

THINKING ABOUT TORT LAW – WHERE DO WE GO FROM HERE?

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I. WHERE WE ARE NOW

In August 1900, the German mathematician David Hilbert addressed the International Congress of Mathematicians in Paris. In the course of his speech he set out a number of mathematical problems that were as yet unresolved, with the object of challenging his audience, and future generations of mathematicians, to solve them. The original speech mentioned 10 problems, but the published version contained 23. By the year 2000, mathematicians had fully or partially resolved 17 of the 23 Hilbert problems, and in doing so fundamentally extended humanity's understanding of mathematics and its foundations.

The legal academy has no equivalent to the Hilbert problems. In this way, law as an academic discipline is very much like English or history – everyone pretty much goes their own way, coming up with their own projects to work on and issues to explore, some of which prove to be fruitful, others not. I think it's a pity that legal academics work in this way, for three reasons:

(1) Academics who work alone tend to avoid addressing really big, major questions because they are just too daunting to be taken on alone. It would be like trying to climb Everest on your own. So legal academics tend to focus on narrower, more manageable topics – ones where one can be confident that six months' or a year's worth of work might yield a decent publishable article. Only the young and foolish try to focus on anything big; and they soon wise up.¹

(2) Where different academics do happen to work on the same questions, all sorts of institutional pressures – in particular, the need to make a name for yourself – encourage them to find points of disagreement between themselves and make the most of those disagreements. They never seem to make any attempt to come together, and work together, to resolve their differences. Instead, the legal journals are littered with a series of Mexican stand-offs between: (a) a few academics who seem to take one view of a question; (b) a few academics who seem to take the opposite view; and (c) a few academics on the sidelines, arguing that sides (a) and (b) are 'really' talking past each other and addressing different issues, or that sides (a) and (b) are 'really' saying the same thing. And no one's backing down.

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¹ I remember attending a talk when I was a student in Oxford where Mark Kelman – one of the biggest names in 'critical legal studies' – observed that academics tended only to focus on big issues when they were young, and as they grew older they would focus more on much narrower and less interesting issues like planning law (his example, not mine).

(3) The lack of any sense among legal academics that they form a community of scholars who are dedicated to working *together* on resolving issues and questions that are important and need to be resolved is dispiriting and destabilising. Legal academics live a Nietzschean nightmare of having to create their own tables of values, their own horizons of what is important. It's a very hard trick to pull off successfully – it requires that you immerse yourself so deeply in your work that you stop thinking about whether what you are doing actually matters, and start simply assuming that it does. But not many people are capable of doing this – most people have more perspective – and the lucky/unlucky ones who can't, have to live with constant uncertainty about what they 'should' be doing with their lives as academics, and whether any of it really matters.

Thus the current state of the legal academy, so far as I see it: a lot of individuals working on their own on quite narrow issues; some debates on particular issues, going nowhere fast; and none but the most narrow-minded feeling that great about themselves or what they are doing.

You may think I'm far too pessimistic, but I'm not the only one.² Where I am not at all pessimistic is in my belief that we can do much better. And we will, if we come together as a community, determined not only to work *together* on questions and issues that actually matter, but also determined to *resolve* those questions and issues *in our lifetimes* and not leave them hanging for future generations of legal academics to pick over and use as a means of racking up research points.

This paper represents my own immodest attempt to try to foster the sort of sense of community among tort scholars that I think is desperately needed at this time. To do this, I will do two things. (1) I will set out a series of questions that I think tort scholars should be working on, and working on together, to resolve. (2) I will set out the different answers to those questions that are currently floating about in the academic literature, so that they are all gathered together in one place. (3) I will make some suggestions as to how we might determine which of these various answers are correct.

II. THE FIRST QUESTION

The first question is obvious. It is – *What are we talking about, when we talk about tort law?* We can hardly think about tort law without first having some idea about what we are thinking about when we think about tort law. And it is a sign of some trouble in tort law scholarship that some of its most distinguished names grow evasive when pressed on this issue. But we must resolve it – we cannot make any progress in understanding a subject that isn't even a subject. Fortunately, there are some answers to this first question that are available to us.

For a long time, tort scholars have assumed that:

² See Pierre Schlag, 'Spam jurisprudence, air law, and the rank anxiety of nothing happening (a report on the state of the art)' (2009) 97 *Georgetown Law Journal* 803, 804: '...American legal scholarship today is dead – totally dead, deader than at any time in the past thirty years. It is more dead, vastly and exponentially more dead, than critical legal studies was ever dead during its most dead period. Nothing's happening.'

(A) Tort law determines when one person – D – will be held liable to pay another – P – compensation for a loss that D has caused P to suffer.

For those who believe that (A) is true, tort law is centred around the concepts of *loss*, *causation*, and *liability to pay compensation*.

For the last 15 years or so, (A) has come under sustained attack. In Birksian terms,³ (A) is criticised for converting tort law – which, as even its name suggests, is an area of law focussed on an *event* – into an area of law that is focussed on a *response*. Instead, it is argued that:

(B) Tort law determines what basic rights we have against other people, and what remedies will be available to us when those rights are violated.

Where P will have a basic right against D that D act (or not act) in a particular way if: (i) the law imposes a duty on D to act (or not act) in that way; (ii) it imposes that duty on D for P's benefit and not for anyone else's benefit; and (iii) P does not have to do anything special for the law to impose that duty on D, such as paying D money.

Given this definition of what a basic right is, (B) can be restated as:

(C) Tort law determines what basic duties other people will owe us, and what remedies will be available to us when those duties are breached.

(C) and (B) say exactly the same thing. (C) is probably more illuminating, and less liable to give rise to confusion. But it must be admitted that (B) has a bit more zing and appeal about it.⁴

John Gardner is unhappy with (B) (and, by extension, its alternative formulation in (C)). He thinks that (B) does not effectively distinguish tort law from the law of equity – or more accurately, that bit of the law of equity that is concerned with equitable wrongdoing.⁵ He would like to say that:

(D) Tort law determines what basic rights we have against other people that they not cause us loss, and give us a right to sue for reparative damages when that right is violated.⁶

John Gardner thinks that this helps to distinguish tort law from the law on equitable wrongdoing as 'The main reason why the defendant has duties to the plaintiff in the law of torts is to protect the plaintiff from losses... This contrasts with the position in

³ Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1989), 39-40.

⁴ The first and second editions of McBride & Bagshaw, *Tort Law* (2001 and 2005 respectively) described tort law as being made up of 'duties owed to others' and remedies for the breach of those duties. Under the influence of Robert Stevens' *Torts and Rights* (OUP, 2007), the third and fourth editions (2008 and 2012 respectively) switched into using the language of rights to describe the fundamental building blocks of tort law. Rob has admitted 'I could have entitled my book... *Torts and the Duties We Owe One to Another* but that wouldn't have been quite so snappy' (Robert Stevens, 'Rights and other things' in Nolan and Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012), 117). But snappiness has its dangers: see the extended critique of the way Rob uses the word 'right' in McBride, 'Rights and the basis of tort law', also in the Nolan and Robertson volume.

⁵ We have to make this qualification because there are plainly some areas of the law of equity that form part of tort law – for example, the rules on when and what equitable remedies (such as an injunction) will be available when someone commits a tort.

⁶ See John Gardner, 'Torts and other wrongs' (available on SSRN).

equity where the main reason for the defendant's duties is to secure that the defendant's dealings are conducted for the plaintiff's advantage, and not the defendant's own.⁷

I think there are two major problems with (D).

(1) Many of the basic rights that tort law gives us are not obviously designed to protect us from suffering losses. I'm thinking here of such things as:

(i) the right that a patient has to be told of the (non-insignificant) risks of an operation that her doctor is suggesting that she have;

(ii) the right that the beneficiary under a will has that the solicitor who has taken on the job of drawing up the will take care to ensure that the will is valid, and is drawn up expeditiously;

(iii) all of the rights that property owners have that other people not interfere with that property (where such interference can occur without in any way causing the property owner loss).

(2) For (D) to work as a definition, it must be possible to come up with an account of when someone will suffer a 'loss' as a result of another's actions. After all, if tort law is concerned to endow us with rights that others not cause us 'loss', we must be able to determine when someone's actions will result in us suffering a 'loss'. I don't want to say that it is impossible for someone to come up with such an account, but I do want to observe that practising tort lawyers have never needed or wanted to come up with such an account. The reason is that practising tort lawyers never need or want to ask – Did A suffer a loss as a result of B's *actions*? Their only concern is to ask – Did A suffer a loss as a result of B's *violating A's rights*?⁸ The baseline for tort lawyers' inquiries into whether A has suffered a loss is set by the position that A would have been in had B not violated his rights. So the scope of A's rights against B determine whether or not A can claim he has suffered a loss at B's hands. From the point of view of a practising tort lawyer, Gardner's position seems to put the cart before the horse in that it allows the issue of what losses A might suffer at B's hands to determine the scope of what rights A will have against B under the law of tort. This does not provide a very promising basis for an argument that is supposed to tell us something about the nature of tort law, *as it is currently practised*.

The only reason John Gardner insists on (D) is to find some way of distinguishing tort law from the law on equitable wrongs. (Even then, it might be observed that there are quite a few equitable wrongs which seem just as much concerned with protecting people from suffering losses as Gardner claims tort law is.)⁹ If this is a concern (which it isn't to most people), there are other ways of distinguishing the two areas of law. One could argue that tort law and equity both do (B), *but from different starting points*. On this view:

⁷ Ibid, 12-13.

⁸ So, for example, Andrew Tettenborn's essay 'What is a loss?' (in Neyers, Chamberlain and Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing, 2007)) is solely concerned with the issue of (at 441) 'just what do we *mean* when we say that a plaintiff *whose rights have been infringed* has nevertheless suffered no loss? Or, if you prefer to put the question positively, what is the law referring to when it talks about 'loss'?' (emphasis added).

⁹ For example, handing over trust assets to a third party without authorisation, dishonestly assisting someone to commit a breach of trust, passing off, breach of confidence.

(E) Tort law determines what basic rights we have against each other, and what remedies will be available to us when those rights are violated, and it does so by giving effect to, and elaborating on, rules and principles that were first developed in the old common law courts.

A similar statement could be made about ‘The law on equitable wrongdoing’, substituting the words ‘courts of Equity’ from ‘common law courts’. (E) works perfectly fine to distinguish tort law from the law on equitable wrongs without committing us to any unduly restrictive – and possibly impossible – views on the nature of the rights that tort law gives us. As between (B) and (E), I think that (E) is more accurate, but for working purposes in talking about tort law, (B) is perfectly adequate.

