

RIGHTS AND THE BASIS OF TORT LAW

Nicholas J McBride*

I. A Disquieting Suggestion

The heading is borrowed from the title of the first chapter of Alasdair MacIntyre's book *After Virtue*.¹ In that chapter, MacIntyre paints a picture of a world where:

the natural sciences ... suffer the effects of a catastrophe. A series of environmental disasters are blamed by the general public on the scientists. Widespread riots occur, laboratories are burnt down, physicists are lynched, books and instruments are destroyed. Finally, a Know-Nothing political movement takes power and successfully abolishes science teaching in schools and universities, imprisoning and executing the remaining scientists.²

Generations later, an attempt is made to revive scientific teaching and learning using the remaining fragments of scientific activity that have managed to survive the catastrophe: 'parts of theories ... instruments whose use has been forgotten; half-chapters from books, single pages from articles.'³ Such an attempt is doomed to failure. Too much knowledge has been lost. As a result, scientific language and scientific argument after the catastrophe becomes arbitrary and inconclusive in a way that it never was before the catastrophe.

MacIntyre's disquieting suggestion is that moral philosophy has undergone such a catastrophe over the last few centuries, with the result that we do not really understand either what we are talking about when we discuss what is right and wrong, or how we can tell what is right and wrong. My disquieting suggestion is that the study of tort law has undergone a MacIntyrean catastrophe at some point in the twentieth century, with the result that we no longer really understand what we are talking about when we talk about tort law. The signs that such a catastrophe has occurred are all around us, if we have eyes to see:⁴

1. Reputable textbooks on tort law, written by very intelligent authors, make statements in their opening pages such as: 'Numerous attempts have been made to define "a tort" or "tortious liability", with varying degrees of lack of success. ... It is

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¹ A MacIntyre, *After Virtue*, 3rd edn (London, Duckworth, 2007).

² *ibid*, at 1.

³ *ibid*.

⁴ One of the marks of a MacIntyrean catastrophe is that it works to conceal the fact that there has been a catastrophe because the catastrophe redefines what is 'normal'. So, in the scenario depicted by MacIntyre, after a few years of attempting to get scientific teaching and learning back on track, people may well say, 'Nothing has changed—everything is back to normal.' In fact everything has changed, and by the standards of the pre-catastrophe community, nothing is back to normal. But the catastrophe is so serious in its effects, people find it hard to realise that this is the case.

not possible to assign any one aim to the law of tort⁵ and ‘[t]o provide a definition which encompasses the whole of this area of law is impossible ... [T]he law of tort is ... concerned with behaviour which is legally classified as ‘wrong’ or ‘tortious’, so as to entitle the claimant to a remedy. It must be conceded that this definition is somewhat circular, but it is the only one that will suffice.’⁶

2. Just as the distant descendants of the survivors of a nuclear apocalypse might come across a compass amid the burned out remains of their ancestors’ civilisation and wonder ‘what is this?’ and throw it aside as ‘useless’ or suggest ‘maybe it’s a toy?’, tort lawyers who consider the duty of care requirement in negligence routinely propose that we should abolish it as ‘redundant’⁷ or suggest ‘maybe it’s a control device?’⁸

3. Many tort academics experience the same uncomprehending reaction when they contemplate the law of tort as a whole, and propose that we should throw it aside in favour of loss compensation schemes of one kind or another that seem on the surface to do something similar to what we think, so far as we can tell, tort law may be doing.⁹

4. The vast amount of academic writing on the nature and basis of tort law that has been produced in the last few decades¹⁰ is not—as some might see it—a sign of health, but rather a sign of sickness within the study of tort law.¹¹ If the community of academic tort lawyers was capable of understanding tort law, don’t you think we would have understood it by now, with the result that the wellspring of academic

⁵ WVH Rogers, *Winfield and Jolowicz on Tort*, 18th edn (London, Sweet & Maxwell, 2010) [1-1]–[1-2].

⁶ P Giliker and S Beckwith, *Tort*, 3rd edn (London, Sweet & Maxwell, 2008) 1.

⁷ See *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] AC 373 [92]–[93], where Lord Nicholls suggested with breathtaking casualness that the ‘radical suggestion’ of ‘jettison[ing] the concept of duty of care as a universal prerequisite to liability in negligence ... is not without attraction’. See also J O’Sullivan, ‘Liability for Criminal Acts of Third Parties in Negligence’ (2009) 68 *Cambridge Law Journal* 270, arguing at 272 that because in *one* particular case a defendant was held not liable on the ground of ‘no duty of care’ when they could also have been held not liable on the ground of ‘no fault’, ‘maybe Lord Nicholls’ radical suggestion of jettisoning the duty of care concept should be reconsidered’.

⁸ See JG Fleming, *The Law of Torts*, 8th ed (Sydney, Lawbook, 1992) 135–36:

The basic problem in the ‘tort’ of negligence is that of limitation of liability. One or more control devices were required to prevent the incidence of liability from getting out of hand. Among these, ‘duty of care’ occupies today a paramount position.

Note the use of scare quotes around ‘tort’ and ‘duty of care’. Such thinking still flourishes today: see I Gilead, ‘Harm Screening under Negligence Law’ in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (Oxford, Hart Publishing, 2007) 251, characterising the duty of care requirement in negligence as a ‘screening device’ on liability in negligence.

⁹ The most vocal proponent of this view in the past few decades has been Patrick Atiyah: see his *Accidents, Compensation and the Law* (now edited by Peter Cane: 7th edn (Cambridge, Cambridge University Press, 2006)) and PS Atiyah, *The Damages Lottery* (Oxford, Hart Publishing, 1997).

¹⁰ For a survey, see P Cane, ‘The Anatomy of Private Law Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 203.

¹¹ In the same way, MacIntyre, above n 1, at 6 argues that the best evidence that the study of moral philosophy has undergone a catastrophe similar to the imaginary catastrophe that he depicts the natural sciences as undergoing in the first chapter of *After Virtue* is that

the debates in which ... disagreements [over moral questions] are expressed [are] interminable [in] character. I do not mean by this just that such debates go on and on and on—although they do—but also that they apparently can find no terminus.

articles on the nature and basis of tort law would have dried up long before now? It is, when you think about, truly astonishing that in 2011, with all the intellectual and material resources available to us, we are still discussing these kinds of issues and have not settled them long ago.

If the study of tort law has undergone a MacIntyrean catastrophe, we can only—at the moment—speculate as to what caused it.¹² But one thing is for sure: the catastrophe happened long before I was a law student at Oxford between 1988 and 1992. By then, the community of tort academics was stuck firmly in the wilderness, unable to make any kind of sense of their subject. They were huddled together under the banner ‘Tort Law = Compensation for Loss’, having arrived at the consensus that the function of tort law was to determine when a plaintiff would be able to claim compensation for a loss that the defendant had caused the plaintiff to suffer.¹³ At the same time, tort academics were intelligent enough to realise that such a view of tort law made a complete nonsense of their subject. If this view of tort law were correct, in a case where a defendant has carelessly caused a plaintiff loss, why would tort law *ever* deny the plaintiff’s claim for compensation from the defendant, as it threatens to do when it requires the plaintiff to show that the defendant owed him or her a duty of care before it will allow the plaintiff’s claim? Surely, in such a case, tort law would *always* make the defendant bear the plaintiff’s loss? And why—if tort law is all about providing people with a way of suing others for compensation for losses that they have suffered—does tort law exist at all? It is a notoriously expensive, inefficient and unjust system for getting money to people who deserve to be compensated for losses that they have suffered. Tort academics had no good answers to these questions, and were as a result condemned to spend their careers criticising their subject for being a ‘mess’ or for being ‘incoherent’.¹⁴

However, things are beginning to look different nowadays. Some tort law academics have now broken away from the pack, and think they have found a way out of the wilderness.

¹² My own speculation is that the catastrophe was triggered by the growing interest in, and affinity for, left-wing politics among Britain’s intelligentsia from the 1920s onwards. This meant that legal academic energies were almost exclusively focused on determining how great the powers of the State should be, and what form the relations between the State and its citizens should take. As a result, very little interest was paid to tort law—which was very much concerned with relations between citizens—and inherited understandings of what tort law was all about were as a result allowed to wither on the vine.

¹³ The result, of course, of this emphasis on compensation as the key to understanding tort law is that other remedies that are available to tort plaintiffs have been almost completely neglected by tort scholars. See, eg, J Murphy, ‘Rethinking Injunctions in Tort Law’ (2007) 27 *Oxford Journal of Legal Studies* 509, 509:

In this jurisdiction, surprisingly little academic attention has been devoted to the availability and role of injunctions in tort law. Certainly, most of the established textbooks afford very little space to injunctions; while detailed analysis within the leading law periodicals is also largely conspicuous by its absence. Discussion, where it does exist, tends to be part of, or tangential to, some other central theme or issue. Yet why this should be the case is perplexing.

There is nothing surprising or perplexing about this—the tort academics’ neglect of injunctions is an inevitable consequence of the way they have been thinking about tort law for the last 30 years or so.

¹⁴ See D Ibbetson, ‘How the Romans Did For Us: Ancient Roots of the Tort of Negligence’ (2003) 26 *University of New South Wales Law Review* 475; B Hepple, ‘Negligence: The Search for Coherence’ [1997] *Current Legal Problems* 69.

II. A New, But Fragile, Hope

An increasing number of tort academics would like to burn the banner ‘Tort Law = Compensation for Loss’. They think that such a view of tort law is not only misconceived, but also dangerous. It creates the impression that judges in tort cases are simply concerned to determine whether it would be ‘fair, just and reasonable’ to allow the plaintiff to sue the defendant for compensation for a loss that the plaintiff has suffered. They point out that this picture of what happens in tort cases is not only completely untrue, but also creates a danger that judges will begin to buy into this myth of what happens in tort law cases and start arrogating to themselves powers to redistribute losses as they see fit, according to their own private notions of what is ‘fair, just and reasonable’.

Academics who reject this picture of what happens in tort cases argue that the function of tort law is: (1) to determine what legal rights people will automatically enjoy under the law, free of charge and without having to contract for them; and (2) to provide people with remedies when those rights¹⁵ are violated, or threatened with violation.

On this *rights-based* view of tort law, tort law does not grant judges a general jurisdiction to reallocate losses from plaintiffs to defendants if they think that it would be ‘fair, just and reasonable’ to make those defendants bear those losses. The task of a judge in a tort case is much more modest. It is to determine whether the plaintiff’s rights have been violated, or threatened with violation, and if they have, to provide the plaintiff with an appropriate remedy to protect those rights. In a case where the plaintiff’s rights are threatened with violation by the defendant, the appropriate remedy will be an injunction, requiring the defendant not to violate the plaintiff’s rights. In a case where the plaintiff’s rights have already been violated, the appropriate response is compensation, to put the plaintiff in the position he or she would have been in had his or her rights not been violated.

