumstances by which the courts will have recourse to exemplary damages, leaving the role and function of exemplary damages unexplained.

Yet another justification for the existence of punitive damages in tort law is the notion that it is a substitute for revenge.[307] According to this theory, victims will waive their right to avenge the harm done to them in exchange for a financial remedy in the form of punitive damages – "a bloodless revenge for a bloody one."[308] Thus, punitive damages are to be viewed as a private civilised act of vengeance by the victim visited upon the defendant.[309] When manifested in the form of punitive damages, revenge serves a different purpose to the criminal law which is more concerned with the harm visited upon society. Revenge in the form of punitive damages is

---

[303] *Conway v Irish National Teachers Organisation* [1991] 2 IR 305.

[304] Ibid., 317.

[305] Brian McMahon & William Binchy, *Law of Torts* (4th ed, Bloomsbury Professional, 2013) [44.77].

[306] Ibid., [44.81].

[307] Anthony J. Sebok, 'Punitive Damages: From Myth to Theory' (2007) 92 Iowa Law Review 1022; Thomas B. Colby, 'Clearing the Smoke from *Philip Morris v Williams*: The Past, Present, and Future of Punitive Damages', (2008) 118 Yale Law Journal 441. In the words of Posner J, in *Mathias v Accord Economy Lodging, Inc.* (2003) 347 F.3d 672, 677; "an age-old purpose of tort law is to provide a substitute for violent retaliation against wrongful injury."

[308] Scott Hershovitz, 'Tort as a Substitute for Revenge' (2013) available at http://ssrn.com accessed on 11 May 2014.

[309] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 150.

personal and private and serves a different purpose.[310] Kelly has similarly posited that the "inner nature of the tort action" and specifically, punitive damages, can be explained as a civilised form of revenge.[311] In his view, the only explanation of the role of punitive or exemplary damages in tort law is:

> ... none other than the theory of ransom from vengeance, the basis of the primeval *actio in personam*; leading nowadays a pallid and much modified existence, it is true, but still there, as a scratch beneath the surface reveals: The purpose of damages for non-pecuniary loss in the tort action is [not to put the plaintiff in the same position, "so far as money can do it", as if the wrong had not been committed, but] to put the plaintiff in possession of a sum of money which in the court's judgment ought to be enough to satisfy his vindictive feelings against the wrongdoer. This theory will in many cases produce the same award as would be produced by the orthodox theory just discarded; but it has the advantage-if we can swallow its disagreeable implications for the recesses of human motivation- that it will account for what actually happens more satisfactorily.[312]

Viewed in this way, Kelly contends that punitive damages are not the oddity that they might first appear. If one views revenge or vindictiveness as the true motivation of the plaintiff in a tort action, then punitive damages are less controversial. Thus, whether damages are compensatory or punitive in nature simply depends on how affronted the plaintiff has been by the defendant's behaviour and is not dependent on the nature of the injury suffered. [313]

---

[310] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 150.

[311] J. M. Kelly, 'The Inner Nature of the Tort Action' (1967) 2 Irish Jurist 279, 285.

[312] Ibid.

[313] Ibid., where the author concludes:

> The unspoken, perhaps unrealised approach of a plaintiff (when deciding whether or not to accept a settlement before trial) is not "What sum will compensate me for my loss?" but "What sum will satisfy my present feelings about my loss? How much would I take, [not as an exchange for my pain or lost health, but] to let the defendant go?" The same approach is then vicariously adopted by a judge or jury fixing the award.

The author finds further support for his thesis in the terminology used in early editions of textbooks on the subject noting:

> The twelfth edition of Mayne & McGregor (1961) opens with this definition: "Damages are the pecuniary compensation obtainable by success in an action." In the first edition of Mayne's book, published in 1856, the definition is the same except that, instead of "compensation", the word "*satisfaction*" appears. It was an age in which the same word was still being used to describe what was sought by one who challenged another to a duel. A challenge of course was a natural expression of vindictive feeling: possibly for this reason, as well as because of their contradiction of legal order, duels have been generally suppressed. Perhaps the same move towards respectability and order which did away with the duel has also covered up, but not extinguished, the real nature of our tort action.

See also, Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 150, where the author questions the "punitive damages as revenge" theory. He notes that it fails to explain why the award of such damages is limited to cases involving serious and deliberate wrongdoing. Surely a victim would also consider revenge in circumstances where he is badly injured as a result of the defendant's carelessness

Dorfman proposes that punitive damages may be explained on the basis that such awards are necessary in order to re-establish a relationship of "respectful recognition" between the victim and defendant.[314] Essentially, when the behaviour of the defendant is particularly egregious (where the defendant is guilty of malicious intent, for example) mere compensation is not enough to restore the relationship between the parties. Citing as an example the publisher of defamatory material who despite knowing the publication contains such material nevertheless calculates that by publishing, the costs of any litigation will be easily borne by the corresponding boost in sales.[315] The defendant is essentially using the victim, against his or her will, as a means to an end and thereby undermining the victim's dignity as a person. Thus:

> ... insofar as the engagement-based remedial process between victim and wrongdoer aspires to turn the former from a mere factor of production (in the latter's service) into a free and equal agent meriting, by virtue of being a person, the sort of respectful recognition mandated by tort law, imposing an additional cost on the wrongdoer owed to the victim becomes appropriate.[316]

Dorfman's justification of punitive damages fits well with Weinrib's Kantian Right theory of corrective justice. Under this interpretation, punitive damages are a form of compensatory damages which serve a specific function i.e. compensating the victim not only for the tangible losses he or she may have incurred, but also for the further harm which results to one's person when one is deliberately used by another against one's will. The difference, as Dorfman writes, is "between simple failure to acknowledge the claims others placed on the wrongdoer and an outright rejection of such claims."[317] Moreover, the need to re-establish the relationship between the parties requires that it is the defendant, and the defendant alone, who carries the extra costs associated. Thus, in line with corrective justice theory, the bipolar relationship between victim and defendant is maintained and explained.

---

as well as in circumstances where he has been intentionally so injured? Moreover, Dorfman observes that this approach will still not solve the puzzle that is punitive damages i.e. "that it is a privately-administered *punishment*" (151). How does the award of punitive damages against the defendant and made payable to the victim explain the correlative relationship between them? Can the victim's vengeance not be satisfied by the State in the form of the criminal law? In the words of Dorfman, "... it is one thing for a victim to gain satisfaction from the suffering of another (and, thus, to cool down his revenge-driven desires); quite another to benefit therefrom as though the damages are a windfall to him (153).

[314] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 154.

[315] *Cassel & Co v Broome* [1972] AC 1027 (HL).

[316] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 156.

[317] Ibid., 158.

Third, it is argued that traditional corrective justice theory fails to explain the place of nominal damages in tort law. Traditionally, such damages have been reserved for harm to dignitary interests, particularly in torts which are deemed actionable *per se* i.e. in torts where the plaintiff has not suffered any loss such as trespass and defamation, for example. Thus, if there is no loss, what necessitates correction? However, in Weinrib's view, nominal damages are simply an example of his corrective justice theory's focus on the protection of individual rights and not on losses.[318] That such damages should be awarded in cases where the victim has suffered a wrong but has not incurred a loss is simply confirmation of Weinrib's theory of corrective justice. The danger, however, is that awarding punitive damages for dignitary harms, will "amount to counting the same loss twice over."[319]

Finally, corrective justice theory fails to account for the granting of injunctions as a remedy. Corrective justice theory is backward looking in that it seeks to repair wrongs or annul wrongful losses. Without a wrong or a loss, there is nothing to repair or annul. How does this explain the availability of injunctive relief in tort law? If no wrong/loss requires to be corrected, what justifies the intervention of corrective justice in the form of an injunction?[320] Weinrib disagrees and argues that the granting of injunctions in cases of wrongdoing is compatible with principles of corrective justice.[321] He argues, that where injunctions are awarded to prevent the continuance of a wrong (in actions for nuisance, passing off, for example), the remedy simply represents corrective justice by restoring the equilibrium between the parties concerned. In this way, "corrective justice operates not only by requiring the defendant to repair a wrong once it has occurred, but also by granting the plaintiff an injunction that prevents the defendant from

---

[318] Ernest J. Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University Law Review 273, 288.

[319] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 146.

[320] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 Oxford Journal of Legal Studies 471, 477.

[321] Ernest J. Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University Law Review 273, 289, where Weinrib refuses to accept that his idea of corrective justice is incompatible with the various remedies available to victims in tort law:

> ... it is a mistake to think that the diversity of the available remedies undermines the corrective justice account. To the contrary, one of the strengths of the corrective justice approach is that, through the robust role that it assigns to rights and their correlative duties, it provides a unifying framework for the different remedies. The different kinds of damages reflect the various kinds of entitlement that a right gives, including an entitlement to the intactness of the object of the right, to its use and value as an intact object, to its inviolability even in the absence of loss, and to the dignity that attaches to the right-holder. The distinction between monetary damages and specific remedies such as injunctions reflects the different ways in which the injured right can be restored.

extending the wrong into the future."[322] However, what this fails to explain is on what basis are *preventative* injunctions available as a potential remedy to a tort action in some circumstances.[323] In other words, how is it possible that a plaintiff may obtain injunctive relief prohibiting the publication of defamatory material? There is no wrong until the material is published – what justifies the intervention of corrective justice in such circumstances?

2.6 Conclusion

Corrective justice theory does have much to recommend it as an interpretartive theory of tort law, particularly as regards its structure. The theory of correlativity explains what links the plaintiff to the defendant and the notion that the purpose of tort law is correct an injustice based on a Kantian notion of rights is, in many ways, normatively appealing. Corrective justice theory does elucidate why it is the defendant who must correct the wrong/loss suffered by the plaintiff. It also explains the theoretical compensatory function of the remedies in tort law which corresponds with Aristotle's notion of equalising the holdings of the parties. However, it fails to account for the wide range of remedies available to the plaintiff. Why is it that a plaintiff can obtain an injunction in certain cases such as defamation and nuisance for example and yet cannot do so in others like negligence? How does the granting of an injunction correct the position of the parties? How does the award of exemplary damages fit within the non-instrumental nature of corrective justice? Moreover, corrective justice fails to account for vast swathes of tort doctrine and provides an incomplete picture. In particular, the complete disregard for distributive justice concerns, in the formalist version of the theory at least, does not accord with the reality of practice and undermines its moral claim.

[322] Ernest J. Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University Law Review 273, 287.

[323] Hilary Delany, *Equity and the Law of Trusts in Ireland* (5th ed.) (Round Hall, Dublin 2011); see discussion of the *quia timet* injunction, 585-590.

Chapter 3

Distributive Justice Theory and Tort Law

3.1 Introduction

In the previous chapter I examined corrective justice one of the dominant moral theories underpinning tort law. Corrective justice theory explains much of the structure of tort practice e.g. the notion of individual responsibility, the reciprocal relationship between plaintiff and defendant, and the purpose of compensation in the tort system. However, corrective justice only paints part of the picture of tort law. In particular, it fails to supply an appropriate normative goal which tort law should pursue and which should underpin the development of the law. If anything, the formalist conception espoused by Weinrib advances a highly individualistic notion of human dignity which fails to accord any significance to the importance of social relations to individual well-being.

In this chapter, I hope to establish that, despite the claims of certain corrective justice theorists, tort law cannot be explained or justified without regard for societal interests or concerns. Corrective justice theory is right that tort law should be concerned with human dignity, just not that of the atomistic individual. In this chapter, I intend to focus on distributive justice theory which is viewed as a competing theory to that of corrective justice with its emphasis on the just distribution of resources across society. In the context of tort law, therefore, distributive justice theory is not, like corrective justice, concerned only with the particular relationship between plaintiff and defendant. Instead, distributive justice requires that, in determining the rights and obligations of the plaintiff and defendant, one must do so with the wider interests of society in mind. In this chapter, I focus on the role that distributive justice theory plays in the interpretation and application of tort rules. In so doing, I first examine John Rawls 'justice as equality' principle. I then discuss how this egalitarian approach can influence tort law by attributing responsibility simply on the basis of whether it would be 'fair' to do so. That is to say, by weighing the benefits and burdens of harm caused by the activity to society when making a decision. I examine how this fairness conception provides the basis of 'enterprise risk' theory which explains not only our system of fault liability but, unlike corrective justice,

strict liability as well. Finally, having explained the importance of distributive justice considerations to the development of tort theory, I conclude this chapter by examining the nature of the relationship between corrective justice and distributive justice in the context of tort doctrine.

3.2 Distributive Justice Theory

As I have already discussed, Aristotle identified particular justice of two kinds, corrective and distributive.[324] The former category of justice is concerned with a transactional form of justice which rectifies imbalances in the distribution of the holdings of the parties which result from involuntary exchanges. Essentially, it "rectifies the conditions of a transaction."[325] Distributive justice by contrast, involves the just distribution of resources amongst a group or community according to merit or need. In the words of Finnis, distributive justice deals with "problems of *distributing* resources, opportunities, profits and advantages, roles and offices, responsibilities, taxes and burdens."[326]

Aristotle defined the distinctive nature of both forms of justice in mathematical terms, stating that distributive justice was concerned with geometrical proportions while corrective justice was concerned with arithmetical proportions. Given that distributive justice is concerned with the wider implications of distribution in a given society, this form of justice has typically been associated with relations between the State and the individual. Corrective justice, on the other hand, is primarily concerned with the relationship between individuals residing within that state.[327] Hence, distributive justice tends to be associated with public law and corrective justice with private law.

Distributive justice is concerned with the manner in which goods in life are distributed across individuals within society.[328] It essentially involves political choices about "how the cake should be sliced." While there are variations of distributive justice theory, the ultimate aim is to provide a moral justification for the distribution of society's resources in a way that is fairest

---

[324] Aristotle, *The Nicomachean Ethics, Book V: Justice* (Penguin Books: London 2004) 118; where distributive justice was defined as, "that which is shown in the distribution of honour or money or such other assets as are divisible among the members of the community."
[325] Ibid.
[326] John Finnis, *Natural Law and Natural Rights* (2nd ed.) (Oxford University Press, 2011) 166.
[327] Timothy D. Lytton, 'Smashing the Idols of Efficiency' (1993) 79 Virginia Law Review 275, 287.
[328] Adi Libson, 'Moral Uncertainty and Redistribution through Private Law' (2016) 29 Canadian Journal of Law & Jurisprudence 371.

to all. One of the more prominent conceptions of 'just' distribution in this regard is that which requires equality between all the parties living within society. This conception is most closely associated with the work of the political philosopher John Rawls and his theory of justice.[329] Rawls' conception of justice views society as consisting of free and equal persons who within reason co-operate with one another to pursue their own conception of the good life. Rawls was not a strict egalitarian: his theory was that equality between individuals in society was just but differences were allowed insofar as they made the least advantaged in society better off. This aspect of his theory is known as the "difference principle."[330]

Rawls's theory of justice is based on a social contract in a hypothetical situation where members of society would meet in what he describes as the "original position" and agree a fair distribution of society's resources. [331] In this original position all parties would negotiate under a "veil of ignorance."[332] In other words, parties negotiating an agreement would not know at that moment what their position in that society would be. They would not have any knowledge of their social status, talents, wealth and so forth. In this scenario everyone is similarly positioned and as "no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain."[333] Thus, as rational beings, each will make choices on the basis of self-interest and based on morality. Consequently, these voluntary choices are considered fair and are therefore just. In such situations, Rawls believes that the following principles of justice would be agreed to by the parties:

> First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

It was Rawls's thesis that from the original position and under a veil of ignorance rational individuals would choose the first principle of justice. Because every person is unaware of his or her position or social status it is rational therefore, for each person to choose a position which secures the most liberty for all i.e. equality. Hence, as Zipursky puts it, "[s]pecial emphasis

---

[329] John Rawls, *A Theory of Justice* (1971) (Revised edition, The Belknap Press of Harvard University Press, 1999).
[330] Ibid.,11
[331] Ibid.
[332] Ibid.
[333] Ibid.

would be given to avoiding very bad outcomes."[334] This position would be chosen by rational individuals under a veil of ignorance as such individuals would be more concerned about being left badly off than they would about being wealthier. The second principle, known as the "difference principle", basically provides that inequalities would be allowed to exist only where they can be used for the benefit of the least advantaged.[335] For example, the political decision of imposing a higher taxation rate on workers who earn more money would be justified if it benefitted the less well-off by paying for the provision of social services. The "difference principle" is criticised on the basis that it can undermine individual autonomy and property rights because it envisages the redistribution of resources from those who own them to those who do not have them i.e. it has a distributive effect. Other critics of Rawls, of which Dworkin is one, would argue that his "difference principle" also fails to account for the role that luck plays (the fact that some people may suffer from disability, for example, and require greater resources than others in society) and also argues that it should more closely reflect distributions made based on the consequences of individuals' choices e.g. the decision to work harder in order to acquire more resources.[336] Feminists such as Matsuda,[337] and others,[338] have attacked Rawls's principle of justice as being individualistic, concerned only with the selfish needs of the atomistic person. Rawls has responded to these criticisms by pointing out that the rational individuals to which he refers are hypothetical and not based on actual persons; in effect he claims that his use of 'persons' in this regard was nothing more than "a device of representation."[339]

---

[334] Benjamin C. Zipursky, 'Rawls in Tort Theory: Themes and Counter-Themes' (2004) 72 Fordham Law Review 1923, 1924.

[335] John Rawls, *Justice as Fairness* (Belknap Press, 2001) 57.

[336] Ronald Dworkin, 'What is Equality? Part 1: Equality of Resources' (1981) 10 Philosophy and Public Affairs 185; Ronald Dworkin, 'What is Equality? Part 2: Equality of Welfare' (1981) 10 Philosophy and Public Affairs 283; Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000).

[337] Mai J. Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 New Mexico Law Review 613.

[338] Thomas Nagel, 'Rawls on Justice' (1973) Philosophical Review 82.

[339] See John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14 Journal of Philosophy and Political Affairs 223, 238-239, where the author explains what he considers a misunderstanding of his thesis as follows:

> ... we introduce an idea like that of the original position because there is no better way to elaborate a political conception of justice for the basic structure from the fundamental intuitive idea of society as a fair system of cooperation between citizens as free and equal persons. There are, however, certain hazards. As a device of representation the original position is likely to seem somewhat abstract and hence open to misunderstanding. The description of the parties may seem to presuppose some metaphysical conception of the person, for example, that the essential nature of persons is independent of and prior to their contingent attributes, including their final ends and attachments, and indeed, their character as a whole. But this is an illusion caused by not seeing the original position as a device of representation. The veil of ignorance, to original position as a device of representation. The veil of ignorance, to mention one prominent feature of that position, has no metaphysical mention one prominent

Central to Rawls's principle of justice is the notion that the institutions of society are just because it is only through these institutions that a framework for society can be created whereby the just distribution of resources can occur. It is only the State – through its institutions[340] – that can do this because "[i]ndividual citizens have no way to acquire the vast amount of knowledge and information required for the task."[341]

Rawls's thesis represented an attack on the dominant moral consequentialist theory of utilitarianism most closely connected with the works of Jeremy Bentham[342] and John Stuart Mill.[343] While Rawls's theory is primarily concerned with the just allocation of society's resources, because it is based on a social contract agreed to by members of society, it does not subvert individual choice. By contrast, under utilitarianism as defined by Rawls, "society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it."[344] Rawls's major difficulty with utilitarianism as a theory of justice was that it undermines individual rights in favour of the will of the majority. For example, he highlighted the fact that a theory of utilitarianism could justify the retention of slavery if it could be established that the benefit derived from slavery by the slave owners outweighed the suffering of the slaves. Thus, minority groups in society suffer disproportionately by virtue of the fact that, as minorities, their interests do not count as much as the majority under such a system.[345]

---

feature of that position, has no metaphysical implications concerning the nature of the self; it does not imply that the self is ontologically prior to the facts about persons that the parties are excluded from knowing. We can, as it were, enter this position any time simply by reasoning for principles of justice in accordance with the enumerated restrictions. When, in this way, we simulate being in this position, our reasoning no more commits us to a metaphysical doctrine about the nature of the self than our playing a game like Monopoly commits us to thinking that we are landlords engaged in a desperate rivalry, winner take all. We must keep in mind that we are trying to show how the idea of society as a fair system of social cooperation can be unfolded so as to specify the most appropriate principles for realizing the institutions of liberty and equality when citizens are regarded as free and equal persons. (footnote omitted).

[340] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 10, where the necessary institutions for a just society were identified by the author as follows: "... the political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production), as well as the family in some form, all belong to the basic structure."

[341] Samuel Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 Oxford Journal of Legal Studies 213, 214.

[342] Jeremey Bentham, *An Introduction to the Principles and Morals of Legislation* (1789) (Oxford: Clarendon Press, 1907).

[343] John Stuart Mill, *Utilitarianism* (4th ed.) (Longmans, Green, Reader, and Dyer, 1871).

[344] John Rawls, *A Theory of Justice* (1971) (Revised edition, The Belknap Press of Harvard University Press, 1999).

[345] John Rawls, *A Theory of Justice* (1971) (Revised edition, The Belknap Press of Harvard University Press, 1999) 135. Feminists have also criticised Rawls on the basis that his theory of justice fails to consider gender

3.3 Enterprise Risk and Distributive Justice

The application of Rawlsian principles of justice to tort law is closely associated with the academic work of Fletcher,[346] Fried,[347] and Keating.[348] Others, like Zipursky - while acknowledging the value in Rawls's work - question its application to tort theory.[349] Appeals to concepts such as fairness and reasonableness can also be found in tort judgments and may be interpreted as an example of Rawls's principles at work.[350] Ripstein, for example, argues that the structure of tort law can be interpreted in Rawlsian terms. He asserts that, when choosing from behind the veil of ignorance, individuals must strike a balance between an interest in security and an interest in liberty in their pursuit of the good life. In the context of tort law, this means that individuals have an interest in being protected from harm caused by the activities of others while also having the freedom to carry out activities which involve the

---

biases within family relationships. See Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989). For further criticism, see: Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974) 152, where the author observes that whereas Rawls' difference principle and Bentham's theory of utilitarianism each revolve around the market creating a pattern of distribution, his libertarian theory of distribution, also known as "entitlement theory," does not involve a patterned distribution through the market. Instead, holdings are just if they follow certain rules on acquisition and exchange. In other words, Nozick's theory is based on the premise that one's holdings are not allocated centrally, instead they arise through one's own labour or through voluntary transactions, for example. However, Nozick acknowledges that not all entitlements are obtained through acquisition or voluntary transfer. For example, someone might gain an entitlement by stealing or defrauding. In other words, they might gain an entitlement unjustly. The existence of such an injustice in holdings leads Nozick to state that it requires that any such injustice must be rectified. Thus, according to Nozick justice is dependent on one's entitlements which are determined by the following principles:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No-one is entitled to a holding except by (repeated) applications of 1 and 2.

[346] George P. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537.
[347] Charles Fried, *An Anatomy of Values* (Harvard University Press, 1970) 183-206.
[348] Gregory C. Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72 Fordham Law Review 1857.
[349] Benjamin C. Zipursky, 'Rawls in Tort Theory: Themes and Counter-Themes' (2004) 72 Fordham Law Review 1923.
[350] Gregory C. Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72 Fordham Law Review 1857. For example, note the difference between the Rawlsian notion of the "reasonable" man as distinguished from Posner's concepts of the reasonable man as an economic rational individual. See discussion of Posner's approach in Richard A. Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29; and in Chapter 4 of this work. Take also, for example, the term "fair, just and reasonable" when considering whether a duty of care should be imposed in a novel set of circumstances – *per* Lord Bridge in *Caparo Industries plc v Dickman* [1990] UKHL 2; [1990] 2 AC 605. See also, *Glencar Exploation plc v Mayo County Council* [2001] IESC 64, [103], where Keane CJ also refused to impose a duty of care unless it was "just, fair and reasonable to do so". Also James A. Henderson Jr., 'Judicial Reliance on Public Policy: An Empirical Analysis of Product Liability Decisions' (1991) 59 George Washington Law Review 1570, 1597, where the author observes, "[m]easured by what judges say in their published opinions ... fairness norms, not efficiency norms ..." are much more prevalent.

risk of harm for others. Where individuals suffer injury as a result of such activity, their interest in security demands that they receive compensation but conversely their interest in liberty means that they should pay as little as possible when compensating others.[351]

Fairness conceptions of responsibility in tort law can clash with corrective justice conceptions of responsibility. Whereas the primary object of fairness is to balance the benefits and burdens of harm caused by activities in society and attribute responsibility accordingly, corrective justice accounts tend to rely on culpable agency and correlativity as the means of attributing responsibility for harm. Hence, Rawlsian fairness considerations veer more towards systems which maximise compensation for victims of harm rather than allowing "the loss to lie where it falls" in the absence of culpability. In this sense, it may be said that the principle of fairness is a matter of distributive justice and consequently, as Keating notes, "the difference between the fairness and corrective justice conceptions" represents "the distinction between distributive and corrective justice."[352]

The difference between fairness and culpable agency conceptions for the attribution of responsibility for activity-causing harm manifests itself most clearly in the differences between strict liability and fault liability within tort law. Those who favour the fairness conception of justice lean more towards a regime of strict liability in dealing with activity-causing harm rather than fault, as the fairest means by which the benefits and burdens caused by such activity might be allocated.[353] Adopting Rawls's social contract theory as the basis for his thesis, Keating, for example, argues that individuals in the original position, as free and equal persons, would prioritise their security in order to allow them pursue their conception of the good life. Given that such individuals are fixed with general knowledge about the occurrence of accidents in society they will choose a compensation system which will maximise their opportunity for compensation while also allowing them the freedom to pursue their conception of the good life. Consequently, such individuals will generally choose a strict liability system over a fault liability system as the fairest means by which the losses arising from harm should be

---

[351] Arthur Ripstein, 'Tort, The Division of Responsibility and the Law of Tort' (2004) 72 Fordham Law Review 1811, 1821.
[352] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 200.
[353] Gregory C. Keating, 'The Idea of Fairness in the Law of Enterprise Liability' (1997) 95 Michigan Law Review 1266.

compensated.[354] The rise of strict liability represented a move away from the individualistic approach towards providing compensation under fault to a collective approach providing more comprehensive compensation to victims.[355]

The presumptive preference for strict liability over fault liability may be morally justified in Rawlsian terms on the basis of a theory of enterprise liability. The origin of enterprise liability is closely associated with the work of Green[356] and James[357] and their work in seeking to establish a more comprehensive compensation system for accidental harm.[358] The primary purpose of enterprise liability is to seek to place responsibility for certain harms created by activity on the shoulders of those responsible for the activity. Liability will be imposed in such circumstances irrespective of whether such parties are culpably responsible for the harm.[359]

---

[354] See Arthur Ripstein, 'Tort, The Division of Responsibility and the Law of Tort' (2004) 72 Fordham Law Review 1811, 1828, where the author notes some difficulties with Keating's approach. For example, he points out that it does not explain why individuals behind the veil of ignorance "would be more concerned to protect their security against accidental injury occasioned by the activities of others, rather than against accidental injury more generally, including injuries they bring upon themselves." This raises the further obvious question: why would such individuals not a system of social insurance which offered them more comprehensive protection?

[355] John G. Fleming, *The Law of Torts* (9th ed.) (1998) (LBC Information Services) 368, where the author observed:

> Society is today as much concerned with salvage and preservation as with acquisition and creation. Therefore, increasing consideration is being given to the compensatory aspect of tort law and to the social value of shifting accident losses by widely distributing their cost among those who benefit from the accident producing activity. It is realised that the result of letting accident losses lie where they fall is not only to impoverish the victim but ultimately to throw the loss on the community as a whole, which must in the last resort foot the bill of rehabilitation and income maintenance through taxation. In effect, society and the victim, by paying the bill, subsidise the activity that produced the loss.

[356] Leon Green, 'The Duty Problem in Negligence Cases: II, The Moral, Economic, Preventative and Justice Factors' (1929) 29 Columbia Law Review 255; Leon Green, 'The Individual's Protection Under Negligence Law: Risk Sharing' (1953) 47 North Western University Law Review 751.

[357] Fleming James, Jr, 'Products Liability' (1955) 34 Texas Law Review 44; Fleming James Jr, 'General Products – Should Manufacturers Be Liable Without Negligence?' (1957) 24 Tennessee Law Review 923.

[358] See Fleming James, Jr, 'Contribution Among Joint Tort Feasors: A Pragmatic Criticism' (1941) 54 Harvard Law Review 1156, 1157, where the author summarised his thinking on the issue as follows; "*[a]n existing rule of law which has some tendency to effect loss distribution over a large segment of society ought not to give way to a rule which will bring about a less effective distribution unless there is a very good reason for it*."

[359] John C.P. Goldberg & Benjamin C. Zipursky, 'Convergence and Contrast in Tort Scholarship: An Essay in Honor of Robert Rabin' (2012) 61 DePaul Law Review 467, 475, where the authors described the theory as follows:

> Enterprise liability is not concerned with locating an actor who is an appropriate bearer of an injury victim's loss by virtue of having carelessly injured that victim. Rather, it is strict, being predicated on the idea that certain ongoing enterprises, even when operating carefully, generate recurring risks of injury and therefore can fairly be asked to pay the costs associated with the realization of those risks. Although not based on notions of wrongdoing, enterprise liability is nonetheless expressive of a normative principle, as opposed to being a purely instrumental means of achieving a policy goal, such as deterrence or loss spreading.

Enterprise liability is a broad moral theory of responsibility normatively premised not on the notion of culpable agency but on the basis of exceptional risk creation. Where the defendant's activity or "enterprise" has imposed exceptional risks on others within society it is only fair that the costs arising from harm which materialises as a result of these risks should be the responsibility of the defendant. Hence, enterprise liability might be dubbed a form of "managerial risk" liability i.e. the entity creating the risk should be charged with its management given the nature of the risk created and failure to do so would result in liability. Whilst the primary focus is on risk creation, the imposition of enterprise liability also serves the secondary goals of loss distribution and deterrence. The rationale is that it is fair to impose the losses on the enterprise because it usually is in a better position to distribute the loss across its enterprise (either in the form of insurance or as part of the cost of carrying out the activity).[360]

Enterprise liability can also have a deterrent effect as the creator of the risk is usually in the best position to control and minimise that risk and take necessary "preventive or prophylactic" measures[361] e.g. if not by taking greater care, by desisting in the activity.[362] Witt has linked this notion to what he calls "*the idea of managerial domination*" observing that such an approach is justified because:

> ... with respect to managing risk, well managed enterprises are in a superior structural and informational position than individuals such as workers and consumers. The inverse to the

---

[360] John Fabian Witt, 'Speedy Freddy Taylor and the Ironies of Enterprise Liability' (2003) 103 Columbia Law Review 1, 41, where the author observes:

> Both enterprises and individuals, of course, are able to buy insurance to spread the cost of accidents. But it follows from the idea of the enterprise's structural superiority that enterprises stand in a better position to buy insurance, both with respect to information about the nature of the risks involved in the enterprise and with respect to power in the insurance market.

[361] Leon Green, 'The Palsgraf Case' (1930) Columbia Law Review 789, 799.

[362] John Fabian Witt, 'Speedy Freddy Taylor and the Ironies of Enterprise Liability' (2003) 103 Columbia Law Review 1, 30, where the author – in an article attributing the rise of enterprise liability with scientific management theory - discusses the deterrent effect of placing liability on the employer for work-related accidents caused by his or her employees because:

> ... if employee carelessness was inevitable, and if occasional negligence, forgetfulness, and ignorance were endemic to the human condition ... it stood to reason that accident prevention and the efficient rationalization of economic processes necessarily depended on the implementation of scientific approaches to the management of production, not on the workers themselves.

> proposition, naturally, is that individuals-whether workers or consumers-are not in a position to evaluate, prevent, or provide for the dangers inhering in modern enterprise.[363]

Such an approach also accords with Rawlsian principles of fairness. In the context of tort law, "society's worst off" are the uncompensated victims of accidents. Rawls' "difference principle" requires that in such cases, society should intervene – through the state institution of tort law – to ensure that these victims receive compensation. In cases of non-negligent harm arising from extraordinary risk creation, fault liability allows the loss to lie where it falls – on the victim. This is unfair and in such circumstances enterprise liability would support a regime of strict liability as a fairer means of distributing the loss. Thus, it may be said that it involved "a shift from a framework in which considerations of interpersonal justice are paramount to one in which notions of what is best for society are dominant."[364]

Enterprise liability is a modern justification for strict liability. It differs from fault liability – favoured by corrective justice theorists - which imposes responsibility on wrongdoers when their activity carelessly harms another. Strict liability on the other hand attributes responsibility for the harm on the activity itself regardless of fault. The associated costs of the harm are then distributed across those enterprises who engage in that particular activity. Thus, the losses are not incurred by the victim nor are they entirely placed on the shoulders of the wrongdoer and instead may be spread across those who profit from the activity. In this way, enterprise liability can be deemed fair as it involves, it is argued, "a just distribution of burdens and benefits"[365] and by taking "organized practices, not isolated acts, as its prey."[366] The enterprise liability approach to accidents is considered fair to the victims as it ensures that the costs associated with such harm are not incurred by them but by those who benefit from the activity and thereby maintains the dignity of the victim by providing comprehensive protection in the form of compensation for the defendant's actions. Enterprise liability benefits the injured party because imposing liability in this manner simply reflects the fact that the defendant made a choice in undertaking the activity and it is only fair that they should have to pay the costs associated with

---

[363] John Fabian Witt, 'Speedy Freddy Taylor and the Ironies of Enterprise Liability' (2003) 103 Columbia Law Review 1, 40.
[364] Robert Rabin, 'Some Thoughts on the Ideology of Enterprise Liability' (1996) 55 Maryland Law Review 1190, 1193.
[365] Gregory C. Keating, "The Theory of Enterprise Liability and Common Law Strict Liability" (2001) 54 Vanderbilt Law Review 1285, 1286.
[366] Ibid., 1331.

that activity.[367] In Ralwsian terms, therefore, it is just that the benefits and burdens of activities carried out by those residing as free and equal persons within that society should be fairly distributed.

3.4 Fault Liability or Strict Liability?

Given that fault liability may be morally justified on the basis of culpable agency and correlativity (a form of corrective justice) and strict liability may be morally justified on the basis of fairness in the allocation of benefits and burdens arising from social activity (a form of distributive justice) how does one choose between these competing systems of liability within our tort system? Why is it that in some cases fault is the appropriate standard and yet in others it is strict liability? In abstract terms, Keating views the choice between these systems as a choice between whether it is more appropriate that the victim should pay for the costs of the harm resulting from the activity or whether the injurer should pay.[368]

Inspired by Rawls's principle of justice, Fletcher has developed the "reciprocity of risk" paradigm for explaining the differing circumstances in which strict liability may be justified in favour of fault liability.[369] Fletcher developed the theory of reciprocity of risk in an attempt to put forward an alternative non-instrumental account of tort law different to what he described as the instrumental "reasonableness" paradigm of fault liability.[370] The idea of non-reciprocal risks however, supplies a normative justification grounded in moral considerations of fairness which explains the existence of strict liability in tort law and thereby provides "doctrinal unity" by linking the different strands of strict liability which exist within tort law.[371]

---

[367] Gregory C. Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72 Fordham Law Review 1857, 1891.

[368] Gregory C. Keating, 'Strict Liability and the Mitigation of Moral Luck' (2006) 2 Journal of Ethics & Social Philosophy 1, 13.

[369] George P. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537, 550, where the author explains the link as follows:

> ... we all have the right to the maximum amount of security compatible with a like security for everyone else. This means that we are subject to harm, without compensation, from background risks, but that no one may suffer harm from additional risks without recourse for damages against the risk-creator.

[370] Ibid., 556. Fletcher essentially saw the law of torts a struggle between the competing theories of reciprocity of risk and reasonableness as strategies for justifying the fairest distribution of the benefits and burdens resulting from activities within our society.

[371] George P. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537, 543.

The theory of reciprocity of risk operates on the basis that the benefits and burdens created by an activity are distributed fairly when the parties are exposed to risks which are "equal in probability and gravity."[372] Thus, risks are reciprocal when the activity involves mutual risk imposition - such as might arise where automobile drivers engage in the activity of driving or where individuals are participants in sporting activities, for example. In such circumstances, the parties are said to be within "a community of risk imposition" as both parties impose similar risks on each other and are equally exposed to similar risks in return.[373] Loss of individual security through the exposure to risk is offset / compensated by a gain in freedom through risk imposition. Such risk imposition is reasonable and justifiable as long as each party gains more by way of freedom than they lose by way of security.[374] Thus, in cases of non-negligent harm arising from mutual risk-imposing activity, it is fair that the costs of the harm should be borne by the victims as they benefit from the activity in the longer term overall. In cases of negligent harm involving reciprocal risk, on the other hand, it is fairer that the negligent injurer rather than the victim should bear the costs of harm associated with his or her conduct. By acting in a careless manner the victim is exposed to an additional non-reciprocal risk. In a community of reciprocal risk imposition, such as that that exists between drivers of automobiles, a regime of strict liability would not have any effect on the distribution of risk and would also not be an appropriate basis of liability either as "a rule of strict liability does no more than substitute one form of risk for another – the risk of liability for the risk of personal loss."[375]

Things are rather different in the case of non-reciprocal risks involving non-negligent harm where the relevant risk imposed by one party on the other is not equal in probability or gravity e.g. where one party stores ultra-hazardous material on his or her property adjoining that of his or her neighbour.[376] Non-reciprocal risks are those which do not arise from a common activity between the parties. Even where the imposition of these risks is fair which is to say where the "risks are to the long-run advantage of the prospective victims that they imperil", it is not fair that the non-negligent harm which results from such risk imposition should lie where it falls.[377]

---

[372] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 205.
[373] George P. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537.
[374] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 203.
[375] George P. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537, 547.
[376] Ibid., 543, where the author describes such scenarios as arising where, "the defendant created a risk of harm to the plaintiff that was of an order different from the risks that the plaintiff imposed on the defendant."
[377] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 203.

These risks are not normal and are not balanced out by the imposition of similar risks in return. Thus, a regime of strict liability is preferable on fairness grounds because:

> Absent reparation by injurers, victims must, at best, draw on their own resources to repair the harm that they have suffered. Absent reparation, victims must not only bear financial loss, they must also bear a dignitary harm. They must live with the knowledge that the community is prepared to appropriate their physical well-being-their lives, limbs, and property-whenever so doing is to the community's advantage. They must live with the devaluation of their lives that this implies. Reparation erases both the financial loss and the dignitary harm.[378]

Ordinary non-negligent background risks arising from activities carried out within society are reasonable as they are the price we pay for the activity which is ultimately to the benefit of all. Thus, it is fair that the losses arising from such activity should be allowed to lie where they fall. When these activities are carefully carried out, we all accept the risks as part of social life as we each impose similar risks on one another and "[b]ecause these risks are the price of ordinary activity, we are all better off bearing them rather than attempting to reduce them."[379] Such risks are to be distinguished from extraordinary risks which are characteristic of the operation of the enterprise's operation over a period time. It is the creation of these risks that gives rise to the attribution of responsibility. These "extraordinary" or "characteristic" risks arise "because ... the enterprise's presence in the world increases the incidence of the risk above its normal, background level."[380]

It is not fair to impose the losses which are caused by characteristic risks on the shoulders of the plaintiff. In such circumstances a regime of strict liability is fairer than one of fault liability because such losses will be transferred from the victim to the defendant. Thus, it may be said that "[r]isk is unfairly distributed ex ante, but the costs of accidents issuing from those risks are fairly distributed ex post."[381] A regime of negligence liability does nothing to help the victim unfairly exposed to such risk because if there is no fault there is no entitlement to compensation. This, according to Keating, is what best explains the moral difference between the imposition of a negligence versus strict liability. The imposition of strict liability is effectively a tax on the carrying out of legitimate activity which brings with it significant increased risk to other members of society who have a long term interest in such activity

---

[378] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 204.
[379] Ibid., 210.
[380] Ibid., 211.
[381] Ibid., 204.

whereas the imposition of negligence liability is for harm wrongfully caused. Thus, "by capturing this distinction, the reciprocity-of-risk criterion helps to explain both why we might sometimes prefer fault and other times strict liability, and how these competing forms of liability embody different moral judgments."[382] This approach also reflects tort's role in protecting a communitarian notion of human dignity as it represents a balancing exercise between protecting the interests of the community as a whole in encouraging certain activities which are to our overall benefit as members of a community while imposing liability on activities which bring with them extraordinary risks which eventuate into harm or where ordinary activities are carelessly conducted.

While the reciprocity of risk criterion is morally appealing it is not without flaws, as Fletcher acknowledges.[383] In particular, judging when risks are so excessive that they should be considered non-reciprocal can be a difficult task.[384] The identification of the relevant risk and whether it is considered serious enough to justify the application of strict liability is critical to the claimed fairness of enterprise liability because, as Brodie acknowledges, "[t]he appeal to equity is only convincing where the scope of the enterprise's liability is actually determined by reference to the risks it has created."[385] However, the identification of these risks can be done,

---

[382] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 205.

[383] George P. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537, 572.

[384] Ibid., where the author posits the following dilemma:

> ... how does one determine when risks are counterpoised as species of the same genus? If one man owns a dog, and his neighbour a cat, the risks presumably offset each other. But if one man drives a car, and the other rides a bicycle? Or if one plays baseball in the street and the other hunts quail in the woods behind his house? No two people do exactly the same things. To classify risks as reciprocal risks, one must perceive their unifying features. Thus, risks of owning domestic animals may thought to be of the same kind. And, theoretically, one might argue with equal vigor that all sporting activities requiring the projection of objects through the air create risks of the same order, whether the objects be baseballs, arrows, or bullets.

See also, Gregory C. Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72 Fordham Law Review 1857, 1910, where the author highlights the challenge of distinguishing ordinary risks from characteristic risks associated with the enterprise in hard cases, with the following example:

> Suppose that members of particular occupations-salespeople of various kinds, perhaps-both drive and telephone a great deal in the course of their work. Suppose further that some such salesperson, commuting to work in the morning or back home in the evening, culpably causes an accident because she is talking on her phone. Should we consider her accident to be a characteristic risk of her employer's enterprise? Accidents that occur in the course of commuting are generally not counted as characteristic risks of particular employments. People are likely to commute to *some* job. If they weren't commuting to this particular job, they would be commuting to another one, so the connection between a particular job and a particular commute is generally coincidental not characteristic. Should this general rule apply to our talkative salesperson? Should it apply if the phone is fixed in the car and paid for by the business, but not if it is fully mobile and paid for by the salesperson? Should it matter if the call was a personal or business one? Should it matter if the salesperson was leaving work late or going to work early because the press of business required her to put in a long day? Should the background level of risk-the prevalence of talking on the phone while driving-in this community be critical?

so Fletcher argues, through abstract thinking focussing on the similarities or "unifying features" of the relevant activities in question.[386] Similarly, Brodie argues, in the context of vicarious liability at least, that the question is "very much a value judgment; it is a matter of what 'experience shows.'"[387]

3.5 Enterprise Liability and Strict Liability

The existence of strict liability within tort law proves troublesome to moralists (such as corrective justice theorists) who believe that the normative force of tort law is predicated on wrongdoers directly repairing or rectifying wrongful caused to the victim. In the case of strict liability, the absence of fault is problematic as it results in the attracting of blame to a party who is not, in the traditional sense, morally culpable. However, it is submitted that morality justifies the co-existence of both systems of liability within tort. Under a theory of enterprise liability, the morality of strict liability can be justified on the basis that, in some cases, it is the failure to redistribute the losses from the victim that is the wrong. The morality of fault liability justifies redistributing the harm from the victim to the wrongdoer rather than letting the loss lie where it falls in circumstances of mutual risk imposition because:

> Wrongdoing fairly exposes wrongdoers to responsibility to repair the harm that they have done. Forgiving wrongful lapses in concentration and failures of foresight would allocate the losses these frailties cause even more unfairly. Why should injured victims absorb the costs of the carelessness that harmed them? Shifting the costs of a negligent injury to the wrongdoer whose inadvertence caused it may be harsh, but it is fairer than letting the loss lie where it fell. Finally, forgiving lapses in concentration and failures of foresight might well encourage carelessness. Forbearance tends to foster the objects of its indulgence.[388]

---

[385] Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27 Oxford Journal of Legal Studies 493, 501, where the author summarises his concerns by stating, "[i]t is conceivable that the claim to fairness, that the equitable basis of enterprise liability seeks to espouse, may be undermined by the practical difficulties in its application."

[386] Ibid.

[387] Ibid., 498. Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 208, where the author also questions whether Fletcher's reciprocity of risk criteria would better reflect the reality of tort law if instead of focussing on risk creation it instead concentrated on harm creation. He points out that as risk, relatively speaking, rarely materialises into harm, it does not "impair the ability to pursue a conception of the good" and in fact, "[i]t is the ripening of risk into harm-not the chance of such ripening-that is the real burden of risk." Thus, the reciprocity of risk approach is only fair if it applies where the "reciprocity of *harm*, as well as reciprocity of *risk*, is present."

[388] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 223.

On the other hand, the morality of strict liability can be understood on the basis that where the harm is not negligently caused and where the risks are not reciprocal it would be unfair to allow the loss to lie where it falls. The failure to distribute the loss is wrong.[389]

The enterprise liability interpretation of strict liability does provide a moral justification for the presence of strict liability within tort law in prominent areas such as product liability, vicarious liability and liability under *Rylands v Fletcher*.[390] For example, the influence of enterprise liability in the development of a European Union-wide product liability law can clearly be found within Council Directive 85/374/EEC which justifies the imposition of liability without fault in this area on the basis that it represents "a fair apportionment of the risks inherent in modern technological production." This directive was transposed into Irish law with the enactment of the Liability for Defective Products Act 1991 which introduced into the Irish legal system a supplementary regime of strict liability in product liability law. Under this Act, strict liability was chosen as the fairest means of distributing the losses which arise from injuries caused by defective products. Strict liability was introduced on the basis that, as producers profit from the introduction of products into the market, they should be held responsible for the risks these products impose on the public. Defective products expose consumers to non-reciprocal risks. It is only fair then that they should have to pay for the harm caused by such risks regardless of whether the defect was negligently caused.[391]

The purpose of the law in such circumstances is to place the costs associated with injury caused by those products "on those who are in a position to pass part of the loss on to purchasers of their products or to factors employed in the production of their products (including labor and

---

[389] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193, 224, where the author points out that:

> To leave nonnegligent losses on those whose misfortune it is to suffer them, when we might readily spread these losses among all those who create similar risks of injury, is unfair ... Fairness favors dispersing the costs of blameless accidents among all those who create similar risks of such accidents, just as much as it favors dispersing the costs of accidents precipitated by wrongdoing among lucky and unlucky wrongdoers. Pooling one set of risks but not the other is presumptively less fair than pooling both sets. A law of accidents that attends to the distribution of the burdens and benefits of risky activities is therefore more just than one which attends only to the rectification of injuries wrongfully inflicted.

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

[391] Bryan McMahon & William Binchy, *Law of Torts* (4th ed, Bloomsbury Professional, 2013) 399, where the authors note that "liability is based, not on *wrongful conduct* by the producer, which (in theory at least) is the hallmark of negligence, but merely on proof of *a fact*, that a defect caused the plaintiff damage."

capital), in this way bringing about a fairly wide spreading of accident losses."[392] Moreover, the fact that a producer is in a much stronger position than the plaintiff to determine the circumstances giving rise to the defect justifies the imposition of strict liability on the defendant in such circumstances.[393] As well as being a method of cost internalisation, such an approach produces a deterrent effect in that the manufacturer is best placed and motivated to ensure that the product does not cause injury to the public in this context on the basis that, to quote Traynor J in the famous American product liability case of *Escola v Coca-Cola Bottling Co.*, "the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot." [394]

In line with this conception of fairness, strict liability does not impose liability for all harm suffered by consumers arising from the use of products. No liability will attach to products which are designed, produced and marketed carefully but remain inherently dangerous e.g. razor blades, pesticides and so forth. The risks from such products are not extraordinary because the benefits received outweigh the burdens that they impose. Thus, the 1991 Act provides that a product is not considered "defective" unless it fails to meet the level of safety that the consumer is *entitled* to expect.[395] However, where the design, production or marketing of the product creates an extraordinary risk of harm and places that risk on to the market (such as where the product is defective) it is fair that the producer should be liable for the harm which eventuates regardless of whether the product has been negligently designed, produced or marketed.

While the 1991 Act introduces a regime of no-fault liability for harm caused by defective products, it does provide a number of defences for producers which waters down the so-called strict nature of the regime and which reinforces the thesis that corrective justice and distributive justice theory co-exist within our tort system. For example, under the 1991 Act a producer will not be liable simply because the existence of the defect was not identifiable at the time the

---

[392] Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 50.
[393] Royal Commission on Civil Liability and Compensation for Personal Injury: Report Vol. 1 (1978) [316].
[394] *Escola v Coca-Cola Bottling Co.*, 150 P.2d 436, 440-441 (Cal. 1944). Note also, the judgment of Traynor J in *Greenman v Yuba Power Products, Inc.* 377 P2d 897, 901 (1963), where he stated that "such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons how are powerless to protect themselves."
[395] Section 5 of the Liability for Defective Products Act 1991.

product was put into circulation due to the limits of scientific or technological knowledge available at that time.[396] In this context Rabin explains that the defence:

> ... insulates a product manufacturer from true strict liability for after-acquired technological advances-safety techniques unknown at the time of product marketing but in use at the time of trial. Just as in the case of after-acquired information about risk, if the courts took seriously the oft-stated homily that strict products liability is based on the "safety of the product, rather than the reasonableness of the manufacturer's conduct," there would be no such retreat to fault-based notions. But fairness considerations, grounded in norms of interpersonal wrongdoing, dictate otherwise. It is not that risk-spreading and deterrence considerations have fallen into disfavor; rather they have been tempered by a residual concern about doing individualized justice.[397]

Enterprise liability theory also provides a moral justification for the strict liability nature of vicarious liability. One of the central criticisms of corrective justice theory is that it cannot explain the presence of vicarious liability in our tort system. If tort law is centred on wrongful agency and correlativity, how is that under vicarious liability an employer, who has not acted negligently in any way, can nevertheless be made liable to a third party for the actions of his or her employee? Enterprise liability and the doctrine of reciprocity of risk may provide an explanation for the existence of vicarious liability in a manner which is morally normatively coherent. Under a theory of enterprise liability, the attribution of legal responsibility is, in this context, justified on the basis that an employer should not be able to avoid liability for injuries caused as a result of extraordinary risks which are characteristic of his or business and where it would be unfair to impose the non-negligent losses arising from such activity on the plaintiff. The moral wrong lies not so much in the conduct of the activity but in the failure to compensate those who are harmed by that activity. Therefore, when a court is asked to determine whether the wrongdoer is an "employee" of the defendant or whether the actions of the wrongdoer were carried out "within his or her course of employment" in the context of vicarious liability, the courts should consider the larger question as to whether it is more appropriate that the losses incurred should be attributed to the defendant's enterprise as a fairer means of distributing the burdens imposed by the enterprise. The losses arising from the increased risk created by the enterprise can be fairly distributed across the enterprise as one of the costs associated with the operation of such an enterprise.[398]

---

[396] Section 6(e) of the Liability for Defective Products Act 1991. Otherwise known as the "state of the art" defence.
[397] Robert Rabin, 'Some Thoughts on the Ideology of Enterprise Liability' (1996) 55 Maryland Law Review 1190, 1206.
[398] W.V.H. Rogers, *Winfield & Jolowicz on Tort* (16th ed.) (London, Sweet & Maxwell 2002) 704, where the authors point out:

Vicarious liability does not involve a pure form of distribution. Before the losses suffered by the plaintiff can be transferred to the defendant enterprise it must be established that the harm was the result of the tort of an employee acting in the course of his or her employment for the defendant enterprise. Without the commission of a tort there can be no vicarious liability. The requirement that the initial harm be caused by a tort provides an incentive for the plaintiff to take reasonable precautions and the defendant employer does not simply become an insurer.[399]

This approach formed the theoretical basis for a finding of vicarious liability in the Canadian Supreme Court judgment of *Bazley v Curry*.[400] In that case, the vexed question as to whether a non-profit organisation should be held liable for acts of sexual abuse by its employees was considered. An employee was employed to care for emotionally troubled children in a residential care facility operated by his employer. The employee's responsibilities involved general supervision and included intimate activities such as tucking the children in at bedtime. The employee was effectively engaged as a surrogate parent of the residents entrusted to his care. During his employment he used the opportunity availed to him to sexually abuse a number of the vulnerable residents. In finding that such activities were within the course of the employee's employment for which the defendant was vicariously liable, McLachlin J held:

> The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm. While the fairness of this proposition is capable of standing alone, it is buttressed by the fact that the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of tort within society.[401]

> Knowing of its potential liability for the torts of its servants, the enterprise insures against this liability and the cost of this insurance is reflected in the price of it charges to its customers. In the result, therefore, losses caused by the torts of the enterprise's servants are borne in small and probably unnoticeable amounts by the body of its customers, and the injured person is compensated without the necessity of calling upon the individual, whose personal fault may be slight or even non-existent, to suffer the disastrous financial consequences that may follow liability in tort. Like many things in the law, the institution is probably to be explained not by reference to any single reason but by the cumulation of several.

[399] W.V.H. Rogers, *Winfield & Jolowicz on Tort* (16th ed.) (London, Sweet & Maxwell 2002) 704.
[400] *Bazley v Curry* (1999) 2 SCR 534. See also, Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27 Oxford Journal of Legal Studies 493, 496, where the author states that the decision in *Bazley* justifies vicarious liability in accordance under enterprise liability "because, on grounds of equity, an enterprise should compensate when risks it has introduced materialize. Equity also demands that the enterprise must accept full responsibility for managing those risks."
[401] *Bazley v Curry* (1999) 2 SCR 534, [31] (McLachlin J.).

McLachlin J also found support for the enterprise liability theory on deterrence grounds:

> Fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision. Failure to take such measures may not suffice to establish a cause of tortious negligence directly against the employer.[402]

In so doing, McLachlin J highlighted the fact the aims of deterrence could not be adequately achieved through fault liability, citing with approval the following words from the trial judge in the companion appeal case of *Jacobi v Griffiths*:[403]

> If the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children. That motivation will not in my view be sufficiently supplied by the likelihood of liability in negligence. In many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven matter.[404]

According to Keating, the question as to whether the relevant employee was acting within the course of his or her employment (or instead, was on "a frolic of his own") can best be resolved on the basis of enterprise liability and depends on "whether the conduct of the business tends to expose third parties to the kind of risk that issued in the injury at hand."[405] Thus, given the fact that the employer's enterprise significantly increased the risk of the abuse occurring by providing the employee with the work environment by which he could abuse the power conferred on him by the employer over the children, the intimate nature of the work, the power imbalance created and the vulnerability of the victims were all relevant factors which justified the imposition of liability on the employer for the creation of an extraordinary risk which materialised into harm.

Similar justification for vicarious liability was found by Lord Millett in the House of Lords' decision in *Lister & Others v Hesley Hall Limited*.[406] In that case, the defendant, as the employer of a warden of a school boarding house, was found vicariously liable for the acts of

---

[402] *Bazley v Curry* (1999) 2 SCR 534, [32] (McLachlin J.).
[403] *Jacobi v Griffiths* [1999] 2 SCR 570.
[404] *Bazley v Curry* (1999) 2 SCR 534, [32] (McLachlin J.), citing with approval the words of Wilkinson J in *G.J. v. Griffiths* [1995] BCJ No. 2370 (QL) (SC) [69].
[405] Gregory C. Keating, "The Theory of Enterprise Liability and Common Law Strict Liability" (2001) 54 Vanderbilt Law Review 1285, 1306.
[406] *Lister & Others v Hesley Hall Limited* [2001] UKHL 22.

sexual abuse carried out by the warden of the residents. Lord Millett noted that the application of enterprise liability theory in such circumstances was not limited to commercial activities or "enterprises for profit," observing that it is:

> ... based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.[407]

Not all are convinced that enterprise liability provides a complete explanation or justification for vicarious liability. Neyers has cast doubt on this approach pointing out that it fails to explain many aspects of the doctrine. In particular, Neyers is not convinced that it is fair that non-profitable organisations should be subject to strict liability on the basis that it is not receiving a "material benefit" from the activity in question; or why it is that vicarious liability is limited to the acts of employees and does not encompass independent contractors amongst other reasons.[408] It is interesting to note on the latter point, that, in recent judgments in cases relating to acts of sexual abuse by members of religious orders, the courts in England & Wales have not been bound by such a restriction and have upheld vicarious liability claims where a relationships "akin to an employment relationship" were found to exist between wrongdoer and enterprise.[409]

Hardiman J expressed similar scepticism towards enterprise liability as a basis for vicarious liability with his judgment in the Irish Supreme Court decision of *O'Keeffe v Hickey*.[410] In that case, the plaintiff was sexually assaulted by her school teacher as a very young child. In holding that the State was not vicariously liable for the acts of the teacher, Hardiman J dismissed the notion of enterprise liability as a means of fairly distributing the benefits and burdens arising from the risk created:

---

[407] *Lister & Others v Hesley Hall Limited* [2001] UKHL 22, [65] (Lord Millet).
[408] J. W. Neyers, 'A Theory of Vicarious Liability' (2005) 43 Alberta Law Review 1, 12-13.
[409] See *The Catholic Welfare Society & Others v Various Claimants & The Institute of the Brothers of the Christian Schools* [2012] UKSC 56; *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 988.
[410] *O'Keeffe v Hickey* [2008] IESC 72.

> ... in the circumstances of this case it is, in my opinion, nonsensical to speak of "risk creation". I do not accept that the State, in performing its constitutional duty to provide for free primary education is creating a risk ... Nor do I consider that the State is to be equated to an "enterprise" which "benefits from" the provision of free primary education. In other words, I consider that, even if a new species of vicarious liability should be introduced in a commercial context based on a theory (surely not a legal one) of "risk creation", of which I am utterly unconvinced at present, it would not apply in (what it has become fashionable to call) the *factual matrix* of the present case.

Hardiman J's criticisms of enterprise liability theory could be countered in the following fashion. First, it is not realistic to state that the State's provision of primary education does not create a risk such as that which materialised in *O'Keeffe*. It is common knowledge now, and was known then, that granting such power and control to individuals in the care and teaching of young, vulnerable and impressionable children would greatly enhance the opportunity of abuse - whether mental, physical or otherwise - occurring.[411] While the creation of the risk may not have been the intention of the State in providing education it cannot be said that it was not a foreseeable consequence. That said, it is essential to the underlying fairness of the enterprise liability justification of vicarious liability that a clear link is established (which Hardiman J did not believe it was in the instant case) between the harm and an inherent risk created by the enterprise.[412]

Second, the theory of enterprise liability is not limited to the commercial context, as Hardiman J's judgment might imply. The primary issue is whether the presence of the enterprise created the risk. The notion of "enterprise" in the context of enterprise liability therefore, as Lord Millett noted in *Lister*,[413] is not necessarily limited to commercial entities seeking to secure a profit and should be more broadly defined as relating to a "project or undertaking."[414] The main aim of enterprise liability is not simply loss distribution or deterrence of harm but is concerned

---

[411] James Gallen, '*O'Keeffe v Ireland*: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education' (2015) 78 Modern Law Review 151, 157, where the author notes that while it is true that the standards of knowledge are different today, "[e]ven granting historical ignorance of the prevalence of such abuse in the 1970s, it seems unreasonable for Ireland to ignore oversight and regulation of the possibility of physical or sexual abuse by teachers of pupils."

[412] Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27 Oxford Journal of Legal Studies 493, 499, where the author observes:

> It is one thing to say that the enterprise should be responsible for the risks it has created; it is quite another to say that it remains responsible when the existence of the risk is entirely coincidental ... Risk allocation can only take place on an equitable basis where the extent of the connection between the risk and the enterprise is known.

[413] *Lister & Others v Hesley Hall Limited* [2001] UKHL 22 [65] (Lord Millet).

[414] Oxford English Dictionary (Oxford University Press, 2000).

with fixing liability on the creation of the risk which has resulted in harm. Thus, whether the enterprise in question is a commercial, profit-making entity or a charitable non-profit one should not be the determining factor. The crucial factor is whether the entity responsible for creating and managing the risk should be held liable for it.[415]

Another question which arises is why is it that strangers to the employer's enterprise should benefit from the strict nature of vicarious liability when its employees, for example, do not? Smith explained that such an approach was indeed fair on the basis that the employee has voluntarily joined the enterprise and is receiving a benefit from it. Strangers, on the other hand, receive no similar benefit and yet are exposed to the risk of injury without having consented to it.[416] Viewed through a corrective justice lens, vicarious liability is something of an anomaly as it lacks the directness which links the wrongdoer to the victim. Peters, Jr argues that corrective justice theorists' arguments in this regard have been "weakened long ago by the rise of liability insurance."[417] Regardless, while correlativity may be missing, in its place victims are provided with an alternative:

> In the place of compensation from the individual wrongdoer, the plaintiff acquires a right of action against the organization that benefitted from the wrongdoer's work and created the environment in which the wrongdoing occurred. In addition to this substitution, enterprise liability offers the promise of fewer future accidents.[418]

Enterprise liability can also provide a moral justification for the imposition of strict liability in cases like *Rylands v Fletcher*.[419] Indeed, Keating points out that the argument in favour of

---

[415] Anita Bernstein, 'The Enterprise of Liability' (2004) 39 Valparaiso University Law Review 27, 37, where the author concludes:

> ... nothing in the stated goals of cost internalization and deterrence implies that the entity held liable must be a for-profit business. For instance, the government holds a power to tax that resembles the product manufacturer's power to set prices. Where the resemblance ends, it would appear that the government is better-suited than a for-profit business to achieve the goal of internalization. Deterrence also may be difficult to impose on, or expect from, the modern corporation.

[416] Jeremiah Smith, 'Tort and Absolute Liability: Suggested Changes in Classification (1917) 30 Harvard Law Review 241, 252-253. The author makes similar argument justifying the imposition of strict liability in defective products claim on the basis that consumers pay the enterprise which creates a fund from which he or she can be compensated for harm suffered. See Jeremiah Smith, 'Tort and Absolute Liability: Suggested Changes in Classification (1917) 30 Harvard Law Review 241, 253.

[417] Philip G. Peters, Jr, 'Resuscitating Hospital Enterprise Liability' (2008) 73 Missouri Law Review 369, 390.

[418] Ibid.

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

enterprise liability in such cases is stronger than other fields.[420] This is so because the existence of property rights provides a clear demarcation between activities. Thus, where the storage of ultra-hazardous material escapes from the defendant's property to another outside his or her control, it represents a clear example of the imposition of non-reciprocal risk and explains why a necessary element of the tort is that the escape must leave the property of the defendant to a property outside his or her control.[421] Individuals may choose to undertake extraordinary risks on their own property – such as the construction of an artificial reservoir – however, imposing those risks on one's neighbours when the thing escapes is unfair. That is why, as Keating asserts, "[b]y helping to locate the boundary between the permissible use of one's own resources and the impermissible appropriation of another's resources, the presence of property rights increases the attractiveness of enterprise liability."[422] It is notable that a use of property will not attract the imposition of strict liability unless the use involves "some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."[423] Thus, the rule supports the communitarian notion of individual dignity in that it protects the community from risks which are not reciprocal and not to the benefit of the community.

3.6 The Relationship between Corrective Justice and Distributive Justice

The interplay between distributive and corrective justice in the application of tort rules and practices is critical to our understanding of how tort law operates or should operate.[424] Corrective justice theorists accept the right of the courts to determine what is just in transactions between private individuals and to rectify an injustice where it arises. However, corrective justice theorists would not accept that it is the role of the court in a dispute between two private parties to take into consideration factors outside of the correlative relationship between the parties (such as public policy concerns); such decisions should be reserved for the legislature.

---

[420] Gregory C. Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72 Fordham Law Review 1857, 1917.

[421] *Read v Lyons* [1947] AC 156 (HL).

[422] Gregory C. Keating, 'Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72 Fordham Law Review 1857, 1917-1918.

[423] *Rickards v Lothian* [1913] AC 263, 279-280 (Lord Moulton).

[424] Benjamin Shmueli, 'Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice' (2015) 48 University of Michigan Journal of Law Reform 745; Norman S. Wilson, 'Is Corrective Justice Subsidiary to Distributive Justice? Which Answer Better Captures the Meaning of Tort Law Practice?' (2007) 10 Trinity College Law Review 45; Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193; Marc A Loth, 'Corrective Justice and Distributive Justice in Tort Law: On the Restoration of Autonomy and a Minimal Level of Protection of the Victim' (2015) 22 Maastricht Journal of European and Comparative Law 788.

Berryman summarised the difference between these two forms of justice as follows: "what is not correction is distribution, and what is not distribution is correction."[425] Thus, it is not for the common law courts, according to corrective justice accounts, to engage in distribution of society's goods and claim it is "justice," that is for parliament, and common law courts must base their decisions on morality and the correlative relationship between plaintiff and defendant in making their decisions.

Does the fact that Aristotle viewed both forms of justice as separate mean that they cannot co-exist within the same system or structure? If that is not the case, to what extent do distributive justice principles impact on corrective justice in the application of tort law? Weinrib was strict disciple of Aristotle in this regard,[426] and considered that both forms of justice were independent of each other and that 'never the twain shall meet.' On the other hand, theorists such as Cane,[427] Keating[428] and, to a lesser extent, Coleman,[429] believe that tort law cannot be viewed entirely or exclusively through the prism of corrective justice without having regard to outside considerations of distributive justice. The difference in approach is critical to our understanding of tort law as:

> The first stream attempts to defend the relevance and legitimacy of using private law for (limited) redistributive purposes. The other ... is the one trying to employ tort law progressively, with an ambition to be sensitive to ... the interests of disadvantaged groups in society.[430]

Weinrib is of the view that the separation of distributive justice from corrective justice provides the basis for distinguishing between private law (such as torts) and other types of legal order.[431] Under this approach, distributive justice is a political form of justice involving the State making just distribution on behalf of its citizens and it therefore contains a public interest element.[432] The equilibrium between the allocated holdings of each private citizen is protected by the principles of corrective justice. Thus, any involuntary transaction between private citizens which upsets that equilibrium must be equalised under corrective justice. In this way, corrective justice can be said to presume that the equality of the holdings between the parties prior to the

---

[425] Jeffrey Berryman, 'The Compensation Principle' (2008) 42 Loyola of Los Angeles Law Review 91, 99.
[426] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995).
[427] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401.
[428] Gregory C. Keating, 'The Priority of Respect Over Repair' (2012) 18 Legal Theory 293.
[429] Jules L. Coleman, *Risks and Wrongs* (New York: Cambridge University Press, 1992).
[430] Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Aldershot: Ashgate 2007) 2.
[431] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 19.
[432] Ibid., 210.

involuntary transaction were just.[433] As Heidt has put it, "[w]ithout the ability to so restore the distribution, the established distribution and its attendant rights would have little value."[434] Under Weinrib's interpretation corrective justice and distributive justice are distinct, independent forms of justice. To unify both forms of justice, in his opinion, would lead to incoherence in the law as "each necessarily undermines the justificatory force of the other."[435] According to Weinrib, because distributive justice essentially involves political matters it is not the function of the courts to do distributive justice. Weinrib is of the view that such matters are best left to those "that are accountable for their choices" such as the legislature.[436]Judges are not suitable to make those decisions because they view such questions through the prism of litigation between private parties. Furthermore, judges as unelected officials "are relatively insulated from accountability to the community".[437]Finally, distributive justice principles have no place in torts, Weinrib opines, as they cannot explain the principle of correlativity lying at the heart of tort law and explain why considerations of distributive justice should be simply limited to the wrongdoer and the victim.[438]

One major criticism of corrective justice as a moral theory, as noted earlier, is that for it to operate it assumes that the pre-existing distribution of holdings between the parties is just. As Dorfman observes, "the base-line on which tort law operates is a-priori-settled normative equilibrium between the distinct freedoms of choice and action exercised, equally, by multiple agents."[439] Corrective justice is doing justice when it restores the status quo in terms of each

---

[433] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995), 62.

[434] Kathryn R. Heidt, 'Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?' (1990) 47 Washington Lee Law Review 347, 352. In Richard W. Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 40 San Diego Law Review 1425, 1429-1430; the author summed up the interaction both forms of justice as follows:

> The external exercise of freedom depends on sufficient access to instrumental goods and sufficient security against interferences by others with one's person and whatever instrumental goods needed to go about their lives. Interactive justice, which is usually misleadingly referred to as "corrective" or "rectificatory" justice, defines the scope of persons' negative freedom-the security of their persons and of their existing stocks of resources in interactions with others. Together, distributive justice and interactive justice seek to assure the attainment of the common good ... by providing each person with her fair share of the social stock of instrumental goods (distributive justice) and by securing her person and existing stock of instrumental goods with interactions with others that are inconsistent with her right to equal external freedom (interactive justice).

[435] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 73.

[436] Ibid., 211.

[437] Ibid.

[438] Stephen R. Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa Law Review 449, 496.

[439] Avihay Dorfman, 'What is the Point of the Tort Remedy?' (2010) 55 American Journal of Jurisprudence 105, 111.

party's allocated holdings. Thus, Weinrib's corrective justice view is dependent on presuming that the initial holdings between the parties are fair. Justice is done in these circumstances when each party is restored to their own. This inspires the question from critics - how can this version of corrective justice be labelled a form of "justice" if it does not examine the inherent justice in the initial distribution? As Gardner highlights, "it cannot be just to restore a distribution that was not itself just."[440] The failure of Weinrib's theory to account for this initial distribution conceptually weakens it as a theory of justice. Perry has countered this criticism by arguing that the essence of corrective justice is not simply about preserving the status quo in terms of holdings but instead involves "the enforcement of the obligation of restoration."[441] In discussing similar criticisms levelled at Coleman's theory of corrective justice, Postema suggests that corrective justice does not assume "that ideal rules have been violated, but because it has a moral job to do even when conditions fall short of the moral ideal."[442] As Coleman himself observes, if corrective justice protects "this second best, real world distribution of rights which balance individual liberty and order needed to carry on a robust social existence, and if it provides a context in which desirable social institutions can exist, then it is worth protecting."[443]

In his later work, Coleman attempts to play down this apparent conflict within corrective justice theory. First, he makes the point that simply because the "demands of corrective justice may from time to time conflict with those of distributive justice" does not necessarily create an insurmountable difficulty, commenting that there is "no reason to suppose that two principles of justice cannot conflict with one another in the same way that principles of morality more generally can."[444] Second, if one accepts the premise "that principles of justice can conflict with one another" there is no reason why distributive justice should be given priority over corrective justice in the event of a clash.[445]

Benson, on the other hand, has sought to defend the notion of the autonomy of corrective justice by finding a moral basis explaining the initial distribution. Building on the work of both

---

[440] John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (2013) available at http://ssrn.com., accessed 12 May 2014.
[441] Stephen R. Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa Law Review 449, 456.
[442] Gerald J. Postema, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) Yale Law Journal 861, 881.
[443] Timothy D. Lytton, 'Smashing the Idols of Efficiency' (1993) 79 Virginia Law Review 275, 287.
[444] Ibid.
[445] Ibid.

Aristotle and Weinrib, he has developed an account of those initial distributions which is based on the concept of personality.[446] Personality, in this context, according to Benson, views persons as "fully accountable choosing agents"[447] having the ability to exercise free will. This Hegelian notion of personality, as previously discussed, achieves "specificity"[448] through a "moral capacity to use things."[449] In line with the Weinribian notion of corrective justice, this capacity is framed in terms of rights and duties which are negative in nature and which manifest themselves through external actions. Consequently, a person is entitled to use things without disrespecting another person's rights as long as those things "are morally available."[450] Moreover, because this duty to respect another's personality is framed negatively, "great inequality in holdings and even sheer propertylessness can, as such, be perfectly compatible with respect for each person's equal capacity to use things."[451]

According to this conception of personality, we do not have an innate right to things; the only innate right is that of bodily integrity.[452] In order to respect personality therefore, we must protect the individual's *capacity* to use things. An innate right to bodily integrity does not allow me to prevent others from taking things that are not already my own. Consequently, the individual does not have an innate right to own things external to themselves. Thus, under Benson's Hegelian-influenced conception of personality, things – before they are lawfully brought under the control of others – are "simply *res nullius*" and do not belong to anybody either communally or individually.[453] In this way, an individual's holdings or things are not based on distributive considerations.[454]

Unlike Weinrib, Coleman does not dismiss the role of distributive justice from tort law entirely. While Weinrib refuses to accept that distributive justice has any role to play in his interpretation

---

[446] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 515.
[447] Ibid., 549.
[448] Ibid., 567.
[449] Ibid.
[450] Ibid., 572.
[451] Ibid., 573.
[452] Ibid., 581.
[453] Ibid., 572.
[454] Ibid., 584-585, where Benson concludes:

> I can only acquire an exclusive right over a thing through an external manifestation of will that signifies that I have effectively brought the thing under my power, so long as my act is prior in time to a similar act by the other. Once established, my right to the thing continues as long as I am able to manifest my power over it. This principle ... is strictly nondistributive in conception. It reflects the standpoint of personality and nothing else.

of tort law, Coleman believes that both forms of justice can, and do, co-exist while at the same time retaining their moral independence from each other. Under Coleman's interpretation it is not incompatible to view the structure of tort law in corrective justice terms while the underlying theory may be based on distributive justice (or even economic) principles.[455] In fact, Coleman believes that there is a split "between the norms governing transactions and the justice of the underlying entitlements."[456] Thus, distributive justice principles can influence our understanding as to the type of wrongful behaviour which will justify the intervention of tort law. Once the behaviour is deemed "wrongful" then corrective justice principles impose a duty to repair that wrongful behaviour on the agent responsible for it. Corrective justice, so understood, "is the *rectifying aspect* of distributive justice."[457]

The tort of negligence is a prime example of this interaction between the competing forms of justice. Questions regarding the duty and standard of care are influenced by distributive justice principles. In the case of the duty question, distributive justice principles could manifest themselves on questions surrounding proximity and policy. In the case of breach of the standard of care, distributive justice principles would manifest themselves in the context of assessing the cost of preventing the accident or considering the social utility of the defendant's actions. Thus, principles of distributive justice would determine whether a wrong (through a breach of a duty to take care) had been committed. Corrective justice would then provide the structure for rectifying that wrong through evidence of the relevant human agency linking the duty to repair to the defendant through concepts such as factual and legal causation.

Coleman provides little further detailed analysis of distributive justice in this context. However, he does make some observations which clarify his thinking in this regard. For example, although Coleman acknowledges that corrective justice does not protect the ideal notion of distributive justice, he does require that the rights so protected "must be real rights ... compatible with the fact that corrective justice imposes moral reasons for acting."[458] The rights in question must be defensible and must give rise to moral reasons to act which justify the intervention of justice to prevent their invasion by the wrongful human agency of others. However, in order to ensure justice between the parties which is at the core of tort law, these

---

[455] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 350.
[456] Ibid., 351.
[457] Jules L. Coleman, 'Epilogue to *Risks and Wrongs* (Marcial Pons, Spanish Translation 2010)'. The English translation is available at http://ssrn.com., accessed 12 May 2014.
[458] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 352.

norms of distributive justice must be limited by the constraints of corrective justice i.e. they must be "localised."[459] It is, in the words of Perry, a form "of localized distributive justice because the group is limited to the victim and her injurer (or injurers)."[460] In identifying these norms, Coleman notes that to apply general distributive principles is too wide an approach. Equally, to apply norms which are peculiar only to the parties to the transaction (those which arise in a contract between the parties) is too narrow an approach to adopt.[461] Coleman proposes adopting a middle ground and explains how such an approach would operate in determining the appropriate norm establishing fault:

> My idea is that informal conventions typically arise within communities of individuals as ways of giving local expression and content to the prohibition against unreasonable risk taking. These conventions govern the behaviour of local communities; members of the communities develop expectations about the behavior of others and internalize constraints regarding their own behavior. These conventions are local, not global. It is the failure to comply with them that typically grounds duties in corrective justice.[462]

According to Coleman, the local conventions or norms regarding reasonable risk taking develop in a fashion which is to the benefit of all within the community of risk. These norms therefore coordinate the behaviour of the members of the community. These norms create expectations in others within that community who rely on them to be respected. These norms, in Coleman's interpretation, give rise to a "moral duty to comply [which] derives from the prohibition against free riding on the compliance of others."[463] Thus, corrective justice sustains these conventions by giving rise to duties to repair against those responsible for breaching them and thereby harming the plaintiff.[464]

Distributive justice is further distinguished from corrective justice by virtue of the fact that corrective justice concerns the private relationship between the parties whereas distributive justice is not so isolated. Whereas corrective justice is concerned with the bipolar relationship between the parties, distributive justice is not so restricted and applies to all members within

---

[459] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 357.
[460] Stephen R. Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa Law Review 449, 461.
[461] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 357.
[462] Ibid., 358.
[463] Ibid., 359.
[464] Some commentators have expressed scepticism as to whether these local norms are appropriate and can provide the "moral directionality" necessary. See in particular, Gerald J. Postema, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) Yale Law Journal 861, 883.

the relevant community.[465] Wright agrees with Weinrib regarding the separate and independent nature of distributive and corrective justice but he does not agree with him that they are mutually exclusive and acknowledges not only that both forms of justice can "coexist in the same body of law, but also may apply simultaneously in the same situation."[466] However, Wright disagrees with Weinrib's notion that corrective justice is exclusively private law and distributive justice is exclusively public law. In particular, Weinrib argues that this must be so on the basis that deciding issues of distributive justice is beyond the remit of the courts who are not democratically elected to make what are essentially political choices. While Wright acknowledges that such decisions should, preferably, be made by the legislature, the courts (through private actions) do have an essential role to play in enforcing "distributive justice claims to political goods such as voting rights, civil liberties, and non-discriminatory treatment. They can review legislative programs that are intended to achieve distributive justice to ensure that such programs demonstrate at least a minimal level of rationality and are properly administered."[467]

Cane vehemently disagrees with the notion that corrective justice and distributive justice are distinct categories of justice.[468] Cane, unlike Weinrib, essentially views tort law as consisting of a mixture of both corrective and distributive justice. Whilst acknowledging the correlativity of tort law, he does not necessarily agree that that means it can be understood without reference to questions of distributive justice.[469] In his view, the rules and principles of tort law are best explained by distributive justice whilst the application of those rules to particular disputes and between particular parties is best explained through principles of corrective justice.[470] In a similar vein, Binchy notes that:

> There can be little doubt that the aims of tort law include distributive justice as well as commutative (corrective) justice. Commentators debate the extent to which distributive justice should be a factor but, even on an approach most strongly in favour of corrective justice, some element of distributive justice must be considered.[471]

---

[465] Richard W. Wright, 'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625, 702.
[466] Ibid., 708.
[467] Ibid., 709.
[468] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401. See also Richard L. Lippke, 'Torts, Corrective Justice, And Distributive Justice', 5 Legal Theory 149, 151, where the author theorises that "*[a] normative account of the occasions of corrective justice in torts is dependent on a larger theory of distributive justice.*"
[469] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401, 404.
[470] Ibid., 405.
[471] William Binchy, '*Meskell*, The Constitution and Tort Law' (2011) 33 Dublin University Law Journal 339.

In Gardner's view, tort law is not exclusively the remit of corrective justice. He acknowledges that tort law "[c]annot be fully justified without" recourse to such principle; however, nor can it "be fully justified by" them either.[472] Instead, he submits, questions of distributive justice are central to the administration of tort law, "*precisely because* tort law is a site of corrective justice."[473] Calnan also agrees with Cane's assertion that modern law of torts is comprised of a mixture of corrective justice and distributive justice principles. In particular, Calnan observes that the legal system which now exists is very different to that that pertained at Aristotle's time. He points out that our current legal system, unlike that of ancient Greece, is a state-sponsored system and justice is carried out by officials of the state in the form of judges, "who is both entitled and obligated to create and enforce rules of law."[474] The role of the judge therefore in a modern legal system is to distribute rights and duties among the public. Thus, corrective and distributive justice are inextricably linked.[475]

As an example of the role of distributive justice in tort law, Cane observes that the analysis of the duty question in negligence receives short analytical shrift in the leading works of the predominant theorists in the field of corrective justice. He points out that Weinrib and Coleman pay little or no attention to the duty of care question.[476] This is rather convenient for them in that questions of distributive justice in negligence most commonly arise under this heading. As Robertson observes: "[t]he determination of the duty of care question seems, superficially, to exemplify a central challenge of private law theory, which is to reconcile the pursuit of interpersonal justice with the overtly instrumental principles that can be found throughout the field of private law."[477]

---

[472] John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (2013) available at http://ssrn.com., accessed 12 May 2014.

[473] Ibid.

[474] Alan Calnan, 'In Defense of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky' (2005) 1 New York University Journal of Law & Liberty 1023, 1065.

[475] John Finnis, *Natural Law and Natural Rights* (2nd ed.) (Oxford University Press, 2011) 166, 179, where the author observes:

> [W]hether the subject-matter of [an] act of adjudication be a problem of distributive or commutative justice, the act of adjudication itself is always a matter for distributive justice. For the submission of an issue to the judge itself creates a kind of common subject-matter, the *lis inter partes*, which must be allocated between parties, the gain of one party being the loss of another.

[476] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401, 403.

[477] Andrew Robertson, 'On the Function of the Law of Negligence' (2013) 33 Oxford Journal of Legal Studies 31.

Corrective justice alone cannot explain why, for example, the law of negligence (through the duty of care mechanism) distinguishes between cases of physical damage on the one hand, and cases of psychiatric damage and pure economic loss on the other. On pure corrective justice principles, the law should not distinguish simply on the basis of the nature of the damage. On corrective justice principles there is no difference between foreseeable physical injury caused by the defendant and foreseeable psychiatric injury or pure economic loss negligently caused by the defendant. Yet, the law of negligence continues to categorise physical, psychiatric and pure economic harm differently.