In his piece on ‘Torts and other wrongs’, John Gardner assumes that the American academics John Goldberg and Benjamin Zipursky endorse (B). They may well do.¹⁰ However, it is worth observing that there is nothing in their ‘civil recourse’ theory of tort liability that *requires* that we endorse (B). To see why, it’s easier if we look at tort law using definition (C), rather than (B). (While remembering that (B) and (C) are formally equivalent.) (C) presents tort law as *forward looking* – as imposing duties on us for other people’s benefit, and telling us what remedies will be available if we breach those duties. So tort law – as defined in (C) – operates as a guide to conduct, in much the same way that the Highway Code does.

In contrast, Goldberg and Zipursky’s ‘civil recourse’ theory of tort law is *backward looking*. It sees tort law as performing the following functions: (i) looking back at what a defendant has done; (ii) determining whether that conduct was ‘wrongful’ (in some sense still to be explored); and (iii) if it was, providing the victim of that wrong with a peaceful means of recourse against the defendant wrongdoer. Nowhere in this picture do we see tort law: (iv) laying down rules that are meant to be followed in future.

Of course, one could argue that in doing (ii), tort law is implicitly doing (iv). And there are some passages in Goldberg and Zipursky’s work that support this idea: that if the law recognises that your conduct is ‘wrongful’ then it is implicitly telling the rest of us not to do the same thing in the future.¹¹ But I don’t see that there is any *necessary* connection between these two things, particularly when the rest of Goldberg and Zipursky’s work makes it clear that (in their opinion) what the law is doing when it is identifying your conduct as ‘wrongful’ is that it is basically saying that it *thinks*¹² you have committed a *moral* wrong that is so serious that in a pre-legal

¹⁰ See, for example, John Goldberg and Benjamin Zipursky, ‘Torts as wrongs’ (2010) 88 *Texas Law Review* 917, 937: ‘Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person’s well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition’ (emphasis added).

¹¹ Ibid, at 949: ‘The statement that it is wrong to lie, spoken by a parent to a child or written by an opinion columnist for newspaper readers, contains injunctive force: it condemns lying and conversely urges refraining from lying. Making such a statement is, moreover, identifying a way of treating other people as unacceptable. The same is true when a court holds liable a broker who has misrepresented a company’s financial condition to an investor who relied on that misrepresentation to his detriment. The court is articulating a norm of conduct that requires certain actors to refrain from deceiving other to their detriment and condemns doing so as wrongful. The first would be said to be a duty-imposing rule of morality, the second a duty-imposing rule of law.’

¹² Of course, the law may be wrong to think this, so there is a conceptual space between the notion of a legal wrong (what the law recognises as being wrongful) and a moral wrong (what is actually wrongful): ibid, 951: ‘The fact that an act falls under an authoritative legal directive that characterizes

state the victim of your wrong would have been *morally* entitled to seek some sort of recourse against you.

In order to make some sort of connection between the law's recognising that doing *x* is *morally* wrongful and the law's telling us not to do *x*, we could take the *tough line* that *whenever* the law makes it clear that it thinks that doing *x* is morally wrongful, it is telling us not to do *x*. But the *tough line* seems to have unacceptable consequences. For example, one could read s 4 of the Law Reform (Miscellaneous Provisions) Act 1970 (which provides that 'no person shall be entitled to...claim...damages from any other person on the ground of adultery with the wife of the first-mentioned person') as saying that making someone a cuckold is morally wrongful, but not so seriously wrongful that it is prepared to offer the cuckold any form of redress for the cuckolding. But if this is correct, and the *tough line* is also correct, then s 4 of the 1970 Act would seem to be saying that you have a legal duty not to sleep with another man's wife – which can't be right. So the *tough line* seems not to work.

But the line that I think Goldberg and Zipursky would like to take – the *G&Z line* – seems equally problematic. The *G&Z line* (so far as I can predict) would be that we can *only* say (a) that the law is telling us not to do *x*, *if* (b) the law regards doing *x* as so seriously morally wrongful that it ought to provide some form of recourse against whoever does *x*. On this view we cannot say that the law tells us not to commit adultery, because s 4 of the 1970 Act makes it clear that the law does not regard adultery as so seriously wrongful as to warrant providing some means of recourse to a man whose wife has sex with someone else. The argument may end up in the right place – there is, of course, no legal duty not to commit adultery – but it gets there by a less than convincing route. There seems no logical reason why we can only say (a) when (b) is true.

It is for Goldberg and Zipursky to sort out these difficulties with their theory. But reflecting on these difficulties indicates that it *might* be possible for *someone* – if not Goldberg and Zipursky themselves – to argue that:

(F) Tort law determines when someone has been the victim of a moral wrong that is so serious that the victim would, in a pre-legal state, have been morally entitled to seek some kind of recourse against the perpetrator of that wrong, and provides the victim of that wrong with a peaceful means of obtaining redress for that wrong.

I have been arguing that (B) and (F) are different. For example, if you believe (B), then what the House of Lords was doing in *Donoghue v Stevenson*¹³ was determining whether consumers automatically have a legal right against manufacturers that those manufacturers take care to ensure that their goods were not dangerous to use, with the result that they don't have to do anything special to obtain that right.¹⁴ If you believe (F), then what the House of Lords was doing was considering whether in a pre-legal state, carelessly causing someone to fall sick by putting into circulation a ginger beer bottle with a dead snail in it would have counted as such a serious moral wrong as to

it as a legal wrong does not entail that such an act, in the circumstances it actually occurred, warrants categorization as morally wrongful.'

¹³ [1932] AC 562.

¹⁴ For such a reading of *Donoghue v Stevenson*, see Andrew Tettenborn, 'Professional negligence: free riders and others' in Economides *et al* (eds), *Fundamental Values* (Hart Publishing, 2000) – for me, one of the top ten articles ever written on tort law in the UK.

entitle the victim of that wrong to seek some sort of recourse against the person who put the ginger beer bottle into circulation.

So should we accept (F)? Two reasons are commonly given for rejecting (F).

(1) It may be questioned whether there are any wrongs that are genuinely ‘redress-entitling’ (my term, not Goldberg and Zipursky’s) in the sense that in a pre-legal state, the victim of that wrong would have been morally entitled to take direct, violent action against the perpetrator of that wrong to seek some sort of redress for what was done to them.¹⁵ Of course, people feel urges to seek revenge on those they feel have wronged them (a fact that I will return to later), but that does not mean that those urges are legitimate or should be given some peaceful form of expression through the law.

(2) (F) does not seem to fit with what we know about how tort law works, and how tort cases are decided. Most importantly, there are plenty of occasions where someone is held liable in tort for doing things that do not seem to amount to a redress-entitling wrong: for example, where someone innocently converts someone else’s property, or innocently trespasses on another’s land, or where someone causes a claimant harm by inadvertently breaching a statutory duty.¹⁶ In many cases where a defendant is held liable in negligence, we may also doubt whether the defendant’s conduct came anywhere close to amounting to a redress-entitling wrong; for example, where the defendant was trying to do his best to avoid harming the claimant, but could have done better.

Goldberg and Zipursky have provided a good explanation why the second reason for rejecting (F) does not stand up. They readily acknowledge that the law’s catalogue of ‘wrongs’ is very different from the list of redress-entitling wrongs that you and I might come up with if we were asked to do so. They explain that it is for institutional reasons that the law ends up stigmatising as ‘wrongful’, conduct that no one would describe as redress-entitling. These institutional reasons for the law’s adopting broader and less flexible accounts of when someone will have ‘wronged’ another than we would expect it to if (F) were true are: (i) the need to make it relatively easy for the courts to determine whether the defendant ‘wronged’ the plaintiff, and avoid protracted and difficult hearings; and (ii) the need to send a strong message about ‘how society expects its members to behave’.¹⁷ However – so far as I know – Goldberg and Zipursky have yet to explain why the first reason for rejecting (F) does not stand up. For myself, I think it does, and accordingly reject (F).

So, of the six definitions of tort law that I have set out above, I believe we should reject (A), (D) and (F). For working purposes, I think we can proceed on the basis that (B) is true, while acknowledging that on occasion we may need to supplement (B) by reference to (C) (its formal equivalent, except using the more precise language of duties owed to another, rather than rights that one has against another) and (E) (if we need to distinguish the law of tort from the law of equitable wrongs).

¹⁵ See John Finnis, ‘Natural law: the classical tradition’ in Coleman and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP, 2002), 656.

¹⁶ See Jane Stapleton, ‘Evaluating Goldberg and Zipursky’s civil recourse theory’ (2006) 75 *Fordham Law Review* 1529.

¹⁷ Goldberg and Zipursky, ‘Tort law and moral luck’ (2007) 92 *Cornell Law Review* 1123, 1158.

Others may disagree. For the remainder of this paper, I will proceed on the basis that (B) is correct, and formulate the next questions tort lawyers should be looking to answer on that basis. But I hope I will say enough in my discussion of what those questions should be to enable those who believe that (A) or (F) is correct to see what form their own ‘next questions’ should take.

III. THE SECOND QUESTION

Academics who endorse (B) have tended to busy themselves with answering *analytical* questions such as:

(1) *The hard law question*: What basic rights does tort law give us, and what remedies will be available when those rights are violated? and

(2) *The interpretive question*: What ideas or principles best explain why tort law gives us the basic rights that it does, and why it makes available the remedies it does when those rights are violated?¹⁸

Though obviously these are questions that need to be answered, I think that there is a danger that paying so much attention to these analytical questions is actually getting in the way of our making any worthwhile progress in thinking about tort law. This is for two reasons.

(1) It is very likely that there are no *completely* clear answers either to the *hard law* question or the *interpretive* question.

Looking at the *hard law* question first, it is obviously clear that tort law gives us certain basic rights – such as a right that others not touch us except in certain defined circumstances. But the available case law makes it hard to tell whether we enjoy certain other basic rights. For example, I would say that there are a huge number of *different* duties of care that we might owe other people in different situations. David Howarth argues that, in fact, we each owe each other a basic duty to take reasonable care not to harm that other by acting unreasonably, with certain exceptions where we are left free to harm others carelessly.¹⁹ I am not sure how the available case law would allow us to say who is right. Similarly, I would say that someone driving down the road owes nearby pedestrians a duty to take care not to drive dangerously. Robert Stevens would say that he owes those nearby pedestrians a duty not to injure them by carelessly driving badly.²⁰ Again, it is very difficult to find relevant materials that allow anyone to say with confidence which of us is correct.