If a plaintiff has suffered loss at a defendant’s hands, but the defendant has not violated the plaintiff’s rights in causing the plaintiff loss, then—on this rights-based view of tort law—the plaintiff has no case, and *cannot* have a case, for suing the defendant in tort for compensation for that loss. It does not matter how ‘fair, just and reasonable’ it might be to make the defendant compensate the plaintiff. The case is dead, so far as tort law is concerned. Where there is a right, there is a remedy. But where there is no right, there is no remedy (in tort).

This rights-based view of tort law would have seemed commonplace at the start of the twentieth century. But nowadays—after the MacIntyrean catastrophe that devastated the study of tort law at some point in the twentieth century—it seems strange and unfamiliar. The strangeness and unfamiliarity of such rights-based accounts of tort law is compounded by the fact that rights-based theorists of tort law have had to engage in a huge intellectual struggle to overcome the after-effects of the catastrophe they are trying to reverse. The extent of that struggle shows up all too painfully in the available rights-based accounts of tort law that can be found in the academic literature. Such accounts of tort law are invariably flawed in three principal ways:

¹⁵ From now on, whenever I use the word ‘right’ it should be understood that I mean by that word ‘legal right’ and not ‘moral right’ or any other kind of right.

1. *Mixing up different kinds of rights.* Robert Stevens' book *Torts and Rights*¹⁶ represents the most sophisticated rights-based account of tort law yet published. However, his explanation of tort law is flawed by the fact that, right at the start of his book, he mixes up different kinds of rights, leaving it unclear what kind of rights he thinks form the basis of tort law.

On page four of his book, at the start of his chapter on 'Rights', Stevens refers to rights:

that you will not defame me, hit me, or tear my clothes ... that my neighbour will not create a nuisance by playing loud music all night long ...

and rights:

not to be punched ... not to be kicked ... not to be carelessly slandered ...
not to be deliberately slandered ...

These are very specific rights, requiring someone else not to act in a particular way.

On page five of his book, Stevens quotes a passage from Cave J's opinion in *Allen v Flood*: 'The personal rights with which we are most familiar are: 1. Rights of reputation; 2. Rights of bodily safety and freedom; 3. Rights of property.'¹⁷ Stevens goes on to discuss these rights for the next few pages of his book, without seeming to notice that (as we will see) *these* rights are very different from the rights with which he started his chapter. These rights are very general, and do not—of and in themselves—require anyone else to do anything in particular.

The fact that Stevens mixes up these different types of rights—the ones he talks about on page four, and the ones he talks about on page five—makes it very hard to know what he actually thinks when he says that '[t]he law of torts is concerned with the secondary obligations generated by the infringement of primary rights. The infringement of rights, not the infliction of loss, is the gist of the law of torts.'¹⁸ What *sort* of rights is Stevens talking about?¹⁹

2. *Reductionism about rights.* Suppose that Fred carelessly crashes his lorry into a power station, with the result that there is a power cut in the surrounding area for a few hours. Wendy's factory is affected by the power cut, and she loses £10 000 in lost profits as a result.²⁰ It is clear that, in England at least, Wendy will not be able to sue Fred in tort for her lost profits.²¹ Rights-based theorists of tort law agree that Wendy cannot sue here because Fred did not violate any of Wendy's rights in crashing into the power station.

¹⁶ R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007).

¹⁷ *Allen v Flood* [1898] 1 AC 1 (HL) 29.

¹⁸ Stevens, above n 16, at 2.

¹⁹ Stevens would probably reply 'both'. In his view, 'rights that...' are merely special instances of more general 'rights to...' and 'rights to...', in their turn, are made up of bundles of specific 'rights that...': see Stevens, above n 16, at 4. However, as we will see (part III(A), below), 'rights that...' do not exist in the same relation to 'rights to...' as, say, 'greyhound' does to 'dog'. They are very different beasts; different in almost every imaginable respect.

²⁰ This example is discussed further in NJ McBride and R Bagshaw, *Tort Law*, 3rd edn (Harlow, Pearson Education, 2008) 200–02, 209–10.

²¹ *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27 (CA).

Peter Benson is one such theorist. He argues that Fred did not violate Wendy's rights in carelessly crashing into the power station because Wendy did not have a *proprietary interest* in the power station: the power station did not belong to her, nor is it in her possession. His argument goes as follows:

At common law, a proprietary or possessory right is something that entitles a person to exclude anyone else from using it without his consent, so long as the first person has, relative to the others, a better claim to it in ownership or possession. If a plaintiff lacks a proprietary or possessory right in something, he has no legal standing to constrain a defendant from intentionally using it as the defendant sees fit, even if this impairs or interferes with the plaintiff's interests.²²

We can immediately note something a little bit fishy about this argument: Wendy is not claiming that she had a right to prevent Fred *using* the power station as he saw fit. This is *not* a case where two people are fighting over the same thing—where the winner is, and can only be, the person with a better title to the thing. Wendy is claiming that she had a right that Fred not *carelessly crash* into the power station so as to cause a power cut. Now—if Wendy *had* had a proprietary interest in the power station, she would have no problem establishing that she had a right that Fred not carelessly crash into the power station. But she did not. For Benson, that ends the matter. For him, the *only* way Wendy could establish that she had a right that Fred not crash into the power station is by showing that she had a proprietary interest in the power station. But there seems no logical reason why the law should take such a stand. While Wendy did *not* have a *proprietary interest* in the power station, she *did* have an *interest in the power station not being crashed into* which *could* form the basis for the law granting her a right that Fred take care not to crash into the power station.²³

Benson's argument suffers from a very common vice that afflicts many rights-based accounts of tort law. This is the vice of *reductionism about rights*: in other words, placing *artificial* limits on what sort of rights underlie tort law. We see the same vice in another paper of Benson's, where he asserts that in order to establish that a defendant owes a plaintiff a duty of care in negligence, it has to be shown that the defendant's conduct threatens 'an *existing* legally protected interest which rightfully

²² P Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Oxford University Press, 1995) 427, 435 (footnote omitted).

²³ In P Benson, 'The Problem with Pure Economic Loss' (2009) 60 *South Carolina Law Review* 823, Benson argues at 865 that

the significance of a requirement of a possessory or proprietary interest is that, in virtue of this, the plaintiff can assert a right, exclusive as against the defendant, to having or using an item free from interference by the defendant. In the absence of a contract or some other basis of personal right against the defendant, the plaintiff cannot have an exclusive right in any other way.

What I am suggesting is that Wendy's interest in the power station not being crashed into could form 'some other basis of personal right against' Fred that he take care not to crash into the power station. However, Benson seems not to advert to this possibility at all: it seems that Wendy can only establish a right against Fred that he take care not to crash into the power station based on her having an interest in the power station, or a contract with Fred. The possibility of Wendy's establishing 'some other basis of personal right against' Fred disappears entirely.

belongs to the plaintiff as against the defendant.²⁴ So if we are to protect a given interest of the plaintiff's by requiring a defendant take care not to damage that interest, we have to show that that interest is *already* protected under the law. This seems illogical. If the plaintiff's interest (in the context of Benson's paper, a beneficiary's interest in receiving a legacy that a testator wants her to receive) is worthy of being protected by the law of negligence, shouldn't we get on with protecting it, and not refuse to protect it merely because it isn't protected by any other area of the law? In fact, if an interest is worthy of protection by the law of negligence, but is not protected by any other area of the law, doesn't that make that interest *especially* worthy of protection by the law of negligence?

The same vice of reductionism can be found in Allan Beever's book, *Rediscovering the Law of Negligence*, when he asserts that 'the law of negligence protects primary rights that arise in the law of property and primary rights that arise in the law of persons'²⁵—with the result that the law of negligence cannot assist Wendy in her claim against Fred because she cannot establish that Fred's actions violated her personality rights, or her proprietary rights. But why is the law of negligence just confined to protecting personality rights and proprietary rights? Why *can't* it protect other kinds of rights—such as a right that other people take care not to cut off the power supply to your business?

Jason Neyers falls into the same vice of reductionism, but in a slightly different way, when he considers a variation on Wendy's case. In this case, Fred—angered by Wendy's refusal to go out with him—*deliberately* crashes his lorry into a power station, with the *intention* of cutting off the power to Wendy's factory, so that she will suffer a loss of profits. In such a case, it is clearly established that Wendy *will* be entitled to sue Fred in tort for compensation for her loss of profits: Fred will have committed the tort of intentional infliction of harm using unlawful means in relation to Wendy by acting as he did. In two papers, Neyers worries whether we can say that in this case, Fred violated Wendy's rights.²⁶ To see whether he did or not, Neyers canvasses a wide range of possible rights of Wendy's that Fred might have violated in this case: a right to trade, a right that Fred not abuse his rights, and a right that Fred not violate the criminal law. As Roderick Bagshaw has already pointed out, at no point does Neyers consider whether Wendy simply has a right that Fred not intentionally cause her harm using unlawful means to do so.²⁷ It seems that, for Neyers, it is just not possible that the law might give Wendy (and everyone else) such a *measured* or *limited* right against Fred. For Neyers, it seems, rights are all or nothing. Either Wendy has a general right to trade, with the result that everyone else has a duty not to get in the way of her trading; or she has nothing. There is no 'in between' right allowed—but why not?

²⁴ P Benson, 'Should *White v Jones* Represent Canadian Law: A Return to First Principles' in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (Oxford, Hart Publishing, 2007) 141, 149 (emphasis altered).

²⁵ A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) 214.

²⁶ See JW Neyers, 'Rights-Based Justifications for the Tort of Unlawful Interference with Economic Relations' (2008) 28 *Legal Studies* 215 and JW Neyers, 'The Economic Torts as Corrective Justice' (2009) 17 *Torts Law Journal* 1.

²⁷ See R Bagshaw, 'Tort Law, Concepts and What Really Matters' in A Robertson and HW Tang (eds), *The Goals of Private Law* (Oxford, Hart Publishing, 2009) 239, 252.

3. *The relevance of public policy.* One possible explanation²⁸ of why Neyers is not willing to accept the existence of such a *measured* or *limited* right is that for him—and for other rights-based theorists of tort law—a rights-based account of tort law should provide us with an account of tort law *that makes no reference to the public interest*, and should certainly not see tort law as existing to serve the public interest.