Take for example, the law's approach toward psychiatric damage claims. Claims of this type have long been viewed with distrust by the courts in the belief that such claims could be easily faked or exaggerated.[478] Such distrust, amongst other reasons, has led to the English courts in particular to apply restrictions on the application of the duty of care in such circumstances.[479] In *White v Chief Constable of South Yorkshire and Others*,[480] the House of Lords was asked to consider the claims of police officers who suffered psychiatric damage as a result of the traumatic scenes that they had witnessed at first hand following the Hillsborough Stadium disaster when 96 football fans ultimately died as a result of crushing caused in the stadium due to the defendant's negligent management of the crowd attending the football match.

In an earlier decision, the House of Lords had rejected similar claims brought by the families of the victims who died that day.[481] Consequently, their Lordships in *White* were faced with a dilemma - if one were to view both cases (*Alcock* and *White*) from a corrective justice perspective, then the admitted negligence should have resulted in the plaintiffs in both cases receiving compensation for the psychiatric injuries suffered by them. However, having already denied recovery to the families of the victims in *Alcock* on policy grounds (through arbitrary control mechanisms), how could the House of Lords, politically and equitably, grant the plaintiffs in *White* compensation on largely the same facts? Ultimately, Lord Hoffmann resorted to distributive justice principles to support the finding that the plaintiffs in *White* were not owed a duty of care in negligence. This was so even though the plaintiffs had put forward cogent arguments as to why they were to be distinguished from the families of the victims in

---

[478] *Victorian Railway Commissioners v Coultas* (1888) 13 App Cas 222. See generally, Bryan McMahon & William Binchy, *Law of Torts* (4th ed, Bloomsbury Professional, 2013) at Chapter 17.
[479] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.
[480] *White v Chief Constable of South Yorkshire and Others* [1999] 1 All ER 1; [1998] UKHL 45.
[481] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

Alcock. In particular, they argued that the law should treat them differently as rescuers (on the basis of the common law's tradition of encouraging such behaviour) or as employees (on the basis that their employer had unreasonably exposed them to a dangerous workplace). Notwithstanding these arguments, Lord Hoffman in refusing to extend liability to the plaintiffs, noted:

> ... I think that such an extension would be unacceptable to the ordinary person because (though he might not put it this way) it would offend against his notions of distributive justice. He would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.[482]

Thus, as Cane notes, Lord Hoffmann saw distributive justice as acting as a limitation on the application of corrective justice.[483] By applying the same result to the facts of similar cases, the court (as Lord Hoffmann interpreted the claims of the policemen in *White* and those of the families of the victims in *Alcock*) was distributing the burden of the defendant's negligence evenly and fairly. Thus, the losses (in the form of psychiatric harm) resulting from the disaster were evenly distributed amongst the victims. Like cases were treated alike. Unfortunately, their Lordships failed to heed the old adage that "two wrongs don't make a right." Appealing to distributive justice in this case by comparing "like with like" simply entrenched the injustice perpetrated on the plaintiffs in *Alcock* but, as Cane comments, "judicial appeal to community values has a long history and is a popular ploy to overcome the democratic deficit under which courts are widely thought to labour."[484]

The logic applied by the House of Lords in imposing restrictions on the plaintiffs' right of recovery in *White* was followed by the Irish Supreme Court in *Fletcher v Commissioner of Public Works in Ireland*.[485] In that case, the plaintiff was employed by the defendant who admitted it had failed to observe proper precautions for the safety, health and welfare of the plaintiff and had thereby exposed him to significant quantities of asbestos dust in the course of his employment. As a consequence, the plaintiff was also exposed to the risk of contracting a

---

[482] *White v Chief Constable of South Yorkshire and Others* [1999] 1 All ER 1, 48.
[483] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401, 403.
[484] Peter Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 Oxford Journal of Legal Studies 393, 400.
[485] *Fletcher v Commissioner of Public Works in Ireland* [2003] IESC 13.

painful and potentially lethal lung disease known as mesothelioma. However, the risk that this disease would eventuate was very remote. The plaintiff was angered upon learning the news that he had been unnecessarily, and without his knowledge, exposed to such a risk and that knowledge eventually resulted in him developing a recognisable psychiatric illness known as reactive anxiety neurosis. The court highlighted the potential difficulties raised by claims of psychiatric damage and noted that the courts could approach the question from either end of two extremes; treat such harm no differently to claims involving physical injury or refuse to recognise it at all. While Geoghegan J did not find favour with either of these two approaches, he did acknowledge that distributive justice required that such claims should be subject to restrictions.[486] Thus, the Supreme Court concluded that the plaintiff was not entitled to recovery for the psychiatric harm that he had suffered in circumstances where he feared contracting a disease notwithstanding the fact that the medical advice he had received indicated that the chances of his contracting the disease was "very remote."

The decision in *Fletcher* is another example of distributive justice influencing the courts' decision in an action for negligence. Rather than view the case in simple Aristotelian corrective justice terms, Geoghegan J, instead referred to distributive justice principles – as Lord Hoffmann did in *White* by comparing "like with like" - in denying recovery to the victim on the basis that:

> ... there would be an element of unfairness ... as between employees exposed to such asbestos who may in fact suffer from great anxiety for the remainder of their lives but not such as could be characterised as psychiatric injury on the one hand and those who suffer from such anxiety which can be characterised as psychiatric injury on the other. Is it just that a worrier who has to take medication for his worry receives sums in the order of €50,000 or more whereas worriers who do not have to take such medication get nothing? I think not.[487]

Once again, the judges resorted to distributive justice principles by comparing two groups within society. The refusal to award damages to the plaintiff was thereby justified on the basis that it would be distributively unfair when compared to how members of the other group were treated. However, the choice of comparators by Geoghegan J in *Fletcher* is questionable. The worrier who has suffered a legally recognisable loss is in a qualitatively very different position to person who suffers no such loss. How then can it be fair to treat them both the same? Such reasoning raises concerns regarding the fairness of decisions. As Beever notes:

---

[486] *Fletcher v Commissioner of Public Works in Ireland* [2003] IESC 13, [117] (Geoghegan J).
[487] Ibid., [130] (Geoghegan J).

> [T]he appeal to such one-sided policy concerns "amounts to the judicial confiscation of what is rightly due to the plaintiff in order to subsidise policy objectives unilaterally favourable to the defendant and those similarly situated". The claimant is treated merely as a means to others' ends.[488]

Questions of distributive justice also regularly arise in cases labelled as "wrongful birth" or "wrongful conception" actions. In one such case, *MacFarlane and Another v Tayside Health Board*,[489] the MacFarlanes were a married couple who already had four children and did not want any more. The husband had a vasectomy. He was then later advised by his surgeon that the procedure was successful and it was no longer necessary for the couple to use contraception. The couple acted on this (negligent) advice and some months later the wife became pregnant. A healthy child was born to the couple who sought damages *inter alia* for the costs of raising the child on the basis that the plaintiffs' autonomy had been unjustifiably invaded. Lord Steyn in recognising the difficult decision that needed to be made observed that "tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and difficulty a choice sometimes has to be made between the two approaches."[490] If one were to view this case from a purely Aristotelian corrective justice point of view then the law would require the defendant to compensate the plaintiffs for the costs of rearing the healthy, but unwanted, child. But, as Lord Steyn noted, if one were to approach the issue from a distributive justice viewpoint, it would require "a focus on the just distribution of burdens and losses among members of society."[491] Thus, under this approach attention should be focused on the question as to whether the ordinary reasonable person would think it just that the parents of a healthy child should be entitled to a legal remedy consequent upon that birth. In concluding, apparently without any empirical evidence, that they would not, Lord Steyn denied the plaintiffs' claim for the costs associated with the rearing of the child. In so doing, Lord Steyn acknowledged that, at its heart, his decision was a moral one:

> ... to explain decisions denying a remedy for the cost of bringing up an unwanted child by saying that there is no loss, no foreseeable loss, no causative link or no ground reasonable restitution is to resort to unrealistic and formalistic propositions which mask the real reasons for the decisions. And judges ought to strive to give the real reasons for their decision. It is my firm conviction that where courts of law have denied a remedy for the cost of bringing up an

[488] Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) 176-177; quoting Ernest J. Weinrib, 'Does Tort Law Have a Future?' (2000) 34 Valparaiso University Law Review 561, 566.
[489] *MacFarlane and Another v Tayside Health Board* [1999] 4 All ER 961; [1999] UKHL 50.
[490] *MacFarlane and Another v Tayside Health Board* [1999] 4 All ER 961, 978.
[491] Ibid., 977.

> unwanted child the real reasons have been grounds of distributive justice. That is, of course, a moral theory. It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.[492]

The Irish High Court expressed approval for the approach adopted by the House of Lords in its decision in *Byrne v Ryan*.[493] In that case, one of the plaintiffs was a mother who underwent a sterilisation procedure which failed because of the negligence of the defendant. Again, the court refused to find the medical professional liable for the cost of rearing a healthy child subsequently conceived because of the failure of the procedure. In so doing, Kelly J was very much guided by *inter alia* questions of distributive justice in reaching a similar conclusion, noting that "the refusal to award damages in circumstances such as this can be equally justified by considerations of distributive justice ..."[494]

Questions of distributive justice commonly come to the fore in claims of negligence against public authorities. It is in disputes between private citizens whose primary focus is on individual interests and public authorities charged with acting in the public interest where the tension between corrective and distributive justice considerations is most explicit. Most recent examples of these clashes have arisen in negligence actions brought against members of An Garda Síochána as regards their investigatory powers.[495] For example, in *Lockwood v Ireland,*[496] the plaintiff was a complainant in a prosecution for rape brought against J.W. by the DPP. During the course of the criminal trial it emerged that certain admissions made by J.W. while in Garda custody could not be placed before the jury. This was due to an error made by the Gardaí during the course of J.W.'s arrest, and as a result, the evidence obtained was inadmissible. The prosecution's case accordingly collapsed.

The plaintiff sought damages for *inter alia* the Gardaí's negligence in arresting J.W. Kearns P dismissed the claim on the basis that, in the absence of *mala fides* on the part of the Gardaí, no

---

[492] *MacFarlane and Another v Tayside Health Board* [1999] 4 All ER 961, 977.
[493] *Byrne v Ryan* [2009] 4 IR 542; [2007] IEHC 207.
[494] *Byrne v Ryan* [2009] 4 IR 542, 581.
[495] Dermot P.J. Walsh, 'Liability for Garda Negligence in the Prevention and Investigation of Crime' (2013) 49 Irish Jurist 1.
[496] *Lockwood v Ireland* [2011] 1 IR 374.

duty of care in negligence arises in the course of a criminal investigation or prosecution. Kearns P referred to the ripple effect a contrary decision would have on the rest of society. In particular, he observed that "the inhibiting nature of any such duty would effectively cripple the capacity of An Garda Síochána, or any other police force for that matter, to carry out its duties effectively and with expedition."[497] Thus, without explicitly acknowledging the influence of distributive justice principles, Kearns P ultimately refused to compensate the innocent plaintiff on the basis of the potential negative implications for the rest of society. Rather than distribute the loss to society (i.e. through the taxpayer) by imposing liability on the Gardai, the court chose to allow the loss rest with the plaintiff.

A similar outcome was reached in another action brought against the police in *L.M. v Commissioner of An Garda Síochana*.[498] In that case, Hedigan J of the High Court - conscious that by recognising a duty in such circumstances could promote the practice of defensive policing - refused to find the existence of a duty observing that "[w]hile the recognition of individualised justice may militate in favour of the recognition of a duty of care, there are compelling considerations rooted in the welfare of the whole community, which outweigh the dictates of individualized justice."[499]

One reason why Weinrib rejects the notion that distributive justice plays any part in judicial decision-making is his argument that judges lack the expertise and legal capacity to make distributive choices.[500] This issue arose in the Irish High Court decision of *O'Reilly & Others v Limerick Corporation & Others*.[501] In that case, the plaintiffs were members of the traveller community residing in caravans on unofficial sites in the city of Limerick. They sought an injunction directing the corporation to provide them with adequate serviced halting sites and

---

[497] *Lockwood v Ireland* [2011] 1 IR 374, 383.

[498] *L.M. v Commissioner of An Garda Síochána* [2011] IEHC 14. The decision in *L.M.* was subsequently expressly approved by the High Court in *G v Minister for Justice, Equality & Law Reform* [2011] IEHC 65.

[499] *L.M. v Commissioner of An Garda Síochana* [2011] IEHC 14, [6.8] (Hedigan J.). The Supreme Court on appeal – given the complex policy issues involved – has held that these cases should returned to the High Court for a full hearing on the issue in *L.M. v The Commissioner of An Garda Síochána & Others* [2015] IESC 81, [25] (O'Donnell J.). See further discussion in chapter 6 of this work.

[500] Christian Witting, 'The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence' (2008) 71 Modern Law Review 621, 638:

> Courts are in a poor position to develop forward-looking policies. These problems include problems of expertise and obtaining sufficient evidence. The judicial process is much better equipped to conduct the backward-looking exercise of determining claims as between parties to particular disputes.

[501] *O'Reilly & Others v Limerick Corporation & Others* [1989] ILRM 181.

damages from the State for the past sufferings which they had undergone. This latter claim raised issues regarding the distribution of public resources and the responsibility of the State for failing to do so in favour of the plaintiffs. In refusing to grant such relief to the plaintiffs, Costello J referred to the principles of corrective and distributive justice:

> There is an important distinction to be made between the relationship which arises in dealings between individuals (a term which includes dealings between individuals and servants of the State and public authorities) and the relationship which arises between the individual and those in authority in a political community (which for convenience I will call the Government) when goods held in common for the benefit of the entire community (which would nowadays include wealth raised by taxation) fall to be distributed and allocated. Different obligations injustice [sic] arise from these different relationships. Distributive justice is concerned with the distribution and allocation of common goods and common burdens. But it cannot be said that any of the goods held in common (or any part of the wealth raised by taxation) belong exclusively to any member of the political community. An obligation in distributive is placed on those administering the common stock of goods, the common resource and the wealth held in common which has been raised by taxation, to distribute them and the common wealth fairly and to determine what is due to each individual. But that distribution can only be made reference to the common good and by those charged with furthering the common good (the Government); it cannot be made by any individual who may claim a share in the common stock and no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due.[502]

Very much in line with Weinrib's thesis, Costello J questioned whether the courts had the expertise or constitutional authority to exercise such a supervisory function over national resources. To expect the courts to intervene would be to make a decision that there was an unjust distribution of those financial resources. Reaching such a conclusion would require the court to analyse the competing claims on such resources and prioritising them. In engaging this process, the courts would not be doing corrective justice but instead would be deciding on the fairness of the allocation of public resources. Such a function is not within the remit of the courts because, "[a]part from the fact that members of the judiciary have no special qualification to undertake such a function, the manner in which justice is administered in the courts, that is on a case by case basis, makes them wholly inappropriate institution for the fulfilment of the suggested role."[503] Ironically, it could be said that Costello J was making a decision regarding the allocation of public resources by *not* agreeing to allocate such resources. By making a decision not to interfere on the basis that they lack the ability to do so, the court is making a decision on the allocation of those resources, just not in the plaintiff's favour.

---

[502] *O'Reilly & Others v Limerick Corporation & Others* [1989] ILRM 181, 194.
[503] Ibid., 195.

Further evidence of the role of distributive justice considerations may be gleaned from the case law on the tort of nuisance.[504] Actions in nuisance essentially involve – in what would appear to be classic corrective justice style – a judgment between the competing interests of property owners. To what extent do utilitarian arguments play a role in such judgments? Traditionally, the Irish[505] and English[506] courts were reluctant to allow considerations of public benefit to effectively extinguish the private rights of individuals in such cases. However, in more recent years the courts have displayed a more favourable attitude towards such considerations and while not a decisive factor, they may play a significant role in determining whether the defendant was acting as a reasonable user of the property or not.[507] The weight to be given to public interest factors is difficult to ascertain. However, as McMahon & Binchy conclude, "[i]t seems that the courts will be reluctant to listen to the plea of public benefit where the injury is out of the ordinary rather than part and parcel of urban life."[508]

Public interest considerations generally come more to the fore when assessing the appropriate remedy to be awarded in an action for nuisance.[509] In cases of loss of amenity in particular, courts are faced with the choice of awarding damages to the plaintiff and/or granting an injunction to prohibit or restrict the offending activity.[510] In making such a decision, should the court take into consideration the defendant's arguments as to the public interest? Consideration of the public interest famously arose in the dissenting judgment of Lord Denning in the decision in *Miller v Jackson,*[511] where it was held by the majority that the public interest was not relevant to liability but was to the remedy. In that case, the plaintiffs had purchased a house next to a cricket club. During the cricket season balls were prone to be hit into their back garden (particularly in circumstances where a six was struck). This caused damage to the plaintiffs' property in the form of chipped paintwork and broken tiles as well as the risk of personal injury. The club took measures to alleviate the risks to the plaintiffs including the erection of a fence

---

[504] Although committed corrective justice theorists like Allan Beever deny that this is the case. See Allan Beever, *The Law of Private Nuisance* (Hart Publishing, 2013), where the author posits that the law of nuisance is rights-based and simply involces the prioritisation of different land uses.

[505] *Bellew v Cement Ltd* [1948] IR 61, 64, where Maguire CJ said: "... I am of the opinion that the Court is not entitled to take the public convenience into consideration when dealing with the rights of private parties."

[506] *Bamford v Turnley* (1862) 2 B&S 66; 122 ER 27.

[507] *Mullin v Hynes* (13 November 1972); *Kelly v Dublin County Council* (21 February 1986).

[508] Bryan McMahon & William Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013) [24.37].

[509] Richard A. Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8 Journal of Legal Studies 49; Maria Lee, 'The Public Interest in Private Nuisance: Collectives and Communities in Tort' (2015) 74 Cambridge Law Journal 329. See also *Lanigan & Another v Barry & Another* [2016] IESC 46.

[510] *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287.

[511] *Miller v Jackson* [1977] 3 All ER 338; [1977] QB 966.

and offered to pay for any damage caused and construct netting which would protect the plaintiffs' property. The plaintiffs were not satisfied and sought *inter alia* an injunction to prohibit the nuisance (as they saw it) from continuing. In the opening paragraph of his judgment, Lord Denning dispensed with the notion that the case focused on the respective rights of the parties at the expense of external factors. In the course of his judgment, Lord Denning famously waxed lyrical on the public importance of playing cricket to English society.[512] In refusing to grant an injunction to the plaintiffs, Lord Denning concluded, "As between their conflicting interests, I am of opinion that the public interest should prevail over the private interest. The cricket club should not be driven out."[513] In a similar if a somewhat less extravagant manner, public policy considerations were to the forefront of the Irish High court's mind in *Clifford v The Drug Treatment Centre Board*.[514] In that case, the court refused to grant an injunction sought by the owners of local businesses to restrict the number of addicts attending the defendants' premises for treatment on the basis that their presence represented a nuisance. In doing so, the court emphasised the public service that was being provided by the treatment centre.

While the general tendency of the courts has been to downplay social utility concerns when deciding liability in nuisance such considerations are an implicit factor when considering whether the activity "fits in" with the character of the neighbourhood (the "locality" rule) which goes towards the larger question as to the reasonableness or otherwise of the defendant's behaviour:

> The persistence of the locality rule in the decided cases cannot easily be squared with a pure theory of corrective justice, where the entire strategy of inquiry is to look at the conduct of the two disputants in isolation and to rebuff any efforts to allow their rights to be influenced, let alone determined, by the conduct or needs of third parties.[515]

Viewed through a Weinribian corrective justice lens, the character of the neighbourhood would be critical importance in determining the extent of the plaintiff's and defendant's rights in the use and enjoyment of their property. In the words of Charleton J in *Lanigan v Barry*, "[w]hat would be a nuisance in quiet areas in Dublin 4 would not necessarily constitute an actionable

---

[512] *Miller v Jackson* [1977] 3 All ER 338, 340-341.
[513] Ibid., 345.
[514] *Clifford v The Drug Treatment Centre Board* (7 November 1997) HC (McCracken J).
[515] Richard A. Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8 Journal of Legal Studies 49, 87.

tort in the industrial heartland of West Dublin."[516] The test would focus on which of the two interests, the plaintiff's enjoyment or the defendant's activity, would be a better fit with the general character of the neighbourhood. In corrective justice terms, the norm governing the relationship between the parties is that each is entitled to use his or her property in accordance with the general use expected in that particular locality. Any use which does not comply and disturbs or affects the use and enjoyment of neighbouring property is actionable as a nuisance in tort. Interesting questions arise however when the activity complained of, although not in keeping with the character of the neighbourhood, has been granted planning permission. To what extent then can the private rights of individuals be restricted or abolished by wider public policy concerns relating to the environmental development of a particular area? Planning permission will be relevant in two ways in this regard. First, the planning permission may specifically authorise the activity complained of. Second, the planning permission may have the effect of essentially changing the character or nature of the neighbourhood to such an extent that the activity will no longer be considered a nuisance. McMahon & Binchy highlight the dilemma posed:

> Courts have struggled with finding an answer to this question. They are conscious of the need to respect the separation of powers. Whereas in past generations courts constituted the only recourse available to those whose rights were imperilled by anti-social abuse of property entitlements, today we have an elaborate machinery for environmental protection, sensitive to democratic participation, involving those likely to be affected.[517]

The clash between individual rights and state regulation in nuisance has become increasingly common in recent years with greater emphasis on environmental protection and strategic planning in development. The courts have been somewhat vague when assessing the weight to be attached to planning permission in determining whether the activity is a nuisance, other than acknowledging that an otherwise unlawful activity does not constitute a nuisance simply by virtue of the fact it has obtained planning permission. Planning permission does not grant immunity from an action in nuisance.[518] In the words of Carnwarth LJ in *Barr v Biffa Waste Services Ltd*, "[s]ticking to the rules is an aspect of good neighbourliness but it is far from the whole story - in law as in life."[519]

---

[516] *Lanigan v Barry* [2008] IEHC 29 [20] (Charleton J).
[517] Bryan McMahon & William Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013) [24.47].
[518] *Cork County Council v Slattery Pre Case Concrete Ltd* [2008] IEHC 291.
[519] *Barr v Biffa Waste Services Ltd* [2012] 3 WLR 795, [76] (Carnworth LJ).

The issue was examined by the Irish High Court in *Lanigan v Barry*.[520] In that case, the plaintiffs were the owners of a stud farm in the County Tipperary countryside. The defendants operated a motor racing track approximately 1km away. The defendants had been granted planning permission in 1981 for such use (between April and October) but had intensified the use beyond the original permission granted (all year round). Charleton J in finding that the defendants' activities did constitute a nuisance examined the impact of planning permission on such questions. He noted that the planning process was democratic, fair and transparent. Under such a process, any citizen affected by the proposed activity would be given adequate notice in advance of the proposed development and would have the opportunity to object if they so wished. In this way, planning decisions could gradually alter the nature of a locality over a period of time as Charleton J noted, "[a]n example of this is the prevalence of small slaughter houses in centre city areas that have now effectively been relocated to rural areas."[521] Thus, distributive justice considerations would take precedence over individual rights through the planning process but only over a period of time and where the plaintiff had advanced warning and a reasonable opportunity to object. In the present case, the defendants had exceeded their original permission in a way no reasonable person could anticipate.[522] Because the defendants had breached the planning permission, Charleton J was not required to deal specifically with the question as to whether activity authorised by appropriate planning permission would effectively grant immunity from an action in nuisance. In conducting their activities, the defendants had exceeded their original permission. While those negatively affected might have anticipated some activity from the race track between April and October, they could not reasonably have expected that such activity would continue on a year round basis. In exceeding their planning permission, the defendants had taken what was not theirs and were accordingly acting wrongfully.[523]

---

[520] *Lanigan v Barry* [2008] IEHC 29.
[521] Ibid., [23] (Charleton J).
[522] Ibid., [37], where it was stated that:

> ... the entire character of this neighbourhood has been altered in a manner which has not been subject to democratic scrutiny under the planning code. It has been unlawfully altered by the refusal of the defendants to have any regard to their obligations under law. What has occurred at the raceway has been a completely new development in respect of which no planning permission exists.

[523] The decision of Charleton J regarding whether the activities amounted to a nuisance was upheld on appeal in *Lanigan & Another v Barry & Another* [2016] IESC 46. But the Supreme Court did hold that the decision to grant the injunction was inappropriate and ordered the question regarding the nature of the remedy be remitted to the High Court for consideration.

In England & Wales, the courts have faced a similar dilemma. In the first of these cases, *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd.*,[524] the High Court was asked to consider a public nuisance action brought on behalf of local residents against the operators of a commercial port. In that case, the commercialisation of the port led to a huge increase in the volume of traffic on the main rod into the port. This traffic mainly consisted of heavy goods vehicles and continued on a 24-hour basis daily. The defendant had obtained planning permission to operate as a commercial port and the use was in line with that permission. In finding that there was no nuisance, the court ultimately held that the planning permission granted to the port company had the effect of altering the nature of the locality which consequently affected the decision as to whether a nuisance had occurred:

> Parliament has set up as statutory framework and delegated the task of balancing the interests of the community against those of individuals and of holding the scales between individuals, to the local planning authority. There is the right to object to any proposed grant, provision for appeals and inquiries, and ultimately the Minister decides. There is the added safeguard of judicial review. If a planning authority grants permission for a particular construction or use in its area it is almost certain that some local inhabitants will be prejudiced in the quiet enjoyment of their properties. Can they defeat the scheme simply by bringing an action in nuisance? If not, why not? It has been said no doubt correctly that planning permission is not licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood.[525]

A more nuanced approach to the issue was adopted by the England & Wales' Court of Appeal in *Wheeler v J.J. Saunders Ltd.*[526] In that case the plaintiffs had instituted proceedings against the defendant regarding the smells emanating from a neighbouring pig farm. The defendant had been granted planning permission for the erection of housing for the animals and argued that consequently the odours emanating therefrom could not be actionable as a nuisance. Staughton LJ held that there was a distinction between a defence of statutory authority in nuisance and the authorisation of the nuisance through planning permission.[527] One could not assume that the balancing interests of all parties had occurred at the planning application stage, according to Peter Gibson LJ, "the planning decisions taken did not involve considerations of community or public interest, but merely whether the private interests of the applicants for the

---

[524] *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1992] 3 All ER 923; [1993] QB 343.
[525] *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1992] 3 All ER 923, 934.
[526] *Wheeler v J.J. Saunders Ltd* [1995] 2 All ER 697; [1994] EWCA Civ 8.
[527] *Wheeler v J.J. Saunders Ltd* [1995] 2 All ER 697, 704.

planning permission should prevail over the private interests of the plaintiff objectors."[528] Staughton LJ concluded that what had occurred was not sufficient to have changed the character of the neighbourhood.[529]

Thus, while authorisations granted under statutory authority to commit a nuisance may grant immunity and may constitute a defence in an action for nuisance, specific planning permission does not necessarily have the same effect. Statutory authority exclusively falls within the realms of distributive justice under this view, whereas planning permission does not. Certainly, the granting of planning permission may alter the character of the neighbourhood over a period of time and thereby affect the rights of the parties but it cannot authorise the activity itself. As McMahon & Binchy observe, "[e]ven if courts should be disposed to defer to contemporary environmental legislation, they would be well advised not to surrender too quickly their protective role."[530]

The United Kingdom Supreme Court revisited the matter most recently in *Coventry & Others v Lawrence & Another*.[531] In that case, L had been occupying a cottage in the countryside near to a speedway stadium operated by C. The construction of the stadium had been granted planning permission in 1975 and was authorised to conduct speedway racing and associated activities for a period of ten years. In 1985 this permission was made permanent. In 1984 stock car racing commenced at the stadium and this activity was subsequently authorised after ten years of use. A motocross track was constructed behind the stadium which was granted temporary permission which was subsequently made permanent. In 2008 L commenced proceedings claiming that the defendants' activities created noise that constituted a nuisance. The majority of the court held that the defendants' activities amounted to a nuisance. In the course of his judgment, Lord Neuberger marginalised the role that planning permissions had

---

[528] *Wheeler v J.J. Saunders Ltd* [1995] 2 All ER 697, 712.

[529] Ibid., 706-707, where Staughton LJ held:

> It would in my opinion be a misuse of language to describe what has happened in the present case as a change in the character of a neighbourhood. It is a change and abuse of a very small piece of land, a little over a 350 square metres according to the dimensions on the plan, for the benefit of the applicant and to the detriment of an objector in the quiet enjoyment of their house. It is not a strategic planning decision affected by considerations of public interest.

[530] Bryan McMahon & William Binchy, *Law of Torts*, 4th ed (Bloomsbury Professional, 2013) [24.48], Similarly, see Maria Lee, 'The Public Interest in Private Nuisance: Collectives and Communities in Tort' (2015) 74 Cambridge Law Journal 329, 348-349, where the author concurred by stating, "[t]he long tradition of protecting the rights of individuals in the face of the powerful state, which is not always either benign or effective, remains urgent."

[531] *Coventry & Others v Lawrence & Another* [2014] UKSC 13.

in deciding questions of nuisance. In particular, he observed that the implementation of planning permission can no more change the character of the neighbourhood than "any other building work or change of use which does not require planning permission."[532] This, of course, would be subject to the point whether the planning permission permitted the very nuisance which has resulted.[533] While the granting of planning permission might be of some relevance in determining whether the activity is unlawful, Lord Neuberger ultimately concluded:

> ... that the mere fact that the activity which is said to give rise to the nuisance has the benefit of a planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity cause a nuisance to her land in the form of noise or other loss of amenity.[534]

However, Lord Neuberger did acknowledge the importance of planning permissions when considering whether to award damages or an injunction as a remedy to a claim. He noted:

> In some cases, the grant of planning permission for a particular activity ... may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction. Accordingly, the existence of a planning permission which expressly or inherently authorises carrying on an activity in such a way as to cause a nuisance by noise or the like, can be a factor in favour of refusing an injunction and compensating the claimant in damages. This factor would have real force in cases where it was clear that the planning authority had been reasonably and fairly influenced by the public benefit of the activity, and where the activity cannot be carried out without causing the nuisance complained of.[535]

Lord Sumption, concurring with Lord Neuberger on the question of whether the activities amounted to a nuisance, questioned whether the public interest could be taken into consideration when deciding on the appropriate remedy, arguing that the judge "will usually lack the information to do so effectively, and is in danger of stepping outside his main function of deciding the issue between the parties."[536] Lord Sumption's comments are interesting as they allude to Weinrib's warnings regarding the incapacity of judges to deal with distributive justice issues.

---

[532] *Coventry & Others v Lawrence & Another* [2014] UKSC 13, [82] (Lord Neuberger).
[533] Ibid., [83] (Lord Neuberger).
[534] Ibid., [94] (Lord Neuberger).
[535] Ibid., [125] (Lord Neuberger).
[536] Ibid., [158] (Lord Sumption).

These cases quite clearly indicate that questions of distributive justice do impact the decisions of the courts particularly in negligence cases where the courts are asked to create new law by recognising a form of liability where hitherto none existed.[537] To deny the role that considerations of distributive justice play in such decisions, as Weinrib does, is to deny the reality of pragmatic judicial decision-making. In each of the cases discussed above, the application of corrective justice principles alone could have justified a finding in favour of the plaintiff. Yet, in refusing to do so, the courts called on considerations external to the correlative relationship between the parties.

As the duty of care is the legal mechanism through which such decisions in negligence are made, it is not surprising that the question of distributive justice concerns arise commonly therein.[538] Hence, Cane has argued that "making rules that define the grounds and bounds of tort liability is a distributive task, while applying such rules in individual cases is a corrective task."[539] In this way, a mixed conception of tort law as consisting of both corrective and distributive justice principles grants the law the fluidity which is necessary that it may grow to recognise new causes of action and in so doing are distributing new rights and duties.[540] Gardner views the creation of these new duties or rights as primary duties based on distributive justice principles. It was these principles that created secondary duties and rights based on corrective justice principles which arise when the primary rights and duties are breached.[541]

Thus, Gardner supports Weinrib to the extent that he too considers that corrective justice principles lie at the heart of tort law. He does not accept that it can explain all of tort, however. Distributive justice principles dictate when new causes of actions should be recognised – thereby distributing new rights and duties. However, these rights and duties are essentially

---

[537] Such claims are not limited to the actions of the police, but have been held to apply to all public authorities. For example, in *Beatty v Rent Tribunal* [2005] 2 IR 191; the Supreme Court held that the tribunal did not owe a duty of care to the plaintiff as a consequence of a negligent decision it had made which had caused the plaintiff loss. McCracken J stated, at 219, "[w]hat is to be considered as just and reasonable is not merely what would be just and reasonable between the parties, but also what would be just and reasonable in the public interest."

[538] Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane & Jane Stapleton (eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, 1998).

[539] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401, 412.

[540] John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (2013) available at http://ssrn.com., accessed 13 May 2014.

[541] Ibid.

corrective. Thus, he concludes that "we need to grasp the essentially corrective ingredient in tort law in order to grasp the whole package deal."[542]

Cane disagrees with Weinrib's suggestion that the judiciary lack the ability to make decisions based on distributive justice. He notes that, while the judiciary may not be as accountable for their decisions as democratically elected public officials are, they are not unaccountable. For example, he cites the requirement for judges to provide written reasons for their judgments as a powerful form of accountability.[543] To argue that the courts lack the capacity to adequately make decisions involving distributive choices, he points out, is no defence to the assertion that they do so. To say that they do not do so on the basis that they cannot do so conveniently avoids the fact that in reality that is exactly what they do. Rather than ignore the reality of judicial lawmaking, Cane suggests that the focus instead should be "to design judicial institutions in such a way as to make them acceptable repositories of the distributive task."[544]

As can be seen from a quick glance through the case law, the reality is that distributive justice principles play a role in judicial decision-making and to ignore that fact is to ignore a fundamental aspect of tort doctrine. However, the courts' use of distributive justice appears to be somewhat contradictory at times. In some instances, where the courts are reluctant to extend liability in a novel case involving negligence, for example, they will resort to principles of distributive justice and plead that, by recognising the claim, a flood of similar actions will result. As a consequence, other socially desirable services or activities will be curtailed or will cease. Thus, distributive justice would dictate that liability should not be extended. However, rarely in such cases will one find that such predicted doomsday scenarios are supported by empirical (or any other) evidence other than the opinion of the individual judge. Yet, in other cases where the court is asked to allocate the resources of the State, for example in a negligence action against a public authority, the courts will plead an unwillingness to involve themselves in decisions for which they lack the necessary expertise or knowledge to weigh up the competing interests involved. It is as though the judges themselves cannot make up their minds as to the extent of their decision-making abilities:

---

[542] John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (2013) available at http://ssrn.com., accessed 13 May 2014.
[543] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401, 413.
[544] Ibid., 414.

> Judges who support their reasons for decision by appeal to concepts such as 'community values' or 'the views of the ordinary person' perhaps believe that by doing so they are more likely to contribute to the management of disagreement, or even to the transformation of disagreement into agreement, than they would be if they offered precisely the same reasons as being their own genuine and considered opinion. Such a belief is likely to be mistaken because judicial views about the content of community values or about what the ordinary person thinks are typically unsupported by evidence, and because there is often no reason to think that disagreements between disputing parties do not reflect wider disagreements in the community at large. Indeed, appeal to controversial external criteria may prove counter-productive if it fuels suspicion that it is being used to mask a personal assessment by the judge of the various considerations relevant to choosing a norm to resolve the dispute at hand.[545]

Consequently, Cane proposes that a much more honest approach would be to simply acknowledge that judge is making a personal decision:

> The best strategy for the individual judge is openly and explicitly to choose (and to give reasons justifying their choice of) the norm that they genuinely think best ... and to leave it to processes such as majority voting by groups of judges in appellate courts, and to political methods of decision-making, to manage disagreement about the norms legalized by courts. We should certainly not impose on judges an obligation to support their reasons by unproven and controversial assertions about what the community values or what ordinary people think.[546]

In Cane's view, the correlativity of corrective justice provides the structure in which tort law applies but cannot always provide an answer, particularly in cases at the outer bounds of liability. In such hard cases, the courts may have recourse to principles of distributive justice in order to make a decision. One form of justice does not necessarily take precedence over another.[547] Thus, "while rules and principles of tort liability are best understood in distributive terms, the principle of correction as embodied in the concept of corrective justice describes the process of application of those rules and principles in individual cases where liability is imposed."[548]

Cane distinguishes tort law as a scheme of compensation from state-supported compensation schemes. Unlike other loss spreading schemes such as insurance or state-supported accident compensation schemes, distributional considerations in tort law are curtailed by the relationship of doer/sufferer of harm between the parties which lies at the heart of Weinrib's

---

[545] Peter Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 Oxford Journal of Legal Studies 393, 409-410.
[546] Ibid.
[547] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401, 413.
[548] Ibid., 405.

theory of tort as private law.[549] Accordingly, while from a structural viewpoint corrective justice principles link the doer and suffer of harm, "[p]rinciples of distributive justice operate within this structure by specifying what these rights and obligations are."[550] Thus, "[t]ort law offers an apparatus for the doing of corrective justice – litigation – that creates the circumstances of localized distributive justice."[551]Calnan agrees with this analysis and argues that corrective justice principles identify the parties whose holdings have been disturbed while the gain and loss suffered as a result identify the extent of the disturbance.[552] Principles of distributive justice on the other hand, dictate "the substantive content of tort law."[553] Similarly, Gardner concludes:

> In deciding whether something should be a tort, then, it is never enough to conclude that it is a wrong calling for repair. It is not even enough to conclude that it should be *recognized by the law* as a wrong calling for repair. The question that must be confronted, in addition, is whether the law should give it *this kind of recognition* – the tort-law kind of recognition – complete with its generous terms for power-sharing and cost-sharing as between the aggrieved party and the legal system. That question is a question of distributive justice.[554]

Despite Weinrib's arguments in favour of the internal coherence of the law and his preference for dispensing with considerations outside of the relationship of the parties, court judgments in tort cases are replete with evidence to the contrary. Distributive considerations not only influence decisions on the development of the law, they also assist the judiciary in determining when those rules apply. In other words, distributive considerations add to its content. In Cane's view, "determining what harms are "wrongful" or "without justification" is best treated as a distributive, not a corrective task."[555] While Weinrib's theory emphasises the correction of wrongs and a "wrong" is defined in accordance with Kantian right, it provided little more insight as to the circumstances when a wrong could be said to have been committed. In Cane's view:

---

[549] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401, 419.
[550] Ibid., 417.
[551] John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (2013) available at http://ssrn.com., accessed 12 May 2014.
[552] Alan Calnan, 'In Defense of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky' (2005) 1 New York University Journal of Law & Liberty 1023, 1066.
[553] Ibid.
[554] John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (2013) available at http://ssrn.com., accessed 12 May 2014.
[555] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401, 415.

> ... corrective justice has no substantive content. Rather, the activities of making rules and principles that define the grounds and bounds of tort liability and of choosing the rule to be applied to any particular case are matters of distribution, while doing corrective justice involves applying those rules and principles to individual cases.[556]

3.7 Conclusion

A review of the prominent case law in areas such as liability for negligently inflicted psychiatric damage, actions in negligence of for "wrongful conception" and cases involving nuisance provide clear evidence, contrary to Weinrib's claims, that tort law cannot be explained on the basis of the principles of corrective justice alone. Instead, as Keating put it, "it is a debate between two different voices."[557] Distributive justice principles do play a role in determining the outcome of certain difficult cases. In the context of negligence, distributive justice principles manifest themselves most prominently in novel cases such as psychiatric damage and wrongful conception where the duty of care (or the extent of liability) is to be determined. In this way, distributive justice can provide guidance to the court as to the content of the plaintiff's and defendant's rights and duties. Corrective justice principles then provide the structure by which any correction between the parties may be applied. Similarly, distributive justice considerations also come to the fore when assessing the standard of care in negligence.

Contrary to Weinrib's thesis on the immanence of private law, the courts do refer to factors outside the private, bipolar relationship between the parties. When assessing the defendant's behaviour the courts will, in appropriate cases, have regard to the cost to the defendant of eliminating the risk[558] or will also consider the motivation behind the defendant's actions in certain circumstances.[559] Considerations of public benefit or public utility are also prominent in certain cases involving private nuisance. While private nuisance actions are classically "private" in that they involve competing interests in private land, such claims are not immune from distributive justice considerations. Thus, the courts may at times consider the social utility of the defendant's actions in determining the validity of his or her actions. Furthermore, questions of distributive justice are classically to the fore in circumstances where the defendant claims that his or her activities have already been approved by way of planning permission.

---

[556] Peter Cane, 'Distributive Justice and Tort Law' (2001) New Zealand Law Review 401, 416.
[557] Gregory C. Keating, "The Theory of Enterprise Liability and Common Law Strict Liability" (2001) 54 Vanderbilt Law Review 1285, 1335.
[558] *O'Gorman v. Ritz (Clonmel) Ltd.* [1947] IR Jur 35.
[559] *Mulcare v Southern Health Board* [1988] ILRM 689 (HC).

Finally, principles of distributive justice provide a moral justification and explanation of the prominent role that strict liability plays within the tort system.

The conclusion must be that while corrective justice certainly explains much of the structures of modern tort doctrine, it cannot be credibly argued that it *is* private law. The application of tort law, as is evident from torts such as negligence and nuisance, cannot be divorced from the society in which the parties exist. What is difficult to discern is the exact nature of the relationship between both forms of justice and as Berryman concludes "[m]apping the contours of the intersection of corrective and distributive justice is a work in progress."[560] Similarly, Cane observes, "debates about the relationship between corrective and distributive justice will need to continue for some time to come if an equilibrium of scholarly opinion is to be reached."[561] Later in this work I will propose that some of the fog as regards the interrelationship between the two forms of justice can be lifted by making the pursuit of relational dignity the aim of tort law.

[560] Jeffrey Berryman, 'The Compensation Principle' (2008) 42 Loyola of Los Angeles Law Review 91, 121.
[561] Peter Cane, 'The Anatomy of Private Theory: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 203, 217.

Chapter 4

The Economic Analysis of Tort Law

4.1 Introduction

In the previous chapter I introduced the concept of distributive justice and explained how factors outside the direct private relationship between plaintiff and defendant can and do influence the development of tort law rules and decisions. In particular, I examined the 'principle of justice as fairness' and through this highlighted how considerations of the wider public interest are replete in tort law and specifically how this theory explains both fault and strict liability within the wider system.

In this chapter, I move the discussion to one of the more prominent and radical deterrence theories of tort law, namely, economic analysis. This theory essentially holds that the normative goal of tort law should be one of deterrence based on principles of economic efficiency. In discussing this theory, I evaluate the differing conceptions of efficiency, beginning with Pareto, Kaldor-Hicks, and Coase, before considering the most prominent theories in this field: Posner's 'wealth maximisation' theory. Finally, I show that far from being the neutral science that some of its supporters proclaim it to be, the economic analysis of tort law is based on faulty assumptions. As behaviorial economic research has shown, instead of making decisions as rational actors with perfect information, people make decisions every day which are anything but rational.

4.2 The Economic Analysis of Tort Law

The economic analysis of tort law provides an instrumental theory which proposes that the purpose of tort law is the optimal deterrence of risk through the levying of prices in the form of legal rules aimed at minimising such risks. Economics is, at its most basic, the study of human behaviour. The assumption that individuals act rationally in response to incentives means that policymakers will introduce rules which will bring about predictable results. According to this theory, the law deters risk by incentivising individuals - through legal commands and sanctions – to respond in a predictably rational manner. To act rationally is to choose the course of action which is optimally efficient. Individuals will do so by comparing

the costs of acting safely with the costs of the resulting injury should such precautions not be taken. Thus, the aim of tort law is not to eliminate all injury, just those injuries it is optimally efficient to eliminate.[562]

The positive economic analysis of tort law purports to provide a value-free, unbiased explanation of most, if not all, tort rules through the utilisation of micro-economic theory as a means of analysing legal rules and decision-making institutions. The economic analysis of law purports to scientifically analyse legal rules in economic terms and consequently has been described "as the answer to the modern legal scholar's prayer for an objectively defensible critical standard."[563]

In general terms, considerations of justice – as moralists would conceive of it - are not of primary importance in the context of economic analysis. To the economist, justice considerations are viewed as ethereal, value-laden, and because of that, arbitrary. For example, in analysing negligence, economic theory downplays the significance of causation in attributing responsibility believing it to be to be largely superfluous, nothing more than a malleable unscientific method of apportioning blame. Instead, the primary concern of economists is to find the most solvent defendant. To moralists, on the other hand, agency is an essential factor in determining liability as it constitutes the basis for the defendant's responsibility for the harm. To the economist, the defendant's behaviour should only attract liability in negligence if it was deemed to be "economically inefficient" and not simply because it is considered to be morally culpable. Thus, causation is not significant and its relevance is simply to promote efficiency by imposing liability where it is most likely to deter future similar behaviour.

The application of the science of economics to legal rules or institutions, according to Richard Posner, "reveals a "deep structure" of law that exhibits considerable coherence."[564] The positive school of economic analysis, of which Posner is a disciple, puts forward a scientific basis for explaining the current state of tort law and "is concerned with the principle of

---

[562] Guido Calabresi, Concerning Cause and Tort Law: An Essay for Harry Kalven, Jr' (1975) 43 University Chicago Law Review 69.
[563] Frank I. Michelman, 'A Comment on Some Uses and Abuses of Economics in Law' (1979) 46 University of Chicago Law Review 307.
[564] Richard A. Posner, 'Values and Consequences: An Introduction to Economic Analysis of Law' (1998) Coase-Sandor Institute for Law & Economics Working Paper No. 53, 6.

economic efficiency as an explanatory tool by which existing legal rules and decisions may be rationalized or comprehended."[565] The positive economic analysis of law utilses the traditional economic model analysis of free markets as a device to evaluate legal questions.[566] Through the prism of 'efficiency', economics provides us with a scientific method by which we can evaluate different legal rules as a matter of public policy. The underlying principle is that legal rules operating in an unregulated market will lead to the most efficient resul.

Broadly speaking, the study of economics can be described as the analysis of the allocation of scarce resources among competing uses. Applied to tort law and policy-naking, economic analysis can prove a useful tool to explain and interpret tort doctrine in a welfarist manner. Tort rules can be evaluated therefore in terms of social welfare which economists interpret as the utility which individuals enjoy under certain legal rules. In this context, utility is an individual's preference for one state of affairs over another or one set of rules over another.[567]

According to this view, the common law – through judicial decisions – shoud seek to promote the efficient allocation of resources, specifically, the preferences of individuals for different states of affairs.[568] In so doing, the application of microeconomic theory to tort law is an instrumental tool used to incentivise and regulate society towards efficient behaviour on the basis that by so doing, one is ensuring that there is a bigger "piece of the pie" for everyone. This may be done by the creation and promotion of efficient legal rules which will "serve to bring about efficient allocations of resources."[569] Welfare economics seeks to maximise social benefits for all in society while minimising social costs. Laws are therefore interpreted in ways in which those benefits are maximised while those costs are minimised. This is achieved by maximising "the utility that individuals enjoy under the laws in question" where utility is defined "as the satisfaction of that individual's preferences over various states of the world."[570]

---

[565] Jules L. Coleman, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 California Law Review 221.
[566] Ibid., 222.
[567] Howard Chang, 'A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle' (2000) Yale Law Journal 173, 175.
[568] William M. Landes & Richard A. Posner, 'The Positive Economic Theory of Tort Law' (1980) 15 Georgia. Law Review 851.
[569] Susan Dimock (ed), *Classic Readings and Canadian Cases in the Philosophy of Law* (Pearson Longman, 2007) 70.
[570] Howard Chang, 'A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle' (2000) Yale Law Journal 173, 175.

Thus, instead of measuring goods and services, the economic analysis of law is concerned with individual utility or individual preferences for different arrangements.

To the economist, where resources are scarce, efficiency is critical. Indeed, the notion of efficiency has been described as the "central organizing idea" of law and economics.[571] Thus, a fair legal system must promote the *efficient* allocation of society's resources to satisfy every individual's preferences.[572] There are many different interpretations of the concept of efficiency. One conception provides that the law should be allocatively efficient i.e. goods or services (or entitlements in a legal system) should be distributed in the most efficient manner across society. Allocative efficiency can be distinguished from productive efficiency which is concerned with maximising the production of goods and services in that society and not with how those goods or services are distributed. An efficient allocation of entitlements is not necessarily a just distribution it is simply the most *efficient*. Thus, equality in the distribution of goods and services is not necessarily allocatively efficient e.g. if, as between two goods (chocolate bars and ice cream) I prefer ice cream to chocolate bars then an equal distribution of goods would not be allocatively efficient as I would prefer more ice cream than chocolate bars. An even split between chocolate bars and ice cream would not maximise my utility.[573]

Thus, central to the economic analysis of law is the notion of efficiency. To the economist, efficiency in a world of scarce resources and competing interests is a good thing and therefore should be the underlying norm of tort law. In choosing between legal rules one must evaluate which is the better, or more efficient, legal rule. The rule that produces the most efficient outcome is the correct one. One state of affairs will be deemed to be better than another if the individual prefers that state of affairs over another. In this way, economists explain individual decision-making on the basis of individual preferences. The rational individual will choose the state of affairs which is, in turn, defined as the efficient maximisation of his or her utility. Thus, to the economist the most scientific manner by which assessments can be made between differing states of affairs is by measuring each in terms of efficiency. There are a number of methods by which economists adopt criteria for making such evaluations.

---

[571] Jules L. Coleman, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 California Law Review 221.
[572] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011).
[573] Lewis A. Kornhauser, "A Guide to the Perplexed Claims of Efficiency in the Law" (1980) 8 Hofstra Law Review 591, 594.

4.2.1 Pareto Efficiency

The first of these methods of measuring efficiency is known as the Pareto criterion.[574] According to this version of efficiency, a series of exchanges or distributions are Pareto efficient once it is no longer possible to satisfy the preferences of an individual without making another less well off. In the words of Calabresi "[i]t is a simple unanimity requirement."[575]A state of affairs is Pareto superior to another if it is possible to move to that state of affairs by making at least one person better off and nobody worse off i.e. "[t]here is at least one winner and there are no losers."[576] Thus, net utility in that society is increased. "Social states" in this context is defined as "snapshot characterizations of the world taken as a whole at a given moment in time."[577]

A current state of affairs is Pareto optimal when any further exchanges or distributions will only improve the situation of some by worsening the situation of just one other. In other words, there are no other states which are Pareto superior.[578] Because there are no states which are superior, Pareto optimal states are not comparable other than on non-efficiency grounds such as justice. Thus, in circumstances where there are no negative externalities and perfect competition exists, a Pareto optimal allocation of resources will result. This is known as the first fundamental theorem of welfare economics.[579] Pareto efficiency is best exemplified in cases of voluntary exchange in the market. In cases where the parties voluntarily enter into negotiations it is presumably on the basis that each party believes that by entering into the transaction the lot of each will be thereby improved. In other words, the presumption is that the parties would not enter into the exchange in the first place unless they both believed that it would improve their relative positions.[580]

---

[574] Named after one of the founding fathers of welfare economics, Vilfredo Pareto (1848-1923).

[575] Guido Calabresi, 'The Pointlessness of Pareto: Carrying Coase Further' (1991) Yale Law Journal 1211, 1215.

[576] Susan Dimock (ed), *Classic Readings and Canadian Cases in the Philosophy of Law* (Pearson Longman, 2007) 70.

[577] Jules L. Coleman, 'Markets, Methods, Morals and the Law' (2014) 66 Alabama Law Review 169, 172.

[578] Jules L. Coleman, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 California Law Review 221, 226.

[579] Ross M. Star, *General Equilibrium Theory: An Introduction* (2nd ed) (Cambridge University Press, 2011) 23-24.

[580] For example, I might own two cars. I may only have use for one. However, I recently lost my job and I am in need of cash. My neighbour has recently obtained a new job and is financially healthy. However, his new job entails a longer commute and he does not own a car. In such circumstances it would be rational if both my neighbour and I entered into a transaction where I received payment in cash in return for providing my neighbour with a car. At the conclusion of such a transaction both parties would presumably be better off than they were before. I have some badly needed extra cash and my neighbour has a car which will facilitate his commute to his new job. We are both happier after the transaction than we were before. Thus, by facilitating such a transaction the law has maximised efficiency and has promoted a Pareto superior move.

The Pareto concept of efficiency has a certain moral appeal in that it stipulates that "[a] change is good if it helps some and hurts none."[581] The underlying norm of Pareto efficiency is one of consent. No changes will be made if it makes someone else worse off. As it is very unlikely that anyone will consent to a change that makes their position worse, the Pareto principle can be interpreted as respecting individual autonomy.[582] As Posner explains "[o]ne ethical criterion of change that is highly congenial to the Kantian emphasis on autonomy is consent. And consent is the operational basis of the concept of Pareto superiority."[583]Pareto does not measure *how much* overall utility is increased because it does not need to. Unanimous consent to a change would not occur unless it was to the benefit of some and not to the detriment of anyone.

Pareto efficiency has much to recommend it, certainly in cases involving *voluntary* exchanges between parties. Contractual transactions, for example, are very much Pareto efficient; the parties would not voluntarily enter into the exchange unless both believed that their situations were being improved by the transaction. In this way "Pareto superiority is connected ... to the ideal of a free-exchange market."[584] Pareto efficient moves can theoretically also occur in situations involving involuntary transactions where some parties lose so long as compensation is paid to the losers and there is a net gain for the winners even after the compensation has been paid.[585]

However, Pareto efficiency is of quite limited usefulness as an instrument of public policy for a number of reasons. First, it is assumed that Pareto superior moves are always welfare-enhancing but that is not necessarily the case. At best, as Coleman observes, Pareto efficiency is "neutral" as regards "the well-being of its citizens"[586] i.e. human welfare.[587] Coleman notes that while Pareto efficiency involves comparing social states based on one's preferences there is nothing within Pareto efficiency that requires such preferences to be ranked on the basis of welfare.[588] If the concept of Pareto efficiency is based on the ranking of preferences over social

---

[581] Russell Hardin, 'The Morality of Law and Economics' (1992) Law & Philosophy 331, 381.
[582] Mark A. Geistfeld, 'Risk Distribution and tort law: Carrying Calabresi Further' (2014) 77 Law and Contemporary Problems 165, 167.
[583] Richard A. Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Ajudication" (1980) 8 Hofstra Law Review 487, 489-490.
[584] Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 Hofstra Law Review 509, 517.
[585] Ibid. 547, where the author cites the example of the elimination of a monopoly. Breaking up a monopoly is economically efficient, but unless the monopolist is compensated, he will suffer a loss. See also, Susan Dimock (ed), *Classic Readings and Canadian Cases in the Philosophy of Law* (Pearson Longman, 2007) 71.
[586] Ibid., 170.
[587] Jules L. Coleman, 'Markets, Methods, Morals and the Law' (2014) 66 Alabama Law Review 169, 173.
[588] Ibid.

states then what is the connection between such preferences and welfare? In examining this issue, Coleman contrasts between claims "that satisfying preferences contributes to welfare and the claim that it constitutes (fully or partially) welfare."[589] In the case of the latter, then any Pareto improvement would be welfare enhancing regardless of the criterion of comparison. Alternatively, if the claim is that preference satisfaction contributes to welfare, then much depends on our interpretation of "satisfaction" in this regard.[590]

Coleman also points out that the connection between "preference satisfaction" and "welfare" is by no means clear. In particular, Coleman notes that there are two notions of "preference" as a form of measurement for comparison purposes: "preference-as-desire" and "preference-as-judgment."[591] In the case of the former, one treats a preference being satisfied when one experiences the positive feelings one expects upon its satisfaction. In the case of the latter, one treats a preference as being satisfied when it meets the relevant standard, whether one experiences positive feelings upon its attainment. The difficulty, as Coleman sees it, is that one cannot determine whether "preference satisfaction" is measured according to desire or judgment. If the former, then the difficulties previously discussed arises; if the latter "there need be no connection with welfare at all. One who prefers a social state to another judges it superior by some relevant criteria that may have nothing to do with any property of the state that has to do with welfare."[592]

Second, Pareto efficiency is of limited usefulness as a policymaking tool as it can be criticised for simply preserving the status quo; "[w]hatever is, is efficient."[593] Because no change can be made without the consent of all, it must be assumed that any current state of affairs is Pareto

---

[589] Jules L. Coleman, 'Markets, Methods, Morals and the Law' (2014) 66 Alabama Law Review 169, 174.
[590] Ibid., where Coleman identifies three ways in which preferences may be satisfied. In the first, preferences may be satisfied in the "logical or formal sense". In this sense, one's preferences are satisfied when one gets what one wished for. Preferences may also be satisfied, according to Coleman, in the "psychological sense" i.e. when one experiences positive feelings as a result of one's preferences being satisfied. Finally, preferences may be satisfied in the "normative sense" i.e. one's preferences are satisfied when you *should* experience positive feelings as a result of one's preferences being satisfied, whether one *actually* experiences them or not.[590] Preference satisfaction in this context is neutral as to whether it actually brings positive feelings or whether those feelings should be positive. Coleman concludes that the concept of welfare under Pareto is of the first kind described above i.e. logical or formal. According to Coleman "[w]elfare is a normative notion. If welfare is a matter of satisfaction, it must be satisfaction aptly or fittingly experienced." Yet, this is not the case with logical or formal welfare. This raises the further question "whether conformity yields gratification or is met with a positive response; another question is still whether, it if is, that response is fitting or apt and thus a contributor to human well-being."
[591] Jules L. Coleman, 'Markets, Methods, Morals and the Law' (2014) 66 Alabama Law Review 169, 177.
[592] Ibid.
[593] Gary Lawson, 'Efficiency and Individualism' (1992) 53 Duke Law Journal 87.

optimal. If it were not, then surely all would have agreed to a change from that state.[594] Accordingly, if no such change has occurred it must be because someone has objected to it. As Calabresi puts it, "if Pareto optimality means a place where no improvement can be made without creating the possibility that there will be some losers, then we *are always* there."[595] Thus, the status quo would remain until such time that society acquired the knowledge and the ability to move to a Pareto superior state with everyone's consent. Moreover, Pareto efficiency may be questioned from a moral standpoint in that it says nothing about the actual distribution between members of society. Thus, a distribution between two parties may be unfair or unjust but could be considered Pareto optimal because any change to the status quo would presumably result in at a least one person becoming worse off. Consequently, as Calabresi surmises, "the Pareto criterion is of no general use as a normative guide."[596]

Third, Pareto efficiency assumes that there are no third party effects or negative externalities.[597] Because most transactions in the real world will affect external third parties Pareto is of limited usefulness as an instrument of policy since changes under it are, in actuality, unattainable.[598] Pareto moves are only justified on the basis that the parties consent to the compensatory exchanges which must leave no-one worse off and at least one person better off. Because changes in legal rules produce some winners and some losers, in the real world Pareto is of little assistance in ranking different rules.[599] Thus, "the Pareto criterion merely provides a reliable way to determine whether a change would increase social welfare. The criterion has no other value."[600] Consequently, as Posner notes, "[t]he fact that the conditions for Pareto superiority are almost never satisfied in the real world, yet economists talk quite a bit about efficiency, means that the operating definition of efficiency in economics cannot be Pareto superiority."[601]

---

[594] Francesco Parisi, 'Positive, Normative and Functional Schools in Law and Economics' (2004) 18 European Journal of Law and Economics 1, 13.
[595] Guido Calabresi, 'The Pointlessness of Pareto: Carrying Coase Further' (1991) Yale Law Journal 1211, 1216.
[596] Ibid.
[597] Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 Hofstra Law Review 509.
[598] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 17, where the author cites changing the prices of other goods as a result of the transaction, or by upsetting others e.g. gay marriage, as but two examples of how transactions can affect third parties.
[599] Jules L. Coleman, 'The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice' (1982) 34 Stanford Law Review 1105.
[600] Mark A. Geistfeld, 'Risk Distribution and tort law: Carrying Calabresi Further' (2014) 77 Law & Contemporary Problems 165, 170.
[601] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 18.

The fourth and final difficulty with Pareto efficiency as an instrument of public policy is that the norms underlying Pareto efficiency may be morally dubious. Economic analysis of law claims to provide a value-free neutral analysis of legal rules. If so, as Markovits reasons, such an approach may produce unconventional and undesirable results.[602]

Consequently, allocative efficiency is not necessarily a desirable value in and of itself. Pareto efficiency cannot achieve its stated aim of evaluating policy or legal rules in a value-neutral way. Temkin also highlights out how Pareto efficiency might contravene other moral principles. In particular, he argues that Pareto efficiency runs contrary to the notion of communal goods. Such goods are those which are of value to society but do not necessarily improve the position of particular individuals and he cites the existence of equality within society as an example of such goods. Thus, in an unequal society there may be individuals who are better off than others. A move to a more equal society will necessarily lead to a worsening of those individuals' position and would therefore contravene Pareto.[603]

---

[602] Richard S. Markovits, 'A Constructive Critique of the Traditional Definition and Use of the Concept of "The Effect of a Choice on Allocative (Economic) Efficiency": Why the Kaldor-Hicks Test, The Coase Theorem, and Virtually All Law-and-Economics Welfare Arguments Are Wrong" (1993) 3 University Illnois Law Review 485, 490, where the author cites the choice not to prosecute a murderer as an example. The decision not to prosecute increases the murderer's utility as he is not punished. This decision while improving the utility of the murderer would not decrease the utility of anyone else if: the murderer was not likely to re-offend; overall deterrence would not be affected if no-one was aware of the decision not to prosecute; and those who would prosecute and imprison the murderer would not suffer a decrease in utility. This example leads Markovits to conclude:

> Clearly, in such circumstances a choice not to prosecute the murderer in question would move the economy to a Pareto-superior position in the conventional sense of that phrase. Nevertheless, from a variety of religious and secular moral value-perspectives, such a nonprosecution decision might be deemed undesirable overall. In particular, such a decision would be condemned by pure retributionists, individuals who believe that there is a moral order whose balance must be maintained, and individuals who believe that our duty to show respect for each moral agent requires us to punish transgressors for their wrongdoings.

[603] Larry Temkin, 'Harmful Goods, Harmful Bads' in Frey and Morris (eds), *Value, Welfare and Morality* (Cambridge University Press, 1993), 290-324. Moreover, it has been argued by Amartya Sen, 'The Impossibility of a Paretian Liberal' (1970) 78 Journal of Political Economy 152, 155-157; that Pareto efficiency, despite its initial intuitive appeal as affording protection to individual autonomy, actually fails miserably in achieving that goal. The philosopher and economist, Amartya Sen has proven that Pareto efficiency can be inconsistent with individual liberty. He uses the example of two individuals (X and Y) and a copy of a book, *Lady Chatterley's Lover* to prove his thesis. In this scenario, X is a prude and Y is a lover of great literature. Sen argues there are three choices available regarding the book. Option (1) X reads the book; option (2) Y reads it; and option (3) neither party reads it. X does not want to read the book and would prefer that no-one reads it because he believes it is smutty and will only corrupt the minds of those that read it. However, given a choice between X reading it or Y, X would prefer that he read it thereby sparing Y from being exposed to its contents. Thus, X would ideally prefer state of affairs (3) where no-one reads it. His next preference would be for state of affairs (1) where he reads it. At least that way he avoids Y having to read it. His last preference is for state of affairs (2) where Y reads it. Because Y values the importance of literature he would prefer that X or Y read the book rather than neither

4.2.2 Kaldor-Hicks Efficiency

Given the 'real world' limitations of Pareto efficiency, economic analysts of law look towards another method of ranking social states, namely, Kaldor-Hicks efficiency.[604] Coleman defines Kaldor-Hicks efficiency as follows:

> A redistribution of resources is Kaldor-Hicks efficient if and only if under the redistribution the winners win enough so that they could compensate the losers. The notion of Kaldor-Hicks efficiency does not require that the winners actually compensate the losers. In effect, a redistribution is Kaldor-Hicks efficient if and only if it is a "possible" Pareto superior distribution.[605]

Moving from one state of affairs to another will almost inevitably lead to a situation where there are some winners and some losers, particularly when choosing between different legal rules. If Pareto efficiency is based on unanimity (which will not always be possible) then one can solve the dilemma by replacing "the idea of a potential agreement for an actual or hypothetical one" i.e. Kaldor-Hicks efficiency.[606] Like Pareto efficiency, Kaldor-Hicks efficiency ranks states of affairs in order to measure their efficiency and was partly developed in response to Robbins's criticism regarding the impossibility of carrying out interpersonal comparisons between individuals' preferences without introducing value-judgments in order to do so.[607]

---

party reading it. Better that someone benefit from reading the great work than nobody benefitting. Of those two options, his first preference is that X reads the book (state of affairs (1)) as he will receive more satisfaction in watching X's discomfort in reading it than he would achieve by reading it himself. Thus, Y would ideally prefer state of affairs (1) where X reads it or if that's not possible, state of affairs (2) where Y reads it. His last preference would be state of affairs (3) where no-one reads it. According to Sen, if the choice is between whether X should read the book (state of affairs (1)) or no-one reading it (state of affairs (3)), the liberal would lend weight to X's preference and hold that state of affairs (3) would be socially optimal. If the choice is between Y reading the book (state of affairs (2)) and no-one reading it (state of affairs (3)) then Y should be permitted to read the book as weight should be given to Y's preference. However, such a move, while justified from a liberal point of view, would not be Pareto efficient. Because the position of both parties would be improved under "state of affairs (1)" rather than "state of affairs (2)" the Pareto efficient move would be to give the book to X to read rather than Y. In other words, if X reads the book he prefers that to Y reading it. Y would prefer that X read the book than he, nor no-one reading it. However, this result while Pareto optimal, does not accord with liberal values, leading Sen to conclude that "[w]hile the Pareto criterion has been thought to be an expression of individual liberty, it appears that in choices involving more than two alternatives it can have consequences that are, in fact, deeply illiberal."

[604] Nicholas Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 Economic Journal 549; John Hicks, 'The Foundations of Welfare Ecomomics' (1939) 49 Economic Journal 696.

[605] Jules L. Coleman, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 California Law Review 221, 239.

[606] Anthony T. Kronman, 'Wealth Maximisation as a Normative Principle' (1980) 9 Journal of Legal Studies 227, 235.

[607] Lionel Robbins, *The Nature and Significance of Economic Science*, (2nd ed) (London: Macmillan, 1935).

If the losers are so compensated the move may also be a Pareto superior move. However, as long as the winners' gain is greater than the losers' losses then a change is considered to be an improvement i.e. if "the position of the winners has been improved more than the position of the losers has been worsened."[608] As such, Kaldor-Hicks efficiency is the basis for traditional cost/benefit analysis. Kaldor-Hicks efficiency and Pareto efficiency may be the same and yet may also be very different. A Kaldor-Hicks move which creates losers and winners but does not oblige the winners to compensate the losers is not a Pareto superior move. In such circumstances, presumably the losers would not have agreed to the move. However, a Kaldor-Hicks move may also be Pareto superior when the winners created by the move compensate the losers. In such circumstances, the winners' position is improved and the losers' position is not worsened as they received compensation. Similarly, a Kaldor-Hicks move might be Pareto optimal if the winners compensate the losers and there is no possibility of further improvement for all the parties. However, it does not necessarily follow that a Kaldor-Hicks move will always be Pareto optimal e.g. there may be the possibility of further improvement of the parties' position through cooperation and exchange.[609] Under Kaldor-Hicks, if the policy change brought an aggregate increase in the total of income such that it would be possible - after the policy change – for the winners to compensate the losers then interpersonal comparisons are not necessary because "in all such cases it is *possible* to make everybody better off without making anybody worse off."[610]

In the real world, however, the market fails and voluntary exchanges become more difficult. The reality is that markets may fail due to third party 'externalities'. These 'externalities' may be defined as "byproducts of an activity that influence the production of other goods or the welfare (or utility) of other individuals."[611] For example, my factory might be producing and selling widgets to consumers at cheap prices. However, if my factory is polluting the local environment then my activity is imposing a cost on third parties which I am not accounting for in the price of my products. It is in these circumstances that the Kaldor-Hicks standard measurement of efficiency is more appropriate. In such cases, the activity (the factory) will be allowed to continue if the benefits produced by the factory are sufficiently large to compensate

---

[608] Jules L. Coleman, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 California Law Review 221, 240.
[609] Ibid.
[610] Nicholas Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 Economic Journal 549, 550.
[611] Jules L. Coleman, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 California Law Review 221, 231-232.

the losers (the third parties suffering from the pollution caused by the factory's operation). Whether the factory owner should be required by law to pay compensation to those third parties will depend on whether it achieves the goal of maximising the value of production. This question would be a consideration for governmental regulation and "is a political question on which the economist, qua economist, could hardly pronounce an opinion."[612] While Kaldor-Hicks could be criticised on the basis that it did not require that compensation be paid by the winners to the losers, proponents have countered by arguing that in the long run losers in one transaction will benefit from another in time. Thus, losers and winners even out over a number of Kaldor-Hicks transactions during their lifetime.[613]

However, the strict definition of Kaldor-Hicks efficiency can also fall foul of the same criticism of Pareto efficiency in that it could be said that it does not reflect the real world. As Lawson explains:

> All it takes to make the universe of Kaldor-Hicks-efficient transactions an empty set is one person who sincerely cannot be bought – that is, a person who values autonomy, either his own or that of others, so highly that no amount of after-the-fact compensation could possibly leave him as well off as he would have been had the loss never been inflicted (without consent) in the first place. In a large population, no legal rule will ever satisfy the Kaldor-Hicks criterion.[614]

Because of these challenges, many economists have adopted a variation of strict Kaldor-Hicks efficiency as a criterion for examining legal rules. Under this version of Kaldor-Hicks, efficiency is measured in monetary (dollar) terms. Efficiency is defined as that which maximises aggregate wealth and does not consider other factors such as happiness or utility. In this version, wealth maximisation is introduced as the underlying norm.[615] Because it measures utility in dollar terms, it avoids the difficulties of interpersonal comparability as it "judges

---

[612] Nicholas Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 Economic Journal 549, 550.

[613] Jonathan R. Hicks, 'Rehabilitation of Consumers' Surplus' (1941) 8 Review Economic Studies 108, 111.

[614] Gary Lawson, 'Efficiency and Individualism' (1992) 53 Duke Law Journal 87, 91-92. Kaldor-Hicks efficiency is also subject to the Scitovszky paradox (T Scitovsky, 'A Note on Welfare Propositions in Economics' (1941) 9 Review Economic Studies 77). The Scitovsky paradox is a limitation on the application of traditional Kaldor-Hicks efficiency. The paradox essentially proves that in some circumstances a change from position X to position Y might be an improvement under Kaldor-Hicks but it may also be possible that position X is an improvement on position Y under the very same Kaldor-Hicks criterion. However, adopting an approach of ranking social states by measuring them in terms of dollar equivalents rather than utility avoids these difficulties. For an example of the Scitovsky Paradox, see Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 Hofstra Law Review 509, 519.

[615] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011).

outcomes efficient when monetary wealth is maximised."[616] This is sometimes known as the "monetized version" of Kaldor-Hicks.[617] Because this variation on Kaldor-Hicks "measures wealth, not utility, and one can deny that wealth, as the theory defines it, is interpersonally aggregable."[618]

As Stringham observes, measuring efficiency in dollar terms is not as easy as it looks.[619] While using dollars introduces some consistency for comparability purposes as it uses a single unit by which preferences can be measured, one is still faced with problem of putting a price in dollar terms on those preferences. One cannot, for example, rely on market prices i.e. the price that was paid in a past transaction because all that does is provide us with a snapshot of the value attached to the exchange at a given point in the past and is not necessarily evidence of what the current price might be. Without an ability to gauge accurately individual preferences how can one judge whether the winners can compensate the losers?[620]

Kaldor-Hicks efficiency may be subject to criticism on the basis that it fails to take into consideration the relative wealth of the parties and consequently displays an inherent bias towards the status quo.[621] Kaldor-Hicks efficiency ignores concerns of distributive justice by failing to take into consideration diminishing marginal utility. In essence, the theory of diminishing marginal utility provides that the value of a dollar is – in general terms - worth more to a poor person than it is to a rich person. The concept was summarised by Dorff as

---

[616] Edward Stringham, 'Kaldor-Hicks Efficiency and the Problem of Central Planning' (2001) 4 The Quarterly Journal of Austrian Economics 41, 42.

[617] Richard S. Markovits, 'A Constructive Critique of the Traditional Definition and Use of the Concept of "The Effect of a Choice on Allocative (Economic) Efficiency": Why the Kaldor-Hicks Test, The Coase Theorem, and Virtually All Law-and-Economics Welfare Arguments Are Wrong" (1993) 3 University Illnois Law Review 485, 491.

[618] Gary Lawson, 'Efficiency and Individualism' (1992) 53 Duke Law Journal 87, 93.

[619] Edward Stringham, 'Kaldor-Hicks Efficiency and the Problem of Central Planning' (2001) 4 Quarterly Journal of Austrian Economics 41, 42. See also: Richard S. Markovits, 'A Constructive Critique of the Traditional Definition and Use of the Concept of "The Effect of a Choice on Allocative (Economic) Efficiency": Why the Kaldor-Hicks Test, The Coase Theorem, and Virtually All Law-and-Economics Welfare Arguments Are Wrong" (1993) 3 University Illnois Law Review 485.

[620] Edward Stringham, 'Kaldor-Hicks Efficiency and the Problem of Central Planning' (2001) 4 Quarterly Journal of Austrian Economics 41, 48, where the author concludes that Kaldor-Hicks efficiency must be rejected as a method of judging policy as it is a measurement based on prices is why:

> ... evidence of past willingness to pay and cannot be used for formulating future policies. To truly figure out willingness to pay, the government would need to read minds to determine how much every single person would value every possible state of the world, a feat that can never be attained.

[621] Richard S. Markovits, 'A Constructive Critique of the Traditional Definition and Use of the Concept of "The Effect of a Choice on Allocative (Economic) Efficiency": Why the Kaldor-Hicks Test, The Coase Theorem, and Virtually All Law-and-Economics Welfare Arguments Are Wrong" (1993) 3 University Illnois Law Review 485.

follows: "someone who has a lot of something values having a bit more considerably less than someone who has none of it."[622] Because Kaldor-Hicks efficiency simply attributes "dollar prices" to revealed preferences of individuals without taking into consideration the relative wealth of the parties before the change it equates the transfer of wealth with the transfer of utility. Again, because a dollar is worth more to a poor person than it is a rich person, the utility derived by the poor person from a dollar would be greater than that derived by the rich person.[623]

4.2.3 The Coase Theorem

One of the biggest flaws with Pareto efficiency is that it suffers from a practical difficulty in that it assumes that negative externalities do not exist. In the real world, it is often the case that transactions between parties will spill-over and negatively affect third parties. Where the costs of these spill-over effects are not internalised by the parties to the transaction they are said to be an "externality." In such cases, the "victims are external to the firm or production unit, but not external to its costs of operation."[624] For example, a factory that manufactures goods but in so doing pollutes the neighbouring environment has created a negative externality through the cost of that pollution which is imposed on society. A failure to internalise the cost of pollution between manufacturer and consumers means that an involuntary cost has been imposed on third parties and the price of the product does not reflect its real cost of production. Consequently, the lower price of the product will lead to its over-consumption and this is inefficient behaviour. Moreover, there is no incentive for either party (factory owner or consumer) to internalise these

---

[622] Michael B. Dorff, 'Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell' (2002) 75 Southern California Law Review 847, 867.

[623] Johnathan Klick & Francesco Parisi, 'Wealth, Utility, and the Human Dimension' (2005) 1 New York University Journal of Law & Liberty 590, 598, where the authors highlight the impact of such failure on the distribution of wealth with the following example:

> Imagine two hypothetical regimes: (a) in which all members of society eat a meal a day; and (b) in which only a random one-half of the population gets to eat a double meal while the other unlucky half remains starving. From a Kaldor-Hicks perspective, the two alternatives are not distinguishable from the point of view of efficiency because the total amount of food available remains unchanged. In a Kaldor-Hicks test, those who get a double meal have just enough to compensate the others, and thus society should remain indifferent between the two allocational systems. Obviously, this indifference proposition would leave most observers unsatisfied. In the absence of actual compensation, the criterion fails to consider the diminishing marginal benefit of a second meal and the increasing marginal pain of starvation. Likewise, the randomized distribution of meals fails to consider the inter-personal effects of unfair allocations. Fortunate individuals suffer a utility loss by knowing that other individuals are starving while they enjoy a double meal. Because of the diminishing marginal utility of wealth and interpersonal utility effects, from an ex ante point of view, no individual would choose allocation system (b), even though the expected return from (b) is equal to the return from (a).

[624] Gary North, 'Undermining Property Rights: Coase and Becker" (2002) 16 Journal of Libertarian Studies 75, 79.

costs. The factory owner is avoiding a social cost in not paying for the cost of pollution while the consumer is receiving an unpaid for benefit in the form of cheaper products.

The English economist Arthur Pigou saw these external costs not as private costs, but social ones, created by inefficiency in the market.[625] If the factory was not forced into internalising the social costs of its production, too much pollution would be produced with negative effects. Traditionally, economists saw that only government intervention would lead to the necessary internalisation of social costs. Pigou, for example, recommended that the polluter should have to pay a tax (Pigovian tax) equivalent to the social cost caused by the pollution. Other interventionist solutions included imposing liability in the form of damages on the polluter or restricting the operation of the factory. This approach would involve identifying the cause of the harm/externality, in this case the polluter, and imposing and collecting a tax on his activities equal to the cost of the damage imposed by the activity.

The approach adopted by Pigou in dealing with social costs was not without flaws. Specifically, calculating the social cost and implementing the correct tax was difficult and the costs of administering such taxes can be expensive. Partly as a response to these criticisms Ronald H. Coase produced one of the most influential law review articles entitled *The Problem of Social Cost*.[626] In this article, Coase argued that there was another way in which social costs could be handled without the intervention of third parties. The theory (which became known as the *Coase Theorem*[627]) may be summarised as follows: "... under conditions of full information, rationality and zero transaction costs, any assignment of legal rights will be efficient. Different initial allocation decisions could affect the distribution of wealth, but not its ultimate efficiency."[628]

The Coase Theorem operates on the assumption that property rights are clearly defined and protected and transaction costs are zero. In such circumstances, the theorem posits that any resulting transaction between parties will be allocatively efficient regardless of the initial

---

[625] Arthur C. Pigou, *The Economics of Welfare* (4th ed.) (London: MacMillan, 1932).
[626] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1. The article is regarded as the most cited law review article of all time with over 5,000 citations. See: Fred R. Shapiro & Michelle Pearse, 'The Most-Cited Law Review Articles of All Time' (2012) 110 Michigan Law Review 1483.
[627] George Stigler, *The Theory of Price* (3rd ed.) (MacMillan, 1966) 113.
[628] Jules L. Coleman, 'Afterword: The Rational Choice Approach to Legal Rules' (1989) 65 Chicago-Kent Law Review 177.

assignment of the property rights.[629] In simple terms, Coase hypothesised that common law rules promoted Pareto or Kaldor-Hicks efficiency.[630] In essence, what Coase was arguing was that the law sets prices and imposes sanctions. In such a world, individuals – who it is assumed are rational maximisers of their self-interest - would bargain to a mutually beneficial arrangement regardless of the initial allocation of entitlements in the absence of transaction costs.

The genius of the theorem lies in its simplicity and, as Coleman observes, "[l]ike many remarkable insights, it can be made to seem obvious in retrospect."[631] Contrary to Pigou, Coase argues that there is another way in which social costs may be internalised between the parties which does not require the intervention of third parties. In circumstances of perfect information and zero transaction costs and regardless of the assignment of legal rights, the market itself will result in an efficient outcome.[632] In such circumstances, the parties will bargain to the efficient result and eliminate the externalities regardless of any legal command requiring them to do so:

> The conclusion then is that when the market fails to secure an optimal result we need not turn to a tax, subsidy, or tort remedy. Instead, a *secondary* or *Cosean* [sic] market may solve the problem through bargained exchange. In other words, some market failures are in principle rectifiable by markets! This was Coase's remarkable insight.[633]

According to the Coase Theorem, where transactions costs are zero, there is no need for legal intervention (through tort law, for example). The market itself will achieve efficiency through

---

[629] Steven G. Medema, '*Juris*prudence: Calabresi's Uneasy Relationship with the Coase Theorem' (2014) 77 Law & Contemporary Problems 65, 66.

[630] Francesco Parisi, 'Positive, Normative and Functional Schools in Law and Economics' (2004) 18 European Journal of Law and Economics 1, 9.

[631] Jules L. Coleman, 'Markets, Methods, Morals and the Law' (2014) 66 Alabama Law Review 169, 184.

[632] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 10; provides the following example of the application of the Coase Theorem:

> Suppose a farmer has the legal right to grow crops free from damage of locomotive sparks, and that is a property right – that is, a right to exclude entry (including entry of sparks emitted by locomotives) upon his land, enforceable by an injunction or perhaps even a criminal penalty for trespass – rather than just a right to be compensated for damage. Assume that his crops are worth $100 and are flammable, that the value to the railroad of unimpeded use of its right-of-way is $120, but that at a cost of $110 the railroad can install spark arresters that will eliminate the fire hazard. On these assumptions, the real value of the crops to the farmer is not $100 but somewhere between $100 and $110, since at any price above $110 the railroad would install sparks arresters rather than buy the farmer's property right, but that at any price below $110 the railroad would buy the property. The farmer is better off selling his property right to the railroad at a price between $100 and $110; he will do this because the railroad will buy at a price in that range; and as a result his land will be shifted into some fire-insensitive use, just as if the railroad had owned it in the first place. Similarly, if the railroad initially has the right to the unimpeded use of its right-of-way, but the farmer's crops are worth more than the cost of spark arresters, the farmer will buy the right to use his land free of spark damage (how much will he pay? Will he go all the way up to $120, the value to the railroad of unimpeded use of its right of way?) and so again the land will be put to its most productive use regardless of the initial assignment of rights

[633] Ibid.

private exchange between the parties producing what Medema calls "Coase's negotiation result."[634] Consequently, "society will avoid the additional administrative costs of litigation."[635] Thus, assuming zero transaction costs, Coase's thesis was that private co-operation between parties would produce efficient results by maximising the value of production (when the value increase was greater than the associated costs) and this would occur regardless of the initial distribution of rights.[636]

The Coase Theorem has been the subject of much criticism on the basis that it is hardly realistic. Its basic assumption is that the world is one of perfect information and zero transaction costs. However, the real world is one that includes substantial transactions costs. Such criticisms, Coase himself has argued, missed the point of his work. In assuming no transaction costs, Coase was not attempting to reflect the reality but was instead trying to use this hypothetical, simplified world to show just how important transaction costs were.[637]

Coase was in fact criticising the assumptions of current economic thinking at the time.[638] It has even been described as a parody of previous economic thinking.[639] Specifically, Coase was highlighting the fact that the role of transaction costs had not been adequately considered by

---

[634] Steven G. Medema, '*Juris*prudence: Calabresi's Uneasy Relationship with the Coase Theorem' (2014) 77 Law & Contemporary Problems 65.