When we turn to the *interpretive* question, the difficulties in finding clear answers increase. There are lots of different aspects of the rights and remedies that tort law gives us that are capable of being explained in a variety of plausible ways. For example, consider the old *actio personalis* rule – now abolished in the UK in all

¹⁸ Though I separate out these two questions, I readily acknowledge that in a common law system where there is an institutional commitment to ensuring that the law is principled and coherent, there will be a lot of overlap between these two questions.

¹⁹ David Howarth, ‘Many duties of care – or a duty of care? Notes from the underground’ (2006) 26 *Oxford Journal of Legal Studies* 449.

²⁰ Stevens, ‘Rights and other things’, above, n 4, 117-118.

but defamation cases²¹ – that a victim of a tort’s right to sue other people in tort would die with him. Someone who adheres to the interpretive view that damages in tort claims are designed to restore to the victim of a tort the means that he has been deprived of by that tort would explain this rule on the basis that if it is no longer possible to do this (because the victim of the tort is dead), there is no point in allowing a claim in tort to be made against the tortfeasor. Someone who endorses Goldberg and Zipursky’s ‘civil recourse theory’ of tort law would give a quite different explanation of the rule: that if the victim of a tort is no longer around and wanting to seek some sort of recourse against the person who did him wrong, then there is really no point in allowing a claim in tort to be made against that person. It is hard to see how we could tell which of these views is correct. We could come up with some real or imaginary cases where the result should be different according to which view is correct, and then ask ourselves how the courts decided, or might have decided, those cases when the *actio personalis* rule existed. But if the case is real, who’s to say that the courts might not have decided the case another way if they had been made aware of the issue of principle that rode on it? And if the case is imaginary, how can we guess how the courts would have decided that case if we cannot tell what principles *really* underlie the law?

The fact that there are no completely clear answers to the *hard law* or the *interpretive* question means that these questions are particularly prone to give rise to protracted debates which take up a lot of time and get nowhere. If we are going to make some progress in thinking about tort law, we have to avoid these kinds of fruitless debates, and seek to advance on other fronts.

(2) Homer’s *Odyssey* tells us the story of Odysseus and his men seeking to make their way back home to Ithaca after the end of the Trojan War. In the course of their travels, they came across the island of the Lotus Eaters. Anyone who ate the flowers and fruits of the lotus plant would lose interest in doing anything else. Odysseus sent some of his men to explore the island, but they never came back. He sent some more, and they too never came back. Finally, he went to look for them, found them eating lotus fruits and flowers, realised what had happened, and dragged them back onto the ship, and set sail. A lucky escape.

What I want to suggest is that the *hard law* and *interpretive* questions are, for legal academics, the equivalent of what the lotus fruits and flowers were for Odysseus’ men. The game of trying to answer these kinds of questions (let’s call it ‘the AQ game’, for ‘analytical question game’) is addictive, and consequently makes you lose interest in doing anything else. This is for three reasons.

First, the AQ game is fun to play. I have a lot of fun writing (with Roderick Bagshaw) my textbook on tort law, taking a whole load of cases and seeing how to fit them into some sort of intelligible pattern. And when you find a new case that fits perfectly with your ‘take’ on the law, you get a little dopamine shot in the brain – a feeling that you are ‘getting somewhere’, that you ‘really understand’ what’s going on with this area of the law.

Secondly, the AQ game is not too hard to play. Computer games that are simply too hard are not addictive because users quickly lose interest in them. But the AQ game is a perfectly balanced game – not so easy that it’s uninteresting, but not so hard that it’s off-putting.²² For example, to play the interpretive level of the AQ game, all

²¹ Law Reform (Miscellaneous Provisions) Act 1934, s 1.

²² Here’s Pierre Schlag, again (see above, n 2, at 809): ‘...legal thought is not rocket science. It’s just not: Putting cases together (case-crunching), recognizing their patterns (theory), weaving them into this

you need is some knowledge of the law, and some knowledge of philosophy (moral and political) and you are away, constructing theories of why the law says what it says, and testing them against the available materials – and always with the option of chucking any cases that are just too intractable into the sad pile marked ‘wrongly decided’.

Thirdly, there are a number of external goods available to those deemed to be high achievers in the AQ game – research funding, prestigious academic posts, citations in real life cases. The prospect of being able to obtain some or all of these goods is an added incentive to keep on playing the AQ game.

Given all this, why would anyone want to do anything but play the AQ game? And so it proves. The amount of literature and effort devoted to the AQ game is vastly out of proportion to the actual tangible progress that we make in coming up with answers to the *hard law* and *interpretive* questions, but still people spend all their time playing.

The fact that people spend so much time playing the AQ game would not be so bad if it deserved to be treated as if it were the only game in town. But it does not. For example, suppose that it could be shown – as some interpretive theorists of tort law contend that it can be – that tort law in its current state can be best explained as requiring us not to violate other people’s independence as persons.²³ Well, so what? Isn’t it more important to know what tort law *should* be doing, rather than what it is doing at the moment? It’s important, of course, that we know what direction we are travelling in at the moment: but it’s far more important that we know whether or not we are travelling in the *right* direction.

For those of us who accept (B) as being correct, we cannot dare to make the next question we address an analytical one, for fear that it will take us into woods from which we will never be able, and never want, to emerge. So the second question I would suggest tort academics (who endorse (B)) should focus on is not analytical at all, but *normative*. The question is – *What basic rights should tort law give us against other people?* This is a much harder question than either the *hard law* or the *interpretive* question, and it is not surprising that academics should shy away from addressing it explicitly. But I think if we are to make some real progress in thinking about tort law, we have to confront it head on.

The available literature suggests four different answers to my second question. I say ‘suggests’ because the available literature is not really concerned to make a normative case for saying that we *should* have certain rights and *should not* have other rights. Instead, it is concerned to make interpretive claims about what ideas and principles best explain why we have the rights that we do have. But when an interpretive theorist of the law argues that a given area of law can be best explained as giving effect to certain ideas and principles, those ideas and principles almost always seem to be – through happy chance – ones that the interpretive theorist himself endorses.²⁴ So I see nothing wrong with mining interpretive claims in the literature as

or that well-known argument... – all in all, it’s just not the sort of thing that requires or permits the display of great intellectual prowess.’

²³ See text at nn 28-31, below.

²⁴ There are, of course, interpretive theorists who attempt to do a hatchet job on tort law, arguing that it can be best explained as giving effect to ideas and principles that no sensible person would ever endorse. Such accounts of tort law are pretty worthless, characterised as they are by a signal unwillingness to consider any other explanations of tort law that might present tort law in a more edifying light.

to what ideas and principles best explain what tort law is up to, in order to come up with some possible answers to the normative question of what ideas and principles tort law *should* give effect to in endowing us with basic rights against other people.

So – here are the four different answers to my second question that are suggested by the available literature. There is, first, the *Rawlsian contractualist* answer, according to which:

(G) Tort law should endow each of us with those basic rights that everyone would agree each of us should have, were we to make that agreement under fair conditions.

As Peter Gerhart observes in his recent book *Tort Law and Social Morality*: ‘By and large, scholars have not taken advantage of the [Rawlsian] device of the veil of ignorance when thinking about tort law.’²⁵ However, his own book can be taken as suggesting (G).

There is, secondly, the *balanced* answer:

(H) Tort law should endow A with a basic right against B so long as: (i) the benefit of giving people like A such a right would outweigh the burden to people like B of A’s having such a right against her; and (ii) the benefit of giving people like A such a right is not offset by any net costs to the community from people like A’s being given such a right.

I call this answer – which is the answer set out at greater length in my piece on ‘Rights and the basis of tort law’²⁶ – the ‘balanced’ answer because it involves, first of all, balancing the interests of people like A against the interests of people like B in determining whether there is a case *in principle* for people like A to be given a right against people like B; and then balancing the interests of people like A against the interests of the community as a whole in determining whether *all things considered* people like A should be given a right against people like B.

There is, thirdly, the *social harmony* answer:

(J) Tort law should endow A with a basic right against B that B do (or not do) *x*, if B’s not doing (or doing) *x* would result in A developing understandable feelings of anger towards B that might result in A seeking some sort of revenge, or recourse, against B.

This is, of course, Goldberg and Zipursky’s ‘civil recourse’ theory of tort law, represented – as Jane Stapleton called for it to be²⁷ – as a normative theory of what tort law should say.

There is, fourthly, the *Kantian Right* answer:

(K) Tort law should, in endowing us with basic rights against other people, give effect to the right to independence that we each have against everyone else.

This is the normative version of the interpretive claim made by theorists like Ernest Weinrib²⁸ and Arthur Ripstein²⁹ – among others – that this is what tort law already

²⁵ Peter Gerhart, *Tort Law and Social Morality* (Cambridge University Press, 2010), 93.

²⁶ McBride, above, n 4.

²⁷ See Stapleton, above, n 16, 1562.

does. Tort law (or so it is claimed) protects our right to independence by preventing other people depriving us of the means that we are entitled to use to pursue the purposes we have chosen to pursue. A succinct and very clear statement of this interpretive view of tort law can be found in Ripstein's very recent paper 'Civil recourse and the separation of wrongs and remedies', from which the following passages are taken.³⁰

The means that you have are, from the point of view of the law of tort, just your own person, that is, your bodily powers and mental capacities (as well as your reputation), and whatever things outside of your own body which are yours, that is, your property... To say that [these means] are yours, as against others, is...to say that you, rather than anyone else, are the one who gets to decide how they will be used. That is...why you can be wronged if somebody touches you without your authorization: that person uses your person – your body – for a purpose that you have not set.

[Tort law] restricts the use of means in two straightforward senses: first of all, the law of tort prohibits trespasses of all forms. You are not entitled to use or even touch another person's body or property without that other's permission, and you are not allowed to do so, quite apart from whatever worthy or unworthy purpose you might be pursuing. Second, you are not entitled to injure other people, either in their person or their property, by using your own property in ways that characteristically cause such injuries.

The first set of restrictions generates a wide variety of trespass-based torts; the second set generates...“harm-based” torts. In a trespass-based wrong, liability is premised on defendant's use of plaintiff's person or property. Defendant need only intend to use something that is another's, and a trespass can be committed even if defendant did not, or even could not know, the title of the thing being used.

Harm based torts concern the side effects of one person's use of his or her own means on the ability of others to continue using their own means. For example, the tort of nuisance is organized around the thought that a landowner's use and enjoyment of his or her own land will inevitably have side effects on his or her neighbours... Given that some side effects are inevitable, the question of whether a particular side effect constitutes a nuisance turns into the question of whether it is excessive in relation to the ability of a plurality of neighbors to each use and enjoy his or her own land, consistent with the ability of other neighbors to do the same.