For such theorists, the idea that Wendy might have a right that Fred not intentionally cause her harm using unlawful means to do so must be anathema. We can only explain why Wendy might have such a *measured* or *limited* right by reference to considerations of the public interest: ‘In principle, the courts would like to say that if you take two given individuals, A and B, A will have a right against B that B not intentionally harm A for no good reason. But such a right is too vague to be effectively enforced or observed, so instead of giving A a right against B that B not intentionally harm A for no good reason, the courts instead give A a right against B that B not intentionally harm A using unlawful means to do so—it being assumed that if B uses unlawful means in order to harm A, he will be up to no good.’

I think this demand that a rights-based theory of tort law abjure any reference to the public interest all the way down—not only in its account of why and when tort remedies will be available, but also in its account of what rights we have and what rights we don’t have—is a big mistake. Rights-based theorists of tort law are right to be suspicious of those who claim that all tort cases ultimately come down to questions of ‘public policy’—but they throw the baby out with the bathwater when they claim that considerations of what is in the public interest are *never* relevant to claims in tort. Plainly they are, and plainly they should be. As Bagshaw observes, the function of tort law—like any other area of law—is ultimately to make the world a better place.²⁹ I would expand this slightly by saying: ‘The function of tort law is to make the world a better place by granting people rights that they can assert against other people, and by providing them with remedies designed to uphold those rights.’ If granting a plaintiff a particular right—for example, a right not to be offended, or a right not to be unjustly defamed on any occasion, even in a newspaper story that is on a matter of the public interest and was responsibly prepared—would make the world a worse place, it seems to me that it would be irresponsible for the courts to disregard that fact in determining what rights the plaintiff should have.

Stevens would agree with this point in that he argues that the courts should not give effect to rights that would work contrary to the public interest, such as a ‘general right not to be caused economic loss’ which would have the effect of making ‘all commercial competition or industrial action ... actionable.’³⁰ However, he would go further and say that not only should the courts not give effect to such a right, they should *also* not seek to give effect to a more limited form of that right that would *not* work contrary to the public interest, as they are not equipped to determine which more limited forms of that right would still be objectionable on public policy grounds, and which more limited forms of that right would not. It seems to me there are three problems with this.

First, this is not what happens in practice. For example, giving people a general right that other people not damage their reputation would be contrary to the public interest, and the courts rightly refuse to recognise that people have such a general

²⁸ I offer another possible explanation of the source of the kind of reductionism about rights evidenced by Benson, Neyers and Beever in part III(C) below. However, to be fair to them, I think they would probably reject this explanation.

²⁹ Bagshaw, above n 27, at 249.

³⁰ Stevens, above n 16, at 338.

right. But they see nothing wrong with giving people more restricted rights that have the effect of protecting people's reputations. Secondly, if Stevens' theory were applied properly, the courts would not give anyone any rights. For example, in relation to rights not to be killed or injured, the courts would say, 'If we gave people a general right not to be killed or injured, that would be contrary to the public interest—for a start, all deaths and injuries on the roads, however caused, would be actionable, which would hugely increase drivers' insurance premiums and force many drivers off the roads. So we are not going to give people a general right not to be killed or injured—but then neither can we give them any more limited rights, such as a right that other people take care not to kill or injure them, as we are ill-equipped to decide whether those more limited rights are compatible with the public interest.' The same objection could be made in relation to any other conceivable right that the courts might consider giving us. Thirdly, the fact that the courts are ill-equipped in some difficult cases to decide what is, and what is not, in the public interest does not mean that they are always incapable of reaching accurate conclusions on such issues. In a case where it is *very clear*—even to a judge—that it would be contrary to the public interest, or that it would not be contrary to the public interest, to grant someone a particular right, why should the courts not take that into account in deciding whether or not to recognise that right?

Wrong turns like these are inevitable. Rights-based theorists of tort law are attempting to recover a way of thinking about tort law that was abandoned decades ago, and was not systematically articulated even then. It would be nothing short of a miracle if they were able to come up with a perfectly clear, coherent and accurate rights-based account of tort law at the first attempt. However, such wrong turns are extremely dangerous for the future of right-based accounts of tort law. They create a risk that such accounts of tort law will fail to gain the widespread acceptance among the academic community that they need to gain if they are to survive, and flourish. Mainstream tort academics—who still stick firmly to the belief that 'Tort Law = Compensation for Loss'—can focus on these wrong turns as an excuse for thinking that rights-based accounts of tort law have nothing worthwhile to say.

My aim in this chapter is to try and provide a systematic rights-based account of tort law that will be free of such wrong turns, and will come closer to the truth of what tort law is all about than any previous rights-based account of tort law. If I achieve my ambition, my hope is that tort academics who adhere to the old ways of thinking about tort law will finally be compelled to make a choice: *either* adopt the rights-based account of tort law offered in this chapter and stop making the sort of post-catastrophe statements about tort law set out at the start of this chapter, *or* explain why exactly it makes more sense to think of tort law as concerned to determine when we can sue other people for compensation for losses than it does to think of tort law as concerned to provide us with a range of rights against other people, and help us vindicate those rights when they are violated or threatened with violation.

III. Rights

Anyone attempting to provide a rights-based account of tort law has to deal with the difficulty that lawyers use the terms 'right' and 'rights' in different ways on different occasions. As a result, if someone says something like 'liability in tort arises out of the violation of a legal right', it is *immediately* unclear what exactly is being said. I

will therefore begin my rights-based account of tort law by distinguishing *three* different ways in which lawyers use the term ‘right’:

1. Lawyers use the term ‘right’, first of all, to describe what A has when A has a power to perform some kind of legal act,³¹ such as suing someone for damages, or terminating a contract. So lawyers will say that A has a ‘right’ to sue B for damages, or to terminate his or her contract with B. We can call this kind of right a *legal power right*.

2. Lawyers use the term ‘right’, secondly, to describe what A has when the law imposes a legal duty³² on B to act in a particular way, and the law imposes that duty on B for A’s benefit. In such a situation, lawyers will say that A has a ‘right’ that B do *x*. This right is correlative to the duty that (lawyers say) B *owes* A to do *x*. The right and the duty are two sides of the same coin. The right does not arise out of the duty. The duty does not arise out of the right. They are the same thing, just viewed through different ends of the telescope. We can call this kind of right a *coercive right* because if A has this kind of right, someone else is always legally required to act in a particular way.³³

3. Lawyers use the word ‘right’, thirdly, to describe what A has when the law takes steps to protect some freedom or interest of A’s from being interfered with by other people.

The law has two principal techniques for doing this. First, the law may impose duties on other people requiring them not to act in ways that will interfere, or are liable to interfere, with that freedom or interest of A’s. Secondly, the law may exempt A (or grant A an ‘immunity’ from) certain legal rules that would otherwise have the effect of enabling other people to interfere with that freedom or interest of A’s.

The law may use either or both of these techniques to offer a given freedom or interest of A’s some degree of protection from being interfered with by other people.

³¹ There seems no pressing need to extend the first sense in which the word ‘right’ is used to cases where someone has the power to perform a *natural act*, and the freedom to perform that natural act is given no special protection by the law that would bring it within the third sense in which the word ‘right’ is used. So, for example, we *could* say that I have a ‘right’ to scratch my nose right now—because I am free to scratch my nose—but there seems no good reason why we *should* say this. It is enough to say that I am *free* to scratch my nose, without bringing the language of rights into the matter. To talk about rights in this kind of situation can create serious confusion. For example, if two people, A and B, see an abandoned newspaper on a train, each of them is free to pick it up. If we say that each of them has a ‘right’ to pick the newspaper up, that might be taken to suggest that if either of them picks it up, they will violate the other’s rights and do something wrong. It is better—because less confusing—just to say that each of them is free to pick the newspaper up, and leave it at that. So the House of Lords was probably wrong in *Bradford Corp v Pickles* [1895] AC 587 (HL) to say that Pickles had a ‘right’ to extract the water from under his land. As the act of extracting water flowing under his land was a natural act that he was free to perform, and that freedom was given no special protection by the law, all the House of Lords had to say in that case was that Pickles was ‘free’ to extract the water from under his land, and this was so whatever his motives were for extracting the water. There was no need to bring the language of rights into the matter.

³² Again, as with the term ‘right’ (see above n 15), whenever I use the word ‘duty’ from now on, it should be understood that I mean by that word ‘legal duty’ and not ‘moral duty’ or any other kind of duty.

³³ Some people follow Wesley Newcomb Hohfeld in calling this second kind of right a ‘claim right’ (see WN Hohfeld, *Fundamental Legal Conceptions* (New Haven, Yale University Press, 1923) 38) but it seems to me this terminology has the potential to confuse this second kind of right with the first kind of right (which covers, among other things, rights to sue people).

Whenever it does so, and to whatever extent, we lawyers say that A has a ‘right’ to use, enjoy or otherwise exploit that freedom or interest.

For example, it is normal to say that a given individual, A, has a ‘right to freedom of expression’. What we mean by that is that the law takes some steps to protect A against other people interfering with his or her freedom of speech. The law does this by, first of all, imposing a duty on the government not to do something that will have the effect of interfering with A’s freedom of expression if doing so would not serve a legitimate purpose or would have a disproportionately adverse effect on A’s freedom of expression.³⁴ The law also protects A’s freedom of expression from being interfered with by other people by allowing A to defame B if he or she does so in a privileged publication—for example, in a newspaper story that is on a matter of the public interest and has been prepared in a responsible way.³⁵

We can call this third kind of right a *liberty/interest right* because A will only have such a right if the law intervenes in some way to protect some freedom or interest of A’s from being interfered with by other people.

A. Differences Between Coercive Rights and Liberty/Interest Rights

There are a number of fundamental differences between coercive rights and liberty/interest rights that make it vital that we always keep them separate in our heads:

1. Coercive rights are *outward-looking*. They *always* take the form of a right that *someone else* act in a particular way. In contrast, liberty/interest rights are *backward-looking*. They look back at the right-holder and reflect the fact that the law gives the right-holder some protection against some freedom or interest of his or hers being interfered with by other people.³⁶

2. Coercive rights are *fundamental*, while liberty/interest rights are *secondary*. What this means is that we can only know what liberty/interest rights we enjoy, and how far they go, once we know what coercive rights we have. This is because one of the principal ways in which the law protects our freedoms and interests from being interfered with by other people is by giving us coercive rights that other people not act in ways that interfere (or are liable to interfere) with those freedoms or interests.³⁷ So we can only know what freedoms or interests of ours are protected by the law after we have found out what coercive rights we enjoy under the law. For example, you cannot say that you have a ‘right to bodily integrity’ unless you *first* know that the law

³⁴ Human Rights Act 1998, s 6 and Sched 1, Part 1, Art 10.

