THE ANATOMY OF TORT LAW

PETER CANE
Corpus Christi College,
Oxford

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. . . ethics are confessedly a branch of academical learning, and Aristotle himself has said, speaking of the laws of his own country, that jurisprudence or the knowledge of those laws is the principal and most perfect branch of ethics.

William Blackstone, *Commentaries on the Laws of England*, Vol. 1, (1765–9), 27

The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality.

Smith New Court Securities Ltd v. *Scrimgeour Vickers (Asset Management) Ltd* [1996] 3 WLR 1051,1073, *per* Lord Steyn

PREFACE

THIS book is not an introduction for beginners or a comprehensive text. However, I hope that it will be accessible to anyone who has done a basic course on tort law, while at the same time offering stimulation to those whose knowledge and understanding of the subject is more advanced. The approach I take is a development of the mode of analysis I adopted in *Tort Law and Economic Interests*, 2nd edn (Oxford, 1996). My aim is to show that it is possible to think about the law of tort in an analytically rigorous way without being tied to the traditional textbook approach to the subject. For me, tort law is an exercise in applied ethics, and I believe that much illumination can be gained by seeking to understand the ethical principles to which it gives practical content.

I owe some major debts. The first is to the British Academy and the Leverhulme Trust whose generosity in awarding me a Senior Research Fellowship in the academic year 1996–7 made the completion of this book possible much sooner than the normal demands of teaching, examining and administration would have allowed. Secondly, in addition to providing me with a constant source of intellectual inspiration and companionship, Jane Stapleton read a draft of this book and, as always, made many penetrating and extremely helpful comments and criticisms.

Thirdly, I want to thank Richard Hart and Jane Parker for agreeing to publish the book. I am delighted that it will be one of the first publications of Hart Publishing. I have known Richard for many years, and I am extremely grateful to him for the loyalty, friendship and encouragement which he has bestowed on me and on so many other authors. It is these qualities, even more than his commercial flair and his eye for quality, which make him a great publisher. And I owe much to Jane for her enthusiasm and warm friendship, as well as for playing her essential part in the production of this book with wisdom and quiet efficiency.

I am writing this preface in anticipation of taking up a Chair of Law in the Division of Philosophy and Law of the Research School of Social Sciences at the Australian National University in Canberra.

This book is, therefore, the last large piece of academic work which I shall complete in Oxford. I cannot let the occasion pass without saying how lucky I am to have been able to spend half my academic life in Oxford, particularly at Corpus. My arrival in Oxford as a graduate student in October, 1974 in a very real sense marked my intellectual birth. Those two years reading for the BCL were enormously exciting. To be able to return as a tutor was a dream come true. Oxford's unique social organization and teaching system, together with the intimacy and mutual respect of the Corpus academic community, have provided me with just the sort of environment I needed to develop as a lawyer. I cannot think how things might have turned out better. So this book is offered as a toast to Corpus Christi College and to Oxford.

PFC
Corpus Christi College
Oxford

April, 1997

TABLE OF CONTENTS

Preface vii
Table of Abbreviations xiii
Table of Cases and Table of Legislation xv

1. DISMANTLING TORT LAW 1
   Introduction 1
   Torts as Recipes 2
   The Anatomy of a Tort 10
   Correlativity and the Forward-Looking Functions of Tort Law 15
   Legislation and Correlativity 19
   A Summary So Far 21
   A Law of Torts or a Law of Tort? 21
   Beyond the Law of Tort 23
   Tort Law as a Set of Ethical Principles 24
   The Relationship Between Tort Law and Morality 25
   Conclusion 27

2. SANCTIONED CONDUCT 28
   Liability-Attracting Conduct 29
      Voluntary Conduct 29
      Deliberate Conduct 32
      Intentional Conduct 32
      Reckless Conduct 33
      Fraudulent Conduct 34
      Motive 35
      Negligent Conduct 36
      Conduct Neither Intentional or Negligent 45
      The Ethical Imperatives of Tort Law 49
      Non-Compliance with Statutes 52
      Illegal Conduct 57
      Causality 58
   Conduct Giving Rise to a Defence 58
      Negligence 58