In the tort of negligence, the same general form of reasoning prohibits people from injuring each other's means through dangerous use of their own means. As people use their means, whether their own bodies or chattels, some side effects on others are inevitable... The law of negligence... [determines] whether defendant's conduct was too dangerous, that is, whether it is was of a type that, in the circumstances, was too likely to interfere with plaintiff's security of his or her means.

²⁸ Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

²⁹ Ripstein, 'Beyond the harm principle' (2006) 34 *Philosophy and Public Affairs* 215; 'Tort law in a liberal state' (2007) 1 *Journal of Tort Law* 3; 'Civil recourse and the separation of wrongs and remedies' (2011, available on SSRN) (henceforth, 'Civil recourse').

³⁰ Ripstein, 'Civil recourse', 9-12.

This austere structure of protecting each person's means against use by others, or damage through the excessive side effects of other people's use of their means, generates the familiar structure of the law of tort. Most importantly, it generates the fundamental distinction between nonfeasance and misfeasance, that is, between wronging someone and failing to confer a benefit on that person. To interfere with what another person already has is a wrong, but to fail to provide aid to that person, no matter how badly that person needs it, is not.

Neither Weinrib nor Ripstein would claim to have invented this explanation of what tort law does. That honour goes to Immanuel Kant, the first part of whose *Metaphysics of Morals* ('The Doctrine of Right'), lay the groundwork for thinking about tort law in this way. Kant's assertion that '*Freedom* (independence from being constrained by another's choice) insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only right belonging to every man by virtue of his humanity'³¹ is key to this view of tort law.

So – we have four different answers to our second question. How do we determine which one is correct? I suggest a good starting point would be to establish whether or not we do have – as Kant contends that we do – a right to independence. Let's call this the *Independence Thesis*. If the *Independence Thesis* is correct, then that automatically establishes that (K) is correct, and (G), (H) and (J) are incorrect. This is because if we do have a right to independence, then the *only* thing that tort law *can* justifiably do is to give effect to this right to independence. If it does anything else, then it will violate our right to independence.

For example, suppose that it were the law that if A were in peril of his life, and B could easily save his life, then A would have a right that B save his life, and let's say that the law took this stance because A would benefit a great deal from his life being saved, and subjecting B to a duty to save A's life would not cost B much, and imposing such a duty on people like B would not have any unacceptable side effects for society as a whole. If the *Independence Thesis* is correct then the law would be unjustified in granting A a right that B save his life. Doing so would do *nothing* to preserve A's independence as a person (as opposed to his welfare), and deprive B of her independence to choose what to do with the means at her disposal.³²

³¹ Immanuel Kant, *Metaphysics of Morals*, Introduction, 6:237 (trans. Mary Gregor). ('6:237' means page 237 of the sixth volume of the Prussian Academy edition of Kant's works.)

³² The fact that, if the *Independence Thesis* is correct, the *only* thing tort law can justifiably do is protect our independence as persons helps to explain certain otherwise strange and (in some cases) infuriating features of the writings of *Kantian tort theorists* who make the interpretive claim that tort law *does* work to protect our independence as persons. Namely:

(1) The limited range of rights that *Kantian tort theorists* are willing to consider a claimant may have had, in considering whether a defendant could be said to have violated that claimant's rights. If the *Independence Thesis* is correct, only independence-protecting rights can count as they are the only rights that tort law can justifiably recognise.

(2) The way *Kantian tort theorists* identify *corrective justice* (which everyone else normally associates with a principle that a defendant who has wronged a claimant should repair the harm that the claimant has suffered as a result of that wrong being committed) with repairing the consequences of a defendant's violating a claimant's right to independence, so that any duties to repair that do not arise out of a violation of the claimant's independence do not count as examples of 'corrective justice' at work. If the *Independence Thesis* is correct, then a defendant can only be said by tort law to have wronged a claimant and incur a consequential duty to repair if he has violated the claimant's right to independence.

(3) The tendency *Kantian tort theorists* have to assert that tort law has *no choice* but to live up to the claims that they make for it. If the *Independence Thesis* is correct, then – as I have observed – then

So if we want to determine which of (G), (H), (J) or (K) is correct, we must find out whether the *Independence Thesis* is correct. Unfortunately, Kant did not attempt to provide any basis for the *Independence Thesis*, saying instead that his ‘Universal Principle of Right’ (which elaborates on the *Independence Thesis* by asserting that ‘Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law’) was ‘a postulate that is incapable of further proof’.³³

Despite this, I think there are four arguments in favour of the *Independence Thesis* that we could consider, to see whether any of them provide a sufficient basis for endorsing it.

(1) *The logic of ownership*. The first argument is that the *Independence Thesis* simply follows from the fact that certain means (such as my body, and my property) belong to me, and not to you.

If my body belongs to me, then what that means is that I am the only one who gets to decide what use to make of my body. If anyone else could decide what use to make of my body, then it would no longer truly belong to me. Of course, if I decide to make use of my body to grab you and wrestle you to the ground, I cannot justify that on the basis that my body belongs to me and as such I am free to do what I like with it. If I assert that my body belongs to me, then I must also acknowledge that your body belongs to you, and that grabbing you and wrestling you to the ground is wrongful.

So the *Independence Thesis* – and workings out of that thesis in things like the Universal Principle of Right – simply gives effect to the idea that different means belong to different people, and ensures that all means-owners enjoy an equal measure of freedom to use the means at their disposal to pursue purposes that they have chosen to pursue.

The difficulty with this argument is that it justifies the *Independence Thesis* at the cost of opening up debates over what is implied by saying that a given set of means *belongs* to someone. We *could* argue that the fact that A owns a given set of means implies that he *must* be allowed *as much freedom as possible* to determine how to use those means, subject only to everyone else being allowed *as much freedom as possible* to determine how to use the means that belong to them. As Arthur Ripstein observes, ‘the sense in which your means are your own is that you alone, as against others, are entitled to determine the purposes for which they will be used.’³⁴ However, to say that a given set of means belongs to you does not *necessarily* imply that you must be allowed a maximal amount of freedom to decide how to dispose of those means. Other models of what owning something means are possible.

the only thing tort law can justifiably do is protect people’s independence as persons. Point (3) reminds me of a funny story told by Derek Parfit in the Preface to his *On What Matters* (Oxford University Press, 2011) about asking a Kantian philosopher about Kant’s Categorical Imperative: ‘I asked a Kantian, “...if I don’t give myself Kant’s Imperative as a law, I am not subject to it?” “No,” I was told, “you have to give yourself a law, and there’s only one law.” This reply was maddening, like the propaganda of the so-called “People’s Democracies” of the Soviet bloc, in which voting was compulsory, and there was only one candidate. And when I said, “But I haven’t given myself Kant’s Imperative as a law”, I was told “Yes you have.” This reply was even worse.’ (Volume 1, xlii-xliii.)

³³ Kant, above, n 31, 6:231.

³⁴ See Ripstein, ‘Civil recourse’, 10.

For example, under the *social* view of ownership,³⁵ being vested with ownership of some thing does not just confer rights on the owner to decide how to use that property, but also responsibilities to act wisely in exercising those rights. On this view, *the trust* provides a more illuminating picture of what it means to be an owner of property than that provided by the institution of legal beneficial ownership of an item of property. If this view of what it means to own something is correct, then there is no reason why an owner of a given set of means must be allowed *as much freedom as possible* to determine how those means are used.

Alternatively, under the *exclusion* view of ownership,³⁶ being vested with ownership of some thing merely means that you are given the power to veto over what *other people* may positively do with that thing. On this view, any limits that the law places on what *you* may positively do with that thing are not incompatible with your being an owner of that thing. So, for example, I would still count as being the owner of Titian's *Diana and Actaeon* even if the UK government prevented me from selling that painting to a buyer located overseas.

So simply to assert that a given set of means belongs to a particular individual does not, of and in itself, imply that that individual must be allowed a maximal degree of freedom to decide how to dispose of those means. To establish this, it would have to be shown that there is something incoherent or irrational or just plain wrong with the social and exclusion views of what it means to be the owner of something. And I am not sure there is.

(2) *Ends, not means*. The second argument is that the *Independence Thesis* gives effect to the moral requirement that we should treat other people as ends, not means. The idea is that if A is drowning in a lake, and we impose a legal duty on a passerby B to save A's life, we are merely using B as a means of securing A's welfare. The only set of legal rules that will treat A and B and all of us as ends in themselves, is one that will guarantee to each of us the maximum possible measure of independence from each other.

The trouble with this argument is that it is vulnerable to the arguments laid out in Chapter 9 of Derek Parfit's *On What Matters*, which explores what it means to treat someone *merely as a means*. Parfit argues that:

we do *not* treat someone merely as a means, nor are we even close to doing that, if either

(1) our treatment of this person is governed or guided in sufficiently important ways by some relevant moral belief or concern,

or

(2) we do or would relevantly choose to bear some great burden for this person's sake.

For some moral belief to be *relevant* in the sense intended in (1), this belief must require direct concern for the well-being or moral claims of the person whom we are treating in some way. Suppose that some...slave-owner never whips his slaves because he believes that such acts would be wrong. But what would make such

³⁵ See, most recently, the symposium on the 'The social function of property: a comparative perspective' in (2011) 80 *Fordham Law Review* 1000ff.

³⁶ See James Penner, *The Idea of Property in Law* (OUP, 1997), chapter 4.

acts wrong, he believes, is not the fact that he would be inflicting pain on his slaves, but the fact that he would be giving himself sadistic pleasure. If that is why this man never whips his slaves, this fact would not count against the charge that he treats his slaves merely as a means. Another example is Kant's view that cruelty to animals is wrong because it dulls our sympathy, making us more likely to be cruel to other people. If it is only this moral belief that leads some scientist to avoid causing her laboratory animals any pain, she would be treating these animals merely as a means.³⁷

By that yardstick, a legal rule which said, 'If people's lives are in danger, save those you can, if you can do so without endangering your own life' would not involve treating anyone merely as a means to an end. The fact that the rule is crafted only to apply to those who can *easily* save others shows that we have been influenced, in creating the rule, by a moral concern for the well-being of those who might be subjected to this rule.

And even a rule which said, 'If people's lives are in danger, save those you can, even if doing so involves great danger for yourself' would not involve treating anyone merely as a means to an end. While such a rule may place a great burden on an emergency worker who is in a position to save someone's life but only at considerable danger to her own, had it been the emergency worker who had been in danger, we would have been willing to risk our lives to save her (as the rule we have created shows).