³⁵ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

³⁶ See MH Kramer, ‘Rights without Trimmings’ in MH Kramer, NE Simmonds and H Steiner, *A Debate over Rights: Philosophical Enquiries* (Oxford, Oxford University Press, 2000) 7, 13–14.

³⁷ This follows from what has already been said about the first technique that the law employs to protect a particular freedom or interest that someone has from being interfered with by other people—imposing duties on other people not to act in ways that will (or are liable to) interfere with that freedom or interest. For example, suppose the law imposes such a duty on B, requiring B not to do *x* because doing *x* will interfere (or is liable to interfere) with a particular freedom or interest of A’s. As that duty is imposed on B for A’s benefit, we can say that B owes A a duty not to do *x* and that A has a correlative coercive right that B not do *x*. So this first technique for protecting a particular freedom or interest that someone has from being interfered with by other people can be redescribed as granting that person coercive rights that other people not act in ways that will interfere (or are liable to interfere) with that freedom or interest.

protects your bodily integrity from being interfered with by other people by giving you coercive rights against other people that they not hit you unjustifiably, and that they take care not to run you over, and so on.³⁸ If the law did not do any of these things, then your ‘right to bodily integrity’ would be a thing written on water—you would not *really* have a ‘right to bodily integrity’.³⁹

3. Coercive rights are *practical*, while liberty/interest rights are *expressive*. What this means is that coercive rights *do* things: they compel people to act in certain ways. If the law gives me a coercive right that you do *x*, then you are required to do *x*. In contrast, liberty/interest rights don’t *do* anything. When we say that I have a ‘right to freedom of expression’, that right does not do any work, or have any effect on the real world. All we are saying, when we say that I have a ‘right to freedom of expression’, is that the law takes some steps to protect my freedom of speech from being interfered with by other people by, for example, granting me coercive rights requiring other people not to interfere with my freedom of speech, or by granting me exemptions from certain legal rules that would otherwise allow other people to interfere with my freedom of speech.⁴⁰ It is by doing *those* things that the law protects my freedom of speech. My freedom of speech is not protected because I have a ‘right to freedom of expression’. Rather, I have a ‘right to freedom of expression’ because my freedom of speech is protected.⁴¹

³⁸ There are other rights of which this is not true. For example, you could say that you had a ‘right to freedom of expression’ even if your freedom of speech was not protected through your being given coercive rights against other people requiring them not to interfere with your freedom of speech. You could still say that you had a ‘right to freedom of expression’ if the law sought to protect your freedom of speech by exempting you from certain legal rules that would otherwise allow other people to interfere with your freedom of speech.

³⁹ Here is a practical demonstration of this point. After the French Revolution, the French Assembly adopted The Declaration of the Rights of Man and Citizen, the articles of which provided, among other things:

13. Every man being presumed innocent until he has been pronounced guilty, if it is thought indispensable to arrest him, all severity that may not be necessary to secure his person ought to be strictly repressed by law.

14. No one ought to be tried and punished except after having been heard or legally summoned, and except in virtue of a law promulgated prior to the offence. The law which would punish offences committed before it existed would be a tyranny: the retroactive effect given to the law would be a crime.

But these statements were meaningless because they were not backed up through the French courts granting accused people effective coercive rights backed by remedies that could be sought if those rights were violated, or threatened by violation. So, for example, in 1794—only one year after the final adoption of this Declaration—leading revolutionary figures such as Georges Danton and Maximilien Robespierre were each in their turn executed without any proper trial. The same point could be made about the Constitution of the former Soviet Union, in which one can find admirable—but in practice utterly meaningless—statements such as: ‘the State pursues the aim of giving citizens more and more real opportunities to apply their creative energies, abilities, and talents, and to develop their personalities in every way’ (art 20).

⁴⁰ It may be that this is what HLA Hart meant when he said that “‘right’” is a term used in discourse *about* the law, used for making statements *about* individual’s positions as seen in terms of the law, rather than a term used *in* the law itself” (as described in DN MacCormick, ‘Rights in Legislation’ in PMS Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Oxford, Clarendon Press, 1977) 189, 190 (emphasis in original)).

⁴¹ It’s important to remember that I am always talking about *legal* rights here. The law may well protect my freedom of speech because I have a *moral* right that people not interfere with my freedom of speech, which is based on my dignity as a human being, and my equal moral status with everyone else. (Though I doubt it: I think it is more likely that the law protects my freedom of speech because it is good for society that it does so.) But to say that I have a *legal* right to freedom of expression is merely

4. Coercive rights are *specific in their effects*, while liberty/interest rights are *indeterminate in their implications*. You know where you are with coercive rights. If I have a coercive right that you do *x*, that means you owe me a duty to do *x*. Liberty/interest rights are far more uncertain in their implications. If someone tells me that I have a ‘right to freedom of expression’, that does not tell me anything other than that the law does, *to some extent*, protect my freedom of speech from being interfered with by other people. I cannot know any more than that from the bare information that I have a ‘right to freedom of expression’. I certainly cannot tell whether or not that means you have a duty not to shout me down when I am delivering a lecture on tort law. To know that, I have to be given some more information about *how far* the law protects my freedom of speech—and in particular, what coercive rights it gives me against other people that require them not to interfere with my freedom of speech.

5. Coercive rights *do not necessarily protect specific freedoms or interests*; liberty/interest rights *always relate to specific freedoms or interests*. If you have a coercive right that I pay you £1000, that right does not protect a specific freedom or interest of yours. It just exists generally for your benefit. Similarly, if you have a coercive right that I not induce you to act in a particular way by lying to you, that right does not protect a specific freedom or interest of yours. It just exists generally for your benefit. So while—as we have seen—many coercive rights exist to protect specific freedoms or interests from being interfered with, this is not true of all coercive rights. In contrast, the idea of a liberty/interest right that does not relate to a specific freedom or interest of the right-holder is a contradiction in terms. Whenever someone enjoys a liberty/interest right, it is always in relation to a particular freedom or interest of theirs that the law protects—to some extent—against being interfered with by other people.

B. Rights In Rem

There is one further feature of coercive rights that I have not mentioned so far: they always operate against a *specific individual*. If A has a coercive right of some kind, it always takes the form of a right that a *particular individual* act in a particular way. In lawyers’ terminology, coercive rights are always rights in personam. It might be thought that this shows my threefold classification of the different ways in which lawyers use the term ‘right’ is inadequate, because it makes no room for rights in rem, which are traditionally understood to be distinct from rights in personam because they do not operate against *particular individuals*. The objection does not stand up: my threefold classification of rights is perfectly capable of accommodating the existence of whatever it is lawyers are talking about when they talk about rights in rem.

It seems to me that lawyers use the phrase ‘right in rem’ in three different ways:

1. Lawyers first of all use the term ‘right in rem’ as a convenient shorthand for saying ‘A has a right in relation to a particular item of property that is exigible against everyone, or—in other words—good against the world.’ What A has here is not actually a single right but billions of different coercive rights, each operating against a

to sum up what the facts are on the ground so far as what the law does already to protect my freedom of speech. If it does nothing to protect my freedom of speech, we cannot say I have a legal right to freedom of expression.

particular individual. So, for example, if I buy a cow called Daisy and take her home with me, lawyers will say that I have a ‘right in rem’ that no one steal Daisy from me. By using this terminology, they are actually saying that I have a coercive right against you that *you* not steal Daisy from me, a coercive right against Tom that *he* not steal Daisy from me, and similar coercive rights against Dick and Harry and everyone else in the world. It is this complex reality that lawyers attempt to describe by simply saying that I have a ‘right in rem’ that no one steal the cow from me.

2. The first use of the term ‘right in rem’ confines its application to situations where someone has a right in relation to *a particular item of property* that is good against the world. But lawyers sometimes use the term ‘right in rem’ to describe what someone has when they have the same right against everyone in the world. For example, James Penner suggests that our rights ‘not to be killed and ... to bodily security’ can be characterised as ‘rights in rem’.⁴² So we could talk about my having a ‘right in rem not to be killed’. However, the same point made in relation to proprietary rights in rem also applies to this kind of non-proprietary right in rem. What I have here is not just a single right, but a bundle of billions of coercive rights, each applying to a particular individual, and each requiring *that* individual not to kill me.⁴³

3. Finally, lawyers use the term ‘right in rem’ as a highfalutin way of describing a *proprietary interest* in a thing that the law recognises and protects in some way against being interfered with by other people. The use of the word ‘right’ in this context is inexcusable: the range of proprietary interests that someone may have in a thing (ownership, charge, beneficial interest, lease) are not in and of themselves rights, and should therefore never be described as ‘rights in rem’. Proprietary interests give rise to coercive rights, as the law seeks to protect those interests from being interfered with by other people, and this protection allows us to say that the interest holder has a ‘right’ (a liberty/interest right) to enjoy that interest. But proprietary interests do not amount to rights in and of themselves.⁴⁴

C. Reductionism Revisited

Although my threefold classification of the way lawyers use the term ‘right’ can easily accommodate references to ‘rights in rem’, I think we should be very careful in using such language when talking about English law. Sloppy or loose use of the phrase ‘right in rem’ can easily result in one falling into the vice of reductionism about rights that I highlighted earlier. Let me explain. Many people believe:

1. All rights that are ‘good against the world’ are ‘rights in rem’.

⁴² JE Penner, *The Idea of Property in Law* (Oxford, Clarendon Press, 1997) 27–28.

⁴³ See NE Simmonds, ‘Rights at the Cutting Edge’ in MH Kramer, NE Simmonds and H Steiner, *A Debate over Rights: Philosophical Enquiries* (Oxford, Oxford University Press, 2000) 113, 151–52 (emphasis in original): ‘There is nothing ... that ... prevent[s] us from talking about a general right not to be assaulted, *provided* that such claims are understood only as summary statements about the existence of various more specific rights obtaining against particular individuals.’

⁴⁴ The fact that our first kind of rights—legal power rights—can amount to property (all forms of intangible property take the form of a power to sue someone if they act in a particular way, which is why another name for a piece of intangible property is a ‘chose in action’) does not affect this point. Rights can amount to property. But interests in property cannot amount to rights.