Consent 60
Illegality 62
Acts and Omissions 63
Conclusion 65

3. Protected Interests 66
Interests in One's Person 67
Physical Interests 67
Dignitary Interests 71
Civil and Political Interests 74
Property Interests 75
Property 75
Interference with Property 78
Contractual Interests 83
Contractual Rights 83
Contractual Expectancies 86
Non-Contractual Expectancies 87
Trade Values 88
Wealth and the Concept of Financial Loss 88
The Requirement of Damage 89
A Hierarchy of Interests 90
Countervailing Interests 91
Public Interests 91
Private Interests 92
Conclusion 94

4. Sanctions 96
Sanctions for Liability-Attracting Conduct 97
Judicial and Non-Judicial Remedies 97
Non-Monetary Remedies 98
Monetary Remedies 102
Ethical Underpinnings of the Law of Tort Damages 115
Sanctions for Victim's Conduct 120
Conclusion 122

5. Reconstructing Tort Law 123
Interests in One's Person 124
Physical Interests 124
Dignitary Interests 134
Civil and Political Interests 138

Property Interests 139
Real Property 139
Chattels 145
Intangible Property 145
Tort Law and the Protection of Property Interests 148
Contractual Interests 150
Contractual Rights 150
Contractual Expectancies 155
Non-Contractual Expectancies 160
Trade Values 162
Infliction of Financial Loss 163
Causality 166
Causation 167
Burden of Proof 171
Remoteness 176
Causation and Victim's Conduct 178
Conclusion 179

6. The Distinctiveness of Tort Law 181
The Argument So Far 181
The Place of Tort Law in the Law of Obligations 182
Tort Law and Contract Law 183
Tort Law and Equity 186
Tort Law and the Law of Restitution 194
The Distinctiveness of Tort Law 196
The Unity of Tort Law 197
Mapping the Law of Obligations 201
Conclusion 204

7. Anatomy, Functions and Effects 206
The Functions of Tort Law 206
The Relationship Between the Anatomy of Tort Law and Its Functions and Effects 208
General Approach 208
Intrinsic Functions 213
Direct Extrinsic Functions 214
Indirect Extrinsic Functions 226
Arguments for the Abolition of Tort Law 231
Conclusion 237

Index 239

ABBREVIATIONS

AC	Appeals Cases
All ER	All England Reports
CICS	Criminal Injuries Compensation Scheme
D	defendant
EC	European Community
EU	European Union
FSR	Fleet Street Reports
ICR	Industrial Cases Reports
KB	King's Bench Division Reports (High Court)
LJ	Law Journal
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
LR	Law Review
MLR	Modern Law Review
NESS	necessary element of a sufficient set
New LJ	New Law Journal
OJLS	Oxford Journal of Legal Studies
P	plaintiff
P & CR	Property and Compensation Reports
QB	Queen's Bench Division Reports (High Court)
So Cal LR	Southern California Law Review
WLR	Weekly Law Reports

TABLE OF CASES

AB v. *South West Water Services Ltd* 115
Alcock v. *Chief Constable of South Yorkshire* 69
Allied Maples Group Ltd v. *Simmons & Simmons* 173

Bristol & West Building Society v. *Mothew* 189, 200
Burris v. *Azadani* 72

Caparo Industries Plc v. *Dickman* 125, 159
Commissioner of Police for the Metropolis v. *Thompson* 109, 114, 139

Donoghue v. *Stevenson* 7, 17, 18, 21, 25, 64, 125, 208, 227
Dorset Yacht Co Ltd v. *Home Office* 227

Frost v. *Chief Constable of South Yorkshire Police* 69

Henderson v. *Merrett Syndicates Ltd* 23
Holgate-Mohammed v. *Duke* 139
Hotson v. *East Berks Health Authority* 173
Hunter v. *Canary Wharf Ltd* 81, 82

John Trenberth Ltd v. *National Westminster Bank Ltd* 141

Kaye v. *Robertson* 72
Khorasandjian v. *Bush* 72
Kleinwort Benson Ltd v. *Birmingham County Council* 196
Kpohraror v. *Woolwich Building Society* 197