(3) *Universal laws*. Arthur Ripstein has attempted to explain the 'Universal Principle of Right' as 'the unique moral principle for rational beings who occupy space':

if you were prohibited from using your body in any way, or, what comes to the same thing, you were conditionally prohibited, so that your entitlement to do anything with your own body was subject to the choice of others, as a material principle would demand (perhaps everyone, or even someone, had to approve any action you chose to perform), your capacity to set and pursue your own purposes would be subject to their choice. No material principle of that sort could be a universal law...because as a rational being you could not will a universal law under which you could never set a purpose for yourself, or one under which you could only do so with leave of another...

If moral persons are individuated spatially, then the only way to have freedom under universal law is for each embodied rational being to have, in virtue of its humanity, a right to its own person – that is, to its own body. Such a right must be innate, because nothing could count as an affirmative act establishing it – the right applies to any rational being that occupies space, because its right is nothing more than the right that it has to the space that it happens to occupy.³⁸

This seems far too strong. While we can concede that no rational person could 'will a universal law under which you could never set a purpose for yourself', there surely must be laws or maxims that a rational person could will that exist somewhere between 'Everything I do will be subject to another's say-so' and 'Nothing I do (that does not violate another person's independence as a person) will be subject to another's say-so'. For example, there seems no reason why a rational person could not will to be a universal law that 'A referee must take care not to write a reference that

³⁷ Parfit, above, n 32, 214-215.

³⁸ Ripstein, *Force and Freedom* (Harvard University Press, 2009), 371-372.

will not unjustifiably damage the subject of the reference's prospects of getting the job he is applying for'³⁹ – which is one of the rules of English tort law to which *Kantian theorists* of tort law should object, as carelessly writing someone a damaging reference does not necessarily violate their independence as a person.

(4) *The importance of independence.* A final argument in favour of the *Independence Thesis* – though not one, I think, that would appeal to any Kantians, who prefer their rights to have a metaphysical, rather than political, origin – goes as follows.

Each person's being free to pursue the purposes he has chosen to pursue with the means at his disposal is more important than anything else except everyone else's being free to pursue the purposes they have chosen to pursue with the means at their disposal. So reason dictates that no one's independence to pursue their purposes can be violated except in the cause of protecting other people's independence to pursue their purposes from being violated.

But this explanation does not seem to stand up. It is of course important that people be free to pursue the purposes they have chosen to pursue, with the means that are available to them. But other things are important as well. Having a job is important. Peace of mind is important. Friendships are important. Happiness is important. It is not clear that someone's being independent as a person is more important than any of these things and cannot be justifiably – rationally – sacrificed in order to protect these things.

If this final defence of the *Independence Thesis* – and, with it, view (K) of what basic rights tort law should give us – falls foul of what we can call the *Many Things Matter Thesis*, then it seems so does (J), which tells us that tort law should endow us with rights that other people not treat us in ways that will cause us, or have a tendency to cause us, to develop understandable feelings of anger towards those other people. Social harmony is important, but if many things matter, then it is not clear why we should not also be endowed with rights against other people where *other* values are at stake.

If (J) is to be saved as a plausible view of what basic rights tort law should give us against other people, we have to find some way of arguing that – at least so far as tort law is concerned – the *Many Things Matter Thesis* is wrong, and that in fact, only one thing matters: either social harmony, or some value intimately linked with social harmony. There seem to be two ways of doing this.

(1) *Public reason.* The first way is to argue that while many things matter, the only thing that we can *agree* matters is social harmony. Given this, and given the need for tort law to be acknowledged as legitimate by the overwhelming majority of the population if it is going to work effectively, the only thing tort law can do is foster and maintain social harmony. If it goes beyond that role, and starts to recognise that other things matter, it will be condemned as illegitimate by those who disagree that those other things matter.

The problem with this view is as follows. Either we say that the only thing tort law can do is give effect to goals and values that we *all* agree on. In which case, fostering social harmony is out, as there obviously some people who do not value social harmony at all. Or we say that the only thing tort law can do is give effect to goals and values that *all reasonable people* agree on. But if it is true that many things

³⁹ *Spring v Guardian Assurance Co Ltd* [1995] 2 AC 296.

matter, we have no reason to think that the *only thing all reasonable people* will agree on is that social harmony matters. Why would they realise that social harmony mattered, but not any of the other things that matter?

(2) *Love*. The second way of defending (J) is to reject the *Many Things Matter Thesis* in favour of the view that only one thing matters: that we love each other. This view, of course, finds its greatest expression in the 13th chapter of St Paul's first letter to the Corinthians. As the examples given by St Paul will be very remote to a 21st century academic audience, I have taken the liberty of rewriting his words to make it dramatically obvious what a radical challenge St Paul poses to the *Many Things Matter Thesis*:

If I write books that sell in their millions and are universally acclaimed, but I have no love, I might as well have written nothing at all. If I understand everything, and can do anything, but have no love, I am worth nothing at all. I may be awarded Nobel Prizes, be on first name terms with heads of state and prime ministers, have Professorships in universities on every continent – but if I have no love, it means nothing at all.

What does this imply for tort law? I think it suggests that in an ideal world, where everyone loved everyone else, there would be no need for tort law to exist at all. If someone did something wrong to me, I would instantly forgive them for whatever they had done – in the same way that I find it very easy to forgive those closest to me whenever they screw up and don't treat me as they ought to. There would be no question of my taking them to court and standing on my rights and demanding some sort of remedy for what they had done.⁴⁰

But we don't live in an ideal world. We live in a world where our starting point is to feel indifferent to most other people. And our relationship with another person can often find itself moving in the wrong direction – from indifference to hate, rather than indifference to love – if we feel mistreated by that person. In the kind of non-ideal world we live in, tort law has a valuable role to play in preventing indifferent relationships being poisoned and becoming hateful, by: (i) requiring people not to treat others in ways that will provoke those others to develop justifiable feelings of anger and recrimination towards the person that has mistreated them, and (ii) where such mistreatment has occurred, requiring the person who is guilty of that mistreatment to make up for what he has done, so as staunch the wound created by his actions. And as the degree of love each of us has for other people is only thing that matters, doing (i) and (ii) should be the only thing that matters to tort law, in endowing us with basic rights against other people, and determining what remedies will be available for violations of those rights.

On this view of tort law, the basic rights I have against other people would not reflect my interest in being *independent* of other people – as the *Kantian theorists* would have it – but would instead reflect the stake I have in my *not being independent of other people*. In other words, my basic rights would protect my interest in having relationships with other people that are love-filled and have not become poisoned through their mistreating me. And what basic rights tort law endowed me with against

⁴⁰ Compare St Paul, in the same letter to the Corinthians in which his famous words on love appear: 'The very fact that you have lawsuits among you means you have been completely defeated already. Why not rather be wronged? Why not rather be cheated?' (I Corinthians 6:7.)

you would be strongly influenced by: (i) who you are; (ii) the nature of our relationship; and (iii) the type of society we live in.⁴¹

(i) Who you are would matter because the degree of anger we feel towards someone for doing or not doing something may depend a lot on who that someone is. We would feel a lot more resentful towards a police officer for failing to save us from being beaten up than we would towards a passing stranger.

(ii) The nature of our relationship would matter because the stronger – more loving – our relationship, the more we could be expected to put up with from the other person without developing feelings of anger and hatred towards them. So friends and family members would have fewer rights against each other than they would against people who were strangers to them.

(iii) The type of society we live in would matter because what sort of society we live in would strongly influence the anger-making significance of certain actions. For example, in Shakespeare's Verona, 'biting your thumb' at someone would be liable to provoke a murderous fight.⁴² But not in the societies we live in. In the same way, we could expect people to react differently to having their character defamed, depending on what kind of society they lived in.⁴³

The love-based argument being made here in favour of (J) may seem very attractive. It provides us with a model of what tort law should do that is much more humane, relational, and culturally specific than the 'austere' (Ripstein's words)⁴⁴ Kantian model we were previously considering. However, the argument that only love matters suffers from a logical flaw. Loving someone involves wanting that person to have whatever is good for them to have, and being willing to sacrifice your own interests to see that that happens. So my loving someone else presupposes: (i) that there are things that it would be good for the loved one to have; and (ii) that there are things that it would be good for me to have, but which I am willing to sacrifice in order to see that the loved one gets the things that it is good for her to have. I can't then be said to love someone else unless I acknowledge that there are things that it is good for the loved one to have, and there are things that it is good for me to have. But if there are such things, then those things must matter. So while love may be the most

⁴¹ Note that none of these factors would be relevant under a *Kantian* vision of tort law where tort law protects the right to independence that each of us has against everyone else. (Though each society would have some 'margin of appreciation' for how it gave effect to that right to independence in relation to matters such as rights arising out of the ownership of property.)

⁴² *Romeo and Juliet*, I.1:

Abraham. Do you bite your thumb at us, sir?

Sampson (*aside to Gregory*). Is the law of our side, if I say ay?

Gregory (*aside to Sampson*). No.

Sampson. No, sir. I do not bite my thumb at you, sir; but I bite my thumb, sir.

⁴³ Contrast Iago's incendiary speech in *Othello*, III.3: 'Good name in man and woman, dear my Lord / Is the immediate jewel of their souls: / Who steals my purse steals trash; 'tis something, nothing; / 'Twas mine, 'tis his, and has been slave to thousands; / But he that filches from me my good name / Robs me of that which not enriches him / And makes me poor indeed' with Falstaff's dismissive shrug in *King Henry IV, Part One*, V.1: 'Can honour set to a leg? No. Or an arm? No. Or take away the grief of a wound? No. Honour hath no skill in surgery, then? No. What is honour? A word. What is in that word? Honour. What is that honour? Air. A trim reckoning! Who hath it? He that died o' Wednesday. Doth he feel it? No. Doth he hear it? No. 'Tis insensible, then? Yea, to the dead. But will it not live with the living? No. Why? Detraction will not suffer it. Therefore I'll none of it. Honour is a mere scutcheon.'

⁴⁴ Ripstein, 'Civil recourse', 12.

important thing, and something without which nothing else matters, love can't be the only thing that matters because love itself acknowledges that other things matter.⁴⁵

If the *Many Things Matter Thesis* causes us, in the end, to reject (J) and (K), that only leaves (G) and (H) standing as plausible accounts of what basic rights tort law should give us against other people. Let's remind ourselves of these accounts again:

(G) Tort law should endow each of us with those basic rights that everyone would agree each of us should have, were we to make that agreement under fair conditions.

(H) Tort law should endow A with a basic right against B so long as: (i) the benefit of giving people like A such a right would outweigh the burden to people like B of A's having such a right against her; and (ii) the benefit of giving people like A such a right is not offset by any net costs to the community from people like A's being given such a right.