[635] Jack M. Balkin, 'Too Good To Be True: The Positive Economic Theory of Law' (1987) 87 Columbia Law Review1447, 1466.

[636] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1, 15-16. See also Jules L. Coleman, 'The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice' (1982) 34 Stanford Law Review 1105, 110, where the author explains how the theorem operates through the following example:

> As between two competitors vying for a land use, the land will be put to efficient use no matter who initially holds the property right. If the person who values the use the least is initially assigned it, he will sell it to the party who values it more; and if the party who values it more is initially assigned the right, he will refuse any trade since the other individual will not offer him sufficient compensation. In the end, the individual who values it most secures the entitlement.

[637] Robert H. Coase, *The Firm, the Market and the Law* (Chicago: University of Chicago Press, 1988) 13. See also, A. Mitchell Polinsky, *An Introduction to Law and Economics* (4th ed.), (Wolters Kluwer, 2011) 16, where the author usefully summarises the theorem as follows:

> Although the simple version of the Coase Theorem makes an unrealistic assumption about transaction costs, it provides a useful way to begin thinking about legal problems because it suggests the kinds of transactions that would have to occur under each legal rule in order for that rule to be efficient. Once these required transactions are identified, it may be apparent that, given more realistic assumptions about transaction costs, one rule clearly is preferable to another on efficiency grounds.

[638] Glenn Fox, 'The Real Coase Theorems' (2007) 27 Cato Journal 373, 375.

[639] Daniel A. Farber, 'Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem' (1997) 83 Virginia Law Review 397, 398.

economists when analysing the effect that changes in the law would have on questions of allocative efficiency.[640]Coase himself recognised that his assumption of zero transaction costs was unrealistic.[641] Transaction costs are part of everyday life and the reality is that such costs represented an impediment to private exchanges.[642]

In the real world, members of society need certain information without which they will not enter into voluntary exchanges. Voluntary exchanges are rarely costless and such transaction costs can be said to "represent the value of the resources that are used up in the process of conducting a market exchange."[643] Coase was instrumental in raising the importance of transaction costs observing that such costs were even incurred "simply in the process of making market exchanges."[644] These informational costs include the costs of identifying the parties to a potential exchange, the costs of negotiating with such parties and the costs of concluding any such negotiation.[645] The more substantial the transaction costs in existence the less attractive (from an efficiency point of view) it is for parties to enter into voluntary exchanges.

Conversely, the lower the transaction costs, the greater incentive that exists for the parties to co-operate. Fox notes that transaction costs might lower naturally.[646] For example, the more informationally technologically advanced a society is then the lower the search costs should be.[647] Fox also points out that search costs may also be lower in societies where freedom of speech and association are guaranteed as it encourages and facilitates parties in seeking each other out in order to enter into exchanges.[648] Transaction costs are lower in societies where the legal system vigorously protects private property entitlements and contractual obligations.[649]

---

[640] Daniel A. Farber, 'Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem' (1997) 83 Virginia Law Review 397, 398.
[641] Robert H. Coase, *The Firm, the Market and the Law* (Chicago: University of Chicago Press, 1988) 174.
[642] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1,15, where the author acknowledged:

> In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.

[643] Glenn Fox, 'The Real Coase Theorems' (2007) 27 Cato Journal 373, 378.
[644] Ibid., 383.
[645] Ronald H. Coase, 'The Nature of the Firm' (1937) 16 Economica 386.
[646] Glenn Fox, 'The Real Coase Theorems' (2007) 27 Cato Journal 373, 380.
[647] Ibid.
[648] Ibid.
[649] Ibid.

Such guarantees provide the parties with the confidence to seek out such exchanges safe in the knowledge that the legal system will step in and provide the necessary protection should the circumstances arise. However, notwithstanding that the natural conditions of the market might lower transaction costs the market might need help in the form of the intervention of the institutions of state. When and how such interventions occur is the "real Coase theorem."[650]

Traditionally, tort problems had been examined in terms of rights and wrongs. However, in section II of his famous article, Coase took a very different approach to such problems.[651] In a break from such tradition, Coase viewed the problem as one of reciprocal wrongs. Rather than examining whether the defendant had committed a wrong for which he or she should compensate the plaintiff, Coase's approach was to reframe the question to one which asked how "to avoid the more serious harm."[652] Rather than analysing the issue in terms of right and wrong, it was more appropriate to analyse it in economic terms as a question of different parties competing for limited resources. As Coase viewed it, to award damages to the plaintiff would simply cause harm to the defendant. Coase elaborated on this view by citing the famous nuisance case of *Sturges v Bridgman.*[653] Coase was an economist and not a lawyer and he interpreted this decision as one where the judge was applying economic principles to a legal problem whether the judge realised he was doing so or not. In *Sturges*, a confectioner had been using industrial pestles and mortars for over 20 years at the back of his premises adjoining the garden of his neighbour, a doctor. Only when the doctor built a consulting room at the back of his garden did the confectioner's activity cause a disturbance to him. As Coase explained the dilemma:

> To avoid harming the doctor would inflict harm on the confectioner. The problem posed by this case was essentially whether it was worth while, as a result of restricting the methods of production which could be used by the confectioner, to secure more doctoring at the cost of a reduced supply of confectionery products.[654]

The answer to the question as to how to avoid the greater harm depends on "the value of what is obtained as well as the value of what is sacrificed to obtain it."[655] In other words, Coase

---

[650] Glenn Fox, 'The Real Coase Theorems' (2007) 27 Cato Journal 373.
[651] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1, 2.
[652] Ibid.
[653] *Sturges v Bridgman* (1879) 11 Ch.D. 852.
[654] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1, 2.
[655] Ibid.

applied a cost/benefit analysis to determine the answer as to whether the confectioner or doctor's activity should be restricted.[656]

In determining whether the confectioner or doctor's activity should be restricted, Coase proposed that the question depended on whose activity was of greater market value measured in terms of allocative efficiency.[657] The value of the doctor's activity should be compared to that of the confectioner. If the benefits of the doctor's activity outweighed those of the confectioner, then such a result would justify the intervention of the law in restricting the confectioner's activity.[658] It was Coase's thesis that in cases with zero transaction costs, the parties would put the resource, in this case the land, to its most productive use. Acting rationally, the parties would respond in a manner which maximises the value of production. If such an exchange was prevented from happening by the presence of substantial transaction costs, then the law should intervene to ensure the most efficient result. In other words, if the free market does not "naturally" produce the most efficient outcome because of some impediment, it is the function of the law to intervene and "mimic the outcome of a Coasean market."[659] If high transaction costs in the real world mean that the parties themselves will not privately bargain to the most efficient allocation of the resources, it is the purpose of the law to step in and impose legal rules which will bring about that efficient allocation i.e. that which Coase would have predicted would have been brought about absent those transaction costs. Thus, Fox argues that Coase was in favour of government regulation when substantial transaction costs existed which would prevent the parties from entering into a private exchange in the free market.[660]

---

[656] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1, 9, where the author observed:

> The doctor would have been willing to waive his right and allow the machinery to continue in operation if the confectioner would have paid him a sum of money which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location or from having to curtail his activities at this location or, as was suggested as a possibility, from having to build a separate wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation or move his confectionery business to some other location. The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's.

[657] Glenn Fox, 'The Real Coase Theorems' (2007) 27 Cato Journal 389.

[658] Ultimately, having regarding to the suburban location of the activity, the court held that the doctor's use of his premises was more in keeping with the environment and the confectioner's activity amounted to a nuisance.

[659] Jules L. Coleman, 'Markets, Methods, Morals and the Law' (2014) 66 Alabama Law Review 169, 186.

[660] Glenn Fox, 'The Real Coase Theorems' (2007) 27 Cato Journal 389, 390. See also Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1,18, where the author expressed some reservations

In their book *Tragic Choices*,[661] the authors Calabresi and Bobbitt identify the conditions which result under the Coase Theorem as Pareto optimal. Regardless, of the initial distributions of entitlements, the Pareto optimal state of affairs will result. For example, if the doctor's activity is more valuable than that of the confectioner's then it does not matter who has the initial right to restrain the other, the result will be the same. If the right rests with the doctor, he will prohibit the confectioner's activities. If the right initially rests with the confectioner, the doctor will purchase the right from him. In the former scenario, the distribution is Pareto optimal as there are no other Pareto superior moves that can be made. However, the latter initial distribution is not Pareto optimal as there is a Pareto superior move that can be made i.e. the doctor purchasing the right to continue his activities from the confectioner. That is not to say that the distribution is both Pareto and allocatively efficient. Coase's thesis is predicated on the notion that individual preference is equated with wealth-maximising preferences; maximising "the value of production."[662] As Coleman notes, "[i]n real life an individual's preferences are presumably more profound" and might include more complicated matters than simply increasing wealth. Consequently, a distribution may be not both allocatively and Pareto efficient.[663]

Medema critically examines the consequences of a Paretian interpretation of efficiency under the Coase Theorem.[664] He points out that the use of Pareto efficiency under Coase renders the theorem a tautology. Once Coasian negotiations have ended the result must be Pareto optimal. If any improvement was possible the transaction would already have occurred. Furthermore, the theorem's assumption about the absence of transaction costs would not be necessary under Pareto efficiency as the parties would have already negotiated for them. Any transaction costs still in existence must therefore be Pareto optimal otherwise steps would have been taken to dispense with them. According to Medema, the Paretian interpretation of the theorem also affects Coase's invariance thesis i.e. that regardless of the initial assignment of rights the parties

---

as regards governmental intervention, observing that such an approach would not necessarily always be less costly as the government and governmental agencies are themselves far from flawless:

> ... there is no reason to suppose that the restrictive and zoning regulations, made by a fallible administration subject to political pressures and operating without any competitive check, will necessarily always be those which increase the efficiency with which the economic system operates ... it follows that direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm.

[661] Guido Calabresi & Philip Bobbitt, *Tragic Choices* (New York: W.W. Norton & Company, 1978) 85.
[662] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1, 6.
[663] Jules L. Coleman, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 California Law Review 221, 231.
[664] Steven G. Medema, '*Juris*prudence: Calabresi's Uneasy Relationship with the Coase Theorem' (2014) 77 Law & Contemporary Problems 65, 89-91.

will negotiate to the same efficient result and the results in terms of resource allocation will be identical.[665] Under Pareto, however, it is not possible to compare one result with the other, "each is equally good if the gains from trade have been exhausted."[666] Third, removing the impediments to facilitate a Coase negotiation result cannot be a Pareto improvement. If it was, they would already have been removed. It follows then that the existence of such impediments benefit someone and their removal must be wealth-enhancing but will create winners and losers and are therefore efficient in the Kaldor-Hicks sense. The application of the Pareto notion of efficiency led Calabresi to conclude that the Coase theorem and welfare economics in general were of little use as guidance in policy making.[667]

While Calabresi's analysis has been accepted by other commentators,[668] it would appear to be directly contradicted by Coase's own words. In *The Problem of Social Cost*, Coase identified the maximisation of "the value of production" as the ultimate result of such negotiation.[669] Under Coase's notion of efficiency, preferences are measured through prices and acknowledged when they lead to profit maximisation; it "depends on the market value of resources."[670] By rejecting the notion of single party causation and viewing the problem in terms of reciprocal harm, Coase is forced into comparing the subjective utility or value of the competing claims in order to give preference to that which increases social value.

In order to conduct this cost/benefit analysis Coase must engage in "making scientifically valid comparisons of interpersonal subjective utility."[671] The assumption that such comparisons can be made has been one of the major flaws that has plagued economic analysis ever since Robbins had proved that it was virtually impossible to do so accurately.[672] If, according to Coase, some

---

[665] Guido Calabresi, 'The Pointlessness of Pareto: Carrying Coase Further' (1991) Yale Law Journal 1211, 1222.
[666] Steven G. Medema, '*Juris*prudence: Calabresi's Uneasy Relationship with the Coase Theorem' (2014) 77 Law & Contemporary Problems 65, 90.
[667] Guido Calabresi & Philip Bobbitt, *Tragic Choices* (New York: W.W. Norton & Company, 1978) 85. See also, Steven G. Medema, '*Juris*prudence: Calabresi's Uneasy Relationship with the Coase Theorem' (2014) 77 Law & Contemporary Problems 65, 92, where the author writes:

> The inability of the Pareto criterion to provide any guidance for policy "makes inevitable a thoroughgoing and open discussion of distribution and of interpersonal comparisons. This, of course, takes the economist into territory that is both unfamiliar and unsettling.

[668] James M. Buchanan & Wm. Craig Stubblebine, 'Externality' (1962) 29 Economica 371.
[669] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1, 8.
[670] Jules L. Coleman, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 California Law Review 221, 225.
[671] Gary North, 'Undermining Property Rights: Coase and Becker" (2002) 16 Journal of Libertarian Studies 75, 81.
[672] Lionel Robbins, *The Nature and Significance of Economic Science*, (2nd ed) (London: Macmillan, 1935).

value must be sacrificed for some greater value, then the question becomes what "value" is to be preferred? [673] Is the confectioner's activity of more value than that of the doctor's? Who decides? And on what basis is the decision made? [674] Consequently, because of its tendency to equate increasing utility with increasing economic value and because of its tendency to rely on interpersonal comparisons, the Coase Theorem is deeply flawed and incomplete. In the words of one commentator, the "whole essay is an exercise in intellectual gymnastics, an illusion of scientific precision."[675] Moreover, Coase dispenses with the notions of causation and responsibility in favour of the idea of "reciprocal harm." By severing the notion of responsibility for one's actions from notions of compensation undermines justice considerations. Causation is central to tort law. It explains the structure of the tort claim – plaintiff *vs* defendant, and implies through agency, moral/legal responsibility for the harm that has been caused.[676]

There is no doubt that the Coase Theorem was a major innovation in private law theory by presenting how legal problems might be resolved through the science of economics. However, it has also been the subject of extensive criticism. For example, it has been argued that the Coase Theorem tends to weaken individual property rights.[677] Coase equates efficiency with justice without considering the moral dimensions of one's rights to one's own property. Under Coase, regardless of who is initially in possession of the property right, in a zero transaction world, the parties will bargain to the most market efficient state. However, as North demonstrates, this conclusion is predicated on two further assumptions. The first is that the party whose property rights are interfered with has no sense of justice or fairness regarding the seemingly arbitrary treatment of his or her property rights i.e. that he or she would simply willing accept the interference with his or her property on the basis of some "value-free"

---

[673] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1, 2.

[674] Peter Lewin, 'Pollution Externalities: Social Cost and Strict Liability' (1982) 2 Cato Journal 220, 222, where the author summarises the dilemma as follows:

> The social-cost concept requires the summation of individual costs, which is impossible if costs are seen in utility terms. The notion of social cost as reflected by market prices (or even more problematically by hypothetical prices in the absence of a market for the item) has validity only in conditions so far removed from reality as to make its use as a general tool of policy analysis highly suspect ...
>
> The foregoing analysis suggests that any perception of efficiency at the social level is illusory ... Social cost falls to the ground precisely because individual evaluations of the sacrifice involved in choosing among options cannot be compared.

[675] Gary North, 'Undermining Property Rights: Coase and Becker" (2002) 16 Journal of Libertarian Studies 75, 83.

[676] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995), 154-158.

[677] Gary North, 'Undermining Property Rights: Coase and Becker" (2002) 16 Journal of Libertarian Studies 75.

analysis of the economic value of that property.[678] The second assumption is that that party will not suffer further injury than he or she has heretofore as a result of this interference. What about future interferences? As North concludes, both of these assumptions are hardly realistic.[679]

North observes that Coase's analysis can be interpreted as undermining property rights by allowing one party cause another economic injury when it is justified as "a factor of production."[680] In other words, preventing another from interfering with your property rights could result in a social cost in that production is not maximised. However, North argues that Coase's theorem could be viewed from the opposite point of view – that strong property rights are essential to maximising production.[681]

The Coase Theorem has also been criticised on the basis that it is agnostic vis-a-vis distributive justice concerns of fairness. According to Coase's invariance thesis, it does not matter whether the initial the entitlement is placed with one party or the other, as the identical result move will

---

[678] An excellent illustration of this point is the case of a Scottish farmer, Michael Forbes and his resistance, along with a handful of other local residents, who refused to sell their properties to the billionaire business tycoon, Donald Trump in order that he could build a golf course in an area of environmental importance and scenic beauty north of Aberdeen in Scotland. The farmer's "David and Goliath" struggle with the billionaire was immortalised in the documentary, *You've Been Trumped* (directed by Anthony Baxter, produced by Richard Phinney, 2011).

[679] Gary North, 'Undermining Property Rights: Coase and Becker" (2002) 16 Journal of Libertarian Studies 75, 84-85. The danger of ignoring justice concerns was highlighted by the author (86) who observes:

> When righteous men are thwarted in their cause by seekers of local "efficiency" who care nothing about the ethics of the solution, there will be serious social consequences. To discuss the efficiency of any given transaction without also discussing the equity of it is to begin to deliver the society into the hands of socialist revolutionaries. Or, to put it in language more familiar to Chicago School economists, penalizing righteousness in the name of economic efficiency is not a zero-cost decision.

[680] Ibid., 89; citing the following passage from Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1, 44:

> If factors of production are thought of as rights, it becomes easier to understand that the right to do something which has a harmful effect (such as the creation of smoke, noise, smells, etc) is also a factor of production. Just as we may use a piece of land in such a way as to prevent someone else from crossing it, or parking his car, or building his house upon it, so we may use it in such a way as to deny him a view or quiet or unpolluted air. The cost of exercising a right (of using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right-the inability to cross land, to park a car, to build a house, to enjoy a view, to have peace and quiet or to breather clean air.

[681] Ibid., where the author writes:

> The legal right of owners to exclude others from invading their property is the crucial factor of capitalist production. This is the production factor of personal confidence that I will be able to retain the fruits of my labor, my land, and my capital assets. When the legal system denies this predictable protection to owners, the free market is steadily eroded by invaders.

result. As a consequence, Coase gives no thought to the impact the initial assignment of entitlement will have on the parties' wealth.

4.2.4 Calabresi's '*The Costs of Accidents*'

Along with Coase, Guido Calabresi is seen as one of the forefathers of the economic analysis of law. In his groundbreaking work, *The Costs of Accidents,*[682] Calabresi put forward his normative economic theory of law which focused not solely on efficiency but also on how the costs of accidents should be distributed across society. Calabresi essentially merged the enterprise liability theory of "fair compensation through the distribution of losses" with the concept of economic efficiency.[683] However, instead of promoting a conception of social insurance based on the fair distribution of losses, he proposes that instead the goal should be the efficient prevention of accidents. Thus, Calabresi views the primary goal of tort law as the minimisation of the costs of accidents and not primarily compensation for wrongs done. Moreover, he interprets these costs not necessarily as a private matter between plaintiff and defendant but as a question for society as a whole. Accidents are viewed as a social problem. The importance of Calabresi's work therefore is "that private ordering has the power to solve the problem of social costs."[684] In this way, Calabresi – while ostensibly relying on enterprise liability principles – established an alternative justification for the imposition of strict liability based on principles of economic efficiency.

Calabresi is different from other economic analysts in that he always expressed an interest for justice considerations in determining between legal rules. In analysing the law, Calabresi is of the view that it must satisfy two goals; it must be fair or just and it must minimise the costs of accidents. He further subdivides the principle of accident reduction into three categories. First, the law must seek to reduce the number and seriousness of accidents (primary accident costs).[685] These costs could be reduced either by prohibiting certain activities that cause accidents entirely or in the alternative, these activities should be made more costly i.e. people

---

[682] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970). Calabresi's work in the field started earlier with the publication of Guido Calabresi, 'Some Thoughts on Risk Distribution and tort law' (1961) 70 Yale Law Journal 499; and was developed further in his later work, Guido Calabresi & A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089.

[683] Virginia E. Nolan and Edmund Ursin, *Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-First Century* (Philadelphia, Temple University Press 1995).

[684] James R. Hackney, Jr., 'Guido Calabresi and the Construction of Contemporary American Legal Theory' (2014) 77 Law & Contemporary Problems 45, 46.

[685] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 26.

should be deterred from undertaking such activities by making the cost of participation expensive. Second, the law should concentrate on reducing the social costs of accidents (secondary accident costs). This can be done either by spreading the loss or through the 'deep pocket' approach.[686] Third, the law should seek to reduce the costs of administering the legal system in establishing and enforcing liability for such accidents (tertiary costs).[687] These three aspects of Calabresi's theory have been described by Posner as "the allocative, the distributive, and the administrative."[688]

Calabresi is of the opinion that accidents are a problem for society. Specifically, that problem is what to do about the costs of those accidents. Tort law is viewed as "a potential tool of social reform" to optimally minimise the costs of accidents.[689] The strength of Calabresi's approach is its ability to take into consideration not only concerns of efficiency but those of justice or fairness as well. Coleman summarises Calabresi's approach as follows: "we want to avoid accidents that are not worth their costs and to spread the costs of accidents that are not worth the costs of preventing them ... We want *optimally* to reduce and spread the risk."[690]

Efficiency considerations come into play in Calabresi's analysis when seeking to reduce primary accident costs. In order to achieve optimal deterrence not all accidents should be prevented. Only those accidents where the expected costs of harm exceed the cost of prevention should be avoided. It would be inefficient and irrational to expect a defendant to take excessive precautions. In this regard, Calabresi identifies two forms of deterrence which would reduce the frequency and severity of accidents. First, is the notion of general or market deterrence.[691] This form of deterrence operates on the basis that it is individuals themselves that are best placed to make decisions on what activities they should or should not undertake. In other words, reliance is placed on the market to deter wrongful behaviour. Thus, "if all activities reflect the accident costs they "cause," each individual will be able to choose for himself whether an activity is worth the accident costs it "causes.""[692] Consequently, individuals are incentivised to take optimal safer activities and to "make activities safer."[693] If individuals or organisations

---

[686] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 21.
[687] Ibid., 27.
[688] Richard A. Posner, "Guido Calabresi's *The Costs of Accidents*: A Reassessment' (2005) 64 Modern Law Review 12, 15.
[689] Jules L. Coleman, 'The Costs of *The Costs of Accidents*' (2005) 64 Modern Law Review 337, 341.
[690] Ibid., 340.
[691] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 68.
[692] Ibid., 70.
[693] Ibid., 73.

have to pay the costs of their wrongful behaviour they are incentivised to take optimal precautions or desist from the activity. Second, is the notion of specific or collective deterrence.[694] Under this approach, decisions regarding the costs of accidents are "made collectively, through a political process."[695] Specific deterrence may be justified *inter alia* on the basis that individuals do not know what is best for themselves and therefore activity decisions should be taken out of their hands.[696]

Calabresi's approach not only analyses how accident costs could be minimised, it also examines how those accident costs could be spread. Under Calabresi's simple efficiency analysis, only those accidents whose costs of prevention are less costly than the accident themselves should be prevented. Consequently, the costs of accidents whose prevention would be more expensive than the costs of the accidents themselves, will fall on the victim. This is so because there is no efficient reason why the losses should be incurred by any other party. However, Calabresi recognises that reliance on economic efficiency in such circumstances would be unfair on the victims of such accidents. It is at this stage of his analysis that Calabresi's notion of justice or fairness comes into play. How are such costs to be distributed in a way that is compatible with justice? As Coleman explains it, "[a]ny mechanism that spreads risk maximally over persons and time and in doing so minimizes its potential impact on individuals is permissible provided it is compatible with more fundamental concerns of fairness."[697] Under Calabresi's general deterrence approach, primary accident costs would allocate those costs "to those acts or activities ... which could avoid the accident costs most cheaply."[698] Or, as Calabresi also put it, those costs would be allocated "to those acts or activities that an arbitrary initial bearer of accident costs would (in the absence of transaction and information costs) find it most worthwhile to "bribe" in order to obtain that modification of behaviour which would lessen accident cost most."[699] Thus, under market conditions the costs arising from accidents would rest with the "cheapest cost avoider" i.e. those who are "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."[700] According to Calabresi's

---

[694] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 95.
[695] Ibid.
[696] Ibid., 96.
[697] Jules L. Coleman, 'The Costs of *The Costs of Accidents*' (2005) 64 Modern Law Review 337, 346.
[698] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 135.
[699] Ibid.
[700] Guido Calabresi and J.T. Hirschoff, 'Towards a Test for Strict Liability in Torts' (1972) 81 Yale Law Journal 1055, 1060.

specific deterrence approach, the question as to who should bear the costs of accidents is determined by the collective (through regulation, for example) rather than letting the market determine the matter. Thus, specific deterrence "must evaluate the "moral" as well as the "economic" value of various acts or activities whose reduction or alteration would reduce accident costs."[701]

One of the key features of Calabresi's theory is its recognition of the distributive effects of legal rules. Calabresi is not wedded to making such decisions based on economic efficiency grounds alone. Instead, Calabresi believes that the costs of such accidents should be distributed fairly across society and as such he views tort law as an instrumental tool to be used to drive social change. Essentially, Calabresi understands that these goals can be achieved in tort law through the application of strict liability principles where liability would be imposed on the cheapest cost avoider regardless of blame. As such Calabresi's aim is to replace the negligence system with a system of strict liability for dangerous activities.[702]

Richard Posner, in particular is critical of Calabresi's support for strict liability over fault liability as the most efficient system for dealing with accidents.[703] He argues that Calabresi makes assertions about the deterrent effect of strict liability over negligence but supports them with little empirical evidence.[704] In Posner's view, a system of fault liability reduces accidents and privatises the administration of the enforcement of norms of good behaviour. In doing so, it minimises governmental or state interference.[705] Posner notes that despite Calabresi's prediction of doom for the tort system it still remains essentially the same some forty-five years later.[706]

---

[701] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 174.
[702] Keith N. Hylton, 'Calabresi and the Intellectual History of Law & Economics' (2005) 64 Maryland Law Review 85, 92, where the author observes, it is Calabresi's argument "that a system of strict liability rules, directed at the appropriate activities, comes much closer to minimizing the sum of primary, secondary, and tertiary costs than does the fault system."
[703] Richard A. Posner, '*The Costs of Accidents*: Book Review' (1970) 37 University of Chicago Law Review 636; Richard A. Posner, "Guido Calabresi's *The Costs of Accidents*: A Reassessment' (2005) 64 Modern Law Review 12.
[704] Richard A. Posner, "Guido Calabresi's *The Costs of Accidents*: A Reassessment' (2005) 64 Modern Law Review 12, 18.
[705] Ibid., 19.
[706] Ibid., 21; Posner summarises his criticisms by stating that "my main point is simply that as a call to reform, *The Costs of Accidents* was a failure, and it was a failure, in part, because Calabresi made no effort to lay an empirical foundation for his rejection of the fault system."

Coleman questions Calabresi's method of allocating the costs of accidents to the cheapest cost avoider on the basis that it "ignores a central feature" of tort law, namely, causation i.e. that which connects a particular defendant to a particular plaintiff.[707] Calabresi does not deem it necessary to limit "who should bear the burden of accident costs" to injurers and victims.[708] Instead, in Calabresi's world, this question is to be decided on an instrumental basis "of the goals we wish accident law to accomplish."[709] In Coleman's view, this is a fatal flaw in Calabresi's analysis.[710]

The relationship between Calabresi's theory and notions of justice has also been subject to much scrutiny. In an exchange with Ronald Dworkin, Calabresi sought to explain the interrelationship between justice and efficiency in his work.[711] In *The Costs of Accidents*, Calabresi's discussion of justice was somewhat vague, describing the notion as "elusive."[712] Dworkin later criticises Calabresi in this regard suggesting that Calabresi was "trading off" justice considerations against those of efficiency.[713] Calabresi rejects these assertions and later clarifies the role of justice in his theory somewhat, by stating that justice considerations act as a veto over efficiency concerns.[714] Calabresi develops his theory of justice a little further stating that in his view, "[a]n appropriate blend of efficiency and distribution is highly instrumental toward, and closely correlated with, achieving what many would view as a just society."[715] However, he does concede that the relationship between considerations of justice, efficiency and distribution is something that requires further research.[716] In a further response to

---

[707] Jules L. Coleman, 'The Costs of *The Costs of Accidents*' (2005) 64 Modern Law Review 337, 352.
[708] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 22.
[709] Ibid.
[710] Jules L. Coleman, 'The Costs of *The Costs of Accidents*' (2005) 64 Modern Law Review 337, 353, where the author observes:

> In turning the problem of an accident – in which the question is whether what happened to you is something that is my problem to address because I have wronged you or inadequately taken into account your interests and the impact of my choices on those interests – into the problem of accidents – in which the question is how should the costs of accidents as a whole be minimized and distributed – the Calabresian framework diminishes, if it does not eliminate altogether, the rich moral character of tort law. Tort law is not a mere technology; it is a way of expressing the nature of responsible agency to one another in our legal practice.

[711] See Ronald Dworkin, 'Why Efficiency? A Response to Professors Calabresi and Posner' (1980) 8 Hofstra Law Review 563, in which Dworkin responds to Guido Calabresi, 'About Law and Economics: A Letter to Ronald Dworkin' (1980) 8 Hofstra Law Review 553 where Calabresi had, in turn responded to Ronald Dworkin, 'Is Wealth a Value?' (1980) 9 Journal of Legal Studies 191.
[712] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 25.
[713] Ronald Dworkin, 'Is Wealth a Value?' (1980) 9 Journal of Legal Studies 191.
[714] Guido Calabresi, 'About Law and Economics: A Letter to Ronald Dworkin' (1980) 8 Hofstra Law Review 553.
[715] Ibid., 558.
[716] Guido Calabresi, 'About Law and Economics: A Letter to Ronald Dworkin' (1980) 8 Hofstra Law Review 553, 559. Calabresi himself did develop his arguments on justice and efficiency somewhat further in a later book,

Claberesi, Dworkin questions his clarification that justice considerations act as a veto over efficiency.[717] Dworkin notes that if that is so it must mean that considerations of efficiency (or an increase in social wealth) must have some inherent value or at least must be instrumental in attaining something else that is of value.[718]

4.2.5 Wealth Maximisation

Richard A. Posner has become one of the most influential thinkers on the economic analysis of law.[719] In Posner's view, the common law tort system is designed, whether consciously or unconsciously, to improve efficiency.[720] As a supporter of small government, Posner believes that the economic theory of the law determines "the appropriate boundaries of the minimum state are" in which the state's role is "to intervene and correct, the best it can, serious market failures."[721]

Initially, Posner's theory simply attempted to demonstrate how the law was economically efficient. This positive approach was concerned with describing how the law *is* rather than how it *should* be. Consequently, it purported to be value-free dependent on scientific economic analysis rather than intuitive notions of justice. Posner's view is that "moral philosophy" is "a weak field, a field in disarray, a field in which consensus is impossible to achieve in our society."[722] Instead, Posner believes that the best explanation of the law is that it is a vehicle by which society's resources are allocated in either a Pareto optimal or Kaldor-Hicks efficient manner. Specifically, Posner adopts the principle that the underlying norm of tort law is to maximise social wealth. Wealth is maximised "when goods and other resources are in the hands of those who value them most, and someone values a good more only if he is both willing and able to pay more in money (or in the equivalent of money) to have it." [723]

Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse University Press, 1985).

[717] Ronald Dworkin, 'Why Efficiency? A Response to Professors Calabresi and Posner' (1980) 8 Hofstra Law Review 563.

[718] Ibid.

[719] Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972).

[720] The decision of Hand J. in *U.S. v Carroll Towing Co.*, 159 F. 2d 169 (2nd cir. 1947); is the most famous example of economic considerations being explicitly considered in a judgment. For an interesting analysis of how efficient rules are more likely to survive as controlling precedents and inefficient rules are likely to be overturned see, George L. Priest, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6 Journal of Legal Studies 65.

[721] Richard A. Posner, 'Law and Economics *is* Moral' (1990) 24 Valparaiso University Law Review 166.

[722] Ibid.

[723] Ronald M. Dworkin, 'Is Wealth a Value?' (1980) Journal of Legal Studies 191, 191-192.

Accordingly, the law should be developed in such a way that increases overall wealth. An increase in social wealth is good because an allocation of resources which maximises wealth is efficient and in a world of scarce resources efficiency is a good thing. In his earlier work, Posner appeared to adopt a utility-based concept of efficiency,[724] however, his thinking later changed.[725] The concept of efficiency utilised by Posner is similar to the monetized version of Kaldor-Hicks i.e. if the winners gain more from the move than the losers lose, regardless of whether the losers are compensated.[726] If the policy change maximises wealth, rather than utility necessarily, then it is deemed to be efficient.[727]

4.2.5.1 *Normative Basis for Wealth Maximisation*

Posner distinguished his concept of wealth maximisation from the principles of utilitarianism and Pareto efficiency. According to Posner's theory, wealth maximisation is not an alternative to efficiency as the underlying norm of tort law but is instead is an alternative basis to utilitarianism for justifying efficiency.[728] In his view, this notion of wealth maximisation is a different type of norm which does not suffer from the limitations of either utilitarianism or Pareto efficiency (preferring Kaldor-Hicks efficiency instead as better reflecting the reality).[729]

As Posner's thinking on the economic analysis of law developed, he realised that it was not sufficient to simply describe how the law was efficient, it was also necessary to explain why

---

[724] Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972).

[725] Richard A. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Ajudication' (1980) 8 Hofstra Law Review 487.

[726] William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (Cambridge, Mass: Harvard University Press, 1987) 16.

[727] Ibid.

[728] Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 Hofstra Law Review 509, 523.

[729] Anthony T. Kronman, 'Wealth Maximisation as a Normative Principle' (1980) 9 Journal of Legal Studies 227, 228. In the case of utilitarianism Posner justifies his move away from *utility* to *value* as a metric in measuring efficiency for a number of reasons. First, by adopting value (in the form of a willingness to pay) instead of utility, it was easier to measure changes in efficiency terms. Secondly, Posner did not believe that happiness or some other measure of utility was necessarily everyone's goal in life (see Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 16, where the author writes, "[w]ould you be willing to take a pill that would put you into a blissfully happy dreamlike trance for the rest of your life, even if you were absolutely convinced of the safety and efficacy of the pill and the trance?"). Thirdly, Posner was of the view that utilitarianism did not adequately value individual autonomy, favouring the collective over the individual (see Richard A. Posner, *Frontiers of Legal Theory* (Harvard University Press, 2004) 97, where the author describes utilitarianism as treating "people as cells in the overall social organism rather than as individuals."). Fourthly and finally, in Posner's view utilitarianism had no boundary principles i.e. whose preferences should count and which of those preferences should count. Nor does Posner find the notion of Pareto efficiency particularly appealing. While acknowledging that the unanimity approach of Pareto is intuitively attractive, he notes that applying it in certain cases can be illiberal (see Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 17). Posner is not attracted to the notion of Pareto efficiency on the basis that it lacks practical use as it does not reflect reality and the fact that most transactions/legal rules create winners and losers.

wealth maximisation was a good in of itself. Posner's wealth maximisation descriptive claim of the law needed to be normatively justified and it therefore became necessary to find "some or other moral value achieved by efficiency ... one that would justify promoting efficiency through the coercive machinery of the law."[730]

Posner first attempted to justify wealth maximisation as the ethical norm underlying his economic analysis in on the basis that 'wealth' is a good in and of itself.[731] Therefore, the pursuit of wealth is good. This is also known as the "wealth as social welfare" argument. In a later article, Posner contends that the moral justification for Kaldor-Hicks (and to a lesser extent, Pareto efficiency) may exist in a Kantian notion of consent which manifests itself in the form of 'ex ante compensation.' This is known as the "consent" argument.[732]

Posner's "wealth as social welfare" argument has been heavily criticised by Dworkin who queries whether Posner believes the maximisation of social wealth is worth pursuing for its own sake or is it an instrumental mechanism designed to produce other things of value in society.[733] Coleman has also argued that because wealth does not have an intrinsic value (unlike happiness, for example), its normative value must lie in the fact that, "pursuing wealth promotes other things of value."[734]Dworkin questions the entire basis of Posner's "wealth as social value" justification noting, '[t]he present question is not whether a society that follows the economic analysis of law will produce changes that are improvements in wealth with nothing else to recommend them. The question is whether such a change would be an improvement in value."[735]

Dworkin ultimately dismisses "wealth maximisation" as a worthy goal on the basis that "[m]oney or its equivalent is useful so far as it enables someone to lead a more valuable, successful, happier, or more moral life. Anyone who counts it for more than that is a fetishist of little green paper."[736] Dworkin concludes that rights in society should be grounded on an independent moral basis otherwise the wealth maximising principle could be utilised in defence

---

[730] Jules L. Coleman, 'The Grounds of Welfare' (2003) 112 Yale Law Journal 1511, 1515.
[731] Richard A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 Journal of Legal Studies 103.
[732] Richard A. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Ajudication' (1980) 8 Hofstra Law Review 487.
[733] Ronald M. Dworkin, 'Is Wealth a Value?' (1980) Journal of Legal Studies 191, 195.
[734] Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 Hofstra Law Review 509, 527.
[735] Ronald M. Dworkin, 'Is Wealth a Value?' (1980) Journal of Legal Studies 191, 196.
[736] Ibid., 201.

of the most reprehensible of regimes (such as slavery, for example). Thus, the moral basis of rights cannot simply be wealth maximisation.[737] Moreover, Dworkin faults Posner's thesis that the initial assignment of rights will follow principles of wealth maximisation. Specifically, he questions Posner's notion that natural rights (right to life, liberty and labour) will be assigned to their true owners on the basis that the natural owner would value them most. Posner's theory of wealth maximisation has nothing to say about the fairness of the initial distribution of society's resources. Thus, it may be the case that such rights which should properly and morally vest in their natural owners will not because of those persons' inability to pay.[738]

In his later article, Posner develops an argument which grounds the moral basis for wealth maximisation in the principle of consent.[739] In essence, Posner states that wealth maximisation can be justified on the basis that because the parties to the transaction had consented to the exchange, wealth maximisation promotes individual autonomy and liberty by giving effect to such consent. Posner locates this notion of consent in a broad Kantian concept of individual autonomy. The obvious difficulty that arises with this notion of consent is that Kaldor-Hicks efficiency does not insist on the actual payment of compensation. If someone may be rendered less well-off than before why would they consent to an exchange in those circumstances? Posner's response is that consent in this context may be real (in situations where compensation is paid) or hypothetical (where compensation should be paid, but is not). This is a somewhat tricky line of argument. It is one thing to say that the *actual* payment of compensation equates with consent it is quite another to say that *potential* compensation also equates with consent.[740]

---

[737] Ronald M. Dworkin, 'Is Wealth a Value?' (1980) Journal of Legal Studies 191, 207.

[738] Ibid., 208:

> If A is B's slave he may not be able to buy back the right to his labor, although if he were not B would not be able to buy back that right from him. If economic analysis makes someone's initial right to his owner labor depend upon whether he would purchase the right if assigned to another, that right cannot be "derived" from economic analysis unless we already know who initially has the right. This appears to be a serious circle. We cannot specify an initial assignment of rights unless we answer questions that cannot be answered unless an initial assignment of rights is specified.

[739] Richard A. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Ajudication' (1980) 8 Hofstra Law Review 487.

[740] Ibid., 492, where the author explains his thinking on hypothetical consent by making the following analogy: "if you buy a lottery ticket and lose the lottery, then, so long as there is no question of fraud or duress, you have consented to the loss." In essence, Posner argues that one consents to the risk of losses when one willing takes part in an enterprise where such risks exist. By taking part in the risky activity, one consents to the potential losses which arise as a result of such participation. In Jules L. Coleman, 'The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's *The Economics of Justice*' (1982) 34 Stanford Law Review 1105, 1123; Coleman struggles with this analogy. In his view, consenting to take a risk as one does when partaking in a lottery

Posner's notion of consent in cases of market failure manifests itself in what he calls "ex ante compensation."[741] Posner believes that while institutions that adopt Kaldor-Hicks efficiency produce losers, they are wealth-maximising and therefore less costly than other institutions which adopt Pareto efficiency, for example. This is because in Pareto superior moves compensation is always paid ex post. Thus, the up-front initial costs of Pareto efficiency make it more expensive than Kaldor-Hicks where compensation is not necessarily paid. Because costs are lower at the outset parties who enter into such transactions are compensated ex ante i.e. by accepting lower entry costs under Kaldor-Hicks, parties are giving their consent by agreeing to losses which have been compensated by lower initial costs.

Coleman is unimpressed with the notions of ex post compensation as consent (as under Pareto) and ex ante compensation as consent (as under Kaldor-Hicks).[742] In Posner's view, accepting compensation is the same as consenting to the harm which gave rise to that compensation. Consequently, if accepting compensation is deemed to equate with consent to the harm which gave rise to the claim for compensation then to signify their lack of consent the individual would have to reject the compensation. However, as Coleman observes, surely would it not be just as plausible to interpret their rejection of their legitimate entitlement to compensation as an indication that "they had, unknown to us, waived their right, that they had given their consent to being injured, or, at the least, that they had willingly assumed the risk."[743] For these reasons

---

is not the same thing as consenting to the loss. The question is not whether the individual has consented to the loss but whether it is fair to impose the loss on the individual. Coleman explains by way of the following example:

> You and I play a game, say tennis, according to the rules. You win, I lose. I have no ground for complaint; the loss is fairly imposed upon me, though I have not consented to it. I enter a lottery. I take a chance; I lose. If the lottery is a fair one, so is my loss. Posner is right in thinking that in this sort of case I have no grounds for complaint. But he is wrong in thinking that the reason I am without recourse is that I have consented to the loss.

In Robin West, 'Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner' (1985) 99 Harvard Law Review 384, 412; the author also questions the appropriateness of the lottery analogy. West contends that taking part in a lottery is in fact an act of forsaking autonomy rather than one which enhances it. The whole point of entering a lottery she opines is to submit oneself to the vagaries of fate. By taking part in a game of chance the individual is giving "full reign to our impulse to abandon the pursuit of autonomy and submit instead to forces outside of our control."

[741] Richard A. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Ajudication' (1980) 8 Hofstra Law Review 487, 492.

[742] Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 Hofstra Law Review 509.

[743] Ibid.

Coleman maintains that Posner's analysis of the relationship between compensation (whether ex ante or ex post) is greatly flawed and cannot be justified.[744]

Posner acknowledges the weakness in relying on personal autonomy as a normative basis for his theory of wealth maximisation. Its dependence on an arbitrary initial assignment of rights raises the question: As between two parties in dispute whose autonomy is to be vindicated?[745] Moreover, strict observance of the principle of personal autonomy without consideration of the impact that such an approach will have on society generally creates difficulties.[746] Whereas "[w]ealth maximization as an ethical norm has the property of giving weight both to preferences, though less heavily than utilitarianism does, and to consent, though less heavily than Kant himself would have done."[747] It is thus the appropriate ethical norm.[748]

---

[744] Jules L. Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 Hofstra Law Review 509, where the author suggests that a more logical argument based on consent would have been to the effect that to impose losses on individuals does not necessarily require their consent if the losses are imposed fairly. Thus, if the institutions imposing those losses are agreed to and the losses imposed, fair, then it does not require the consent of all parties. Instead, the more logical argument for Posner to put forward in such circumstances is that individuals who are risk-neutral and rational and faced with a decision under uncertainty would choose the wealth maximisation option through Kaldor-Hicks efficient moves. Where such an individual made a choice and suffered loss as a consequence it could be said that he or she had consented to running the risk. Thus, so the argument goes, imposing the loss would be fair not because he or she had consented to the loss. Ultimately, in Coleman's view, even this argument is doomed to failure. While more plausible than Posner's notion of "compensation as consent" it is based on the assumption that rational, risk-neutral individuals would pursue wealth maximisation as a social goal and that in so doing they would follow Kaldor-Hicks as the means for achieving it. Therefore, if this argument were to succeed it would be on the basis that the pursuit of wealth is a worthy ethical norm. If it were, then why bother with an argument based on consent to justify wealth maximisation through Kaldor-Hicks moves? However, the point is somewhat moot from Coleman's perspective as the instrumentalist argument on which it is based fails and therefore so too must this.

[745] Richard A. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Ajudication' (1980) 8 Hofstra Law Review 487, 496.

[746] Richard A. Epstein, 'Corrective Justice and its Utilitarian Constraints' (1979) 8 Journal of Legal Studies 49, 74-75.

[747] Richard A. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Ajudication' (1980) 8 Hofstra Law Review 487, 496.

[748] Ibid., 497, where Posner writes:

> The perfectly free market, in which there are no third-party effects, is paradigmatic of how utility is promoted noncoercively, through the voluntary transactions of autonomous, utility-seeking individuals. The system of wealth-maximization consists of institutions that facilitate, or where that is infeasible approximate, the operations of a free market and thus maximize autonomous, utility-seeking behavior. Because utility seeking in the market requires inducing others to enter into transactions advantageous to them, wealth is automatically transferred to those who have productive assets, whether goods or time. By the same token, those who have not productive assets have no ethical claim on the assets of others. This is not necessarily a result that maximizes utility; it is of course uncongenial to those who believe that the individual is separable from his endowments of skill, energy, and character. It is consistent, however, with a desire, rooted in the principles of autonomy and consent, to minimise coercion.

4.2.5.2 *In-built bias?*

Under Posner's approach resources will move to their most valued use in a voluntary exchange in a free market.[749] In Posner's view, "[w]hen resources are being used where their value is highest, or equivalently, when no reallocation would increase their value, we say they are being employed efficiently."[750] According to Posner, the economic value of goods or other resources essentially depends on how much someone was willing to pay for it, or if that person already has the goods/resources, how much he or she would demand for parting with them.[751]

Thus, in Posner's world, value is increased in a voluntary exchange because both parties are "better off" than they were before the transaction. Both parties presumably believe that they are in a better position than they were before the trade otherwise they would not have agreed to it. Value, as measured by a system of "prices", is increased in such circumstances. The buyer in the transaction pays a price that he or she is willing to pay and that the seller is willing to accept and "[w]hen not more such trades can be made, the situation is "efficient"."[752]

In Posner's wealth maximisation approach wanting something but not being able to pay for it does not entitle you to the goods in question. Desire is not sufficient unless it is supported by the ability to pay for the goods.[753] Thus, a poor person who could not afford to pay for a good/resource would be deemed not to value that good/resource to the degree that a rich person who was willing and able to pay for it. On the other hand, utility maximisation would justify the redistribution of wealth from the rich to the poor on the basis that the utility of a dollar is greater to a poor person than it is to a rich person. However, under wealth maximisation, such redistribution would have no impact on increasing overall wealth and hence would not be economically efficient.

---

[749] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 13.
[750] Ibid., 13.
[751] Ibid., 15. See also Lewis A. Kornhauser, 'A Guide to the Perplexed Claims of Efficiency in the Law' (1980) 8 Hofstra Law Review 591, 595, where the author points out that it is in this way that Posner distinguishes between wealth and utility:

> Wealth maximization provides a way to compare productively efficient points to one another and to select one as "best." In effect, wealth maximization uses prices to measure the values of the various goods. One can then compare productively efficient combinations of outputs by comparing the monetary value of the combinations. The criterion of wealth maximization, therefore, will dictate a choice between states over which neither the criterion of productive superiority nor allocative superiority is decisive.

[752] C. Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) 5 Philosophy & Public Affairs 3, 5.
[753] Richard A. Posner, 'The Value of Wealth: A Comment on Dworkin and Kronman' (1980) 9 Journal of Legal Studies 243.

Posner's notion of wealth maximisation through Kaldor-Hicks moves as the underlying ethical norm of tort law has also been criticised on the basis that it is not neutral and instead displays a bias against the poor in favour of the wealthy.[754] In particular, Posner's definition of "value" based on a willingness and an ability to pay is considered to exacerbate inequality.[755] Posner's wealth maximisation approach justifies the assignment of rights to their most valued use. By definition, therefore, the most valued use always places those rights with society's wealthiest.[756] While the notion of wealth maximisation may not be morally justifiable, Posner and others do not attempt to defend this concept of economic efficiency, noting that what they are doing is simply "explaining, rather than defending, the common law of torts"[757] and acknowledge its limitations, particularly as regards the inequality that can occur with the initial distribution of rights.[758] Instead, Posner accepts the fact that the initial distribution of wealth is a consequence of the market and pure luck.[759]

In Baker's view, Posner's approach to the initial assignment of entitlements can affect the wealth of the parties (and the value they place on such entitlements) which in turn might affect the use to which those entitlements will ultimately be put.[760] In developing his argument, Baker

---

[754] Lucian A. Bebchuk, 'The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?' (1980) 8 Hofstra Law Review 671.

[755] C. Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) 5 Philosophy & Public Affairs 3, 10.

[756] Ibid., 11.

[757] William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (Cambridge, Mass: Harvard University Press, 1987) 9.

[758] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 15-16:

> Suppose that pituitary extract is in very short supply relative to the demand and is therefore very expensive. A poor family has a child who will be a dwarf if he doesn't get some of the extract, but the family cannot afford the price and could not even if it could borrow against the child's future earnings as a person of normal height, because the present value of those earnings net of consumption is less than the price of the extract. A rich family has a child who will grow to normal height, but the extract will add a few inches more, and his parents decide to buy it for him. In the sense of value used in this book, the pituitary extract is more valuable to the rich family than to the poor one, because value is measured by willingness to pay; but the extract would confer greater happiness in the hands of the poor family than in the hands of the rich one.

[759] Ibid., 18, where the author writes:

> Much inequality of wealth undoubtedly reflects sheer luck, even if one's natural endowment of character and intelligence is considered an entitlement rather than a product of the genetic lottery. There is the luck of being born in a wealthy versus poor country, the luck of being a beneficiary or casualty of unpredictable shifts in consumer demands and labor markets, the luck of inheritance, the luck of the financial markets, the luck of whom you know, and the luck of your parents' ability and willingness to invest in your human capital. Determinists think that it's all luck, that deservedness has nothing to do with how rich or poor anyone is. The greater the role of luck in the distribution of wealth and economic opportunities, the more difficult it is to defend the distribution as just in a strong sense ...

[760] C. Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) 5 Philosophy & Public Affairs 3, 12.

distinguishes between rights desired for "consumptive use" from those desired for "productive use."[761] As Baker explains it, the wealthier a person is the more likely it is that he or she will pay more for the right. Thus, such a person becomes wealthier if the consumptive right is initially assigned to him or her. However, the value of the productive right should not change regardless of the wealth of the individual. Such rights will be purchased in the costless market at a price where they will give a return to the purchaser or sold down to a price which gives a return to the seller. While the initial assignment of such a right might increase the wealth of the holder, it does not affect its value – the price is the price. Thus, Baker theorises that the bias inherent in Posner's concept of wealth maximisation is two-fold; first, it is biased in favour of producers over consumers and second, it is biased in favour of the wealthy and against the poor.[762]

A difficulty also arises in Posner's use of "offer" rather than "asking" prices.[763] Posner's concept of value is dependent on what an individual would be able and willing to pay for the right (offer prices) – what Baker describes as the *situation ante* approach[764] - rather than what individual would ask for if the right was initially assigned to him (asking prices) – what Baker describes as the *situation post* approach.[765] In cases of productive use there may be no difference in monetary value between offer and asking prices. The price is determined by the producer's inputs and outputs.

However, because of what Bebchuk describes as the "wealth effect" there may be a disparity in cases of consumptive use between offer and asking prices.[766] A consumer's wealth is increased when the entitlement is assigned to him or her. With the increase in wealth the consumer's marginal utility of income may be decreased. In such circumstances, the monetary value that the consumer puts on the entitlement may be greater. Consequently, the wealthier the consumer is the more likely it will be that the entitlement will be assigned to him or her

---

[761] C. Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) 5 Philosophy & Public Affairs 3, 12, 14.
[762] Ibid., 9.
[763] Lucian A. Bebchuk, 'The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?' (1980) 8 Hofstra Law Review 671, 679.
[764] C. Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) 5 Philosophy & Public Affairs 3, 11; "because the criteria used is willingness to pay *before* the assignment."
[765] Ibid.; because, as the author notes, "the criteria used presupposes an assignment."
[766] Lucian A. Bebchuk, 'The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?' (1980) 8 Hofstra Law Review 671, 679.

rather than to a poorer consumer. In this way, the use of offer prices "is biased against the poor."[767]

Productive users of entitlements are also preferred under Posner's approach. As between assigning the right to productive user or consumptive user it is likely that the productive user will be favoured. In other words, because the consumer's willingness to pay based on existing distributions is more likely to be reduced than the producer's valuation it means that it is more likely that the right will be assigned to the most valued or efficient use i.e. the productive user. Consequently, because the wealthy are more likely to own a disproportionate amount of productive assets they are indirectly favoured by Posner's approach. Bebchuk thereby concludes:

> First ... the monetary valuations of wealthy consumers are likely to be reduced by the use of offer prices to a lesser extent that those of poor consumers. Second, part of the producer's gain is materialized by the owners of the producing firm, and wealthy individuals have a disproportionate share of the ownership of productive assets. To sum up, the use of offer prices

---

[767] Lucian A. Bebchuk, 'The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?' (1980) 8 Hofstra Law Review 671; 680. See also, C. Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) 5 Philosophy & Public Affairs 3, 19, where the author highlights the disparity between rich and poor created by Posner's willingness to pay based on existing distributions criteria with the following example:

> Assume that a city is deciding whether to use an open space for high intensity recreation (e.g. basketball courts, swimming area) favoured by poor youth or for a fee-charging golf course favoured by rich. Assume that the total cost to the city of either use is the same and there are no negotiation costs (or other transaction costs). Then if the rich were willing to offer the city $5,000 to make a golf course but that the poor youth could only scrape together $4,500 for their offer, would "value" be increased by using the land as a golf course? Presumably, Posner would say yes. But if granted the right to have the land used for high intensity recreation, the poor youth might not give up the right for less than $7,000 while the rich, whose wealth would be little changed by being granted the right to have the land used for golf, would be willing to sell the right for a little more than $5,000. Adopting the *situation post* perspective clearly favors the poor for whom the right constitutes a larger proportionate addition of wealth. Alternatively, Posner's *situation ante* approach favors the rich ...

This example highlights Baker's concerns regarding the bias inherent in Posner's reliance on offer prices (based on existing distributions) instead of asking prices as an indicator of value. In the above example, the open space would be assigned to the rich on the basis of their greater willingness and greater ability to pay for the land. Because the rich value it more, then an assignment of the land to the rich is efficient. However, if one were to use asking prices as an indicator of value instead, a different outcome would be reached. Because of the law of diminishing marginal utility, the rich would be willing to give up their entitlement to the land for anything more than the $5,000 they would be willing to offer for it. Given their financial status their wealth would be affected little by the transaction as long as they received something more than they were willing to pay for it. However, if the land was assigned to the poor youths the price that they might be willing to accept to part with ownership of it might be a lot higher than they could afford to pay for it were they to purchase it i.e. $7,000. In other words, the "wealth effect" of the transaction in such circumstances is much greater for the poor youth than it is for the rich.

> benefits producers at the expense of consumers; wealthy individuals are likely to contribute a smaller than proportionate share of the consumers' losses, and to receive a larger than proportionate share of the producers' gains.[768]

Thus, Posner's use of offer prices favours the wealthy over the poor. By assigning rights to the party most willing and able to pay; and by defining 'willingness to pay' on the basis of offer prices; those with the greater wealth will be assigned the right rather than those who are less financially secure. Under Posner's approach, someone values goods or entitlements more than another simply because he or she is willing and able to pay more for it. Consequently, this approach is biased in favour of those who can afford to pay i.e. it presupposes that such a person is in the financial position to pay that price for it. Balkin highlights the potential danger associated with such bias:

> ... if the wealthy are in control of the executive and legislative branches (a rare occurrence in history, I admit), they can appoint judges who reflect the same biased ideology. Then they can claim that wealth maximizing rules are neutral, apolitical standards of conduct which incidentally maximize the size of the pie for everyone, and that to alter the common-law rules by legislative action would be to politicize what is neutral, apolitical, and in the best interests of all concerned.[769]

Bebchuk notes that one could avoid this in-built bias in favour of the rich by assessing "willingness to pay" on the basis of asking prices rather than offer prices. If value were instead determined on the basis of a price at which someone would be willing to give up the object (i.e. asking prices) then the legal rules would shift towards favouring the poor rather than the rich. Theoretically, this will lead to a more equitable distribution because of the "grass is always greener" phenomenon which "leads someone to covet his neighbor's property more than if it were his own."[770] However, the reliance on asking prices as a guide to value may not produce this outcome and, as Dworkin observes, may lead to cases where the asking price is much higher than the offer price.[771] For this reason, Dworkin finds the asking prices solution to be ill-defined and unreliable. Instead, he suggests that a better definition of value based on prices might be as follows:

---

[768] Lucian A. Bebchuk, 'The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?' (1980) 8 Hofstra Law Review 671, 681.

[769] Jack M. Balkin, 'Too Good To Be True: The Positive Economic Theory of Law' (1987) 87 Columbia Law Review 1447, 1482.

[770] Ronald M. Dworkin, 'Is Wealth a Value?' (1980) Journal of Legal Studies 191, 192.

[771] Ibid., where the author gives the following example: "When I am lucky enough to be able to buy Wimbledon tickets in the annual lottery for £5, I will not sell them for, say, £50, although I will certainly not pay £20 to buy them when I lose the lottery.

> We may say that the goal of wealth maximization is served by a particular transfer or distribution only when that transfer would increase social wealth measured by what the person into whose hands the good falls would pay if necessary to acquire it, and *also* by what he would take to part with it.[772]

Stringham also questions the use of "prices" to determine policy. He points out that prices can only represent a past willingness to pay and do not represent what a party would pay. To determine true willingness to pay, Stringham contends "the government would need to read minds to determine how much every single person would value every possible state of the world, a feat that can never be attained."[773] Bebchuk questions the use of monetary valuations when considering the assignment of entitlements on the basis of wealth maximisation. He argues that based on the marginal utility of income an increase in an individual's wealth decreases his or her marginal utility of income. Consequently, such an increase in wealth will normally increase the monetary value he or she places on the entitlement in question.[774]

4.2.5.3 *How does Wealth Maximisation Operate?*

In Posner's view the market solution provides the most efficient answer to questions of legal or social policy. Posner's thesis is essentially, "that the common law is best (not perfectly) explained as a system for maximizing the wealth of society."[775]Building on the work of Coase, Posner also believes that when transaction costs are zero the marketplace will - through negotiation between the parties - bring about the most efficient result. In other words, rational actors would – through a process of voluntary exchange - in such circumstances transfer the right to the most highly valued use.[776] The most efficient result will occur regardless of the initial assignment of entitlements. It is through voluntary exchanges that efficiency can be best achieved as "[t]he transaction would not have taken place unless both parties had expected to be made better off by it."[777]However, Posner acknowledges that in practice transaction costs are rarely zero and therefore one cannot simply rely on the marketplace to produce the efficient result. Thus, the law must be developed in such a way so that transaction costs which would impede the conclusion of a voluntary exchange are minimised. That is why, for example, the

---

[772] Ronald M. Dworkin, 'Is Wealth a Value?' (1980) Journal of Legal Studies 191, 192.
[773] Edward Stringham, 'Kaldor-Hicks Efficiency and the Problem of Central Planning' (2001) 4 Quarterly Journal of Austrian Economics 41, 48.
[774] Lucian A. Bebchuk, 'The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?' (1980) 8 Hofstra Law Review 671, 682-683.
[775] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 32.
[776] Ibid., 13.
[777] Ibid., 20.

rules of contract law are designed in a way that "guards against market failure by reducing uncertainty."[778]

The reality is that not all transactions which occur in society are entirely voluntary. Hence, tort law has been described as "a response to contract failure owing to high transaction costs."[779] As Posner himself notes, "[m]ost crimes and accidents are involuntary transactions, and so is a legal judgment to pay damages or a fine."[780] In such circumstances, the market is broken and it is the purpose of the law, in Posner's view, to produce the result which the market would have if it were not broken; "[i]n short, Posner's view is that the market should be relied upon – either directly or as a guide – to achieve efficiency."[781] Thus, the law should "mimic the market" in order to produce the result that the market would have produced had a voluntary transaction been possible.[782] In so doing, Posner does not require that compensation be paid in all cases where an involuntary transaction has taken place only when the payment of compensation increases efficiency is it required.[783] In Posner's view, the alternative to ignoring market failures is not an option. While mimicking the market is challenging, the alternative of banning, "all forced exchanges would be grossly inefficient. It would amount to abolishing markets, since all market transactions have some uncompensated third-party effects."[784]

Posner's approach towards involuntary exchanges differs from the Coase theorem in that it involves a notion of Kaldor-Hicks efficiency rather than Pareto superior moves to a Pareto optimal outcome. Thus, Posner's approach towards mimicking the market may produce losers as well as winners. However, by "assigning the right to the party who would have purchased it in a costless exchange market guarantees that the individual who secures the entitlement could have compensated the losers and still have been better off. Thus, Posner's rule satisfies the Kaldor-Hicks criterion."[785] In this way, in cases involving involuntary exchange, Posner assigns rights based on Kaldor-Hicks efficiency. Coleman notes that Posner's approach to

---

[778] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 87.
[779] Jules L. Coleman, 'The Structure of Tort Law' (1988) 97 Yale Law Journal 1233, 1238.
[780] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 20.
[781] A. Mitchell Polinsky, 'Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's *Economic Analysis of Law*' (1974) 87 Harvard Law Review 1655, 1664.
[782] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 20.
[783] Ibid., note Posner's discussion of compensation and eminent domain at 73; and his discussion regarding the payment of damages in negligence at 243.
[784] Ibid., 20.
[785] Jules L. Coleman, 'The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's *The Economics of Justice*' (1982) 34 Stanford Law Review 1105, 1109.

market failure also differs from Coase because it cannot be justified on utilitarian nor libertarian grounds.[786] Because Posner's approach abandons Pareto's unanimity requirement for Kaldor-Hicks efficiency "it undermines whatever claim economic analysis has to a utilitarian foundation."[787] Moreover, given its coercive and interventionist nature Posner's approach to market failures cannot be grounded on libertarian values. In conclusion, Coleman therefore notes, "if Posner's principle is defensible, it is because the Kaldor-Hicks criterion is; but what justifies Kaldor-Hicks?"[788] That justification, according to Posner, is founded on his principle of wealth maximisation which implies:

> ... first, an initial distribution of individual rights (to life, liberty and labor) to their natural owners; second, free markets to enable those rights to be reassigned from time to time to other uses; third, legal rules that simulate the operations of the market when the costs of market transactions are prohibitive; fourth, a system of legal remedies for deterring and redressing invasion of rights; and fifth, a system of personal morality (the "Protestant virtues") that serves to reduce the costs of market transactions. Were the traditional common law fields to be recognized along more functional lines, the first of these areas would be the domain of property law, the second of contract law, the third of tort law, and the fourth of procedural and remedial (including criminal) law.[789]

4.2.5.4 *Wealth Maximisation Explains the Structure of Tort Law*

Posner has applied his notion of economic efficiency to almost every aspect of tort law.[790] In his view, economic analysis explains how the law is efficient or seeks to achieve efficiency. In other words, not only do judges choose between different laws on the basis of efficiency, when applying that law, they also do so on the basis of efficiency. As Baker writes:

> The court decision frequently affects efficiency. The award may create an efficient or inefficient situation, may affect the difficulty (cost) of the behavior necessary to reach an efficient solution, or may affect the incentive for efficiency generating behaviour. If the relevant cost-causing behaviour of the parties has been completed, the specific decision may not directly affect efficiency; however, as a guide to future behaviour, the rule announced can.[791]

---

[786] Jules L. Coleman, 'The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's *The Economics of Justice*' (1982) 34 Stanford Law Review 1105, 1110.
[787] Ibid.
[788] Ibid.
[789] Richard A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 Journal of Legal Studies 103, 127.
[790] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011), Chapter 6; William L. Landes & Richard A. Posner, 'Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism' (1978) 7 Journal of Legal Studies 83; Richard A. Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29; Richard A. Posner, 'The Right of Privacy' (1978) 12 Georgia Law Review 393; William L. Landes & Richard A. Posner, 'An Economic Theory of Intentional Torts' (1981) 1 International Law & Economics Review 127; William L. Landes & Richard A. Posner, 'Joint and Multiple Tortfeasors: An Economic Analysis' (1980) 9 Journal of Legal Studies 517.
[791] C. Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) Philosophy & Public Affairs 3, 7.

Posner's analysis of fault liability in negligence is just one example. In Posner's view, because wasteful conduct is inefficient the law should seek to minimise such behaviour by deterring similar behaviour in the future.[792] The basic structure of the negligence system can be explained by economic analysis. Plaintiffs are economically motivated to bring civil actions to court if they believe that there is a reasonable cause of action while defendants are motivated to defend the claim or settle out of court. In this way, "the system enables society to dispense with the elaborate governmental apparatus that would be necessary for gathering information about the extent and causes of accidents had the parties no incentive to report and investigate them exhaustively."[793] Furthermore, limiting the claims to plaintiff and defendants is administratively efficient. While there may be other parties in the world who could have avoided the accident at a cheaper cost, it may be too difficult and expensive to identify who those parties are.[794]

Corrective justice theorists do not find these arguments persuasive, pointing out that economic analysis does not adequately explain what brings the plaintiff and defendant together. Such theorists would argue that the goals of efficiency could be achieved as effectively by administrative agencies through the imposition of fines. In the case of car accidents, it might be the case that the cheapest cost avoider is not the plaintiff or the defendant drivers but the car manufacturer simply on the basis that by imposing liability on the manufacturer "we might encourage manufacturers to lobby for safer roads and to adjust their cars for unsafe drivers."[795] Consequently, it is argued by corrective justice theorists that the economic analysis of the structure of tort law fails to adequately account for the role of causation and correlativity which lies at its heart. For example, it does not explain why the defendant is linked to the plaintiff. Under economic analysis, the emphasis is not the relationship between these two private parties "but is instead a relationship between injurers and the goals of tort law and victims and the goals of tort law.[796]

---

[792] Richard A. Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29, 33.
[793] Ibid., 48.
[794] Jules L. Coleman, 'The Structure of Tort Law' (1988) 97 Yale Law Journal 1233, 1243, where the author writes:

> First, we sometimes put victims in a position of *liability* to encourage them to take precautions. Second, we put victims in a position of *recovery* when otherwise they would be induced to take too many precautions. Thus, victims are always relevant to decisions about who pays, and structures designed to resolve these questions must always include victims.

[795] Ibid., 1242.
[796] Jules L. Coleman, 'The Structure of Tort Law' (1988) 97 Yale Law Journal 1233, 1250.

Negligence as a form of efficient regulation can be criticised on the basis that appropriate standards of behaviour are only set after the accident has occurred. This lack of information amongst the general public as to appropriate standards of behaviour is compounded by the fact that the public are not necessarily familiar with tort doctrine and rules. Posner disagrees and points out that this same criticism applies to "legislative and administrative regulation as well."[797] However, it could be argued that the retrospective application of compensation when an accident occurs is not the optimal efficient manner by which accidents could be discouraged. A claim in negligence can only be brought after an injury has resulted and therefore is reactionary. Consequently, the deterrent effect of tort law is only effective when the careless behaviour actually materialises into harm to the defendant. This does not necessarily have to be the case under legislative regulation where legislation can have a deterrent effect simply where the defendant creates or fails to deal with, a risk to the health and safety of another.[798]

4.2.5.5 *Wealth Maximisation and the Duty of Care*

A key criticism of the economic analysis of tort law is that it does not adequately explain the role and function that the duty of care plays in negligence. Given that the duty of care is a cornerstone of negligence law this is a major flaw in economic theory. As the duty of care acts primarily as an exclusionary tool - a way of controlling or limiting claims - it is difficult to rationalise in efficiency terms because interpreted in this way it "means that some of the costs of one's mischievous conduct will be externalized."[799] In other words, notwithstanding that one acts carelessly and thereby causes damage to another innocent party, the duty of care may operate in a way that ensures that no liability is imposed on the wrongdoer. To moralists, the duty of care is a critical element explaining the bilateral relational nature of negligence which underscores the normative basis for tort law. In economic theory, the rationale for the imposition of duty is not as clear.

The inefficiency of the duty of care as an exclusionary tool is exemplified by the no-duty rule in rescue cases.[800] Why does the law not encourage the carrying out of "easy rescues" by

---

[797] Richard A. Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29, 49.

[798] Take, for example, the Safety, Health and Welfare at Work Act 2005 which has been enacted in order to better provide for the protection of health and safety in the workplace. The aim of the legislation is to prevent accidents or illnesses. In particular, section 20 of the Act provides that every employer must prepare a statement in writing known as a safety statement. Failure to adequately prepare a safety statement is a criminal offence.

[799] Jules L. Coleman, 'Doing Away with Tort Law' (2008) 41 Loyola Los Angeles Law Review 1149, 1159.

[800] The Law Reform Commission recently reformed the law in this area and recommended no change to the 'no duty' rule. See: Law Reform Commission Report, *Report on Civil Liability of Good Samaritans and Volunteers* (LRC 93-2009).

imposing a duty to do so? Would society not benefit greatly from such intervention particularly when it involves so little cost to the rescuer and would provide such benefit to society? In a rare case of a judge - on this side of the Atlantic, at least - explicitly acknowledging the impact of economic theory on his decision, the efficiency arguments against such a duty were outlined by Lord Hoffmann in the House of Lords' decision in *Stovin v Wise* as follows:

> In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call 'externalities') the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities.[801]

In other words, according to Lord Hoffmann, if an individual could defray the costs of undertaking dangerous activities by spreading responsibility across society generally (in the form of a duty to rescue), the costs of such an activity would become cheaper thereby increasing the likelihood that the individual would undertake the risky activity.

One particular reason that the law has distinguished between acts which give rise to a duty and omissions which generally do not, is based on causation. Epstein, for example, justifies the 'no duty to rescue' rule on the basis that if it could not be said that the rescuer did not cause the dangerous situation why should he or she be held liable for it?[802] However, to the economic analyst the distinction between acts and omissions and the question of causation is less relevant because under the Coase Theorem causation is relegated to the idea of "reciprocal harm."[803]

Landes and Posner have defended the economic efficiency interpretation of the "no duty to rescue" rule.[804] The authors justify the duty requirement in the case of a professional rescue based on simple economics and competitive markets. In the stranger rescue cases, however, they rationalise the 'no liability' rule on the basis of economic efficiency. Landes and Posner begin their analysis by recognising that rescues carried out by strangers are generally motivated by altruism and argue that were a liability rule introduced which imposed a duty to rescue in

---

[801] *Stovin v Wise* [1996] AC 923; 3 All E.R. 801 (HL), 819.
[802] Richard A. Epstein, 'A Theory of Strict Liability' (1973) 2 Journal of Legal Studies 151.
[803] Ernest J. Weinrib, 'The Case for a Duty to Rescue' (1980) 90 Yale Law Journal 247, 249.
[804] William L. Landes & Richard A. Posner, 'Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism' (1978) 7 Journal of Legal Studies 83.

such cases, this would only reduce the number of altruistic rescues.[805] According to the authors, such an approach would be inefficient. They contend that replacing a legal system which compensated rescuers for carrying out the rescue of a stranger "would be inefficient because it would substitute a costly legal transaction for a costless altruistic exchange."[806]

In effect, rescues would be carried out altruistically where no compensation was involved. By introducing a rule of compensation, rescuers would seek reimbursement which would only lead to an increase in administrative and other costs in processing the claim Indeed, Rubin has conducted research which would indicate that such costs could even be pohibitive and could be such as would justify the imposition of a no liability rule.[807] Landes and Posner point out that these costs would be further increased in cases where it is difficult to identify the potential rescuers, for example, take the swimmer who gets into difficulty while swimming off a crowded beach. Of those on the beach who should come to the rescue?[808]

In cases where the activity is likely to lead to the need for rescue and where the cost of carrying out such rescue is quite expensive, Landes and Posner argue that a commercial market for rescue will develop. The danger of introducing compensation for rescues, however, is that it will drive out altruistic rescues "unless the altruist values an expected increase in the victim's wealth by more than he values a dollar loss in his own wealth."[809] Thus, a legal rule requiring rescue might increase rescues by those who are not strongly motivated by altruistic reasons but will not affect the actions of those who are strongly motivated to rescue for altruistic reasons.

However, while the imposition of a duty might encourage the weak altruist to act there is a real danger that such a duty would increase the likelihood that would-be rescuers will avoid situations which might be likely to give rise to a duty to rescue. That is to say, potential rescuers would "substitute away" from hazardous activities.[810] The introduction of a duty to rescue will also cause the weak altruists to leave the hazardous area which will, in turn, increase the likelihood that the strong altruists will face rescue situations. Furthermore the introduction of

---

[805] William L. Landes & Richard A. Posner, 'Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism' (1978) 7 Journal of Legal Studies 83, 94.
[806] Ibid., 95.
[807] Paul H. Rubin, 'Cost and Benefits of a Duty to Rescue' (1986) 6 International Review of Law & Economics 273.
[808] William L. Landes & Richard A. Posner, 'Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism' (1978) 7 Journal of Legal Studies 83, 124.
[809] Ibid., 99.
[810] Ibid., 121.

liability for failing to rescue "also reduces the supply of a moral value on altruism."[811] Consequently, strong altruists would be more likely to avoid rescue situations because it would "be unclear if their action was motivated by altruism or by the liability rule that was imposed."[812] Levmore has questioned the contention that the introduction of a liability for rescue rule would lead to altruistic rescuers avoiding hazardous activities, arguing that the validity of such a theory depends on whether the rescuer has the ability to identify such danger areas and avoid them. As the author observes, "one can barely imagine evening strolls on the beach decreasing if potential strollers feared that in the event of a drowning they would be identified as having passed within earshot of the victim."[813]

Hasen criticises Landes and Posner's analysis on the basis that it treats the rescuer and the victim as separate parties. Under such an assumption their analysis of the substitution effect may be valid. However, when one considers that rescuers and victims can be the same person then the analysis no longer holds. Consequently, he argues that the substitution to a safe place will not occur and the no liability rule is therefore efficient.[814]

The case of the rescuer aside, there has been comparatively little economic analysis of the duty of care in negligence. Hylton attempts to provide a broader framework which explains the role of duty in economic terms.[815] Hylton argues that a "no duty" finding is preferable to a finding of negligence in cases where the benefits of the activity carried out by the defendant "are considerably in excess of the externalized costs" of that activity.[816] According to Hylton the duty doctrine serves three functions which can be explained in terms of economic efficiency. First, "no-duty" findings subsidises the activities of the defendant in circumstances where those activities (because the benefits far outweigh the costs) are socially desirable i.e. it relieves the defendant from the costs of having to take reasonable care.[817] Secondly, in circumstances where "costs are so high relative to benefits that the optimal scale of the activity is zero,"[818] then Hylton argues, a property rule prohibiting such behaviour is preferable to a liability rule. For

---

[811] Michael G. Faure, 'Liability for Omissions in Tort Law: Economic Analysis' (2011) 2 Journal of European Tort Law 184, 194.
[812] Ibid.
[813] Saul Levmore, 'Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations' (1986) 72 Virginia Law Review 879, 890.
[814] RL Hasen, 'The Efficient Duty to Rescue' (1995) 15 International Review of Law & Economics 141.
[815] Keith N. Hylton, 'Duty in Tort Law: An Economic Approach' (2006) 75 Fordham Law Review 1501.
[816] Ibid., 1505.
[817] Ibid., 1508.
[818] Ibid., 1509.

example, the tort of false imprisonment prohibits the unlawful detention of another person without lawful excuse. The victim is entitled to use reasonable force in resisting the imprisonment and in so doing owes no duty to the would-be imprisoner. Thirdly, and finally, the no-duty rule permits "the market to regulate activity levels without distortions created by liability."[819]

Posner qua judge appears to have given the duty of care issue more thought than Posner qua academic. In *Edwards v Honeywell Inc.*,[820] Posner J. carefully explained the duty of care in efficiency terms. In that case, the plaintiff brought an action in negligence against the defendant alarm company for the death of her husband, a fireman. The plaintiff's husband had died while on duty when he entered a burning building and the floor beneath him collapsed. The plaintiff alleged that the defendant had acted negligently in failing to call the fire department promptly upon receiving a signal from the alarm. Because of the delay the floor of the burning building was much weaker by the time the plaintiff's husband had arrived. Posner J. was asked to consider whether the defendant company owed a duty of care to the plaintiff's fireman husband.

In upholding a finding of no-duty, Posner J. cited Cardozo J.'s opinion on duty in *Palsgraf v Long Island Railroad*[821] with approval. However, he based his rationale in economic terms in the following manner. First, corporations are, under the doctrine of vicarious liability, strictly liable for their employees' negligence. If the corporation is to act efficiently (e.g. in deciding what steps to take to limit employees' carelessness) the corporation needs to know or predict the types of harm that their employees might cause. Imposing liability on the corporation for unforeseeable harm is not efficient as it does not promote greater care on the part of the corporation. Second, the duty limitation can be rationalised on the basis that the defendant may not have been in the best position to have avoided the accident. By imposing liability on it, one is diluting the incentive of other, better placed, defendants from taking steps to minimise the harm. For example, the defendant had no control over who started the fire, nor could it control who was responsible for putting out the fire – both of which were better lines of defences at preventing the harm than the defendant. The list of possible defendants could include the owners of the furnace which exploded and thereby caused the fire who perhaps did not maintain it properly or its manufacturer and so on. Consequently, Posner J. concluded that "the creation

[819] Keith N. Hylton, 'Duty in Tort Law: An Economic Approach' (2006) 75 Fordham Law Review 1501, 1528.
[820] *Edwards v Honeywell Inc* 50 F.3d 484 (7th Cir. 1995).
[821] *Palsgraf v Long Island Railroad* 248 N.Y. 339, 162 N.E. 99 (1928).

of a duty of care running from the alarm service to Edwards is likely to make at best a marginal contribution to fire safety and one outweighed by the cost of administering such a duty."[822] Cunningham has questioned Posner J.'s efficiency rationale of duty in this case. Posner J.'s analysis rests on the assumption that "parties have knowledge of least cost avoidance at the time accidents occur, weakening its justification."[823]

4.2.5.6 *Wealth Maximisation and the Standard of Care*

Posner challenges the traditional view which interprets the standard of care in negligence as a moral standard, pointing out, that the objective nature of the standard of care does not necessarily equate with moral notions of blame.[824] For example, he notes that this objectivity means that a man may be negligent even if he did his very best to avoid the accident but failed to do so because of his clumsiness.[825] Instead, the standard of care in negligence, Posner argues, is better explained on the basis of economic efficiency. In his view, acting carelessly is to act inefficiently, which violates a social norm against wasteful conduct – a notion that some other commentators find "far-fetched."[826]In support of his thesis, Posner cites the famous judgment in *United States v Carroll Towing Co.*[827] by Hand J which became known as the "Hand Formula" for determining whether the standard of care in any given case had been breached. Whether intentional or not, Posner credits this decision with introducing economic "cost/benefit" analysis for determining the question as to whether the defendant's behaviour fell below the requisite standard of care. In that case, the court was assessing liability in a case where a barge had broken free and as a result had caused damage to other vessels. In this context, Hand J. noted:

> Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she

---

[822] *Edwards v Honeywell Inc* 50 F.3d 484 (7th Cir. 1995) [24] (Posner J.). Interestingly, the contract between the defendant alarm company and the Bakers' (the couple whose building the alarm had been installed) contained a clause which limited the defendants' liability to the Bakers to $250. In upholding this clause, Posner J. ([25]) dismissed contrary arguments to the effect that such a result would mean that alarm companies would have no incentive to take care, stating: "But they will. Honeywell lost the Bakers' business. Our society relies more heavily on competition than on liability to optimize the quality of the goods and services supplied by the private sector of the economy. A case such as this does Honeywell's customer relations no good even it if wins the case-as we think it must."

[823] Lawrence A. Cunningham, 'Traditional Versus Economic Analysis: Evidence From Cardozo and Posner Torts Opinions' (2010) 62 Florida State University Law Review 667, 710.

[824] Richard A. Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29, 31.

[825] *Vaughan v Menlove* (1837) 132 E.R. 490 (CP).

[826] John C.P. Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 Georgetown Law Journal 513, 553.

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

> will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called *P;* the injury, *L*; and the burden, *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether $B < PL$.[828]

To the economist, this method for determining the standard of care in negligence is an explicit example of economics infiltrating legal judgments. This is so, notwithstanding the fact that at no stage throughout the decision did Hand J refer to concepts such as efficiency in his reasoning.[829] To economic analysts, the "Hand Formula" as it has become known, is explicit judicial acknowledgment that individuals are actors who will undertake rational "cost/benefit" analysis of their behaviour. As rational actors, individuals will avoid accidents when the cost of preventing them is less than the expected losses which arise from those accidents. Failure to do so in such circumstances will render the individual negligent. Consequently, the negligence standard forces parties to internalise the social costs of their activities and is thereby efficient.

Calabresi doubts the assumption of many economists that the reasonable care standard represents the norm of economic efficiency and that one must look beyond simple efficiency considerations and examine the underlying distributional concerns. Calabresi considers that the standard is a reflection of the views of the powerful in society at the time of its development in the common law i.e. wealthy, white, men. He writes, "I do think I am exaggerating this tendency of the previously dominant group to offer equality, but only when the group seeking it accepts the culture of the group granting it."[830] Feminist critiques of tort law would also question the so-called objective nature of the standard of care as a determinant of individual behaviour. Bender points out that the concept is a male construct and therefore is inherently biased and its so-called objectivity must be questioned.[831]

---

[828] *United States v Carroll Towing Co* 159 F.2d 169 (2d Cir. 1947), 173.