Marc Rich & Co AG v. *Bishop Rock Marine Co Ltd, The Nicholas H* 229, 230
Morris v. *Murray* 61, 122
Morriss v. *Marsden* 30
Murphy v. *Brentwood DC* 101

Nelson v. *Rye* 200
Nicholas H, The. See Marc Rich & Co AG v. *Bishop Rock Marine Co Ltd*

Page v. *Smith* 69
Pitts v. *Hunt* 122

R v. *Secretary of State for Transport, ex parte* Factortame Ltd (No. 4) 56
Roberts v. *Ramsbottom* 30
Rookes v. *Barnard* 115
Rylands v. *Fletcher* 49, 144

Stansbie v. *Troman* 58, 167
Stovin v. *Wise* 55

Thornton v. *Kirklees MBC* 185
Three Rivers DC v. *Bank of England* (No3) 34
Torquay Hotel Ltd v. *Cousins* 85
Tremain v. *Pike* 176

Walker v. *Northumberland County Council* 68, 69
Westdeutsche Landesbank Girozentrale v. *Islington LBC* 84
Wilsher v. *Essex Area Health Authority* 173

X v. *Bedfordshire County Council* 55

TABLE OF LEGISLATION

France

Civil Code
art. 1382 3

United Kingdom

Access to Neighbouring Land Act 1992 141

Consumer Protection Act 1987 ..... 131, 166
Part I 48, 53, 93, 130
s. 6(4), (5) 59, 60
Copyright, Designs and Patents Act 1988 88

Defamation Act 1996
s. 1 135
ss. 2–4 135
Defective Premises Act 1972 ..... 53, 93, 166

Fatal Accidents Act 1846 134
Fatal Accidents Act 1976 ..... 88, 129, 161, 162
Financial Services Act 1986 ..... 86, 160

Housing Act 1988
s. 27 ..... 53, 140
s. 28 140

Law Reform (Contributory Negligence) Act 1945 ..... 59, 120

Misrepresentation Act 1967 ..... 53, 86
s. 2
(1) 160
(2) 184

Occupiers' Liability Act 1957 53
Occupiers' Liability Act 1984 53

Protection from Harassment Act 1997, s. 3 72

Race Relations Act 1976 ..... 45, 74, 87, 138, 157
Registered Designs Act 1949 88
Road Traffic Act 1988 93
s. 149(3) 122

Sex Discrimination Act 1975 ..... 45, 53, 74, 87, 138, 157

Sexual Offences (Amendment) Act 1976 52

Torts (Interference with Goods) Act 1977 ..... 53, 98, 145
s. 11(1) 60

Unfair Contract Terms Act 1977 93

1. DISMANTLING TORT LAW

INTRODUCTION

As its name implies, this book is about the structure of tort law. Its starting point is the proposition that the law of tort can be viewed as a system of ethical rules and principles of personal responsibility for conduct. This approach is in contrast to the traditional one of seeing tort law as made up of a number of discrete "torts", that is, legal formulae which can be used to obtain remedies from courts or as bargaining counters in out-of-court negotiations. I see tort law as a collection of causes of action (or "heads of liability") each made up of three main components: an interest protected by the law, some conduct which the law sanctions, and a remedy or sanction by which the interest is protected and the conduct is sanctioned. The structure of causes of action in tort is "correlative"; that is, every cause of action in tort is a two-sided affair made up of elements relating to the plaintiff and elements relating to the defendant. In Chapter 1, I explain the relationship between the traditional approach to the exposition of tort law and my "personal responsibility" approach; and I give an account of the basic structure of tort law in terms of correlativity, protected interests, sanctioned conduct and sanctions.