Other people believe that:

2. All 'rights in rem' are based on the right-holder having a proprietary interest in some thing.

I think it is perfectly legitimate to believe that *either* 1. *or* 2. is true. If you want to define a 'right in rem' as a right that is 'good against the world', then go ahead. And if, alternatively, you want define a 'right in rem' as a right that arises out of the right-holder having a proprietary interest in some thing, then feel free. But what you cannot—must not—do is believe that *both* 1. *and* 2. are true. If you do, you will end up believing:

3. All rights that are 'good against the world' are based on the right-holder having a proprietary interest in some thing.

Assuming that the only rights that one stranger can have against another stranger are rights that are 'good against the world',⁴⁵ if you believe 3. you will also believe that:

4. If you take two strangers, A and B, the only rights that A can have against B will arise out of A's having a proprietary interest in some thing.

Both 3. and—consequently—4. are incorrect. Let's leave aside rights not to be beaten up or to be falsely imprisoned, both of which are 'good against the world' but both of which could be said by those who believe 3. to be true to arise out of the fact that a person 'owns' him or herself. One of the rights mentioned in Stevens' catalogue of rights that are 'good against the world' is a 'right not to be lied to.'⁴⁶ That is a right that is not based on the right-holder having a proprietary interest in anything. The existence of that right shows that 3. and—consequently—4. are incorrect.

Those who believe—or assume—that 3. is true do so because the ambiguity in meaning attached to the term 'right in rem' tempts people to think that because some people think that 1. is true and because other people think that 2. is true, *both* 1. *and* 2. are true. This is a mistake. Either you can believe that 1. is true, and consequently reject 2. because of the existence of rights such as the right not to be lied to. Or you can believe that 2. is true, and consequently reject 1. because of the existence of rights such as the right not to be lied to. What you cannot do is believe that both 1. and 2. are true. Doing so makes you fall into the trap of thinking that 3. and—consequently—4. are true.

This is a trap that I fear many rights-based theorists of tort law have fallen into in the past. Go back to the case where Fred carelessly crashes his lorry into the power station, causing a power cut to Wendy's factory and a consequential loss of profits on Wendy's part. Unless at some deep level, Benson believes—or assumes—that 4. is true, it is hard to understand why he thinks the issue of whether Fred violated Wendy's rights can be resolved by asking whether Wendy had a proprietary interest

⁴⁵ I am happy to make this assumption *at this point* because it is an assumption that the rights-based theorists of tort law I am about to discuss in this section seem to make. They seem to assume that, as between two strangers A and B, A cannot have any *special* rights against B that are based on B's status or position. So the only rights A can assert against B are rights that A can assert against everyone, including B. It seems to me that this assumption is highly questionable, and may be another example of the vice of reductionism about rights that I discussed earlier: see text accompanying nn 23–27 above.

⁴⁶ Stevens, above n 16, at 8.

in the power station.⁴⁷ A similar point can be made about Beever's discussion of the same issue, where he ends up arguing that Wendy would only be able to bring a claim in tort against Fred if she could show that, at the time of Fred's accident, she had a proprietary interest in the bank notes that her customers would have paid her for the goods that she never got to produce because of the power cut.⁴⁸ And again the same point can be made in relation to the case where Fred *intentionally* crashes into the power station in order to disrupt Wendy's business. The fact that Neyers never considers whether Wendy has a right 'good against the world' that other people not intentionally cause her economic loss using unlawful means to do so⁴⁹ may possibly be accounted for by a deep-lying and unspoken assumption that a right that is 'good against the world' must exist to protect some specific proprietary interest of the plaintiff's, and not a generalised interest that he or she has in not being made worse off.⁵⁰

So the ambiguities in meaning attached to the phrase 'right in rem' can have disastrous consequences intellectually; and anyone seeking to produce a rights-based theory of tort law has to be on guard against those disasters.

IV. Tort Law, In a Nutshell

Going back to Stevens' book *Torts and Rights*, it should be clear now that the rights that Stevens talks about on page four (rights 'that you will not defame me, hit me, or tear my clothes ...' and so on) are examples of coercive rights. In contrast, the rights that Stevens talks about on page five (rights 'of reputation ... of bodily safety and freedom ... of property') are examples of liberty/interest rights.

It is equally clear that many rights-based theorists of tort law think that tort law exists to protect liberty/interest rights, and that it does this by imposing duties on us not to do things that will infringe those rights, and by providing us with remedies

⁴⁷ See text accompanying n 22 above.

⁴⁸ Beever, above n 25, at 241. To be fair to Beever, I think he would reject 1. and therefore 3. and 4.. But his discussion of the equivalent of Wendy and Fred's case does seem to assume that the only rights that Wendy could have against Fred are: (i) rights that are based on Wendy and Fred having a 'special relationship' or (ii) rights that are 'good against the world'. And the only rights that Wendy could have against Fred that are 'good against the world' are rights: (iia) not to have her person or reputation interfered with; and (iib) rights based on her having a proprietary interest in some thing. But it is never explained why these are the *only* rights 'good against the world' that we can have. The only expressed basis for this view seems to be that all rights that are 'good against the world' are either in rem or in personam, where rights in rem are defined as rights arising out of someone having a proprietary interest in some thing and rights in personam are assumed to be rights relating to someone's person or personality (see at 240: 'Was there a [good against the world] right in personam violated by the defendant? ... [T]here was not. Causing someone economic loss could not plausibly be regarded as a violation of her bodily integrity, freedom of movement, reputation, etc.'). This is a wholly novel use of the phrase 'right in personam', which is more usually used to describe a right that a particular person act in a particular way.

⁴⁹ See text accompanying n 27 above.

⁵⁰ See also Neyers' assertion that McLachlin J's judgment in *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 (Supreme Court of Canada), which found that the plaintiff in that case had a right that the defendant take care not to damage a bridge that the plaintiff railway company ran trains over, 'in essence argued that the [plaintiff] should be treated as a joint *owner* of the bridge'—as though ownership of the bridge was the *only* possible basis for finding that the plaintiff had a right against the defendant that the defendant not damage the bridge. See JW Neyers, 'Tate & Lyle Food & Distribution Co Ltd v Greater London Council (1983)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (Oxford, Hart Publishing, 2010) 227, 242 (emphasis added).

when those duties are breached. So, for example, Ernest Weinrib includes in his catalogue of liberty/interest rights that are protected by tort law, ‘the right to the integrity of one’s body ... [and] the right to property in things appropriately connected to an external manifestation of the proprietor’s volition’.⁵¹ Tort law protects rights like these by imposing duties on us not to do things that will infringe on these rights: ‘the plaintiff’s right is the basis of the defendant’s duty’.⁵² ‘[T]he concepts and principles of tort liability set out the conditions under which the defendant’s conduct counts as a wrongful infringement of the plaintiff’s right.’⁵³

I think this view⁵⁴ of tort law is totally upside down. (This does not mean that it is without merit. Quite the contrary: it is of huge merit. In order to understand the truth about tort law, all we have to do is turn this view of tort law the right way up.) The function of tort law *cannot* be to protect liberty/interest rights because—as I have said already—the law does not protect liberty/interest rights. Liberty/interest rights exist because the freedoms and interests to which they refer are *already* protected under the law, through the law—among other things—granting us coercive rights that we can assert against other people. So tort law does not do what it does because we have rights to bodily integrity, and to our reputations, and to our property, and tort law seeks to protect those rights. The truth is completely the other way round. We have rights to bodily integrity, and to our reputations, and to our property, because tort law does what it does.

So what *does* tort law do? This:

Tort law grants us coercive rights that we can assert against other people, free of charge and without us having to contract for them, and it provides us with remedies to assist us when those rights are violated, or threatened with violation, by other people.

Tort law is not the only source of such rights,⁵⁵ but it is by far the most important. Once we understand and accept this, the effects of the catastrophe that has afflicted tort law studies in the twentieth century will be fully reversed.⁵⁶ Instead of making

⁵¹ EJ Weinrib, ‘Corrective Justice in a Nutshell’ (2002) 52 *University of Toronto Law Journal* 349, 354.

⁵² *ibid*, at 352.

⁵³ *ibid*, at 353.

⁵⁴ It should be noted that Weinrib’s account of tort law is not touched by the points made in this paragraph if we interpret him as saying that tort law imposes on us legal duties not to infringe on people’s *moral* rights to bodily integrity and property and so on. (For such a reading of Weinrib and other rights-based theories of law, see Donal Nolan and Andrew Robertson’s introduction to this book (‘Rights and Private Law’), at text accompanying n 11.) However, such an account of tort law is flawed by the fact that while it is possible to make sense of the concept of a *legal* ‘right to...’ (as I have above, in part III of this chapter), it is hard to understand what is meant by saying that someone has a *moral* ‘right to...’. We could say that someone has a *moral* right to bodily integrity if their interest in bodily integrity is so important other people should respect it. If that is correct, then Weinrib’s account of tort law simply ends up saying that tort law imposes legal duties on us not to interfere with other people’s interests when those interests are so important that we are morally bound to respect them. This may be correct, but it is also so obviously correct that it is hardly worth saying.

⁵⁵ Equity and the law of restitution are other sources of coercive rights that we may assert against other people, free of charge and without us having to contract for them.

⁵⁶ If tort law is indeed what I say it is, we can see the plausibility of the twin suggestions made at the start of this chapter: (1) that tort law studies in the twentieth century underwent a MacIntyrean catastrophe; and (2) that this catastrophe has its roots in the growth of interest in left-wing politics among the British intelligentsia from the 1920s onwards. Left-wing academics—utilitarian in outlook, and preoccupied with delineating the powers of the State over the individual—could not be expected to

post-catastrophe statements of the kind listed at the start of this chapter, we will be able to say things like:

The function of tort law is to determine—in conjunction with the law of equity and the law of restitution—what coercive rights we can assert against other people, free of charge and without us having to contract for them, and to determine what remedies will be available when those rights are violated, or threatened with violation, by other people.

A tort is committed if someone violates a coercive right that someone else enjoys under the law, when that right does not arise under the law of contract, or the law of equity, or the law of restitution. To put it another (identical) way: someone will commit a tort if they breach a duty owed to another under the law, when that duty does not arise under the law of contract, or the law of equity, or the law of restitution.

The duty of care requirement in negligence exists because carelessness in the abstract does not give rise to liability in tort, even where that carelessness results in the plaintiff suffering some kind of loss. Liability in tort only arises when a plaintiff is able to establish that he or she had a right that the defendant not act in the way they did. To put it another (identical) way, liability in tort only arises when a plaintiff is able to establish that the defendant owed him or her a duty not to act in the way they did. So, if a plaintiff wants to sue a defendant in negligence, the plaintiff always has to show that the defendant owed him or her, and breached, a duty to take care not to act in the way they did.