[829] Allan M. Feldman & Jeonghyun Kim, 'The Hand Rule and *United States v Carroll Towing Co.* Reconsidered' (2005) 7 American Law and Economics Review 523, 542.

[830] Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse University Press, 1985) 29.

[831] Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 Journal of Legal Education 3, 22, where the author writes:

> The original phrase "reasonable man" failed in its claim to represent an abstract, universal person. even if such a creature could be imagined, the "reasonable man" standard was postulated by men, who, because they were the only people who wrote and argued the law, philosophy, and politics at that time, only theorized about themselves. When the standard was written into judicial opinions, treatises, and casebooks, it was written about and by men. The case law and treatises explaining the standard are full of examples explaining how the "reasonable man" is the "man on the Clapham Omnibus" or "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves." When the authors of such works said "reasonable man," they meant "male," "man" in a gendered

Many other commentators argue that the "cost/benefit" analysis of the Hand Formula is overstated.[832] Wright has extensively reviewed the evidence to determine whether the Hand Formula is actually used in U.S. court judgments as a means of determining the standard of care in negligence. He notes that the formula "is almost never referred to in jury instruction, is seldom referred to in judicial opinions, and is inconsistent with the actual criteria applied by the courts in various types of situations"[833] before concluding that "it is an academic myth."[834] In the later judgment of *Moisan v Loftus*,[835] Hand J. himself questioned the accuracy of the formula, pointing out in relation to each of the factors that:

> ... care is the only one ever susceptible of quantitative estimate, and often that is not. The injuries are always a variable within limits, which do not admit of even approximate ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries. It follows that all such attempts are illusory, and, if serviceable at all, are so only to center attention upon which one of the factors may be determinative in any given situation. It assists us here to center on the factor of probability, because the difference between "gross" and "ordinary" negligence consists in the higher risks which the putatively wrongful conduct has imposed upon the injured person. The requisite care to avoid the injuries and the possible injuries themselves are the same.[836]

In other common law jurisdictions like Ireland, economic factors play a secondary role in determining the appropriate standard of care in such cases:

> In Ireland, along with many other jurisdictions, the courts will be slow to reduce the behavioural standard where the finances of the defendant are unable to meet the cost of avoiding the risk (if one cannot avoid the risk then, perhaps, one should not engage in the activity). In many situations, where the cost of avoidance is high, insurance may be available to offset the cost to the defendant of his liability to the plaintiff. When the reverse cost-benefit situation applies, the courts in Ireland are more willing to use the economic analysis as a ground for finding the defendant to be in breach of duty.[837]

---

sense. The legal world that generated the "reasonable man" was predominantly, if not wholly, male. (footnotes omitted).

[832] For example, in Australia the courts have not displayed a keenness for the primacy of cost/benefit analysis in determining the standard of care. "Negligence is not an economic cost/benefit equation. Immeasurable 'soft' values such as community concepts of justice, health, life and freedom of conduct have to be taken into account": *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 at 523, *per* McHugh J.A.

[833] Richard W. Wright, 'Hand, Posner, and the Myth of the "Hand Formula," (2003) 4 Theoretical Inquiries in Law 145, 273, where the author provides excellent empirical analysis of the use of the Hand Formula in various English and U.S. judgments.

[834] Ibid.

[835] *Moisan v Loftus* 178 F.2d 148 (2d Cir. 1949).

[836] Ibid., 149.

[837] Eoin Quill, *Torts in Ireland* (2nd ed), (Gill & MacMillan, 2004) 77.

Posner himself cites English decisions such as *Bolton v Stone*[838] and *Paris v Stepney Borough Council*[839] as examples of the Hand formula being used to establish negligent behaviour. However, it is submitted that these cases are more concerned with issues surrounding the magnitude of the risk (comprising of the probability and gravity of the threatened harm) than based on an analysis of the cost/benefit of the defendants' activities. As Weinrib observes, "the conclusion that a particular risk is unacceptable generally reflects not a comparison with the cost of taking precautions but a causuistic judgment concerning the magnitude of the risk."[840] In *Bolton*, the plaintiff was struck by a cricket ball from the defendant's cricket ground. The ball had travelled approximately 100 yards and cleared a 17 foot fence some 78 yards away when it struck the plaintiff. The evidence indicated that this was an unusual event – in thirty years only six balls had cleared the fence in this manner. In finding that the defendant was not negligent, the House of Lords held, that given the improbability of the events which had occurred and the seriousness of the injury, the defendants had not acted unreasonably. Interestingly, in so doing Lord Reid stated "I do not think it would be right to take into account the difficulty of remedial measures."[841]

Similarly, *Paris* was a decision concerned mainly with the magnitude of the risk – in this case, the gravity of the harm – rather than on a cost/benefit analysis. In that case, the plaintiff, who worked in a garage, had only one good eye. While he was working, a chip of metal hit and seriously injured that eye and blinding him. The plaintiff claimed that the failure by his employer to provide him with goggles - which would have prevented his injury - was negligent. The court held that, while ordinarily the simple failure to provide an employee with protective goggles resulting in an eye injury would not have been negligent, the defendant had acted negligently in these circumstances. This was so because, "the more serious the damage which will happen if an accident occurs, the more thorough are the precautions which an employer must take."[842] Given that the employer was aware that the plaintiff had only one good eye, the seriousness of the harm to this plaintiff should the risk materialise was too great for the employer not to take reasonable steps to protect him.

---

[838] *Bolton v Stone* [1951] A.C. 850 (HL).
[839] *Paris v Stepney Borough Council* [1951] A.C. 367 (HL).
[840] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 150.
[841] *Bolton v Stone* [1951] A.C. 850 (HL); 1 All E.R. 1078, 1086.
[842] *Paris v Stepney Borough Council* [1951] A.C. 367 (HL), 385.

Again, Posner incorrectly paints this decision as one exemplifying Hand's cost/benefit formula. The key question in *Paris* was, that given the employer knew of the plaintiff's circumstances, it was highly foreseeable that injury of this kind could have much more serious ramifications for the plaintiff than would otherwise be the case. Therefore, there was a greater onus on the employer to take steps to alleviate that risk.

It is not that the cost of preventing the harm is never taken into consideration in such cases; it is simply that questions of cost should only be borne in mind in cases where the risk is slight and yet the cost of eliminating it is prohibitive. In other words, economic considerations are only of secondary importance. In *Latimer v AEC Ltd,*[843] the defendants' factory was flooded during an exceptionally heavy storm. The water mixed with an oily liquid and the floor of the defendants' premises became very slippery. The defendants took precautionary steps to deal with the issue by cleaning it up and spreading sawdust on the floor. There was not enough sawdust to cover the floor in its entirety and the plaintiff slipped on an uncovered portion. In an action for negligence the plaintiff claimed that the defendant could have avoided the accident by shutting down the entire factory until the spill was cleaned completely. Given the improbability of the defendant slipping on the only part of the floor that was uncovered and given the gravity of the harm when compared to the costs that the plaintiff expected the defendants to take in order to eliminate the risk, the House of Lords held that the defendants were justified in ignoring the risk. Again, however, the key feature in this case was the fact that the chances of the risk in question materialising were minimal and the seriousness of the harm not great; then: and only then, did the House of Lords consider the unreasonably high costs suggested by the plaintiff to eliminate the risk as being a relevant factor.

Thus, the decisions of the House of Lords in *Bolton, Paris* and, to a lesser extent, *Latimer*, do not provide a ringing endorsement of the Hand Formula. Yes, cost of prevention is a consideration when determining the standard of care but a subsidiary one when considered in light of the magnitude of the risk. Thus, the cost of preventing the risk is relevant only where the chance of the risk materialising is *small* and would involve a *significant* cost in removing it. As Weinrib notes in relation to the decision in *Bolton*, "the consideration that the cost to the defendant of precautions would exceed the ex ante quantification of the plaintiff's injury does

[843] *Latimer v AEC Ltd* [1953] AC 643.

not exonerate the defendant from liability. The defendant can therefore be liable even for a cost-justified action."[844]

Even if it could be said that courts were trying to make economically efficient decisions when determining the appropriate standard of care, it has been argued that the Hand Formula will not necessarily produce the economic results that its proponents might claim and in fact it can result in the production of "inefficient equilibria."[845] Furthermore, putting an economic value on 'L' (the injury) in Hand's formula operates on the assumption that 'L' can be given an "accurate value" and the fact remains that any value the law does attach to injuries can be nothing other than "conventional" and arbitrary.[846] Consequently, it is very difficult to apply the Hand Formula in anything approaching a scientific manner.[847]

---

[844] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 149. See also, Bryan McMahon & William Binchy, *Law of Torts* (4th ed.), (Bloomsbury, 2013) 241, where the authors sum up as follows:

> Of course, a test for the standard of care that ignores the economic implications of the imposition (or non-imposition) of liability in particular sets of circumstances would be socially dangerous; conversely, reducing such adjudication process to such economic criterion as wealth maximisation or a utilisation test of social welfare would be normatively controversial.

[845] Allan M. Feldman & Jeonghyun Kim, 'The Hand Rule and *United States v Carroll Towing Co.* Reconsidered' (2005) 7 American Law and Economics Review 523, 542.

[846] Mark Lunney & Ken Oliphant, *Tort Law: Text and Materials* (5th ed), (Oxford, 2013) 163.

[847] This very fact was acknowledged by Posner himself when sitting as a Circuit judge in *McCarty v Pheasant Run Inc.* 826 F 2d 1554, 1557 (1987), [9]. In that case, the plaintiff sued the defendant (the owner of a hotel) in negligence alleging that the defendant's lack of security measures led to her being attacked in her hotel room by an intruder. Ultimately, the plaintiff's case failed as she had not proven that the defendant had failed to provide adequate precautions to protect her from such an attack. On the application of the Hand Formula to the question of the defendant's alleged negligence, Judge Posner admitted that:

> Ordinarily, and here, the parties do not give the jury the information required to quantify the variables that the Hand Formula picks out as relevant. That is why the formula has greater analytic than operational significance. Conceptual as well as practical difficulties in monetizing personal injuries may continue to frustrate efforts to measure expected accident costs with the precision that is possible, in principle at least, in measuring the other side of the equation – the cost or burden of precaution.

In Lawrence A. Cunningham, 'Traditional Versus Economic Analysis: Evidence From Cardozo and Posner Torts Opinions' (2010) 62 Florida University State Law Review 667, 688, the author criticises Posner J.'s decision in *McCarty* as one which exposes the limitations of the Hand Formula. The nature of the formula concentrated on economic factors such as whether a lock should have been on the plaintiff's hotel room door or whether the hotel should have warned guests of the dangers of break-ins through the use of notices and yet left no room for considering the hotel's safety record in the calculus. See also Richard W. Wright, 'Hand, Posner, and the Myth of the "Hand Formula," (2003) 4 Theoretical Inquiries in Law 145, 263-264, where the author notes that the plaintiff had presented evidence that there had been nine break-ins through such doors in the previous two years and management of the hotel had expressed concern regarding the matter. Yet, Posner J. upheld the trial judge's exclusion of such evidence on the basis that the door in the plaintiff's case had been unlocked and therefore the evidence was not relevant.

Over-reliance on the 'bean-counting' approach in the analysis of the defendant's behaviour may also lead to the distasteful scenario where the risk to other persons' bodily integrity is reduced to nothing more than a mathematical input placed in a ledger. An extreme example of this approach arose in the U.S. case of *Grimshaw v Ford Motors*.[848] In that case, Mrs Gray and a 13-year-old Richard Grimshaw were driving in Mrs Gray's Ford Pinto which was manufactured by the defendants. The car stalled on the highway due to a malfunction and was rear-ended by a car behind it going in the same direction. The car which collided with Mrs Gray's Pinto was travelling at 28 to 37 miles per hour. As a result of the impact, the Pinto caught fire and its interior was engulfed in flames. Mrs Gray died of her injuries a few days later and Grimshaw managed to survive with serious facial and other burns. It transpired that fuel tank was defectively designed. The tank was placed over the rear axle with little "crush space" between the axle and the back bumper of the car. Furthermore, the bumper was little more than a design feature and provided little protection. Finally, there was a line of exposed bolt heads used in the car which were sufficient to puncture the fuel tank if driven forward as the result of a rear impact. In testing, the Pinto failed the standard impact tests. Yet, despite the fact that the "fixes" for these defects were relatively inexpensive, Ford sold the Pinto to the public without doing anything about these defects. Evidence was produced which indicated that the defendant had ignored the design defect and delayed the implementation of changes even though the cost was nominal because it calculated that in so delaying the defendant would make savings in the region of $20.9 million. The court observed:

> ... there was other documentation which illustrated the fact that cost considerations caused Ford to delay incorporating safety features in the fuel tank system of its cars despite the knowledge that there was a need for such improvement ... Ford did in fact engage in cost-benefit analyses which balanced life and limb against corporate savings and profits.[849]

Effectively, the defendants had compared the costs of implementing the design change to make the car safer (approximately $4 to $8 per car) against the costs of litigation in cases brought for wrongful death suits, physical injuries and property damage. In light of the savings to be made by not implementing or delaying the necessary changes for two years, the defendants calculated that it would be much more economically efficient to ignore the flaws and delay the

---

[848] *Grimshaw v Ford Motors* 119 Cal.App.3d 772 (1981). Similar problems were faced by the General Motors Company in relation to a faulty ignition switch in their cars which led to the death and maiming of a number of people. See Daniel M. Isaacs, 'The Use of Economics in Defense of General Motors' Decision Not to Fix Faulty Ignition Switches Demonstrates that Economics Is Not a Moral Theory' (2015) 47 Connecticut Law Review 51.
[849] *Grimshaw v Ford Motors* 119 Cal.App.3d 772 (1981).

improvements. Grimshaw was awarded $2.5 million in compensatory damages and the heirs to Mrs Gray were awarded $559,680. Grimshaw was also awarded punitive damages in the region of $125 million in light of the defendant's callous disregard for his safety in failing to act on the design defects in order to enhance corporate profits. The *Grimshaw* decision highlights the dangers normatively speaking of relying on principles of economics alone in determining questions of liability. It might be argued that Ford were simply acting rationally. In terms of pure economics, the decision not to recall the defective cars made sense. Yet, the imposition of punitive damages is surely correct. It is one thing to be influenced by economic factors when making business decisions, it is quite another to favour economics over human life when one is fully aware of the consequences of that decision.

There is little persuasive evidence to suggest that Irish or English precedents on the standard of care can be best explained or justified on the basis that the courts in making their decisions were doing so on an economic efficiency basis. While there is no doubt that economic factors might be of relevance in cases where the risk is insignificant and the costs are unreasonably high,[850] it is rare that based on economic factors alone a determination of negligence will be made. Such determinations are more nuanced than that and depend on a variety of factors that cannot be easily placed into mathematical formula. As Fleming noted, "[i]n short, the reasonable man is by no means a caricature cold blooded, calculating Economic Man."[851]

4.2.5.7 *Wealth Maximisation and Causation*

To the economist, causation is essentially superfluous in determining liability in negligence. In economic terms, causation can only be explained in terms of efficiency if imposing liability on the defendant for having caused the harm will promote the efficient allocation of resources in the future:

> .. a defendant's conduct will be deemed the cause of an injury when making him liable for the consequences of the injury would promote an efficient allocation of resources to safety and care; and when it would not promote efficiency for the defendant to behave differently, then the cause of the accident will be ascribed to an "act of God" or some other force on which liability cannot rest. In this view, the injurer "causes" the injury when he is the cheaper cost avoider; not otherwise. The idea of causation becomes a result rather than a premise of the economic analysis of accidents.[852]

---

[850] *Kirwan v Bray UDC* (30 July 1969) SC.
[851] John G Fleming, *Tort law* (9th ed.), (LBC Information Services, 1998), 132.
[852] William M. Landes & Richard A. Posner, 'Causation in Tort Law: An Economic Approach' (1983) 12 Journal of Legal Studies 109, 110.

To the economist "faulty conduct ought to be deterred if it *risks* harm in the future regardless of whether it happened to cause harm in the past."[853] Thus, causation is useful in instrumental terms if it can be used to deter future bad behaviour. Explaining and justifying the principle of causation has proved most troublesome for the economic analysis of law.[854] While establishing a causative link between the wrongdoer and the victim – correlativity – is central to private law theory, economists struggle with explaining why it is necessary at all. If the economic analysis of law is founded on the premise that people, acting rationally, will alter their behaviour when economically incentivised to do so, why must those economic incentives go from the defendant to the plaintiff? Why not instead institute a governmental system of fines whereby the wrongdoer would have to pay into a fund where he or she is found guilty of wrongdoing? Such an approach, it could be argued, might be more efficient to administer than the current tort system. As Wright observes, traditional causation analysis appears to be at odds with modern economic analysis. To the economist, the costs of accidents are sunk costs of which nothing can be done because they have already occurred. However, a defendant should be held liable for those costs if by doing so it will have a deterrent effect on the defendants' future behaviour or on the behaviour of others like them. On the other hand, the traditional causation analysis is backward-looking, primarily a factual enquiry as to whether the defendant's behaviour brought about the plaintiff's injuries. If this link cannot be established no liability rests with the defendant regardless of how careless he or she may have been.[855]

Coase in *The Problem of Social Cost* almost casually dismissed the primacy of causation in tort cases. As noted earlier, the question in his view was not one of assigning blame but one of "dealing with a problem of reciprocal nature."[856] Instead, the problem should be viewed not as

---

[853] John C.P. Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 Georgetown Law Journal 513, 556.

[854] Richard W. Wright, 'Actual Causation vs Probablistic Linkage: The Bane of Economic Analysis (1985) 14 Journal of Legal Studies 435, 445-448; Richard W. Wright, 'The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics' (1987) 63 Chicago-Kent Law Review 553, 571-573; Steven Shavell, 'An Analysis of Causation and the Scope of Liability in Tort Law' (1980) 9 Journal of Legal Studies 463.

[855] Richard W. Wright, 'Actual Causation vs Probablistic Linkage: The Bane of Economic Analysis (1985) 14 Journal of Legal Studies 435, 437.

[856] Robert H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1, 2, where the author referring to his famous "cattle and crops" example and the facts of the nuisance case of *Sturges v Bridgman* (1879) 11 Ch D 852; wrote (13):

> Judges have to decide on legal liability but this should not confuse economists about the nature of the economic problem involved. In the case of the cattle and the crops, it is true that there would be no crop damage without the cattle. It is equally true that there would be no crop damage without the crops. The doctor's work would not have been disturbed if the confectioner had not worked his machinery; but the machinery would have disturbed no one if the doctor had not set up his consulting room in that particular place ... If we are to discuss the problem in terms of causation, both parties cause the damage.

one of "who is to blame?" but rather, "in what way can we assign blame so that wealth is maximised?" In his treatise, *The Costs of Accidents*,[857] Calabresi also questions the relevance of the causation requirement. In his view, it is far more efficient and would have a greater deterrent effect if fines were levied against wrongdoers for creating inefficient risks regardless of whether they resulted in actual injury or not. Moreover, Calabresi is of the view that it is far more efficient to impose liability on the party who is the "cheapest cost-avoider" regardless of whether they were responsible for the harm or not. However, it was not long before Calabresi recognised the significance of the role of causation in tort and revised his analysis in his later work.[858] Traditionally, factual causation has involved an assessment of the historical events which brought the harm about. Yet, Calabresi defines causation by stating "[t]here is a casual link between an act or activity and an injury when we conclude on the basis of the available evidence that the recurrence of that act or activity will increase the chances that the injury will also occur."[859]

Calabresi analyses causation in terms of tort law's compensation and deterrence goals. In terms of its compensation function, Calabresi maintains that, if loss spreading were the only goal of tort law, then causation was unnecessary and a "social insurance fund, raised through taxes ... would be the optimal mechanism for achieving it."[860] Furthermore, some aspects of proximate cause or legal causation can be explained on the basis that it allows the courts "to distinguish relatively good [loss] spreaders from poor ones."[861] Because the wealth of the parties says little about the likelihood of the risk of a particular harm reoccurring, Calabresi is not convinced that causation can be explained in wealth distribution terms.[862] Not surprising given his background, Calabresi has more to say about the role of causation in serving tort law's deterrence goals.

As highlighted earlier, Calabresi distinguishes between two forms of deterrence, namely, "collective/specific deterrence"[863] and "market or general deterrence."[864] Collective deterrence occurs when society determines that certain activities are unwanted and should be eliminated.

---

[857] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).
[858] Guido Calabresi, 'Concerning Cause and tort law: An Essay for Harry Kalven, Jr' (1975) 43 University Chicago Law Review 69.
[859] Ibid., 71.
[860] Ibid., 74.
[861] Ibid., 75.
[862] Ibid., 76-77.
[863] Ibid., 78.
[864] Ibid., 84.

In such circumstances, according to Calabresi, factual causation would play an important role. However, as most behaviour involves some kind of risk and should not be completely eliminated, factual causation is only of limited usefulness as it cannot distinguish when such activity should give rise to liability. A strong argument exists in favour of the foreseeability element of legal causation in collective deterrence. As Calabresi opines "[c]ollective deterrence is as appropriate when the actors themselves should have foreseen the danger in time to control their behaviour as when the collective decision makers prohibit it."[865]Market deterrence on the other hand, arises where it is left to the individuals themselves to strike the appropriate balance between safety and injury costs when undertaking an activity. This approach incentivises the party who those individuals who can best gauge the safety costs versus the costs of injury:

> Thus, the chosen loss bearer must have better knowledge of the risks involved and of ways of avoiding them than alternate bearers; he must be in a better position to use that knowledge efficiently to choose the cheaper alternative; and finally he must be better placed to induce modifications in the behaviour of others where such modification is the cheapest way to reduce the sum of accident and safety costs.[866]

In Calabresi's world, therefore, the selection of the cheapest cost avoider is essential to the goal of market deterrence. This decision would be dependent on establishing a causal link between the activity and that cheapest cost avoider because it would be would be pointless imposing liability on a party who had no influence on reducing the chances of the injury reoccurring. Calabresi views the role of the 'but for' test of factual causation in market deterrence as simply a way "to assure the injury costs allocated to the cheapest cost avoider include only those costs relevant to the choice between injury and safety."[867] Thus, Calabresi concludes, while the 'but for' test is not essential to achieving this aim it is useful to the cheapest cost avoider in allowing him or her to 'tot up' the various costs which will allow him or her to make informed decisions so as to ensure that he or she avoids "injuries worth avoiding and not avoid those injuries that are too costly to eliminate."[868] Legal causation also plays a role in market deterrence. The requirement of foreseeability "will create incentives for both the loss bearers and others to foresee those injuries that may be worth avoiding in the future."[869] Ultimately, Calabresi summarised both "cause-in-fact" and "cause-in-law" in instrumental terms:

---

[865] Guido Calabresi, 'Concerning Cause and tort law: An Essay for Harry Kalven, Jr' (1975) 43 University Chicago Law Review 69, 81.
[866] Ibid., 84.
[867] Ibid., 85.
[868] Ibid., 86.
[869] Ibid., 88.

> If we recognize that *in law* the term "cause" is used in different guises but always to identify those pressure points that are most amenable to the social goals we wish to accomplish, the apparent paradox disappears. Where goals differ, so does the practical definition of causation. Some aspects of causation (like proximate cause) show this functional basis on the surface. Others like causal linkage and *but for* relationship, often seem to be almost absolute, goal-neutral requirements. But they appear that way simply because they are being employed in contexts where, by and large, the appropriate goals require them to be established almost universally.[870]

Posner's discussion of causation is minimal when compared to the voluminous literature he has authored on the subject of the economic analysis of law generally. For example, in his treatise the *Economic Analysis of Law* he devotes a mere six pages to the subject in a text that is over 900 pages in length and does not really get to grips at all with explaining the primacy of the causation rules that have historically existed in tort law.[871] Landes and Posner dismiss the traditional notion of causation, arguing that it "can very largely be dispensed with in the economic analysis of torts"[872] on the basis that questions of causation can be resolved in accordance with the Hand Formula on the standard of care which interprets the problem in terms of efficiency and finding the cheapest cost avoider. Posner's approach therefore is to subsume the question of causation into the analysis of the standard of care under the Hand Formula. According to this approach, if the *but for* test is not satisfied it simply means that the probability of the risk materialising was so small it would be inefficient to incentivise the defendant to take precautions against such a risk in the future.[873]In seeking to explain why concepts such as "cause-in-fact" and "cause-in-law" are such a staple of judgments on causation, Landes and Posner somewhat unrealistically claim that judges use such language because "[t]hey do not have an economic vocabulary in which to express the ideas conveyed by such terms."[874]

The failure to convincingly account for the prominence of causation in tort law is problematical for adherents to the economic analysis of law. The economists' failure to rationalise or justify tort law's requirement of establishing a nexus between a specific defendant and a specific plaintiff undermines their thesis as it cannot explain one of the essential features of the system's

---

[870] Guido Calabresi, 'Concerning Cause and tort law: An Essay for Harry Kalven, Jr' (1975) 43 University Chicago Law Review 69, 106-107.
[871] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 233-239.
[872] William M. Landes & Richard A. Posner, 'Causation in Tort Law: An Economic Approach' (1983) 12 Journal of Legal Studies 109, 110.
[873] John C.P. Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 Georgetown Law Journal 513 John C.P. Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 Georgetown Law Journal 513, 556.
[874] William M. Landes & Richard A. Posner, 'Causation in Tort Law: An Economic Approach' (1983) 12 Journal of Legal Studies 109, 110.

structure. As Weinrib observes, in economic efficiency terms the parties to the accident are subject to different incentives that do not necessarily link the plaintiff to the defendant.[875] For example, the award of damages against a defendant can be justified in economic terms on the basis that it incentivises the defendant to take appropriate precautions, but does not explain why such damages are paid to the plaintiff. On the other hand, the payment of damages to the victim can be explained on the basis *inter alia* that it provides the plaintiff with an incentive to enforce the norm of reasonable care.[876] Ultimately, the efforts by various law and economics advocates to explain causation are not convincing. As Wright concludes, "their efforts to fit the requirement into their theories resemble the efforts of those trying to fit a square peg into a round hole."[877]

4.2.5.8 *Wealth Maximisation and the "Fault Liability vs Strict Liability" Debate*

Posner's interpretation of the rules on the standard of care is that fault liability promotes efficency. However, a rule of strict liability may also be efficient. This is so because strict liability operates to force an individual to internalise the costs that his or her activities may impose on others. As Coleman notes, imposing strict liability puts the onus on the defendant to make the decision whether the benefits derived from carrying out the activity outweigh the costs. Coleman concludes, "[i]f it does, the actor will engage in the activity and compensate his victims. If it does not, the actor will not undertake them."[878] Thus, a rule of strict liability is efficient because it forces the defendant not to act in ways which are likely to injure others unless it is economically efficient to do so.

Posner assumes that the negligence system for dealing with accidents is wealth maximising when compared to a system of strict liability. For example, he argues that if car drivers were guaranteed compensation for an accident under a strict liability scheme regardless of fault they would simply purchase first party insurance. This is because the purchase of such insurance

---

[875] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995) 46.
[876] Ibid., 47, where the author concludes:

> Both parties are thereby involved in the damage award, but for separate reasons. Efficiency might as easily be served by two different funds, one that receives tort fines from inefficient actors and another that disburses the indicated inducements to victims. Instead of linking each party to the other, economic analysis construes the presences of both as a consequence of combining incentives that are independently applicable to each.

[877] Richard W. Wright, 'Actual Causation vs Probablistic Linkage: The Bane of Economic Analysis (1985) 14 Journal of Legal Studies 435, 455.
[878] Jules L. Coleman, 'The Structure of Tort Law' (1988) 97 Yale Law Journal 1233, 1239.

would, according to Posner, come at a lower cost than compensation received through a system of strict liability.[879] A system of strict liability provides no incentive for the victims to take care because they will be fully compensated for their injuries regardless of their behaviour. Moreover, a strict liability system is costly as all accidents will give rise to a claim. Negligence on the other hand is more efficient in reducing the sum total costs of accidents as it is theoretically cheaper to administer because there will be less claims and it encourages the victim to act carefully.[880] Thus, under negligence "a rational defendant will always invest in safety up to the point where the marginal cost of care equals the marginal decrease in expected losses to plaintiffs."[881]

Strict liability theoretically encourages parties to act more carefully than would a negligence standard. Because wrongdoers will only be liable where they fail to act carefully under negligence it is said to be less demanding a standard than that of strict liability. But as Landes and Posner have explained this is not necessarily so.[882] They establish that regardless of the standard imposed on the defendant he or she will act in compliance with standard of reasonable care. If the defendant must pay compensation regardless of whether he or she has taken reasonable care, as would be the case under a scheme of strict liability, there is no incentive for him or her to take more than reasonable care. This is because the cost of any care taken by him or her above that level will be greater than the expected reduction in his or her liability to the plaintiff. Similarly, individuals will not act any more carefully under a negligence standard. While the defendant will be incentivised to take reasonable care he or she will not be encouraged to go any further as he or she will not be liable for any harm he or she causes where he or she has acted carefully.[883]

---

[879] Richard A. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Ajudication' (1980) 8 Hofstra Law Review 487, 493.
[880] Richard A. Posner, 'The Positive Economic Theory of Tort Law' (1980) 15 Georgia Law Review 851, 873.
[881] Jack M. Balkin, 'Too Good To Be True: The Positive Economic Theory of Law' (1987) 87 Columbia Law Review 1447, 1463. See also, Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 241, where the author writes:

> Strict liability increases the costs of engaging in various activities, and thereby discourages them, but it does not discourage individuals from engaging in desirable activities at appropriate or optimal levels. Provided the marginal benefit of engaging in the activity at a given level exceeds the total marginal cost, the agent will engage in the activity even if he is held fully liable for its social costs. Because the benefits exceed the costs, the activity is desirable.

[882] William M. Landes & Richard A. Posner, 'The Positive Economic Theory of Tort Law' (1980) 15 Georgia. Law Review 851, 874.
[883] Ibid.

Yet, Landes and Posner point out that, while both fault and strict liability produce the same level of care from the defendant, the standards differ in their economic effects. In the first place, the costs of administering the two standards vary. Landes and Posner identify these costs as being of two kinds; "information costs" and "claim costs."[884] Information costs are those costs associated with assessing whether the defendant attained the appropriate level of care. In the case of strict liability, these costs are zero. In the case of negligence, these costs may be quite substantial e.g. trying to determine whether the defendant acted negligently will inevitably involve some investigation. Claim costs on the other hand are those other costs generally associated with litigation. Such costs are more likely to be higher in the case of strict liability than fault simply because cases involving strict liability are likely to be more common than those of negligence. It is much more likely that a plaintiff injured under strict liability is going to bring a claim than someone injured by the defendant under a negligence regime. However, where a claim is brought in negligence it is likely that those costs will be greater than in a strict liability claim given the fact that much more investigation as to the cause of the accident and the behaviour of the defendant will be necessary than in the case of strict liability.[885] Landes and Posner therefore conclude that these economic factors explain why there has been a shift away from strict liability to fault in recent years.[886]

Choosing between negligence or strict liability might incentivise the reduction of accidents not by encouraging greater levels of care but by reducing the level of activity by the defendant. Such a reduction should in turn decrease the likelihood of injury resulting from his or her behaviour. As Landes and Posner point out, when assessing the behaviour of the defendant courts tend to examine only whether he or she could have carried out the activity more carefully e.g. in the case of a road traffic accident, was the defendant driving within the speed limit. The court does not engage in any assessment as to whether it was necessary for the defendant to make the journey via car in the first place.[887] According to Shavell, this is so because the courts

---

[884] William M. Landes & Richard A. Posner, 'The Positive Economic Theory of Tort Law' (1980) 15 Georgia. Law Review 851, 874.
[885] Ibid., 875.
[886] Ibid, where the authors explain:

> ... a fall in information costs would result in a shift away from strict liability and toward negligence. Looking broadly at the history of liability rules and at the differences between liability rules in primitive and modern societies, we find that the secular decline in the costs of information associated with growing literacy and knowledge of how the physical world operates has been accompanied by a movement away from strict liability and toward negligence as the dominant rule of liability.

[887] Ibid., 876.

would struggle in trying to determine activity levels such as how many miles somebody walks versus how many miles somebody should drive and so forth. Such a task would be much more complicated than judging simply whether reasonable care had been taken.[888] Posner acknowledges that the difficulty faced by the courts in trying to determine what the appropriate level of activity should be in any given situation "is potentially a serious shortcoming of a negligence system."[889] Under a system of strict liability on the other hand, potential injurers would consider not only the level of care but also the level of activity in making decisions.

However, in the case of strict liability the defendant might be encouraged to reduce his or her activity level (driving) as that would lessen the chance of exposing him or her to liability for an accident whereas the plaintiff would not vary his or her activity levels because he or she will be compensated regardless. In negligence, however, the defendant has no incentive to modify or reduce his or her activity level, but the plaintiff does because he or she will not be entitled to compensation for activities which are carried out with reasonable care.[890] This analysis leads Landes and Posner to conclude that one can predict the circumstances in which strict rather than fault will be chosen as the liability rule:

> If a change in the plaintiff's activity is unlikely to be an efficient method of accident avoidance, but a change in the defendant's activity is likely to be an efficient method, strict liability is an attractive rule. It will deter many accidents, and what we have called the claim cost of strict liability will be reduced. However, where greater care rather than less activity is the optimal method of accident avoidance by potential injurers, the case for negligence is strengthened, for now the claim costs of strict liability are likely to be high relative to its allocative effect, compared to negligence.[891]

Shavell's analysis of liability rules can explain aspects of strict liability in tort law such as liability for wild animals and the rule in *Rylands v Fletcher*.[892] Shavell identifies these cases has having two common characteristics. First, in each of these scenarios the activity of the injurer is easily identifiable from the norm and the activity imposes significant risks on the victim and consequently justifies the control of such activity. Second, by contrast the victim's activity is not special or unique and therefore does not require control. Thus, these cases

---

[888] Steven Shavell, 'Strict Liability Versus Negligence' (1980) 9 Journal of Legal Studies 1, 23.
[889] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 227.
[890] William M. Landes & Richard A. Posner, 'The Positive Economic Theory of Tort Law' (1980) 15 Georgia Law Review 851, 876-877.
[891] Ibid., 877.
[892] *Rylands v Fletcher* (1868) LR 3 HL 330.

highlight the principle that "strict liability is preferable if it is more desirable to control the injurers' activity than victims'."[893]

Posner justifies the imposition of strict liability for ultra-hazardous activities like that in *Rylands v Fletcher* on the basis that such activities are tagged as dangerous because they are new. By imposing strict liability on such activities where they bring increased danger to others one can limit the activity until greater knowledge about the activity is developed which will lead to it being carried out in a safer manner.[894] Hylton concludes therefore that the choice of legal rule depends on the externalised costs and benefits of the activity in question; "[s]trict liability is preferable to negligence if the costs externalized by an activity substantially outweigh the benefits externalized. Negligence is preferable if there is a rough equality between externalized benefits and externalized costs."[895] Similarly, Landes and Posner would argue "that strict liability is more likely to be the superior regulatory device in cases where optimal accident avoidance requires altering the defendant's activity rather than his care or the plaintiff's activity or care."[896]

The economic analysis of strict and negligence liability and the assumptions on which it is based are subject to extensive criticism. Balkin, for example, questions the assumption that the expected accident losses which result from the defendant's carelessness are equal to the plaintiff's expected damages awards.[897] Balkin contends that this assumption is unrealistic. In his view, the expected damage awards received by the plaintiff, in reality, will amount to a percentage of the expected accident losses caused by the defendant. The reason for this is two-

---

[893] Steven Shavell, 'Strict Liability Versus Negligence' (1980) 9 Journal of Legal Studies 1, 24. See also Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 228, where the author agrees with such analysis by explaining as follows:

> If my neighbour has a pet tiger, there is little I can do (at reasonable cost) to protect myself. And there is only so much the owner can do, in the way of being careful, to keep the tiger under control. The most promising precaution may consist simply of not having a tiger – an activity-level change. But suppose we're speaking not of a neighbor's tiger but the zoo's. Is it likely that the best way of controlling accidents to visitors at zoos is not to have dangerous animals in zoos – just gentle ones? The social cost of this particular activity change would be prohibitive, because dangerous animals are major zoo attractions.

[894] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 229.
[895] Keith N. Hylton, 'Duty in Tort Law: An Economic Approach' (2006) 75 Fordham Law Review 1501, 1505.
[896] William M. Landes & Richard A. Posner, 'The Positive Economic Theory of Tort Law' (1980) 15 Georgia Law Review 851, 904. See also *Indiana Harbor Belt Railroad Co. v American Cyanamid Co* 916 F.2d 1174 (7th Cir. 1990). For discussion see David Rosenberg, 'The Judicial Posner on Negligence Versus Strict Liability: *Indiana Harbor Belt Railroad Co v American Cyanamid Co.* (2007) 120 Harvard Law Review 1210; Alan O. Sykes, 'Strict Liability versus Negligence in *Indiana Harbor* (2007) 74 University Chicago Law Review 1911.
[897] Jack M. Balkin, 'Too Good To Be True: The Positive Economic Theory of Law' (1987) 87 Columbia Law Review 1447, 1463.

fold. First, not every person brings an action for accident losses either because many people do not realise they have been injured or they cannot afford legal advice and so forth. Second, even where a victim does bring an action he or she may not be awarded full compensation because either the victim settles the action for less than the full amount, or the victim's legal advice is inadequate and results in a lesser award and so forth. When one takes these assumptions into account, the defendant will actually "spend less on care than she should, because expected damage costs are less than the total social loss suffered by plaintiffs. Hence negligence will lead to an inefficient investment in safety."[898] On the contrary, a rule of strict liability might be more efficient in these circumstances. This is so, because the damages awards in such cases are closer to the expected accident losses of the plaintiff and because it is more likely that plaintiffs will bring an action if they do not have to establish carelessness on the part of the defendant and because it is more likely that defendants will settle such cases for larger damages awards.[899]

4.2.5.9 *Wealth Maximisation and Distributive Justice*

One major objection to Posner's positive economic analysis of tort law is its failure to consider any value other than wealth maximisation as the underpinning norm.[900] Specifically, the law and economics movement is solely concerned with allocative efficiency and appears to ignore the highly relevant fact that all movements or transactions result in a redistribution of wealth. Yet, the law and economics movement has little or nothing to say about this fact. In particular, Posner's economic analysis fails to consider questions of justice in any meaningful manner.

As Rawls notes, "laws and institutions no matter how efficient or well-arranged must be reformed or abolished if they are unjust."[901] Thus, economists are said to be concerned with increasing "the size of the pie" (which is a question of efficiency) rather than with "who gets what slices" (which is a question of equity or fairness).[902] In particular, the economic analysis of law has been criticised on the basis that it does not take into consideration questions of distributive justice and fairness. Rights are assigned to their most efficient use i.e. to those who

---

[898] Jack M. Balkin, 'Too Good To Be True: The Positive Economic Theory of Law' (1987) 87 Columbia Law Review 1447, 1463.
[899] Ibid.
[900] Donald H.J. Hermann, '*Economic Analysis of Law* – A Book Review' (1974) Washington University Law Quarterly 354.
[901] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 3.
[902] A. Mitchell Polinksy, *An Introduction to Law and Economics* (4th ed.) (New York: Wolters Kluwer Law & Business, 2011) 7.

are willing and able to pay. However, this approach fails to take into consideration an individual's "starting point" and represents an in-built bias towards those who are already wealthy.[903] In other words, economic analysis notions of efficiency is dependent on the assumption of a certain state of affairs without which it would not be possible to evaluate whether the proposed change operated to maximise wealth. Calabresi states that, without starting points or an initial distribution of rights or entitlements, "it is hard to give any meaning to the term "an increase in wealth""[904] and that the harm means nothing without some basis in "starting points or distributional values."[905] In this respect, Dworkin agrees:

> ... no-one can pay what he does not own, or borrow if he has nothing to pledge or if others have nothing to lend. Society bent on maximizing wealth must specify what rights people have to money, labor, or other property so that it can be determined what is theirs to spend and, in this way, where wealth is improved.[906]

Rawls has acknowledged that the initial distribution of resources in society is morally arbitrary.[907] The consequence for wealth maximisation is that the resources may only be afforded by those with the good fortune to have wealth. Thus, prices will be impacted. Because the rich have more wealth, the price they are willing to pay for resources will more accurately reflect their desire. On the other hand, those without wealth may desire a resource intensely but they do not have the wealth to reflect that in terms of a price they are able to pay. Dorff believes that the disproportionate impact that wealth maximisation has on the price of resources may be exaggerated.[908] Dorff questions whether the wealthy necessarily have the degree of economic power such that they may be able to influence the prices of resources in such a manner. Because the "wealthy" are relatively few he believes that the price for resources is "determined

---

[903] C. Edwin Baker, 'Starting Points in Economic Analysis of Law' (1980) 8 Hofstra Law Review 939.
[904] Guido Calabresi, 'About Law and Economics: A Letter to Ronald Dworkin' (1980) 8 Hofstra Law Review 553, 555.
[905] Guido Calabresi, 'First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?' (1984) 69 Iowa Law Review 833, 833-834.
[906] Ronald M. Dworkin, 'Is Wealth a Value?' (1980) Journal of Legal Studies 191, 207.
[907] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 72:

> The existing distribution of income and wealth, say, is the cumulative effect of prior distributions of natural assets – that is, natural talents and abilities – as these have been developed or left unrealized, and their use favored or disfavored over time by social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view.

[908] Michael B. Dorff, 'Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell' (2002) 75 Southern California Law Review 847, 876.

predominantly by the much larger number of middle-and-working class earners."[909] The wealthy might determine the market price for luxury goods but these goods are a small part of the whole economy.

Some defend wealth maximisation on the basis that it reflects the real world where some people are lucky enough to be born into privilege while others are unfortunate to be born into poverty. However, a form of wealth maximisation, while it may directly favour the wealthy, will indirectly benefit all in society by increasing societal wealth – a rising tide that lifts all boats. Posner would defend this aspect of his wealth maximisation theory on the basis that it is not the purpose of economic theory to concern itself with initial distributions of rights rather it is concerned with transactions involving such rights.[910]

Dworkin is not convinced by Posner's reasoning in this regard. He cites for example an individual's natural right to his or her body or labour which, according to Posner, vests in the natural owner. However, under Posner's own theory of wealth maximisation such rights would only vest in the natural owner in circumstances where if such rights were assigned to someone else the "natural owner" would be willing and able to purchase those rights.[911] That raises another question: whether it can be said that the "natural owner" would be willing and able to purchase those rights from another depends on the wealth that each party has and the price to be paid for those rights. This scenario leads to Dworkin to observe:

> If economic analysis makes someone's initial right to his own labor depend upon whether he would purchase the right if assigned to another, that right cannot be "derived" from economic analysis unless we already know who initially has the right. This appears to be a serious circle. We cannot specify an initial assignment of rights unless we answer questions that cannot be answered unless an initial assignment of rights is specified.[912]

---

[909] Michael B. Dorff, 'Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell' (2002) 75 Southern California Law Review 847, 876.

[910] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 19, where the author states:

> Because economics cannot tell us whether the existing distribution of income and wealth is good or bad, just or unjust – although it can tell us a great deal about the costs of altering the existing distribution – the economist cannot issue mandatory prescriptions for social change. Yet this turns out to be less of a handicap to the normative use of economics than might appear. Economists can usually appeal to a generally accepted goal, such as maximising the value of output, rather than having to defend the goal. By showing how a change in economic policy or arrangements would advance us toward that goal, they can make a normative statement without having to defend their fundamental premises.

[911] Richard A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 Journal Legal Studies 103, 127.

[912] Ronald M. Dworkin, 'Is Wealth a Value?' (1980) Journal of Legal Studies 191, 208.

Dimock explains the economist's defence to such criticism. She points out that such rights vest in their natural owner because the transaction costs in identifying another individual who would value them more would be prohibitive. Moreover, assigning the right to labour to one individual (in a system of slavery, for example) would be inefficient and therefore the economic analysis of law would not support "a perverse initial distribution of rights."[913] It is not guaranteed therefore that the natural owner would be willing and able to purchase these rights as that possibility will depend on the wealth that each party has and the price to be paid for those rights.

This leads to a further criticism of wealth maximisation which is that it contains an inherent in-built bias in favour of the status quo i.e. it favours those who already have privilege. Under a system of wealth maximisation the wealthy get wealthier. In the words of Kronman, it "necessarily favors those who already have money, or the resources with which to earn it, and are therefore able to pay more than others to have a new legal rule defined in the way that is favorable to them."[914] Malloy makes a similar point when he describes the principle of wealth maximisation's notion of willingness to pay as akin to "casting dollars as votes." In those circumstances, "if I start out with lots and lots of resources, I have more votes, thus my particular definition of highest use is more persuasive."[915] Similarly, Baker notes that ignoring starting points as regards distribution means that "those with power to choose rules will, when possible, choose as their givens or starting points those preferences and distributions that further ruling class interests."[916]

Calabresi cites the standard of care in negligence as an example of the dangers of ignoring distribution starting points. Observing that notions of what is "reasonable" will be determined "from the point of view of those who dominate law-making in a given society."[917] Calabresi discusses the latent sexism contained by the very phrase "the reasonable man" and how that reflects those with power in society at the time of its development.[918] Calabresi goes even

---

[913] Susan Dimock (ed), *Classic Readings and Canadian Cases in the Philosophy of Law* (Pearson Longman, 2007) 79.
[914] Anthony T. Kronman, 'Wealth Maximisation as a Normative Principle' (1980) 9 Journal of Legal Studies 227, 240.
[915] Robin Paul Malloy, 'The Limits of Science in Legal Discourse – A Reply to Posner' (1990) 24 Valparaiso University Law Review 175, 180.
[916] C. Edwin Baker, 'Starting Points in Economic Analysis of Law' (1980) 8 Hofstra Law Review 939, 968.
[917] Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse University Press, 1985) 22.
[918] Ibid., 31-32.

further by asserting that the concept of the reasonable man also has racial undertones given its origins.[919] All of which leads Hackney to conclude:

> The cultural biases built into the reasonableness standard run afoul of our diversity value. If certain groups cannot (or choose not to) live up to the behavioral norms of the reasonable-person standard and are therefore punished for their deviation by being deemed negligent, and thus legally liable, this has a distributional consequence.[920]

The economic analysis of tort law has also been critiqued on the basis that it does not take into account the theory of diminishing marginal utility and its effect on the allocative distribution of rights and benefits among people.[921] Economists would counter that the notion of marginal utility is simply not a robust enough objection to undermine economic efficiency. For example, it may be the case that the needs of the wealthier in society are insatiable and that the poor are not so materialistic and do not want certain goods as much.[922] Some argue that distribution based on grounds other than efficiency might lead to the underproduction of goods and services because of a lack of motivation to produce which will result in making everybody better off.[923]

From a law and economics perspective, issues surrounding the just distribution of resources should be a matter that is left to governments in the form of taxation rather than the legal system, which lacks the necessary information to make such judgments and which proves costlier.[924] Judges could only make decisions on non-political issues such as allocative efficiency and issues such as the proper distribution of wealth are for the legislature to decide. It is one thing to separate issues of allocative efficiency from considerations of distributive justice; "[i]t was still another thing to propose or defend changes in the common law rules without taking responsibility for the resulting distributional changes."[925] In Posner's view, the courts lack the necessary tools to redistribute wealth and should therefore "concentrate on making the pie larger."[926] Of course this raises the question, what makes Posner think that

---

[919] Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse University Press, 1985) 26-28.
[920] James R. Hackney, Jr., 'Guido Calabresi and the Construction of Contemporary American Legal Theory' (2014) 77 Law & Contemporary Problems 45, 59.
[921] Francesco Parisi, 'Positive, Normative and Functional Schools in Law and Economics' (2004) 18 European Journal of Law and Economics 1, 15-16.
[922] Michael B. Dorff, 'Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell' (2002) 75 Southern California Law Review 847, 867.
[923] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 62.
[924] Louis Kaplow & Steven Shavell, 'Why the Legal System is Less Efficient than the Income Tax in Redistrbuting Inccome' (1994) 23 Journal of Legal Studies 667.
[925] Morton J. Horwitz, 'Law and Economics: Science or Politics?' (1980) 8 Hofstra Law Review 905, 906.
[926] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 553.

judges are qualified to conduct the economic analysis required of wealth maximisation any more than they are qualified to redistribute wealth? And, if this is what judges are in fact doing, why not, as Michelman suggests, "insist that our judges both learn economics correctly and use it openly?"[927]

4.2.5.10 *Wealth Maximisation and Judicial Knowledge*

According to Posner, it is the role of judges when deciding between legal rules to choose the most efficient rule i.e. that which increases social wealth. This immediately raises a number of questions: Why is there so little explicit reference to economic principles in the leading tort judgments? Even if judges were rationalising their judgments on the basis of economic principles, what kind of formal training do they have to apply the science? In the first instance, Posner dismisses the notion that legal judgments are not made on the basis of efficiency simply because these judgments do not explicitly reference economic principles:

> .. often the true grounds of legal decision are concealed rather than illuminated by the characteristic rhetoric of opinions. Indeed, a good legal education equips students to dig beneath the rhetorical surface to find those grounds, many of which may turn out to have an economic character.[928]

Posner qualifies his statement by arguing that not all of the common law can be explained on efficiency grounds but "that the common law is best (not perfectly) explained as a system for maximizing the wealth of society."[929] In his earlier writings, Posner had expressed the view that judges could apply the principles of economics "intuitively" in the course of their judgments and that the judicial language we are familiar with reading in the course of a judgment is "simply the translation of economic principles into ethical language"[930] and, quoting Holmes,[931] "warned ... about the confusion that can result from taking the moral overtones of legal language too seriously."[932] However, there is little explicit evidence that judges do interpret the law on the basis of efficiency and, as Michelman notes, "[i]t is ... a striking- a remarkable - notion that the mass of judicial decisions and rules should turn out to

---

[927] Frank I. Michelman, 'A Comment on Some Uses and Abuses of Economics in Law' (1979) 46 University of Chicago Law Review 307, 314.
[928] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 31.
[929] Ibid., 32.
[930] William M. Landes & Richard A. Posner, 'The Positive Economic Theory of Tort Law' (1980) 15 Georgia Law Review 851, 863.
[931] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 459-460.
[932] Richard A. Posner, "Guido Calabresi's 'The Costs of Accidents': A Reassessment' (2005) 64 Modern Law Review 12, 19.

meet the standard of wealth maximization."[933]Even if it were accepted that judges are involved in promoting economic efficiency within the law, what experience or training do they have to make such judgments?

Posner derides the notion that judges have the ability and the expertise to make decisions on the basis of distributive justice and that therefore such decisions should be left to governmental agencies. In Posner's view, because judges "cannot do much as judges to alter the slices of the pie that the various groups in society receive, they might as well concentrate on increasing its size."[934] Yet, he does not seem to think that similar problems would arise for members of the judiciary who lack formal training in economic concepts making decisions on the basis of economic efficiency - an ability that has been questioned by others.[935]

Moreover, even if it could be said that the judge was possessed of the relevant information and had the necessary training or expertise in economics, what makes us believe that the standard of wealth maximization "possesses [such] a strong moral appeal" that it is likely it is the standard that is adopted by the courts?[936] Hayek challenges the notion of 'judges as economists' on the basis that even if it could be said that the judge had the information and the ability to apply efficiency analysis to the choice of rules how can a judge predict an improvement in the law as a consequence of such analysis and application? In other words, even if a judge could adopt economic efficiency in their analysis of legal rules could that judge reliably predict that the stated policy goal would be achieved by their decision?[937]

4.3 The Behavioural Economic Analysis of Law

One of the core assumptions of the microeconomic theory of law is that individuals are rational utility maximisers who will respond in an efficient manner to certain incentives such as legal rules or commands. In normal conditions, people will act in such a way as to try to maximise their benefits and minimise their costs. Thus, people will make choices by balancing the costs and benefits of one choice against the other and assumes "that people are self-interested utility

---

[933] Frank I. Michelman, 'A Comment on Some Uses and Abuses of Economics in Law' (1979) 46 University Chicago Law Review 307, 311.
[934] Richard A. Posner, *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011) 319.
[935] James M. Buchanan, 'Good Economics, Bad Law' (1974) 60 Valapariso Law Review 483.
[936] Frank I. Michelman, 'A Comment on Some Uses and Abuses of Economics in Law' (1979) 46 University of Chicago Law Review 307, 311.
[937] Fredrich A. Hayek, Legislation & Liberty: Volume 1: Rules & Order (University of Chicago Press, Chicago, 1973) 102.

maximizers with stable preferences and the capacity to optimally accumulate and assess information."[938] This is otherwise known as rational choice theory. From these choices a pattern of behaviour develops from which future behaviour in society can be accurately predicted.

The recent literature on behavioural analysis represents a serious challenge to the economic analysis of law. Economists view tort law as an instrument to be used to deliver the goal of economic efficiency. In order to achieve this goal, individuals must react predictably in certain situations. In this way, the law can be developed and interpreted in a manner that encourages individuals to act in ways which promotes the greater goal of efficiency. If human behaviour is much more unpredictable than the economists have traditionally assumed, it raises serious questions regarding the ability of tort law to achieve the economists' stated aims.[939]

In particular, the behavioural analysis of law questions whether the hypothetical behaviour of individuals lying at the heart of economic theory is realistic. It asserts that in fact, the reality of human behaviour is very different to that predicted by the rational choice theory of economists. This is so because the reality is that individuals often make decisions which objectively might be considered suboptimal. The literature would indicate that, rather than carrying out careful, complex cost/benefit analysis before making decisions, individuals are often influenced by heuristics and biases. In a larger sense, on might argue, that such behaviour actually conforms to rationality. Without such shortcuts, decision-making would become too burdensome and costly. Adopting these shortcuts increases the risk of mistakes, but could be justified on the basis that it is an efficient form of decision-making.[940]

---

[938] Jennifer Arlen, 'Comment: The Future of Behavioral Economic Analysis of Law' (1998) 51 Vanderbilt Law Review 1765, 1766.
[939] Ibid., 1055-1056.
[940] Russell B. Korobkin & Thomas S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 California Law Review 1051; Christine Jolls, Cass R. Sunstein, and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) Stanford Law Review 1471; Herbert A. Simon, 'A Behavioral Model of Rational Choice' (1955) 69 Quarterly Journal of Economics 99; Herbert A. Simon, Models of Man, *Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting* (New York: John Wiley and Sons, 1957); Herbert A. Simon, 'Theories of Bounded Rationality' in Herbert A. Simon (ed) *Models of Bounded Rationality: Behavioral Economics and Business Organization* (Vol 2) (Cambridge, MA: MIT Press, 1982) 408; Naresh K. Malhotra, 'Information Load and Consumer Decision Making' (1982) 8 Journal of Consumer Research 419; Amos Tversky & Daniel Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124; Jennifer Arlen, 'Comment: The Future of Behavioral Economic Analysis of Law' (1998) 51 Vanderbilt Law Review 1765; William Samuelson & Richard Zeckhauser, 'Status Quo Bias in Decision Making' (1988) 1 Journal of Risk and Uncertainty 7; Daniel Kahneman, Jack L. Knetsch, and Richard Thaler, 'Experimental Tests of the Endowment Effect and the Coase Theorem' (1990) 98 Journal of Political Economy 1325; Jeffrey J. Rachlinski & Forest Jourden, 'Remedies and the Psychology of Ownership' (1998) 51 Vanderbilt Law Review 1541; Christine Jolls, 'Behavioral Economics Analysis of Redistributive Legal Rules'

4.4 Conclusion

The economic analysis of tort law attempts to offer a descriptive theory of law which provides that legal rules are efficient and may be best explained on the basis that their purpose is the promotion of economic efficiency. Specifically, according to the theory, it is the purpose of tort law to bring about the efficient allocation of resources within society. The validity of this assertion is questionable. The analysis fails to account for key doctrine in tort law. Take negligence, for example, what some might consider the paradigmatic tort. Economic analysis fails to adequately explain the role of causation which lies at its heart as a means of attributing responsibility. To private law theorists such as Weinrib causation is central to the tort. Yet, to the economic analyst, it plays a periphery role – it fails to explain why it is the defendant wrongdoer who must pay compensation to the victim. Is that always efficient? Similarly, the duty of care receives short shrift from economic analysts. A finding of "no duty" tends to operate inefficiently as it externalises the costs of the defendant's wrongdoing. Despite this, economic theorists struggle to justify – in efficiency terms – rules such as no duty to rescue. Economists even struggle to convince that the standard of care can be explained in efficiency terms. Notwithstanding the explicit reference to cost/benefit factors in the famous 'Hand Formula,' economists cannot produce convincing empirical evidence from the case law where 'cost/benefit' analysis dictated determinations as to whether the defendant had failed to take reasonable care. However, as the case law indicates, cost/benefit factors are very much of secondary importance after consideration of the magnitude of the risk in such cases. Given that economic analysis fails to convincingly explain key aspects of negligence, the claim of economic analysts that it provides a descriptive theory of tort law is underwhelming.

A key aspect of economic theory of tort law is that it explains what judges or courts are doing when implementing or deciding between legal rules. Yet, there is no empirical evidence to

---

(1998) 51 Vanderbilt Law Review 1653; Howard Latin, '"Good" Warnings, Bad Products, and Cognitive Limitations' (1994) UCLA Law Review 1193; Lynn A. Barber & Robert E. Emery, 'When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage' (1993) 17 Law & Human Behavior 439; Cass R. Sunstein, 'Behavioral Analysis of Law' (1997) 64 University of Chicago Law Review 1175; Neil Weinstein, 'Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample' (1987) 10 Journal of Behavioral Medicine 481; Ola Svenson, 'Are We All Less Risky and More Skilful Than Our Fellow Drivers?' (1981) 47 Acta Psychologica 143; Baruch Fischoff, 'Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty' (1975) 1 Journal of Experimental Psychology: Human Perception & Performance 288; Jeffrey J. Rachlinski, 'A Positive Psychological Theory of Judging in Hindsight' (1998) 65 University of Chicago Law Review 571; Amos Tversky & Daniel Kahneman, 'Rational Choice and the Framing of Decisions' (1986) 59 Journal of Business S251.

support this claim. The economic analysis of law fails to prove that this is what the courts are doing. Certainly, there is little or no evidence of judges explicitly applying economic principles in their judgments. The economists' argument is that judges intuitively apply economic principles to resolve legal issues and that while the application of these principles may not be obvious on the surface of such judgments all one needs do is dig beneath the "rhetoric" of judgments and these economic principles come to the fore. Acceptance of the notion of judges as economists in disguise is somewhat farfetched. Apart from the fact that there is little evidence to support the assertion what is even more worrying that if it is valid what kind of training or expertise do these judges have in the field in order to be able to apply these scientific principles accurately?

Notwithstanding the issues surrounding the economic analysis of law as a descriptive theory, it is its normative justification that possibly gives rise to the greatest concern. If economic efficiency cannot be said to provide an accurate description of tort law, can it nevertheless be justified as a normative goal? The most prolific writer on economic analysis, Richard Posner, identified the underlying norm to be wealth maximisation. Legal rules are efficient if they lead to an increase in wealth. Posner, and others like him, are of the view that the free market should decide how resources (including rights) are allocated and only where the market fails should outside intervention occur to correct the market. In the free market, resources should naturally go to those who value them most. There is no doubt that Posner's approach reflects an ideological preference in favour of the wealthiest in society. By ignoring the starting points of individuals prior to a transaction one is biased towards the wealthier in society and justice and fairness concerns are sidelined or completely ignored. Moreover, the tendency of economists to put a "price" on individual rights to gauge efficiency can lead to distasteful and morally reprehensible conduct whereby individual life and limb is monetised and inputted into a spreadsheet as part of a mathematical equation with normatively unappealing results such as that which arose in the *Grimshaw* decision. Our faith in the ability of markets to be able to regulate themselves must be shaken following the worldwide economic crisis of 2008. If that crisis has taught us anything it is that unregulated markets are not in society's best interests. Thus, any normative justification of tort law reliant on such principles should itself be treated with a certain amount of scepticism.

Finally, regardless whether one finds economic efficiency to be an accurate description of the tort law or whether one finds it to be normatively appealing and a goal worth pursuing, there

is actually a great deal of evidence that the science is based on faulty assumptions. In fact, it may be the case that economic theory – whether it is considered a good or bad thing – does not actually work. The key underlying assumption of the economic analysis of law is that individuals are self-interested rational maximisers of their own utility i.e. otherwise known as rational choice theory. However, research from the behavioural economic analysts would strongly indicate that this assumption is flawed. Increasingly, the evidence indicates that it is much more difficult to predict how people will react in certain circumstances or how they will respond to different incentives. Our individual cognitive abilities, past experiences, and biases influence our thinking and decision-making. So much so that more often than not rather than acting rationally as economic analysis would predict, individuals act in a very different way. If this is the case, then the entire basis of the economic analysis of tort law is fatally undermined. Economists present themselves as scientists of human behaviour who can predict with reasonable accuracy as to who any individual will act in certain situations. On this basis, one can develop or apply rules which will lead to an economically efficient outcome. If the economist's ability to predict human behaviour is inaccurate more often than not, how can we rely on it as the normative basis of our law?

CHAPTER 5

Tort Law and the Promotion of Human Dignity

5.1 Introduction

In the previous chapters of this work, I examined the different theories which seek to explain the underlying normative basis of tort law. The early chapters concentrated on the moral theories of corrective justice and distributive justice and the last chapter examined the more radical theory of deterrence derived from economic analysis. In that chapter, attempts to explain tort law as a scientific, value-free system of justice were evaluated. The chapter concluded that economic analysis is an unattractive norm which only succeeds in dehumanizing the individual and the assumptions under which it operates are flawed and undermine its legitimacy.

In this chapter, I intend to show that there is a deeper rationality which underlies all of tort law. I will submit that this rationality is based on the promotion of human dignity. This central value is not that based on the atomistic selfish individual but is instead a conception which recognises that our individuality is partly constituted by our social relations and communal environment. This approach recognises that as individuals we not only have rights we also have responsibilities. In this chapter, I will first discuss the differing conceptions of dignity which exist before discussing how dignity is currently situated within tort law. I then put forward my conception of relational dignity, and highlight – through practical case law examples – how this normative goal best explains our current tort system.

5.2 The Role of Dignity in Tort Law

The purpose of this research is to determine if there is a unifying moral basis which justifies the continued existence of tort law and, relationally, to consider whether society would be any the poorer if it were replaced in its entirety with an alternative mechanism such as a statutory compensation scheme. The importance of this question is two-fold. First, the identification of an underlying normative basis is essential if tort law is to remain fit for purpose as it will bring much needed coherence to the interpretation of current tort rules and in the construction of new

ones, thereby improving justice for the participants.[941] Second, the identification of an underpinning normative value is critical as it will provide a metric by which the worth of the tort system can be measured against alternative compensation systems which might replace it.

Already the institution of tort law is under sustained attack by those who claim that it is an outdated, ineffective and expensive compensatory system which should be replaced in its entirety with a form of social insurance similar to that adopted in New Zealand in 1972.[942] These critics argue that the current tort system has bred a 'compensation culture' which has led to an overly-litigious society.[943] This has a negative knock-on effect, so the argument goes, on the economy through unjustified costs in the form of compensation payments and increased liability insurance premiums. Such attacks are particularly vociferous in the United States where the phrase 'Tort Reform' has become a political campaign slogan for politicians who believe in deregulation and small government.[944] Similar concerns regarding the so-called 'compensation culture' are beginning to infiltrate this side of the Atlantic[945] despite the fact

---

[941] Edward J. Bloustein, 'Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University Law Review 962, 1004, where the author observed, "[c]onceptual unity is not only fulfilling in itself ... it is also an instrument of legal development."

[942] The Accident Compensation Act 1972. The crucial provision of the legislation is section 5(1) which provides:

> Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or by any other person, and whether under any rule or any enactment.

[943] Association of British Insurers, 'Tackling the Compensation Culture: The Legal Aid, Sentencing and Punishment of Offenders Bill: Improving the System for All' (September 2011).

[944] Such reformers cite *Liebeck v McDonald's Restuarants, P.T.S., Inc*., No. CV 93 02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994); better known as the "McDonald's Coffee Case", as evidence of this increasing litigious society. In that case, widespread media reports indicated that the plaintiff was awarded aprroximately $2.8 million in compensation after she burned herself having spilled a cup of McDonald's coffee in her lap. What was not reported as widely were the finer details of the case. The plaintiff, Mrs Liebeck was a 79-year-old woman who suffered third-degree burns which required skin grafts, an eight-day hospital stay and two years of medical treatment after the incident. It transpired that the coffee was served at temperature between 180 and 190 degrees Fahrenheit which, if spilled, can cause third degree burns in a matter of seconds. Normal household coffee is brewed at between 135 to 140 degrees Fahrenheit. Despite the fact that McDonalds had received over 700 complaints previously about the temperature of their coffee they had not taken any steps to warn their customers of this danger the seriousness of which was not obvious to them. The plaintiff, after the defendant had refused to pay her medical expenses of $10,000, instituted legal proceedings and was eventually awarded $640,000 in compensation. The quantum of compensation awarded was equivalent to three days' coffee sales for McDonalds.

[945] Concerns over the 'compensation culture' led, in part, to the introduction of the Personal Injuries Assessment Board Act 2003 which created the Personal Injuries Board (PIAB) whose function it is to limit the need for litigation in personal injury cases involving motor, workplace and public liability claims. Where liability is not in dispute between the parties, PIAB will make awards of compensation cutting the costs associated with traditional litigation. This legislation was accompanied by the Civil Liability and Courts Act 2004 which introduced a number of procedural reforms in personal injury litigation designed *inter alia* to minimise litigation costs and restrict fraudulent claims. See generally, Ciaran Craven and William Binchy (eds) *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (FirstLaw, 2005). In more recent times, a trend of reducing awards

that there appears to be little empirical evidence confirming its existence.[946] These concerns raise questions as to whether we should we retain tort law as the primary system for providing compensation for civil wrongdoing and whether we forego anything of significant social value by replacing it with a statutory compensation scheme as has occurred in New Zealand.

It is submitted that there is much to lose should we swap the tort system for a form of social insurance. Those who advocate the introduction of statutory compensation schemes as a replacement for the tort system as has occurred in New Zealand, are not making appropriate comparisons. In criticising the efficiency of tort law when contrasted with such schemes, these critics tend to concentrate only on one aspect of tort law (its compensation function) and, in so doing, they "attack the tort system for failing to achieve an objective that it never purported to recognize ..."[947]

Tort law is much more than simply a system for allocating compensation. It is argued here that there is an underlying moral basis to tort law which is founded on the notion of respect for oneself and for others which justifies its retention and it is a function which is not served by statutory compensation schemes. That moral basis lies in the protection of human dignity within a social community. While principles of corrective and distributive justice explain crucial aspects of tort law they are deficient in identifying its overarching purpose. Corrective justice and distributive justice represent the means by which human dignity is vindicated but

---

made by lower courts in personal injuries actions has developed. For example, in *Shannon v O'Sullivan* [2016] IECA 93, a husband and wife were awarded damages of €91,463 and €131,463 by the High Court for pain and suffering arising from a road traffic accident. These awards were reduced to €65,000 and €40,000 respectively by the Court of Appeal on the basis that they were considered excessive. Similarly, in *Nolan v Wirenski* [2016] IECA 56, Irvine J found that the injuries suffered by the plaintiff were on the lower end of the scale and reduced the award for pain and suffering of €120,000 made by the High Court to €65,000.

[946] See speech by Dyson MR, 'Magna Carta and Compensation Culture', The High Sheriff of Oxfordshire's Annual Law Lecture, 13 October 2015; James Hand, 'The Compensation Culture: Cliché or Cause for Concern' (2010) 37 Journal of Law & Society 569, where the author points out that despite the public perception, claims for personal injuries had decreased during the period where the phrase "compensation culture" was in popular use. See also Richard Lewis, Annette Morris, and Ken Oliphant, 'Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?' (2006) 14 Torts Law Journal 158, which concluded - on the analysis of the available statistical information - that there has not been a flood of personal injury claims in recent years. See also Ray Ryan, 'The Impact of the Act on the "Compensation Culture": Big or Small?' in Ciaran Craven and William Binchy (eds) *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (FirstLaw, 2005) 138; Jonathan Ilan, 'Four Years of the Personal Injuries Board: Assessing Its Impact' (2009) Judicial Studies Institute Journal 54; Steve Hedley, 'The Rise and Rise of Personal Injury Liability – A Temporal Difficulty or a Permanent Crisis?' in Ciaran Craven and William Binchy (eds) *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (FirstLaw, 2005) 203; Simon Halliday, Jonathan Ilan, Colin Scott, 'The Public Management of Liability Risks'(2011) 31 Oxford Journal of Legal Studies 527; Eoin Quill and Raymond J. Friel (eds.), *Damages & Compensation Culture – Comparative Perspectives* (Oxford, Hart, 2013).

[947] James A. Henderson Jr, 'The New Zealand Accident Compensation Reform' (1981) 48 University of Chicago Law Review 781, 790.

do not represent its overall purpose. Thus, the protection of human dignity is the lodestar and principles of corrective justice and distributive justice may be invoked to attain it. By re-calibrating the focus in hard cases towards the dignitary interests involved and utilising principle of corrective or distributive justice to promote these interests, tort law will produce more just results.[948]

The tort system, for all its apparent deficiencies and flaws, remains essential in vindicating this fundamental value. As du Bois notes, without the tort system, society "would lack one of the essential building blocks of a political system predicated on individual freedom and dignity."[949] The replacement of tort law with a statutory compensation scheme would undermine the human dignity of the members of that society.[950] Tort law provides a mechanism by which the victim can 'tell his or her story' and empowers him or her to insist that the wrongdoer respond "by respectfully demanding respect."[951]

One example of the importance that tort law plays in vindicating human dignity in this manner is reflected in the Irish Supreme Court decision of *Grant v Roche Products*.[952] In that case, the plaintiff was the father who brought a fatal injuries action against the defendants arising from the death of his son. The plaintiff's son had been prescribed a drug called Roaccutane as a

---

[948] Allan Beever, 'What does Tort Law Protect?' (2015) 27 Singapore Academy of Law Journal 626, 642, where the author concludes with the following observations about the role of tort law:

> If tort law is understood as delineating the boundaries of the permissible in accordance with individuals' fundamental rights and as mandating remedies for the violations of those rights, then tort law is rightly viewed as one of the most foundational elements in the legal system. It is the chief mechanism through which the moral personality of the individual is recognised, protected and enforced and it requires wrongdoers to fulfil their primary moral duty: to make good their wrongdoing. On this view, tort law is not correctly viewed as an almost wholly inadequate response to social cost. It is rather one of the most important protectors of individual liberty in existence.

[949] Francois du Bois, 'Tort Law Recovered? From Alan Brudner's Revised Case for Tort Law to the Ethical Underpinnings of Liberal Democracy' (2014) 1 Critical Analysis of Law 285.

[950] Sir Geoffrey Palmer, 'New Zealand's Accident Compensation Scheme: Twenty Years On' (1994) 44 University of Toronto Law Journal 223, 247; this is not so according to the author who claims that in New Zealand:

> The corrective-justice analysis that an individual whose autonomy has been invaded ought to have it restored and paid for by the person who caused it holds no sway. There is no community expectation that the restoration needs to be carried out by the person who inflicted the injury, or that anything is to be gained socially by compelling those who cause personal injury to provide redress in damages to victims. No principle of corrective justice has been evident since the scheme's inception, except for rare cases of punitive damages. No demands for its restoration have seriously been proposed. People from overseas tend to worry about it, but not New Zealanders. Corrective justice may provide some arguments as to why tort law exists but not, I think, as to why it should be retained.

[951] Stephen Darwall, *Morality, Authority and the Law: Essays in Second-Personal Ethics I* (Oxford University Press, 2013) 196; R. Antony Duff, 'Torts, Crimes and Vindication: Whose Wrong is it?' in Matthew Dyson (ed) *Unravelling Tort and Crime* (Cambridge University Press, 2014) 146-173.

[952] *Grant v Roche Products* [2008] IESC 35.

treatment for his severe acne. The plaintiff claimed that Roaccutane was a defective product because one of the known side effects of its use was the onset of depression and suicidal ideation. The plaintiff's son had taken his own life during the final week of the course of prescribed medication, having displayed no depressive tendencies previously. In response to the plaintiff's claim the defendants offered to pay compensation totalling €30,990.22. This figure represented the maximum amount payable for mental distress and funeral expenses recoverable under the legislation governing the claim.[953] This was offered without an admission of liability on the part of the defendants. The defendants also offered to pay the plaintiff's costs related to the claim.

The plaintiff refused the offer believing that it was a cynical attempt to avoid a public trial. The defendants then sought to dismiss the plaintiff's claim on the basis that his statutory right to litigate was qualified under the legislation which had set the quantum on damages that could be recovered in such cases. It was argued that given the offer of compensation that had already been made, the plaintiff's claim was vexatious and an abuse of process as the plaintiff and his family would receive "no tangible benefit" in litigating. In dismissing the defendants' motion, Hardiman J held that it could not be said that the plaintiff and his family would receive no tangible benefit (other than compensation) in pursuing a claim:

> It is quite contrary to any holistic view of human nature to fail to acknowledge that each and every one of these people will benefit from a resolution of the suspicions which they clearly hold, that the deceased was led to take his own life by the ingestion of a prescription drug known or believed to be associated with grave adverse consequences. Moreover, where a very young man has died by his own hand, there is a manifest benefit to his father and other relatives in establishing, if it be the case, that his death had an exogenous cause and was not the result of a free decision on his part. The overwhelming majority of humanity, including the "reasonable man" beloved of the law, would recognise this instinctively and in my view correctly.

Hardiman J went on to conclude that the statutory cause of action had to be interpreted in light of the constitutional guarantee under Article 40.3. of the Constitution. This right requires that the right to life be vindicated and in the circumstances where the plaintiff's son was already deceased, Hardiman J was of the view that this right could only be vindicated by a hearing into

[953] Section 49 of the Civil Liability Act 1961.

the claim and a determination as to whether the death of the plaintiff's son was caused by the wrongdoing of the defendant.[954]

The importance of the role of tort law in vindicating human dignity was also acknowledged by the Supreme Court in *Kearney v McQuillan and North Eastern Health Board.*[955] That case, mentioned in the opening pages of this work, concerned a medical negligence action brought relating to the performance of an unnecessary symphysiotomy procedure. In finding that the plaintiff had been wronged, MacMenamin J acknowledged the impact that the negligence had on her dignity:

> ... one must consider the human situation of a young 18 year old mother who entrusted her own care, and that of her child, to Dr Connolly. The Constitution identifies rights which are to be protected and vindicated because they belong to each human person because of their very humanity. Among the values which have been recognised by the Courts are human dignity, bodily integrity, and autonomy, that is the capacity to make informed decisions affecting one's own health. The duty to protect those rights is not confined to the Courts. Each health professional is, and was always, under a similar duty. Although the finding of the Court is founded in negligence, what happened here was a betrayal of trust; it was an invasion and violation of the rights just identified; it was the gravest kind of negligence. The determinations of both the High Court and this Court on the liability issue, on the facts of this particular case, are a vindication of Mrs. Kearney's decision to pursue matters.[956]

The power to hold others to account conferred by tort law should not be underestimated.[957] Not only does tort provide an avenue for redress to the plaintiff, it also restores the power imbalance between defendant and plaintiff created by the former's wrongful behaviour and thereby acknowledges the plaintiff's dignity. As Bender observes, "[l]egally requiring harm-causers to compensate the parties they injure rectifies the social harm of permitting one person to injure another with impunity and prevents one party's well-being from being valued more highly than another's."[958] This power is lost under a statutory compensation scheme as individualised justice is sacrificed in favour of distributive justice.

---

[954] See also *Farrell v Ryan* [2015] IEHC 275; [11.7], where although the plaintiff lost her claim in negligence against the defendant regarding a prophylactic symphysiotomy which was performed on her, Cross J did acknowledge that:

> Though I would in the words of Sir Ranulph Crewe, Chief Justice of England, "take hold of a twig or twine-thread" to uphold the plaintiff's case, I must find that this remarkable lady whose story indeed deserves to be told must fail in her case against the defendants.

[955] *Kearney v McQuillan and North Eastern Health Board* [2012] IESC 43.

[956] Ibid., [29].

[957] Although some commentators would question how effective tort law is in achieving this aim. See Ori J. Herstein, 'How Tort Law Empowers' (2015) 65 University of Toronto Law Journal 99.

[958] Leslie Bender, 'Tort Law's Role as a Tool for Social Justice Struggle' (1998) 37 Washburn Law Journal 249, 251.

The psychological benefits of the tort system are important to the plaintiff's healing and satisfy the plaintiff's understandable thirst for revenge.[959] Tort law can also provide a valuable service to society as a vehicle by which the victims of civil wrongdoing can obtain closure in some cases by pursuing civil litigation requiring the defendant respond to the plaintiff's complaint[960] and can also prove to be an effective means of exposing wrongdoing.[961] In this sense, "[t]ort law, like sunlight, acts as a disinfectant by exposing hidden threats to the public welfare."[962] Finally, while the extent of it may be exaggerated and empirical evidence hard to come by, tort law does have a deterrent effect which can benefit society by encouraging safer practices. Take, for example, the phenomenon of "defensive medicine". While this is generally perceived to be a pejorative term by critics, the phenomenon of defensive practices is also proof of the existence of the deterrent effect of tort.[963] The development of defensive practices in response to legal risk can encourage safer and better ways of doing things. Moreover, where the perceived legal risk is lessened, there is evidence that the incidences of injury have increased.[964]

My claims regarding tort law might be considered aspirational and that the realities of tort law practice undermine the central thesis. For example, the vast majority of personal injury claims are settled long before they reach the courtroom. How do such private settlements hold others to account before society? I would argue that even in these circumstances, the tort system promotes human dignity. First, it is the rules of tort law which bring the defendant to the table for settlement discussions in the first place. It is the plaintiff's choice as to whether to settle or not. It may be the case that for the plaintiff vindication rests in the settlement. In the alternative, he or she may wish to reject the settlement and go to trial as the plaintiff decided in *Grant v*

---

[959] John M. Kelly, 'The Inner Nature of the Tort Action' (1967) 2 Irish Jurist 279.

[960] For example, note the claim in tort by some of the families of the victims of the 'Omagh bombing' carried out by the IRA. Frustrated by a lack of progress in the criminal investigation, the families successfully launched civil proceedings for trespass to the person against the suspected perpetrators of the atrocity. See: *Breslin v McKenna* [2011] NICA 33.

[961] Take for example, the case of *Grimshaw v Ford Motors* 119 Cal.App.3d 772 (1981); which involved litigation over design defects in manufacture of the Ford Pinto car. Despite knowledge of these defects in advance of production, Ford Motors proceeded with its manufacture. It was during the course of this litigation that evidence emerged that management at Ford Motors were aware of these defects in advance of production and ignored them. As a result of this litigation Ford Motors were required to pay millions of dollars in damages and order a recall of all defective vehicles.

[962] Thomas H. Koenig & Michael L. Rustad, *In Defense of Tort Law* (New York University Press, 2003) 3.

[963] David M. Studdert & Troyen A. Brennan, 'Defensive Medicine and Tort Reform: A Wide View' (2010) 25 Journal of General Internal Medicine 380, where the authors discuss how medical practitioners are motivated in their treatment of patients in accordance with the degree of perceived legal risk.

[964] Zenon Zabinski & Bernard S. Black, 'The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform' (2015) *Northwestern Law & Economics Research Paper No 13-09* available at http://papers.ssrn.com (accessed 5th October 2015), where the authors found evidence that the implementation of tort damage caps by states led to higher rates of preventable adverse safety events in hospitals.

Roche Products,[965] seeking public vindication. While private settlements do not send a public message to society, such settlements are negotiated in light of precedent and statute determeind by tort rules. Another difficulty lies in the cost of prosecuting tort claims. Tort law can be expensive to administer with lawyers' fees representing a significant proportion of costs associated with its administration.[966] However, this is not an insurmountable difficulty. As just noted, the vast majority of tort litigation is settled before coming to court. Furthermore, the enactment of the Personal Injuries Assessment Board Act 2003 is designed to limit costs in litigation where liability is not in dispute by allowing an assessment of compensation to be made at first instance by the Personal Injuries Assessment Board. Moreover, with the enactment of the Legal Services Regulation Act 2015, it is hoped that greater transparency in relation to the costs of litigation will be introduced and increased competition within the professions will lead to a further reduction in these costs.[967] Thus, it is my thesis, that notwithstanding the merits of statutory compensation schemes like that introduced in New Zealand, eliminating tort law at the expense of such a scheme is too great a price to pay. The benefits provided under such a scheme cannot make up for what is lost if we eliminate common law rights of action. It is an aspirational notion but one which we should strive to achieve.

In order to test my arguments about the importance of our tort system in the promotion of human dignity and the consequent social value of pursuing such a goal, it is worth contrasting this approach with alternative systems for dealing with problem of accidental losses. For example, many tort reformers would claim that the functions of tort law could be catered for by the establishment of a statutory compensation sceheme, like that introduced in New Zealand. In order to examine the efficacy of such claims it is necessary to examine the operation of this scheme in greater detail.

5.3 New Zealand's Statutory Compensation Scheme

The introduction of the statutory compensation scheme in New Zealand involved a dramatic shift from individual responsibility for harm caused by accidents to community responsibility for such harms.[968] Personal injuries arising in such circumstances became society's concern

[965] *Grant v Roche Products* [2008] IESC 35.
[966] The Competition Authority, *Competition in Professional Services: Solicitors and Barristers*, December 2006.
[967] For example, note the proposed introduction of the Office of the Legal Costs Ajudicator under Chapter 2 of the Act.
[968] See generally, Sir Geoffrey Palmer, 'New Zealand's Accident Compensation Scheme: Twenty Years On' (1994) 44 University of Toronto Law Journal 223; Stephen Todd, 'Forty Years of Accident Compensation in New

and not the individual's. The aim of the New Zealand scheme is to provide compensation to a wider range of victims, particularly those who were considered the "innocent injured" i.e. those injured in a non-negligent manner, and who would otherwise be left without compensation under the tort system. Under the scheme victims are entitled to earnings-related compensation which is payable weekly based on 80% of pre-injury earnings.[969] Thus, while full compensation might not be available, this is offset by the fact that a greater number of victims are entitled to compensation than otherwise would be the case under tort. The scheme is funded from general taxation and various levies paid by employers, motor car owners and the self-employed.[970]

There are undoubted merits to a statutory compensation scheme like that adopted in New Zealand and its implementation in Ireland is worthy of further investigation. However, the tort system should not be sacrificed to make room for it. Instead, empirical research should be conducted into the benefits of implementing a dual system where such a scheme could supplement the current tort system.[971] The introduction of such a statutory compensation scheme to replace tort comes at too high a social price and one need only review the New Zealand experience for evidence of that as will be discussed below.