It may be that we have no need to decide which of these answers to our second question is correct. The arguments in Derek Parfit's book *On What Matters* incline me to believe that whichever of (G) and (H) we adopt, we will end up coming to the same conclusions as to what basic rights tort law should give us against other people.⁴⁶ That is, a basic right that satisfies conditions (i) and (ii) in formula (H) will also be one that everyone would agree each of us should have, were we to make that agreement under fair conditions. And the same applies *vice versa*.

My own view is that (G) and (H) are the best answers we have at the moment to our second question. It may be that this is wrong. But I think it will only be shown to be wrong if someone comes up with a fifth answer to our second question that is superior to either (G) or (H). I am fairly confident that neither (J) nor (K) provide better answers to our second question than (G) or (H) do. But that is not to say that (J) and (K) are valueless as responses to our second question. On the contrary: reflecting on the values that could justify (J) and (K) reminds us of facts about what really matters that we are in danger of overlooking in the legal academy today.

⁴⁵ It may be that John Gardner was alluding to this point in his cliffhanger ending to 'Obligations and outcomes in the law of torts' where he asserts that Kant's argument that 'the only source of unconditional (a.k.a. moral) value in our actions is the good will' 'collapses...spectacularly' but says that showing this is 'a task for another paper': see Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart Publishing, 2001), 144. In a follow-up piece ('The wrongdoing that gets results' (2004) 18 *Philosophical Perspectives* 53), Gardner argues that Kant's argument fails because (at 68) 'Morally virtuous people...do not regard the value in their actions as stemming from their virtues [i.e. their good will], but...from their actions.' This may be true but doesn't quite trigger the promised 'spectacular' collapse in Kant's position.

⁴⁶ Parfit's book is concerned to come up with a formula that will allow us to determine when it would be morally wrong to act in a particular way. He ends up considering three formulae: (1) An act is wrong if and only if such acts are disallowed by some principle that is one of the principles whose being universal laws would make things go best (*rule consequentialism*). (2) An act is wrong if and only if such acts are disallowed by a principle that is one of the only principles everyone could rationally will (*Kantian contractualism*). (3) An act is wrong if and only if such acts are disallowed by a principle that no one could reasonably reject (*Scanlonian contractualism*). Parfit ends up concluding that these three different formulae end up generating the same set of principles and that those who think that 'there are...deep disagreements between Kantians, Contractualists and Consequentialists' are wrong: 'These people are climbing the same mountain on different sides': Parfit, above, n 32, 419.

(K) reminds us that human independence is important – that people must be allowed the room to feel that the lives they are living are ones that they have chosen to lead. Legal academics often forget this, in their eagerness to propose rafts of new duties to deal with real or perceived social problems. But if all these proposals are given effect to, pretty soon you have created a drone society, where no one is allowed any room to make up their own mind what’s the best thing to do.⁴⁷

(J) reminds us that causing another to hate us is perhaps the very worst thing we can do to someone. As Martin Luther King Jr preached, ‘Like an unchecked cancer, hate corrodes the personality and eats away its vital unity. Hate destroys a man’s sense of values and his objectivity. It causes him to describe the beautiful as ugly and the ugly as beautiful, and to confuse the true with the false and the false with the true.’⁴⁸

In reminding us of these facts, (J) and (K) play a vital role in enabling us to apply the formulae set out in (G) and (H) in a way that is truly attentive to what really matters.

IV. THE THIRD QUESTION

The third question is also a normative question, and follows on from the second question. It is: *What remedies should be made available to someone whose basic rights have been violated by someone else?* (To save words, I will call someone whose basic rights have been violated, ‘the victim of a tort’, and someone who violates someone’s basic rights ‘a tortfeasor’.) There are too many possible answers to this question for me to set down and consider here. However, as an aid to clear thinking in answering this third question, I want to consider two answers to this third question which currently enjoy great popularity, and explain why I think the first answer is deeply problematic, and the second answer completely wrong. The two answers I want to consider are as follows:

(L) The victim of a tort should be allowed to sue the tortfeasor for compensatory damages designed to put him in the position he would have been in had that tort not been committed, as a ‘next best’ way of giving effect to the basic right that the tortfeasor violated in committing his tort.

(M) The victim of a tort should be allowed to sue the tortfeasor for any profits made by the tortfeasor from committing his tort because no one should be allowed to profit from his wrong.

Let’s take (L) first. *Next best theories* of why the victim of a tort should be allowed to sue the tortfeasor for compensatory damages are very popular at the moment among

⁴⁷ An abiding theme of Philip K Howard’s writings on law is how having too many laws undermines people’s capacities to think for themselves, and take responsibility for their actions. See, most recently, *Life Without Lawyers* (WW Norton & Co, 2009). (On the same day I wrote this footnote, there was a story on a UK newspaper website about how a fire brigade refused to rescue a drowning man from a lake on the ground that health and safety regulations did not allow it. The lake was three feet deep, and regulations do not permit the fire brigade to rescue people from waters more than ‘half a boot’ deep.)

⁴⁸ Martin Luther King Jr, *Strength to Love* (Fortress Press, 2010), 48.

theorists who endorse (B), as the following passages from, respectively, Ernest Weinrib, John Gardner, Robert Stevens, and Arthur Ripstein, show:

When [a] defendant...breaches a duty correlative to the [claimant's] right, the [claimant] is entitled to reparation. The remedy reflects the fact that even after the commission of the tort the defendant remains subject to the duty with respect to the [claimant's] right. The defendant's breach of...duty...does not, of course, bring the duty to an end... With the materialization of wrongful injury, the only way the defendant can discharge his or her obligation respecting the [claimant's] right is to undo the effects of the breach of duty... Thus tort law places the defendant under the obligation to restore the [claimant], so far as possible, to the position the [claimant] would have been in had the wrong not been committed.⁴⁹

When I fail to perform a duty that I owe to someone, there is something that I still owe that person afterwards. Strictly speaking, I still owe him performance of the duty, which continues to bind me. But if it is too late to perform – the dirty deed is done – I now owe him the next best thing. I owe it to him to put him back, so far as it can now be done, into the position he would have been in if I had done my duty in the first place.⁵⁰

Where [a] wrong has been committed, the secondary obligation to pay money imposed upon the wrongdoer can be seen as the law's attempt to reach the 'next best' position to the wrong not having been committed by him in the first place. Where the defendant is required to make good the claimant's...loss...this is the law's attempting to reach this nearest approximation of the wrong not having occurred.⁵¹

[I]f someone interferes with a right that you have, the right does not thereby cease to exist. Since your right is to the exclusive use and security of your means, you remain entitled to the security of your means, even if another interferes with those means and so with your right. A remedy serves to 'preserve what is mine undiminished' ... If I negligently destroy your coat, the coat no longer exists. But your right to your coat – that is, the constraint on my conduct generated by the fact that you, rather than I, are the one who is entitled to determine how it will be used – is not changed by the fact that I acted contrary to that right. Destroying the coat does not extinguish the right understood as a constraint on my conduct. If the coat no longer exists, that constraint may call for different specific actions. My duty to repair, to restore to you the means to which you have a right against me, takes the form of a duty to replace the means of which I have deprived you.⁵²

The difficulty with all such *next best theories* of the foundation of a victim of a tort's right to sue the tortfeasor for compensatory damages is that they conceal a problem that needs to be addressed.

It is *tempting* to think that because the law is justified in imposing a duty on *Driver* to take care not to crash into *Pedestrian* (= giving *Pedestrian* a right that *Driver* not carelessly crash into her), the law is *also* entitled – in the case where *Driver* violates that right/duty by carelessly crashing into *Pedestrian* – to require *Driver* to repair his violation of that right/duty by putting *Pedestrian* back (so far as

⁴⁹ Weinrib, *The Idea of Private Law*, 135.

⁵⁰ Gardner, 'Punishment and compensation: a comment' (available on SSRN), text at n 20.

⁵¹ Stevens, *Torts and Rights*, above, n 4, 59.

⁵² Ripstein, 'Civil recourse', 17-18. See also Ripstein, 'As if it had never happened' (2007) 48 *William and Mary Law Review* 1957.

money can do it) into the position *Pedestrian* would have been had that duty/right not been violated. But, like most temptations, this is one that needs to be resisted. The reason for this is that repairing *Driver's* violation of the duty he owed *Pedestrian* (or the right that *Pedestrian* had against *Driver*) is almost always going to be *a lot* more burdensome than observing the primary duty/right that was violated in this case. So it would be wrong to think that *just because* the primary duty that *Driver* owed *Pedestrian* (or the right *Pedestrian* had against *Driver*) is justified, then requiring *Driver* to repair his violation of that duty/right is *also* justified. What we need is an argument that it would *not be unfair* on *Driver* to require him to repair that violation – and no one has yet been able (successfully) to make such an argument out.⁵³ So (L) might be correct, but only if it can be supplemented with an argument as to why it is *not unfair* to make a tortfeasor repair the violation of the right/duty that he has violated in committing his tort, given how burdensome such a duty of repair can be for a tortfeasor.

Let's now turn to (M), which says that the victim of a tort should be entitled to sue the tortfeasor for any profits that the tortfeasor has made from committing his tort because no one should be allowed to profit from his wrong. This is just a straightforwardly bad argument that should be consigned to the dustbin, and never be heard again. The reason why is that it is tautologous. The tautology is concealed, though – which may be the reason why many academics have fallen for (M). To see that (M) is tautologous, we just have to change the words used in (M) slightly (without in any way altering their meaning). So (M) says:

The victim of a tort should be entitled to sue the tortfeasor for any profits that the tortfeasor has made from committing his tort because no one should be allowed to profit from their wrong.

The following is identical to (M) in all material respects:

(M1) A tortfeasor should be made to give up to the victim of his tort any profits that he has made from committing his tort because no one who has committed a wrong should be allowed to profit from that wrong.

The following is identical to (M1) in all material respects (and is different only in the immaterial⁵⁴ respect that we have dropped the reference to it being the victim of the tort who gets the profits made by the tortfeasor):

(M2) A tortfeasor should not be allowed to retain any profits that he has made from committing his tort because no one who has committed a wrong should be allowed to profit from that wrong.

The following is identical to (M2) in all material respects:

⁵³ There is, of course, Tony Honore's theory of 'outcome responsibility' (see, originally, his article 'Responsibility and luck: the moral basis of strict liability' (1988) 104 *Law Quarterly Review* 530), but it is very doubtful whether 'outcome responsibility' is, in fact, as fair as Honore claims that it is.