V. Recognition of Coercive Rights

What has been said so far provides the skeleton outline of a rights-based account of tort law. But to put some flesh on the bones, we need to provide an account of when the courts should recognise that A has a coercive right that B act in a particular way. If the courts regularly find liability in tort in situations where we would expect them to find that no coercive right has been violated, and no liability in tort in situations where we would expect them to find that a coercive right has been violated, then that fundamentally weakens the contention that tort law is rights-based in nature. If, on the other hand, the courts regularly find liability in tort in situations where we would expect them to find that a coercive right has been violated, and no liability in tort in situations where we would expect them to find that no coercive right has been violated, then that—I contend—would be clinching evidence that tort law is rights-based in nature.⁵⁷

have any interest in any area of law that was concerned with allowing individuals to assert rights against each other.

⁵⁷ See McBride and Bagshaw, above n 20, at Preface ('The Tort Wars') and Appendix ('Professor Stapleton's Criticisms of the Traditional View of Tort Law') for other evidence that tort law is rights-based in nature.

A. The *Right Conditions*

So when should the courts find that A has a coercive right that B do *x*? In approaching this issue, it's helpful to remind ourselves of what the law does when it grants A a coercive right that B do *x*. When the law does this, it imposes a duty on B to do *x*, and it does so for A's benefit—no one else's. This suggests two conditions that should be satisfied before the courts find that A has a coercive right that B do *x*.

The first condition is this:

The Benefit Condition. A should have an interest in B doing *x*. If we are going to impose a duty on B to do *x*, *for A's benefit*, then it should *actually* be of benefit to A that B do *x*.

It might be thought that in any conceivable case where A might sue B in tort, the *Benefit Condition* will always be satisfied. This is not so.

For example, if A sues his doctors, claiming that he has a right that they not use cancerous tissue that they took from his body for research,⁵⁸ A's claim should be rejected on the basis that it fails the *Benefit Condition*. A does not have a genuine interest in his doctors not using the cancerous tissue for research. He is trying it on.

Again, if A is in a permanent vegetative state, and his family attempt to argue that A has a right that his doctors continue treating him, A's family's claim should (probably)⁵⁹ be rejected on the basis that it fails the *Benefit Condition*.⁶⁰ Given A's state, A does not have a genuine interest in continuing to be treated by his doctors.

The second condition is this:

The Burden Condition. Other things being equal, A's interest in B's doing *x* should be of sufficient importance that it justifies our imposing a duty on B to do *x*.

When we grant A a coercive right that B do *x*, we are saying that A's interest in B's doing *x* is so weighty that it would be right to burden B with a duty to do *x*. So it should be established that this is the case.

In determining whether the *Burden Condition* is satisfied, we are acting just like moral philosophers, who seek to determine what obligations individuals will owe each other, given their respective needs and situations.⁶¹ So it would not be surprising if applying the *Burden Condition* yielded the following list of duties that it would be right to burden B with, for the benefit of A. The list of duties (which is not intended to be exhaustive) should be familiar because any moral code worthy of the name would recognise these duties: (1) don't murder, deliberately maim or rape A; (2) don't steal or intentionally damage A's property; (3) don't take unnecessary chances with A's life or person or property; (4) look after A if he can't look after himself, and you are in a good position to help him; (5) don't make A's life a misery for no good reason;

⁵⁸ See *Moore v Regents of the University of California*, 793 P 2d 479 (Supreme Court of California, 1990).

⁵⁹ The doubt arises out of the fact that the 'permanent' in 'permanent vegetative state' may be a misnomer: people who have been diagnosed as being in a permanent vegetative state have been known to recover.

⁶⁰ See *Airedale NHS Trust v Bland* [1993] AC 789 (HL).

⁶¹ For a very illuminating discussion of how one should go about determining what we are morally required to do for each other, see D Parfit, *On What Matters* (Oxford, Oxford University Press, 2011) chs 14–17.

(6) don't tell lies to A, and don't tell lies about A to other people; (7) do your best to keep any legitimate promises you made to A; (8) don't manipulate A into acting contrary to his own self-interest; (9) don't exploit any disability or weakness on A's part for your own, or someone else's, advantage; (10) don't betray any legitimate trust that A has placed in you, at your invitation.

The nature of coercive rights suggests that we should require that the *Benefit Condition* and the *Burden Condition* be satisfied before we grant A a coercive right that B do *x*. However, in determining whether the *Burden Condition* is satisfied, we have to ask ourselves whether, *assuming that other things are equal*, A's interest in B doing *x* is of sufficient importance that it justifies our imposing a duty on B to do *x*. In the real world, other things are rarely equal. Even if the *Burden Condition* is satisfied, granting A a coercive right that B do *x* may have knock-on effects that make it, on balance, undesirable to grant A such a right. Given this, there is a further condition that we should require to be satisfied before we find that A has a coercive right that B do *x*:

The *Desirability Condition*. The side effects of granting A a coercive right that B do *x* should not be such that, all things considered, it would be undesirable to grant A such a right against B.

So suppose someone proposes that the law should say that if you take any two individuals A and B, A will have a coercive right against B that B help A out if A is unable to help himself and B is in good position to help A. Such a proposal would fail the *Desirability Condition*. Recognising the existence of such a right would have major adverse knock-on effects: (i) the law would become very uncertain; (ii) the courts would be flooded with litigation designed to take advantage of, and test the limits of, this right to be helped; (iii) people's incentives to put themselves in a position where they could look after themselves would be reduced; (iv) people's incentives to put themselves in a position where they could not help someone in need would be hugely increased; and (v) people would be robbed of any credit for helping someone else in need as giving such help would be a matter of legal obligation, rather than a matter of individual choice. Given the severity of these side effects, it would be—all things considered—undesirable for the courts to recognise that if you take any two individuals A and B, A will have a general right to be helped by B if A is in need of such help and B can easily provide it.

But that is not the end of the matter.⁶² Even if the proposal that each of us should be given a *general* right to be helped fails the *Desirability Condition*, more limited forms and instances of that right may not. And so it proves. The law is unable responsibly to give *full* effect to the moral command that we should help other people if they are incapable of helping themselves, and we are in a good position to help them. But it *is* able to give—and *does* give—*partial* effect to that moral command by giving us a set of tightly-drawn coercive rights which, because they are so tightly-drawn, do not fail the *Desirability Condition*. These coercive rights include: (i) the right a visitor to premises has that the occupier of those premises protect him or her from dangers arising due to the state of the premises; (ii) the right an employee has that his or her employer protect him or her from dangers arising out of the work the

⁶² Though it is for some rights-based theorists. See above, text at n 30, for a discussion of Stevens' views on this matter.

employee does; (iii) the right that a child has to be looked after properly by his or her parents, or those who have taken parental responsibility for him or her.

So far we have been assuming that we can tell for certain whether or not the above conditions are satisfied. But this will often not be the case. For example, it will often be uncertain whether it would be undesirable—all things considered—to grant A a right that B do *x*. In such cases of uncertainty, we should also require that the following condition be satisfied before finding that A has a coercive right that B do *x*:

The *Uncertainty Condition*. We should only find that A has a coercive right that B do *x* if it is *very clear* that the *Benefit Condition*, and the *Burden Condition*, and the *Desirability Condition* are satisfied with respect to that right.

By seeing what set of rights satisfy the above conditions, we should be able to produce for any given pair of individuals A and B, a template of coercive rights that they should enjoy against each other. But respect for individual liberty suggests that A and B should be given the final word on what coercive rights they have against each other. This suggests that the coercive rights A and B enjoy against each other should be subject to one final condition:

The *Voluntarist Condition*. If you take any two individuals A and B, A and B should be free to vary by agreement (whether adding to, or subtracting from) the coercive rights they would otherwise enjoy against each other so long as: (i) the agreement is free and fair; (ii) not contrary to public policy; and (iii) both A and B are of sufficient capacity to enter into such an agreement.

It is the *Voluntarist Condition* that accounts for coercive rights arising under contracts and as a result of other ‘assumptions of responsibility’ akin to contracts.

B. Applications

It is beyond the scope of this paper to apply what we can call the *Right Conditions* to generate a list of coercive rights that the courts should recognise and then compare this list with a list of situations where there is either liability in tort, or no liability in tort, so as to see: (i) whether the courts are finding liability in tort in situations where we would expect the courts to find that the defendant’s conduct violated a coercive right of the plaintiff’s; and (ii) whether the courts are finding that there is no liability in tort in situations where we would expect the courts to find that the defendant’s conduct did not violate a coercive right of the plaintiff’s.⁶³ However, I would be surprised if we did not find a close correspondence between the courts’ decisions on

⁶³ A small-scale version of this project is undertaken in McBride and Bagshaw, above n 20, at ch 9 where we take 10 situations where the courts refuse to find liability in negligence on the ground that the plaintiff did not owe the defendant a duty of care, and test to see whether such a refusal to find that a duty of care was owed can be rationally defended. We employ a procedure for determining whether the courts should recognise that a duty of care is owed in a given situation that is very similar to the procedure outlined above for determining whether the courts should recognise that someone has a coercive right. We score the courts 10/10: in each case where they refuse to find liability on the basis that no duty of care was owed, such a finding can be rationally defended.

liability and no liability in tort, and our list of coercive rights. To illustrate the point, and the method for determining whether or not the courts should recognise that someone has a coercive right in a given situation, we will consider the two variations on Wendy's case discussed above.

(i) *First Variation*

In this case, Fred *carelessly* crashes his lorry into a power station, causing a power cut that puts Wendy's factory out of action, as a result of which Wendy loses money. The courts—at least in England—will not find Fred liable in tort to compensate Wendy for her loss of profits. If tort law is rights-based, does this make sense? I submit that it does.

Let's address this issue by asking whether the law should say that if you take any two given individuals, A and B, A will have a coercive right that B take care not to damage or destroy a given item of property if it is reasonably foreseeable that doing so will result in A suffering some kind of economic loss. It is assumed that neither A nor B are owners of the item of property in question.⁶⁴ I don't think it should.⁶⁵

Obviously, it would be in A's interest that B take care not to damage or destroy the item of property in question—thus satisfying the *Benefit Condition*—but I don't think the *Burden Condition* is satisfied in this case. A's interest will—in the average of cases covered by this right—simply not be weighty enough to justify imposing a duty on B to look out for A's interests here. The fact that A will often be able to take steps to guard him or herself against suffering a loss in the event of B damaging or destroying the property in question further weakens the case for saying the *Burden Condition* is satisfied. And even if the *Burden Condition* were satisfied, it is very clear the *Desirability Condition* is not. Recognising the existence of the kind of right contended for here would have seriously adverse effects on individual freedom, as people in all walks of life would come under a huge tranche of duties to look after other people's economic interests, and would have seriously adverse effects on the court system as it struggled to cope with the flood of claims resulting from the recognition of these rights.