Zealand' (2011) 28 Thomas M. Cooley Law Review 189, 192; James A. Henderson Jr, 'The New Zealand Accident Compensation Reform' (1981) 48 University of Chicago Law Review 781; Lewis N. Klar, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 University of Toronto Law Review 80; Juliet Bull, 'New Zealand's Accident Compensation Scheme and Chronic Pain Syndrome' (2014) 45 Victoria University of Wellington Law Review 53; Colleen M. Flood, 'New Zealand's No Fault Accident Scheme: Paradise or Panacea?' 8 Health Law Review 11; Stephen Todd, 'Treatment Injury in New Zealand' (2011) 86 Chicago-Kent Law Review 1169; Stephen Todd, 'Privatization of Accident Compensation: Policy and Politics in New Zealand' (2000) 39 Washburn Law Journal 404; Bronwen Lichtenstein, 'From Principle to Parsimony: A Critical Analysis of New Zealand's No-Fault Accident Compensation Scheme' (1999) 12 Social Justice Research 99; Ken Oliphant, 'Beyond Misadventure: Compensation for Medical Injuries in New Zealand' (2007) 15 Medical Law Review 357; Craig Brown, 'Deterrence in Tort and No-Fault: The New Zealand Experience' (1985) 73 California Law Review 976; Ursula Cheer, 'Social Policy Implications Arising From Legal Aspects of New Zealand's Latest Accident Compensation Scheme' (1995) 5 Social Policy Journal of New Zealand; G Shapira, 'New Zealand Accident Compensation and the Foreign Plaintiff: Some of Conflict of Laws Problems' (1980) 12 Ottawa Law Review 413; D.R. Harris, 'Accident Compensation in New Zealand: A Comprehensive Insurance System' (1974) 37 Modern Law Review 361; Richard S. Miller, 'Analysis and Critique of the 1992 Changes to the New Zealand Accident Compensation Scheme' (1993) 52 Maryland Law Review 1070; Richard Gaskins, 'Tort Reform in the Welfare State: The New Zealand *Accident Compensation Act* (1980) 18 Osgoode Hall Law Journal 238; Werner Pfennigstorf, 'Accident Compensation in New Zealand: How Does It Work? A Review of Palmer's *Compensation for Incapacity* and Ison's *Accident Compensation*' (1981) 6 Law and Social Enquiry 1153; Geoffrey Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, 1979); Terence G. Ison, *Accident Compensation: A Commentary on the New Zealand Scheme* (London: Croom Helm Ltd., 1980).

[969] Section 97(2) of the Accident Compensation Act 1972.

[970] Stephen Todd, 'Forty Years of Accident Compensation in New Zealand' (2011) 28 Thomas M. Cooley Law Review 189, 192.

[971] Similar recommendations have been made elsewhere: Alan Brudner, *The Unity of the Common Law – Studies in Hegelian Jurisprudence* (University of California Press, 1995) 205; Lewis N. Klar, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 University of Toronto Law Review 80, 83.

The scheme adopted in New Zealand does not provide full compensation to the victim. The greater certainty of obtaining compensation comes at the price of obtaining lower individual awards. However, this choice has led to a number of unintended consequences. Failing to provide full compensation under the scheme has led to a significant increase in claims before the civil courts from claimants seeking to "top up" their statutory compensation award with an award for exemplary damages for which there is no bar to recovery in civil law under the scheme.[972] This raises important legal questions regarding the purpose of exemplary damages, as lawyers, in an effort to gain full compensation for their client's injuries not available under the scheme, stretch the definitional limits of exemplary damages to include harm not normally subject to such an award.[973] Although such claims have been restricted in more recent times,[974] the proliferation of these types of awards has led to businesses arranging additional third party insurance for such claims, adding to overall costs, and is also general evidence of dissatisfaction with the scheme.[975]

The bar on full compensation has also resulted in an expanded role for the criminal law within New Zealand society. Despite claims that tort law has not been missed,[976] 91.8% of participants in a non-binding citizens' initiated referendum in 1999 sought reform of the criminal justice system which would place greater emphasis on the payment of compensation by the wrongdoer to the victim.[977] The Sentencing Act 2002 was introduced which strengthened the requirement that convicted offenders provide reparation to their victims.[978] In order to assist the funding of such compensation the Sentencing (Offender Levy) Amendment Act 2009 was enacted, which provides that a charge will be levied against convicted offenders to be paid into a central fund from which the victims of crime may be compensated. Thus, part of the compensatory function

---

[972] *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA). See also: *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 (HC); *Bottrill v A* [2002] UKPC 49, [2003] 2 NZLR 721.

[973] *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 (HC).

[974] *Ellison v L* [1998] 1 NZLR 416 (CA); *Bottrill v A* [2001] 3 NZLR 622 (CA); *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149.

[975] *Couch v Attorney-General* [2010] NZSC 27; *per* Blanchard J at [67].

[976] Sir Geoffrey Palmer, 'New Zealand's Accident Compensation Scheme: Twenty Years On' (1994) 44 University of Toronto Law Journal 223.

[977] http://www.elections.org.nz/voting-system/referenda (accessed 5th November 2015). The referendum was held at the same time as the 1999 general election and there was an 84.8% voter turnout. The question that was put to the citizens was as follows:

> Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

[978] Section 12(3) of the Sentencing Act 2002.

of tort law which was purported to be adequately replaced by the statutory compensation scheme has now been diffused into, and rests uneasily within the realm of the criminal law.[979]

One of the principal arguments in favour of the New Zealand statutory compensation scheme was that it would be much more administratively efficient and cost-effective than the tort system.[980] However, the extent of costs' savings brought about by the scheme remains questionable. First, rather than costs decreasing, there is some evidence that the costs of administering the government scheme have increased substantially since its introduction.[981] Klar questions the costs' efficiency of the scheme, noting that the Woodhouse Report which recommended its introduction relied on statistical evidence from a small number of tort claims that appeared before the Supreme Court in New Zealand over a two-year period. This was an inappropriate comparison as it did not take into consideration the vast majority of tort claims which are settled long before they reach a courtroom.[982] Second, the introduction of the government scheme created other hidden costs. For example, Klar notes that the costs' assessment of the scheme did not take into consideration the fact that the removal of the deterrent effect of tort required the creation of a Safety Division to promote and regulate safe practices at additional expense.[983] Third, the costs' analysis undertaken of both systems does not take into consideration the effect that administration of the statutory compensation scheme has on other social services. As Klar observes: "[t]he financial aspect of the introduction of the program has been that other social welfare recipients, who are not included in the program, have begun to demand increases in the level of their benefits to match the benefits offered by

---

[979] For detailed analysis of the relationship between tort law and the criminal law see: Matthew Dyson (ed), *Comparing Tort and Crime: Learning from across and within Legal Systems* (Cambridge University Press, 2015) and Matthew Dyson (ed) *Unravelling Tort and Crime* (Cambridge University Press, 2014); and in the New Zealand context, Simon Connell, 'What is the Place of Corrective Justice in Criminal Justice? (2011) 19 Waikato Law Review 134.

[980] Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand*, Wellington, Government Printer, 1967). Otherwise known as the "Woodhouse Report" named after its Chairman, the Hon Justice Woodhouse.

[981] Ministerial Working Party on the Accident Compensation Corporation and Incapacity Report (1991) 51 and First Supplementary Report (1991). These were followed by a report by Hon W F Birch *Accident Compensation: A Fairer Scheme* (Wellington, 1991); which noted that the cost of the scheme an increased by an average rate of 25% per annum between 1985 and 1990. See also Margaret Devaney, 'A Comparative Assessment of Personal Injuries Compensation Schemes: Lessons for Tort Reform?' (2009) 13 Electronic Journal of Comparative Law, http://www.ejcl.org; citing (fn 25) The Press, 'Escalating Cost of Accident Compensation Must be Tackled' (Available at: http://www.stuff.co.nz/the-press/opinion/editiorials (accessed 25th September 2015), where it was noted that in the eight years prior to 2009 the cost of the scheme's claims increased from NZ$1.4 billion a year to NZ$3.2 billion a year. More recently, the Accident Compensation Corporation's Annual Report (2011) stated that outstanding claims liability had grown from NZ$9.4 billion in 2004-2005 to NZ$24.5 billion in 2010-2011.

[982] Lewis N. Klar, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 University of Toronto Law Review 80, 94.

[983] Ibid., 99.

accident compensation."[984] Moreover, it is submitted that the long terms costs cannot be definitively known as of yet given that the scheme has only been in operation for just over forty years. It may become increasingly costly to administer as the number of dependents relying on the scheme increase and those already receiving benefits grow older. Thus, much like former Chinese premier Zhou Enlai's analysis of the French Revolution,[985] it might at this point be "too early to say" what the full impact of the New Zealand scheme will be.

One of the aims of the scheme is to provide compensation for a wider range of harm than tort had traditionally done. At the same time, boundaries had to be drawn on the types of injury covered by the scheme. In fact, the kind of harm that is covered by the scheme is quite restrictive and the manner in which it treats certain types of harm is eerily similar to that adopted in tort. This approach has resulted in victims seeking alternative redress in the civil courts for injuries suffered not falling within the scope of the scheme. For example, the scheme applies only to personal injury caused by "accident"[986] and the meaning of this phrase has led to some strained judicial analysis in litigation. [987]

---

[984] Lewis N. Klar, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 University of Toronto Law Review 80, 100.

[985] Doubts have recently been cast as to whether Zhou Enlai was in fact referencing the 1789 French Revolution when this quote was attributed to him during US President Richard Nixon's visit to China in 1972. Some commentators believe that he may in fact have been referring instead to the 1968 students' riots in Paris. See Richard McGregor, Zhou's Cryptic Caution Lost in Translation, June 10, 2011. http://www.ft.com/intl/cms/s/0/74916db6-938d-11e0-922e-00144feab49a.html#axzz3qchnVDYc (accessed 5th November 2015).

[986] Section 5(1) of the Accident Compensation Act 1972 provides:

> Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or by any other person, and whether under any rule or any enactment.

[987] One rather peculiar example is that which occurred in *G v Auckland Hospital Board* [1976] 1 NZLR 638, In that case, the plaintiff was a patient raped by one of the hospital's employees. She brought a civil action seeking damages against the hospital. The hospital successfully defended the claim by arguing that the plaintiff's injuries were caused "by accident" and consequently the plaintiff was limited in her claim to compensation under the scheme. In interpreting the phrase "personal injury by accident", Henry J examined the purpose of the legislation as a whole:

> The injury (or death) is qualified by the term 'by accident' which seems to be me to preclude the test from being an inquiry into whether or not the person who caused the injury was an intentional wrongdoer, reckless wrongdoer, negligent wrongdoer or merely the innocent cause of the injury. That is the description of the actor and not a description of what the victim suffered ... The legislation must be construed from the point of view of the person who suffers the injury …

Concerns regarding the drawing of boundaries relating to recoverable harm and rising costs associated with claims have led to further restrictions on the types of cover and entitlements that were previously available.[988] For example, recovery for mental injury is restricted[989] while recovery for work-related gradual process, disease or infection is also barred.[990] The scheme applies essentially the same restrictions as tort law does to what are known as 'nervous shock' claims;[991] and also like tort law, cases involving "unwanted pregnancy" are not considered personal injury for the purpose of the scheme.[992]

Part of the attraction of a statutory compensation scheme like that in New Zealand is that it can provide for the fairer distribution of society's resources to compensate for losses arising from personal injury through a form of distributive justice; less compensation for more victims. However, difficulties also arise with the scheme in this regard. The statutory compensation scheme perpetuates income inequality through the social welfare system because it is based on the victim's earning capacity prior to the injury and not on the needs of the victim. As Klar observes "[u]nlike other social welfare programs which are concerned exclusively with the needs of citizens, accident compensation is concerned with the desire of citizens to maintain their standard of living despite disabling injury."[993] Indeed, given the generous welfare schemes (free medical care etc) which already exist within New Zealand society, Henderson

---

[988] See the Accident Rehabilitation and Compensation Insurance Act 1992.

[989] Section 21B(1) of the Accident Compensation Act 2001. The restrictions that apply to such claims are very similar to those which apply to our own common law negligence claim for 'nervous shock.' See: *Kelly v Hennessy* [1995] 3 IR 263.

[990] Section 318 of the Accident Compensation Act 2001. As a result, "common law damages were now the only remedies for work related stress claims, passive smoking and illnesses such Legionnaires disease contracted from defective air conditioning systems." See John Miller, 'Trends in Personal Injury Litigation: The 1990s' (2003) 34 Victoria University of Wellington Law Review 407, 410. See also James A. Henderson Jr, 'The New Zealand Accident Compensation Reform' (1981) 48 University of Chicago Law Review 781, 792, where the author opines:

> My criticism of the New Zealand system in this context is that there is no reason why victims of misfortunes other than accidents should not have equally valid claims to compensation as accident victims. Why, for example, should the working person whose leg must be amputated because of cancer be denied benefits because he lost his leg through disease rather than by accident? Diseases such as cancer may often cause more significant disruptions in people's lives than accidents.

[991] Section 21B(1) of the Accident Compensation Act 2001. The exclusion of nervous shock from the application of the scheme has resulted in law schools throughout New Zealand teaching the law of nervous shock in tort law courses for the first time in 18 years. See John Miller, 'Trends in Personal Injury Litigation: The 1990s' (2003) 34 Victoria University of Wellington Law Review 407, 408. See also Juliet Bull, 'New Zealand's Accident Compensation Scheme and Chronic Pain Syndrome' (2014) 45 Victoria University of Wellington Law Review 53.

[992] *Accident Compensation Corporation v D and Ballal* [2008] NZCA 576 (CA); approved in *Allenby v H* [2011] NZCA 251 (CA).

[993] Lewis N. Klar, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 University of Toronto Law Review 80, 99.

argues that the statutory scheme applies in fact to a very small percentage of victims who are "otherwise financially inconvenienced" and because of that the scheme is "in essence, a social welfare system for the middle and upper-middle classes."[994]

The New Zealand system is somewhat deficient in that it effectively dispenses with the principle that wrongdoers should take responsibility for their wrongdoing.[995] There is a danger by moving to the concept of collective responsibility that one is thereby creating a regime whereby nobody is responsible. That in turn raises questions about the deterrent effect of such schemes.[996] Indeed, there has been some evidence from New Zealand that removing the tort system and failing to replace it with an alternative means of promoting deterrence might have been related to an increase in accidents experienced in some industries in the years immediately following the introduction of the scheme.[997]

By rendering individualised justice secondary to the collective in all cases, the statutory compensation scheme fails in a moral and political sense to fully vindicate human dignity by eliminating the injured victim's right to hold the wrongdoer to account for his or her wrongdoing.[998] It fails to recognise the victim's consciousness of having been wronged by the

---

[994] James A. Henderson Jr, 'The New Zealand Accident Compensation Reform' (1981) 48 University of Chicago Law Review 781, 789.

[995] David Enoch, 'Tort Liability and Taking Responsibility' in John Oberdeek (ed.), *Philosophical Founndations of the Law of Torts* (Oxford University Press, 2014).

[996] James A. Henderson Jr, 'The New Zealand Accident Compensation Reform' (1981) 48 University of Chicago Law Review 781, 794-795, where the author questions the economic deterrence of the scheme:

> Generally, if actors are not required to pay a fair share of the costs of their activities, including the accident costs, they will tend to overengage in those activities whose costs they can most successfully escape from paying. Thus, if everyone were required to pay into a universal accident compensation fund on a flat-rate, per capita basis, those who engaged in comparatively safe activities would pay more than their share of the total accident costs generated by all activities, and those who engaged in relatively risky activities would pay less. The resulting wealth transfers would encourage actors at the margin (those indifferent to which sort of activities to engage in) to switch from safe to risky activities. Not everyone would switch, but enough would to cause the overall accident costs in the society to increase over what they would have been if those engaging in relatively safe activities had not been required to subsidize their risk-preferring fellow citizens. Resources would be misallocated to relatively risky activities; the increase in accident costs would constitute social waste.

[997] For example, Klar cites a study established by the Accident Compensation Commission (the Nordmeyer Report, 1977) to investigate the number of accidents in the freezing industry following the introduction of the compensation scheme. The study found that 'lost time injuries' increased by 92% in the two years following the introduction of the scheme and that accident rates doubled. See Lewis N. Klar, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 University of Toronto Law Review 80, 97.

[998] James A. Henderson Jr, 'The New Zealand Accident Compensation Reform' (1981) 48 University of Chicago Law Review 781, 797, where the author highlights the anomalous situation with the following example: "A person intentionally struck by another... would no longer be entitled to a legal judgment that his right to personal integrity has been violated."

violation of a social norm.[999] As a consequence of this restriction, individuals have sought to circumvent the scheme by devising imaginative ways of pursuing claims before the civil courts. For example, in *Re Chase*[1000] the New Zealand Court of Appeal was asked to consider whether nominal damages were recoverable outside of the scheme. In that case, the deceased was a gang member who was shot dead by police who raided his home. The police had mistaken an iron bar that the deceased was holding for the barrel of a gun. The family of the deceased brought civil proceedings seeking nominal damages of one dollar. The court held that the claim was barred by the scheme. While exemplary damages awards (which were not available in this case because the victim was deceased) had been recognised outside of the scheme, nominal damages were not to be treated in the same way, according to the court. Cooke P considered that the clear purpose of the litigation was "to ventilate the allegations of police misconduct in connection with the shooting." In Cooke P's view, because the facts surrounding the deceased's death had already been subject to an inquiry and an inquest, it was unnecessary to consider the matter further in the present proceedings. Of course what this decision fails to consider is that such inquests generally do not involve findings of liability or attribution of responsibility which can be so important to the family of the deceased person. Thus, despite claims that tort law has not been missed by New Zealanders, there is evidence that the loss of the right to personally vindicate one's dignity by holding the individual wrongdoer to account has not been satisfied under the statutory compensation scheme.[1001] What is more the criminal law has been deemed an inadequate substitute to fill this need,[1002] because, as Miller notes:

> Many victims considered that they lost control of the proceedings where the State became the prosecutor and the victim was relegated to the role of witness. Victims found themselves un-represented by counsel unlike the defendant. This made the option of civil proceedings more attractive. The victim was represented by counsel and had control of the proceedings.[1003]

---

[999] Steven D. Smith, 'The Critics of "Crisis": A Reassessment of Current Conceptions of Tort Law' (1987) 72 Cornell Law Review 765, 784:

> Lawyers know, however, that clients are not interested solely in the monetary amount of their recovery; they frequently want to proceed with cases just for the "principle" at stake. Experimental research confirms this observation: in simulated studies, social psychologists have found that injury victims feel most satisfied when the harmdoer provides compensation. If instead a third party pays compensation, victims are not as satisfied and may even feel that the payment constitutes a further inequity.

[1000] *Re Chase* [1989] 1 NZLR 325 (CA).

[1001] Sir Geoffrey Palmer, 'New Zealand's Accident Compensation Scheme: Twenty Years On' (1994) 44 University of Toronto Law Journal 223.

[1002] *G v G* [1997] NZFLR 49 (HC), where $85,000 was awarded in a civil action involving domestic abuse and rape.

[1003] John Miller, 'Trends in Personal Injury Litigation: The 1990s' (2003) 34 Victoria University of Wellington Law Review 407, 412.

Finally, one of the hallmarks of tort law which has marked its development over the centuries has been its ability to adapt to meet the needs of modern society and the new harms it creates. Under a statutory compensation scheme given its bureaucratic nature, such flexibility does not exist, which is one more reason not to dispense with the tort system. [1004]

There is merit in examining alternative compensation schemes as methods by which civil wrongs may be remedied. For example, the notion of periodic payments of compensation instead of lump sum awards is a mechanism that is most certainly worthy of further consideration.[1005] Moreover, there is an argument to be made that such schemes have a role in vindicating individual autonomy by providing some form of compensation for those who may not otherwise be able to access it through the tort system (with its related costs and delays). However, the introduction of such proposals should not come at the expense of our tort system. We have too much to lose if we do so especially in the absence of convincing evidence that it is in the best interests of society. Why was it so necessary to eliminate tort in favour of the statutory compensation scheme in New Zealand? Could such a system not have been introduced effectively in any other way? In Klar's view the justification for doing so was simply an economic one.[1006] The prevailing view was that it was imperative to the financial stability of the statutory scheme that the common law right of action in tort which victims would traditionally have availed be eliminated lest its continuing existence would divert much needed financial resources away from the statutory scheme. If one is to eliminate the

---

[1004] Lewis N. Klar, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 University of Toronto Law Review 80, 105-106, where the author writes:

> Over the years the courts have been able to expand and contract liability, to recognize new needs, to set new standards, and to recognize new economic realities. One of the disadvantages in legislating programs is that this tends to perpetuate the status quo. In New Zealand, the accident compensation bureaucracy has become a rather inflexible institution. It has been attacked as being too 'insurance-orientated' and for having lost sight of the original goals of its founders. Reform of the compensation process has been taken away from the courts and placed into the hands of politicians and bureaucrats.

[1005] See for example, the Civil Liability (Amendment) Bill 2015 which proposes to allow for the provision of periodic payment orders in cases before the Irish courts where a plaintiff has suffered catastrophic injury. See also, The Law Reform Commission, *Report on Personal Injuries: Periodic Payments and Structured Settlements* (LRC 54 – 1996).

[1006] Lewis N. Klar, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 University of Toronto Law Review 80, 90:

> The reason was a financial one. Funds would be needed for the proposed accident compensation program. The system of common law rights of action seemed, owing to its functional similarity, to be a logical source of these funds. The strategy was to minimize the values, objectives, and achievements of the common law system and to divert the funds used to support it into the accident compensation system.

individual's right to hold the wrongdoer to account – which is but one aspect of vindicating his or her dignity - one must have a stronger theoretical rationale for doing so other than the financial imperative of ensuring the viability of the scheme.

5.4 Tort Law and the Search for Principle

Tort law is a form of social regulation and as such it is not surprising that its development appears haphazard and lacking in coherence. As we have seen throughout this work, numerous efforts have been made to develop unitary theories of tort law in the belief that in so doing, coherence will be brought to bear on the field. Given tort law's history it is perhaps not surprising that each has, to a greater or lesser extent, been unsuccessful in the attempt. The failure to identify or agree upon the central unifying feature of tort law is not just of academic concern; it is also of real practical concern. Tort law has not survived for centuries without reason. It has played a fundamental role in maintaining social cohesion in civilised society. However, as society becomes ever more complex tort law must remain responsive. Despite increasing legislative intervention, tort law remains primarily judge-made law and it is essential that greater clarity be brought to judicial thinking on the subject and a single overriding guiding principle is developed. If such a normative guide could be identified, while it may not provide a clear answer in every case, it might at least clarify thinking and bring greater coherence, and therefore justice, to the law. It is submitted that such a normative principle can be found in the promotion of human dignity.

5.5 The Promotion of Human Dignity

The Oxford English dictionary defines 'dignity' as "the state or quality of being worthy of respect."[1007] *Human* dignity is that state or quality which is derived from our humanity. It is this quality that elevates us from animals. Human dignity demands respect because we "should value the human person, simply because he or she is human."[1008] This notion of dignity rests in each of us and captures "what one *is* rather than what one does."[1009] It is a matter of self-respect and respect for others. It is about who we are, how we conduct ourselves, how we are

[1007] Oxford English Dictionary (Oxford University Press, 2000).
[1008] Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates', in Christopher McCrudden (ed.), *Understanding Human Dignity* (British Academy, Oxford University Press, 2013) 2.
[1009] Robert E. Goodin, 'The Political Theories of Choice and Dignity' (1981) 18 American Philosophical Quarterly 91, 96.

viewed by others, and how we treat others.[1010] Thus, human dignity is a normative concept whose interpretation, "has been left to intuitive understanding, conditioned in large measure by cultural factors."[1011] The broad concept of dignity can provide us with a normative value by which decisions can be measured.[1012]

Notwithstanding the increasing recognition of, and need to protect human dignity, the usefulness of the concept as a policy tool has been criticised as being "hopelessly vague and excessively prone to manipulation."[1013] Some observe that "[i]t is a slippery and inherently speciesist notion, it has a tendency to stifle argument and debate and encourages the drawing of moral boundaries in the wrong places."[1014] While an admirable goal, many would argue that the concept of dignity is of little pragmatic usefulness. Generalised ideas of dignity provide a broad canvas on which both sides of a policy debate can use to justify their own position.[1015] Thus, the major difficulty with human dignity as a tool of policy implementation is that it can mean very different things to different people.[1016] As Shepherd notes, the concept is "putty" to

---

[1010] Lois Shepherd, 'Dignity and Autonomy After *Washington v Glucksberg*: An Essay About Abortion, Death, and Crime' (1998) 7 Cornell Journal of Law & Public Policy 431, 448, where the author observes:

> When we say that someone acts in a *dignified* manner, we are saying something about her behavior, not merely acknowledging the actor's ability to reflect upon her course of action and to act according to her choice (autonomy). Thus, we might consider an individual who meets an unfortunate fate with her head held high as acting with great dignity; an individual who babbles and cries is undignified.- We want our public officials to act with dignity; we call some of them "dignitaries." Our heroes act with dignity. It is not about winning; losers might lose with dignity. It is about deportment. It is about how others perceive us.

[1011] Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 American Journal of International Law 848, 849.

[1012] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655.

[1013] Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates', in Christopher McCrudden (ed.), *Understanding Human Dignity* (British Academy, Oxford University Press, 2013) 2.

[1014] Helga Kuhse, 'Is There a Tension Between Autonomy and Dignity?' in Peter Kemp et al. (eds), *Bioethics and Biolaw Vol. II: Four Ethical Principles* (Copenhagen, Rhodes International Science and Art Publishers and Centre for Ethics and Law, 2000) 61, 74.

[1015] David A. Hyman, 'Does Technology Spell Trouble with a Capital "T"?: Human Dignity and Public Policy' (2004) 27 Harvard Journal of Law & Public Policy 3, 5, where the author points out, that the parties in such cases:

> ... are only likely to agree on what is dignified for matters at the extreme end of the policy distribution (e.g., incest, slavery, and cannibalism). On matters that fall closer to the mean (e.g., organ transplantation, cloning, affirmative action, tobacco regulation, church-state relationships, hate crimes, private gun ownership, and euthanasia), the preferences of individual citizens, groups, and nations vary tremendously.

[1016] The concept has been described as "awkward, clumsy, sloppy, instrumental, inflationary and open to judicial vagary" and "that it is internally inconsistent and provides the citizenry with clear rules to follow." See: Rex D. Glensy, 'The Right to Dignity' (2011) 43 Columbia Human Rights Law Review 65, 107.

one's own law."[1028] Therefore, under this conception one respects another's dignity by providing each person with the space and freedom to make these choices. Protecting dignity guarantees non-interference with the exercise of those rights. Respect for dignity under this conception, therefore, is satisfied by respecting individual autonomy.[1029]

This conception of human dignity is dependent on the individual's capacity for rational thought and the ability to choose. This idea of humans as 'rational choosers' is derived from Kant's conception of the autonomous individual. Kant's second formulation of the categorical imperative provides that *"you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."*[1030] According to Kant, every individual is entitled to be treated not as a means by another i.e. one should not be subjected to another's will. Human beings, therefore, are intrinsically worthy of respect and interferences with individual autonomy can thus be interpreted as an attack on human dignity. Thus, this formulation of dignity entails the protection of individual free choice, respecting those choices and providing the social conditions by which effect should be given to those choices.[1031] Respect for individual autonomy and the individual's capacity for free choice has, as Pellegrino identifies, both negative and positive aspects. Thus, moral claims to autonomy can "come to mean a right of self-determination against those who would usurp that right" and implies "an obligation to foster the human capacity for self-determination, to enhance it, and to remove obstacles to its full operation."[1032]

According to this formulation, one's autonomy, and therefore, one's dignity, is best guaranteed by promoting individual rights which will protect one's freedom.[1033] This is done, as Nedelsky writes, "... by erecting a wall (of rights) between the individual and those around him."[1034]

[1028] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7, 10.

[1029] Lois Shepherd, 'Dignity and Autonomy After *Washington v Glucksberg*: An Essay About Abortion, Death, and Crime' (1998) 7 Cornell Journal of Law & Public Policy 431, 442. In other words, dignity, "... is the moral status appropriate to beings with the capacity for self-determination."

[1030] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (New York, NY: Cambridge University Press; 1997) 428–429.

[1031] Roger Brownsword, 'An Interest in Human Dignity as the Basis for Genomic Torts' (2003) 42 Washburn Law Journal 413, 420.

[1032] Edmund D. Pellegrino, 'Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship' (1994) 10 Journal of Contemporary Health Law Policy 47, 49.

[1033] Bailey Kulklin, 'Private Requitals' (2016) 64 Cleveland State Law Review 965.

[1034] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7, 12.

These rights – such as the right to freedom of expression, the right to privacy, for example – would also accord with Rawls's 'first principle of justice' on the basis that they would be chosen by hypothetical individuals operating behind a "veil of ignorance."[1035] In this way, this conception of dignity provides the normative justification for modern human rights law which is, "typically ... concerned to prevent treatment which damages a person's self-respect."[1036]

The liberal interpretation of dignity emphasising individualism based on autonomy and freedom of rational choice has been challenged by other commentators.[1037] One such criticism is that it fails to appreciate significance of the role that community plays in the development of individual autonomy and in the enhancement of our dignity and therefore well-being.[1038] As Nedelsky points out, the significance of community in this regard is not to be underestimated:

> ... people are not self-made. We come into being in a social context that is literally constitutive of us. Some of our most essential characteristics, such as our capacity for language and the conceptual framework through which we see the world, are not made by us, but given to us (or developed in us) through our interactions with others.[1039]

The emphasis in liberal theory on individual autonomy in its conception of dignity is also problematic. As Shepherd points out, the over-emphasis on individual autonomy within the notion of human dignity causes confusion and leads to the terms being used interchangeably to such a degree that they blend into one another such that they become indistinguishable as

---

[1035] John Rawls, *A Theory of Justice* (1971) (Revised edition, The Belknap Press of Harvard University Press, 1999). Discussed in greater detail in Chapter 3.

[1036] David Feldman, 'Human Dignity as a Legal Value: Part 1' (1999) 16 Public Law 682, 686.

[1037] Charles Taylor, 'Atomism' in Shlomo Avineri and Avner De-Shalit (eds.) *Communitarianism and Individualism*, (Oxford: Clarendon Press, 1992) 29-50. See also Linda C. McClain, '"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence' (1992) 65 Southern California Law Review 1171, 1174, where the author summarises some feminist criticisms of liberalism in this regard; "Liberalism masculine jurisprudence has exalted rights over responsibilities, separateness over connection, and the individual over the community."

[1038] See Charles W. Lidz & Robert M. Arnold, 'Rethinking Autonomy in Long Term Care' (1993) 47 University of Miami Law Review 603, 608, where the authors observe:

> All human life takes place in a historical, social and cultural context. Individuals' values and actions are necessarily affected by their past and environment. People do not autonomously choose their genetic background, their parents, the time period or society in which they are born or raised. All these factors place limits on the persons they are and will become, and make the notion of an independent, self-ruled person unrealistic.

[1039] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7, 8.

concepts.[1040] Thus, the prospect exists that respect for dignity of the individual would be satisfied simply by respecting the freedom of choice of others exercising Kant's "rational will." This conception of dignity presupposes that the individual has the capacity to exercise free will in making choices. It therefore follows that only those who have the capacity to choose have dignity. As Goodin writes, "respecting choices entails a conception of rights as protected choices, implying that: only people who can choose can have rights; and they can have rights only insofar as they can choose ..."[1041] Conceivably, therefore, under this formulation of dignity, only those persons capable of exercising independent free will have dignity. Such a view would deny dignity to those persons who lack such capacity like minors, the mentally incapacitated and prisoners, for example.[1042]

5.5.1.2 *Relational Dignity*

The liberal interpretation of dignity may be contrasted with the communitarian or relational ideal. In this form, dignity cannot be interpreted in isolation but must also take into consideration what is referred to in the Preamble to the Irish Constitution, as "the common good." Under this conception, dignity is not solely derived from the autonomy of the atomistic individual but also comprises consideration of a larger, interrelated community of persons within a society i.e. it is a relational concept. It represents "our right to be individuals while co-existing in one society."[1043] Under this approach the emphasis is on the individual residing

---

[1040] Lois Shepherd, 'Dignity and Autonomy After *Washington v Glucksberg*: An Essay About Abortion, Death, and Crime' (1998) 7 Cornell Journal of Law & Public Policy 431. See also Robert E. Goodin, 'The Political Theories of Choice and Dignity' (1981) 18 American Philosophical Quarterly 91, 96, where the author observes:

> ... it has now become commonplace to substitute "capacity for choice" for "dignity." This makes the injunction to "respect the dignity of people" perilously close to the injunction to "respect the choices of people." The point of the former principle was just the opposite, that we should respect people *rather* than their choices. If the capacity to choose is what we respect about people, the two principles become virtually equivalent.

[1041] Robert E. Goodin, 'The Political Theories of Choice and Dignity' (1981) 18 American Philosophical Quarterly 91, 98.

[1042] See, Lois Shepherd, 'Dignity and Autonomy After *Washington v Glucksberg*: An Essay About Abortion, Death, and Crime' (1998) 7 Cornell Journal of Law & Public Policy 431, 438, for analysis of the role of dignity and autonomy in the abortion debate. In Ireland, the courts have acknowledged the dignity of prisoners, notwithstanding the restrictions which might exist on their individual autonomy. In *Creighton v Ireland* [2010] IESC 19, at [4]; the Irish Supreme Court found that the prison authorities were not negligent in failing to prevent an attack against a fellow inmate. The plaintiff claimed that the attack could have been avoided had a stricter regime of searches and surveillance been introduced by the prison authorities. Fennelly J disagreed, stating that the prison authorities "must balance the protective function and possible demand for instructive searches against the need to permit prisoners an appropriate degree of freedom of movement and human dignity."

[1043] Jeremy M. Miller, 'Dignity as a New Framework, Replacing the Right to Privacy' (2007) 30 T. Jefferson Law Review 1.

within the community not one who is divorced from it. This relational formulation understands that "individuals are socially and historically situated, bound together by ties of tradition and mutual obligation."[1044]

Kant's work in the Metaphysics has also been used to justify the relational aspect of dignity.[1045] While Kant emphasised the importance of individual free will by insisting that such persons are not to be used as a "means to an end," the corollary is that you must not use others in a similar way. Kant's instruction, therefore, was that we must respect ourselves *and* others. This utopian society based on mutuality of respect was described by Kant as "the Kingdom of Ends."[1046] Contrary to utilitarianism, Kant's conception of the 'Kingdom of Ends' does not ignore the "distinction between persons" by pursuing the maximisation of a singular conception of the good at the expense of the interests of individuals within that group. [1047] Instead, Kant envisages a society created through "rational agreement of a plurality of distinct and equal persons who freely choose to unite their ends on terms that respect each one's autonomy."[1048]In this society individual autonomy is not limitless and is bounded by the requirements of the dignity of others within the community. Thus, this conception of human dignity "speaks less to what is special about humans qua humans and more to what is special about a particular community's idea of civilised life and the concomitant commitments of its members."[1049] Thus, instead of acting atomistic manner, it recognises that we are, in essence, social beings.[1050]

[1044] Charles W. Lidz & Robert M. Arnold, 'Rethinking Autonomy in Long Term Care' (1993) 47 University of Miami Law Review 603, 609.

[1045] George P. Fletcher, 'Human Dignity as a Constitutional Value' (1984) 22 University of Western Ontario Law Review 171. See also Bryan M.E. McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013) para [1.01] where the authors write, "[s]ince human beings are social animals they pursue their interests in a social context."

[1046] Allen W. Wood, 'What is Kantian Ethics?' in Allen W. Wood (ed. and trans.) *Groundwork for the Metaphysics of Morals, Immanuel Kant* (Yale University Press, 2002) 162, where the author offers the following interpretation of Kant's thesis:

> Kant's own basic principle is that we must see ourselves as part of an ideal community, a "realm of ends" in which all human ends are united and mutually supporting. The most basic object of value in Kantian ethics is therefore the rational being not as an isolated individual but as the object of a set of common laws *uniting rational beings in a community*.

[1047] John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971) 27.

[1048] Allen W. Wood, 'What is Kantian Ethics?' Allen W. Wood (ed. and trans.) *Groundwork for the Metaphysics of Morals, Immanuel Kant* (Yale University Press, 2002) 162.

[1049] Roger Brownsword, 'An Interest in Human Dignity as the Basis for Genomic Torts' (2003) 42 Washburn Law Journal 413, 422.

[1050] Alasdair MacIntyre, *After Virtue – A Study in Moral Theory* (3rd ed.) (University of Notre Dame Press, 2007) 213., where the author vividly describes the role community plays in our development as follows:

The relational conception of human dignity acknowledges not only individual rights but also the responsibilities each of us owe others residing within society. In this context, therefore, "appeals to human dignity draw on what is distinctively valued concerning human social existence in a particular community."[1051] This approach to human dignity therefore underpins the promotion of socio-economic rights deemed necessary to human dignity in order to provide the individual with the supportive societal environment needed to contribute to human flourishing and to truly vindicate freedom of choice.[1052] While the individualistic approach to dignity would imply negative freedom, the relational approach requires the law "to go further, imposing positive duties on people to act in ways which optimise the conditions for social respect and dignity."[1053]

It is submitted that it is the relational conception of human dignity which best provides the normative basis for the interpretation and application of tort rules. This notion of dignity exists within all of us simply on the basis that we are human and are therefore deserving of respect.[1054] This notion of respect is critical to every person's well-being and is essential to social cohesion. Under this approach, dignity is not just about respecting our choices nor is it entirely dependent

---

> ... what the agent is able to do and say intelligibly as an actor is deeply affected by the fact that we are never more (and sometimes less) than the co-authors of our own narratives. Only in fantasy do we live what story we please. In life ... we are always under certain constraints. We enter upon a stage which we did not design and we find ourselves part of an action that was not of our making. Each of us being a main character in his own drama plays subordinate parts in the dramas of others, and each drama constrains the others.

[1051] Roger Brownsword, 'An Interest in Human Dignity as the Basis for Genomic Torts' (2003) 42 Washburn Law Journal 413, 422.

[1052] See generally Gerry Whyte, *Social Inclusion and the Legal System – Public Interest Law in Ireland*, (2nd ed, Institute of Public Administration, 2015); Desmond M. Clarke, 'The Concept of the Common Good in Irish Constitutional Law' (1979) 30 Northern Irish Law Quarterly 319.

[1053] David Feldman, 'Human Dignity as a Legal Value: Part 1' (1999) 16 Public Law 682, 686-687. See also Marc A Loth, 'Corrective Justice and Distributive Justice in Tort Law: On the Restoration of Autonomy and a Minimal Level of Protection of the Victim' (2015) 22 Maastricht Journal of European and Comparative Law 788, 803, where the author applies the 'capability approach' i.e. to properly vindicate a person's autonomy each individual must have certain capabilities and be free to use them as he or she wishes. In this context therefore:

> ... the principles of distributive justice can imply that the restoration of the autonomy of the victim is an appropriate response of the government as well. From the idea that a just society offers her citzens an equal right to a worthy life, the notion of a capability connectes individual needs with public rights. This bridges the gap between public law and private law as well. The capability approach fits well with the growing influence of fundamental rights in private law (the constitutionalization of private law). From this perspective, public institutions like the legislator, the government, and the judiciary have a responsibility to safeguard for citizens a minimum threshold of human capabilities that constitute a just society. For political authorities like the legislator and the government this is more or less self-evident, but the judiciary has a responsibility in this respect as well, especically when tort causes the victim to fall below an accepted minimal standard in society. The capability approach therefore not only provides a framework for the justification of liability, but also a theory on the just distribution in society.

[1054] Lois Shepherd, 'Dignity and Autonomy After *Washington v Glucksberg*: An Essay About Abortion, Death, and Crime' (1998) 7 Cornell Journal of Law & Public Policy 431, 456.

on our capability for rational thought, as suggested by some interpretations of Kant.[1055] One can have dignity even where one lacks the autonomy to choose.[1056] Instead, it encompasses a normative element which dictates the manner in which we conduct ourselves as individuals and in our relationship with others measured in accordance with societal values.[1057] In this way, as Goodin writes, "the demands of dignity impose a minimum standard of decent treatment for every individual not to be sacrificed for any less weighty considerations."[1058] The key is that we should respect persons and because we respect persons we should respect their choices. It is not that we respect the choice, rather we respect the person making the choice. We must also acknowledge the impact that individual choices affect the dignity of others. In this way, respect for human dignity is not dependent on our capacity to choose.[1059]

Schachter notes that this concept of dignity is justified on the basis that respecting individual choice implies responsibility for those choices by individuals. Consequently, dignity not only entails the protection of individual autonomy: "[i]t also embraces a recognition that the individual self is a part of larger collectivities and that they, too, must be considered in the meaning of the inherent dignity of the person."[1060] Because the community within which we reside and the relationships we have created form part of us and are important to our general well-being,[1061] it is important that community values of what is or is not dignified should be

---

[1055] Allen E. Buchanan, 'Assessing the Communitarian Critique of Liberalism' (1989) Ethics 852, 853, where the author summarises communitarian criticism in this regard as follows, "[L]iberalism presupposes a defective conception of the self, failing to recognize that the self is "embedded" in and partly constituted by communal commitments and values which are not objects of choice."

[1056] Robert E. Goodin, 'The Political Theories of Choice and Dignity' (1981) 18 American Philosophical Quarterly 91, 96, where the author explains:

> Consequently, individuals capable of precious little free choice can still possess dignity or suffer indignities. A prisoner of war, although having few opportunities for autonomous action, can nevertheless carry himself with great dignity. That, recall, was what the "Bridge over the River Kwai" was all about. And a paraplegic, utterly at the mercy of natural necessity, still suffers an "indignity" when the nurse examines him in the public ward of the hospital without drawing the curtain."

[1057] Bailey Kulklin, 'Constructing Autonomy' (2015) 9 New York University Journal of Law & Liberty 375, 435, where the author observes that 'wrongfulness' "... the degree of disrepectfulness, is culturally situated. A pat on the back may be acceptable in some circumstances or societies, but not others."

[1058] Robert E. Goodin, 'The Political Theories of Choice and Dignity' (1981) 18 American Philosophical Quarterly 91, 97.

[1059] Ibid., 94.

[1060] Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 American Journal of International Law 848, 851.

[1061] Allen E. Buchanan, 'Assessing the Communitarian Critique of Liberalism' (1989) Ethics 852, 857: where the author summarised the arguments favouring the role of community in the welfare of the individual (albeit in the context of where he disagreed with such sentiments):

> The claim that community is a fundamental good for human beings may be understood in two ways, either as a descriptive psychological generalization that human beings strongly desire community, or at least find it deeply

part of the equation.[1062] This interpretation of dignity is nothing more than an acknowledgment that "[d]ignity is socially constructed ... influenced by collective human action and decision-making ...,"[1063] and ensures that subjective views of one's own self-worth do not dominate. Instead, an objective approach will be taken to determine one's dignity.[1064]

Essentially, the relational aspect of human dignity recognises the fact that there is more to being human than respecting our capacity for self-determination.[1065]Having dignity means more than that – it is about respect for oneself and others as persons. Such respect may involve sacrificing individual autonomy if it interferes with the dignity of another or where it conflicts with contemporary notions of what is 'dignified.' It also recognises the fact that every person has dignity even where such individuals are incapable of exercising autonomy. This approach may involve the State taking "a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices which, in the state's view, interfere with the dignity of the individual, a social group or the human race as a whole."[1066] The relational notion of dignity therefore acknowledges that humans are social

---

satisfying or fulfilling when they achieve it, or as a normative claim that community is an important objective good for human beings.

[1062] Lois Shepherd, 'Dignity and Autonomy After *Washington v Glucksberg*: An Essay About Abortion, Death, and Crime' (1998) 7 Cornell Journal of Law & Public Policy 431, 450, where author observes that the concept of dignity, "refer[s] to contemporary attitudes of how one should live an independent life."

[1063] Denise G. Réaume, 'Indignities: Making a Place for Dignity in Modern Legal Thought' (2002) 28 Queen's Law Journal 61, 87.

[1064] Robert E. Goodin, 'The Political Theories of Choice and Dignity' (1981) 18 American Philosophical Quarterly 91, 97, where the author writes:

> ... respecting people's dignity does not commit us to protecting their freedom of choice at any cost. Constraints on one's freedom are justifiable not only to protect freedom itself but also to protect the dignity of people in any way it might be threatened, including through the unconstrained exercise of another's free choice.

[1065] Isaiah Berlin, 'Two Concepts of Liberty' (1958) in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) 20:

> What I may seek to avoid is simply being ignored, or patronized, or despised, or being taken too much for granted-in short, not being treated as an individual, having my uniqueness insufficiently recognized, being classed as a member of some featureless amalgam, a statistical unit without identifiable, specifically human features and purposes of my own. This is the degradation that I am fighting against not equality of legal rights, nor liberty to do as I wish (although I may want these too), but for a condition in which I feel that I am, because I am taken to be, a responsible agent, whose will is taken into consideration because I am entitled to it, even if I am attacked and persecuted for being what I am or choosing as I do.

[1066] David Feldman, 'Human Dignity as a Legal Value: Part 1' (1999) 16 Public Law 682, 685. See also Lois Shepherd, 'Dignity and Autonomy After *Washington v Glucksberg*: An Essay About Abortion, Death, and Crime' (1998) 7 Cornell Journal of Law & Public Policy 431, 451, where the author explains: "[t]he choices made by an individual would be subject to our scrutiny and approval or disapproval as conforming to an expectation about dignified behavior."

animals who are "more interdependent than independent"[1067] and recognises that decisions made by individuals within society "are constrained by a variety of social, economic, religious, psychological, and familial pressures that produce choices we often perceive to be anything but free."[1068] In this way, dignity "implies a departure from classical individualism, but at the same time rejects any form of collectivism."[1069]

The relational concept of dignity may be criticised on the basis that it adopts a paternalistic or 'nanny-state' approach towards individual freedom. Restricting individual autonomy in the interests of 'the common good' works both ways and, as Feldman writes, "may subvert rather than enhance choice ... Once it becomes a tool in the hands of lawmakers and judges, the concept of human dignity is a two-edged sword."[1070] A celebrated example of this dilemma is the French 'dwarf-throwing' case where a ban on dwarf-throwing as a form of amusement in local clubs was upheld on the basis that it was necessary in order to protect human dignity within French society at that time.[1071] This was so despite the fact that the ban was challenged by one dwarf who was employed to take part in such activities and freely participated in doing so. The dwarf contended that to ban such activity was to undermine his dignity to freely take part in such activity. However, the state sought to limit that right in order to protect human dignity in the objective sense. The ban was upheld on the basis that "dignity is deemed to be good for everyone, whether or not they share the State's model of dignity or want it imposed on them."[1072]In essence, it is the price that we pay as humans for living in a socially-cohesive society.[1073] As Brudner explains it:

> ... neither the individual self nor the common good is an absolute end to the exclusion of the other, for each needs the other to be fully the end that it inherently is. The common good cannot be the end or good *of* the individual if it annihilates his or her distinctive identity; rather, it is

[1067] Bruce J. Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 Villanova Law Review 1705, 1769.
[1068] Ibid.
[1069] Kurt Sontheimer, 'Principles of Human Dignity in the Federal Republic,' in Paul Kirchof & Donald Kommers (eds) *Germany and Its Basic Law: Past, Present and Future* (Nomos Verlagsgesellschaft, 1993) 213, 215.
[1070] David Feldman, 'Human Dignity as a Legal Value: Part 1' (1999) 16 Public Law 682, 685.
[1071] *Ville d'Aix-en-Provencez*, 1996 Dalloz 177 (Conseil d'Etat) req. Nos. 143-578; *Cne de Morsang-sur-Orge*, 1995 Dalloz 257 (Conseil d'Etat) req nos. 136-727.
[1072] David Feldman, 'Human Dignity as a Legal Value: Part 1' (1999) 16 Public Law 682, 700.
[1073] Denise G. Réaume, 'Indignities: Making a Place for Dignity in Modern Legal Thought' (2002) 28 Queen's Law Journal 61, 92-93, where the author acknowledges the flaw in her definition of dignity by admitting that objective notions of dignity may be undermined by bias inherent in the social convention in question.

> the good only in being validated as such through the individual's free deference to community as to the basis of his or her independent worth.[1074]

While relational dignity is not dependent on an individual's capacity to exercise free will,[1075]that is not to say that autonomy is not a highly valued ingredient of what is means to have dignity.[1076] Protecting individual freedom to choose is an important element of what makes us human and should not be surrendered too readily in the interests of the greater good. Instead, the task should be to "combine the claim of the constitutiveness of social relations with the value of self-determination."[1077] Thus, the optimal promotion of human dignity is a question of striking the appropriate balance between recognition of the fact that individuals cannot operate in isolation without regard for others while at the same time providing those individuals with the space in which their capacity for free choice is allowed to flourish.[1078]

There are strong psychological reasons for supporting human dignity within society.[1079] Winick argues that emphasis on human choice rather than governmental control is much better for individuals and for society. In such a society, people are happier as exercising their choice is "more self-satisfying"[1080] and allowing individuals to set their own goals "often enhances the likelihood of success in attaining their goals."[1081] Adopting one's goals allows one to pursue one's own happiness and choice in adopting those goals leads to greater motivation in seeking

---

[1074] Alan Brudner, *The Unity of the Common Law – Studies in Hegelian Jurisprudence* (University of California Press, 1995) 94.

[1075] Lois Shepherd, 'Dignity and Autonomy After *Washington v Glucksberg*: An Essay About Abortion, Death, and Crime' (1998) 7 Cornell Journal of Law & Public Policy 431, 460:

> ... while respecting the dignity of an individual requires that we respect her autonomy, it also requires more since there are other aspects to being human besides rationality. Unconditional dignity requires a number of responses from us to the individual; only a subset of those responses stems from our respect for the autonomy of rational individuals.

[1076] Ibid., 451, where, in the context of the right-to-die debate, the author notes:

> Identifying "choices central to personal dignity and autonomy," then, does not mean that we leave those choices to the individual because we respect her ability and the importance to her self-determination to make them. Instead, we protect choices that, properly made, promote dignity (proper conduct and appearance) and autonomy (independent living).

[1077] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7, 9.

[1078] Ibid., 21, where the author writes, "[t]he task, then, is to think of autonomy in terms of the forms of human interactions in which it will develop and flourish."

[1079] Bruce J. Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 Villanova Law Review 1705, 1755-1768.

[1080] Ibid., 1756.

[1081] Ibid., 1754-1756.

to achieve them.[1082] Furthermore, giving greater freedom in decision making facilitates the development of individuals "as self-determining adults" thereby enabling individual self-fulfilment.[1083]

In summary, therefore, individual well-being is grounded in respect for oneself and others. Part of what it means to be respected is a recognition that we are happier when are granted a protective space in which we can exercise our capacity to choose. Equally, however, the relationships we enter into which are the by-product of participating in society play a crucial role in our well-being. As Buchanan writes:

> Without the protection for autonomy and independence guaranteed by liberal rights, the individual, absorbed in community, unable to reflect critically upon her role, her obligations, and the character of her community as a whole, may become an unwitting accomplice in an immoral way of life. Indeed, the individual may vanish. But the danger is even graver: as the ability to choose and revise one's ends diminishes and the critical distance between oneself and possible courses of action shrinks, one's very status as a moral agent becomes precarious.[1084]

As social animals, our place within the community is an essential part of this. Humans are dependent on the relationships that we create while living in the community. While respecting our autonomy is a critical part of our well-being so too is broader respect for us as persons. This broader notion of human dignity emphasises our responsibilities as social beings and less so, our individual rights as persons. It represents the normative values of a more caring society. Within this community we must leave room for the individual, otherwise there is a danger that he or she will be lost and individuals will become "social robots who have abdicated their moral agency (or never been allowed to develop it)."[1085] The protection of human dignity, therefore, is not limited to the protection of our capacity for reasoned thought and capacity for self-determination: it also relates to our conduct and how we are perceived and treated by others.

Striking the balance between the interests of individualism and collectivism is a challenge. Proper respect for human dignity should recognise the value of social relations to human well-being while also leaving some room for individual autonomy to flourish. Priority should be given to autonomy unless doing so would undermine our obligations to others within that

---

[1082] Bruce J. Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 Villanova Law Review 1705, 1761.
[1083] Ibid., 1754-1764.
[1084] Allen E. Buchanan, 'Assessing the Communitarian Critique of Liberalism' (1989) Ethics 852, 871-872.
[1085] Ibid., 872.

community as judged by the normative values of that society. To what degree must we consider the dignity of others when exercising our free will? Requiring one to consider the interests of everyone residing within that society might not reflect the appropriate balance as it would be too burdensome for the individual and would therefore undermine individual autonomy. As Dworkin points out:

> The general surrender of personality and autonomy it contemplates would leave people too little room for leading their own lives rather than being led along them; it would destroy the very emotions it celebrates. Our lives are rich because they are complex in the layers and character of the communities we inhabit. If we felt nothing more for lovers or friends or colleagues than the most intense concern we could possibly feel for all fellow citizens, this would mean the extinction not the universality of love.[1086]

Thus, the proper protection of human dignity would prioritise autonomy while also recognising the importance of social relations to our general well-being as persons. While prioritising the value of individual autonomy, this notion of human dignity also recognises that as members of a moral community we must have regard for its values. Our community obligations should not be allowed to dilute our autonomy entirely. Thus, our obligations to others are not all-encompassing and may be limited, for example, to considering those who are in a special relationship to us.[1087]

5.5.2 The Infringement of Human Dignity – A Constitutional or Tortious Violation?

The concept of dignity already has a strong pedigree in Irish law.[1088] The preamble to the Irish Constitution expressly states that its goal is the promotion of the dignity and freedom of the

---

[1086] Ronald Dworkin, *Law's Empire* (The Belknap Press of Harvard University Press, 1986) 215.

[1087] Consider, for example, Lord Atkin's famous speech in *Donoghue v Stevenson* [1932] AC 562, 580, where he laid down the conceptual foundation for the law of negligence and specifically, the duty of care based on his 'neighbour principle' and guided very much by our relations with others in a limited sense:

> ... in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

[1088] Gerry Whyte, *Social Inclusion and the Legal System – Public Interest Law in Ireland*, (2nd ed, Institute of Public Administration, 2015) 103, where the author observes that both notions of individual autonomy and communitarian concerns are embedded within the Constitution:

individual.[1089] The concept of dignity has formed the justificatory basis for the unenumerated personal rights guaranteed under the Constitution.[1090] The protection of human dignity has also gained international recognition. Following the atrocities of Nazism during World War II the concept has found its way into various international legal instruments as the foundational underpinning of human rights.[1091] It is the communitarian idea of human dignity that is incorporated into the Irish Constitution and which is also reflected in the jurisprudence of the Irish courts.[1092]

> Both philosophies, moreover, are represented in the Irish Constitution. The constitutional guarantees of personal liberty, freedom of expression, freedom of assembly, freedom of association and freedom of religion are clearly inspired by the liberal tradition, while the provisions relating to the family and to private property are clearly derived from the communitarian tradition of Roman Catholic social teaching.

For example, in *Fleming v Ireland* [2013] IESC 19, the Irish Supreme Court held that the constitutional right to life guaranteed under Article 40.3.2 did not, as a corollary include granting the citizen a right to die. In limiting human autonomy in this regard, Denham CJ stated [110]:

> ... the appellant invokes constitutional values of autonomy, self-determination and dignity. It is undoubted that the Constitution recognises and respects these general values in the rights protected by it. It does not follow, and it is not claimed, however, that every law which impinges on the life of individuals is even *prima facie* inconsistent with the Constitution. Whether therefore values of autonomy, self-determination and dignity, as they find expression in the rights guaranteed by the Constitution, provide constitutional protection for the performance of specific acts depends on a concrete analysis of the impact of any law which is impugned in a particular case on the life of the individual, and a careful consideration of the provisions of the Constitution and the values its protects in the rights it guarantees.

Denham CJ was careful to distinguish cases such as this one where the applicant wanted to end her own life, which she was entitled to do, with the right of a competent individual in refusing medical treatment to artificially extend their own life as occurred in *Re Ward of Court (No.2)* [1995] IESC 1. In that case, the Supreme Court upheld the ward's right to refuse medical treatment which would have artificially prolonged her life in order to allow "nature to take its course and for the ward to die with dignity." (*per* Hamilton CJ, at [195]).

[1089] The Preamble states: "And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained ..."

[1090] In *Re Ward of Court (withholding medical treatment) (No. 2)* [1995] IESC 1; [1996] 2 IR 73, "[a]n unspecified right under the Constitution to all persons as human persons is dignity - to be treated with dignity", *per* Denham J, [351].

[1091] For example, Article 1 of the Universal Declaration of Human Rights states "All human beings are born free and equal in dignity and rights." Similarly, in the International Covenant on Civil and Political Rights, Article 10 provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

[1092] For example, in *W v Ireland (No2)* [1997] 2 IR 141, 164, where Costello P noted that "[t]he rights guaranteed under the Constitution are not absolute rights ... and their exercise and enjoyment may be, and frequently are, limited by reason of the exigencies of the common good." See also Gerry Whyte, *Social Inclusion and the Legal System – Public Interest Law in Ireland*, (2nd ed, Institute of Public Administration, 2015) 31, where the author argues that the traditional interpretation of the doctrine of the separation of powers has allowed the courts to avoid questions of distributive justice, a position he disagrees with:

> My difficulty with this position, however, is that it completely ignores the fact that the Irish Constitution derives its philosophical inspiration from two very different sources – liberal democracy and Christian democracy. The former prizes the autonomy of the individual and rejects the idea that any other conception of the common good can be objectively justified. The latter, however, argues that it is possible to discern the existence of an objective moral order and that a key element in such order is the recognition of the mutual interdependence of individual and social progress. In particular, Christian democracy promotes the value of social inclusion and recognises socio-economic rights as indispensable to the common good. Reliance on this aspect of the Constitution would, therefore, in my

While the protection of dignity has been an essential feature of the Irish Constitution and subsequent jurisprudence, there has been a stark reluctance on the part of the judiciary to explicitly invoke dignitary interests in developing tort doctrine mainly due to what Binchy describes as "the obscure relationship between the Constitution and tort law."[1093] In the Irish Supreme Court judgment of *Meskell v CIÉ,*[1094] Walsh J recognised that individuals are entitled to seek redress for infringement of their constitutional rights from others who have transgressed those rights. This was significant step as it confirmed the principle that the violation of constitutional rights gave rise to a cause of action not only vertically between the individual and the State but also horizontally between private individuals. However, the application of this cause of action was subsequently limited by the Irish Supreme Court in *Hanrahan v Merck Sharp and Dohme*[1095] to infringements where existing tort actions were "basically ineffective" in providing redress.[1096] Thus, tort law is looked upon as the primary mechanism by which infringements of a citizen's constitutional rights should be vindicated and where tort law is deemed to be ineffective in addressing the issue then, and only then, should that individual have recourse directly to the Constitution for violation of these rights.

Notwithstanding the limitations imposed on *Meskell*, the principles outlined therein have been used to develop an emerging jurisprudence in areas - such as the right to privacy to name just one - founded on constitutional values of individual dignity.[1097] However, as Binchy points out, this approach "is an unsatisfactory strategy" and "the courts should reassess the tort repertoire in the light of constitutional values and rights,"[1098] one of which is the concept of dignity.

---

opinion, justify a robust approach on the part of the courts towards problems of social inclusion where it is apparent that such problems are being neglected by ordinary politics.

[1093] William Binchy, 'Meskell, The Constitution and Tort Law' (2011) Dublin University Law Journal 339. See also Bryan M.E. McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013), [1.45] to [1.124] for detailed analysis.

[1094] *Meskell v CIÉ* [1973] IR 121.

[1095] *Hanrahan v Merck Sharp and Dohme* [1988] ILRM 629 (SC).

[1096] Ibid., 636.

[1097] See *Herrity v Associated Newspapers [Ireland] Ltd* [2008] IEHC 249 and *Hickey & Anor -v- Sunday Newspapers Ltd* [2010] IEHC 349, where a private tort claim for invasion of privacy was recognised in actions between non-state actors was recognised on the basis of an unenumerated personal constitutional right upheld in cases such as *McGee v Attorney General* [1974] IR 284 (SC) and *Kennedy & Arnold v Ireland* [1988] ILRM 472 (HC).

[1098] William Binchy, 'Meskell, The Constitution and Tort Law' (2011) Dublin University Law Journal 339.

Despite the judicial handbrake that has been placed on *Meskell*, some members of the judiciary, Hogan J in particular,[1099] have displayed a willingness to break free from the shackles of traditional tort actions and uphold claims for infringement of human dignity as protected under the Irish Constitution.[1100] One such example is the Irish High Court decision in *Sullivan v Boylan & Others*.[1101] In that case, the plaintiff lived alone and became involved in a dispute with the first named defendants who were building contractors regarding monies owed on building work that the plaintiff had engaged the first named defendants to carry out. The debt and its possible extent were in dispute and the first named defendants placed the matter in the hands of a debt collector. It was then that a series of acts of harassment of the plaintiff by the debt collector occurred. He regularly called the plaintiff and sent her threatening emails and texts, appeared in her house unannounced on one occasion, parked his van directly outside her house with the signage – "Licensed Debt Collectors" – prominently displayed, and threatened to call her neighbours. The plaintiff was granted an injunction prohibiting this ongoing harassment, which the court found to be in breach of her constitutional rights to the protection of the person (Article 40.3.2) and the inviolability of the dwelling (Article 40.5).

The principal tort actions which Hogan J identified as offering a potential remedy for the violations which the plaintiff was subjected to were the law of nuisance and the rule in *Wilkinson v Downton*.[1102] However, both causes of actions were dismissed by Hogan J on the basis that they were "basically ineffective" in protecting the plaintiff's interests in this case. He dismissed the law of nuisance as a viable cause of action on the basis that that tort was designed to protect property interests which was not relevant to the case at hand. The rule in *Wilkinson v Downton* was dismissed on the basis that an essential feature of that tort was that the acts of the wrongdoer must be calculated to cause physical harm. In this case, while the plaintiff had lost weight and had been prescribed sedatives because her sleeping patterns had been disturbed, she had not suffered physical harm. Rather, the actions of the debt collector had humiliated her and caused her great anxiety and distress. The interest deserving of protection in this case,

---

[1099] *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, [9], where Hogan J stated "[b]y solemnly committing the State to protecting the person, Article 40.3.2 protects not simply the integrity of the human body, but also the integrity of the human mind and personality."

[1100] *Grant v Roche Products Ltd* [2008] IESC 35, where Hardiman J of the Irish Supreme Court stated, "There is thus authority both judicial and academic for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever."

[1101] *Sullivan v Boylan & Others* [2013] IEHC 104.

[1102] *Wilkinson v Downton* [1897] 2 QB 57.

according to Hogan J, was the protection of personality or personhood.[1103] While Hogan J noted "that the common law might well yet develop unaided ... so that in time ... the law of nuisance and the rule in *Wilkinson v Downton* would be regarded as just distinct sub-rules of a more general tort which protected human dignity and the person,"[1104] such developments had not yet occurred. Given that traditional torts were basically ineffective, Hogan J held that the plaintiff could sue and recover damages for the violation of her constitutional rights and awarded her €15,000 in general damages to reflect the fact that "the defendant's conduct ... has been outrageous, contumellous and malicious"[1105] and which resulted in her suffering great distress.

Similarly, in *D.F. v Garda Commissioner & Others,*[1106] Hogan J refused to dismiss the possibility that the protection of the plaintiff's dignitary interests in tort could be enhanced by reference to constitutional rights founded on notions of human dignity. In that case, the plaintiff was a 28-year-old man who was severely autistic. The plaintiff was outside his grandparents' house when he was unlawfully arrested by members of An Garda Síochana following a complaint that he had been involved in a minor altercation with another member of the public. He was subsequently detained for approximately an hour before being released into the care of his parents. The plaintiff brought an action against the defendants on the basis *inter alia* of the nominate torts of assault, battery and false imprisonment. The plaintiff also alleged infringement of his constitutional rights (including liberty, bodily integrity and privacy). In a summary motion, Hogan J refused to rule out the possibility that the plaintiff might be able to prove at a full trial of the action that the nominate torts might not be sufficient to vindicate his constitutional rights to the protection of his dignity. For example, Hogan J noted the restriction on the tort of assault requires proof of apprehension of a battery before it occurs. Yet, given the fact that the plaintiff lacked the cognitive capacity to understand the nature of the Gardaí's actions in arresting and detaining him could it be said that an assault had been committed? On this basis, Hogan J refused to strike out on a summary basis the claims made by the plaintiff regarding the infringement of his constitutional and related rights.

The protection of personhood in the interests of the common good lies at the heart of the Irish Constitution. While the judiciary have been reluctant in allowing plaintiffs to directly rely on

---

[1103] *Sullivan v Boylan & Others* [2013] IEHC 104, [37], citing Peter Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1997) 32 Irish Jurist 1.
[1104] *Sullivan v Boylan & Others* [2013] IEHC 104, [38].
[1105] Ibid., [46].
[1106] *D.F. v Garda Commissioner & Others* [2014] IEHC 213.

the violation of constitutional rights in a claim for damages, *Meskell* does provide for such a cause of action. However, these actions are limited to scenarios where the current tort system fails to provide effective protection of these rights. This approach does not adequately promote individual autonomy. While it is appropriate that the courts should not have to deal with a multiplicity of constitutional right violations where such claims can be adequately dealt with under tort doctrine, it hardly represents a vigorous protection of such rights if they only become actionable where the tort is "basically ineffective".

Such claims should be allowable in circumstances where the plaintiff can simply establish that the constitutional claim enhances, rather than simply duplicates, their tort claim. Such an approach would promote emphasis on dignity, a rights-based approach, and may in certain cases provide greater protection as the approach in tort is skewed towards the defendant's behaviour rather than focussing on the impact on the plaintiff's dignity. Irrespective of the limitations placed on *Meskell*, it is submitted that current tort law can be much improved by utilising the values of human dignity enshrined under the Irish Constitution to re-interpret current tort doctrine, thereby liberalising it from the shackles of traditional forms of harm and facilitating the recognition of new causes of action which is necessary in a rapid changing technological society.

Irrespective of whether a plaintiff may plead infringement of his or her constitutional rights, it is submitted that current tort doctrine can be improved in such a way that will avoid injustice by making relational dignitary interests the primary focus in the decision-making process. Doing so in hard cases will bring greater coherence to the law and will ensure justice is achieved. Utilising relational dignity as the lodestar in decision-making will ensure that tort doctrine will continue to evolve to meet the exigencies of an increasingly complex society.

5.5.3 The Role of Dignity in Tort Law

Notions of dignity are not regularly explicitly raised in tort cases;[1107] however, it is submitted that the concept has a normative value endorsed by the Irish Constitution which confers on

[1107] Denise G. Réaume, 'Indignities: Making a Place for Dignity in Modern Legal Thought' (2002) 28 Queen's Law Journal 61, 62, where the author observes that dignity is "[m]ore often ... mentioned as a way of putting the final rhetorical flourish on a conclusion that can be adequately justified by reference to other, subordinate, values or interests."

judges the power to make moral choices in hard cases.[1108] While dignity in its generalised form is an amorphous concept, dignity in its relational form should provide clearer guidance in hard cases on how the law should be interpreted and developed. Although it may not necessarily provide perfect answers, "it may create the conditions for the task of trying to look for an answer to, or at least an accommodation of, conflicting values and rights."[1109] Brownsword, while recognising the dangers of simply translating moral principle as a legal rule, nevertheless argues that "we should conceive of law as an exercise in applied moral reason, and that if human dignity is a landmark in moral reason, we should not be shy of integrating [human dignity] within the legal landscape."[1110]

It is submitted there that the structure and content of tort doctrine already reflects the concept of relational dignity.[1111] Tort law as a form of private law seeks to regulate, although not necessarily control, human behaviour in accordance with societal norms. While tort law limits certain types of human behaviour through its rules, these are mere guidance directives only. Ultimately, it is up to the individual as to whether he or she conforms to them. Autonomy is respected by virtue of the fact that the individual can 'choose' to injure another in a negligent

---

[1108] Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (Toronto: Thomson Canada Ltd., 1996) 1-2, where the author writes that tort law, "is based on a sense of the moral distribution of societal resources."

[1109] Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates', in Christopher McCrudden (ed.), *Understanding Human Dignity* (British Academy, Oxford University Press, 2013) 14-15.

[1110] Roger Brownsword, 'An Interest in Human Dignity as the Basis for Genomic Torts' (2003) 42 Washburn Law Journal 413, 419. To what extent can arguments surrounding dignity be used to promote socio-economic rights? After all, it may be argued, what is the point of recognising human dignity as a moral value if the individual is not provided with the tools by which it attain or maintain it? As one commentator notes: "Social inequalities indirectly assault dignitary interests. Social equality requires that each and every one of us be treated fairly and with appropriate respect as a member of our human community. To properly fulfill this purpose in redressing assaults on human dignity, tort law must work to eradicate social inequality." See Leslie Bender, 'Tort Law's Role as a Tool for Social Justice Struggle' (1998) 37 Washburn Law Journal 249, 256. As of yet, the Irish courts have not displayed an appetite for the recognition of such claims, preferring an approach which delineates between issues of commutative or corrective justice (what is due between one individual and another), which are for the judiciary to deal with, and issues of distributive justice (taking from the common stock), which are primarily for the executive. See *O'Reilly v Limerick Corporation* [1989] ILRM 181; *Sinnott v Minister for Education* [2001] IESC 63; [2001] 2 IR 505; *TD v Minister for Education* [2001] 4 IR 259 and *Cromane Foods Ltd v Minister for Agriculture, Fisheries & Food* [2016] IESC 6.

[1111] Hanoch Dagan (2015) 'The Challenges of Private Law: Towards a Research Agenda for an Autonomy-Based Private Law' available at http://papers.ssrn.com/sol3/papers (last accessed 13th May 2016), where the author writes:

> A satisfying conception of private law should not only appreciate its indispensable role in forming and sustaining the variety of frameworks for our interpersonal interactions which are necessary to our ability to form and lead the conception of our life. It should also affirm and vindicate our claims from one another to relational justice, which derives from a robust notion of interpersonal respect to each other's right of self-determination.

manner, for example. But should he or she make such a choice, he or she must bear the consequences through the payment of compensation to the victim if found liable.[1112] The structure of our civil legal system is also supportive of individual autonomy. In our legal system, tort actions can only be pursued at the behest of the plaintiff. It is he or she who decides whether a claim is pursued and it is he or she who has the power to decide whether it should be settled.[1113] Again, human dignity is enhanced by resting control on such matters with the individual a right which is not afforded to him or her under a statutory compensation scheme.

As such, the protection of dignity should therefore manifest itself in our interpretation and formulation of tort rules. All of tort law, it is submitted, can be rationalised on the basis that its underlying normative value rests in the protection of human dignity.[1114] Bloustein, in his famous article rationalising a general right to privacy, made the following arguments in favour of the importance of a unifying moral value underpinning the general right which is apt for present purposes:

> In the first place, the disorder in the cases and commentary offends the primary canon of all science that a single general principle of explanation is to be preferred over a congeries of discrete rules. Secondly, the conceptual disarray has had untoward effects on the courts; lacking a clear sense of what interest or interests are involved in privacy cases has made it difficult to arrive at a judicial consensus concerning the elements of the wrong or the nature of the defences to it. Thirdly, analysis of the interest involved in the privacy cases of utmost significance because in our own day scientific and technological advances have raised the spectre of new and frightening invasions of privacy. Our capacity as a society to deal with the impact of this new technology depends, in part, on the degree to which we can assimilate the threat it poses to the settled ways our legal institutions have developed with similar threats in the past.[1115]

Much the same can be said for arguments justifying human dignity as the unifying moral theme of tort law. First, it is better to have a single principle as a metric by which the rules can be measured in preference to discrete apparently disparate rules. Second, the conceptual uncertainty in tort has led, as we have seen, to some incoherence in the law. Third, given

---

[1112] Bruce J. Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 Villanova Law Review 1705, 1754.

[1113] Ibid., 1754-1755.

[1114] Edward J. Bloustein, 'Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University Law Review 962. See also Peter Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1997) 32 Irish Jurist 1, where the author uses the same article as a basis for his thesis justifying an independent tort of contemptuous harassment.

[1115] Edward J. Bloustein, 'Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University Law Review 962, 963.

advances in technology it is imperative that coherence be brought to bear in the field in order that the threats posed by such technology can be dealt with in a reasoned way.

While perhaps it has rarely been explicitly called upon in judgments, dignity has always been in the background of tort doctrine. The protection of human dignitary interests in a social community is a recurring theme throughout our system of torts. For example, the moral basis for tort law based on human dignity manifests itself in the trespass to person action when the plaintiff's right to "self-possession" is wrongfully interfered with by the defendant's imposing his will on the control of the plaintiff's body without the plaintiff's consent.[1116] Liability according to Burdner in these cases is strict because the individual's right to control his or her body "is established prior to any social interaction"[1117] and therefore any voluntary interference is wrong.

The protection of property rights in cases such as nuisance can also be justified on the basis of human dignity. According to the German philosopher Georg Hegel, in order to exist as more than abstract beings, persons must have the ability to impose themselves on the external world. Developing Kant's theory of personality, Hegel believed that in order to make the Kantian freedom practical it was necessary for it to manifest itself externally. In Hegel's words, "[a] person must translate his freedom into an external sphere in order to exist as an Idea."[1118] Hegel believed that it was through ownership of property that the autonomous individual could express his or her freedom beyond his or her person and into the material world. Property rights unlike personal rights (such as bodily integrity, for example) require some outward signs of possession as manifestation of the individual's will, in essence, establishing to others that it is yours by bringing it under your control. In this way, the property right is more community-orientated than the right to self-possession "because the right requires some external act of taking control of which others must have notice if they are to be capable of respecting it."[1119] The use of property in one's possession must therefore be respected as a manifestation of one's will. However, that does not entitle one to use one's property however one pleases without regard for the rights of others. When use of one's property unreasonably interferes with

---

[1116] Alan Brudner, *The Unity of the Common Law – Studies in Hegelian Jurisprudence* (University of California Press, 1995) 179.
[1117] Ibid.
[1118] Georg W. F. Hegel, *The Philosophy of Right* (A.W. Wood ed, Cambridge University Press, 1991) 41.
[1119] Alan Brudner, *The Unity of the Common Law – Studies in Hegelian Jurisprudence* (University of California Press, 1995) 180.

another's, one is simply using that other as a means to an end. Thus, uses of property which can be considered socially acceptable or 'ordinary' are allowable under the law of nuisance. Such uses involve an element of reciprocity, a respect for others i.e. 'live and let live.' Similarly, an "extraordinary" use is actionable "because it arrogates to oneself a degree of liberty to interfere with another greater than that to which one submits in return."[1120]

The protection of human dignity also forms the basis of the tort of negligence and fault liability in general. In civilised society, we each have our spheres of freedom only limited by the freedom of others. In this way a relationship of reciprocal care-giving is created between individual members of society. Thus, negligence can be described as "the claiming of a right to more liberty in relation to the other than is consistent with the equal security of both in the conditions of effective freedom."[1121] In cases where such reciprocity of risk does not exist - such as between consumer and producer in product liability cases, for example - the cohesiveness of society can only effectively be maintained by imposing strict liability for commission of wrongs in such circumstances. In such cases, therefore, "no accommodation will be made to the defendant's liberty in defining the plaintiff's right."[1122]

Dignitary interests are clearly to the fore in what might be described as the 'personality torts' of defamation and privacy. A critical aspect of individual personality is one's reputation. A person's reputation is an external manifestation of one's personality. Our reputation is how we are perceived by others in society. Damaging another's reputation by communicating untruths is to undermine that person's dignity. The protection of one's reputation is not absolute and in the interests of the community as a whole it must be balanced with protection of the dignity of others to freely express their opinions. Thus, communication which damages another's reputation may not always give rise to a cause of action if truthful,[1123] or privileged[1124] or subject to a public interest defence,[1125] for example. Dignitary interests also lie at the core of the emerging tort of privacy.[1126] While it has long been held that Irish citizens have a

---

[1120] Alan Brudner, *The Unity of the Common Law – Studies in Hegelian Jurisprudence* (University of California Press, 1995) 182. The author also argues that the strict liability basis for *Rylands v Fletcher* can also be explained on similar grounds (183).
[1121] Ibid., 186.
[1122] Ibid., 178.
[1123] Section 16 of the Defamation Act 2009.
[1124] Sections 17 and 18 of the Defamation Act 2009.
[1125] Section 26 of the Defamation Act 2009.
[1126] Edward J. Bloustein, 'Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University Law Review 962; James Q. Whitman, 'The Two Western Cultures of Privacy: Dignity and

constitutional right to privacy[1127] which is deemed "necessary for the expression of an individual personality,"[1128] it has only been in more recent times that the Irish courts have recognised that breach of the constitutional right is actionable against a private person or entity.[1129] The right to privacy supports autonomy in that it makes the individual "the master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image ... and also of the 'zone of interaction' ... between himself and others."[1130] However, once again, the individual autonomy of the individual is not protected at all costs. Disclosures of what would otherwise be considered private information are justifiable in the public interest.[1131]

Tort law also recognises that corporations, partnerships, unincoporated bodies and trade unions may sue or be sued.[1132] To speak of promoting human dignity in the context of non-human actors such as companies, for example, might at first appear incongrous. While the line between human and corporate personality is becoming increasingly blurred, one yet cannot speak of a company having 'dignity.'[1133] How can the promotion of human dignity, therefore, be regarded as the central organizing principle of tort law where one of the parties to the litigation happens to be a corporate entity?

This question is not as problematic as it might first appear.[1134] The activities of all corporate entitites are ultimately determined and carried out by human actors.[1135] Behind the veil lies a

---

Liberty' (2004) 113 Yale Law Journal 1151; Val Corbett, 'The Illusion of Safety: The Right to Privacy of Sex Offenders' (2011) 3 Journal of Media Law 89, 93-98.

[1127] *McGee v Attorney-General* [1974] IR 284; *Kennedy v Ireland* [1987] 1 IR 587.

[1128] *Norris v Attorney-General* [1984] IR 36, 72.

[1129] *Herrity v Associated Newspapers (Ireland) Ltd* [2008] IEHC 249; *Hickey & Another v Sunday Newspapers Ltd* [2010] IEHC 349. Similarly, in *Campbell v MGN Ltd* [2004] UKHL 22, the existence of the right to privacy was justified by the House of Lords on the basis of protecting "an aspect of human autonomy and dignity", *per* Lord Hoffmann, at [50].

[1130] *per* Laws LJ, *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, [21].

[1131] *Cogley v RTE & Others* [2005] IEHC 181.

[1132] Bryan McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury, 2013) 1457-1466. For example, section 12 of the Defamation Act 2009 provides that a body corporate may bring an action in defamation.

[1133] Steven R Ratner, 'Corporations and Human Rights: A Theory of Responsibility' (2001) 111 The Yale Law Journal 443; Cees van Dam, 'Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights' (2011) 2 Journal of European Tort Law 221. See also *Citizens United v Federal Election Commission* 58 US 310 (2010), where the US Supreme Court held that the 1st Amendment of the Constitution regarding Freedom of the Press protects not ony individuals but also associations of individuals such as corporations and trade unions.

[1134] Benjamin Ewing, 'The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility' (2015) Journal of Tort Law 1.

[1135] Bryan McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury, 2013) 1459, where the authors observe:

human ownership, management, and employee structure. Any harm caused or suffered by such an entity ultimately can be traced back to individuals. Thus, there is a human dimension to an entity's activities and tort law is simply extending human norms to the company's commercial activites. If one wishes to operate within our society, whether as a commercial entity or as an individual, one must follow the norms of that society. These are human values and applied to commercial activity act as a metaphor for the norm of personal respsonibilty and mutual respect.

While it is argued here that the underlying normative basis of tort law is a moral one grounded in human dignity, theoretical justifications for torts such as corrective justice and distributive justice are an essential part of the tort story. Tort law is not exclusively about corrective justice nor is exclusively about distributive justice. It is a combination of both insofar as these principles promote relational human dignity. What is presented here is simply the notion that, whether decisions are made on corrective justice or distributive justice grounds, they must be influenced by the enhancement of the relational concept of human dignity. As Bender explains:

> It is not that these aren't powerful ideas that need further development, but they have been wrongfully situated at tort's center. They may suggest some of tort law's secondary and tertiary rationales more than elucidate its essential role and purpose, much in the way deterrence and punishment functions, will foster autonomy, increase utility, correct injustices, and distribute valuable resources to the same extent that tort laws do today. Utility, autonomy, and corrective justice are all important concerns of tort law, but its primary focus must be on the promotion of human dignity and social harmony, because it is only through those ends that we flourish. The more we facilitate social justice and human dignity, the more we create opportunities for peace, creativity, and better lives for all of us.[1136]

The continuing vitality of tort law as an institution which promotes societal values of mutual respect is essential to maintaining the unity of peaceful society, "otherwise, we would settle for 'might makes right' or 'economic power makes right'."[1137] Putting dignity to the fore in considering tort judgments will reinvigorate the institution of tort law for the requirements of the 21st century by - to borrow the words of Lord Steyn used in another context - "sharpening

---

> Since a corporation is an artificial legal person it must unavoidably act through agents. Consequently the liability of a corporation is usually vicarious liability for the acts of its employees, and in this, corporate liability is no different from the liability of any employer for the tortious acts of its employees.