⁵⁴ Immaterial because the 'principle' that 'no one should be allowed to profit from their wrong' itself admits that it is immaterial who gets the profits made by a wrongdoer – it is just important that they do not remain in the hands of the wrongdoer.

(M3) A wrongdoer should not be allowed to profit from his wrong because no one who has committed a wrong should be allowed to profit from that wrong.

The following is identical to (M3) in all material respects:

(M4) A wrongdoer should not be allowed to profit his wrong because a wrongdoer should not be allowed to profit from his wrong.

(M4) is obviously tautologous, but – as the transition from (M) to (M4) shows – is no different from (M) in any material respect. If (M4) is tautologous (which it is obviously is), then so is (M). (M) is a bad argument, and must be dropped. Those who would argue that the victim of a tort should be entitled to sue the tortfeasor for any profits made by him as a result of committing that tort need to explain exactly *why* it is that ‘no one should be allowed to profit from their wrong.’

V. THE FOURTH QUESTION

Our second and third questions exhaust all the normative questions that we might want to ask about tort law. Having worked our way through them, we can return – perhaps with some relief – to the analytical territory that represents our comfort zone. But this time we need have no worry that dwelling on analytical questions will prevent us ever getting onto other questions that need addressing: having already dealt with those other questions, we can take as much time as we like over analytical issues. And the fourth question I would like us to address will require *a lot* of analytical work to be answered properly. The fourth question is this: *How far does tort law in its current state fall short of our ideals as to what tort law should say?*

I have put this question in a negative way, focussing our attention on how far tort law falls short of our ideals for it, instead of asking how far tort law lives up to those ideals. This is deliberate. I am desperate that we – as a community of tort lawyers – should not fall into the trap of writing what Pierre Schlag calls ‘the zeitgeist is going my way’⁵⁵ articles, where we argue that tort law, properly understood, in fact largely does exactly what we think it should be doing. So we take a bunch of cases, and make an argument that the cases – understood as a whole – can be explained as giving effect to some ideal that coincides with what we would like the law to be doing. Some cases fit within the argument with no problems. Others can be massaged to fit the overall argument, either by focussing on particular features of the case and arguing that they ‘really’ provided the motivation for the decision, or by focussing on a few lines in the judgment as revealing the ‘real’ reason for the decision. And then there are the remaining cases that just don’t fit, and they are categorised as ‘wrongly decided’.

We are all familiar with these kinds of articles. What is a bit more mysterious is why we write articles like these. Why don’t we just say – ‘This is what we think the law should be doing, and sometimes it does it, and sometimes it doesn’t, and where it doesn’t, it needs to be changed.’ The suggestion made by Roberto Unger, and with which Jeremy Waldron agrees,⁵⁶ is that the academic obsession with trying to

⁵⁵ Pierre Schlag, ‘Normative and nowhere to go’ (1990) 43 *Stanford Law Review* 167, 172.

⁵⁶ See Roberto Unger, *What Should Legal Analysis Become?* (Verso, 1996), and Jeremy Waldron’s review of Unger’s book in ‘Dirty little secret’ (1998) 98 *Columbia Law Review* 510, especially at 517-

establish that the cases, viewed as a whole, *already* give effect to some ideal that the author wants the law to give effect to is that the author is really addressing him or herself to the judiciary and is essentially saying to the judges: ‘You *have* to give effect to my ideal vision for the law, because that ideal vision is already embedded in the case law.’

So, for example, restitution scholars who wished to see the law explicitly give effect to the principle that ‘P will be entitled to sue D for restitution of a gain made by D if D will be unjustly enriched at P’s expense if he is allowed to keep that gain’ never wrote articles saying ‘Look – here’s a principle that we think the law should give effect to, and this is why, and if the law falls short of implementing that principle, it needs to be changed.’ Instead, they wrote articles saying ‘This principle is *already* part of the law, and we just need to wake up to that fact, and iron out any inconsistencies in the law that have arisen because of a failure to recognise that this principle is already part of the law.’ And that is because, I believe, they were essentially writing for judges, and attempting to get the judges to sign up to giving effect to what they would like the law to say.

I think we tort lawyers should try very hard to avoid this model of writing.⁵⁷ The process of massaging and squeezing the cases to fit a particular model of what we think tort law should be is, in the long run, damaging to the quality of our writing and thinking. The role of a prophet crying in the wilderness is not without honour, and one that we should not be afraid to assume if it proves that – honestly examined – tort law does not in fact live up to the ideals we have for it.

It is to help ensure that we do not fall into the temptation of writing ‘the zeitgeist is going my way’ articles that I suggest that, in addressing my fourth question, we approach tort law in a critical spirit, seeking to identify any aspects of the law where it falls short of the ideals we have for it. In order to shore that critical spirit up still further, I’d like to point out a few very well-established features of tort law that seem to be very hard to justify:

(1) *Companies*. I don’t want to suggest that tort law’s protections should only be reserved for real people. Companies should obviously have basic rights not to have their property seized or taken by the State or individuals. But I do want to suggest that a company’s interest in not having its property destroyed or damaged may not be weighty enough to justify burdening the rest of us with duties to take care not to destroy or damage a company’s assets. When it comes down to it, a company’s interest in not having its property destroyed or damaged is purely economic in nature, and purely economic interests are not generally regarded in the law as sufficient on their own to justify giving rise to duties of care in other people. On the same basis, it could be argued that the only basic rights companies should enjoy in respect of their reputation is a right that other people not maliciously damage their reputation – something which would give rise to a claim under the tort of malicious falsehood. So it may be questioned whether the law of defamation should protect companies at all, as it unquestionably does at the moment.

519 (agreeing with Unger, that the academic obsession with influencing judges is a reaction both to political defeat at the legislative level, and the perception that it is easier to effect change through judges than through democratic processes).

⁵⁷ Which is not to say that we should give up on attempting to influence judges. But we should seek to do so not through appeals to authority, but to their reason.

(2) *Full compensation.* I observed above that no one had yet successfully made an argument that it would not be unfair to make a tortfeasor pay the victim of his tort compensatory damages designed to put the victim (so far as money can do it) in the position he or she would have been in had the tort not been committed. It may be that so far as human tortfeasors are concerned, no such argument can be made. If this is the case, we should revisit the idea that the standard response to someone's committing a tort is to make him or her compensate the victim of the tort *in full* for the non-remote losses resulting from that tort. Moderating the amount of damages payable to take account of a tortfeasor's ability to pay – at least in cases where the tortfeasor is a real life human being, and could not reasonably be expected to carry liability insurance – might make it easier to justify making a tortfeasor pay compensatory damages to the victim of his tort. It should also be noted that adopting a 'measured' approach to assessing the damages payable to the victim of a tort would lessen the pressure on ordinary people to obtain liability insurance to cover potentially catastrophic awards of damages being made against them, which pressure allows liability insurers a huge amount of completely unregulated power to dictate to people how to conduct their lives and what sort of risks they are allowed to take.

(3) *Vicarious liability.* If the institution of vicarious liability did not exist, would anyone feel any need to invent it? Arguments that the rules on vicarious liability are necessary, in order to allow us to determine when an artificial legal person has committed a tort⁵⁸ do not work: we already have such rules ('rules of attribution') and they look nothing like the rules on vicarious liability. Recent decisions on vicarious liability seem to have been influenced by a perception that where A employs B to do work for him and the nature of B's work means that it is likely that he will commit a particular kind of tort T, A should take steps to guard against the possibility that B will commit tort T and if he does not (and B commits tort T), then A should incur some kind of sanction.⁵⁹ But the law on vicarious liability is not needed to give effect to this perception. We could easily (and I think rightly) find that A owes those who might be victims of B's committing tort T a duty to take reasonable steps to see that B does not commit that tort. We could also (and again, I think justifiably) reverse the burden of proof in cases where it is alleged that A has breached that duty of care, so that A will be found to have breached this duty unless he can prove that he did take reasonable steps to see that B would not commit tort T.

(4) *Strict duties.* There are two kinds of strict duties that tort law imposes on us. First, strict duties of care, where the amount of care we are required to take with regard to another's interests is assessed objectively and not according to how much care we are capable of taking. Secondly, duties to ensure that something does not happen, such as that we do not defame someone unjustly, or that we do not treat property belonging to another as our own to dispose of. I think the first type of strict duty can be easily justified in most situations, but the second type of strict duty is much harder to justify. However, the matter is so complex, I have deferred discussion of it to an Appendix to this paper.⁶⁰

⁵⁸ See Stevens, *Torts and Rights*, above, n 4, 260-262.

⁵⁹ See *Gravil v Carroll* [2008] EWCA Civ 689 (vicarious liability for rugby player throwing punch on field), *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441 (vicarious liability for priest sexually abusing child he had met, but not through his being a priest).

⁶⁰ See below, p 28.

VI. CONCLUSION

I began with the great German mathematician David Hilbert, and I would like to finish by going back to him. On Hilbert's tombstone in the German city of Göttingen, there are inscribed some words, not from his 1900 speech to the International Congress of Mathematicians, but from a speech that he gave 30 years later on his retirement, to the Society of German Scientists and Physicians:

Wir müssen wissen
Wir werden wissen

In English – ‘We must know, we will know’. I would suggest these words as a good slogan for tort lawyers to adopt. The questions I have been discussing in this paper are questions to which we must know the answers. We cannot carry on saying that it is impossible to say what we are talking about, when we are talking about tort law; or that we don't really know whether tort law serves any rational or justifiable purpose. The people whose freedoms are limited every year in the name of tort law are owed more than that.

As for whether we will ever know the answers to the questions identified in this paper, I am very doubtful that we will unless we come together, and work together, on answering these questions. I look forward to a day when instead of firing papers at each other, people who take different views on the questions I have been discussing will write papers *together*, explaining and working through their differences. No more papers written *just* by Ripstein or *just* by Goldberg and Zipurky, but papers written by Ripstein *and* Goldberg/Zipursky, together. Not *just* Stevens and *just* Stapleton, but Stapleton *and* Stevens, together. Can any of these amazingly distinguished academics really tell us anything more *on their own* than they have told us already? But *together*, there is a real hope that they can say something new, and progress can be made. Even if a joint paper does not result in unanimity, the process of working together and achieving a very deep understanding of where the other person is coming from must be beneficial, and holds out the hope of future breakthroughs.⁶¹ So let's resolve to come together to work out the answers to the questions discussed in this paper, and arrive at some determinate answers to them before we reach retirement age, thereby allowing the next generation of tort academics to grapple with fresh challenges and fresh questions, as yet unimagined.