Should the law recognise a narrower right that would cover Wendy's case? Should the law say that a factory owner will have a coercive right that a lorry driver driving in the vicinity of the factory take care not to crash into a power station supplying power to the factory? Again, the *Benefit Condition* would be satisfied, but it is still hard to see that this narrower right satisfies the *Burden Condition*. The type of economic loss factory owners like Wendy are liable to suffer in the event of a power cut—a loss of profits—must rank very low on a scale of economic losses that we should take care not to cause other people to suffer. It hardly compares with losing a job, or losing one's house, and—moreover—factory owners like Wendy are in an especially good position to protect themselves against the losses that they stand to suffer in a power cut. Nor is the *Desirability Condition* satisfied. If factory owners like Wendy were granted this coercive right against lorry drivers, other people who stood to suffer economic loss as a result of property belonging to third parties being damaged would demand to be granted similar coercive rights, asking: if factory owners, why not us? And once these demands were granted—as they would have to be in a legal system committed to the principle that like cases should be decided

⁶⁴ If A were the owner, it would be obvious that he had such a right against B; if B were the owner, it would be obvious that A could not have such a right against B unless B had contractually, or otherwise, assumed a responsibility to A not to destroy or damage the property.

⁶⁵ McBride and Bagshaw, above n 20, at 209–10.

alike—all the undesirable consequences of recognising the general right discussed above would ensue.

So there is no conceivable right that Wendy could be granted in this case that would satisfy the *Right Conditions* set out above.

(ii) *Second Variation*

In this situation, Fred is aggrieved with Wendy and as a result he *deliberately* crashes his lorry into a power station, with the *intention* of triggering a power cut that will disrupt Wendy's business. In this case, Fred will be held liable to compensate Wendy for her loss of profits. Again, we ask the question: if tort law is rights-based, does this make sense? I submit that it should.

We can address the issue by asking whether the law should say that if you take two given individuals A and B, A will have a coercive right against B that B not intentionally cause A harm using unlawful means to do so. I think it is very clear that it should. Such a right satisfies the *Benefit Condition*—A will plainly have an interest in B not intentionally causing A harm using unlawful means to do so. The right will also plainly satisfy the *Burden Condition*. While—in the average of cases covered by this right—the harm suffered by A may not be that serious, the fact that B is actively trying to cause A to suffer that harm means that the law is justified in imposing a duty on B, for A's benefit, that B not intentionally cause A harm using unlawful means to do so. People should not have to put up with the malicious or vindictive attentions of others. Finally, the right is so tightly-drawn that it is also clear that the *Desirability Condition* will be satisfied. For example, giving A such a right would not create any uncertainty in the law; so long as 'intentionally causing harm' is defined in its normal sense of 'acting with the aim or purpose of causing harm' and 'unlawful means' is defined as 'doing that which you are not at liberty to do under the law',⁶⁶ no debilitating uncertainty could attach to the existence of this right.⁶⁷

Given this, it seems *very clear* that the *Right Conditions* are satisfied with respect to this proposed coercive right, and that the law *should* recognise that in the case we are considering, Wendy had a right that Fred not intentionally cause her harm using unlawful means to do so. In fact, the case for recognising the existence of such a right is so clear that the courts would be brought into disrepute if they *failed* to recognise that, as between two individuals A and B, A will have a right that B not intentionally cause A harm using unlawful means to do so. In a case where B deliberately set out to cause A harm, and used unlawful means to do so, A would be astonished to be told by the courts, 'The law gives you no right that B not do this sort of thing to you.'⁶⁸

⁶⁶ See P Sales and D Stilitz, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 *Law Quarterly Review* 411.

⁶⁷ Sadly, the decision of the House of Lords in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 has created a lot of uncertainty in this area of the law through a failure to define 'intentionally causing harm' and 'unlawful means' in such a straightforward fashion.

⁶⁸ The refusal of the courts to extend the right not to be intentionally caused harm using unlawful means to cases of intentionally inflicted emotional distress (see *Mbasogo v Logo Ltd* [2006] EWCA Civ 1370, [2007] QB 846) means that at the moment: (1) bank robbers will not violate the rights of a bank manager if they kidnap the manager's family and threaten to kill them as a means of inducing the manager to withdraw money from the bank; and (2) the father and brothers of a teenager will not violate her rights if they execute her boyfriend, with whom she has been sleeping, and show her a video of her boyfriend being executed as a warning to her not to engage in pre-marital sex. I think ordinary people would be rightly astonished if they were told that English law currently provides no right not to be subjected to such horrendous treatment.

VI. Responses

Weinrib once famously compared tort law to love, arguing that it existed to serve no purpose except to be itself.⁶⁹ I think a more apt comparison is with Cinderella. Like Cinderella, tort law is—at the moment—disinherited, unloved, misused, abused, and thought to be fit only to clean up messes.⁷⁰ I hope I have said enough by now to raise the prospect that, like Cinderella, one day tort law's fortunes will change, and that people generally will come to recognise its huge importance as a legal subject in determining what coercive rights we enjoy against each other, free of charge and without having to contract for them, and in providing us with remedies where those rights are violated or threatened with violation. In a last attempt to ensure a happy ending to tort law's current tale of woe, I would like to finish by responding to some comments that I have received about earlier drafts of this chapter, in the expectation that readers generally may share some of the commentators' views.

A. The Catastrophe Thesis

The catastrophe thesis posits that: (1) there was a time when it was reasonably well understood what tort law was all about; (2) something happened to disrupt that understanding; (3) with the result that we nowadays have no real idea what tort law is all about.

A few commentators questioned whether (1) could be true, with one pointing out that as no one used to ask what tort law was all about, it would be surprising if anyone ever had the answer to that question; while another commentator pointed out that the historical record shows that our puzzlement about the basis of liability in tort law goes back at least as far as the nineteenth century—long before my suggested catastrophe occurred.

Well, it's only a thesis, but one I am still inclined to cling to as the best (and perhaps only) explanation of why we no longer understand why tort law exists, when we know for certain that tort law must exist for some purpose, as everything created by human beings always and everywhere serves some purpose or other. As for whether (1) could be true, three points can be made. First, unspoken understandings are still understandings even though they are unspoken; and indeed the things we understand best are the things we are least likely to speak about and ask questions about because we see no need to. Secondly, if there has been a catastrophe affecting our understanding of tort law, that catastrophe would contaminate legal historical researches as much as anything else and prevent us seeing what was actually going in the nineteenth century and encourage us to think that they then were in just as much of a mess about the basis of tort liability as we suppose we are in now. Thirdly, if (1) is not true, where does the idea—which all tort textbooks pay lip-service to (but only lip-service)⁷¹ and even the most diehard opponent of rights-based theories of law has

⁶⁹ EJ Weinrib, *The Idea of Private Law* (Cambridge MA, Harvard University Press, 1995) 6.

⁷⁰ See JL Coleman, 'Second Thoughts and Other First Impressions' in B Bix (ed), *Analyzing Law: New Essays in Legal Theory* (Oxford, Clarendon Press, 1988) 257, 302: 'Tort law is about messes. A mess has been made, and the only question before the court is, who is to clean it up?'

⁷¹ Almost all tort textbooks open by saying that a tort is a form of legal wrong, and then forget all about that by the second page and identify tort law not with an event (a wrong) but with a response

been known to invoke⁷²—that tort law is part of the law of wrongs come from? This idea is absolutely central to rights-based theories of tort law (as ‘wrong’ is just a synonym for ‘violation of a right’), but it is not an invention of the recent crop of rights-based theories of tort law. Where does it come from, if not a time when people had a much clearer understanding of what tort law is all about than we do?

B. Are Rights-Based Theories of Tort Law Right-Wing?

One commentator on this chapter reproved me for suggesting that the catastrophe in our understanding of tort law was triggered by the growing popularity of left-wing political theories from the 1920s onwards, and the accompanying obsession with discussing and defining what goals the State should pursue, and what it should and should not do to the citizens under its control; all of which left tort law—which (as rights-based theorists of tort law contend) is very much concerned with the *horizontal* relationships between citizens, rather than the *vertical* relationship between citizen and State—out in the cold. The commentator suggested that this view would give comfort to those who accuse rights-based theorists of tort law of being right-wing in their political orientation. Well, maybe it will—but it shouldn’t. There is nothing distinctively left-wing or right-wing about being obsessed with what powers the State should have, and what goals it should pursue, and what the relationship should be between the State and the citizens under its control. In fact, politicians on the right have been obsessed with nothing else for the last 40 years or so. So there is no significance in the fact that the growing interest in the 1920s in defining the powers of the State came from the left; ten years after that, the interest was all on the right-hand side of politics.

All of which is incidental to the main issue, which is: *are* rights-based theories of tort law right-wing?⁷³ There is no doubt that thinkers on the right would find the rights-based theories of tort law that we have been presented with so far much more congenial than thinkers on the left would. This is because such theories have tended to argue that the courts should only recognise and uphold very basic rights to one’s person, one’s property and one’s reputation. Such arguments would find favour with those on the right who think that the State should play nothing more than a nightwatchman role in society, stopping people harming others. But those on the left who think that the State should take a more active role in promoting people’s welfare cannot be expected to be happy at the prospect of the courts recognising and upholding such a limited range of rights. As Bagshaw has observed:

[I]t is not realistic to suppose that people in a society such as that in England will have sufficient freedom to choose a pattern of life and flourish if private law limits itself to granting them some security for their

(compensation for loss). I think the tort textbook I co-authored with Bagshaw was the first ever to take seriously the idea of a tort being a form of legal wrong, and expel from tort law (though not from the book) liability rules that could not be seriously said to arise out of a wrong, such as the rule in *Rylands v Fletcher* and the liability rules contained in the Consumer Protection Act 1987.

⁷² J Stapleton, ‘The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable’ (2003) 24 *Australian Bar Review* 135, 149.