[1136] Leslie Bender, 'Tort Law's Role as a Tool for Social Justice Struggle' (1998) 37 Washburn Law Journal 249, 258.
[1137] Ibid., 255.

... focus on the weight of competing considerations."[1138] Explicit acknowledgment of human dignity in tort cases places the focus on the injured plaintiff and not primarily on the wrong or the manner of its commission. It is a rights-based approach, but not solely one based on the atomistic individual. The emphasis is on the dignity of the plaintiff as a member of wider society and as such the analysis will focus on respect for the individual as a member of the community. That is why society loses something fundamentally valuable when it replaces the tort system with a statutory compensation scheme based solely on principles of distributive justice. Under such schemes, individual personality and agency is undermined. While social insurance schemes might guarantee a minimum amount of welfare for a broader range of accident victims, one must weigh those benefits against the costs. [1139]

Thus, while statutory compensation schemes may produce more efficient ways of providing compensation, it is questionable whether such schemes can do everything that tort law currently does. The danger is that in replacing our tort system with a statutory compensation scheme we are losing something fundamental in our society and that is full respect for individual dignity. As Brudner explains:

> ... when pushed to its logical extreme, social insurance reveals itself as indifferent to the worth of persons, for it permits acts inconsistent therewith to go unchallenged. The wronged individual may be insured ... against the loss of welfare he has suffered from the wrong; however, he is deprived of the institutional means by which to redress the wrong qua wrong and so to vindicate his self-worth against acts that contradict it. More specifically, he is deprived of an authoritative determination that the disrespect shown for his person is an infringement of his right; and he is likewise deprived of a remedy for another's debasement of his person, one that would require the *wrongdoer* to annul *all* the losses connected with his wrong. The full realization of the person's end-status is thus a legal order in which negations of that status are allowed to stand, or in which that status *lacks* objective confirmation.[1140]

[1138] *MacFarlane v Tayside Health Board* [2000] 2 AC 59, 81.

[1139] Alan Brudner, *The Unity of the Common Law – Studies in Hegelian Jurisprudence* (University of California Press, 1995) 209, where the author writes:

> ... if retention of a tort action would render economically unfeasible the guarantee of a basic minimum of human welfare, then statutory limitations on the right to sue would be legitimate if they were needed to achieve the welfare objective. However, in a contest between the right to vindicate self-worth and guaranteed levels of welfare above this minimum, the former must prevail, since personality is more fundamental than any of its contingent goals. Accordingly, the state cannot legitimately curtail the right to a tort action for the sake of a gilt-edged compensation scheme. Only the individual can surrender it.

[1140] Alan Brudner, *The Unity of the Common Law – Studies in Hegelian Jurisprudence* (University of California Press, 1995) 206.

Human dignity is consequently undermined by statutory compensation schemes in circumstances where tort law is no longer made available to the individual as an alternative or supplementary avenue for redress. Such schemes fail to recognise the individual as an end in himself or herself. There is a distinct lack of accountability on the part of the wrongdoer under such schemes as there is no institutional acknowledgement of the wrong done to the plaintiff. Instead, the emphasis on the compensation to the person is separated from the validation of the individual's liberty. Consequently, "[s]ocial insurance ... regards welfare as publicly significant but not the vindication of the person whose welfare it insures."[1141] This 'disconnect' between compensation and individual personality results in a situation where the individuality is lost, "the vindication of personality is depreciated by community, then the welfare it guarantees becomes detached from the end that gave welfare its human significance."[1142]

5.5.4 Tort Law and the Vindication of Relational Dignity

A review of the historical development of tort law shows that it is a mistake to try and decipher a conscious theme running through the different court judgments. In fact, much of tort doctrine appears to have developed in response to rapid technological developments rather than any coherent or principled approach.[1143] While a superficial analysis of tort's history would tend to

---

[1141] Alan Brudner, *The Unity of the Common Law – Studies in Hegelian Jurisprudence* (University of California Press, 1995) 207.

[1142] Ibid.

[1143] Ken Oliphant, 'Tort Law, Risk, and Technological Innovation in England' (2014) 59 McGill Law Journal 819. Other legal historians have argued that the coincidence of fault liability with industrialisation was the acts of judges who sought to "create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development". See Morton J. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977) 85-101. In Ken Oliphant, 'Tort Law, Risk, and Technological Innovation in England' (2014) 59 McGill Law Journal 819; the author examines the historical development of tort law in light of the social change brought about by the Industrial Revolution and the risks it created. Oliphant notes that the "... law's overall response to accidental injury is excessively marked by ad hoc responses to historical circumstances, and ... sustained intellectual engagement is still required to provide a consistent and principled basis for further legislative reform." Thus, negligence, for example, may be seen as a response to the flood of accidents which coincided with increased industrialisation. This received wisdom regarding the development of fault liability has been criticised. See Robert W. Gordon, 'Book Review - *Tort Law in America: An Intellectual History'* (1980) 94 Harvard Law Review 903, 907, where the author argues:

> ... it is actually very difficult to account for the emergence of negligence as a general organizing principle of tort liability as if it were a technological response of the law to the "social needs of industrialization," for one would have to explain, for instance, why England and the United States seem to have undertaken the systematic generalization of the fault principle to include all tort liability at the same time (1870's and 1880's) despite England's much earlier industrialization as well as why Germany responded to industrialization by imposing strict liability on railroads and industrial concerns for accidents by way of exception to a pre-existing fault standard! There are simply too many variables in economic growth to support a hypothesis that any of them is socially "necessary."

Similarly, islands of strict liability - such as that which exists under *Rylands v Fletcher* - can be explained as a response to a particular societal ill. In that case the creation of a strict liability tort enabled the court to impose liability on the defendant mill-owner whose property had been flooded. The decision might be explicable, not on the basis of some underlying principle of tort law, but on the basis that the judges were conscious of the dangers

refute the notion of conscious coherent development, it is my thesis that our system of tort law is best explained as respecting human dignity as defined by our relationships with others in society.[1144]

In light of this, the notion of dignity put forward here is philosophical, in terms of respecting individual dignity through the recognition of one's autonomy, and political, in that these individual rights are not recognised without recourse to wider societal concerns. This is the price we pay in return for living within a social community. Tort law is built on the relationships we have with others within a community. These relationships do not always create legal responsibilities. Were it otherwise, the individual autonomy of the individual would be submitted to the will of the whole. Only special relationships with others can give rise to legal obligations. Such relationships may be created where vulnerability, dependency, or reliance exists such as between employer and employee, parent and child, occupier and entrant, or producer and consumer to name but a few examples.[1145] All harm which occurs in society arises in the context of a relationship of some kind and consequently, it is a mistake to place the spotlight on either the plaintiff or the defendant without regard for the relationship between the two. Depending on the nature of the relationship, society plays its role by imposing standards of expected behaviour on the parties.

The existing research on the theoretical underpinnings of tort law is limited as it fails to fully account for the relational aspects of the system in this regard. Corrective justice theories are overly focused on the individualistic aspect of dignity and compensating the plaintiff for the

---

posed to society by bursting dams which had resulted in major loss of life and property damage in the years immediately preceding the case. See AW Brian Simpson, 'Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*' (1984) 13 Journal of Legal Studies 209. The decision might also be explicable on the basis that the accident had occurred in Lancashire, which was a major centre for mining, and the need to protect the local industry. In Leslie Bender, 'Tort Law's Role as a Tool for Social Justice Struggle' (1998) 37 Washburn Law Journal 249, 258, the author warns against relying too heavily on precedent to determine the value of tort law as one will simply "... confuse responses to historical contexts with role and purpose ... The theory must respond to the changing historical context and must reassess its underlying purposes and goals.

[1144] Hanoch Dagan, 'The Challenges of Private Law: Towards a Research Agenda for an Autonomy-Based Private Law' (2015) available at http://papers.ssrn.com/sol3/papers (last accessed 13th May 2016), where the author observes:

> Our practical affairs are deeply interdependent. They are replete with interactions with others, ranging from fairly trivial transactions to the most crucial relationships in our lives, such as those related to family, friends, work, and other significant positions we come to occupy in society. These interactions can take either voluntary or involuntary forms of being with others.

[1145] Scott William Hugh Fletcher, 'Who are we Trying to Protect? The Role of Vulnerability Analysis in New Zealand's Law of Negligence' (2016) 47 Victoria University of Wellington Law Review 19.

wrong without sufficient examination of the dignitary aspects of the other side of the relationship and the norms of behaviour expected by society. Corrective justice theorists are overly-concerned with policing wrongdoing and fixated by the rights of the plaintiff without regard to the interests of others, including the defendant. Corrective justice theories recognise that tort law is relational but only from a structural point of view for the purposes of identifying who it is that will "pay the bill" for the plaintiff's injuries. Distributive justice theories by contrast, fail to sufficiently account for the direct relationship between plaintiff and defendant. The protection of human dignity which lies at the heart of tort law works both ways. While it grants rights, it also imposes obligations on those living within society and also implies accountability and responsibility as regards how one behaves towards others.

This relational, community-based approach towards human dignity is embedded throughout tort doctrine. In negligence, the duty of care reflects the notion that our obligation to take reasonable care of our neighbours is not open-ended and must be restricted in light of the dignity of others. Such relationships generally involve a form of responsibility, dependency, vulnerability, or expectation of some kind. That is why, the "no duty to rescue a stranger" rule, for example, can be justified on the basis that it respects the putative rescuer's autonomy in refusing to allow the victim to unilaterally impose an obligation of care on him or her.[1146] At the same time, if the defendant accepts that responsibility by coming to the assistance of the stranger they voluntarily assume a relationship with the victim which requires them to ensure that they take care of that stranger.[1147] Thus, principles of distributive justice act in such a way as to ensure that the costs of the stranger's actions are not unfairly levied on the rest of society.

Similarly, the notion of relational human dignity at the centre of tort law is reflected in the principle that normally there is no responsibility placed on individuals for the independent

---

[1146] *Stovin v Wise* [1996] AC 923, 943-944, where Lord Hoffmann justified the common law position as follows:

> In political terms it is less an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose on him a duty to rescue or protect. A moral version of this point may be called the 'Why pick on me?' argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people ... the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community ... But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else.

[1147] Section 51D(3) of the Civil Liability Act 1961 as amended by Part 3 of the Civil Law (Miscellaneous Provisions) Act 2011.

actions of others.[1148] The Irish courts have consistently reiterated the principle that in the absence of some special pre-tort relationship between the parties, no such duty will arise. Once again, however, such a relationship might be created in circumstances where the defendant is found to have exercised such control over the other party that it could be said that it should have been highly foreseeable that the other party's actions could injure another.

A recent analysis of this issue occurred in *Ennis v The Child and Family Agency & Another*.[1149] In that case, the Irish Court of Appeal overturned a decision of the High Court which held that the first named defendant was responsible for damage caused to the plaintiff's cottage as a result of a fire which was maliciously started in a neighbouring property owned by the second-named defendant and which involved a young woman, Ms A. Ms A was born to a dysfunctional family and had been placed into care with the first named defendant at two years of age. As she approached the age of majority Ms A expressed a desire to live independently. While some reservations were expressed by her guardian ad litem about her ability to do this, shortly after her eighteenth birthday it was decided to allow her to do so. Social workers acting for the first named defendant agreed to lease the second-named defendant's property in order that Ms A could commence independent living. The arrangement was short-lived and after complaints of anti-social behaviour the second named defendant asked that Ms A leave the premises and the lease was terminated. The next morning a number of people broke in to the property and set fire to two mattresses in an upstairs room. The fire also damaged the house next door owned by the plaintiff.

Ms A was detained at the scene and it transpired that a group of people (including Ms A) entered the premises and held a party there. Ms A claimed that when she arrived at the house that two men, Mr C and Mr D, were already present having broken in. Mr C and Mr D admitted to setting fire to the mattresses. Kelly J, in reversing the judgment of Hogan J in the High Court, held that the first named defendant did not have any legal control or powers of detention over Ms A given that she was of the age of majority. Furthermore, it had absolutely no control over the actions of Mr C and Mr D who were unidentifiable strangers to it. Consequently, the Court

[1148] *Murphy v GN Ry Co* [1897] 2 IR 301, 308-309, *per* O'Brien J., "there is no rule of law that obliges persons to provide against the possible misconduct of others."
[1149] *Ennis v The Child and Family Agency & Another* [2015] IECA 105.

of Appeal held that the necessary degree of control which the defendants might have exercised to prevent the damage and create a duty of care owed to the plaintiff was absent.[1150]

This relational notion of human dignity is also prevalent in the developing area involving non-delegable duties of care.[1151] The concept of "non-delegable duty" is well entrenched principle of employers' liability.[1152] Essentially it provides that the defendant, in certain circumstances, has a positive duty, irrespective of whether he or she has delegated the operation of that duty to another, which he or she owes personally to the plaintiff to ensure that the duty is carried out with due care. The non-delegable duty is similar to the doctrine of vicarious liability in that under both the defendant is made liable for the actions of another which have caused injury to a third party. However, they crucially differ in that under a non-delegable duty the defendant cannot avoid liability to the plaintiff by carefully selecting and supervising an independent contractor to carry out the duty.[1153]

Like much of tort law, the principles underlying non-delegable duties have developed in an ostensibly haphazard manner. In addition to an employer's duty to employees, other areas where non-delegable duties have been held to exist include liability for the storage of hazardous materials,[1154] liability of hospitals for the actions of medical practitioners working there,[1155]in Australia, between schools and their pupils for acts of sexual assaults by teachers,[1156] and even in cases involving the undermining of support provided to a neighbour's land.[1157] In *Woodland v Essex County Council,*[1158] Lord Sumption of the UK Supreme Court sought to identify some

---

[1150] In a similar vein, in *Flanagan v Houlihan* [2011] IEHC 105, the Irish High Court affirmed that a publican does not owe a duty of care to road-users for the actions of customers who, having consumed alcohol on their premises, later proceed to drive while intoxicated thereby causing harm to others. To do otherwise, the court held, would be to impose a disproportionate burden on the shoulders of the publican whereby they would be required to determine whether customers consuming alcohol on their premises would later drive while intoxicated. An alternative approach would only serve to undermine the autonomy of the customer who makes the decision to whether to consume alcohol and how much to consume.

[1151] Simon Deakin et al, *Markesinis & Deakin's Tort Law* (6th ed.) (Oxford University Press, 2008) 697-701; Eoin Quill, *Torts in Ireland* (3rd ed.), (Gill & MacMillan, 2009) 556-561; Jenny Steele, *Tort Law: Cases & Materials* (2nd ed.) (Oxford University Press, 2010) 597-601.

[1152] *Wilsons and Clyde Coal v English* [1938] AC 57; *Connolly v Dundalk Urban District Council and Mahon & McPhilips* [1990] 2 IR 1.

[1153] Glanville Williams, 'Liability for Independent Contractors' (1956) Cambridge Law Journal 180; Robert Stevens, 'Non-delegable Duties and Vicarious Liability' in J. Neyers et al, *Emerging Issues in Tort Law* (Hart Publishing, 2007) 331-368.

[1154] *Burnie v Port Authority v General Jones Property Ltd* (1994) 120 ALR 42; *Honeywell & Stein v Larkin* [1934] 1 KB 191.

[1155] *Byrne v Ryan* [2007] IEHC 207; *Cassidy v Ministry of Health* [1951] 2 KB 343.

[1156] *New South Wales v Lepore* (2003) 212 CLR 511.

[1157] *Hughes v Percival* (1883) 8 App Cas 443.

[1158] *Woodland v Essex County Council* [2013] UKSC 66.

general principles regarding the situations in which a non-delegable might be held to exist. In that case, the appellant, Annie Woodland, was a ten-year old pupil of a school for which the defendant local authority was responsible. The curriculum of the school included swimming lessons. As the school did not have a swimming pool the lessons took place at a local public pool. The lessons were provided to the local authority by an independent contractor "Direct Swimming Services" who employed an instructor and a lifeguard for these purposes. During these swimming lessons, Ms Woodland was discovered lying face down in the pool having got into difficulties. She was resuscitated but suffered a serious hypoxic brain injury. The appellant alleged that her injuries occurred as a result of the negligence of the swimming instructor and lifeguard engaged by "Direct Swimming Services" who was an independent contractor. It was the appellant's claim that the respondent education authority owed her a non-delegable duty of care and as a result was liable for the negligence of the swimming instructor and the lifeguard engaged by "Direct Swimming Services" who it had engaged to deliver the lessons.

Essentially, the question before the court was to consider not only the defendant's duty to take care when engaging a contractor to carry out duties entrusted to it but to examine the extent of such duty. For example, did the duty include a duty to procure the careful performance of work delegated to others."[1159] In search for an underlying principle to answer this question, Lord Sumption reviewed the case law where a non-delegable duty had been previously found to exist and concluded that the case law could be reconciled on the basis that in each case there was an assumption of responsibility akin to that which might exist when establishing a duty of care in negligence.[1160] However, the assumption of responsibility in these cases was significantly more taxing because "[t]he circumstances must be such that the defendant can be taken not just to have assumed a positive duty, but to have assumed responsibility for the exercise of due care by any one to whom he may delegate its performance."[1161]

In examining the case law involving employees, hospitals and schools Lord Sumption identified the key factors which go towards establishing such a relationship as including the vulnerability of the plaintiff, the nature of the relationship between the plaintiff and the defendant which imports some control over the plaintiff, and the delegation of such control to

[1159] *Woodland v Essex County Council* [2013] UKSC 66, *per* Lord Sumption, [5].
[1160] In doing so, he excluded cases involving the creation of hazards as not being directly relevant to the case at hand: *Woodland v Essex County Council* [2013] UKSC 66; *per* Lord Sumption, [6].
[1161] Ibid., *per* Lord Sumption, [12].

another person.[1162] According to Lord Sumption the critical feature was not the relationship between the hospital and a surgeon or an employer and a worker, for example, but between the hospital and the patient, the employer and the injured employee. Thus, where a special relationship characterised by vulnerability or dependency existed between these parties that justified the imposition of a special non-delegable duty not only to take reasonable care but also "a duty to ensure that reasonable care is taken."[1163] In such situations, the defendant assumes a specific responsibility for the plaintiff and his or her property.[1164]

Lord Sumption warned that before imposing non-delegable duties which are quite onerous, courts must consider the potential financial burdens that the imposition of such responsibility might create stating that such duties should only arise where it was "fair, just and reasonable" to do so.[1165] On the facts, Lord Sumption held that the respondent did owe a non-delegable duty of care to the appellant in the circumstances. In doing so, he explained that a decision in favour of the appellant in the case simply reflected the law's traditional protective approach towards those in relationships where they are almost uniquely dependent on the defendant observing the appropriate standards of safety. The schoolchildren had no choice in this matter,

---

[1162] *Woodland v Essex County Council* [2013] UKSC 66, *per* Lord Sumption, [12].
[1163] *Commonwealth v Introvigne* (1982) 150 CLR 258, *per* Mason J, [29].
[1164] *Woodland v Essex County Council* [2013] UKSC 66, [23]; Lord Sumption identified the following factors as being particular relevant in determining whether a non-delegable duty of care existed:

> (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
>
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.
>
> (3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.
>
> (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.
>
> (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

[1165] *Woodland v Essex County Council* [2013] UKSC 66, *per* Lord Sumption [25]. See also *NA v Nottinghamshire County Council* [2015] EWCA 1139, where it was held that a locat authority should not be held liable for abuse perpetrated by foster carers. There was no non-delegable duty in such circumstances.

nor did their pare hey were required by law to submit the care of their children to the school and as such school should be responsible - even where those duties are delegated by the school - for tions of those to whom the exercise of the duties have been delegated. This duty is not liss, the defendant is only responsible in this regard for careful exercise of its control for tfunctions which it has assumed for itself a duty to perform, "[n]or will they be liable for tgligence of those to whom no control over the child has been delegated, such as bus drivere theatres, zoos or museums to which children may be taken by school staff in school hou"[1166]

The developing ot of "non-delegable duties of care" fully accords with the notion of relational human ty at the centre of tort law which is proposed here. The emphasis throughout Lord Sion's succinct exposition of the law was not the relationship between the harmdoer and fendant; or the defendant's ability to control the environment in which the plaintiff was id, the focus was instead on the antecedent relationship between the defendant and the tiff. The key feature therefore is the interpersonal relationship between the defendant and tiff. Where that relationship is characterised by dependence for one's safety as in the cf an employee, pupil or patient, and where the employer, school or hospital voluntarilumes responsibility for the care, supervision and control of that other party, the notion otional dignity requires that the special relationship between the parties imposes an affirmduty of care on that employer, school or hospital.

The relational aspc human dignity may also be gleaned from the principles of negligence on the standard of The imposition of a standard of reasonable care is an acknowledgement of the importanche relational aspect of human dignity which underpins negligence doctrine. A standaich does not require perfection of the defendant reflects the notion of human dignity as aional standard which balances the rights and interests of the individual with the needs ofety. Thus, the standard reflects community norms of behaviour as manifested througl man on the Clapham Omnibus."[1167] While the standard that is imposed by society has beeicised as being morally flawed because not everyone, despite their best efforts, can attain ibes set a minimum performance level which is necessary for the proper running of society.

[1166] *Woodland v Essex Council* [2013] UKSC 66, [25].
[1167] *per* Collins MR, *Me v Western Morning News Company* [1903] 2 KB 100, 109.
[1168] *Vaughan v Menlov*7) 132 ER 490 (CP).

Determining whether the standard is breached in any given set of cstances is highly contextual and fact specific. However, the courts, having regard to the :t on the relational dignity of the parties, will consider factors such as the probability of trm,[1169] the gravity of the threatened harm,[1170] the cost of prevention,[1171] and the social utili of the defendant's conduct. Thus, not all conduct of the defendant that results in harm to thatiff is recoverable under negligence. The assessment of the defendant's behaviour acknows his or her dignity and that of the plaintiff by providing that liability will not be imposed e defendant where his or her actions resulted in improbable injury, particularly where thesome social utility involved in the defendant's actions. It is not the function of the courts ard compensation to victims simply because they suffer catastrophic injuries even thougl are not at fault at all or even in circumstances where they are at fault, the harm is dispropnate to their fault.

The House of Lords' decision in *Tomlinson v Congleton Boroughncil & Others*[1173] illustrates this particular point. In that case, the claimant was in a courark in which there was a lake that had been created by the flooding of an old sand quarry. Irk was an amenity used by the public as it provided sandy beaches which allowed people ıbathe, play in the sand or paddle in the water. The claimant was injured when he ran out ie water and dived. He had done this often before but on this occasion his head hit the santtom and he broke his neck. As a result of his injuries he was rendered a tetraplegic anc no longer able to walk. The claimant initiated proceedings against the defendant under tcupiers' Liability Acts 1957 and 1984. In particular, he alleged that the defendant had brd its statutory duty of reasonable care to prevent his injuries. The Council had erecteds around the lake warning entrants about the dangers of swimming in the lake but these sis well as warnings given by rangers were repeatedly ignored. At the time of the claimantident the Council had drawn up a plan in order to discourage swimming which involved ng reeds and other shrubbery by the water's edge in order make accessibility to the watch more difficult. However, these plans had not been implemented at the time of the acci

In the course of his judgment as to whether the defendant had been in h of a duty to take reasonable care for the safety of the claimant in the circumstances, Lorffmann negotiated

---

[1169] *Bolton v Stone* [1951] AC 850.
[1170] *Paris v Stepney Borough Council* [1950] 1 KB 320.
[1171] *Latimer v AEC Ltd* [1952] 2 QB 701.
[1172] *Mulcare v Southern Health Board* [1988] ILRM 689.
[1173] *Tomlinson v Congleton Borough Council & Others* [2003] UKHL 47.

a delicate balance between the compensatory function of tort law and the promotion of the relational ideal of human dignity. With this in mind, Lord Hoffmann concluded that the risk of serious injury involving the water was foreseeable in the circumstances[1174] although the cost of preventative measures (which approximated £5,000) might not have been deemed excessive by some, they were sufficient to negatively impact on the allocation of the defendant's budget to the detriment of the public benefit.[1175] In making his determination as to whether the defendant had breached its duty, Lord Hoffmann placed great emphasis on the social value of the activities which the community would have been deprived of should the defendant be required to reduce or eliminate the risk of swimming posed by the water. [1176] Lord Hoffmann recognised also that as a matter of "free will" respecting individual autonomy requires that "people should accept responsibility for the risks they choose to run."[1177] Respect for human dignity involves an acknowledgement that if individuals wish to undertake inherently dangerous activities, that is their prerogative and it is not for others in society to protect them from themselves.[1178]

In finding that the defendant was not liable for the claimant's injuries, Lord Hoffmann's judgment is a prime example of how tort law aims to protect the relational notion of human dignity. The claimant had suffered catastrophic injuries from a momentary lapse in judgment. However, it is not the purpose of tort law to compensate injured parties in such circumstances. Tort law does not view human dignity in isolation it must also consider the impact on the dignity of others within the community and the notion of self-responsibility in particular. Thus, tort law recognises individual autonomy to undertake inherently dangerous activities but that

---

[1174] *Tomlinson v Congleton Borough Council & Others* [2003] UKHL 47, *per* Lord Hoffmann, [39].
[1175] Ibid., *per* Lord Hoffmann [40].
[1176] Ibid., [42], where Lord Hoffmann stated:

> The majority of people who went to the beaches to sunbathe, paddle and play with their children were enjoying themselves in a way which gave them pleasure and caused no risk to themselves or anyone else. This must be something to be taken into account in deciding whether it was reasonable to expect the Council to destroy the beaches.

[1177] *Tomlinson v Congleton Borough Council & Others* [2003] UKHL 47, *per* Lord Hoffmann [44].
[1178] Ibid., [46], where Lord Hoffmann observed:

> ... I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious.

does not mean that the individual can transfer responsibility for those actions to others within society. The responsibility, in such circumstances, must rest with the individual.[1179]

This respect for human dignity is also reflected in the statutory defences of contributory negligence and waiver. The defence of contributory negligence,[1180] where the defendant's liability may be reduced in proportion to the plaintiff's own carelessness, is a further acknowledgement that the protection of human dignity at the centre of tort law is a notion that implies responsibility for one's own decisions and actions. Thus, carelessness for one's own safety will lead to the proportionate attribution of responsibility for the harm to the plaintiff and in this way also acknowledges the wrongdoer's dignity. Similarly, the defence of waiver is an explicit acknowledgment that individual autonomy includes the right to consent to harm for which the injurer cannot be made responsible and respects the plaintiff's autonomy to make his or her own informed choices.[1181]

The relational aspect of human dignity protected by tort law is also reflected in the rules of causation in negligence. The requirement that the plaintiff must establish that the defendant was the factual cause of his or her injuries by requiring proof that the injury would not have

---

[1179] Similar conclusions can be gleaned from the case law on professional negligence as it applies to physicians and the doctrine of informed consent (discussed in chapter 6). In *Montgomery v Lanarkshire Health Board (Scotland)* [2015] UKSC 11, [115]; the United Kingdom Supreme Court acknowledged the importance of recognising patient autonomy as regards decisions on medical treatment. In that case, the claimant had not been advised on alternative options to giving natural birth (vaginally) such as through caesarean section. As a consequence of the negligence of the defendant physician in not advising the claimant's child suffered injuries due to complications relating to the giving of natural birth. In promoting patient autonomy and the right to choose as the primary goal, Lady Hale accepted that the question cannot be answered by reference to the patient's wants alone:

> A patient is entitled to take into account her own values, her own assessment of the comparative merits of giving birth in the "natural" and traditional way and of giving birth by caesarean section, whatever medical opinion may say, alongside the medical evaluation of the risks to herself and her baby. She may place great value on giving birth in the natural way and be prepared to take the risks to herself and her baby which this entails. The medical profession must respect her choice, unless she lacks the legal capacity to decide ... There is no good reason why the same should not apply in reverse, if she is prepared to forgo the joys of natural childbirth in order to avoid some not insignificant risks to herself or her baby. She cannot force her doctor to offer treatment which he or she considers futile or inappropriate. But she is at least entitled to the information which will enable her to take a proper part in that decision.

[1180] Section 34(1) of the Civil Liability Act 1961 provides:

> Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible ... and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant.

[1181] Section 34(1)(b) of the Civil Liability Act 1961.

occurred "but for"[1182] the defendant, is a key aspect of corrective justice theories and is recognition that human dignity implies responsibility for one's actions.[1183] In cases where proving causation is relatively straightforward i.e. in cases of single causes, the "but for" test is not problematic. However, difficulties arise in cases where causation is a complex factual issue - such as in cases involving harm associated with pollution,[1184] disease[1185] or medical negligence[1186] - where there a number of complex, competing potential causes and it is impossible to determine which is factually responsible for the plaintiff's injuries. Strict application of traditional "but for" principles may result in a finding that no party caused the injuries. Is it just that, because of the evidentiary limits of modern science, such plaintiffs are not awarded compensation for the harm? In the alternative, should the law respond by modifying the rules in some way that allows recovery?

The courts have responded to such claims by relaxing the rules on causation where in principle it is deemed logical and just to do so. The first of these cases was *Bonnington Castings v Wardlaw.*[1187] In that case, the plaintiff was an employee of the defendant who was exposed to silica dust at work which resulted in him contracting a lung disease. The dust which the plaintiff had ingested was partly derived from his employer's negligent failure to keep grinders clear from dust. However, part of the dust which the plaintiff had ingested arose from hammers which the plaintiff was using. There were no reasonable precautions that the defendant could have taken which would have prevented the plaintiff from ingesting this dust. The medical evidence before the court indicated that the plaintiff's lung disease was progressively caused by the gradual accumulation of dust particles in the plaintiff's lungs over a period of time. Of the two sources of dust, it was not possible to determine which of the two sources of dust was the more likely to have been the cause of the plaintiff's injury. Lord Reid accepted that it was

---

[1182] *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.

[1183] Similarly, the rules on legal causation which restrict liability for one's negligence to the foreseeable consequences of that negligence first established in the Privy Council decision of *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388, have been justified on the basis that while apparently arbitrary actually reflect societal interests. In Marshall S. Shapo, *Tort Law and Culture* (Carolina Academic Press, 2003) 99, the author writes:

> The method by which judges determine where to draw the line along an extended chain of harms is in significant part a process of sorting out culturally based intuitions. That process involves both seeking the roots of those intuitions in economic pragmatism and probing the sense of fairness in people's inclination to say, of such odd consequences, that they must simply be absorbed as part of the vicissitudes of life.

[1184] *Hanrahan v Merck Sharp & Dohme* [1988] ILRM 629.

[1185] *Bonnington v Castings Ltd v Wardlaw* [1956] AC 613.

[1186] *Wilsher v Essex Area Health Authority* [1988] AC 1074, HL.

[1187] *Bonnington v Castings Ltd v Wardlaw* [1956] AC 613.

probable that most of the dust the plaintiff had ingested had come from the hammers. However, he considered the key question to be "whether the dust from the swing grinders materially contributed to the disease."[1188] Lord Reid went on to state that a source made a material contribution where its contribution was more than *de minimis* i.e. not negligible.[1189] Thus, causation was established on the basis that as the plaintiff's lung disease was cumulative - arising from the dust inhaled in the workplace - and because the negligent dust contributed to the total amount of dust in the environment, the defendant had materially contributed to the harm. This was so even though the plaintiff could not prove that the contribution of the defendant's negligence was more than 50 per cent (more likely than not to be the sole cause). The plaintiff simply had to prove that the contribution made was more than negligible.

The House of Lords went one step further in its relaxation of the rules on causation with its subsequent decision of *McGhee v National Coal Board*.[1190] This case was also one that involved a disease allegedly contracted by an employee as a result of his employer's negligence. The House of Lords held that causation could be established even in circumstances where it could not be proven that the defendant's negligence contributed to the disease (as in *Bonnington*) but simply where the plaintiff could prove that the defendant's negligence contributed to increasing the *risk* of the harm occurring. In that case, the plaintiff was cleaning brick kilns on behalf of the defendant, his employer, when he was exposed to abrasive brick dust. The plaintiff's exposure to the brick dust did not occur due to the negligence of the defendant. However, the defendant did negligently fail to provide the plaintiff with washing facilities on site. As a consequence, the plaintiff was forced to cycle home after work before the dust could be removed. A short time later the plaintiff developed dermatitis and brought an action in negligence against the defendant alleging that his prolonged exposure to the brick dust materially increased the risk that he might contract dermatitis. *McGhee* could be distinguished on its facts from *Bonnington*, in that *Bonnington,* it was accepted as proven that every particle of dust (both negligent and non-negligent) had contributed to the plaintiff's disease as it increased the dosage of toxic material he had ingested.[1191] In *McGhee*, on the other hand, it was not proven that prolonged exposure to the dust had any causative effect. Despite this, Lord Reid, in adopting a broad approach to the question of causation, held that because

---

[1188] *Bonnington v Castings Ltd v Wardlaw* [1956] AC 613, 621.
[1189] Ibid., 622.
[1190] *McGhee v National Coal Board* [1973] 1 WLR 1.
[1191] Although one might counter that it was scientifically arguable that all that was proven was that both forms of dust were inhaled rather than both forms of dust combined to cause the harm.

the defendant's negligence added materially to *the risk of the injury occurrring* (longer exposure to the dust increased the likelihood of contracting the disease) then it could be inferred from the facts that the defendant's negligence had materially contributed to the occurrence of the harm. Particularly relevant to their Lordships' analysis was the nature of the relationship between plaintiff and defendant (that of employer and employee).[1192]

The *McGhee* decision represented a major departure from orthodox causation principles and it could be said that by "equating risk with cause"[1193] it had taken a step too far. In a subsequent decision, the House of Lords sought to limit its application with its decision in *Wilsher v Essex Area Health Authority*.[1194] In that case, the plaintiff was born prematurely. He suffered from an oxygen deficiency and in treating him a catheter was negligently inserted into his vein rather than an artery. As a consequence, the plaintiff was administered excessive oxygen. The plaintiff was later diagnosed as suffering from a condition which resulted in near blindness. This condition could have been caused by the negligent administration of excess oxygen. However, it could also have been caused by any one of four other natural potential causes which were associated with premature births. The plaintiff sought to establish causation based on the principle in *McGhee* i.e. that the negligence of the defendant increased the risk that he would contract the disease and therefore could be said to have contributed to its occurrence.

While the plaintiff was successful at first instance, the House of Lords ultimately rejected his claim. In so doing, Lord Bridge sought to limit the application of the principle of causation outlined in *McGhee,* arguing that it created "no new principle whatever" and should be confined to its own facts.[1195] Thus, the subsequent interpretation of *Bonnington/McGhee* was that an inference of causation can more readily be made in cases involving a "single agent/source"

[1192] *McGhee v National Coal Board* [1973] 1 WLR 1, 6; Lord Wilberforce outlined why the court could be justified in bridging the evidential gap in such a manner when he said:

> ... one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases, of which the present is typical, this impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creator of the risk, who ex hypothesi must be taken to have foreseen the possibility of damage, who should bear its consequences.

[1193] Eoin Quill, *Torts in Ireland* (2nd ed.) (Gill & MacMillan, 2004) 413.
[1194] *Wilsher v Essex Area Health Authority* [1988] 2 WLR 557.
[1195] Ibid., 569.

whereas in cases involving "alternative sources," such as *Wilsher*, the rules on causation would not be relaxed. In other words, the potential causes in *Bonnington/McGhee* - it was reasoned - were cumulative and could therefore be said to have combined to cause the harm. In *Wilsher,* the potential causes were independent and did not combine; each cause independently could have been the sole cause of the plaintiff's harm. Thus, an inference of causation could not be made in *Wilsher* as the defendant's negligence may have had no part to play in the plaintiff's injuries.

The *McGhee* principle was revitalised somewhat with the subsequent House of Lords decision in *Fairchild v Glenhaven Funeral Services Ltd.*[1196] In that case, a number of plaintiffs were negligently exposed by different employers to asbestos dust over the course of their careers. These plaintiffs had contracted mesothelioma (a form of lung disease associated with exposure to asbestos dust). Based on the available evidence it could not be conclusively proved whether the illness was caused as a result of prolonged exposure to the dust or by the once-off exposure to a single fibre. As a result of this evidentiary gap it was not possible for the plaintiffs to establish at what time each had contracted their illness and therefore which of their former employers had caused their disease. Lord Bingham considered that *McGhee* was not so confined to its facts as suggested by the decision in *Wilsher* and he acknowledged that to impose liability in circumstances where causation had not been proven under orthodox principles could result in the imposition of liability on an employer for the plaintiffs' injuries in circumstances where the plaintiff was only employed for a very short time over a long career by the employer. However, Lord Bingham - again emphasising the employment relationship which existed between the parties - observed that the interests of justice required a departure from the usual rules, and concluded that:

> ... there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can have only been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered. I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to the victim.[1197]

[1196] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

[1197] Ibid., [33]. The decision in *Fairchild* was upheld by the United Kingdom Supreme Court decision in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, where the Supreme Court - in yet another case involving the exposure of an employee by an employer to asbestos - confirmed that *Fairchild* was not limited to cases involving negligent exposures.

The jurisprudence on "multiple causation" is difficult to rationalise.[1198] On the one hand, precedent such as *McGhee/Fairchild* indicates that the creation of an increased risk of harm can be treated as satisfying causation. Yet, in *Wilsher*, this was not the case. One explanation of the distinction between the cases is that the harm in cases such as *Bonnington/McGhee/Fairchild* derived from a single noxious agent making it possible to prove that the negligent cause 'contributed' to the harm or the increase of risk of the harm. From there, it was a short logical step to make to conclude that the negligence contributed to the harm and therefore should be treated as a cause. In *Wilsher*, there was no single noxious agent ultimately responsible for the plaintiff's injuries. In that case, the harm could have been independently caused by at least four other 'natural' causes. Thus, the evidential step required was too great to make and causation was not established.

What the case law shows is that the courts are willing to adopt a principled, commonsense approach to the question of causation in circumstances where it is necessary to do so in the interests of justice. Contrary to the principles of corrective justice which demands proof of the existence of a factual link between defendant and plaintiff, the courts have been willing to impose liability in certain cases by distributing the loss to the employer notwithstanding the fact that the orthodox principles of causation have not been proven.

In the context of tort law's role in promoting relational human dignity, it is interesting to note that cases like *Bonnington, McGhee, Fairchild* and *Sienkiewicz* each involved employers who had negligently exposed their employees to the harm in question. Yet, in different relationships like that of doctor/patient as in *Wilsher* and other medical negligence cases,[1199] the courts were not as willing to take such radical steps.[1200] The relational conception of human dignity justifies the relaxation of causation rules in cases involving certain categories of relationship (such as that between employer and employee) where the dignitary interests of the plaintiff trump those of the defendant. In cases involving other relationships (such as that between medical

---

[1198] Sandy Steel, 'Justifying Exceptions to Proof of Causation in Tort Law' (2015) 78 Modern Law Review 729.
[1199] *Quinn (a minor) v The Mid-Western Health Board and Donal O'Sullivan* [2005] IESC 19.
[1200] Ibid., where Kearns J of the Irish Supreme Court limited the principle outlined in *McGhee* stating:

> *Wilsher* suggests that it is less open to a court to relax the onus of proof in relation to causation where the condition brought about by negligence is multi-factorial or is capable of being triggered for a variety of reasons or by a variety of agents. Conversely, where only one reason or agency can be identified, a court may more readily make good any evidential shortfall to draw an appropriate conclusion, notably when scientific and medical science is incapable of providing the requisite information.

practitioner and patient), however, the balance is tilted in the opposite direction given the social value afforded to the community in protecting the defendant in such relationships. As Stauch puts it:

> ... there are ... significant differences between industrial disease and medical negligence claims, justifying a more claimant-friendly approach in the former. There, typically, *the claimant is exposed to risk factors that, even if the defendant is only at fault for one, all ultimately derive from the workplace environment*. By contrast, in medical negligence cases, the doctor intervenes on behalf of the patient to ward off natural risks (stemming from illness), and the treatment itself usually adds to the risks in play; furthermore ... *in the case of NHS care, allowing recovery in doubtful causation cases will affect the resources available for other patients*. [emphasis added][1201]

These cases highlight how the courts are willing to apply distributive justice principles where it is deemed necessary to do so in order to promote human dignity. Notwithstanding the fact that in each of these cases it was not possible for the plaintiff to establish factual causation on traditional principles, the courts were willing in some of the cases to relax the orthodox rule when it was in the interests of justice to do so. Certainly, in cases where a relationship of employer and employee exists between the parties, the courts appear more willing to display flexibility presumably on the basis that relational dignitary interests justify so doing where the employer's private enterprise created the risk to which the employee was exposed and the employee suffers harm of the type that the employer was under a duty to protect the employee from. In such circumstances, the benefit obtained by the employer from his or her profit-making exercise does not justify the risk created. On the other hand, case law such as *Wilsher* reflects the fact that the courts are less likely to relax the rules on causation in relationships between doctor and patient where the risk is created by medical intervention. Given the complexity of the work carried out by the medical community and when one considers the benefit such work confers on society the relational notion of human dignity requires that the scales be tipped in favour of the defendant hence the strict application of causation principles.

Ernest J Weinrib, the leading corrective justice theorist, perhaps not surprisingly, does not see the *McGhee* line of authority as being at odds with corrective justice theory.[1202] Weinrib argues that it is a mistake to view the case as one involving two separate incidents i.e. the exposure to the dust which was not negligently caused, and separately the delay caused by the failure to

[1201] Marc Stauch, 'Material Contribution as a Response to Causal Uncertainty: Time for a Rethink' (2009) Cambridge Law Journal 27, 29.
[1202] Ernest J. Weinrib, 'Causal Uncertainty' (2015) Oxford Journal of Legal Studies 1.

provi the washing facilities which was negligent. Instead, in Weinrib's view they should both be vied as part of the same continuum i.e. a non-negligent act which created a risk (exposure to du and the negligent failure to ensure it did not cause harm (through the provision of washi facilities). In this way, Weinrib likened the case to one involving nonfeasance.[1203] In other ords, the real question was did the defendant create what was initially an innocent risk but th failed to reasonably ensure that it did not cause an injury? In Weinrib's view one cannceparate the so-called innocent cause from the guilty cause:

> Both the innocently created risk and the omission to alleviate it form a single sequence the entirety of which is imputable to the defendant's agency. An actor whose earlier conduct, even though not tortious at the time, creates a kind of risk that characteristically arises from that conduct, has a duty to exercise reasonable care to prevent that risk from materialising into harm or to ameliorate that harm if it occurs. Because the very creation of the risk obligates the risk creator to follow through with appropriate precautions, the defendant, unlike the rest of the world, is at no point a stranger to the normative implications of his own activity. The risk-creating segment of the defendant's activity remains innocent only when accompanied by risk-alleviating measures. One cannot, accordingly, segregate the innocence of creating the risk from the culpability of not alleviating it.[1204]

Thus, e employer's negligent failure to alleviate a risk that he had created by providing washi facilities on site in circumstances where it is proven that workers who are provided with sh facilities ordinarily did not contract dermatitis allowed an inference that causation had be proven by the plaintiff. This inference could only be rebutted by evidence which establ ed that the cause of the plaintiff's injuries was out of the ordinary. In conclusion, theref, the employer should be prevented from taking advantage of the fact that his negligent failure alleviate the risks created by his activity creates causal uncertainty and it is that fact whichstifies an inference of causation in the plaintiff's favour.[1205]

The pkets of strict liability which exist in tort law can also be rationalised on the basis of protecg the notion of relational human dignity. There are circumstances when principles of distribve justice dictate that the protection of human dignity is best achieved through the

---

[1203] Ern J. Weinrib, 'Causal Uncertainty' (2015) Oxford Journal of Legal Studies 19, where the author makes the follng analogy by way of explanation:

> suppose that at night someone falls into a hole that he did not see because the excavator had failed to put up a ght. The excavator can hardly argue that, if his digging of the hole was not tortious, the failure to illuminate it is erely nonfeasance. Digging the hole and failing to take proper steps to prevent others from being injured by it, ken together, constitute negligence.

[1204] Ibid0.
[1205] Ibid3.

creation of torts of strict liability. Thus, where the harm is intentionally, as opposed to accidentally caused, like cases involving trespass to the person, strict liability applies. Similarly, strict liability is imposed on the defendant where his or her land-based activity creates a disproportionate risk of harm to the plaintiff with little public interest as in *Rylands v Fletcher*.[1206] Strict liability now also applies in cases involving product liability which reflects the fact that the promotion of human dignity includes protecting the consuming public from defective products which are produced for the purposes of a commercial enterprise.[1207] Individual dignity is protected by imposing strict liability on producers for injuries caused to consumers by defective products. The fact that producer is in a much stronger position than the plaintiff to determine the circumstances giving rise to the defect justifies the imposition of strict liability on the defendant in such circumstances.[1208] Moreover, society generally better protected as the imposition of strict liability on producers will deter the flow of such products into the market. Finally, strict liability is also imposed on the defendant for harm caused by his or her employees while acting in the course of their employment under the doctrine of vicarious liability.[1209] This is so on the basis that because the harm would never have resulted had the

---

[1206] See the tort of *Rylands v Fletcher* (1866) LR 1 Ex 265. In particular, note the definition of "non-natural" which was defined by Lord Moulton in *Rickards v Lothian* [1913] AC 263, 280; as involving "... some special use bringing with it an increased danger to others, and must not merely be the ordinary use of land or such use as is proper for the general benefit of the community." Some have argued that the decision is explicable simply on the basis of a bias towards the economic interests of the burgeoning coal industry versus the diminished economic power of the farming community. However, Marshall S. Shapo, *Tort Law and Culture* (Carolina Academic Press, 2003) 85; offers the following explanation which is grounded in moral notions of the community:

> American judges today, at least those who write majority opinions, are generally more measured and less moralistic in approach and tone. Less bound by mountains of precedent and by traditions of judicial self-restraint the Law Lords in *Rylands* were more inclined directly to articulate the moral beliefs of the society they served. Perhaps, as has been suggested, their decision represented the ascendance of coal, and more generally of the oncoming forces of the Industrial Revolution, against the dwindling power of the miller. But Justice Blackburn, referring to fact situations that formed the basis for precedents, mentions cases involving cattle eating crops, sewage invading neighbors' cellars, and air pollution. Moreover, the language of the opinions occupies a much broader plane than a skirmish between mining and a farm economy. Any economic explanations become swept into a justice-oriented definition of rights and wrongs. The *Rylands* courts' opinions appear to represent an appeal to the moral sense of the community, whose views they reflect.

[1207] The Liability for Defective Products Act 1991.

[1208] Royal Commission on Civil Liability and Compensation for Personal Injury: Report Vol. 1 (1978) [316]; Richard Lewis, 'Insurance and the Tort System' (2005) 25 Legal Studies 85; Robert Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (2012) 75 Modern Law Review 301; Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 59 Modern Law Review 820; Martin Davis, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9 Legal Studies 67; Jonathan Morgan, 'Tort, Insurance and Incoherence' (2004) 67 Modern Law Review 384. For an American perspective, but still relevant in Ireland, see Kenneth S. Abraham, *Liability Century: From the Progressive Era to 9/11* (Harvard University Press, 2008).

[1209] *Escola v Coca Cola Bottling Co. of Fresno*, 150 P 2d 436 (1944), where Traynor J justified the imposition of strict liability on the following basis:

> ... public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some

employer nt engaged the employee for the benefit of his or her enterprise, thereby exposing the plaintifto an unnecessary and nonconsensual risk of injury. The losses suffered by the plaintiff (wo is entirely innocent) are distributed to the employer regardless of his or her moral blameworthess.

5.5.5 The Ble of Insurance in Tort Law

The obviourejoinder to the argument that tort law's justificatory basis is a moral one lying in the protectin of relational dignity is that such a position ignores the "elephant in the room" which is thavailability of insurance.[1210] The morality-based justification of tort law proposed here, so th argument goes, is undermined by the presence and availability of liability insurance. Isuch circumstances, the "bad man" does not actually make direct payment to the plaintiff as ompensation for his wrongdoing. Instead, the losses are the insurers' who have been descried as "the paymasters of the tort system."[1211] The presence of insurance means that it is rary the defendant who actually pays the compensation to the plaintiff the reality is that the praice does not accord with principles of corrective justice.[1212] Thus, as the social psychologis de Carufel concludes, the benefit of "receiving the compensation from the harmdoer [hich] is necessary to produce positive reactions"[1213] does not occur. Another argument isthat the existence of insurance is unlikely to deter future wrongful behavior because thensured defendant has no incentive to take precautions as any losses which will

---

hazar and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective produs are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manuturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the mketing of products having defects that are a menace to the public. If such products nevertheless find their way in the market it is to the public interest to place the responsibility for whatever injury they may cause upon the mufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the mket. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their currence is a constant risk and a general one. Against such a risk there should be general and constant proteon and the manufacturer is best situated to afford such protection.

[1210] For detail analysis and discussion of the effect, if any, that the availability of insurance has on tort legal principles see ne Stapleton, 'Tort, Insurance and Ideology' (1995) 58 Modern Law Review 820; Richard Lewis, 'Insurance anche Tort System' (2005) 25 Legal Studies 85; Gary T. Schwartz, 'Ethics and the Economics of Tort Liability surance' (1990) 75 Cornell Law Review 313; Fleming James Jr. and John V. Thornton, 'The Impact of Insunce on the Law of Torts' 15 (1950) Law and Contemporary Problems 431; Ernest J. Weinrib, 'The Insurancustification and Private Law' (1985) 14 Journal of Legal Studies, 675.

[1211] Richard Lis, 'Insurance and the Tort System' (2005) 25 Legal Studies 85, 87.

[1212] See Leman AB, 'Coercive Insurance and the Soul of Tort Law' (forthcoming, 2016) 105 Georgia Law Review; http:/apers.ssrn.com (last accessed 18 September 2016), where the author claims that a system of insurance wou be far more efficient than tort law as a system of compensation.

[1213] Andre de Crufel, 'Victims' Satisfaction with Compensation: Effects of Initial Disadvantage and Third Party Intervention' (981) 11 Journal of Applied Social Psychology 445, 452.

result from his or her careless behaviour will be paid by the insurance company.[14] For these reasons, the prevalence of insurance, as Stapleton observes "brings with it dilution of whatever moral and economic incentives would otherwise have followed had liability remained focused on the defendant personally."[1215]

The fact that the compensation to which the plaintiff is entitled is paid by a third pay insurance company does not fatally undermine the morality of tort law as a means of promoting relational dignity. The payment of compensation by the defendant is only but one aspect of tort law. Tort law vindicates the dignitary interests of the relational individual. It does this where the defendant has committed a wrong, by allowing the plaintiff to hold the defendant to account, obtaining compensation (or other relief), providing the plaintiff with the opportunity for his or her story to be heard, uncovering wrongdoing and deterring future wrongful behaviour. It is submitted that the existence or otherwise of insurance has minimal, if any, impact on any of these aims.

My response to such arguments may be outlined as follows. First, while there is some truth to the assertion that the moral imperative which requires that "it is the defendant who must pay" is weakened by the presence of liability insurance, it is not as significant as one might expect. For example, most liability insurance policies are "responsive"[1216] in the sense that the premiums are adjusted according to the level of risk associated with the defendant and his or her activity.[1217] Thus, the defendant does pay for his or her wrongdoing albeit may be a smaller fraction of the entire damages award.[1218] The payment by the defendant in the form of increased premiums therefore accords with corrective justice notions of tort law. In this way, "a finding of tortious conduct and the imposition of some sanction against the defendant,

---

[1214] Michael Trebilcock, 'The Social Insurance-Deterrence of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis' (1987) 24 San Diego Law Review 929.

[1215] Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 Modern Law Review 820, 825.

[1216] See Gary T. Schwartz, 'Ethics and the Economics of Tort Liability Insurance' (1990) 75 Cornell Law Review 313, 318, where responsive insurance is compared to "insurance that is "completely flat": insurance whose premiums and other terms takes no account of the level of risks created by an insured as he pursues a particular activity."

[1217] For a discussion of the impact of insurance on tort law and liability risk, see Steven D. Smith, 'The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law' (1987) 72 Cornell Law Review 765.

[1218] See Gary T. Schwartz, 'Ethics and the Economics of Tort Liability Insurance' (1990) 75 Cornell Law Review 313, 335 (fn 101), where the author observes:

> Consider a $100,000 accident that results in a motorist's premiums being increased by $150 for each of three years. This $450 obligation is less than .5% of the plaintiff's entitlement. Nevertheless, it is hardly a token increase as far as the motorist is concerned.

coupled with compensation by the defendant's insurance carrier" complies with moral principles of fairness and justice.[1219] The fact that the defendant may have assigned his or her rights to an insurance company through subrogation does not alter the fact that it is he or she who remains legally responsible to the plaintiff. This is evident from the fact that any litigation which results will be pleaded and reported in the name of the defendant regardless of whether it is the insurance company who is liable for the payment of any compensation.

Even where an insurance policy does exist it does not necessarily mean that the defendant will avoid personally paying for the plaintiff's injuries. For example, many insurance policies will not pay for claims where the harm has been caused by the defendant's deliberate acts or through his or her gross negligence. Moreover, insurance companies - through the use of deductibles – will not pay certain expenses incurred by the defendant as there may be a minimum threshold figure below which the insurance company will not be obliged to pay the plaintiff for losses caused by the defendant's wrongdoing.

Similarly, while the existence of liability insurance diminishes tort's deterrent effect it does not do so to any significant effect. The availability of insurance against risk creates a "moral hazard" where defendants might become complacent as regards the occurrence of that risk. However, insurance companies operating in a competitive marketplace will take steps to eliminate that hazard by imposing lower premiums for better safety records and equipment, increasing premiums where a bad safety record exists, capping compensation payments, refusing to cover risks and so forth.[1220] Moreover, regardless of the existence of insurance defendants are motivated by factors other than financial cost. For example, defendants will seek to avoid causing harm to others because of the reputational damage (both professionally and personally) that may be associated with a successful claim against them. Also, in some cases involving physical harm, where the harm to the plaintiff also exposes the defendant to similar risk, the defendant will moderate his or her behaviour out of self-preservation.

[1219] Steven D. Smith, 'The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law' (1987) 72 Cornell Law Review 765, 795-796.

[1220] See Gary T. Schwartz, 'Ethics and the Economics of Tort Liability Insurance' (1990) 75 Cornell Law Review 313, 336-359; for discussion of the effect of insurance on deterrence. For example, see Alexander B. Lemann, 'Coercive Insurance and the Soul of Tort Law' (forthcoming, 2016) 105 Georgia Law Review; http://papers.ssrn.com (last accessed 18 September 2016), where the author highlights new technology used by car insurance companies which monitors drivers' driving habits e.g. whether they speed, drive late at night etc. From the information gained from this technology, the insurance companies can better decide risk and reward those drivers who exhibits are safe while imposing higher premiums on those who have careless habits.

Second, through the litigation process, tort law determines liability throughttlement of, or a judgment on, the cause of action. It is only after this process that ince comes into operation.[1221] Thus, it is through the tort system that acceptable societal s of behaviour are promoted and insurance is not a factor which determines this moral que.[1222] However, the presence of insurance is fair to the defendant as it ensures that he or she crushed under the financial burden which can arise from serious injury. Notwithstandie existence of insurance, tort law plays a significant role in sending a signal to the rest oiety as to what is or is not acceptable behaviour. Furthermore, the existence of insurance not affect the fact that the plaintiff can hold the defendant to account publicly (if he or shhooses) in the vindication of his or her rights. If ensuring compensation to the victim was nly concern of tort law, then a logical extension of this argument would be that it should ly be replaced by a system of first party insurance which might be more efficient than ourent system of liability insurance. [1223]

A scheme of first party insurance would relieve the defendant of his or her nsibility to the plaintiff. Rather than require the defendant to take into consideration the ire of others it would impose responsibility on the plaintiff to ensure that he or she was aately protected from such harm. Such an approach would undermine the plaintiff's autoy as he or she would simply be a means to the others' end. It would also undermine the pff's autonomy

---

[1221] Ernest J. Weinrib, 'The Insurance Justification and Private Law' (1985) 14 Journal of Studies 675, 683.
[1222] Note the words of Viscount Simonds in *Lister v Romford Ice and Cold Storage Co L*57] AC 555, 576-577, where he stated: "As a general proposition it has not, I think, been questioned 00 years that in determining the rights *inter se* of A and B the fact that one or other of them is insured is disregarded." An example of the law's refusal to consider the fact that the one of the parties to the litigationbe insured can be gleaned from section 2 of the Civil Liability Act 1961 which provides:

> In assessing damages in an action to recover damages in respect of a wrongful act (inclu crime) resulting in personal injury not causing death, account shall not be taken of (a) any sum payable in r of the injury under any contract or insurance; or (b) any person, gratuity or other like benefit payable undate or otherwise in consequence of the injury.

See also Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 Modern Law Review 82(where the author observes, "Across the broad range of cases where courts have recognised tort liability, from*ghue v Stevenson* to *Dorset Yacht Co Ltd v Home Office*, the question of whether the plaintiff had or could btained first party insurance is simply ignored ..."
[1223] Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 Modern Law Review 820,where the author points out that such an approach would be normatively unappealing:

> By assuming that the victim needs insurance, we are assuming that he cannot as of righre the defendant to protect his relevant interests. It impliedly rejects the possibility that sometimes there are s why the law may want to grant him that right and the accompanying entitlement to a restorative measure ages: for example, because it wants to deter certain conduct of defendants or because it regards the injury a ng which 'justice' requires to be 'corrected', or an 'outcome' for which the defendant should be held respons

in that it would require him or her to purchase first party insurance to guard against such wrongdoing. For these reasons, the existence of liability insurance does not undermine the morality of tort law put forward here. The existence of insurance is only significant in that it provides the plaintiff with access to compensation for his or her injuries and ensures that the defendant is not crushed under huge financial strain for a moment's inattention which causes serious injury. However, the fact that insurance exist does not affect the liability rules of tort nor its ultimate aim of preserving relational dignity.

5.6 Conclusion

In this chapter, I identified the promotion of human dignity as the underlying norm of tort law. It is my thesis that tort law can be best explained and interpreted on this moral basis. The notion of diginity is an elusive concept and for these reasons it is easy to attack as a normative principle; it is whatever you want it to be. That said, I have attempted to develop a more concrete notion of human diginity which is not simply based on individual autonomy but also takes into account of our relationships in society which partly constitute us. It is my thesis that this notion of relational human dignity not only provides the best explanation for current doctrine it also provides the guidance necessary for the future development of tort law.

Having identified the promotion of human dignity as the normative basis for our tort system I examined what might be lost to society if we were to dispense with it as a method of dealing with harm caused by wrongful behaviour. In this context, I evaluated the impact that the introduction of a no-fault statutory compensation scheme like that introduced in New Zealand might have on our society. Having done so, it is my conclusion that we, as a society, have much to lose should we follow the same path. In this chapter, I also explained how the promotion of human dignity already lies at the heart of our Constitution and our legal system. I highlighted how the notion of relational diginity is a constant thread through tort doctrine by analysing the leading judgments in areas such as causation, non-delegable duties, affirmative duties and so forth. Finally, I engaged the "elephant in the room" which might undermine my theory of human dignity and that is the availability of insurance and elucidated how tort law still ensures that individual dignity is vindicated regardless of whether it is the defendant who directly pays. In the next chapter, I highlight how the pursuit of the normative goal of the promotion of human dignity can improve current tort rules while also leading to the principled development of new ones.

Chapter 6

The Future of Tort Law

6.1 Introduction

In the previous chapter I identified the underlying norm of tort law to be the promotion of relational dignity. I sketched my vision of relational diginity to be applied and grounded within the Irish Constitution and the common law more genearally. In so doing, I also highlighted the social value of retaining our tort system and explained what might be lost should we dispense with it by contrasting it with other systems such as that adopted in New Zealand. In this chapter I examine how the notion of relational human dignity can lead to a more coherent and principled system of justice which will be to the benefit of all. In particular, I analyse how this normative principle can be utilised to re-interpret current tort doctrine and furthermore, how it might be used to develop new tort rules in areas involving emerging technology.

While it is submitted that the relational aspect of human dignity best represents the role and purpose of tort law, that is not to say that the courts have always struck the correct balance in achieving this aim. While a concept of human dignity which encompasses wider societal interests is put forward as the underlying rationale for tort law, one has to remain vigilant that the social dimension of the concept is not corrupted by historical bias as regards gender, race or the nature of the harm, for example. Conaghan for one has pointed out such dangers as they might apply in the case of gender bias (as reflected perhaps in decisions regarding failed sterilization and assisted human reproduction discussed later in this chapter) when she warns:

> … injury has a social as well as an individual dimension: people suffer harm not just because they are individuals but also because they are part of a particular class, group, race or gender. Moreover, their membership of that particular class, group, race or gender can significantly shape the nature and degree of the harm they sustain. The problem with law then is its failure to recognise that social dimension. Consequently, and in the context of gendered harms, it fails to offer proper redress.[1224]

A recalibration of focus on vindicating human dignity, will have the advantage of releasing judges from the strictures of the old causes of action approach which was reliant upon traditional notions of harm, thus making the law more adaptable. A reconfiguration of tort

[1224] Joanne Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16 Oxford Journal of Legal Studies 407, 408.

claims with primacy given to the protection of relational human dignity would revitalise tort law particularly when dealing with new emerging causes of harm. Such an approach would "recognize that a citizen can be wronged without being "harmed.""[1225] It is therefore submitted that the protection of relational human dignity is the underlying theme of tort law that does not necessarily create an independent right in itself but instead is the basis for all causes of action in tort. Thus, not only does dignity inherently rest within current tort rules, it also provides a normative principle whereby such rules will be interpreted in hard cases and from which new tort rules can be created. The protection of human dignity in this regard operates through tort rules as a negative right, breach of which provides remedies to individuals for infringement of their dignity. Thus, it might be said, as Glensy vividly put it, that the role of dignity is as tort law's tuning fork, "to which all elements of the orchestra need to be harmonized."[1226] It is the underlying norm of tort law which represents our "right to have rights".[1227] This involves a move towards a rights-based approach with less emphasis on the nature of the loss viewed in light of societal concerns as to what amounts to acceptable behaviour.

While dignitary interests may be inherent, consciously or unconsciously, in tort rules, it is necessary in the interests of justice that these values feature more prominently in judicial thinking when interpreting such rules. That is not to say that personal interests are absolute: the concept of dignity proposed here is one limited by the rights of others living in the community. The foregoing analysis of select areas of tort doctrine, by way of example, highlights how tort law might be improved and developed in more principled fashion if the dignitary interests of the plaintiff received greater weight in the analysis of competing interests. What is proposed here is simply a framework by which cases could be decided in a just manner. Further research is required on how this framework might be implemented. However, it is proposed here that the notion should operate on the basis that the primary concern should be the vindication of relational human dignity i.e. both that of the plaintiff and the defendant. Within that consideration, primacy should be given to vindicating the autonomy of plaintiff and defendant

---

[1225] Joseph Goldstein, 'For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain' (1975) 83 Yale Law Journal 683, 691. Peter Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1997) 32 Irish Jurist 1, where the author proposes the creation of a tort of contemptuous harassment based on the notion of equality of respect between persons.

[1226] Rex D. Glensy, 'The Right to Dignity' (2011) 43 Columbia Human Rights Law Review 65, 122; when discussing the role of dignity under the U.S. Constitution and borrowing the analogy from Mary Ann Glendon, '*Propter Honoris* Respectful: Knowing the Universal Declaration of Human Rights' (1998) 73 Notre Dame Law Review 1153, 1173.

[1227] John F. Stinneford, 'Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity' (2006) 3 University of St. Thomas Law Journal 559, 566.

only when by doing so harm is caused to wider societal interests should autonomy considerations be treated as secondary.

6.2 The Role of Dignity in Interpreting Current Tort Rules

It is first necessary to examine how the pursuit of the normative goal of the promotion of human dignity can improve current tort rules. For example, Irish courts have not evinced any enthusiasm for tort claims against members of An Garda Síochána in relation to the negligent investigation of crimes. In two recent decisions of the Irish High Court - *Lockwood v Ireland*[1228] and *M v Commissioner of An Garda Síochána*[1229] - the plaintiffs, after making criminal complaints against identified individuals, sought damages when the subsequent prosecution of the alleged perpetrators collapsed due to the negligence of members of An Garda Síochána in the investigation of the cases. In the judgments of both cases, emphasis was placed on the chilling effect that any other decision would have on the work of the police force. According to these judgments, a finding of liability in such circumstances would only serve to inhibit the work of the force as it would potentially expose them to a flood of similar actions. Thus, the exigencies of the common good trumped individualised justice.

What is concerning about these particular cases is what little regard was paid to the plaintiffs' dignity in the course of the judgments. Certainly, the concern for the common good might justify a finding of 'no duty' in cases where the plaintiff – who was previously unidentifiable to members of An Garda Síochána – is the victim of a crime which could have been prevented but for their negligence.[1230] But in these particular cases the plaintiff, having already come forward and made the criminal complaint identifying her attacker, was specifically identifiable as a potential victim of the defendant's negligence prior to its occurrence.[1231] Consequently, it is difficult to understand, and certainly no empirical evidence was introduced to support the contention, how the recognition of the plaintiff's claim would have led to a flood of litigation against the force. The one-sided use of public policy concerns in this manner, as Beever

[1228] *Lockwood v Ireland* [2011] 1 IR 374.
[1229] *M v Commissioner of An Garda Síochana* [2011] IEHC 14. The decision in *M v Commissioner of An Garda Síochána* was subsequently expressly approved by the High Court in *G v Minister for Justice, Equality & Law Reform* [2011] IEHC 65.
[1230] *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL).
[1231] Dermot P.J. Walsh, 'Liability for Garda Negligence in the Prevention and Investigation of Crime' (2013) 49 Irish Jurist 1.

observes, results in the plaintiff being "treated merely as a means to others' ends."[1232] The dignity of the plaintiffs in both of these cases was sacrificed for the greater good (being interpreted as saving the force from a tsnunami of negligence claims) without any empirical analysis as to the extent of such a threat if it existed at all. Nor was there any real consideration of the benefits that might accrue to society if members of the police force were held to account for their negligent actions when discharging their duties. Instead, the costs that would be imposed on society (real or exaggerated) by a finding of negligence against the public authority, as du Bois points out, are continually highlighted in such cases "without attempting to balance these against the benefits of doing so" and consequently, "appears to leave half the task undone."[1233] As Lord Bingham, commenting on the decisions in two House of Lords' decisions regarding the same issue,[1234] stated:

> If the virtual immunity now extended ... to large areas of police activity were removed, there would no doubt be a cost falling, directly or indirectly, on the community who fund the service. If economy were all, the present law has its virtue. But if a member of the public whom a public service exists to serve suffers significant injury or loss through the culpable fault or reprehensible failure of that service to act as it should, is it not inconsistent with ethical and, perhaps, democratic principle that the many, responsible for funding the service, should bear the cost of compensating the victim?[1235]

The so-called immunity granted to the police in the investigation of crime has been held to contravene Article 6 of the European Convention on Human Rights (right to a fair hearing). In *Osman v United Kingdom*,[1236] the European Court of Human Rights held that the finding of 'no duty' in such cases infringed Article 6 stating that "it must be open to a domestic court to have regard to the presence of other public-interest considerations which pull in the opposite direction."[1237] In the subsequent decision of *Z v UK*,[1238] however, the Court decided that the 'no duty' rule was not necessarily a violation of Article 6, stating that its reasoning in *Osman* had developed and "was based on an understanding of the law of negligence ... which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and

---

[1232] Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) 176-177; quoting Ernest J. Weinrib, 'Does Tort Law Have a Future?' (2000) 34 Valparaiso University Law Review 561, 566.
[1233] Francois du Bois, 'Human Rights and The Tort Liability of Public Authorities' (2011) 127 Law Quarterly Review 589, 596.
[1234] *Smith v Chief Constable, Sussex Police* [2009] 1 AC 225 and *Chief Constable, Hertfordshire Police v Van Colle* [2008] UKHL 50.
[1235] Lord Bingham, 'The Uses of Tort' (2010) 1 Journal of European Tort Law 3, 15.
[1236] *Osman v United Kingdom* [1998] ECHR 101.
[1237] Ibid., [151].
[1238] *Z v UK* [2001] ECHR 333.

notably by the House of Lords."[1239] That case stemmed from the decision of *X (Minors) v Bedfordshire County Council*, [1240] where a number of children who suffered psychiatric harm as a result of abuse that they had suffered and from which they contended various public authorities should have protected them from. The House of Lords found that no duty of care was owed to the children in the circumstances. This decision was appealed to the European Court of Human Rights which effectively reversed its decision in *Osman* and held that the 'no duty' finding was not in violation of Article 6. However, the Court did find that the public authorities' failure to act in these circumstances constituted a violation of the children's rights under Article 3 (protection from inhuman and degrading treatment).

Notwithstanding the rejection of the claims of the plaintiffs as a preliminary issue in *Lockwood v Ireland* and *M. v Commissioner of An Garda Síochána,* there are signs that the winds might be changing in this regard and there would now appear to be a renewed appetite for further scrutiny of such claims. In the recent Irish Supreme Court decision of *L.M. v The Commissioner of An Garda Síochána & Others,*[1241] O'Donnell J, influenced by developments in other common law jurisdictions[1242] and the jurisprudence of the European Court of Human Rights, emphasised the complexity regarding the very important public policy questions raised by these cases in examining whether it was appropriate to dismiss them as a preliminary matter.[1243] O'Donnell J questioned whether the policy issues raised by the cases before him were the same as those raised in ostensibly similar cases such as *Hill* and which were used as supporting precedent for a finding of no duty in *Lockwood* and *M.* As O'Donnell J observed in *L.M.*, even if the law were to allow a claim involving the negligent failure by the police to apprehend an individual who later commits and is convicted of a crime (as in *Hill*), that does not necessarily mean that such a rule should also be extended to a situation where it is alleged the individual has not been tried, or where he has been tried, has not been convicted of the crime. How would one deal with such issues where a central part of the negligence claim might be that "the accused, would or could, have been found guilty?"[1244] Given the thorny policy issues involved,

---

[1239] *Z v UK* [2001] ECHR 333, [100].
[1240] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.
[1241] *L.M. v The Commissioner of An Garda Síochána & Others* [2015] IESC 81.
[1242] Ibid., [20], where O'Donnell J cited a recent Northern Ireland case involving similar issues and where the court refused to strike out the claim in negligence: *C (A Person Under a Disability) v The Chief Constable of the Police Service of Northern Ireland* [2014] NIQB 63.
[1243] Ibid., [25].
[1244] *L.M. v The Commissioner of An Garda Síochána & Others* [2015] IESC 81, [25].

some of which he merely touched upon, O'Donnell J held that both cases should be returned to the High Court for a full hearing on the issue, stating:

> The combined effect of the importance and complexity of the legal issue raised in these cases, the procedural inadequacies and confusions, the lack of factual and legal precision even after a number of years, the unlikelihood that even the bluntest answer will resolve all issues in such cases, and the possibility, at least, that the Court might not be able to offer more than a highly qualified, contingent or abstract answer, all lead me to the conclusion that the determination of the preliminary issue in these cases is an inadequate and inappropriate vehicle for the determination of the important issues raised. While the point raised is an important and absorbing one from the point of legal theory, it is also of particular importance at a human level, not least to the individual plaintiffs whose experience of the legal system in its broadest sense, cannot be said to have been positive. It is important that these cases are properly and fairly determined, which means in my view that these plaintiffs should be allowed bring their cases to trial.[1245]

Similarly, in the context of vicarious liability, greater regard for human dignity might have led to a very different result in the Irish Supreme Court decision of *O'Keeffe v Hickey & Others*.[1246] In that case, as discussed earlier in this work, Ms O'Keeffe was sexually assaulted on at least 20 occasions as a young child by her schoolteacher while at school in 1973. She subsequently sought compensation from the State on the basis of vicarious liability arguing that the State, through the Department of Education, was the teacher's employer because they paid his salary and had certain managerial oversight over his employment. This line of argument was somewhat complicated because of the long historical involvement of the Catholic Church with the delivery of education in Ireland. Ultimately, Ms O'Keeffe's claim failed as the majority of the Supreme Court held that the State was not the teacher's employer, because in their opinion, greater day-to-day control of the management of the School rested with the local management board and not with the Department of Education. Consequently, vicarious liability could not be established which would have allowed Ms O'Keeffe to claim compensation from the State for the harm she suffered at the hands of her teacher.

Again, the judgment of the majority effectively relegated Ms O'Keeffe's human dignity to secondary importance in its deliberations in favour of protecting the financial resources of the State. Ms O'Keeffe had been left psychologically scarred as a vulnerable young child by the

---

[1245] *L.M. v The Commissioner of An Garda Síochána & Others* [2015] IESC 81, [44].

[1246] *O'Keeffe v Hickey & Others* [2008] IESC 72. For further discussion, see Desmond Ryan, 'Connections without Consensus: Recent Approaches to Vicarious Liability in the Irish Supreme Court' (2009) 31 Dublin University Law Journal 457.

actions of a teacher in whose care she had been entrusted. In refusing to hold the State vicariously liable for the teacher's actions, the court denied her (and others like her) access to an adequate source of compensation which would have gone some way to vindicating her dignity as well as acknowledging the State's role in what had occurred.

Having exhausted all legal avenues open to her in Ireland, Ms O'Keeffe appealed the Irish Supreme Court decision to the European Court of Human Rights on the basis that her Article 3 rights (protection from torture, inhuman or degrading treatment) under the European Convention on Human Rights had been breached as the State had not provided for an effective domestic remedy to her claims.[1247] The European Court of Human Rights (ECtHR) held that the State had failed in its obligations under Article 3 in not having implemented a more robust system of detection in sexual assault cases such as this and thereby, impliedly, had failed to vindicate Ms O'Keeffe's dignity. The State countered that Ms O'Keeffe had been provided with an effective domestic remedy in the form of a constitutional tort action protecting her right to bodily integrity.[1248] But the ECtHR held that this protection was somewhat illusory because under domestic law Ms O'Keeffe was precluded from pleading infringement of her constitutional rights before the Irish courts as there was an adequate remedy provided under tort law which, it was argued, was sufficient to vindicate her interests in her bodily integrity. Such protection came in the form of a direct claim in negligence and/or an indirect claim based on vicarious liability. Notwithstanding these private causes of action, it was maintained in submissions to the court, and ultimately upheld by it, that these torts were ineffective in vindicating Ms O'Keeffe's rights in that tort remedies tended to focus on the defendant's conduct rather than the plaintiff's rights.[1249]

The tortious remedies available to Ms O'Keeffe did not adequately focus on the vindication of her dignity. The negligence action, by concentrating on the defendant's behaviour, lacked adequate focus on the impact that behaviour had on Ms O'Keeffe. Given the emphasis

---

[1247] *O'Keeffe v Ireland* [2014] ECHR 96.

[1248] The provision of civil remedies for breaches of constitutional rights was discussed earlier and was recognised in *Byrne v Ireland* [1972] IR 241and in *Meskell v Ireland* [1973] IR 121.

[1249] *O'Keeffe v Ireland* [2014] ECHR 96, [182], where it was stated:

> ... the nature of the tortious relationship (negligence/vicarious liability) defined the State's obligations/rather than the possibly broader duty of the State to vindicate the rights of a child in the public education system. This, in turn, raised the question of whether the private law remedy in tort was adequate to protect the substance of the applicant's constitutional rights not least because the private law remedy focused on the State's conduct rather than on the applicant's rights.

traditional negligence claims place on the behaviour of the wrongdoer, Ms O'Keeffe was dissuaded from bringing an action directly against the State in negligence (such a claim had earlier been dismissed).[1250] It would have been very difficult to establish from an evidentiary point of view that she was owed a duty of care given "the interposition of the denominational managers to the exclusion of the State control in National Schools would appear to be incompatible with the existence of any such duty of care."[1251] Moreover, the emphasis in tort law on the wrongdoer's behaviour meant that it would be necessary for Ms O'Keeffe to establish that the State should have had knowledge of the risks posed in not having a more robust system of detection in place. This was a significant undertaking in terms of proof and Ms O'Keeffe simply did not have the financial resources to carry out such an investigation and consequently did not pursue it further.

Furthermore, the Supreme Court's failure to hold that the Department of Education was the teacher's employer for the purposes of vicarious liability was a decision which also entirely failed to protect Ms O'Keeffe's dignity. A greater emphasis on protecting her dignity would have led to the conclusion that the State had the greater 'control' over the teacher on the basis that it had the authority to withdraw any teacher's qualifications for stated misbehaviour which was a power that was not vested in the local management board. Had the Supreme Court instead found that the State – through the Department of Education - was the abuser's employer it would have provided Ms O'Keeffe with an avenue by which her dignity could be vindicated while also deterring similar future behaviour by placing responsibility on the employer to minimise its occurrence.

Keane has criticised the decision of the ECtHR in *O'Keeffe*.[1252] In particular, he questions whether it was correct, as the ECtHR decided, that Ms O'Keeffe had in fact exhausted all domestic remedies available to her in preferring one domestic cause of action (the vicarious liability claim before the Supreme Court) over another (a claim for negligence and/or breach of a constitutional tort pleaded before the High Court but not before the Supreme Court) when

[1250] *L. O'K v L.H. & Others* [2008] 13.
[1251] *O'Keeffe v Ireland* [2014] ECHR 96, at [185].
[1252] Ronan Keane, '*O'Keeffe v Ireland* in Strasbourg: Punishing the Guilty?' (2015) Dublin University Law Journal 172.

both causes of action had the same objective i.e. holding the state responsible for the teacher's actions.[1253]

As to whether the Irish state had failed in its obligations to Ms O'Keeffe under Article 3, Keane suggests that "there was no evidence whatsoever to support their finding that the State should have known of the risk of sexual abuse in the national primary schools."[1254] It was, in Keane's opinion, unfair to impose modern standards regarding child protection measures on the State's actions in 1973.[1255] If measured in accordance with the contemporary standards and knowledge of the time there was no evidence, according to Keane, that the State had knowledge or should have had knowledge of the dangers posed by the teacher in such circumstances.[1256] Gallen counters, however, by noting that while it is true that the standards of knowledge are different today, "[e]ven granting historical ignorance of the prevalence of such abuse in the 1970s, it

---

[1253] James Gallen, '*O'Keeffe v Ireland*: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education' (2015) 78 Modern Law Review 151, 161, where the author points out that in analysing these remedies the Court may have been guilty of conflating direct liability with vicarious liability. See also Ronan Keane, '*O'Keeffe v Ireland* in Strasbourg: Punishing the Guilty?' (2015) Dublin University Law Journal 172, 181, where the author concludes that:

> It is a remarkable consequence of the judgment of the majority that a finding of legal culpability was made by the ECtHR without the final court of appeal in Ireland being given the opportunity of determining whether, in a matter of this gravity, the Irish state should be found so culpable. It seems difficult to reconcile – to put it no more strongly – with the primary role of the Member States in safeguarding human rights ...

[1254] Ronan Keane, '*O'Keeffe v Ireland* in Strasbourg: Punishing the Guilty?' (2015) Dublin University Law Journal 172, 190.

[1255] *O'Keeffe v Ireland* [2014] ECHR 96, [36], note the dissenting opinion of Charleton J who stated: "the standards of today based on experience up to today are not necessarily how conduct in the past is fairly to be judged." See also James Gallen, '*O'Keeffe v Ireland*: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education' (2015) 78 Modern Law Review 151, 158, where the author makes a similar point about the failure of the Court to articulate its methodology in addressing the retrospective application of Convention standards in cases such as this, noting:

> As the Strasbourg court remains under considerable pressure from the UK courts and politicians regarding perceived judicial activism, a more explicit methodology may have been appropriate. While the court was unlikely to articulate a comprehensive interpretative methodology, some broader guidance would have been welcome to avoid suggestions of ad hoc and ideological judicial activism.

[1256] James Gallen, '*O'Keeffe v Ireland*: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education' (2015) 78 Modern Law Review 151, 155, where the author makes a similar point:

> ... the decision ... raises concerns regarding the Court's approach to the positive obligations under Article 3, the Court's methodology for the historical application of the Convention and the relationship of its effective remedy jurisprudence to vicarious liability in tor law.

seems unreasonable for Ireland to ignore oversight and regulation of the possibility of physical or sexual abuse by teachers of pupils."[1257]

Dignitary interests also suffer in cases involving non-traditional harm such as psychiatric injury. Tort law's aversion towards particular types of harm, particularly non-physical harm,[1258] has resulted in a situation where the dignitary interests of the plaintiff in these types of cases are continually undermined. For example, in *Fletcher v Commissioner of Public Works in Ireland*,[1259] the Irish Supreme Court denied recovery to the plaintiff where his employer had negligently exposed him to significant quantities of asbestos dust in the workplace and as a consequence also exposed him to the risk, albeit medically remote, of contracting a lung disease known as mesothelioma. While the plaintiff did not contract the lung disease he did develop a psychiatric illness as a result of his understandable worry. Notwithstanding the fact that the court accepted that the possibility of the plaintiff contracting such a psychiatric illness was in the circumstances readily foreseeable, liability was denied on the basis that to do so would be contrary to public policy. Yet again, the plaintiff's dignitary interests were deemed subservient to policy considerations arising from the court's concerns regarding the nature of the harm. Despite the fact that it was proven that the defendant's careless behaviour caused the plaintiff to suffer recognisable and foreseeable harm, no liability attached to the defendant. As Binchy observes:

> Again one can discern a desire to blame people with psychiatric illness for their irrationality in becoming ill. This stance may be considered to lack insight into the aetiology of mental illness. The idea that one can make a meaningful distinction based on whether the mental illness derives from physical illness sustained in an accident or from predisposing mental condition seems mistaken.[1260]

In *Devlin v The National Maternity Hospital*,[1261] the plaintiff had claimed damages for the psychiatric damage that she had suffered at the hands of the defendant hospital. In 1988, the plaintiff gave birth to a stillborn child. Without her knowledge or consent, a post-mortem was performed on her daughter and her organs were retained for medical purposes by the defendant

---

[1257] James Gallen, '*O'Keeffe v Ireland*: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education' (2015) 78 Modern Law Review 151, 157.
[1258] Nicky Priaulx, 'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law' (2012) 33 Adelaide Law Review 177.
[1259] *Fletcher v Commissioner of Public Works in Ireland* [2003] IESC 13.
[1260] William Binchy, 'Recent Developments in the Law of Torts' (2004) Judicial Studies Institute Journal 8, 16.
[1261] *Devlin v The National Maternity Hospital* [2007] IESC 50.

hospital. It was not until November 2000 that the plaintiff learned that her daughter's organs had been retained by the hospital. She suffered post traumatic stress as a result. By pigeonholing the plaintiff's claim as a typical nervous shock claim, the emphasis focused on controlling such claims rather than on vindicating the plaintiff's dignitary interests. In so categorising the harm, precedent dictated that certain conditions should be met before a plaintiff would be entitled to damages.[1262] These conditions included a requirement that the plaintiff establish that the shock was sustained by reason of actual or apprehended injury to oneself or another person. The plaintiff's claim failed by reason simply of the fact that, because she learned 'bad news' and did not witness actual harm, or the risk thereof, to her child, she was not entitled to recover any damages. Yet again, the preoccupation of the court was with the nature of the harm – categorised as 'nervous shock' – and not her human dignity as a mother. The hospital's failure to obtain her permission for the post-mortem and the retention of her daughter's organs was negligent. It was these acts of negligence which caused her deep psychological harm and not, as Denham J termed it, "the receipt of bad and sad news."[1263] Yet, the fixation in Irish tort law on the nature of the harm distracted from the real harm – the damage to the human dignity of the plaintiff.[1264] One wonders whether the decision reflects the gender bias - of which Conagahan has previously referred[1265] - inherent in the law in its approach to damage of this kind which essentially involved the psychological trauma suffered by the plaintiff in respect of the indignity visited upon her by failing to respect her role as a mother.