⁶¹ In this respect, the recent blog debate between Alan Calnan and John Goldberg & Ben Zipursky on the basis of tort law at <http://lawprofessors.typepad.com/tortspof/2012/01/quandaries-of-civil-recourse-calnan-replies-to-goldberg-zipursky.html#more> provides a model for future collaboration between seeming opponents on tort law issues.

APPENDIX: STRICT DUTIES⁶²

As has already been observed, tort law imposes two kinds of strict duties on us:

(1) *Strict duties of care*. These require us to take an objective degree of care with regard to other people's interests.

(2) *Duties to ensure* that something does not happen. These require us to ensure that a particular event does not occur. Examples of such duties are our duties to ensure that we do not defame another unjustly, or that we do not convert another's property by treating it as our own to dispose of.

Kantian tort theorists have no problem accounting for the existence of strict duties in tort law. For them, the legal duties that tort law imposes on us serve as boundary markers, telling us how far we can go before we will start violating someone's independence as a person. If we go over those boundaries, then we have done something wrong – and how and why we went over those boundaries will be irrelevant.

For me, strict duties in tort law are more of a problem. That is because I take the view – as thinkers like HLA Hart and Lon Fuller have done before me – that legal duties exist to provide us with a guide to conduct.⁶³ If one takes this view, then strict duties are a problem because their strictness means we are not always capable of complying with them. Defects in knowledge, skill and resources will lead even the most law-abiding individual into violating a strict duty at some point. So why would tort law ever impose such duties on us?

One response to this problem might be to say that it's a problem that doesn't actually exist, except in the minds of people who believe in (B) and (C). The idea is that people who believe in (B) and (C) see a defendant being held strictly liable in defamation or conversion to pay a claimant damages and they think (because they believe (B) and (C)), 'Oh, the fact that the defendant is being held liable even though his conduct was blameless *must* mean that he has breached a strict duty owed to the claimant to ensure that he not defame the claimant unjustly/not convert the claimant's property. How very strange – why would the law impose such strict duties on people like the defendant?' But (so the accusation goes) the 'must' in the above sentence only follows if (B) and (C) are correct. For someone who believes in (A), the fact that the defendant is being held strictly liable in defamation or conversion to pay a claimant damages does not necessarily indicate that he has breached a duty owed to the claimant, but may just indicate that it is fair, just and reasonable (for one reason or another) for the defendant to pay up, despite the lack of fault on his part.

As this paper has been written on the basis that (B) and (C) are correct, I think I can put this objection aside and instead assume that tort law *does* impose strict legal duties on us, and ask how that might be justified. But a beneficial side effect of

⁶² I am grateful to Jane Stapleton for pressing me to address the issue of strict duties in this paper. The issue is, of course, discussed in Gardner's essay on 'Obligations and outcomes in the law of torts', above, n 45, where he distinguishes between 'duties to succeed' and 'duties to try'. I haven't followed Gardner's terminology in what follows because it seems to me that both of the strict duties I am talking about are 'duties to succeed', if they are anything.

⁶³ I think John Gardner, in addressing this issue, is writing more within the Kantian tradition, where legal duties provide us with an authoritative guide as to what we are morally required to do. So if there are moral duties to succeed (as he argues that there are), then there is no problem with the law imposing on us legal duties to succeed.

proceeding in this way may be that if I can show that the law might justifiably impose strict legal duties on us, that may make it more plausible for those who currently believe (A) to switch sides and start thinking that (B) and (C) are correct.

1. Strict duties of care

Let's begin with *strict duties of care*. To keep the discussion simple, I will consider the case where *Learner* and *Experienced* are each driving on the same area of road. In principle, we might just want to impose on *Learner* a *measured* duty to take as much care as he is capable of not to drive dangerously, as that is the only duty that *Learner* could be expected to comply with. However, a number of different considerations will lead us instead to impose a strict duty of care on *Learner* that requires him to take as much care as a normal driver could be expected to take not to drive dangerously:

(1) In this case, *Learner* and *Experienced* each owe each other duties of care not to drive dangerously. If those duties of care were measured, then *Learner* would end up owing *Experienced* a less demanding duty of care than *Experienced* would end up owing *Learner*. This might be thought *unfair*: it would seem to punish *Experienced* for her expertise, and reward *Learner* for his inexperience.

(2) Similarly, *Other Drivers* will owe *Experienced* duties of care not to drive dangerously. If those duties of care were measured, then they may end up owing *Experienced* more demanding duties of care than *Learner* would owe *Experienced*. This, again, might be thought to be *unfair* as it punishes the *Other Drivers* for not being like *Learner* and reward *Learner* for not being like *Other Drivers*.

(3) *Learner* could have avoided exposing *Experienced* to danger by simply doing *nothing*. Given that *Learner* chose to put *Experienced* at risk of harm by going out onto the road, it is *not unfair* to require *Learner* to take the same sort of care as normal drivers to ensure that his choice to drive does not result in *Experienced* suffering harm, even if *Learner* is incapable of meeting that standard of care. If *Learner* had not wanted to be subjected to such a demanding standard of care, he could have avoided it by simply *not driving*.

In contrast, in the case where *Landowner* has a fire start on his land which threatens *Neighbour's* property, then the case for imposing a strict duty of care on *Landowner* to look out for *Neighbour's* interests grows considerably weaker. As there is no danger on *Neighbour's* land that threatens *Landowner's* property, the duty of care that *Landowner* owes *Neighbour* is not matched by a corresponding duty of care that *Neighbour* owes *Landowner*. And the duty of care that *Landowner* owes *Neighbour* does not correspond with a duty of care that anyone else owes *Neighbour*: as the danger to *Neighbour's* property has arisen on *Landowner's* land, only *Landowner* is under a duty of care to abate it. And *Landowner* did not do anything to incur that duty of care that might make it not unfair if that duty of care were too demanding for *Landowner* to live up to. It may not be surprising, then, that the duty of care that *Landowner* owes *Neighbour* is measured, rather than strict.⁶⁴

⁶⁴ *Goldman v Hargrave* [1967] 1 AC 465.

2. Duties to ensure

Let's now turn to *duties to ensure* that something does not happen. Again, to keep the discussion simple, I'll consider the case where *Customer* goes to *Jeweller's* store, offering to sell *Jeweller* a watch. *Customer* offers *Jeweller* proof that the watch belongs to him, and talks knowledgeably about its history and provenance. *Jeweller* buys the watch and then later gives it away as a birthday present. The watch is subsequently lost or destroyed. It turns out that the watch was stolen, and the true *Owner* successfully sues *Jeweller* for converting his watch, both in taking possession of it, and then in giving it away.

Again, *in principle*, we might just want to impose a *measured* duty of care on *Jeweller* not to treat *Owner's* watch as his own to dispose of, as that is the only duty that *Jeweller* could be expected to comply with. So how can the law be justified in imposing on *Jeweller* a duty to ensure that he does not convert *Owner's* watch? It seems to me that the most promising way of justifying imposing such a duty on *Jeweller* would go as follows.

(1) We want *Jeweller* to do what he can to take care to see that he does not get involved with buying or selling stolen property.

(2) But if we simply impose a duty of care on *Jeweller* to this effect (what we can call 'the target duty'), *Jeweller* will consistently underestimate how much care he needs to take to avoid getting involved with dealing in stolen property. In other words, he will consistently think that he has taken adequate precautions against this risk, when he has not.

(3) In order to help ensure that *Jeweller* complies more effectively with the target duty, we need to impose on *Jeweller* a more demanding duty to ensure that he does not get involved with dealing in stolen property. Imposing such a duty on *Jeweller* will put him 'on edge' and encourage him to take special measures to ensure that he does not deal in stolen property, and thereby help ensure that he hits the 'target duty' more often than he would do if he were simply subject to that 'target duty'.

The crucial step in this argument is (2). *In this context*, I think (2) is quite plausible. The law on fiduciary duties owes its existence to the courts' acknowledgment that self-interest can distort people's judgments as to whether they are doing the right thing: fiduciaries duties exist in order to eliminate that distorting effect. I see no reason why a duty to ensure that he does not trade in stolen goods could not be imposed on a jeweller with the same object.

However, I think this argument only works effectively in this context, where *Jeweller* is operating a business. I find it hard to see how this argument could work to justify the existence of duties to ensure that you do not unjustly defame me, or trespass on my land. (Though it might in particular contexts, for example where it is a newspaper doing the defaming, or the State intruding onto my land.)

Instead of assuming that there *must* exist some justification for the existence of these duties to ensure, we should consider the possibility that they owe their existence to a simple confusion. It is noticeable that these duties to ensure that something does not happen tend to crop up in relation to torts that can be committed in ways that allow plaintiffs to seek a remedy against someone who is *currently* committing the tort. For example, if *Jeweller* were still in possession of *Owner's* watch, *Owner* would simply go to court for an order that *Jeweller* hand over the watch or its value, and he would get it. It would be no defence for *Jeweller* to argue that he had not acted

carelessly in buying the watch. It seems a plausible suggestion that the courts have made the incorrect inference that if the *Jeweller's* degree of care (or lack of it) is irrelevant to his liability in the case where he *still* has *Owner's* watch, it cannot be relevant either in the case where he *no longer* has *Owner's* watch. After all, the courts have made the same elision between the case where *Jeweller* still has *Owner's* watch and the case where *Jeweller* no longer has *Owner's* watch in connection with the ground of *Jeweller's* liability. In the case where *Jeweller* still has *Owner's* watch, *Owner* could not simply go to court and say, 'He has got my watch – make him give it back, or its value!' *Owner* had to go to court and say, 'He is acting inconsistently with my rights in hanging on to my watch – make him give it back, or its value!' But in allowing *Owner's* claim on that basis in the case where *Jeweller* still had *Owner's* watch, the idea arose that doing *anything* with the watch that was inconsistent with *Owner's* rights over the watch (such as taking possession of it, or handing it over to someone else) would make someone liable to *Owner* to pay *Owner* the value of the watch.

So the courts *say* that *Jeweller* is under a duty to ensure that he does not convert *Owner's* watch because his liability for converting *Owner's* watch is never dependent on its being established that he was at fault for converting *Owner's* watch. But *Jeweller's* liability is never dependent on his being at fault because in the case where *Jeweller* is still in possession of *Owner's* watch, his fault is irrelevant to his liability and the courts wrongly assume (in, frankly, a typically and exasperatingly English way) that what is true in that case must be true in all cases where *Owner* sues *Jeweller* in conversion.

A rational tort law that is built on formulae such as (G) and (H) will rid itself of confusions like these, if confusions they be. Under such a tort law, we could expect the existence of duties to ensure that something does not happen to be limited to cases where arguments analogous to the one made out in steps (1) – (3) above can be made out.