⁷³ It is a quite different question whether rights-based *theorists* of tort law are right-wing. As Neyers has pointed out to me, it is quite clear that at least some of them are not, and that those theorists argue that it is precisely because tort law is so limited in what it does that other areas of law need to be expanded or strengthened to achieve desirable social goals.

persons, possessions and promises. Moreover protecting property ahead of less tangible economic interests tends to perpetuate inequalities with regard to the protection of welfare. Few would deny that the welfare of *many* people in England is far more closely tied to their future economic prospects than to their present property.⁷⁴

However, I would also argue that a properly worked out rights-based theory of tort law—of the kind I have tried to set out in this chapter—will be neither right-wing nor left-wing in orientation. Of course, like any other rights-based theory of tort law, it will be strongly resistant to attempts to twist and distort tort law’s basic rules and doctrines in an attempt to achieve collective goals⁷⁵ (other than the collective goal of ensuring that people are able to assert against each other the coercive rights that the *Right Conditions* tell us they should enjoy). But there is nothing distinctively left-wing or right-wing in recognising that there are limits to what we should be allowed to do to each other, and allowed to refuse to do for each other, and that the law should be involved in policing those limits, where it can do so without unacceptable side effects.

C. Freedom and Rights

A couple of commentators objected to my saying⁷⁶ that if there is an abandoned newspaper on a train and two passengers on the train, we should simply say that each passenger is ‘free’ to pick up the newspaper and we should not say that either passenger has a ‘right’ to pick up the paper.

One commentator argued that in this case, each passenger has a *legal power right* to make the newspaper ‘theirs’. I’m not sure we can say that either passenger would be performing a distinctively legal act in picking up the newspaper, which would entitle us to say that each passenger has a legal power right in this case. I think it’s more accurate to say that each passenger is free to perform a natural act—take possession of the newspaper—and if and when that act is performed, certain legal consequences will follow.⁷⁷

The other commentator argued that in this case, each passenger has a *liberty/interest right* to pick up the newspaper because the law protects each passenger’s freedom to pick up the newspaper through granting each passenger coercive rights that the other passenger not hit or assault him or her when he or she is attempting to pick up the paper. I don’t think this is right. The coercive rights that each passenger enjoys that the other passenger not hit or assault him or her are not

⁷⁴ Bagshaw, above n 27, at 254 (emphasis in original).

⁷⁵ Against E Chamberlain, ‘Negligent Investigation: Tort Law as Police Ombudsman’ in A Robertson and HW Tang (eds), *The Goals of Private Law* (Oxford, Hart Publishing, 2009) 283, arguing at 284 that the police should be held liable in negligence for harm resulting from their failure to investigate crime properly as doing so will ‘encourage greater care by [the] police and an improvement in standard investigatory techniques’. For another example of attempts to twist and distort tort law to help achieve collective goals, see the claims brought in the United States against companies for property damage caused by climate change allegedly contributed to by those companies’ activities. (I am indebted to Jolene Lin for pointing this out to me.)

⁷⁶ See above n 31.

⁷⁷ An analogy: when a woman gives birth, she alters the legal position of the father of the child. But I don’t think the fact that her giving birth will have that effect would cause many people to say that she has a legal power right to give birth.

specifically intended to protect the passenger's freedom to pick up abandoned newspapers; they are intended to protect the passenger's interest in not being hit or assaulted. Given this, I don't think it is possible to say that the law gives either passenger's freedom to pick up the newspaper any kind of special protection which would allow us to say that each passenger has a liberty/interest right to pick up the paper.

For the same reason, I don't think it's right to say that any of us has a 'right' to walk down the street,⁷⁸ even though the law imposes on each of us a duty not to obstruct the public highway unreasonably. That duty is not intended to protect any particular individual's freedom to walk down the street—for the obvious reason that a single individual's interest in being able to walk down the street unhindered is not sufficiently strong to justify anyone else having a duty not to obstruct the highway unreasonably. So as the law does not go out of its way specifically to protect your or my freedom to walk down the street unhindered, neither you nor I can say that we have a liberty/interest right to walk down the street unhindered. Nor can anyone say that they have a coercive right that I not obstruct the highway unreasonably as my duty not to obstruct the highway unreasonably is not imposed on me for the benefit of any particular individual, but for the good of society as a whole. So if I do obstruct the highway unreasonably, I will commit a crime (the crime of public nuisance), but not a tort. The fact that I will be liable to compensate those who suffer 'special damage' as a result of my crime does not bring my conduct within the realms of tort law. In fact, the fact that I will *only* be held liable to compensate those who suffer 'special damage' as a result of my crime shows that my conduct does not amount to a tort; if it did, a plaintiff would not need to show that he or she had suffered 'special damage' as a result of my conduct in order to bring a claim against me.

D. Conceptually Impossible Rights

In the chapter that Stevens has contributed to this book ('Rights and Other Things') he argues that:

A wrong ... occurs in a moment of time, although some wrongs can be repeated, such as libel, or can be ongoing such as a trespass to land. D commits a civil wrong in relation to C whenever he breaches a duty to C not to do *x*. It is consequently meaningless to talk of a duty not to be caused loss. If loss is suffered it is a consequence of a breach of duty, it cannot go to the definition of what D is under a duty to do or not to do.⁷⁹

If this argument were correct, it would be conceptually impossible for one person to owe another a duty not to cause them loss intentionally, using unlawful means to do so. If this is right, then in the *Second Variation* considered above,⁸⁰ Fred *could not* (contrary to my view) have violated Wendy's rights in intentionally crashing into the power station with the intentioning of disrupting her business.

Stevens' argument does not work. It does not follow from the fact that a 'wrong ... occurs in a moment of time' that it 'is meaningless to talk of a duty not to be caused loss.' If A had a duty not to cause B loss, that duty would be breached exactly at the

⁷⁸ Against Stevens, above n 16, at 8.

⁷⁹ Text accompanying n 11.

⁸⁰ See part V(B)(ii), above.

moment in time when A's actions first made B worse off. Stevens' denial that it is possible for duties not to cause others loss to exist is also hard to reconcile with his insistence, earlier in his chapter, that the duty a driver owes nearby drivers and pedestrians is 'a duty not to injure, and not a duty not to expose to the risk of injury.'⁸¹ While 'loss' and 'injury' clearly have different meanings for Stevens,⁸² the important point for our purposes here is that a duty not to cause someone injury and a duty not to cause someone loss have exactly the same structure. Given this, it is hard to see why Stevens is happy to accept that we owe other people the first kind of duty, while condemning the second type of duty as 'meaningless'.

E. A Merely Semantic Difference?

A couple of people with whom I have discussed this chapter have argued that if the rights-based theory of tort law I advance in this chapter is correct, there is then no *essential* difference between the approach that I think the courts should (and do) adopt in deciding tort cases (ask yourself whether the defendant violated a coercive right that we should recognise the plaintiff had against the defendant) and the approach to deciding tort cases that I criticised at the start of this paper (ask yourself whether it would be 'fair, just and reasonable', all things considered, to make the defendant compensate the plaintiff for some loss that the defendant has caused the plaintiff to suffer). The difference between the approaches, it was said, just comes down to semantics—all the things we might consider in determining whether it would be 'fair, just and reasonable' to make the defendant compensate the plaintiff for some loss that he or she has caused the plaintiff are, under my theory, simply repackaged as factors that we should consider in determining whether we should find that the defendant violated the plaintiff's rights in acting as he or she did.

I don't think the criticism is justified—even in relation to earlier drafts of this chapter, where the *Right Conditions* were, admittedly, sketched out in a much rougher form than they are now. Let's call the approach I want the courts to adopt (and which I claim they do adopt) in deciding tort cases, the 'rights-based approach'. Let's call the approach that I don't want the courts to adopt (and which I claim they don't adopt) the 'loss-based approach'. The rights-based approach and the loss-based approach to deciding tort cases *are* different, both in terms of the factors they take into account, and in terms of the results they come up with.

Let's look at factors first. Both of the people to whom I talked thought that if you take into account the public interest in determining what rights we enjoy against each other, the distinction between the rights-based approach to deciding tort cases and the loss-based approach to deciding tort cases weakens considerably. I don't think this is true. The role the public interest plays in deciding tort cases is very different under each approach. Under the rights-based approach to deciding tort cases, the public interest only ever comes in as a reason for *denying* a claim (on the ground that it would be contrary to the public interest to find that the plaintiff had a right that the

⁸¹ Text accompanying n 8.

⁸² For Stevens, 'loss' equates to being made worse off, and – in this context – 'injury' equates to suffering damage to one's body. Elsewhere, Stevens uses the word 'injury' as a synonym for 'wrong' but – in this context – he cannot be taken to suggest that the duty of a driver to nearby drivers and pedestrians is a duty not to wrong them, as such a duty would be completely redundant: it would equate to a duty not to breach some further duty that the driver owes nearby drivers and pedestrians.

defendant violated).⁸³ Under the loss-based approach to deciding tort cases, the public interest can come in as a reason for *granting* a claim (on the ground that society would be better off if the sort of conduct the defendant engaged in incurred some kind of sanction through the tort system).

Let's look at results next. Suppose that A, a driver, runs down B, a pedestrian. A was not at fault in any way for the accident, in which B is badly injured. B sues A in tort for compensation for his injuries. If we adopted a loss-based approach to deciding this case, we might well find that it is 'fair, just and reasonable' to hold A liable here. Doing so will not inconvenience A too much as he will be carrying liability insurance; and in any case, it would probably be a good idea to make drivers internalise all the costs resulting from cars being on the road so as to ensure that in time no more than an optimal number of cars will be on the road. (The optimal number being the number where the marginal costs resulting from adding one more car to the road will outweigh the marginal benefits.) But if we adopt a rights-based approach to deciding this case, we won't hesitate to dismiss B's claim. In order for B's claim to succeed, B would have to show that he had a coercive right that A *ensure* when she was driving that she not knock B down. While B would have an interest in A ensuring that she did not knock B down—thus satisfying the *Benefit Condition*—that interest could not ever be weighty enough to justify imposing on A a duty that would be so onerous to discharge. So the *Burden Condition* would not be satisfied in B's case, with the result that B would not be able to establish that A violated B's rights in running him down.

VII. Conclusion

I believe that the best hope of understanding tort law as an intelligible body of law lies in adopting a rights-based theory of tort law. However, those who agree with me on this point are, I fear, in danger of snatching intellectual defeat from the jaws of victory by advancing rights-based theories of tort law that are fundamentally flawed in the ways I have described in this chapter. However, my primary aim in writing this chapter has been constructive, not destructive. In setting out a rights-based theory of tort law that transcends the limitations of its predecessors, I hope to provide tort scholars with a proper basis both for determining whether or not tort law is genuinely rights-based, and – if it is – for determining what rights tort law should recognise us as having against other people.

⁸³ See, to the same effect, the 'pluralist approach to duty' set out by Andrew Robertson in his chapter in this book ('Rights, Pluralism and the Duty of Care') at text accompanying n 26.