[1262] *Kelly v Hennessy* [1995] 3 IR 263.

[1263] Ibid., [35].

[1264] See Nicky Priaulx, 'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law' (2012) 33 Adelaide Law Review 177, 189, where the author observes that the solution might not exist in extending recognition for such harms:

> The point is this: we have been so concerned with making gains *within* the law that we have neglected to *address* the system as a whole. The gains made within the system may serve largely rhetorical ends because of the way that negligence really works. For those committed to using the legal project as an instrument for achieving equality this poses a sizeable dilemma. Extending the damage principle to humanise tort and embrace the kinds of experiences which profoundly harm us may be a laudable aim in theory, but in practice, we are only reaching a limited and privileged range of beneficiaries in a highly limited way – with money ... We would do well to consider whether financial compensation might be a rather lazy and impoverished means of providing account to victims for the non-economic consequences of injury whether stemming from physical injury or indeed, 'messed up lives'. Either way, it looks like something less than a genuine account for the losses victims do sustain.

[1265] Joanne Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16 Oxford Journal of Legal Studies 407, 408.

6.3 The Role of Dignity in Formulating Tort Rules

Not only do dignitary interests have a role to play in the interpretation of current tort rules, they have perhaps an even more important role to play in the formulation of new ones. Using dignity as the lodestar in decision-making, it is submitted that a principled, coherent and just approach can be adopted in formulating new tort rules. Emerging technology, while bringing great benefits, will also bring new threats of harm to society and it is essential that, as Bloustein put it, "[o]ur capacity as a society to deal with the impact of this new technology depends, in part, on the degree to which we can assimilate the threat it poses to the settled ways of our legal institutions have developed with similar threats in the past."[1266] For present purposes, the notion of autonomous choice as manifested in decisions surrounding the doctrine of informed consent and procreative torts will be discussed by way of example to highlight the role that dignity might play in future developments.[1267]

6.3.1 The Doctrine of Informed Consent

Decisions relating to one's medical treatment are among the most personal that any individual can make and are in a realm where the strongest arguments can be made in defence of individual autonomy.[1268] Yet, Irish tort doctrine fails lamentably to protect individual autonomy in this regard. The protection of informed choice in the medical context has become critical in modern society. The choices now available to patients as regards their medical treatment are much broader and more complex than ever before and as such promoting informed choice has become even more essential.[1269] Where a physician has failed in his or her duty to adequately warn a patient about a particular risk associated with a proposed procedure the injured patient may pursue a claim in negligence under the 'doctrine of informed consent.'[1270] However, it is submitted, that this doctrine merely provides illusory protection of

---

[1266] Edward J. Bloustein, 'Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University Law Review 962, 963.

[1267] For example, the principle of human dignity can be used to support of the creation of a right of publicity (otherwise known as 'image rights') which have yet to be explicitly recognised in Irish law. See Alice Haemmerli, 'Whose Who? The Case for a Kantian Right of Publicity' (1999) 49 Duke Law Journal 383; Margaret J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 956; Val Corbett, 'The Right of Publicity and the Search for Principle' in András Koltay (ed.) *Media Freedom and Regulation in the New Media World* (Wolters Kluwer, Budapest, 2014) 385-413. See also Peter Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1997) 32 Irish Jurist 1, where the author justifies the creation of an independent tort of contemptuous harassment based on the notion of equality of respect between persons.

[1268] Marjorie Maguire Shultz, 'From Informed Consent to Patient Choice: A New Protected Interest' (1985) 95 Yale Law Journal 219, 220; Heidi M. Hurd, 'The Normative Force of Consent' in Peter Schaber (ed) *The Ethics of Consent* (Routledge Press, 2016).

[1269] Marjorie Maguire Shultz, 'From Informed Consent to Patient Choice: A New Protected Interest' (1985) 95 Yale Law Journal 219, 221-222.

[1270] *Canterbury v Spence* (1972) 464 F 2d 772.

dignitary interests which are "vindicated only as a by-product of protection for ... other interests" such as bodily integrity.[1271]

The doctrine of informed consent is a species of negligence. It provides that, when a physician negligently fails to disclose a medical risk to a patient who because of that fact decides to undergo medical treatment which he or she would not otherwise have agreed to, that physician is liable in negligence if the relevant risk materialises and causes the patient harm.[1272] In such circumstances, it matters not that the treatment itself was carried out with reasonable care.[1273]The cause of action requires proof of recognisable harm which results from physical contact by the physician. The requirement of physical harm is a by-product of the action's historical links to the trespass action and the tort of battery specifically. Such claims were made on the basis that physical contact of the patient by the physician was unauthorised if the patient's consent was not valid.[1274] In more recent years most common law jurisdictions have instead favoured negligence doctrine for dealing with such claims[1275] on the basis that disclosure of medical risks to a patient is something that was best left to the discretion and standards of the profession.[1276] As Twerski and Cohen observe, "[t]o say that a doctor who falls short of meeting a reasonableness standard is thereby transformed into an intentional tort-feasor

---

[1271] Marjorie Maguire Shultz, 'From Informed Consent to Patient Choice: A New Protected Interest' (1985) 95 Yale Law Journal 219.

[1272] In *Montgomery v Lanarkshire Health Board (Scotland)* [2015] UKSC 11, [115], the United Kingdom Supreme Court emphasised that the notion of patient autonomy should be at the heart of determining whether it was unreasonable to withhold certain information from a patient. Lady Hale stated:

> A patient is entitled to take into account her own values, her own assessment of the comparative merits of giving birth in the "natural" and traditional way and of giving birth by caesarean section, whatever medical opinion may say, alongside the medical evaluation of the risks to herself and her baby. She may place great value on giving birth in the natural way and be prepared to take the risks to herself and her baby which this entails. The medical profession must respect her choice, unless she lacks the legal capacity to decide ...

See also Nadia N. Sawicki, 'Informed Consent as Societal Stewardship' (2016) http://papers.ssrn.com (last accessed 17 September 2016), where the author presents an excellent analysis of the negative impact that promoting individual autonomy without regard to social needs which might result. Specifically, the author points out that informing patients of medical options might have public health impacts (e.g. where the patient refuses vaccination for communicable diseases) as well as financial costs (e.g. ordering extra medical tests or insisting on brand name medication rather than generic).

[1273] *Fitzpatrick v White* [2007] IESC 51; *Geoghegan v Harris* [2000] IEHC 129; the establishment of the doctrine is most closely associated with the decision of the United States Court of Appeals for the D.C. Circuit in *Canterbury v Spence* (1972) 464 F 2d 772.

[1274] Don S. Smith, 'Battery in Medical Torts' (1967) 16 Cleveland-Marshall Law Review 22, 32-37.

[1275] In Canada, see *Reibl v Hughes* (1980) 114 DLR (3d) (SC); in England & Wales, see *Chatterton v Gerson* [1981] 1 QB 432 (QBD); in Australia, see *Rogers v Whitaker* (1992) 175 Comm LR 479; in Ireland, see *Walsh v Family Planning Services & Oths.* [1992] 1 IR 496 (SC).

[1276] Bryan M.E. McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013), [14.96]; Jay Katz, 'Informed Consent – A Fairy Tale? Law's Vision' (1977) 39 University of Pittsburgh Law Review 137, 165.

does not seem consistent with the traditional perception of an intentional tort."[1277] Regardless of its origins, the persistence of the need for harm to result "does not recognize that a citizen can be wronged without being 'harmed,' that his dignity as a human being has been violated and that an assault has taken place the moment the deceiving authority commences therapy or the experiment, even if beneficial."[1278]

The requirement that the plaintiff prove that he or she suffered personal injury as a consequence of his or her decision to proceed with treatment in the absence of full knowledge of the risks "depends on constructing a causal bridge between the absence of the information and the decision of the plaintiff."[1279] However, the requirement that a causative link be established between the failure to disclose and physical harm resulting from the subsequent treatment distracts from what should be the main focus of such claims, namely, the protection of the patient's decisional autonomy and not related physical harm. As Twerski and Cohen state:

> Once the blinding light of spectacular personal injury damages is removed, the interests protected by the informed choice doctrine can be clearly seen. The right to participate in, and indeed, make important decisions concerning one's health is a critical element of personal autonomy. The value of this process right is largely independent of the ultimate decision. In its exclusive focus on determining personal injury damages, the legal system has largely overlooked these process rights. The legal system should protect these rights and provide significant recompense for their invasion, rather than continue its single-minded and ill-considered attention to personal injuries allegedly *caused* by the lack of information.[1280]

Therefore, because the doctrine of informed consent is formulated as a traditional negligence action it requires proof of personal injury. The plaintiff must establish a causative link between the negligence in failing to disclose the medical risk and the resulting harm. The harm is viewed as the personal injury suffered by the plaintiff as a result of the risk materialising following his or her decision to undergo the treatment. Establishing causation in negligence is achieved using the objective hypothetical 'but for' test i.e. would the patient have decided not to undergo the medical treatment (thereby avoiding the negative outcome) 'but for' the medical practitioner's failure to disclose the relevant risk to him or her? [1281] This is more specifically known as

---

[1277] Aaron D. Twerski & Neil B Cohen, 'Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation' (1988) 3 University of Illnois Law Review 607, 612.
[1278] Joseph Goldstein, 'For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain' (1975) 83 Yale Law Journal 683, 691.
[1279] Aaron D. Twerski & Neil B Cohen, 'Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation' (1988) 3 University of Illnois Law Review 607, 608.
[1280] Ibid., 609.
[1281] *Barnett v Chelsea and Kensington HMC* [1969] 1 All ER 1068.

"decision causation."[1282] The central difficulty for the plaintiff in such cases is that "since it centres on a point in the past impossible now to revisit, this determination requires a probabilistic answer to a hypothetical question.'[1283] Thus, the plaintiff must convince the court that on the balance of probabilities he or she would have chosen not to undergo the treatment had the risk been disclosed to him or her. Whether the plaintiff has established causation has traditionally been judged on an objective basis i.e. what would the reasonable prudent patient have decided to do in similar circumstances? The alternative approach is to adopt a subjective standard to the question i.e. what would the particular patient have decided in the circumstances? The subjective approach eschews the reasonable patient test for one which considers whether the particular patient in question would have undergone the proposed treatment had he or she been fully informed of the relevant risks.[1284] Whereas under the objective standard much will depend on the physician's recommendation as to treatment and the objective statistical frequency of the risk arising, the subjective standard is very much dependent on the individual patient's own testimony as to what he or she would have decided in the circumstances.

The main argument in favour of adopting an objective standard for causation in cases involving medical choice is that it avoids an over-reliance on the plaintiff's own subjective declarations as to what he or she would have decided in the particular situation.[1285] The fear is that it is unwise to allow the issue "turn solely on the rather shaky reed of the plaintiff's hindsight testimony."[1286] In other words, a plaintiff's testimony as to the decision he or she would have made had he or she known all the relevant facts would be questionable at the very least given that it would be delivered with the benefit of bitter hindsight. A patient injured 'after the event' is not likely to be anything but negative towards the physician who he or she blames for his or her misfortune. That bias is therefore likely to taint the patient's evidence against that physician. Furthermore, the nature of hindsight is such that, even if the risk was statistically minimal, to the plaintiff it becomes substantial "by the circumstance that the uncommunicated hazard has in fact materialized."[1287] In essence, therefore, given that plaintiff suffers from a

---

[1282] Alan Meisel & Lisa D. Kabnick, 'Informed Consent to Medical Treatment: An Analysis of Recent Legislation' (1980) 41 University of Pittsburgh Law Review 407, 438-439.
[1283] John Healy, *Medical Malpractice Law* (Round Hall, 2009), [9-112].
[1284] This was the approach approved by the Australian High Court in *Chappel v Hart* [1998] HCA 55.
[1285] *Canterbury v Spence* (1972) 464 F 2d 772, 791.
[1286] Marjorie Maguire Shultz, 'From Informed Consent to Patient Choice: A New Protected Interest' (1985) 95 Yale Law Journal 219, 251.
[1287] *Canterbury v Spence* (1972) 464 F 2d 772, 790.

credibility problem, is it fair that the physician should be made liable on such a flimsy basis? Adopting an objective standard of causation, so the argument goes, at least provides the courts with access to a broader range of evidentiary factors such as statistical risk, medical opinion and so forth, and therefore is a steadier basis on which to make such determinations. That is why the "courts have felt it necessary to subject hypothetical reconstructions of individual choice to standardized criteria."[1288]

The protestations of those who would support an objective standard for causation receive short shrift from other commentators. As to the question of witness credibility, Katz maintains that such problems are common in legal proceedings and that courts are well versed in sifting through witness testimony in order to determine its veracity.[1289] Furthermore, the resilience of plaintiff testimony can be tested through cross-examination by the defendant's counsel.[1290] However, the major criticism of adopting the objective standard of causation is that it entirely undermines individual autonomy and thereby, dignity.[1291] In such circumstances, can arguments regarding witness credibility justify the failure to protect the patient's right to self-determination as it relates one of the most personal decisions of all – that of medical treatment?

The objective standard of causation is judged in accordance with what the hypothetical reasonable prudent patient would have decided in similar circumstances to the plaintiff. Plainly this approach undercuts the oft-stated justification for the doctrine of informed consent - the protection of individual autonomy. Instead of examining what the particular plaintiff's individual choice might have been, one is replacing it with the choice that would have been made by a hypothetical person.[1292]This approach ignores the fact that different patients react in different ways when confronted with illness and recommendations on treatment and an objective standard of causation disregards individual choice.[1293] As Katz concludes:

[1288] Marjorie Maguire Shultz, 'From Informed Consent to Patient Choice: A New Protected Interest' (1985) 95 Yale Law Journal 219, 249.
[1289] Jay Katz, 'Informed Consent – A Fairy Tale? Law's Vision' (1977) 39 University of Pittsburgh Law Review 137, 164.
[1290] Evelyn Tenenbaum, 'Revitalizing Informed Consent and Protecting Patient Autonomy: An Appeal to Abandon Objective Causation" (2012) 64 Oklahoma Law Review 697, 730.
[1291] Jay Katz, 'Informed Consent – A Fairy Tale? Law's Vision' (1977) 39 University of Pittsburgh Law Review 137, 394.
[1292] Evelyn Tenenbaum, 'Revitalizing Informed Consent and Protecting Patient Autonomy: An Appeal to Abandon Objective Causation" (2012) 64 Oklahoma Law Review 697, 719.
[1293] Edmund D. Pellegrino, 'Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship' (1994) 10 Journal of Contemporary Health Law Policy 47, 53-54.

> The belief that there is one "reasonable" or "prudent" response to every situation inviting medical intervention is nonsense, both from the point of view of the physician as well as that of the patient. Since different doctors approach similar cases in diametrically opposed ways, equally varying responses by patients ought to be considered "reasonable." The aim of the doctrine is not to encourage uniformity in medical treatment, but to preserve individual choice. Other courts, while doing rhetorical honors to self-determination, have adopted this self-contradictory position.[1294]

Thus, the reasonable prudent patient test essentially ignores the very thing that the protection of individual autonomy demands, the right to make an alternative choice to the reasonable person. The objective standard test of causation further undermines individual autonomy because, if a physician recommends a particular course of treatment to a patient, unless the physician has acted negligently, it must be because the physician has formed the professional opinion that it is in the patient's best medical interests. In such circumstances, how likely is it that the reasonable prudent patient would refuse that treatment even if the relevant risks been disclosed to him or her? Consequently, it is even more unlikely that the patient will succeed in establishing causation as "[m]ost reasonable patients do follow the advice of their reasonable doctors."[1295] That is why some have even argued that the use of terminology such as "informed consent" is inherently biased against individual autonomy as it implies that the patient would have consented to the procedure had he or she been properly informed and in this way fails to recognise the importance of the patient's *choice* i.e. to accept or decline the treatment.[1296]

In other words, it implies that the aim of communicating with the patient is simply to obtain their consent rather than ensuring informed choice. Notwithstanding these difficulties, the adoption of the reasonable patient test towards causation is at the very least emblematic because it sends the signal to the medical profession that it is not solely their judgement that determines the issue and it is the rights of the patient which are paramount.[1297] The medical profession respond by arguing that the reasonable patient test is wholly unsatisfactory because it introduces too much uncertainty into the equation as "there is no standard patient only

---

[1294] Jay Katz, 'Informed Consent – A Fairy Tale? Law's Vision' (1977) 39 University of Pittsburgh Law Review 137, 164.

[1295] Aaron D. Twerski & Neil B Cohen, 'Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation' (1988) 3 University of Illnois Law Review 607, 615.

[1296] Joseph Goldstein, 'For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain' (1975) 83 Yale Law Journal 683, 691, where the author points out, ""consent," as opposed to "decision," in the legal concept of informed consent introduces a bias, especially in therapeutic transactions, for perceiving refusals as uninformed."

[1297] Margaret Brazier, 'Patient Autonomy and Consent to Medical Treatment: The Role of the Law?' (1987) 7 Legal Studies 169, 187.

particular patients."[1298] Consequently, it will be difficult for the physician to determine the requirements of the reasonable prudent patient. A standard that involves a shift from the opinions of the medical community will create more uncertainty perhaps but the same thing can be said for the application of the reasonableness standard in other areas of negligence.[1299] Moreover, the medical profession are not completely without guidance in this regard as empirical evidence is available to them which will provide assistance in this regard.[1300]

Ultimately, the debate regarding the appropriateness of an objective or subjective standard for causation in the cases of medical disclosure is irrelevant because, regardless of the standard adopted, it is virtually impossible to determine. As Twerski and Cohen explain:

> To make the causal connection, the patient must reconstruct the decision-making process with such detail and precision that the fact finder can determine what decision the patient would have made had the doctor presented the additional increment of information ... Regardless of the legal standard, however, extensive psychological research into human decision making casts significant doubt on our ability to create a credible model.[1301]

Twerski and Cohen emphasise that the question of what the patient (reasonable or otherwise) would have done in a particular circumstance is extraordinarily difficult to litigate, so much so, that the issue, they conclude, is "not practically justiciable."[1302] Each individual's decision-making process can be different and moreover, not always necessarily logical. Individuals make mistakes and act irrationally (particularly when facing medical illness).[1303] Moreover, as we have already seen in earlier chapters on behavioural economics, human behaviour is influenced by various heuristics and biases.[1304] What this research shows us is that individuals, in the majority of situations, do not act rationally. At the very least, their behaviour is

---

[1298] Margaret Brazier, 'Patient Autonomy and Consent to Medical Treatment: The Role of the Law?' (1987) 7 Legal Studies 169, 189.
[1299] Erin Sheley, 'Rethinking Injury: The Case of Informed Consent' (2015) 63 Brigham Young University Law Review 63, 100-105.
[1300] Alasdair Maclean, 'Giving the Reasonable Patient a Voice: Information Disclosure and the Relevance of Empirical Evidence (2005) 7 Medical Law International 1, where the author highlights the availability of research surveys on patients' needs in this regard.
[1301] Aaron D. Twerski & Neil B Cohen, 'Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation' (1988) 3 University of Illnois Law Review 607, 626.
[1302] Ibid., 608.
[1303] Ibid., 626-641.
[1304] See discussion of economic analysis in Chapter 4.

unpredictable. This in turn has implications for litigating decision-making that might have occurred in the past.[1305]

In Ireland, the courts have adopted a hybrid approach to the question of causation which incorporates elements from both standards but leans towards an objective test. In the words of Healy, "it may be characterised as a modified objective test."[1306] This mixed test was adopted in the Irish High Court case of *Geoghegan v Harris.*[1307] In that case, the plaintiff had agreed to undergo a dental implant procedure. As part of this procedure a bone graft which was taken from his chin resulted in nerve damage at the front of his chin which left him in severe pain following the procedure. In an action for negligence the plaintiff claimed that the defendant should have disclosed to him the unlikely possibility that the procedure could result in the plaintiff suffering prolong pain from the nerve damage and that had the defendant done so he would have decided against undertaking the procedure. For his part, the defendant reasoned that the risk which eventuated was highly remote and that it was his practice to warn patients only of risks which were more than 1% likely to occur. As this was not such a case, he did not deem it necessary to warn the plaintiff of the possibility of such a remote risk occurring.

In adopting a mixed test approach to the issue of causation, Kearns J was of the view that one should, at first instance, approach the question from an objective point of view i.e. what would the reasonable patient in the plaintiff's position have done?[1308] Kearns J was of the opinion that factors that would be relevant in considering the issue of "the plaintiff's position" would

---

[1305] Aaron D. Twerski & Neil B Cohen, 'Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation' (1988) 3 University of Illnois Law Review 607, 642, where, for the authors, these findings are fatal to the causation analysis:

> If the legal standard of decision causation is the subjective (this patient) standard, the fact finder must determine how irrational this patient is, or was, at processing medical information generally. More specifically, the fact finder must determine the incremental effect of the omitted information on the rational or irrational decision-making process ...
>
> If the standard of decision making is objective (reasonable patient), the problems are even more daunting. Clearly, the reasonable person (at least if that mythical creature is modelled on actual, accepted human behavior) is not an objectively "rational" decision maker. Therefore, we cannot assume that the reasonable patient would have acted rationally. Yet, the irrationality that would attend a decision made by a *reasonable* patient cannot easily be quantified or predicted. How would a reasonable patient act? Reasonably irrationally? Unless this question can be answered, the objective standard of causation lacks all credibility.

[1306] John Healy, *Medical Malpractice Law* (Round Hall, 2009), [9-127].
[1307] *Geoghegan v Harris* [2000] IEHC 129; approved by the Irish Supreme Court in *Fitzpatrick v White* [2007] IESC 51.
[1308] *Geoghegan v Harris* [2000] IEHC 129, [119].

includhis age, pre-existing health and the nature of the treatment.[1309] According to Kearns J, the obctive test should yield to a subjective test "when, but only when, credible evidence, and not nessarily that of the Plaintiff, in the particular case so demands."[1310] In applying this test to the cts Kearns J decided that the plaintiff would not have been swayed against having the operatn on the basis of a very remote risk when the occurrence of that risk was weighed againsthe perceived benefits of the proposed treatment. Kearns J therefore concluded that even hl the plaintiff been informed of the risk he would have agreed to undergo the procedure regardss.[1311]

The med test approach adopted by the Irish courts to the question of causation in cases of informd consent does little to enhance individual autonomy. While the application of the mixedst does not foreclose the possibility that the plaintiff's particular circumstances will be taken to consideration, in reality, this evidence is unlikely to overrule objective evidence to the corary. Subjective considerations, particularly when supported only by the evidence of the platiff, seem to be of secondary importance. Hence, according to Kearns J, subjective factorshould only come into play when "credible evidence"[1312] (other than that of the plainti) demands it. In such circumstances, it would seem unlikely that the idiosyncratic aspectof the plaintiff's personality will be given precedence.

Notwistanding the aforementioned jurisprudence, the English and Irish courts have, from time tcime, displayed flexibility towards causation rules in cases of informed consent, even if theseefforts might be described as strained – intellectually tortuous even – attempts to vindice patient autonomy. The House of Lords decision in *Chester v Afshar*[1313] is one such examp. In that case, the claimant was suffering from a degenerative back condition. She had

---

[1309] *Geogan v Harris* [2000] IEHC 129, [119].
[1310] Ibid 122].
[1311] Ibid 134]. See also, the later Supreme Court decision of *Fitzpatrick v White* [2007] IESC 51; [2008] 3 IR 551, [41where Kearns J similarly held that causation had not been established on an application of the reasonable prudent st, stating:

> it were necessary to apply an objective test as to what a reasonable patient would have done if warned days or eeks in advance of his operation in an outpatient setting of the particular risk which later arose in this case, I am tisfied that such a patient, anxious to achieve a cosmetic improvement to his eyes, would, having placed the enefits of the proposed surgery in balance with the statistically remote risk of muscle slippage causing diplopia, ave nonetheless opted to proceed with the surgery.

[1312] *Geogan v Harris* [2000] IEHC 129, [122].
[1313] *Cher v Afshar* [2004] UKHL 41.

availed of different forms of conservative treatment but her condition worsened. Reluantly, she agreed to undergo surgery. She was not informed of a small (1-2 per cent) risk at she could suffer severe neurological damage regardless of how skilfully the surgery wasarried out. Following receipt of this advice, the claimant agreed to undergo the operation thr days later. The claimant did not assert that had she been informed of the risk associated vth the procedure that she would *never* have undergone the procedure and the risk. Moreover, e risk was not one which was specific to her particular physiological condition rather it as an inherent risk associated with the particular surgery. However, she did contend that had s been properly informed of the risk, she would have taken more time to consider her decisn and consult with others. Had she the opportunity to do so, she would not have undergone the rgery on the date she actually did or had the procedure by that particular surgeon. On this bas Lord Hope concluded that the chances of her experiencing the negative outcome would ha been the same regardless of whether she had been appropriately informed or not. In his wor, "the risk would have been the same whenever and at whoever's hands."[1314] Therefor their Lordships did not consider that the failure to disclose the risk materially contributeco the claimant's injury by increasing the risk of it occurring; the risk was the same regardss.[1315] Thus, because the 'but for' test could not be established on standard rules, the majoritof the House of Lords held that vindication of the patient's autonomy allowed for the departu from normal causation principles.

According to Lord Steyn, this approach could be justified on the basis that the protectioof the patient's dignity should be vindicated by a limited departure from traditional casation rules.[1316] Borrowing from the academic work of Honoré,[1317] Lord Steyn noted that theuty to warn in such cases was important because it ensured that the risks to the patient were mimised and was also essential in maintaining the patient's decision-making autonomy. While e fact that the claimant might not have been able to establish the risk of the harm occurrig was increased by depriving her of the opportunity of having the surgery at a later or dator by another surgeon, the fact that judgment in her favour would promote her decisional aunomy was sufficient justification to create an exception from normal causation principles. Exaining

[1314] *Chester v Afshar* [2004] UKHL 41.
[1315] *McGhee v National Coal Board* [1973] 1 WLR 1.
[1316] *Chester v Afshar* [2004] UKHL 41, [24].
[1317] Tony Honoré, 'Medical Non-Disclosure, Causation and Risk: *Chappel v Hart*' (1999) 7 Torts Law Jrnal 1, 8; cited by Lord Steyn in *Chester v Afshar* [2004] UKHL 41, [80].

the issue from a policy perspective, Lord Hope explained why such an approach was necessary on the facts:

> To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in the cases where it may be needed most. This would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned. I would find that result unacceptable. The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. On policy grounds therefore I would hold that the test of causation is satisfied in this case. The injury was intimately involved with the duty to warn. The duty was owed by the doctor who performed the surgery that Miss Chester consented to. It was the product of the very risk that she should have been warned about when she gave her consent. So I would hold that it can be regarded as having been caused, in the legal sense, by the breach of that duty.[1318]

On one level, the decision in *Chester* is to be welcomed in that it reflected a shift in judicial attitude from a paternalistic approach to decisions on medical treatment towards a more patient-centred, rights-based one based on the vindication of patient autonomy.[1319] However, while the outcome might be considered just, the rationale for the decision is strained. The requirement that a causative link be proven between the failure by the physician to disclose a material risk and resultant physical harm is an unnecessary distraction from the stated purpose of such claims, namely, the protection of patient autonomy. Proof of physical harm should be considered an ancillary issue and the requirement of proving a causative link between it and the breach of duty is unnecessary. Rather, the focus should not be on whether physical harm results but whether an infringement of the patient's autonomy can be established.

Stapleton, for one, has criticised the decision on the basis that the facts of the case did not require any departure from orthodox causation principles at all.[1320] Essentially, it is Stapleton's view that the real question before the House of Lords was a normative one as to whether the defendant should be held responsible for the claimant's misfortune.[1321] It was Stapleton's contention that this question could have been resolved simply by reference to normal causation

---

[1318] *Chester v Afshar* [2004] UKHL 41, [87].
[1319] This shift in approach culminated with the decision of the United Kingdom Supreme Court decision in *Montgomery v Lanarkshire Health Board (Scotland)* [2015] UKSC 11. See also Rob Heywood, 'R.I.P. *Sidaway*: Patient-Oriented Disclosure – A Standard Worth Waiting For?' (2015) 23 Medical Law Review 455.
[1320] Jane Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 Law Quarterly Review 426, 436-438.
[1321] Ibid., 436.

principles without the need to create exceptions. In her view, on a straightforward approach to the "but for" test, it was probable that had the claimant been informed of the 1-2 per cent risk associated with the procedure that she would not have had it at that particular time. Given that the risk was so statistically improbable, it was unlikely therefore to have arisen on the date she *would* have undergone the procedure. Thus, in terms of "historical involvement" it could be said that it was likely that the misfortune would not have resulted had the claimant been properly informed.[1322] In Stapleton's view, therefore, the normative question as to whether it was fair to find in her favour, was one which should have been answered under the second part of the causation hurdle, namely, legal causation i.e. was the misfortune which befell the claimant a reasonably foreseeable consequence of the failure to warn her?[1323] Legal causation, according to Stapleton, would leave room for normative and policy-driven analysis in deciding where responsibility should lie for the claimant's injuries without resort to creating complicated exceptions to general principle.

In analysing whether the claimant had satisfied legal causation, Stapleton observes that the approach of the English courts "is to reject liability for coincidental consequences of breach."[1324] A "coincidental breach" is one where the defendant's breach is part of the historical events leading to the outcome, but the occurrence of the particular outcome is not generally increased by the breach in question.[1325] The underlying rationale for this approach, Stapleton notes, is one of deterrence. If the breach does not affect the incidences of the harm resulting, there is no incentive for the wrongdoer to alter his or her behaviour. Stapleton concluded that the claimant's injuries were not coincidental notwithstanding the fact that the claimant had acknowledged that she probably would have had the procedure eventually. According to Stapleton, this is so because one can never say that a patient will always elect to have a medical procedure no matter how necessary because the patient's right to self determination means that

---

[1322] Jane Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 Law Quarterly Review 426, 437.

[1323] *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388.

[1324] Jane Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 Law Quarterly Review 426, 441.

[1325] Ibid., 439, where the author provides the following example to highlight her point:

> Take lightning injuries. When, due to the breach of duty of a lightning rod installer, the rod fails to protect residents of the building from lightning injuries, those results of the breach are not coincidental consequences: the incidence of lightning injuries is *generally* increased by the type of breach in issue. On the other hand, where the defendant carelessly runs over the claimant and on the way to hospital the claimant's ambulance is struck by lightning and the claimant is killed, the lightning injury to the claimant is a consequence of the breach but it is a coincidental consequence because the incidence of lightning injuries is *not generally* increased by careless driving.

he or she has the right to refuse any treatment.[1326] Stapleton points out that the failure to warn was not a coincidental injury because while the risk of a negative outcome remained the same regardless of whether a warning was issued or not, the incidences of the negative outcome would be reduced where a warning is given i.e. less patients will have the risky procedure which means that the percentage number of patients suffering the negative outcome reduces, even if the percentage risk remains the same.[1327]Thus, in her view, it was probable that had the claimant been warned of the risks she would have decided to have the surgery at another time. While the risk of the negative outcome would have been the same (1-2 per cent) it was unlikely given that the chances of the risk materialising was so small that it would have occurred when she *should* have had the procedure.[1328]

Clark and Nolan respond to Stapleton's analysis of *Chester* with an eloquent and well-reasoned rebuttal.[1329] It is their position, contrary to Stapleton's thesis, that *Chester* does in fact represent a departure from orthodox causation principles.[1330]The essence of the authors' disagreement centres on Stapleton's definition of "coincidental injury" in legal causation.[1331] As already noted, under Stapleton's interpretation such injury was of a type of consequence whose occurrence is not generally increased by the breach in question. By contrast, Clark and Nolan's interpretation of "coincidental injury" is harm "which is not attributable to that which made the defendant's conduct wrongful, which in negligence means damage that does not represent the materialization of one of the risks that made the defendant's conduct negligent."[1332] This interpretation of "coincidental injury" leads the authors to the conclusion that:

[1326] Jane Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 Law Quarterly Review 426, 442-443.
[1327] Ibid., 441-442.
[1328] Ibid., 442, Stapleton's analysis of "coincidental injury" in causation is how she justifies the imposition of liability on the basis of "but for" causation in *Chester v Afshar* rather than viewing the decision as one involving protecting the patient's autonomy of choice a fact which she recognises when she states:

> The only coherent way to explain the imposition of the duty would be that it protected the claimant's autonomy, in the sense of her interest in being fully informed of the inescapable risk she would inevitably face, and in deciding when and where to undergo it. This is an interest not traditionally protected by the tort of negligence. In short, if the relevant risk were truly inescapable, we would not be able to explain why the law would impose the obligation to warn unless we resorted to such a radical unorthodox proposition: that this was to protect an interest not previously protected by the tort of negligence in England.

[1329] Tamsyn Clark and Donal Nolan, '*A Critique of* Chester v Afshar' (2014) 34 Oxford Journal of Legal Studies 659.
[1330] Ibid., 670.
[1331] Ibid., 672.
[1332] Ibid. In the context of medical disclosure, the authors identify the relevant risk which makes the failure to disclose negligent "is not the risk of the complication in question coming about *per se*, but the risk of the complication in question coming about *when the patient was unwilling to subject herself to that risk*." (ibid., 667).

> Stapleton's definition commits her to the counterintuitive view that whenever a patient undergoes a procedure that she would not have undergone if she had been warned of a particular risk of the procedure (such as the accident of anaesthesia) is not a coincidental consequence either.[1333]

To suggest that the decision in *Chester* is controversial is an understatement. It has divided opinion amongst the most eminent tort scholars. Regardless of one's interpretation of the reasoning underlying the decision it seems clear that the normative basis for it lay in the vindication of the claimant's autonomy.[1334] If the court had instead acknowledged the harm as dignitary in nature it would not have become distracted by the question of proving causation of physical harm and much of the controversy surrounding the decision might have been averted.

Much like the approach of the House of Lords in *Chester v Afshar*, the Irish Supreme Court has given some indication – albeit indirectly – that it too is willing to recognise the importance of patient autonomy by relaxing the rules on causation as they relate to physical injury in informed consent cases. In *Philp v Ryan*,[1335] the plaintiff was informed by the first named defendant in July 2001 that he was suffering from acute prostratitis. In fact, he had been misdiagnosed and he was actually suffering from prostate cancer which at that stage had spread to other parts of his body. It was not until March 2002 that he discovered the misdiagnosis. As a consequence of the defendant's negligence, the plaintiff was deprived of the opportunity of discussing and considering alternative forms of treatment that might have been available to him had he been diagnosed correctly some eight months earlier than he was. The plaintiff suffered great anguish and distress as a result of the fact that he had been deprived of this opportunity. It was unlikely, according to the medical evidence, that had the plaintiff been provided with the opportunity of availing of the alternative treatment at the earlier stage that he would have survived the illness. Nevertheless, the High Court awarded the plaintiff damages for the anguish that he had suffered as a result of the lost opportunity of availing of alternative medical treatment which would have prolonged his life by anything from eight months to two years. The plaintiff was awarded €45,000 in damages.

[1333] Tamsyn Clark and Donal Nolan, '*A Critique of* Chester v Afshar' (2014) 34 Oxford Journal of Legal Studies 659. 673.

[1334] Ibid., 675, where the authors dispute the claim that the case is one founded on patient autonomy stating that "the fact that it is located within a negligence framework casts doubt on this assumption."

[1335] *Philp v Ryan & Another* [2004] IESC 105; [2004] 4 IR 241.

The defendants appealed the award as being excessive particularly as the plaintiff had not established that the alternative treatment that he could have availed of was likely to be successful. Thus, regardless of the defendant's negligence, it was argued, the ultimate outcome was not affected. The plaintiff cross-appealed asserted *inter alia* that damages should have been awarded for possible loss of life expectancy on the basis that he had been deprived of the opportunity of availing of such treatment and had he done so it was likely that his life would have been extended. The Supreme Court denied the defendants' appeal and upheld the plaintiff's. Fennelly J held that the plaintiff was entitled to damages for loss of expectancy of life stating:

> ... it seems to me to be contrary to instinct and logic that a plaintiff should not be entitled to be compensated for the fact that, due to the negligent diagnosis of his medical condition, he has been deprived of appropriate medical advice and the consequent opportunity to avail of treatment which might improve his condition. I can identify no contrary principle of law or justice.[1336]

Thus, Fennelly J approved the High Court's award of compensation for the anguish suffered by the plaintiff based on his reasonable belief that he had been wrongly deprived of an opportunity which would have prolonged his life. However, Fennelly J increased the award to include damages for loss of expectation of life from €45,000 to €50,000 and also awarded aggravated damages of an additional €50,000. While the final outcome of this case might appear just, the rationale underlying the decision appears somewhat incoherent. Both the High Court and Supreme Court readily accepted that the plaintiff was entitled to compensation, but what was the harm for which he was being compensated?[1337] The Supreme Court awarded additional damages for loss of life expectancy which is normally only awarded once the plaintiff has proven that the defendant has caused him legally recognisable damage which has shortened his life expectancy. On what basis was this award made?[1338] The medical evidence

---

[1336] *Philp v Ryan & Another* [2004] 4 IR 241, 249.

[1337] John Healy, *Principles of Irish Torts* (Clarus Press, 2006), [4-33], where the author draws the following conclusions:

> Fennelly J. essentially amalgamated the gateway common law rules determining *damnum* and causation with a rule that applies to *quantification* of compensatory damages for future injuries flowing *consequentially* from the plaintiff's *damnum*. Since orthodox torts law does not recognise loss of life expectancy or loss of beneficial treatment or loss of chance as *damnum* in personal injuries actions – though it makes awards reflecting these losses when they flow consequentially from the *damnum* or physical injury – a ruling of this nature fundamentally reformulates the *damnum* or compensatable loss capable independently of attracting compensation in negligence personal injury proceedings. It creates new law and throws open windows formerly assumed to be closed.

[1338] See John Healy, *Medical Malpractice Law* (Round Hall, 2009), [13-97], where the author concludes that "the Supreme Court chose to accept dimunition of prospects and life expectancy as *damna* attracting liability independently of any factual connection with a precipitant physical injury."

did not indicate that the plaintiff would have survived "but for" his misdiagnosis and yet both the High Court and Supreme Court awarded damages "for the loss of an opportunity to elect for treatment".[1339] The most logical explanation for the decision, as Healy quite rightly concludes,[1340] is that with this decision the Supreme Court effectively recognised for the first time a "loss of a chance"[1341] claim and as such it "represents something of a breakthrough, if poorly signposted along the way."[1342]

The decision of the Supreme Court in *Philp v Ryan*, while ostensibly a case involving medical misdiagnosis, could also be interpreted as the Irish courts recognising – even obliquely – patient autonomy as a protected legal interest. Under this interpretation, the award of damages to the plaintiff is understandable. The plaintiff was deprived of the opportunity of making an informed decision as to treatment by the negligent misdiagnosis of the defendant. The compensation which was awarded to him was in recognition of this fact. If the protected interest is that of patient autonomy, the likelihood of success of the alternative treatment matters not. The harm was in depriving the patient of the opportunity to make the decision.[1343] Recognising the protectable interest as patient autonomy would explain the decision of the Supreme Court to award additional damages for loss of expectation of life.

Ultimately, the doctrine of informed consent fails to do what it promises. Judicial rhetoric embraces notions of 'autonomy', 'dignity' and 'self-determination.' In reality, rarely does application of the doctrine achieve these goals. This is partially due to historical accident and

---

[1339] Eoin Quill, *Torts in Ireland* (3rd ed.) (Gill & MacMillan, 2009) 452, where the author observes:

> What is unusual about *Philp* is that there was no threshold physical injury and the psychological injury was not established to be a medically recognised illness (though it may well have been). Nonetheless, few would object to the result in the case and the Supreme Court judgment does expressly support loss of chance recovery.

[1340] John Healy, *Principles of Irish Torts* (Clarus Press, 2006), [4-30] to [4-34], provides excellent analysis of the implications of the decision.

[1341] See Bryan M.E. McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013), [2-30] to [2-35] for detailed analysis of such claims.

[1342] John Healy, *Principles of Irish Torts* (Clarus Press, 2006), [4-34].

[1343] Ernest J. Weinrib, 'Causal Uncertainty' (2015) Oxford Journal of Legal Studies 1, 29, where the author situates the 'loss of chance' doctrine within corrective justice theory as a claim relating to reliance:

> ... the loss of the chance is compensable not because the plaintiff has an independent right to the chance, as they have to their physical integrity. Instead, the right is to the defendant's non-negligent conduct in the execution of an undertaking on which the plaintiff, at the defendant's invitation, is relying. The purpose of the undertaking is to allow the plaintiff to have a chance, whatever it is, to survive or recover from the illness. The plaintiff has a right to conduct consistent with that purpose.

traditional tort law's aversion towards anything other than "corporeal harm."[1344] As a consequence, courts become pre-occupied with establishing a causative link between a failure to disclose and resulting personal injury to the plaintiff. A re-conceptualisation of the cause of action which focuses not on traditional personal injury but instead on vindicating individual autonomy "would be honest" and would properly secure individual dignity in such cases.[1345] Instead, the current approach focuses more on what the physician should disclose (informed *consent*) rather than on enhancing the patient's choice. In the words of Cardozo J, used in another context, "[t]here is no freedom without choice, and there is no choice without knowledge, or none that is not illusionary."[1346] By reframing the claim as one relating to autonomy, one rids oneself of the virtually impossible task of trying to establish what the patient would have done in a particular situation in the past and focus would be placed where it should be i.e. on the fact that the plaintiff's capacity to choose was wrongly interfered with by the negligence of another. As Twerski and Cohen conclude:

> The purpose of the duty of a physician ... to share information is to empower the plaintiff, if he desires, to become a participant in an important decision-making process concerning his own body. To hold this process right hostage to personal injury damages is as illogical as denigrating the value of the right to vote in an election because the vote would not have altered the election result. Courts should value the decision right and assess substantial damages for its violation, even though plaintiffs cannot realistically establish causation.[1347]

Adopting an approach which concentrates on the enhancement of patient autonomy would be good for individual patients and for society generally. The current approach simply leads, as Tenenbaum puts it, to "a formalistic recitation of risks and alternatives intended to protect the physician against liability, rather than a joint process during which the physician and patient coordinate to ensure that the patient's decisions are based on individual preferences and concerns."[1348] Thus, instead of being preoccupied with the threat of litigation, physicians would be encouraged to enhance patient choice by promoting open dialogue between patient and medical practitioner. Another advantage of this approach is that research shows patients are

---

[1344] Nicky Priaulx, 'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law' (2012) 33 Adelaide Law Review 177, 179.

[1345] Aaron D. Twerski & Neil B Cohen, 'Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation' (1988) 3 University of Illinois Law Review 607, 609.

[1346] Benjamin Cardozo, 'The Paradoxes of Legal Science' in Margaret E. Hall (ed), *Selected Writings of Benjamin Nathan Cardozo* (Fallon Publications, 1947) 317-318.

[1347] Aaron D. Twerski & Neil B Cohen, 'Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation' (1988) 3 University of Illinois Law Review 607, 651-652.

[1348] Evelyn Tenenbaum, 'Revitalizing Informed Consent and Protecting Patient Autonomy: An Appeal to Abandon Objective Causation" (2012) 64 Oklahoma Law Review 697.

less likely to sue where they have greater role in decision making through the provision of more information.[1349] Finally, as Shultz observes, open disclosure by the physicians relieves him or her from some of the legal responsibility for the patient's choice.[1350]

The question of quantifying damages for such a cause of action remains and there is a very real danger that such awards, as Twerksi and Cohen observe, "might suffer from serious undervaluation because of the tradition of valuing such rights minimally."[1351] The challenges in calculating the quantum of compensation for such claims has been highlighted by McMahon & Binchy who make the following astute observation:

> What relationship is there between the quantum for violation of autonomy and that of the physical harm that occurred? If €1,000,000 damage is caused in one case and €50,000 in another, should the amount of compensation for violation of autonomy be the same in each case or should it reflect the different amounts of physical damage? The violation of autonomy in each case might be regarded as identical yet the instincts of the court are likely to be to award more in the former hypothetical case.[1352]

Putting a figure on compensation awards for such dignitary harms represents a challenge for the courts but no more so than damages in other areas where the courts are asked at a particular moment in time to award damages for the future consequences of a psychological injury, for example. Any award made must be more than nominal in order to reflect the harm caused to the plaintiff's dignitary interests and to act as a sufficient deterrent as a signal to the rest of the community. In terms of the question posed by McMahon & Binchy, it could be said that the award of damages in such cases for wrongful interference with autonomy should be the same in both cases however if the consequences of that interference are different then that should be reflected in the quantum awarded subject to the rules on remoteness of damage.[1353]

[1349] Irwin Press, 'The Predisposition to File Claims: The Patient's Perspective' (1984) 12 Journal of Law, Medicine & Ethics 53.

[1350] Marjorie Maguire Shultz, 'From Informed Consent to Patient Choice: A New Protected Interest' (1985) 95 Yale Law Journal 219, 296.

[1351] Aaron D. Twerski & Neil B Cohen, 'Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation' (1988) 3 University of Illinois Law Review 607, 614.

[1352] Bryan M.E. McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013), [2.16]. See also *Chester v Afshar* [2004] UKHL 41, [34], where Lord Hoffmann made similar points when he stated:

> I can see that there might be a case for a modest solatium in such cases. But the risks which may eventuate will vary greatly in severity and I think there would be great difficulty in fixing a suitable figure. In any case, the cost of litigation over such cases would make the law of torts an unsuitable vehicle for distributing the modest compensation which might be payable.

[1353] For a novel approach to this issue, see *ACB v Thomson Medical Pte Ltd & Others* [2017] SGCA 20, [137] to [209], discussed later in this work, where the Court of Appeal in Singapore was asked to quantify the damages

6.3.2 Procreative Torts

Tort law's tendency to cling to traditional forms of harm has had a stultifying effect on the development of the law and, should it continue, will result in tort losing its protean capacity to meet the societal challenges of the 21st century. The emerging types of harm that new technologies can bring and the advantages of framing tort claims in terms of human dignity are explained by Brownsword as follows:

> ... a changing social context may generate new kinds of grievance which might then be articulated as novel claims in the tort system. If the claims are so novel that they fit no recognised cause of action, they are liable to be filtered out at an early stage without any serious argument. One of the attractions, therefore, of a general principle, or of a broad cause of action, such as that designed to protect human dignity, is that it offers a real prospect of novel claims at least being brought forward and given serious consideration. Moreover, the flexibility of such a cause of action gives it some chance of staying connected to rapid technological development.[1354]

There is a danger, as we have already seen with a review of the earlier case law above, that tort law is becoming overly-conservative, backward-looking and bound too much by precedent without regard to justice issues.[1355] By placing emphasis on dignitary interests we can ensure that tort law continues to produce adequate responses to the dangers produced by an ever complex society. Recasting such claims from the point of view of human dignity should not pose too much difficulty for the Irish judiciary given the prominence which the Irish Constitution places on human dignity. Although, it does involve a change in mindset, the focus should be on the protection of the dignity of the individual living in a particular society and not on the behaviour of the defendant or the particular nature of the harm suffered by the plaintiff.

The biggest obstacle to the enhancement and promotion of human dignity under current tort doctrine is its constricted interpretation of compensable injury.[1356] While some tort actions such

---

payable to a couple for loss of "genetic affinity" in a case involving negligent IVF treatment which resulted in the mother being impregnated with sperm from an unknown third party not her husband.

[1354] Roger Brownsword, 'An Interest in Human Dignity as the Basis for Genomic Torts' (2003) 42 Washburn Law Journal 413, 485-486.

[1355] Note the retrenchment of recent years in the application of the duty of care in favour for incrementalism since the Irish Supreme Court decision in *Glencar Exploration plc v Mayo County Council* [2002] 1 ILRM 481(SC). For more detailed analysis, see Bryan M.E. McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013), [6.46] to [6.129].

[1356] Dov Fox, 'Reproductive Negligence' (2017) Columbia Law Review (forthcoming) 1, 4; available at http://ssrn.com., accessed 17 September 2016, where the author identifies the unique harm suffered in cases of reproductive negligence as follows:

> Reproductive negligence inflicts an injury that goes beyond any material or psychological harm like bodily intrusion or emotional distress. It is a distinct harm that consists in being robbed of the ability to determine the conditions

as trespass do not require proof of damage and are actionable *per se*, tort doctrine has historically been dominated by concern for personal injury. It is only in relatively recent times that tort law has recognised recovery (albeit severely and artificially limited) for pure economic loss[1357] and claims involving psychiatric damage not accompanied by physical injury, for example.[1358] Notwithstanding the limited recognition of these other types of harm, "the presence of a physical, bodily harm remains the gold standard of 'damage' in negligence."[1359] This narrow view of 'damage' can result in injustice by hindering the promotion of human dignity particularly in litigation involving emerging technologies.

6.3.2.1 *Wrongful Conception Cases*

One example where the law falls short in protecting human dignity in this regard is the area of reproductive autonomy.[1360] Courts throughout the common law world have failed to develop a coherent approach to claims involving failed sterilisation procedures which results in the birth of an unwanted child. Otherwise known as "wrongful conception/wrongful birth" cases, the courts have struggled to identify the nature of the harm in such circumstances.[1361] Grappling

---

> under which to be pregnant or have children. More than almost any other purpose we commit to or role we assume, parenthood shapes who we are, what we do, and how we want to be remembered.

[1357] *Glencar Exploration plc v Mayo County Council* [2002] 1 ILRM 481(SC).

[1358] *Kelly v Hennessy* [1995] 3 IR 263.

[1359] Nicolette M. Priaulx (2015) 'Injuries That Matter: Manufacturing Damage in Negligence' Available at: http://works.bepress.com/nicolette_priaulx/2 (last accessed 5th October 2015). Moral theories of tort law such as corrective justice suffer in this regard as their primary focus is backward looking and focused on wrongful losses. See Gemma Turton, 'Defining Damage in the House of Lords' (2008) 71 Modern Law Review 987, 1011, where the author observes, "the term 'wrongful loss' allows flexibility within the distinct torts in distinguishing between those losses that are considered deserving of compensation and those which everyone is expected to tolerate."

[1360] *Byrne v Ryan* [2007] IEHC 207; *MacFarlane v Tayside Health Board* [2000] 2 AC 59 (HL). See also Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart 2001).

[1361] Nicky Priaulx, 'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law' (2012) 33 Adelaide Law Review 177, 182, where the author points out that tort law may suffer from a gender bias in this regard in that it "fails to 'see' may of the injuries that women sustain as women." Nicky Priaulx, 'Joy to the World! A (Healthy) Child is born! Reconceptualizing 'Harm' in Wrongful Conception' (2004) 13 Social & Legal Studies 5; Nicky Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Oxford: Routledge-Cavendish, 2007); See also Dov Fox, 'Reproductive Negligence' (2017) Columbia Law Review (forthcoming) 1, 11; available at http://ssrn.com., accessed 17 September 2016, where the author observes:

> Wrongful birth comes closest to recognizing this injury. But on a closer look, it does not vindicate lost opportunity to make meaningful decisions about whether to continue a pregnancy. That courts fasten the damages for wrongful birth actions to the costs of raising a child makes clear that these actions do not redress the distinct injury of forced procreation in ways parents sought to avoid, or might have, if not deprived of material information. Even if wrongful birth recognizes this harm in theory, it fails to recognize it in practice when it reckons damages in terms of birth or abortion. The burden it foists on plaintiffs to prove the costs of childrearing, as opposed to lost control over procreation, suggests the harm is less about reproductive freedom than it is about childbirth or rearing. This redefinition of the harm to fit tort law's conventional focus on tangible injury is indeed why so many courts have rejected such suits outright, whether to avoid casting children as "emotional bastard[s]" or to avoid forcing doctors to subsidize the "invaluable benefits of parenthood." Twenty states accordingly refuse to consider the merits of such professional malpractice actions against forced procreation. These actions miss the harm that victims of reproductive negligence suffer. Their complaint is not that their child is undesired or undesirable; it is that they have been denied the chance to decide whether to be a gestator or parent. And showing this harm does not require proving they would

with traditional notions of personal injury, they have resorted to identifying the harm as either physical (relating to the discomfort and pain of childbirth) or purely economic (relating to the costs of raising the unwanted child). In so doing, the courts have shied away from acknowledging the real harm in such cases and that is the impact on the human's dignity through the restriction of the plaintiff's procreative autonomy.[1362] The value in procreative autonomy – the right whether or not to reproduce – "is central to personal identity, to dignity, and to the meaning of one's life."[1363] The right to procreate "fulfils cultural norms and individual goals about a good or fulfilled life, and many consider it the most important thing a person does with his or her life."[1364] Decisions relating to procreation are deeply personal and the capacity to choose whether to have children or not is one of the most important decisions any individual can make in their lives.[1365] Consequently, as Jackson writes:

> have ended the pregnancy. Failure to recognize that wrongful interference over so far-reaching a facet of life is itself serious risks implying that parents do not want the child they have or that she would have been better off never having been born. These barriers to recovery give reason to care how courts characterize the harms borne of reproductive negligence, beyond how they assess damages for those harms (footnotes omitted).

[1362] Nicolette Priaulx, 'Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters' (2008) Medical Law Review 199. See also Bruce Feldthusen, 'Suppressing Damages in Involuntary Parenthood Actions: Contorting Tort Law, Denying Reproductive Freedom and Discriminating Against Mothers (2014) 29 Canadian Journal of Family Law 11, 23, where the author recognises the fundamental value at play here as one of autonomy:

> The right of a woman, or a woman and her partner acting in concert, to make reproductive choices lies at the core of the involuntary parenthood action … The involuntary parenthood action deals with the parents' claim to recover pecuniary damages they suffer as the result of negligently inflicted damage to their right to reproductice autonomy. It is quite possible that the "inherent value of human life" rhetoric is simply a device employed to constratin reproductice autonomy. There is arguably a rational connection between these core values and the background facts of involuntary parenthood such as abortion and sterilization. Having failed to oulaw reproductive autonomy, this is a line of argument that would appear to judges who wish to constrain it.

[1363] John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, 1994) 24.

[1364] John A. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' (1983) 69 Virginia Law Review 405, 408.

[1365] Dov Fox, 'Reproductive Negligence' (2017) Columbia Law Review (forthcoming) 1, 17; available at http://ssrn.com., accessed 17 September 2016:

> The exercise of control over decisions about whether or not to gestate matters to women, and to a lesser extent their partners, not only because pregnancy carries, as one U.S. court noted, "a litany of physical, emotional, economic, and consequences" associated with unwanted or risky miscarriage, abortion, adoption, childbirth, and prenatal or post-partum care. Being pregnant or not being so can also, as one British judge elaborated, "deeply reflect[] the way the woman thinks about herself and her relationship to others and to society."Khiara Bridges describes this injury as "the fact that the woman thinks of herself differently," in a disorientating transformation "from 'woman' to 'pregnant woman,'"or as a rejection of the desired sense of oneself as pregnant. Denying a woman's ability to construct the experience of pregnancy for herself, Julia Hanigsberg notes, separates her from her reproductive capacity and at the same time reduces her to it. This is why negligent contraceptive or infertility treatment can create and enforce a "perceived identity" that it "confines" a woman to by depriving her authority over this part of her life in ways that can "forcefully reshape and redirect" it "in the minutest detail." These serious and gendered kinds of harms to the interest in controlling pregnancy warrant protection against wrongful violation. (footnotes omitted).

> When we disregard an individual's reproductive preferences, we undermine their ability to control one of the most intimate spheres of their life. Our reproductive capacity or incapacity indubitably has a profound impact upon the course of our lives, and decisions about whether or not to reproduce are among the most momentous choices that we will ever make ... Insofar as it is now possible for individuals to decide if, whether or when to reproduce, depriving them of this control significantly interferes with their capacity to live their life according to their own beliefs and practices.[1366]

Current tort law has struggled to adequately protect procreative autonomy of individuals in cases where due to the negligence of the defendant a sterilisation procedure undergone by the plaintiff or his or her partner results in an unwanted pregnancy. Such a scenario arose in *MacFarlane v Tayside Health Board,*[1367] where a couple agreed that the father would undergo a vasectomy operation. The couple were negligently informed that the procedure was a success and that the father's sperm count was negative. In reaching their judgement, their Lordships struggled with identifying the nature of the damage which had resulted. Lord Slynn classified the harm as pure economic loss and held that, while the mother of the child was entitled to some damages for the physical effects of the pregnancy on policy grounds, no recovery was allowable for the costs of raising the child. Lord Steyn, while acknowledging the law must respect "the right of parents to make decisions on family planning ... which are so closely tied to their basic freedoms and rights of personal autonomy,"[1368] held nonetheless that based on distributive justice grounds it would not be appropriate to award compensation for the costs of rearing a healthy, but unwanted child.[1369] In terms of the mother's claim, Lord Hope identified the harmful event as the child's conception. This act had consequences for the mother in the form of personal injury for which she was deserving of compensation. Yet, Lord Hope

---

[1366] Emily Jackson, *Regulating Reproduction* (Hart Publishing, 2001) 7.
[1367] *MacFarlane v Tayside Health Board* [1999] UKHL 50; [2000] 2 AC 59 (HL).
[1368] *MacFarlane v Tayside Health Board* [2000] 2 AC 59, 81.
[1369] Ibid., where Lord Steyn acknowledged the policy issues at play when he stated:

> It is possible to view the case simply from the perspective of corrective justice. It requires somebody who has harmed another without justification to indemnify the other. On this approach the parents' claim for the cost of bringing up Catherine must succeed. But one may also approach the case from the vantage point of distributive justice. It requires a focus on the just distribution of burdens and losses among members of a society. If the matter is approached in this way, it may become relevant to ask commuters on the Underground the following question: Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority, i.e. until about 18 years? My Lords, I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with an emphatic "No." And the reason for such a response would be an inarticulate premise as to what is morally acceptable and what is not. Like Ognall J. in *Jones v. Berkshire Area Health Authority* (unreported) 2 July 1986 they will have in mind that many couples cannot have children and others have the sorrow and burden of looking after a disabled child. The realisation that compensation for financial loss in respect of the upbringing of a child would necessarily have to discriminate between rich and poor would surely appear unseemly to them. It would also worry them that parents may be put in a position of arguing in court that the unwanted child, which they accepted and care for, is more trouble than it is worth. Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent up upon the birth of a healthy child, which all of us regard as a valuable and good thing.

categorised the claim for child-rearing costs as purely economic and therefore separate and consequently outside the ambit for which a duty of care would be owed. In a dissenting judgment, Lord Millet stated that there should be no recovery for the harm associated with the costs of rearing the child (nor indeed compensation awarded to the mother for the physical harm suffered by reason of child birth) on the basis that "[t]here is something distasteful, if not morally offensive, in treating the birth of a normal healthy child as a matter for compensation."[1370] Lord Millet did, however, expressly acknowledge that the plaintiffs' procreative autonomy had been undermined in the circumstances on the basis that:

> They have suffered both injury and loss. They have lost the freedom to limit the size of their family. They have been denied an important aspect of their personal autonomy. Their decision *to have no more children is one the law should respect and protect. They are entitled to general* damages to reflect the true nature of the wrong done to them.[1371]

However, his Lordship's almost dismissive attitude towards such dignitary interests was reflected in his quantification of the damages that should be awarded indicating the award for such harm "should be a conventional sum" which he did "not expect to exceed £5,000."

A similar, if slightly different scenario arose in the England & Wales of Court of Appeal case of *Parkinson v St James and Seacroft University Hospital NHS Trust*.[1372] In that case, the plaintiff underwent a sterilisation procedure that was negligently performed by the defendant. The plaintiff subsequently gave birth to a child with a disability. The case was distinguished from *MacFarlane* on the basis that in *Parkinson* the defendant's negligence led to the birth of an unwanted child who was also suffering from a disability and as a consequence required greater support (both emotional and financial) from his parents. The question the court had to address was whether the plaintiff was entitled to damages for the extra costs associated with caring for such a child? In upholding the plaintiff's claim, Hale LJ had regard for the impact an unwanted pregnancy has on the mother, observing "[l]iterally, one's life is no longer one's own but also some-one else's."[1373] She also noted that these responsibilities do not end with the birth of the child and involve 24 hours a day, seven days a week responsibilities until the child is old enough to care itself.[1374] Hale LJ viewed the costs of raising the child in such

---

[1370] *MacFarlane v Tayside Health Board* [2000] 2 AC 59, 111.
[1371] Ibid., 114.
[1372] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] QB 266.
[1373] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [66].
[1374] Ibid., [71].

circumstances not as pure economic loss, but as consequential economic loss arising from the invasion of the mother's autonomy. According to Hale LJ, *MacFarlane* could be distinguished on the basis that the refusal to award damages in cases of "wrongful conception/wrongful birth" should be limited to cases involving "the ordinary costs of the ordinary child."[1375] In cases, such as *Parkinson*, where there were extra costs associated with caring for the child, those extras costs should be recoverable.

The "wrongful conception/wrongful birth" action was revisited by the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust*.[1376] In that case, the plaintiff became pregnant following a negligently performed sterilisation procedure. While the child was healthy, the plaintiff mother was suffering under a disability (near blindness) and sought recovery from the defendant for the extra costs that she would incur because of her disability in raising her child. Lord Bingham, following Lord Millet's conventional award approach in *MacFarlane*, awarded the plaintiff £15,000 in recognition of the fact that the defendant's negligence had denied the plaintiff "the opportunity to live her life in the way she wished and planned."[1377] This award "would afford some measure of recognition of the wrong done."[1378] Lord Nicholls concurred with Lord Bingham's conventional award of £15,000 stating that the court "should add a gloss to the decision in *MacFarlane* ..."[1379] Lord Steyn for his part did not agree with the conventional award approach to the issue and questioned whether the award in *MacFarlane* was supported by the majority in that case,[1380] stating that it was "a backdoor evasion of the legal policy enunciated in *MacFarlane,*"[1381] and was a matter which was best left to Parliament.[1382] Lord Hope also disagreed with the basis of making a conventional award. In Lord Hope's view the award of £15,000 could only be categorised as a general damages award whereas the financial losses incurred by the plaintiff in raising the child should be categorised as special damages. Because special damages for financial losses are quantifiable they should not be the subject of a conventional award.[1383] Lord Millet was not of the opinion that his

[1375] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [90].
[1376] *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52.
[1377] Ibid.
[1378] Ibid.
[1379] Ibid., [17]. This award was described "more as a consolation prize in the face of denying a proper remedy" by the author in Nicky Priaulx, 'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law' (2012) 33 Adelaide Law Review 177, 186.
[1380] *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [41].
[1381] Ibid., [46].
[1382] Ibid.
[1383] Ibid., [71].

conventional award approach was overruled by the majority in *MacFarlane,* observing that such an award should be made in recognition of that fact that such pregnancies represent a denial of an aspect of the parents' autonomy, which he identified as "the right to limit the size of their family."[1384] Lord Scott also agreed with the conventional award of £15,000 but did so on the basis that the plaintiff was "deprived of the benefit that she was entitled to expect"[1385] when she agreed to undergo the sterilisation procedure.

The "wrongful conception/wrongful birth" action arose in an Irish context in the High Court decision of *Byrne v Ryan.*[1386] In that case, the plaintiff underwent a tubal ligation procedure which was negligently performed. She subsequently gave birth but was incorrectly advised that the reason she had a child was because she was pregnant at the time of the first sterilisation procedure and not because the procedure was defective. It was not until the plaintiff became pregnant on a second subsequent occasion that it become known that the initial sterilisation procedure had failed and it was at this point she had a second sterilisation procedure. In denying the plaintiff's claim for the financial costs in rearing the two children, Kelly J followed the line of authority established in *MacFarlane,* agreeing that it would not be just and reasonable to impose such liability on the defendant in the circumstances. Such an approach, according to Kelly J, was consistent with principles of distributive justice and justifiable on the basis that the benefits associated with the birth of a healthy child outweighed the costs. Kelly J found support for his approach by reference to the Constitutional protection of the family and the dignity of human life.[1387] What Kelly J did not appear to consider, however, was the dignity of the plaintiff whose procreative choice had been denied not once, but twice, by the negligence of the defendant. In dismissing the plaintiff's claim for the financial costs of rearing the two children, Kelly J did award the plaintiff a total of €80,000 in respect of the pregnancy and birth of the two children to take into account the physical trauma and emotional distress the pregnancies caused her.[1388] This award was calculated on the basis that the plaintiff was

---

[1384] *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [123].
[1385] Ibid., [148].
[1386] *Byrne v Ryan* [2007] IEHC 207.
[1387] In Bryan M.E. McMahon & William Binchy, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013), [33.59], the authors question whether this may refer to a concern that approving such claims could be interpreted as endorsing the parents' right to consider travelling abroad to have an abortion.
[1388] See also the Irish High Court decision in *Hurley Ahern v Moore* [2013] IEHC 72, where it was recognised that the legal harm which results from a failed sterilisation procedure does not necessarily end upon the birth of the child. In that case, the plaintiff had undergone a sterilisation procedure for medical reasons. The procedure was negligently carried out and the plaintiff became pregnant with a child who suffered severe congenital abnormalities. The child died some six months later as a result of his condition. In examining the question from

required to undergo a second sterilisation and the abnormal physical difficulties that the plaintiff underwent in giving birth to both children.

There is a conceptual incoherence evident from the decisions of the Irish and English courts in cases involving "wrongful conception/wrongful birth" as evidenced by the fact that in the space of seven years four cases between the UK and Ireland were litigated on essentially the same point. The failure by the courts to develop a principled approach towards such cases leads one to agree with Hoyano's conclusion that the failure to articulate "a clearly defined supporting principle has fomented rather than forestalled further litigation." [1389] Much of this incoherence stems from the courts' reluctance to recognise forms of harm other than those which are of a physical nature. This narrow conception of harm meant that much of the courts' discussion focused on the physical harm – and to a lesser extent, the emotional harm – arising to the mother as a result of the pregnancy. This harm ended with the birth of the child (or soon thereafter). Consequently, the financial costs for raising the child could be separated and were therefore viewed as purely economic. The focus in these claims was therefore diverted from the actual harm caused by the defendant's wrong i.e. the denial of the plaintiff's right to procreative autonomy and the physical, psychological and financial consequences which flow from such denial. In so doing, the courts viewed the harm as the physiological outcome of the wrong i.e. the birth of the child. Hence, the emphasis in *MacFarlane* was on the fact that the plaintiffs were not entitled to recovery in damages for the ordinary costs associated with the birth of a healthy child.[1390]

Categorising the harm in this manner also tends to stigmatise the plaintiffs' claim as being one simply about the financial costs associated with raising the child. The perception is that the plaintiffs' claim is distasteful in that it is reducing the 'gift of life' to a mere commodity rather than viewing the claim as one by which the plaintiffs are seeking vindication of their human

---

the point of view of remoteness of damage, the court considered the events after the birth of the child as being relevant, particularly as the reasons the plaintiff underwent the procedure was for medical purposes. The High Court awarded €100,000 in compensation. Ryan J considered the issue from the point of remoteness of damage. The plaintiff had undergone the sterilisation procedure as she had received medical advice that should she become pregnant there was a strong likelihood that the child would suffer severe congenital defects. The harm and trauma associated with the birth and death of the child were therefore considered foreseeable and thus recoverable.

[1389] Laura C. H. Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 Modern Law Review 883, 884.

[1390] See Marc Ramsay, 'Wrongful Pregnancy and the Offset/Benefits Approach' (2015) 28 Candaian Journal of Law & Jurisprudence 129, 139, where the author criticises the notion that because the birth of a healthy child might bring benefits that fact should not be offset against the harm caused; "... a tortfeasor who negligently damages one of a victim's interests cannot reduce his liability for that interest by arguing that his negligence has benefitted some of the victim's other interests."

dignity as a result of the wrongful interference with their procreative autonomy.[1391] The perception thus created in such cases is that there is something 'grubby' about claiming compensation for the birth of one's own child. The compensation claim based on the extra costs associated with caring for a disabled child in *Parkinson* also raises somewhat uncomfortable questions about how we value life and puts plaintiffs in a position where they must prove that their child is disabled for the purposes of compensation.[1392] It also raises questions about what qualifies as 'disability' for the purpose of such a claim and how the additional costs incurred by caring for such a child are quantified.[1393]

Similar points have been raised by Hoyano[1394] in the context of the approach by Hale LJ to the claim of the disabled mother in the Court of Appeal decision in *Rees v Darlington Memorial Hospital NHS Trust*.[1395] In justifying the award of damages to the plaintiff in that earlier decision, Hale LJ emphasised the fact that, in her opinion, the plaintiff would *need* assistance in raising the child because of her disability and would *need* it if her child was not "to be taken away to be looked after by the local social services authority or others."[1396] However, this analysis simply "fosters a culture of helplessness and victimhood"[1397] around disability and would require parents in such cases to "depict themselves as inadequate parents."[1398] The danger in adopting such a rationale to recovery for such damages is that the courts are simply reinforcing stereotypes which anti-discrimination laws and the courts have for years been trying to eliminate. Consequently, Hoyano concludes that "[c]ourts must tread delicately here.

[1391] Bruce Feldthusen, 'Suppressing Damages in Involuntary Parenthood Actions: Contorting Tort Law, Denying Reproductive Freedom and Discriminating Against Mothers (2014) 29 Canadian Journal of Family Law 11, 24, where the author is deeply critical of judges' purported justifications for restricting such claims: "If they insist on limiting the reproductive autonomy of women and families, they should do so explicitly and justify their position openly. It is disingenuous to pay lip service to reproductive freedom and to simultaneously gut it." Feldthusen later also makes the point (51) about these cases that, "... in each case the damage limit discriminates against parents, particularly mothers. These limits effectively require paretns to subsidize medical malpractice."

[1392] *per* Kirby J in *Cattanach v Melchior* [2003] HCA 38, [166] to [163].

[1393] See also the Australian High Court decision of *Cattanach v Melchior* [2003] HCA 38, [166], where in a similar case, Kirby J stated:

> It reinforces views about disability and attitudes towards parents and children with physical or mental impairments that are contrary to contemporary Australian values reinforced by the law. English judges have been forced into this unhappy differentiation because of the authority of *McFarlane*. Some of them show obvious discomfort with it and some even rebellion.

[1394] Laura C. H. Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 Modern Law Review 883, 900.

[1395] [2002] EWCA Civ 88; [2003] QB 20.

[1396] *Rees v Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88; [22].

[1397] Laura C. H. Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 Modern Law Review 883, 900.

[1398] Ibid.

Barriers to true equality of opportunity for the disabled are just as objectionable when they are brought through benign paternalism as through deliberate action or neglect."[1399]

In each of the "wrongful conception/wrongful birth" cases, some damages were awarded to the plaintiffs. The justification for these awards was wide and varied. In some cases, relatively minor awards were made for the pain and suffering associated with the physical act of childbirth, in others, damages were awarded for the economic costs associated with that physical harm while in some others conventional awards were made for the loss of the plaintiff's personal autonomy.[1400] However, none of these awards confronted directly the fundamental issue at play here, which is the protection of the plaintiff's procreative autonomy. In each of these cases, the plaintiffs made personal decisions regarding their family planning and yet had their autonomy undermined by the negligence of the defendants. These dignitary interests received, at best, indirect protection in the form of compensation awards in subsequent litigation. The law's obsession with traditional forms of harm in these types of cases has led the courts to create arbitrary distinctions between what are essentially identical cases where the harm is viewed as physical (the pregnancy) and purely financial (the costs associated with raising the child). Dignitary interests are given mere lip service in some of the cases in the form of conventional awards. The failure to put dignitary interests to the fore in these cases and to acknowledge the true nature of the harm fails to recognise the true impact on the physical, emotional and financial well being of the plaintiff which does not end with the birth of the child. It also leads to arbitrary and incoherent decision making which only leads to further litigation. Until then, it cannot be truly said, as Lady Hale has recently done, that "[g]one are they days when it was thought that, on becoming pregnant, a woman lost, not only her capacity, but also her right to act as a genuinely autonomous human being."[1401]

6.3.2.2 *Assisted Human Reproduction*

Tort law also faces new challenges in protecting human dignity in the face of massive technological change in the field of assisted human reproduction. Scientific advances in this area have developed to such an extent that the human reproduction process is no longer solely

---

[1399] Laura C. H. Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 Modern Law Review 883, 901.
[1400] All of which has led Lady Hale to conclude in *Montgomery v Lanarkshire Health Board (Scotland)* [2015] UKSC 11, [108]; that "[i]t is now well recognised that the interest which the law of negligence protects is a person's interest in their own physical and psychiatric integrity, an important feature of which is their autonomy, their freedom to decide what shall and shall not be done with their body ..."
[1401] *Montgomery v Lanarkshire Health Board (Scotland)* [2015] UKSC 11, [116].

dependent on members of the opposite sex having sexual intercourse in order to exercise their rights to procreation. The development of technologies such as in vitro fertilisation ("IVF") has massively expanded the opportunities afforded to individuals to exercise their procreative autonomy.[1402] While this technology has benefitted many families, the continued advancement of such technology does raise serious questions about tort law's ability to cope with claims arising from the negligent use of such technology. Tort law's reluctance to put the plaintiff's dignitary interests first, preferring instead to rely on traditional forms of harm to provide indirect protection, has led courts to pigeonholing the square peg of dignitary harm into the round hole that is traditional personal injury.[1403] Thus, cases which essentially involve unreasonable interferences with the plaintiff's procreative autonomy are instead dressed up in the traditional garb of personal injury and thus are typically described as actions for negligently inflicted emotional distress or economic loss thereby bringing with them traditional policy restrictions.

One such example of the pitfalls associated with the negligent administration of IVF treatment is the U.S. case of *Harnicher v University of Utah Medical Center.*[1404] In that case, the plaintiffs availed of IVF treatment using "mixed sperm." This process increased the chances that the plaintiffs (David and Stephanie) would conceive but involved using donor sperm in addition to that of the father. The couple were able to select the donor sperm in order to ensure that any

---

[1402] In its most basic sense, IVF treatment involves the removal of a woman's ovaries which are then fertilised with the sperm of a man. The resultant embryo is then implanted into the uterus of the woman.

[1403] For an interesting discussion, see Marshall S. Shapo, *Tort Law and Culture* (Carolina Academic Press, 2003) 53-54, where the author explains the possible reasons for the reluctance by the law to recognise types of harm other than those which involve interferences with bodily integrity:

> The cultural basis for that interest has several foundations. Some will locate its roots pragmatically in the need to keep peace in society: to allow people to invade bodily integrity of others without legal sanctions is to invite retaliation and social breakdown. Others will suggest that the key to the protection of various interests that tort law vindicates is the desire to minimize the amount of resources that people spend on defending things they value – in addition to their bodies, these things may include their tangible property and various intangibles. The definition of rights by the law varies with the types of interests that are involved, reflecting a range of attitudes that people have concerning the value of those interests. Finally, many will subscribe to the idea that there are certain parts of our lives that simply are inviolable, requiring compensation when others encroach on them because they are what define us as human beings. Some may speak of natural rights and others in terms of categorical imperatives; at some point these irreducibly protectable elements of our existence are incapable of further definition.
>
> ... a substantial body of tort law rests on the idea that one has a right to physical integrity, protectible against many kinds of activities carried on by others. By contrast, the tort rules of many jurisdictions indicate that one does not have a right to psychological integrity with respect to certain kinds of conduct. Differing rules of this type arise from our attitudes about the value of physical and psychological integrity and about the importance of such things as freedom of movement and encouragement to experimentation.

[1404] *Harnicher v University of Utah Medical Center,* 962 P.2d 67 (Utah 1998).

resultant child would have similar physical characteristics and blood type to David. The defendant mistakenly used sperm different to that chosen by the couple. Triplets were born to the plaintiffs as a result of the IVF treatment. It became clear that the children were not the result of David's sperm nor did they result from the donor sperm chosen by the couple as the children looked nothing like David. The plaintiffs brought an action in negligence against the defendant alleging that it negligently had caused them emotional harm. The claim was dismissed because traditional tort doctrine refused to recognise recovery for such harm unless accompanied by physical harm. In another U.S. case, *Creed v United Hospital*,[1405] the plaintiffs, a married couple, were undergoing IVF treatment with the defendant hospital when they were informed that the wife's fertilised ova were mistakenly implanted in another woman. The plaintiffs' claim for emotional distress was also dismissed because the plaintiffs had not suffered any physical injury as a result of the defendant's negligence.

In each of these cases the plaintiffs were restricted in their pleadings. None could realistically claim that they had been physically injured by the defendants' negligence. Unlike the traditional wrongful conception cases, the plaintiffs in each of these cases *wanted* to conceive. But in order to obtain justice for the wrong perpetrated against them the plaintiffs were forced to 'shoehorn' their claim into a recognisable form of harm for the purposes of the tort action. Had these claims been reformulated as claims relating to the infringement of personal autonomy, a different, more just outcome would have resulted. In this regard, Kleinfeld proposes a solution which involves tort law doing away with the "legal fiction" of basing such claims artificially on traditional types of harm such as emotional distress and economic loss.[1406] Instead he argues that tort law should recognise a new cause of action protecting what he describes as one's "procreative interest"[1407] which "consists in bearing and rearing one's own genetic progeny with the mate of one's choice."[1408]

A novel approach to this issue was adopted in a Singaporean case involving the negligent administration of IVF treatment called *ACB v Thomson Medical Pte Ltd & Others.*[1409] In that

---

[1405] *Creed v United Hosp.*, 600 N.Y.S.2d 151 (App. Div. 1993).
[1406] Joshua Kleinfeld, 'Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury"' (2005) 115 Yale Law Journal 237, 242.
[1407] Ibid.
[1408] Ibid., 243.
[1409] *ACB v Thomson Medical Pte Ltd & Others* [2017] SGCA 20. In a case closer to home, and one cited in *ACB v Thomson Medical Pte Ltd & Others*, is *A & B by C v A Health and Social Services Trust* [2011] NICA 28. In that case, the Northern Ireland Court of Appeal dismissed a claim by two minors who were twins born as a result of IVF treatment. When undergoing IVF treatment, the children's parents were keen to ensure that the children

case, the claim was primarily presented as one dealing with recovery for economic loss linked to the upkeep of the child. The plaintiff was Singaporean woman of Chinese descent who was married to a German of Caucasian descent. The couple underwent IVF treatment in order to conceive a child. Due to the negligence of the defendant, the plaintiff's eggs were fertilised with the sperm of an Indian male instead of her husband's sperm. The baby that was born to the parents was of a different blood type, skin tone and hair colour to her parents and her brother. The plaintiff sought damages in negligence. Phang J of the Court of Appeal dismissed the aspect of the claim relating to the child's upkeep on the basis that it would be inconsistent with the best interests of the parent/child relationship.[1410] Phang J did explicitly consider whether the plaintiff was entitled to damages for the "loss of autonomy" incurred. Treating the concept of "loss of autonomy" as recognisable harm was ultimately rejected by the court on the basis that it was too broad in scope and "as a head of damage would allow for the circumvention of existing control mechanisms in the tort of negligence."[1411] Despite rejecting the concept of loss of autonomy as a standalone head of damage, Phang J did acknowledge the importance of autonomy "as an important background consideration"[1412] when assessing what the court considered to be the real loss which was that of "genetic affinity." This more restrictive head of damage was summarised by Phang J as follows:

> The loss suffered by the Appellant as a result of the Respondents' negligence is the result of a complex amalgam of biological, social, ethical, and historical factors. Many of these have to do with certain aspects of human relationships and personhood that are fundamental parts of the human condition, such as the role of genetic relatedness, physical resemblance, race, culture, and the importance of familial relations. Some are matters which are rightly cherished; others are perhaps regrettable features of the society which we inhabit. However, what is clear is that the Appellant would be ill-served by a judicial refusal to fully engage with these issues in order to recognise the true loss which has been suffered. In our judgment, the Appellant's

---

born as a result of the treatment were of a similar ethnic background to them (white Caucasian). Due to an error on the part of the defendant the sperm used in the IVF treatment came from a donor of a Caucasian (Cape coloured) background. As a result, the resulting children – although perfectly healthy – were of a skin colour which was very much of a darker hue to their parents. The children, then aged 11 years of age, brought an action in negligence seeking compensation for the emotional harm that they had suffered because of the fact that their skin colour was different to that of their parents and because they were the subject of abusive and derogatory comments by other children. Girvan LJ dismissed the claim on the basis that the twins did not prove that they had suffered damage which was compensable in the eyes of the law.

[1410] *ACB v Thomson Medical Pte Ltd & Others* [2017] SGCA 20, [101], where it was said:

> The recognition of a claim for upkeep would require the court to regard, as actionable damage, the incidents of a relationship which is regarded as socially foundational and incapable of estimation as loss. Such recognition would also be inconsistent with, and deleterious to, the health of the institution of parenthood and would be against the public interest.

[1411] Ibid., [123].

[1412] Ibid., [125].

> interest in maintaining the integrity of her reproductive plans in this very specific sense – where she has made a conscious decision to have a child with her Husband to maintain an intergenerational genetic link and to preserve "affinity" – is one which the law should recognise and protect.[1413]

The decision is to be welcomed as it represents an innovative approach towards the development of the law which has an underlying basis resting in individual autonomy. However, in limiting its application to "genetic affinity" as the recognisable form of harm, it is unduly restrictive. Phang J himself acknowledged that the "genetic affinity" claim could not apply to wrongful conception cases where a child is born following a failed sterilisation procedure but is of the same genetic makeup as his or her parents. In those circumstances, Phang J noted that while the parents might have suffered an interference of their procreative choice it was, in his opinion, a disruption that was "qualitatively different" from that which occurred in the case before him and he left the question open "for another day."[1414] As such, the Court of Appeal decision in *ACB* represents a missed opportunity. The recognition of a broader notion of harm based on the plaintiff's right to procreative autonomy based in relational dignity would more accurately reflect the interests involved in such cases and would also leave room for the recognition of wrongful conception cases. Such a development would not be overly broad as it would be limited to cases where the plaintiff's procreative choice - derived from relational dignity – has been wrongly interfered with. That said, the decision of Phang J is a classic example of how tort law might incrementally develop by recognising new casues of action based on the moral principle of the promotion of human dignity.

The expanding choice available to couples raises moral and ethical questions as to the extent of procreative autonomy and where the limits should be drawn.[1415] It is one thing to have the opportunity to avail oneself of IVF treatment where one cannot conceive naturally but how far does this choice extend? Prenatal screening which identifies whether a mother is at risk of giving birth to a child suffering from congenital disability is becoming more commonplace.[1416] Specifically, in the context of IVF treatment, pre-implantation genetic diagnosis ("PGD") has

---

[1413] *ACB v Thomson Medical Pte Ltd & Others* [2017] SGCA 20, [135].
[1414] Ibid., [136].
[1415] See generally Debora L. Spar, 'As you Like It: Exploring the Limits of Parental Choice in Assisted Reproduction' (2009) 27 Law & Inequality 481; Karen E. Schiavone, 'Playing the Odds or Playing God? Limiting Parental Ability to Create Disabled Children Through Preimplantation Genetic Diagnosis' (2009) 73 Alb Law Review 283.
[1416] See generally Kate Wevers, 'Prenatal Torts and Pre-Implantation Genetic Diagnosis' (2010) 24 Harvard Journal of Law & Technology 257.

reached an advanced stage. PGD allows embryos to be screened for certain genetic traits at the eight cell stage before implantation in the uterus.[1417] Thus, parents undergoing IVF treatment now not only have the choice as to whether they become pregnant, but also *how* they will become pregnant.[1418] Parents undergoing IVF treatment can now screen their children for various genetic anomalies and select their preferred embryo. Parents can now screen their embryos for serious diseases or illnesses in order to minimise the possibility that they will give birth to anything less than a healthy baby. How far should we go as a society in allowing parents full autonomy in this regard? Fox recognises these policy concerns,[1419] but is of the opinion that these arguments should not deter the courts from dealing with these claims:

> Reasonable people disagree, often sharply, however, about the ethics of prenatal selection, especially for nonmedical traits. Far-reaching prenatal selection might be defended as a way to help parents form the families they want and their children to lead lives more likely to go well. Of course, we can easily imagine cases—setting out to create a child to suffer or be a slave—that manifest undeniably base reasons to reproduce. For many other unusual or idiosyncratic offspring preferences such as deafness or transplant compatibility, however, the reason they are not widely shared or appreciated may owe at least as much to general unfamiliarity with the experiences and perspectives of would-be parents who have unique values, backgrounds, or circumstances. The contested character of this concern about parental values accordingly leaves it precarious footing for a policy objection to leave otherwise compensable confounded procreation without remedy.[1420]

The emergence of these new technologies raises ethical questions as to what might happen in cases where incorrect genetic information provided to the parents in IVF treatment leads to a decision which ultimately results in the birth of a child with a genetic disorder. Should the parents be entitled to bring an action for the costs of raising the child on the basis that they would not have continued with the IVF treatment had they been aware of the genetic anomaly?

[1417] Ibid., 258.

[1418] Debora L. Spar, 'As you Like It: Exploring the Limits of Parental Choice in Assisted Reproduction' (2009) 27 Law & Inequality 481, 482.

[1419] Dov Fox, 'Reproductive Negligence' (2017) Columbia Law Review (forthcoming) 1, 46; available at http://ssrn.com., accessed 17 September 2016, where the author notes that:

> These concerns might include empirical or normative judgments about sex ratios, newborn health, and secular values about group equality or offspring acceptance that are bound to be controversial.469 Here, decision-making authority would shift from juries (as instructed by judges) to judges alone. For a judge to treat reproductive negligence as noncompensable, she would have to conclude that policy concerns outweigh the countervailing expression of values favoring interests in procreation. But there is nothing unusual about courts evaluating such policy exceptions to judge-made law

[1420] Ibid., 51.

This is what occurred in *Waller v James*[1421] a recent decision of the New South Wales Court of Appeal. In that case, a child born to a couple undergoing IVF treatment suffered a stroke four days after his birth which left him severely disabled. He was also born with a genetic condition (ATD) which he had inherited from his biological father. There was no scientific link between the baby's stroke and the ATD. The plaintiffs were under the mistaken impression that the ATD could not be inherited by their child. They claimed that had they been made aware of the potential for their child to inherit the disease they would have deferred IVF treatment until such time as they could do so without the risk of passing on the disorder. As a consequence, they claimed that the defendant had deprived them of their right to plan their family and reproductive future. While the defendant had referred them for genetic counselling he did so only briefly, did not explain the importance of such counselling to them and did not follow up in order to determine whether they had undertaken the counselling. The plaintiffs alleged that the defendant had a duty of care towards them to ensure that they undertook and understood the counselling, a duty which he had breached. Had he acted as carefully as he should have, the plaintiffs would have refrained from having a child using the father's sperm until such time as PGD testing had become available which would have informed them whether the condition had been passed on to the embryo and would have avoided the negative outcome which occurred. The plaintiffs sought recovery for the costs of the child's care.

Ultimately, while the court held that the defendant had breached his duty of care towards the plaintiffs, it had not been proven that his negligent behaviour had caused the harm. There was no scientific or medical connection between the child's inherited ATD and the subsequent stroke which left him profoundly disabled. The court distinguished the case from those involving wrongful conception like *MacFarlane* and *Cattanach* on the basis that this was a case where the plaintiffs wanted a child and were prepared to accept the ordinary risks associated with childbirth (such as the unusual risk which resulted in their baby's stroke). What they were not willing to accept was running the risk of giving birth to a child with the ATD gene. As there was no causal connection between the ATD inherited by the child and his subsequent stroke and because the stroke was deemed to be within the scope of risks which the defendant could not have anticipated as arising from his negligence, no liability attached.

[1421] *Waller v James* [2015] NSWCA 232.

In *Waller*, the focus was once again on the costs associated with raising a disabled child. This approach distracts from the real issue at play which is the unjust interference with the plaintiffs' procreative autonomy. If one conceptualises the harm as being the costs associated with raising the child, then it is correct to conclude that the plaintiffs had not established causation. The stroke which caused the disability was not medically connected to inheriting the ATD. However, if the cause of action instead focused on interference with procreative autonomy, then negligence could be established. The plaintiffs would not have undergone the IVF treatment at that time and would have waited for the development of PGD testing before deciding to undertake the IVF treatment at another time. Thus the harm that was suffered by the plaintiffs was the unlawful interference to make their own informed choices as to their family planning which was denied to them by the defendant's negligent actions. Quantifying such a claim in damages would not necessarily include the costs associated with their child's disability, nor rule them out, as this would remain subject to the normal rules on remoteness and would depend on the individual circumstances of the case.[1422]

6.4 Conclusion

It is my thesis that the central organising feature of tort law is the promotion of human dignity. This norm must be to the forefront of decisionmaking in tort cases when interpreting current tort doctrine in hard cases and, perhaps even more importantly, in the development of new tort rules. In this chapter, I analysed how current rules could be made more just and theoretically more coherent if the focus in cases such as police negligence, vicarious liablity and sexual abuse, for example, concentrated on the true nature of the harm which, in my view, is the wrongful interference with human dignity. I also analysed how the norm of human dignity, if

---

[1422] Dov Fox, 'Reproductive Negligence' (2017) Columbia Law Review (forthcoming) 1, 42-43; available at http://ssrn.com., accessed 17 September 2016, where the author points out that the challenge represented by quanfitying damages in such cases is not insurmountable:

> Incommensurability is no greater problem for reproductive negligence than other contexts in which juries sometimes make decisions about recovery for intangible losses. These include tort actions for humiliation of the privacy intrusion, betrayal of fiduciary breach, or lost choice of uninformed consent. Or consider "wrongful living" cases where medical providers negligently breach their duty to know and honor a patient's expressed wish to forego lifesaving treatment. The typical such case involves resuscitation despite the "Do Not Resuscitate" order displayed in a patient's chart. These cases pose a similar loss of similarly decisional autonomy and practical aftermaths ranging from avoiding prolonged suffering to sparing one's family from witnessing it. People may be less familiar with harms related to procreation. But it will not be so much harder, compared to the intangible losses in the above contexts, to affix awards for thwarted interests that vary in systematic ways based on fair and plausible judgments about reproductive negligence.

used as a guiding principle when determining such cases, can also better prepare our courts for dealing with the challenges which are increasingly being presented to them by emerging technology with particular reference to cases involving procreative torts such as wrongful conception and cases involving assisted human production which continue to pose serious ethical questions for our courts and society in general.

Chapter 7

Conclusion

This thesis is prefaced with a quote from Oliver Wendell Holmes Jr who once said of tort law that it "... did not begin with a theory. It has never worked one out."[1423] The challenge set in this thesis was to work out such a theory. The central research questions of this work are to enquire whether there is a cohesive normative principle underpinning tort law as a system of justice, and if so, to identify what it is. My answers to these questions are that there does exist a coherent moral seam underlying tort doctrine – whether created by accident, design or intuition – which supports the enhancement of relational human dignity. This ideal is made explicit in some of the leading judgments in tort and is implicit throughout tort doctrine.

Tort law is not a perfect system of civil justice. Its harshest critics would contend it is prohibitively expensive to administer and is nothing more than an incoherent jumble of ad hoc rules with no discernible common theme uniting them. Consequently, it produces unpredictable and at times, unjust results. This thesis establishes that such views are based largely on a one-eyed view of tort law – that its main function is to compensate victims and deter wrongful behaviour - and is an unreliable metric for gauging its true value to society. The goal of promoting relational human dignity not only provides a blueprint for the future development of the law, it also provides a more appropriate metric by which tort law's social value can be measured.

The answer to these research questions is built on the work of the leading philosophers in the field of private law theory and in the decisions of prominent jurists throughout the common law world. In chapter two, I examined the work of Ernest J. Weinrib and Jules L. Coleman and their contribution to the literature on the leading moral theory of corrective justice. In this section, I highlighted how corrective justice theory provides an accurate description of the structure of our tort system. In chapter three, I analysed the literature on the distributive justice theory of tort law. In this section, the ability of distributive justice theory to account for the public welfare role that tort law clearly plays – particularly, its role in loss distribution – was

[1423] Oliver Wendell Holmes, Jr, *The Common Law* (Little Brown, 1909) 7.

appraised. In chapter four, tort law as an instrumental system of deterrence was discussed. Specifically, the economic analysis of law and the work of Richard A. Posner, Guido Calabresi and Ronald Coase was examined and the effectiveness and appropriateness of tort law in achieving this aim was analysed. In chapter five, I build upon the pre-existing literature by presenting my conclusion that tort law may be best explained as a system of justice whose primary aim is the promotion of relational human dignity Finally, in chapter six, I highlight through an analysis of current tort doctrine and future legal developments how the explicit recognition that the promotion of human dignity lies at the heart of tort law will improve it as a system of justice to the benefit of all.

While aspects of the literature in this field outlined above provides a partial explanation and justification for current tort theory and practice, it is incomplete. When applied to leading tort judgments it becomes clear that each theory has its own limitations. Corrective justice theory – particularly, its formalist conception – fails to adequately account for the importance of welfare considerations when determining private disputes, it also fails to explain the role of strict liability within our current system and it ultimately fails to convincingly infuse tort doctrine with moral normative content. Distributive justice theory on the other hand, fails to justify the bilateral relationship central to our tort system and is therefore weak in promoting individual accountability and responsibility. Meanwhile, the economic analysis of law purports to provide a scientific approach to the administration of tort law as a system of deterrence based on economic efficiency. However, the economic theory of tort is normatively unappealing. It is biased towards the wealthy and treats individuals as commodities by licensing wrongdoing based on a set list of prices. It is indifferent to humanity and, as Bender notes, it "dehumanizes people generally, sees them as statistics, or sees their injuries as costs of economic growth and progress."[1424] Moreover, its assumptions about the predictability of human behaviour is – as behavioural research has shown – deeply flawed.

The existing research does, however, provide a platform on which I base my own conclusions. While each theory might assist in achieving the ultimate aim of enhancing relational dignity, they cannot individually explain the entire phenomenon. These theories are not, as many commentators have claimed, mutually exclusive. They each have a part to play in achieving the ultimate goal. So, corrective justice theory accurately describes why it is that the plaintiff

[1424] Leslie Bender, 'Changing the Values in Tort Law' (1990) 25 Tulsa Law Journal 750, 767.

and defendant are connected and why compensation must be payable from defendant to plaintiff. However, in determining whether the plaintiff has suffered a wrong that should entitle him or her to compensation one must pay respect not only to the individual dignity of both parties but also have regard for their responsibilities to one another and society as a whole. Thus, distributive justice considerations will form part of the decision-making process in determining whether a wrong has been committed. Even the economic analysis of tort law has something to say about the tort story explaining how tort is a more effective way to investigate accidents and assign responsibility than any bureaucratic government system could.

The knowledge that the aim of tort law should be recognised explicitly as protecting relational human dignity is of significance. The adoption of an explicit moral principle as the central aim of tort law will bring coherence to the field. This in turn will lead to the principled development of the law. While much of tort doctrine already achieves this aim, it is submitted that were the law to refocus its aims towards the explicit protection of relational dignity as its overarching goal improvements could be made. For example, as I discussed in chapter six in the case of informed consent and procreative torts, current tort doctrine fails to account for certain types of harm and is unduly focused on corporeal harm and therefore does not always acknowledge the harm caused to a victim by the wrongdoer's failure to respect the humanity of the individual. The relational notion of human dignity is not simply concerned with the rights of the plaintiff but must also acknowledge his or her responsibility to others and the defendant's own dignity. The adoption of this explicit moral principle as tort law's guiding light is also significant because it provides a more suitable context within which the value of tort law can be debated. Viewed through the prism of deterrence or compensation, tort law can appear prohibitively expensive and inefficient and in such circumstances calls for its abolishment and replacement with a statutory compensation scheme like that in New Zealand appear reasonable. However, tort law is not simply about deterrence or compensation – although these are subsidiary goals – it provides much more to society than that. Tort law provides the means by which we as human beings can demand respect which is essential to our humanity by holding wrongdoers to account in a public forum. Lose the ability to do this and we lose an essential aspect of our dignity and society will be much the poorer for it. This notion of respect requires individuals to consider others (and not simply their own selfish desires) and is a manifestation of individual agency. However, its relational aspect recognises that we are interdependent and not simply independent. Individual autonomy, while a primary element of human dignity, is not everything. When acting, regard must also be had for societal norms. Consequently, any

debate about substantial reform or even the abolishment of our tort system must have regard to the social value it provides.

My research is not without its limitations. Specifically, the notion of relational human dignity outlined here and how it might be applied in court judgments requires further elaboration. There exists an inevitable tension between respecting the autonomy of individuals and the demands of the particular society in which we reside. Human dignity is not vindicated simply by respecting autonomy without regard for social norms; however, one must be conscious not to allow prevailing oppressive social norms from undermining individual autonomy. This Mrs Kearney discovered to her cost as a victim of symphysiotomy when her autonomy, and dignity, were disregarded at the expense of a prevailing social norm existing within a small section of the Irish medical community. A community dominated by men and influenced by religious doctrine rather than patient autonomy. For my own part, I believe that that balancing exercise should be weighed in favour of respecting individual autonomy unless there are powerful countervailing social considerations which would dictate otherwise. In protecting human dignity, therefore, primacy must be given to individual autonomy but respect must be accorded to the responsibilities and obligations created by social norms.

As a result of my work, further research is necessary as regards how we value harm caused by infringements of human dignity but which do result in physical or economic injury. This has proven a stumbling block in the recognition of such interests. However, this is not a unique problem for tort law which has struggled when assessing the quantum of damages to be awarded generally and has also more recently recognised that harm of a non-physical nature, such as psychiatric damage and economic loss, is recoverable. Beyond the tort system, further research might be conducted into other means by which dignitary interests may be vindicated such as the creation of optional statutory compensation schemes for injuries suffered through medical misadventure, workplace or road traffic accidents. Such schemes must be optional as victims of injury might wish to vindicate their dignity through means other than simple compensation. Finally, consideration must be given to the introduction of apology protection legislation – particular in the field of medical negligence cases – where wrongdoers can admit wrongdoing, provide explanations, and to apologise to victims and their families in cases where they cause harm. For many, this would be enough to satisfy their need for respect.

Tort law cannot survive nor continue to adequately serve the needs of society unless its purpose within that society is properly understood. In this work I have shown how, in addition to providing compensation for wrongful losses, tort law provides so much more to society - it plays a crucial role in setting standards of behaviour, holding wrongdoers to account as well as playing a vital public watchdog role in uncovering wrongdoing. As such, it is much more than a system of compensation, deterrence or loss distribution and is critical in maintaining social stability. It is a law of respect, for oneself and for others that brings with it not only rights but responsibilities. Notwithstanding its imperfections, it is an essential from of social justice and a system for the vindication of rights that we should be slow to relinquish.

BIBLIOGRAPHY

Books

A

Abraham KS, *Liability Century: From the Progressive Era to 9/11* (Harvard University Press, 2008)

Aristotle, *Nicomachean Ethics*, *Book V* (J.A.K. Thomson, trans) (Penguin Books, 2004)

Atiyah P, *Accidents, Compensation and the Law* (London: Weidenfeld and Nicholson, 1970)

Avineri S and De-Shalit A, (eds.) *Communitarianism and Individualism* (Oxford: Clarendon Press, 1992)

B

Barron A et al, (eds.) *Jurisprudence and Legal Theory: Commentary & Materials* (Oxford University Press, 2005)

Beever A, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007)
-- *The Law of Private Nuisance* (Hart Publishing, 2013)
-- *Forgottten Justice: Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, 2013)

Bentham J, *An Introduction to the Principles and Morals of Legislation* (1789) (Oxford: Clarendon Press, 1907)

Berlin I, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969)

Blackstone W, *Commentaries on the Laws of England* (Clarendon Press, Oxford 1765-69)

Brudner A, *The Unity of the Common Law – Studies in Hegelian Jurisprudence* (University of California Press, 1995)

C

Calabresi G, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970)

-- and Bobbitt P, *Tragic Choices* (New York: W.W. Norton & Company, 1978)

-- *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse University Press, 1985)

Cane P and Stapleton J, (eds.) *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, 1998)

-- *Atiyah's Accidents, Compensation and the Law* (7th ed.) (Cambridge University Press, 2006)

Coase RH, *The Firm, the Market and the Law* (Chicago: University of Chicago Press, 1988)

Coleman JL, *Risks and Wrongs* (Cambridge University Press, 1992)

-- *The Practice of Principle* (Oxford, 2001)

Cooke J, *Law of Tort* (9th ed.) (Pearson Longman, 2009)

Cooper-Stephenson K, *Personal Injury Damages in Canada* (Toronto: Thomson Canada Ltd., 1996)

Craven C and Binchy W, (eds.) *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (FirstLaw, 2005)

D

Darwall S, *Morality, Authority and the Law: Essays in Second-Personal Ethics I* (Oxford University Press, 2013)

Deakin S, Johnston A and Markesinis B, *Markesinis & Deakin's Tort Law* (6th ed.) (Oxford University Press, 2008)

Delany H, *Equity and the Law of Trusts in Ireland* (5th ed.) (Round Hall, Dublin 2011)

Dimock S, (ed.) *Classic Readings and Canadian Cases in the Philosophy of Law* (Pearson Longman, 2007)

Duff RA, 'Torts, Crimes and Vindication: Whose Wrong is it?' in Dyson M, (ed) *Unravelling Tort and Crime* (Cambridge University Press, 2014)

Dworkin R, *Law's Empire* (The Belknap Press of Harvard University Press, 1986)

Dyson M, (ed.) *Comparing Tort and Crime: Learning from across and within Legal Systems* (Cambridge University Press, 2015)
-- (ed.) *Unravelling Tort and Crime* (Cambridge University Press, 2014)

F

Finnis J, *Natural Law and Natural Rights* (2nd ed.) (Oxford University Press, 2011)

Fleming JG, *The Law of Torts* (9th ed.) (LBC Information Services, 1998)

Frey and Morris, (eds.) *Value, Welfare and Morality* (Cambridge University Press, 1993)

Fried C, *An Anatomy of Values* (Harvard University Press, 1970)

H

Hall ME, (ed.) *Selected Writings of Benjamin Nathan Cardozo* (Fallon Publications, 1947)

Healy J, *Medical Malpractice Law* (Round Hall, 2009)
-- *Principles of Irish Torts* (Clarus Press, 2006)

Hegel GWF, *Philosophy of Right*, (Thomas M. Knox, trans), (Oxford University Press, 1967)

Horsley K and Rackley E, *Tort Law* (2nd ed.) (Oxford University Press, 2011)

Horwitz MJ, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977)

I

Ison TG, *Accident Compensation: A Commentary on the New Zealand Scheme* (London: Croom Helm Ltd., 1980)

J

Jackson E, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart 2001)

K

Kant I, *Groundwork of the Metaphysics of Morals* (New York, NY: Cambridge University Press; 1997)

-- *The Methaphysics of Morals,* (Mary Gregor (ed.) (Cambridge University Press, 1996).

-- *The Science of Right*, (BiblioBazaar, 2009)

Kemp P et al, (eds) *Bioethics and Biolaw Vol. II: Four Ethical Principles* (Copenhagen, Rhodes International Science and Art Publishers and Centre for Ethics and Law, 2000)

Keren-Paz T, *Torts, Egalitarianism and Distributive Justice* (Aldershot: Ashgate 2007)

Kirchof P and Kommers D, (eds.) *Germany and Its Basic Law: Past, Present and Future* (Nomos Verlagsgesellschaft, 1993)

Koenig TH & Rustad ML, *In Defense of Tort Law* (New York University Press, 2001)

Koltay A, (ed.) *Media Freedom and Regulation in the New Media World* (Wolters Kluwer, Budapest, 2014)

Kymlica W, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989)

M

MacIntyre A, *After Virtue* (University of Notre Dame Press, 1981)
-- *After Virtue – A Study in Moral Theory* (3rd ed.) (University of Notre Dame Press, 2007)

McCrudden C, (ed.) *Understanding Human Dignity* (British Academy, Oxford University Press, 2013)

McMahon BME and Binchy W, *Law of Torts* (4th ed.) (Bloomsbury Professional, 2013)

Mill JS, *Utilitarianism* (4th ed.) (Longmans, Green, Reader, and Dyer, 1871)

Moller Okin S, *Justice, Gender, and the Family* (New York: Basic Books, 1989)

Mulhall S and Swift A, *Liberals and Communitarians* (2nd ed., Blackwell, 1996)

N

Nolan VE and Ursin E, *Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-First Century* (Philadelphia, Temple University Press 1995)

Nozick R, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974)

O

Oberdeek J, (ed.) *Philosophical Founndations of the Law of Torts* (Oxford University Press, 2014)

Owen D, (ed.) *Philosophical Foundations of Tort Law* (Oxford University Press, Oxford (1995)

P

Palmer G, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, 1979)

Pigou AC, *The Economics of Welfare* (4th ed.) (London: MacMillan, 1932)

Polinsky AM, *An Introduction to Law and Economics* (4th ed.), (Wolters Kluwer, 2011)

Posner RA, *Economic Analysis of Law* (Boston: Little, Brown, 1972)

-- *Economic Analysis of Law* (8th ed.), (Wolters Kluwer, 2011)

-- *Frontiers of Legal Theory* (Harvard University Press, 2004)

Priaulx N, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Oxford: Routledge-Cavendish, 2007)

Q

Quill E, *Torts in Ireland* (2nd ed), (Gill & MacMillan, 2004)

-- *Torts in Ireland* (3rd ed.), (Gill & MacMillan, 2009)

-- Friel R (eds.), *Damages & Compensation Culture – Comparative Perspectives* (Oxford, Hart, 2013).

-- *Torts in Ireland* (4th ed.) (2014)

R

Rawls J, *A Theory of Justice* (Harvard University Press, 1971)

-- *A Theory of Justice* (1971) (Revised edition, The Belknap Press of Harvard University Press, 1999)

-- *Justice as Fairness: A Restatement* (Harvard University Press, 2001)

-- *Justice as Fairness* (Belknap Press, 2001)

Robbins L, *The Nature and Significance of Economic Science* (2nd ed) (London: Macmillan, 1935)

Robertson JA, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, 1994)

Rogers WVH, *Winfield & Jolowicz on Tort* (16th ed.) (London, Sweet & Maxwell 2002)

S

Sandel M, (ed.) *Liberalism and Its Critics* (New York University Press, 1984)

Sandel MJ, *Liberalism and the Limits of Justice* (Cambridge University Press, 1982)

Schaber P, (ed.) *The Ethics of Consent* (Routledge Press, 2016)

Shapo MS, *Tort Law and Culture* (Carolina Academic Press, 2003)

Simon HA, *Models of Man, Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting* (New York: John Wiley and Sons, 1957)
-- (ed.) *Models of Bounded Rationality: Behavioral Economics and Business Organization (Vol 2)* (Cambridge, MA: MIT Press, 1982)

Stapleton J, *Product Liability* (Butterworths, 1994)

Star RM, *General Equilibrium Theory: An Introduction* (2nd ed) (Cambridge University Press, 2011)

Steele J, *Tort Law, Text, Cases & Materials* (2nd ed.) (Oxford University Press, 2010)

Strong ST and Williams L, *Tort Law, Text, Cases & Materials* (Oxford University Press, 2008)
Organization (Vol 2) (Cambridge, MA: MIT Press, 1982)

T

Taylor C, *Sources of The Self – The Making of the Modern Identity* (Harvard University Press, 1989)

Tully J, *Tort Law in Ireland* (Clarus Press, 2014)

W

Weinrib EJ, *The Idea of Private Law* (Cambridge, Mass, 1995)
-- *Corrective Justice* (Oxford University Press, 2012)

Wendell Holmes O, JR, *The Common Law* (Little Brown, 1909)

White GE, *Tort Law in America, An Intellectual History* (Oxford University Press, 2003)

Whyte G, *Social Inclusion and the Legal System – Public Interest Law in Ireland*, (2nd ed, Institute of Public Administration, 2015)

Wood AW, (ed. and trans.) *Groundwork for the Metaphysics of Morals, Immanuel Kant* (Yale University Press, 2002)

Journal Articles

A

Allen AL & Morales MH, 'Hobbes, Formalism, and Corrective Justice' (1992) 77 Iowa Law Review 713

Alexander L, 'Foreword: Coleman and Corrective Justice' (1992) 15 Harvard Journal of Law & Public Policy 621

Allcock M, 'Corrective Justice and Kantian Right as a Mechanism to Reconcile 'Substantially Clashing Interests' in Cases of Negligently Inflicted Psychiatric Injury (2015) 40 Australian Journal of Legal Philosophy 17

Arlen J, 'Comment: The Future of Behavioral Economic Analysis of Law' (1998) 51 Vanderbilt Law Review 1765

Arneson R, 'Metaethics and Corrective Justice' (1995) 37 Arizona Law Review 33

B

Balkin JM, 'Too Good To Be True: The Positive Economic Theory of Law' (1987) 87 Columbia Law Review 1447

--'The Path of Robotics Law' (2015) 6 California Law Review 45

Baker CE, 'The Ideology of the Economic Analysis of Law' (1975) 5 Philosophy & Public Affairs 3

--'Starting Points in Economic Analysis of Law' (1980) 8 Hofstra Law Review 939

Beever A, 'What does Tort Law Protect?' (2015) 27 Singapore Academy of Law Journal 626,

Bebchuk LA, 'The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?' (1980) 8 Hofstra Law Review 671

Bender L, 'A awr's Primer on Feminist Theory and Tort' (1988) 38 Journal of Legal Education 3

--'Tort Law's olks a Tool for Social Justice Struggle' (1998) 37 Washburn Law Journal 249, 251

Ben-Shahar O Pat A, 'Personalizing Negligence Law' (2016) 91 New York University Law Review 1

Benson P, 'TheBa of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Revw 5

Bernstein A, 'Te Eerprise of Liability' (2004) 39 Valparaiso University Law Review 27

Berryman J, 'Te Cnpensation Principle' (2008) 42 Loyola of Los Angeles Law Review 91

Binchy W, 'Reent evelopments in the Law of Torts' (2004) Judicial Studies Institute Journal 8

-- '*Meskell*, ThCotitution and Tort Law' (2011) Dublin University Law Journal 339

Bingham L, 'T Us of Tort' (2010) 1 Journal of European Tort Law 3

Birks P, 'Harasneand Hubris: The Right to an Equality of Respect' (1997) 32 Irish Jurist 1

Bloustein EJ, 'Iiv As An Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York Uivsity Law Review 962

Brazier M, 'PaenAutonomy and Consent to Medical Treatment: The Role of the Law?' (1987) 7 Legal tucs 169

Brodie D, 'Entpr Liability: Justifying Vicarious Liability' (2007) 27 Oxford Journal of Legal Studies 43

Brown C, 'Derree in Tort and No-Fault: The New Zealand Experience' (1985) 73 California LawRew 976

Brownsword R, 'An Interest in Human Dignity as the Basis for Genoc Irts' (2003) 42 Washburn Law Journal 413

Bryan M, 'Justice Callinan's Judgments in Private Law: Story Telling, gaCoherence and Corrective Justice' (2008) 27 University of Queensland Law Journal 29

Buchanan AE, 'Assessing the Communitarian Critique of Liberalism' (19) thics 852

Buchanan JM & Stubblebine WC, 'Externality' (1962) 29 Economica 37
-- 'Good Economics, Bad Law' (1974) 60 Valapariso Law Review 483.

Bull J, 'New Zealand's Accident Compensation Scheme and Chronic Pa Sydrome' (2014) 45 Victoria University of Wellington Law Review 53

C

Calabrese JP and Niehaus SE, 'Nano-torts on the Horizon: A Jack andill tory' (2012) 9 Nanotechnology Law and Business 156

Calabresi G, 'Some Thoughts on Risk Distribution and tort law' (1961) Ye Law Journal 499
-- 'Property Rules, Liability Rules, and Inalienability: One View of the thdral' (1972) 85 Harvard Law Review 1089
-- 'Towards a Test for Strict Liability in Torts' (1972) 81 Yale Law Jourl 165
-- 'Concerning Cause and tort law: An Essay for Harry Kalven, Jr' (7543 University Chicago Law Review 69
-- 'About Law and Economics: A Letter to Ronald Dworkin' (1980) 8 ofsa Law Review 553
-- 'First Party, Third Party, and Product Liability Systems: Can Econoc Aalysis of Law Tell Us Anything About Them?' (1984) 69 Iowa Law Review 833
-- 'The Pointlessness of Pareto: Carrying Coase Further' (1991) Yale Lavonal 1211

Calnan A, 'In De of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky' (1 New York University Journal of Law & Liberty 1023

-- 'The Distortelity of Civil Recourse Theory' (2012) 60 Cleveland State Law Review 159

-- 'What's Wrcith Torts as Wrongs (or Redirecting Civil Recourse Theory)' (2010) available at http.com., accessed 13 May 2014

Cane P, 'CorreJustice and Correlativity in Private Law' (1996) 16 Oxford Journal of Legal Studies 4

-- 'Distributive ɔ and Tort Law' (2001) New Zealand Law Review 401

-- 'The Anatom'rivate Theory: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 2(

-- 'Taking Disa,ent Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 Oxford JourLegal Studies 393

Cardi JW, Penfi Yoon A, 'Does Tort Law Deter?' (2011) Wake Forest University Legal Studies Paper N1383 (available at http:// ssrn.com accessed 23 May 2016)

Chang H, 'A L Theory of Social Welfare: Fairness, Utility, and the Pareto Principle' (2000) Yale Lavnal 173

Cheer U, 'Socicy Implications Arising From Legal Aspects of New Zealand's Latest Accident Compon Scheme' (1995) 5 Social Policy Journal of New Zealand

Chroust AH & G DL, 'Aristotle's Conception of Justice' (1959) Notre Dame Lawyer 129

Clark T and Nc, '*A Critique of* Chester v Afshar' (2014) 34 Oxford Journal of Legal Studies 659

Coase RH, 'The e of the Firm' (1937) 16 Economica 386

-- 'The Problemcial Cost' (1960) 3 Journal of Law & Economics 1

Cockfield JM, 'nutative Justice in Tort: Towards a 'Pure' Rights-Based Theory' (2011) III King's Studev Review 53

Colby TB, 'Clearing the Smoke from *Philip Morris v Williams*: The Past ent, and Future of Punitive Damages' (2008) 118 Yale Law Journal 441

Coleman JL, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 ha Law Review 509

-- 'Moral Theories of Torts: Their Scope and Limits: Part I" (1982) 1 La hilosophy 371

--Jules L. Coleman, 'The Normative Basis of Economic Analysis: A Critic iew of Richard Posner's *The Economics of Justice*' (1982) 34 Stanford Law Review 110

--'Moral Theories of Torts: Their Scope and Limits: Part II" (1983) 2 La hilosophy 5

-- 'The Structure of Tort Law' (1988) 97 Yale Law Journal 1233

-- 'Afterword: The Rational Choice Approach to Legal Rules' (1989) 6 ago-Kent Law Review 177

-- 'The Mixed Conception of Corrective Justice' (1992) 77 Iowa Law Re 427

--'Tort Law and the Demands of Corrective Justice' (1992) 67 Indiana L rnal 349

-- 'The Practice of Corrective Justice' (1995) 37 Arizona Law Review 15

-- 'The Grounds of Welfare' (2003) 112 Yale Law Journal 1511

-- 'The Costs of *The Costs of Accidents*' (2005) 64 Modern Law Review

-- Doing Away with Tort Law' (2008) 41 Loyola of Los Angeles Law Re 1149

--'Epilogue to *Risks and Wrongs* (Marcial Pons, Spanish Translation '. The English translation is available at http://ssrn.com., accessed 12 May 2014

-- 'Markets, Methods, Morals and the Law' (2014) 66 Alabama Law Rev 69

Conaghan J, 'Gendered Harms and the Law of Tort: Remedying (Sexual) ssment' (1996) 16 Oxford Journal of Legal Studies 407

Connell S, 'What is the Place of Corrective Justice in Criminal Justice? 1) 19 Waikato Law Review 134

Corbett V, 'The Illusion of Safety: The Right to Privacy of Sex Offenders 1) 3 Journal of Media Law 89

-- 'Why It's Better to be Sorry than Safe: The Case for Apology Protectio slation' (2013) 36 Dublin University Law Journal 127

Cunningham LA, 'aditional Versus Economic Analysis: Evidence From Cardozo and Posner Torts Opinions' (20) 62 Florida State University Law Review 667

D

Dagan H, 'The Clienges of Private Law: Towards a Research Agenda for an Autonomy-Based Private Law2015) available at http://papers.ssrn.com/sol3/papers (last accessed 13th May 2016)

Davies JA and Lavnce C. Levine, 'Biotechnology's Challenge to the Law of Torts' (2000) 32 McGeorge Laweview 221

Davis M, 'The End the Affair: Duty of Care and Liability Insurance' (1989) 9 Legal Studies 67

de Carufel A, 'Vicns' Satisfaction with Compensation: Effects of Initial Disadvantage and Third Party Intervdon' (1981) 11 Journal of Applied Social Psychology 445

Devaney M, 'A mparative Assessment of Personal Injuries Compensation Schemes: Lessons for Tort Rorm?' (2009) 13 Electronic Journal of Comparative Law

Dorff MB, 'Why Ilfare Depends on Fairness: A Reply to Kaplow and Shavell' (2002) 75 Southern Californi.aw Review 847

du Bois F, 'Tort Iv Recovered? From Alan Brudner's Revised Case for Tort Law to the Ethical Underpinnis of Liberal Democracy' (2014) 1 Critical Analysis of Law 285

Dworkin R, 'Is Wh a Value?' (1980) Journal of Legal Studies 191
--'Why EfficiencyA Response to Professors Calabresi and Posner' (1980) 8 Hofstra Law Review 563
--'What is EqualityPart 1: Equality of Resources' (1981) 10 Philosophy and Public Affairs 185
--'What is EqualityPart 2: Equality of Welfare' (1981) 10 Philosophy and Public Affairs 283

E

Encarnacion E, 'Corrective Justice as Making Amends' (2013) availablt http://ssrn.com., accessed 16 May 2014

Epstein RA, 'A Theory of Strict Liability' (1973) 2 Journal of Legal Stud 151
-- 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1978 Journal of Legal Studies 49

F

Farber DA, 'Parody Lost/Pragmatism Regained: The Ironic History of t Coase Theorem' (1997) 83 Virginia Law Review 397

Faure MG, 'Liability for Omissions in Tort Law: Economic Analysis' 011) 2 Journal of European Tort Law 184

Feldman AM & Kim J, 'The Hand Rule and *United States v Carroll Towing Co.* Reconsidered' (2005) 7 American Law and Economics Review 523

Feldman D, 'Human Dignity as a Legal Value: Part 1' (1999) 16 Public L 682, 685

Feldthusen B, 'Suppressing Damages in Involuntary Parenthood Actions: Gtorting Tort Law, Denying Reproductive Freedom and Discriminating Against Mothers (14) 29 Canadian Journal of Family Law 11

Fischoff B, 'Hindsight ≠ Foresight: The Effect of Outcome Knowledge Judgment Under Uncertainty' (1975) 1 Journal of Experimental Psychology: Human Percepn & Performance 288

Fletcher GP, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Lawview 537

-- 'Human Dignity as a Constitutional Value' (1984) 22 University of Western Ontario Law Review 171
-- 'Corrective Justice for Moderns' (1993) 106 Harvard Law Review 1658

Fletcher SWH, 'Who are we Trying to Protect? The Role of Vulnerability Analysis in New Zealand's Law of Negligence' (2016) 47 Victoria University of Wellington Law Review 19

Flood CM, 'New Zealand's No Fault Accident Scheme: Paradise or Panacea?' 8 Health Law Review 11

Fox G, 'The Real Coase Theorems' (2007) 27 Cato Journal 373

Fox D, 'Reproductive Negligence' (2017) Columbia Law Review (forthcoming) 1, 4; available at http://ssrn.com., accessed 17 September 2016

G

Gallen J, '*O'Keeffe v Ireland*: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education' (2015) 78 Modern Law Review 151

Gardner J, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (2013) available at http://ssrn.com., accessed 12 May 2014

Gaskins R, 'Tort Reform in the Welfare State: The New Zealand *Accident Compensation Act* (1980) 18 Osgoode Hall Law Journal 238

Geistfeld MA, 'Risk Distribution and tort law: Carrying Calabresi Further' (2014) 77 Law & Contemporary Problems 165

Glendon MA, '*Propter Honoris* Respectful: Knowing the Universal Declaration of Human Rights' (1998) 73 Notre Dame Law Review 1153

Glensy RD, 'The Right to Dignity' (2011) 43 Columbia Human Rights Law Review 65

Goldberg JCP & Zipursky BC, 'The Moral of MacPherson' (1998) 146 University of Pennsylvania Law Review 1733
--'Twentieth-Century Tort Theory' (2003) 91 Georgetown Law Journal 513
-- 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2005) 115 Yale Law Journal 524
--'Ten Half Truths About Tort Law' (2008) 42 Valparaiso University Law Review 1221
--'Tort Law and Moral Luck' (2007) 92 Cornell Law Review 1123
--'Tort Law at the Founding' (2011) 39 Florida State University Law Review 85
--'Torts as Wrongs' (2010) 88 Texas Law Review 917
-- 'Convergence and Contrast in Tort Scholarship: An Essay in Honor of Robert Rabin' (2012) 61 DePaul Law Review 467
-- 'Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette' (2013) 88 Indiana Law Journal 569

Goldstein J, 'For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain' (1975) 83 Yale Law Journal 683

Goodin RE, 'The Political Theories of Choice and Dignity' (1981) 18 American Philosophical Quarterly 91

Gordley J, 'Equality in Exchange' (1981) 69 California Law Review 1587
-- 'The Moral Foundations of Private Law' (2002) 47 American Journal of Jurisprudence 1.

Gordon RW, 'Book Review - *Tort Law in America: An Intellectual History'* (1980) 94 Harvard Law Review 903

Green L, 'The Duty Problem in Negligence Cases: II, The Moral, Economic, Preventative and Justice Factors' (1929) 29 Columbia Law Review 255
-- 'The Palsgraf Case' (1930) Columbia Law Review 789
-- 'The Individual's Protection Under Negligence Law: Risk Sharing' (1953) 47 North Western University Law Review 751
--'Foreseeability in Negligence Law' (1961) 61 Columbia Law Review 1401

H

Hackney Jr, JR 'Guido Calabresi and the Construction of Contemporary American Legal Theory' (2014) 77 Law & Contemporary Problems 45

Haemmerli A, 'Whose Who? The Case for a Kantian Right of Publicity' (1999) 49 Duke Law Journal 383

Hand J, 'The Compensation Culture: Cliché or Cause for Concern' (2010) 37 Journal of Law & Society 569

Hardin R, 'The Morality of Law and Economics' (1992) Law & Philosophy 331

Harris DR, 'Accident Compensation in New Zealand: A Comprehensive Insurance System' (1974) 37 Modern Law Review 361

Halliday S, Ilan J, Scott C, 'The Public Management of Liability Risks' (2011) 31 Oxford Journal of Legal Studies 527

Hasen RL, 'The Efficient Duty to Rescue' (1995) 15 International Review of Law & Economics 141

Heidt KR, 'Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?' (1990) 47 Washington Lee Law Review 347

Henderson Jr, JA, 'The New Zealand Accident Compensation Reform' (1981) 48 University of Chicago Law Review 781

-- 'Judicial Reliance on Public Policy: An Empirical Analysis of Product Liability Decisions' (1991) 59 George Washington Law Review 1570

Hershovitz S, 'Corrective Justice for Civil Recourse Theorists' (2012) 39 Florida State University Law Review 107

-- 'Tort as a Substitute for Revenge' (2013) available at http://ssrn.com accessed on 11 May 2014

Herstein OJ, 'How Tort Law Empowers' (2015) 65 University of Toronto Law Journal 99

Heyman SJ, 'Aristotle on Political Justice' (1992) 77 Iowa Law Review 851

Heywood R, 'R.I.P. *Sidaway*: Patient-Oriented Disclosure – A Standard Worth Waiting For?' (2015) 23 Medical Law Review 455

Hicks J, 'The Foundations of Welfare Economics' (1939) 49 Economic Journal 696

Hicks JR, 'Rehabilitation of Consumers' Surplus' (1941) 8 Review Economic Studies 108

Hieronymi P, 'Articulating an Uncompromising Forgiveness' (2001) 62(3) Philosophy and Penomenological Research 529

Holmes, Jr, OW, 'The Path of the Law' (1897) 10 Harvard Law Review 457

Honoré T, 'Medical Non-Disclosure, Causation and Risk: *Chappel v Hart*' (1999) 7 Torts Law Journal 1

Horwitz MJ, 'Law and Economics: Science or Politics?' (1980) 8 Hofstra Law Review 905

Hoyano LCH, 'Misconceptions about Wrongful Conception' (2002) 65 Modern Law Review 883

Hylton KN, 'Calabresi and the Intellectual History of Law & Economics' (2005) 64 Maryland Law Review 85
-- 'Duty in Tort Law: An Economic Approach' (2006) 75 Fordham Law Review 1501

Hyman DA, 'Does Technology Spell Trouble with a Capital "T"?: Human Dignity and Public Policy' (2004) 27 Harvard Journal of Law & Public Policy 3

I

Ilan J, 'Four Years of the Personal Injuries Board: Assessing Its Impact' (2009) Judicial Studies Institute Journal 54

Isaacs DM, 'The Use of Economics in Defense of General Motors' Decision Not to Fix Faulty Ignition Switches Demonstrates that Economics Is Not a Moral Theory' (2015) 47 Connecticut Law Review 51

J

James Jr, F and Thornton JV, 'Contribution Among Joint Tort Feasors: A Pragmatic Criticism' (1941) 54 Harvard Law Review 1156

--'The Impact of Insurance on the Law of Torts' 15 (1950) Law and Contemporary Problems 431

--'Products Liability' (1955) 34 Texas Law Review 44

-- 'General Products – Should Manufacturers Be Liable Without Negligence?' (1957) 24 Tennessee Law Review 923

Jolls C, Sunstein CR, and Thaler R, 'A Behavioral Approach to Law and Economics' (1998) Stanford Law Review 1471

-- 'Behavioral Economics Analysis of Redistributive Legal Rules' (1998) 51 Vanderbilt Law Review 1653

K

Kahneman D, Knetsch JL, and Thaler R, 'Experimental Tests of the Endowment Effect and the Coase Theorem' (1990) 98 Journal of Political Economy 1325

Kaldor N, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 Economic Journal 549

Kaplow L & Shavell S, 'Why the Legal System is Less Efficient than the Income Tax in Redistrbuting Inccome' (1994) 23 Journal of Legal Studies 667

Katz J, 'Informed Consent – A Fairy Tale? Law's Vision' (1977) 39 University of Pittsburgh Law Review 137

Keane R, '*O'Keeffe v Ireland* in Strasbourg: Punishing the Guilty?' (2015) Dublin University Law Journal 172

Keating GC, 'The Idea of Fairness in the Law of Enterprise Liability' (1997) 95 Michigan Law Review 1266

--'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 Southern California Law Review 193

--"The Theory of Enterprise Liability and Common Law Strict Liability" (2001) 54 Vanderbilt Law Review 1285

-- 'Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72 Fordham Law Review 1857

-- 'Strict Liability and the Mitigation of Moral Luck' (2006) 2 Journal of Ethics & Social Philosophy 1

-- 'The Priority of Respect Over Repair' (2012) 18 Legal Theory 293

Kelly JM, 'The Inner Nature of the Tort Action' (1967) 2 Irish Jurist 279

Klar LN, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 University of Toronto Law Review 80

Kleinfeld J, 'Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury"' (2005) 115 Yale Law Journal 237

Klick J & Parisi F, 'Wealth, Utility, and the Human Dimension' (2005) 1 New York University Journal of Law & Liberty 590

Kronman AT, 'Wealth Maximisation as a Normative Principle' (1980) 9 Journal of Legal Studies 227, 228

Korobkin RB & Ulen TS, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 California Law Review 1051

Kress K, 'Formalism, Corrective Justice and Tort Law' (1992) 77 Iowa Law Review I

Kronman AT, 'Wealth Maximisation as a Normative Principle' (1980) 9 Journal of Legal Studies 227

Kornhauser LA, "A Guide to the Perplexed Claims of Efficiency in the Law" (1980) 8 Hofstra Law Review 591

Kulklin B, 'Constructing Autonomy' (2015) 9 New York University Journal of Law & Liberty 375
-- 'Private Requitals' (2016) 64 Cleveland State Law Review 965

L

Landes WM & Posner RA, 'Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism' (1978) 7 Journal of Legal Studies 83
--'Joint and Multiple Tortfeasors: An Economic Analysis' (1980) 9 Journal of Legal Studies 517
--'The Positive Economic Theory of Tort Law' (1980) 15 Georgia. Law Review 851
-- 'An Economic Theory of Intentional Torts' (1981) 1 International Law & Economics Review 127
-- 'Causation in Tort Law: An Economic Approach' (1983) 12 Journal of Legal Studies 109

Latin H, '"Good" Warnings, Bad Products, and Cognitive Limitations' (1994) UCLA Law Review 1193 Lynn A. Barber & Robert E. Emery, 'When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage' (1993) 17 Law & Human Behavior 439

Lawson G, 'Efficiency and Individualism' (1992) 53 Duke Law Journal 87

Lemann AB, 'Coercive Insurance and the Soul of Tort Law' (forthcoming, 2016) 105 Georgia Law Review; http://papers.ssrn.com (last accessed 18 September 2016)

Lee M, 'The Public Interest in Private Nuisance: Collectives and Communities in Tort' (2015) 74 Cambridge Law Journal 329

Levmore S, 'Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations' (1986) 72 Virginia Law Review 879

Lewin P, 'Pollution Externalities: Social Cost and Strict Liability' (1982) 2 Cato Journal 220

Lewis R, Morris A, and Oliphant K, 'Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?' (2006) 14 Torts Law Journal 158
-- 'Insurance and the Tort System' (2005) 25 Legal Studies 85

Libson A, 'Moral Uncertainty and Redistribution through Private Law' (2016) 29 Canadian Journal of Law & Jurisprudence 371

Lichtenstein B, 'From Principle to Parsimony: A Critical Analysis of New Zealand's No-Fault Accident Compensation Scheme' (1999) 12 Social Justice Research 99

Lidz CW & Arnold RM, 'Rethinking Autonomy in Long Term Care' (1993) 47 University of Miami Law Review 603

Lippke RL, 'Torts, Corrective Justice, And Distributive Justice', 5 Legal Theory 149

Loth MA, 'Corrective Justice and Distributive Justice in Tort Law: On the Restoration of Autonomy and a Minimal Level of Protection of the Victim' (2015) 22 Maastricht Journal of European and Comparative Law 788

Lucy W, 'Method and Fit: Two Problems for Contemporary Philosophies of Tort Law' (2007) 52 McGill Law Journal 605

Lytton TD, 'Smashing the Idols of Efficiency' (1993) 79 Virginia Law Review 275

M

Maclean A, 'Giving the Reasonable Patient a Voice: Information Disclosure and the Relevance of Empirical Evidence (2005) 7 Medical Law International 1

Malloy RP, 'The Limits of Science in Legal Discourse – A Reply to Posner' (1990) 24 Valparaiso University Law Review 175

Malhotra NK, 'Information Load and Consumer Decision Making' (1982) 8 Journal of Consumer Research 419

Markovits RS, 'A Constructive Critique of the Traditional Definition and Use of the Concept of "The Effect of a Choice on Allocative (Economic) Efficiency": Why the Kaldor-Hicks Test, The Coase Theorem, and Virtually All Law-and-Economics Welfare Arguments Are Wrong" (1993) 3 University Illnois Law Review 485

Matsuda MJ, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 New Mexico Law Review 613

McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655

McClain LC, '"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence' 65 Southern California Law Review (1992) 1171

Medema SG, '*Juris*prudence: Calabresi's Uneasy Relationship with the Coase Theorem' (2014) 77 Law & Contemporary Problems 65

Meisel A & Kabnick LD, 'Informed Consent to Medical Treatment: An Analysis of Recent Legislation' (1980) 41 University of Pittsburgh Law Review 407

Merkin R, 'Tort, Insurance and Ideology: Further Thoughts' (2012) 75 Modern Law Review 301

Michelman FI, 'A Comment on Some Uses and Abuses of Economics in Law' (1979) 46 University of Chicago Law Review 307

Miller RS, 'Analysis and Critique of the 1992 Changes to the New Zealand Accident Compensation Scheme' (1993) 52 Maryland Law Review 1070

Miller J, 'Trends in Personal Injury Litigation: The 1990s' (2003) 34 Victoria University of Wellington Law Review 407

Miller JM, 'Dignity as a New Framework, Replacing the Right to Privacy' (2007) 30 T. Jefferson Law Review 1

Modak-Truran MC, 'Corrective Justice and the Revival of Judicial Virtue' (2000) Yale Journal of Law & the Humanities 249

Morgan J, 'Tort, Insurance and Incoherence' (2004) 67 Modern Law Review 384

N

Nagel T, 'Rawls on Justice' (1973) Philosophical Review 82

Nedelsky J, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7

Neyers JW, 'A Theory of Vicarious Liability' (2005) 43 Alberta Law Review 1

North G, 'Undermining Property Rights: Coase and Becker" (2002) 16 Journal of Libertarian Studies 75

O

O'Connell MS, 'Correcting Corrective Justice: Unscrambling the Mixed Conception of Tort Law' (1997) 85 Georgetown Law Journal 1717

Oberdiek J, 'Method and Morality in the New Private Law Torts' (2012) 125 Harvard Law Review Forum 189

Oliphant K, 'Beyond Misadventure: Compensation for Medical Injuries in New Zealand' (2007) 15 Medical Law Review 357
-- 'Tort Law, Risk, and Technological Innovation in England' (2014) 59 McGill Law Journal 819

P

Palmer G, 'New Zealand's Accident Compensation Scheme: Twenty Years On' (1994) 44 University of Toronto Law Journal 223

Parisi F, 'Positive, Normative and Functional Schools in Law and Economics' (2004) 18 European Journal of Law and Economics 1

Perry SR, 'The Moral Foundations of Tort Law' (1992) 77 Iowa Law Review 449

Pellegrino ED, 'Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship' (1994) 10 Journal of Contemporary Health Law Policy 47

Peters Jr, PG, 'Resuscitating Hospital Enterprise Liability' (2008) 73 Missouri Law Review 369

Pfennigstorf W, 'Accident Compensation in New Zealand: How Does It Work? A Review of Palmer's *Compensation for Incapacity* and Ison's *Accident Compensation*' (1981) 6 Law and Social Enquiry 1153

Polinsky AM, 'Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's *Economic Analysis of Law'* (1974) 87 Harvard Law Review 1655

Postema GJ, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) 103 Yale Law Journal 861

Posner RA, '*The Costs of Accidents*: Book Review' (1970) 37 University of Chicago Law Review 636

--'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29

-- 'The Right of Privacy' (1978) 12 Georgia Law Review 393

-- 'Utilitarianism, Economics, and Legal Theory' (1979) 8 Journal Legal Studies 103

--"The Ethical and Political Basis of the Efficiency Norm in Common Law Ajudication" (1980) 8 Hofstra Law Review 487

-- 'The Positive Economic Theory of Tort Law' (1980) 15 Georgia Law Review 851

--'The Value of Wealth: A Comment on Dworkin and Kronman' (1980) 9 Journal of Legal Studies 243

--'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 Journal of Legal Studies 187

--'Law and Economics *is* Moral' (1990) 24 Valparaiso University Law Review 166

-- 'Values and Consequences: An Introduction to Economic Analysis of Law' (1998) Coase-Sandor Institute for Law & Economics Working Paper No. 53, 6

-- "Guido Calabresi's 'The Costs of Accidents': A Reassessment' (2005) 64 Modern Law Review 12

Postema GJ, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) Yale Law Journal 861

Priaulx N, 'Joy to the World! A (Healthy) Child is born! Reconceptualizing 'Harm' in Wrongful Conception' (2004) 13 Social & Legal Studies 5

--'Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters' (2008) Medical Law Review 199

--'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law' (2012) 33 Adelaide Law Review 177

-- 'Injuries That Matter: Manufacturing Damage in Negligence' (2015) Available at: http://works.bepress.com/nicolette_priaulx/2 (last accessed 5th October 2015)

Press I, 'The Predisposition to File Claims: The Patient's Perspective' (1984) 12 Journal of Law, Medicine & Ethics 53

Priest GL, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6 Journal of Legal Studies 65

Polinsky AM & Shavell S, 'Punitive Damages: An Economic Analysis' (1998) 111 Harvard Law Review 887

Q

R

Rabin R, 'Some Thoughts on the Ideology of Enterprise Liability' (1996) 55 Maryland Law Review 1190

Rachlinski JJ, 'A Positive Psychological Theory of Judging in Hindsight' (1998) 65 University of Chicago Law Review 571

Radin MJ, 'Property and Personhood' (1982) 34 Stanford Law Review 956

Ramsay M, 'Wrongful Pregnancy and the Offset/Benefits Approach' (2015) 28 Canadian Journal of Law & Jurisprudence 129

Randall S, 'Corrective Justice and the Torts Process' (1993) 27 Indiana Law Review 1

Ratner SR, 'Corporations and Human Rights: A Theory of Responsibility' (2001) 111 The Yale Law Journal 443

Rawls J, 'Justice as Fairness: Political not Metaphysical' (1985) 14 Journal of Philosophy and Political Affairs 223

Ripstein A, 'Tort, The Division of Responsibility and the Law of Tort' (2004) 72 Fordham Law Review 1811

Robertson A, 'On the Function of the Law of Negligence' (2013) 33 Oxford Journal of Legal Studies 31

Robertson JA, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' (1983) 69 Virginia Law Review 405

Robinette CJ, 'Why Civil Recourse Theory is Incomplete' (2011) 78 Tennessee Law Review 431

Rosenberg D, 'The Judicial Posner on Negligence Versus Strict Liability: *Indiana Harbor Belt Railroad Co v American Cyanamid Co.* (2007) 120 Harvard Law Review 1210

Rubin EL, 'Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law' (1998) Wisconsin Law Review 131

Rubin PH, 'Cost and Benefits of a Duty to Rescue' (1986) 6 International Review of Law & Economics 273

Rustad ML, 'Torts as Public Wrongs' (2011) 38 Pepperdine Law Review 433

Ryan D, 'Connections without Consensus: Recent Approaches to Vicarious Liability in the Irish Supreme Court' (2009) 31 Dublin University Law Journal 457

S

Samuelson W & Zeckhauser R, 'Status Quo Bias in Decision Making' (1988) 1 Journal of Risk and Uncertainty 7

Sawicki NN, 'Informed Consent as Societal Stewardship' (2016) http://papers.ssrn.com (last accessed 17 September 2016)

Sebok AJ, 'Punitive Damages: From Myth to Theory' (2007) 92 Iowa Law Review 1022

Sen A, 'The Impossibility of a Paretian Liberal' (1970) 78 Journal of Political Economy 152

Schiavone KE, 'Playing the Odds or Playing God? Limiting Parental Ability to Create Disabled Children Through Preimplantation Genetic Diagnosis' (2009) 73 Alb Law Review 283

Scheffler S, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 Oxford Journal of Legal Studies 213

Schroeder CJ, 'Corrective Justice, Liability for Risks, and Tort Law' (1990) 38 UCLA Law Review 143

Schwartz GT, 'Ethics and the Economics of Tort Liability Insurance' (1990) 75 Cornell Law Review 313

-- 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994) 42 University of California Los Angeles Law Review 377

Schachter O, 'Human Dignity as a Normative Concept' (1983) 77 American Journal of International Law 848

Scitovsky T, 'A Note on Welfare Propositions in Economics' (1941) 9 Review Economic Studies 77

Shavell S, 'Strict Liability Versus Negligence' (1980) 9 Journal of Legal Studies 1

Sheley E, 'Rethinking Injury: The Case of Informed Consent' (2015) 63 Brigham Young University Law Review 63

Shapira G, 'New Zealand Accident Compensation and the Foreign Plaintiff: Some of Conflict of Laws Problems' (1980) 12 Ottawa Law Review 413

Shapiro FR & Pearse M, 'The Most-Cited Law Review Articles of All Time' (2012) 110 Michigan Law Review 1483

Shepherd L, 'Dignity and Autonomy After *Washington v Glucksberg*: An Essay About Abortion, Death, and Crime' (1998) 7 Cornell Journal of Law & Public Policy 431

Shmueli B, 'Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice' (2015) 48 University of Michigan Journal of Law Reform 745

Shultz MM, 'From Informed Consent to Patient Choice: A New Protected Interest' (1985) 95 Yale Law Journal 219

Simon HA, 'A Behavioral Model of Rational Choice' (1955) 69 Quarterly Journal of Economics 99

Simpson AWB, 'Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*' (1984) 13 Journal of Legal Studies 209

Sinel Z, 'Concerns about Corrective Justice' (2013) Canadian Journal of Law and Jurisprudence 137

Smith DS, 'Battery in Medical Torts' (1967) 16 Cleveland-Marshall Law Review 22

Smith J, 'Tort and Absolute Liability: Suggested Changes in Classification (1917) 30 Harvard Law Review 241

Smith SD, 'The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law' (1987) 72 Cornell Law Review 765

Spar DL, 'As you Like It: Exploring the Limits of Parental Choice in Assisted Reproduction' (2009) 27 Law & Inequality 481

Stapleton J, 'Tort, Insurance and Ideology' (1995) 59 Modern Law Review 820

-- 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 Law Quarterly Review 426

Stauch M, 'Material Contribution as a Response to Causal Uncertainty: Time for a Rethink' (2009) Cambridge Law Journal 27

Steel S, 'Private Law and Justice' (2013) 33 (3) Oxford Journal of Legal Studies 607
--'Justifying Exceptions to Proof of Causation in Tort Law' (2015) 78 Modern Law Review 729

Stinneford JF, 'Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity' (2006) 3 University of St. Thomas Law Journal 559

Stringham E, 'Kaldor-Hicks Efficiency and the Problem of Central Planning' (2001) 4 The Quarterly Journal of Austrian Economics 41

Studdert DM & Brennan TA, 'Defensive Medicine and Tort Reform: A Wide View' (2010) 25 Journal of General Internal Medicine 380

Sunstein CR, 'Behavioral Analysis of Law' (1997) 64 University of Chicago Law Review 1175

Svenson O, 'Are We All Less Risky and More Skilful Than Our Fellow Drivers?' (1981) 47 Acta Psychologica 143

Sykes AO, 'Strict Liability versus Negligence in *Indiana Harbor* (2007) 74 University Chicago Law Review 1911

T

Tenenbaum E, 'Revitalizing Informed Consent and Protecting Patient Autonomy: An Appeal to Abandon Objective Causation" (2012) 64 Oklahoma Law Review 697

Trebilcock M, 'The Social Insurance-Deterrence of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis' (1987) 24 San Diego Law Review 929

Todd S, 'Privatization of Accident Compensation: Policy and Politics in New Zealand' (2000) 39 Washburn Law Journal 404

-- 'Forty Years of Accident Compensation in New Zealand' (2011) 28 Thomas M. Cooley Law Review 189

-- 'Treatment Injury in New Zealand' (2011) 86 Chicago-Kent Law Review 1169

Turton G, 'Defining Damage in the House of Lords' (2008) 71 Modern Law Review 987

Tversky A & Kahneman D, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124

--'Rational Choice and the Framing of Decisions' (1986) 59 Journal of Business S251

-- 'Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation' (1988) 3 University of Illnois Law Review 607

U

V

van Dam C, 'Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights' (2011) 2 Journal of European Tort Law 221

Varuhas JNE, 'The Concept of 'Vindication' in Tort Law: Rights, Interests and Damages' (2014) Oxford Journal of Legal Studies 1

X

W

Walsh DPJ, 'Liability for Garda Negligence in the Prevention and Investigation of Crime' (2013) 49 Irish Jurist 1

Weinrib EJ, 'The Case for a Duty to Rescue' (1980) 90 Yale Law Journal 247
-- 'Toward a Moral Theory of Negligence Law' (1983) 2 Law & Philosophy 37
--'The Insurance Justification and Private Law' (1985) 14 Journal of Legal Studies, 675
--'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 Yale Law Journal 949
--'Understanding Tort Law' (1989) 23 Valparaiso University Law Review 485
-- 'The Jurisprudence of Legal Formalism' (1993) 16 Harvard Journal of Law & Public Policy 583
-- 'The Gains and Losses of Corrective Justice' (1994) 44 Duke Law Journal 277
--'Does Tort Law Have a Future?' (2000) 34 Valparaiso University Law Review 561
-- 'Correlavity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 Theoretical Inquiries in Law 107
-- 'Corrective Justice in a Nutshell' (2002) 52 University of Toronto Law Journal 349
-- 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University Law Review 273
-- 'The Structure of Unjustness' (2012) 92 Boston University Law Review 1067
-- 'Causal Uncertainty' (2015) Oxford Journal of Legal Studies 1

Weinstein N, 'Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample' (1987) 10 Journal of Behavioral Medicine 481

West R, 'Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner' (1985) 99 Harvard Law Review 384

Wevers K, 'Prenatal Torts and Pre-Implantation Genetic Diagnosis' (2010) 24 Harvard Journal of Law & Technology 257

White JPM, 'Exemplary Damages in Irish Tort Law' (1987) Irish Law Times 60

Whitman JQ, 'The Two Western Cultures of Privacy: Dignity and Liberty' (2004) 113 Yale Law Journal 1151

Williams G, 'Liability for Independent Contractors' (1956) Cambridge Law Journal 180

Wilson NS, 'Is Corrective Justice Subsidiary to Distributive Justice? Which Answer Better Captures the Meaning of Tort Law Practice?' (2007) 10 Trinity College Law Review 45

Winick BJ, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 Villanova Law Review 1705

Witt JF, 'Speedy Freddy Taylor and the Ironies of Enterprise Liability' (2003) 103 Columbia Law Review 1

Witting C, 'The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence' (2008) 71 Modern Law Review 621

Wright RW, 'Actual Causation vs Probablistic Linkage: The Bane of Economic Analysis (1985) 14 Journal of Legal Studies 435
--'The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics' (1987) 63 Chicago-Kent Law Review 553
--'Substantive Corrective Justice' (1992) 77 Iowa Law Review 625
-- 'Hand, Posner, and the Myth of the "Hand Formula," (2003) 4 Theoretical Inquiries in Law 145
--'The Grounds and Extent of Legal Responsibility' (2003) 40 San Diego Law Review 1425

Z

Zabinski Z & Black BS, 'The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform' (2015) *Northwestern Law & Economics Research Paper No 13-09* available at http://papers.ssrn.com (accessed 5th October 2015)

Zipursky BC, 'Rights, Wrongs, and Recourse in Tort Law' (1998) 51 Vanderbilt Law Review 1
--'Civil Recourse Not Corrective Justice' (2003) 91 Georgetown Law Journal 695
-- 'Rawls in Tort Theory: Themes and Counter-Themes' (2004) 72 Fordham Law Review 1923

Book Chapters

Berlin I, 'Two Concepts of Liberty' (1958) in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) 20

Cardozo B, 'The Paradoxes of Legal Science' in Margaret E. Hall (ed), *Selected Writings of Benjamin Nathan Cardozo* (Fallon Publications, 1947) 317

Corbett V, 'The Right of Publicity and the Search for Principle' in András Koltay (ed.) *Media Freedom and Regulation in the New Media World* (Wolters Kluwer, Budapest, 2014) 385

Duff RA, 'Torts, Crimes and Vindication: Whose Wrong is it?' in Matthew Dyson (ed) *Unravelling Tort and Crime* (Cambridge University Press, 2014) 146

Enoch D, 'Tort Liability and Taking Responsibility' in John Oberdeek (ed.), *Philosophical Founndations of the Law of Torts* (Oxford University Press, 2014) 250

Hedley S, 'The Rise and Rise of Personal Injury Liability – A Temporal Difficulty or a Permanent Crisis?' in Ciaran Craven and William Binchy (eds) *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (FirstLaw, 2005) 203

-- 'Tort and Personal Injuries, 1850 to the Present' in TT Arvind and Jenny Steele (eds.), *Tort Law and the Legislature* (Oxford: Hart, 2013) 249

-- 'Corrective Justice - An Idea Whose Time Has Gone?' in Maksymilian Del Mar and Michael Lobban (eds.), *Law in Theory and History: New Essays on a Neglected Dialogue* (Oxford, Hart, 2016) 305

McCrudden C, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed.), *Understanding Human Dignity* (British Academy, Oxford University Press, 2013) 2

Kuhse H, 'Is There a Tension Between Autonomy and Dignity?' in Peter Kemp et al. (eds), *Bioethics and Biolaw Vol. II: Four Ethical Principles* (Copenhagen, Rhodes International Science and Art Publishers and Centre for Ethics and Law, 2000) 61

Murphy JG, 'Forgiveness and Resentment' in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge UK: Cambridge, 1990) 25

Ryan R, 'The Impact of the Act on the "Compensation Culture": Big or Small?' in Ciaran Craven and William Binchy (eds) *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (FirstLaw, 2005) 138

Simon HA, 'Theories of Bounded Rationality' in Herbert A. Simon (ed) *Models of Bounded Rationality: Behavioral Economics and Business Organization* (Vol 2) (Cambridge, MA: MIT Press, 1982) 408

Sontheimer K, 'Principles of Human Dignity in the Federal Republic' in Paul Kirchof & Donald Kommers (eds) *Germany and Its Basic Law: Past, Present and Future* (Nomos Verlagsgesellschaft, 1993) 213

Stevens R, 'Non-delegable Duties and Vicarious Liability' in J. Neyers et al, *Emerging Issues in Tort Law* (Hart Publishing, 2007) 331

Taylor C, 'Atomism' in Shlomo Avineri and Avner De-Shalit (eds.) *Communitarianism and Individualism*, (Oxford: Clarendon Press, 1992) 29

Temkin L, 'Harmful Goods, Harmful Bads' in Frey and Morris (eds), *Value, Welfare and Morality* (Cambridge University Press, 1993) 290

Other Publications

Accident Compensation Corporation's Annual Report (2011) (New Zealand)

Association of British Insurers, 'Tackling the Compensation Culture: The Legal Aid, Sentencing and Punishment of Offenders Bill: Improving the System for All' (September 2011)

Birch WF, *Accident Compensation: A Fairer Scheme* (Wellington, 1991)

Dyson MR, 'Magna Carta and Compensation Culture', The High Sheriff of Oxfordshire's Annual Law Lecture, 13 October 2015

Law Reform Commission, *Report on Civil Liability of Good Samaritans and Volunteers* (LRC 93-2009)

Law Reform Commission, *Report on Personal Injuries: Periodic Payments and Structured Settlements* (LRC 54 – 1996)

Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand*, Wellington, Government Printer, 1967

The Accident Compensation Corporation and Incapacity Report (1991) (New Zealand)

The Competition Authority, *Competition in Professional Services: Solicitors and Barristers*, December 2006

Walsh O, *Report on Symphysiotomy in Ireland, 1944-1984* (Department of Health, 2014)

Table of Cases

A & B by C v A Health and Social Services Trust [2011] NICA 28

ACB v Thomson Medical Pte Ltd & Others [2017] SGCA 20

Accident Compensation Corporation v D and Ballal [2008] NZCA 576 (CA)

Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310

Allenby v H [2011] NZCA 251 (CA)

Bamford v Turnley (1862) 2 B&S 66; 122 ER 27

Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428

Barr v Biffa Waste Services Ltd [2012] 3 WLR 795

Barrett v Ministry for Defence [1995] 3 All ER 87

Bazley v Curry (1999) 2 SCR 534

Beatty v Rent Tribunal [2005] 2 IR 191

Bellew v Cement Ltd [1948] IR 61

Breslin v McKenna [2011] NICA 33

Bolton v Stone [1951] AC 850 (HL)

Bonnington v Castings Ltd v Wardlaw [1956] AC 613

Bottrill v A [2001] 3 NZLR 622 (CA)

Bottrill v A [2002] UKPC 49, [2003] 2 NZLR 721

Burnie v Port Authority v General Jones Property Ltd (1994) 120 ALR 42

Byrne v Ryan [2009] 4 IR 542; [2007] IEHC 207

Byrne v Ireland [1972] IR 241

C (A Person Under a Disability) v The Chief Constable of the Police Service of Northern Ireland [2014] NIQB 63

Campbell v MGN Ltd [2004] UKHL 22

Canterbury v Spence (1972) 464 F 2d 772

Caparo Industries plc v Dickman [1990] UKHL 2; [1990] 2 AC 605

Cassel & Co v Broome [1972] AC 1027 (HL)

Cassidy v Ministry of Health [1951] 2 KB 343

Cattanach v Melchior [2003] HCA 38

Chappel v Hart [1998] HCA 55

Chatterton v Gerson [1981] 1 QB 432 (QBD)

Chester v Afshar [2004] UKHL 41

Chief Constable, Hertfordshire Police v Van Colle [2008] UKHL 50

Clifford v The Drug Treatment Centre Board (7 November 1997) HC

Cne de Morsang-sur-Orge, 1995 Dalloz 257 (Conseil d'Etat) req nos. 136-727

Cogley v RTE & Others [2005] IEHC 181

Cole v South Tweed Heads Rugby League Football Club Ltd. and Another [2004] HCA 29

Commonwealth v Introvigne (1982) 150 CLR 258

Cork County Council v Slattery Pre Case Concrete Ltd [2008] IEHC 291

Connolly v Dundalk Urban District Council and Mahon & McPhilips [1990] 2 IR 1

Conway v Irish National Teachers Organisation [1991] 2 IR 305

Couch v Attorney-General [2010] NZSC 27, [2010] 3 NZLR 149

Coventry & Others v Lawrence & Another [2014] UKSC 13

Creed v United Hospital, 600 NY S 2d 151 (App Div 1993)

Creighton v Ireland [2010] IESC 19

D.F. v Garda Commissioner & Others [2014] IEHC 213

Devlin v The National Maternity Hospital [2007] IESC 50

Donoghue v Stevenson [1932] AC 562

Donselaar v Donselaar [1982] 1 NZLR 97 (CA)

Dunne v National Maternity Hospital [1989] IR 91 (SC)

Edwards v Honeywell Inc 50 F 3d 484 (7th Cir. 1995)

Ellison v L [1998] 1 NZLR 416 (CA)

Ennis v The Child and Family Agency & Another [2015] IECA 105

Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22

Farrell v Ryan [2015] IEHC 275

Fitzpatrick v White [2007] IESC 51

Flanagan v Houlihan [2011] IEHC 105

Fleming v Ireland [2013] IESC 19

Fletcher v Commissioner of Public Works in Ireland [2003] IESC 13

G v Auckland Hospital Board [1976] 1 NZLR 638

G v G [1997] NZFLR 49 (HC)

G v Minister for Justice, Equality & Law Reform [2011] IEHC 65

G.J. v. Griffiths [1995] BCJ No 2370 (QL) (SC)

Geoghegan v Harris [2000] IEHC 129

Gillingham Borough Council v Medway (Chatham) Dock Co Ltd [1992] 3 All ER 923; [1993] QB 343

Glencar Exploration plc v Mayo County Council [2001] IESC 64

Greenman v Yuba Power Products, Inc. 377 P2d 897, 901 (1963)

Grant v Roche Products Ltd [2008] IESC 35

Grimshaw v Ford Motors 119 Cal App 3d 772 (1981)

Hanrahan v Merck Sharp and Dohme [1988] ILRM 629 (SC)

Harnicher v University of Utah Medical Center, 962 P 2d 67 (Utah 1998)

Hedley, Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465

Herrity v Associated Newspapers [Ireland] Ltd [2008] IEHC 249

Hickey & Anor -v- Sunday Newspapers Ltd [2010] IEHC 349

Hill v Chief Constable of West Yorkshire [1989] AC 53 (HL)

Honeywell & Stein v Larkin [1934] 1 KB 191

Hughes v Percival (1883) 8 App Cas 443

Hurley Ahern v Moore [2013] IEHC 72

Indiana Harbor Belt Railroad Co. v American Cyanamid Co 916 F 2d 1174 (7th Cir 1990)

Jacobi v Griffiths [1999] 2 SCR 570

JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 988

Kearney v McQuillan & Another [2012] IEHC 127

Kearney v McQuillan and North Eastern Health Board [2012] IESC 43

Kelly v Dublin County Council (21 February 1986)

Kelly v Hennessy [1995] 3 IR 263

Kennedy & Arnold v Ireland [1988] ILRM 472 (HC)

Kent v Griffiths [2001] QB 36

Kinsella v Governor of Mountjoy Prison [2011] IEHC 235

Kirwan v Bray UDC (30 July 1969) SC

L.M. v Commissioner of An Garda Síochána [2011] IEHC 14

L.M. v The Commissioner of An Garda Síochána & Others [2015] IESC 81

L O'K v L.H. & Others [2008] 13

Lanigan v Barry [2008] IEHC 29

Lanigan & Another v Barry & Another [2016] IESC 46

Latimer v AEC Ltd [1952] 2 QB 701

Liebeck v McDonald's Restuarants, P.T.S., Inc., No. CV 93 02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994)

Lister & Others v Hesley Hall Limited [2001] UKHL 22

Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555

Lockwood v Ireland [2011] 1 IR 374

M v Commissioner of An Garda Síochána [2011] IEHC 14

MacFarlane v Tayside Health Board [2000] 2 AC 59 *Ennis v The Child and Family Agency & Another* [2015] IECA 105

McCarty v Pheasant Run Inc. 826 F 2d 1554, 1557 (1987)

McGee v Attorney General [1974] IR 284 (SC)

McGhee v National Coal Board [1973] 1 WLR 1

McLaren Transport Ltd v Somerville [1996] 3 NZLR 424 (HC)

McIntyre v Lewis [1991] 1 IR 121

McQuire v Western Morning News Company [1903] 2 KB 100

Meskell v CIÉ [1973] IR 121

Miller v Jackson [1977] 3 All ER 338; [1977] QB 966

Moisan v Loftus 178 F.2d 148 (2d Cir. 1949)

Montgomery v Lanarkshire Health Board (Scotland) [2015] UKSC 11

Mulcare v Southern Health Board [1988] ILRM 689

Mullin v Hynes (13 November 1972)

Murphy v GN Ry Co [1897] 2 IR 301

New South Wales v Lepore (2003) 212 CLR 511

Nolan v Wirenski [2016] IECA 56

Norris v Attorney-General [1984] IR

O'Gorman v Ritz (Clonmel) Ltd [1947] IR Jur 35

O'Keeffe v Hickey [2008] IESC 72

O'Keeffe v Ireland [2014] ECHR 96

O'Reilly & Others v Limerick Corporation & Others [1989] ILRM 181

Osman v United Kingdom [1998] ECHR 101

Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1)) [1961] AC 388

Palsgraf v Long Island Railroad Co 248 NY 339 (NY CA 1928)

Paris v Stepney Borough Council [1951] AC 367 (HL)

Parkinson v St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530; [2002] QB 266

Philp v Ryan & Another [2004] IESC 105; [2004] 4 IR 241

Quinn (a minor) v The Mid-Western Health Board and Donal O'Sullivan [2005] IESC 19

Re Chase [1989] 1 NZLR 325 (CA)

Re Ward of Court (No.2) [1995] IESC 1; [1996] 2 IR 73

Read v Lyons [1947] AC 156 (HL)

Rees v Darlington Memorial Hospital NHS Trust [2002] EWCA Civ 88

Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52

Reibl v Hughes (1980) 114 DLR (3d) (SC)

Rickards v Lothian [1913] AC 263

Rogers v Whitaker (1992) 175 Comm LR 479

Rylands v Fletcher (1868) LR 3 HL 330

Securities Trust Ltd v Hugh Moore & Alexander Ltd [1964] IR 417

Shannon v O'Sullivan [2016] IECA 93

Shelfer v City of London Electric Lighting Company [1895] 1 Ch 287

Shortt v Commissioner of An Garda Síochána [2007] 4 IR 587

Sienkiewicz v Greif (UK) Ltd [2011] UKSC 10

Sinnott v Minister for Education [2001] IESC 63; [2001] 2 IR 505

Smith v Chief Constable, Sussex Police [2009] 1 AC 225

Sturges v Bridgman (1879) 11 Ch D 852

Stovin v Wise [1996] AC 923

Sullivan v Boylan & Others [2013] IEHC 104

TD v Minister for Education [2001] 4 IR 259

The Catholic Welfare Society & Others v Various Claimants & The Institute of the Brothers of the Christian Schools [2012] UKSC 56

Tomlinson v Congleton Borough Council & Others [2003] UKHL 47

U.S. v Carroll Towing Co 159 F 2d 169 (2nd Cir 1947)

Vaughan v Menlove (1837) 132 E.R. 490 (CP)

Victorian Railway Commissioners v Coultas (1888) 13 App Cas 222

Ville d'Aix-en-Provencez, 1996 Dalloz 177 (Conseil d'Etat) req. Nos. 143-578

Vincent v Lake Erie Transport Co., 124 NW 221 (Minn 1910)

W v Ireland (No2) [1997] 2 IR 141

Waller v James [2015] NSWCA 232

Walsh v Family Planning Services & Others [1992] 1 IR 496 (SC)

Western Suburbs Hospital v Currie (1987) 9 NSWLR 511

Wheeler v J.J. Saunders Ltd [1995] 2 All ER 697; [1994] EWCA Civ 8

White v Chief Constable of South Yorkshire and Others [1999] 1 All ER 1; [1998] UKHL 45

Wilkinson v Downton [1897] 2 QB 57

Wilsons and Clyde Coal v English [1938] AC 57

Wilsher v Essex Area Health Authority [1988] AC 1074, HL

Wood v Commissioner of Police for the Metropolis [2009] EWCA Civ 414

Woodland v Essex County Council [2013] UKSC 66

X (Minors) v Bedfordshire County Council [1995] 2 AC 633

Z v UK [2001] ECHR 333

Legislative Sources

Ireland

Civil Law (Miscellaneous Provisions) Act 2011

Civil Liability and Courts Act 2004

Defamation Act 2009

Liability for Defective Products Act 1991

Occupiers' Liability Act 1995

Safety, Health and Welfare at Work Act 2005

New Zealand

Accident Compensation Act 1972

Accident Compensation Act 2001

Accident Rehabilitation and Compensation Insurance Act 1992

Sentencing Act 2002