In Chapters 2, 3 and 4 respectively I offer an account of the sorts of conduct which tort law sanctions, the sorts of interests it protects and the sanctions by which it does the protecting and the sanctioning. In Chapter 5 I draw together the strands of the previous three chapters and show how the various interests protected and the various types of conduct sanctioned by tort law are combined into heads of liability, defined in terms of protected interests and sanctioned conduct, which trigger the various sanctions available in tort law. This chapter provides the reader with a whistle-stop tour of tort doctrine. It provides a range of new perspectives on a well-cultivated landscape. What I do in Chapters 2–5 is to break tort law up into its constituent building blocks and then put those blocks back together in a novel way which not only illuminates the inner workings of tort law but also lays the groundwork for a better understanding of the

relationship between tort law and other areas of the law, such as contract law and criminal law. Against the background of the idea of personal responsibility, this account offers fresh insight into, and greater understanding of the significance of, many aspects of tort doctrine.

It is, of course, not only tort law which can be described in terms of the ethics of personal responsibility, and it is not only tort law which has a correlative structure. In this light, Chapter 6 tackles two difficult questions raised by my approach: what, if anything, holds together the body of law traditionally referred to as the law of tort and gives it "unity"; and in what way, if any, is that body of law distinctively different from other bodies of law which are concerned with personal responsibility (such as contract law). The basic argument of this chapter is that legal categories such as tort and contract are useful, if at all, only for educational purposes and to facilitate access to legal materials. This conclusion will not be very congenial to those who wish, for whatever reason, to preserve sharp conceptual divisions between different areas of civil law. Amongst other things, it has important implications for the issue of concurrent liability and for modes of analysis of the "law of obligations".

Finally, in Chapter 7, I explore the implications of my approach for the relationship between the doctrines, rules and principles of tort law on the one hand, and the functions and effects of the law on the other. This relationship is complex because practising lawyers and their clients often seek to use tort doctrine for pragmatic purposes which may conflict with the principles of personal responsibility which underlie that doctrine. The basic thesis of this chapter is that the meaning and value of tort law viewed as a set of ethical rules and principles of personal responsibility can be properly understood only if account is also taken of its functions and effects. This is because there is a symbiotic relationship between the rules and principles of tort law and its functions and effects.

TORTS AS RECIPES

In this first chapter, then, I shall argue that the traditional approach to tort law conceals its nature as a system of ethical principles of personal responsibility. My claim is that organizing the law around the ideas of correlativity, protected interests, sanctioned conduct and sanctions provides a much deeper understanding of its inner logic than the traditional approach, and also a more satisfactory way of sorting out the relationship between tort law and other legal categories. In my view,

the framework I offer provides, both for theoretical and practical purposes, a much better way of thinking about and organizing tort law than the traditional division of the law into "torts".

If you look at a typical text on the law of tort in any common law jurisdiction (that is, where the applicable law is, or is derived from or based on, English law), you will find the law discussed and expounded in terms of a number of "torts". These include the tort of negligence, the tort of nuisance, the tort of conversion, the tort of defamation, and so on. Indeed, one author has constructed an "alphabetical list of known torts" containing more than 70 entries.[1] This approach to expounding tort law I shall call the "common law approach". This approach is in notable contrast to that adopted in civil law jurisdictions (that is, where the law is derived from or based on Roman law). France provides, perhaps, the most extreme example of the civil law approach: there, much of the law of delict (or "tort") is derived from a few very general provisions in the *Code Civil*, such as Article 1382: "Every act whatever . . . which causes damage to another obliges him by whose fault the damage occurred to repair it".[2] This provision has two notable features: first, it is very general, and secondly, it bases liability directly on a principle of personal responsibility for damage caused by faulty conduct. The common law approach, by contrast, has at least two important characteristics relevant to the present discussion. First, and putting the point very crudely, whereas a French lawyer might see the process of deciding particular legal disputes as involving the application of broad general principles to particular facts, the common lawyer is more likely to think of that process in terms of determining whether a particular fact situation fits into a framework of rules and quite narrow principles which define the elements of "a tort". Secondly, the common lawyer tends to view the elements of particular torts as technical requirements of the law rather than as applications of ethical principles of personal responsibility concerned with what people ought or ought not to do, such as that people ought not to cause damage deliberately. The common lawyer's understanding of the law of tort consists largely of knowledge about the technical definitions of legal terms and concepts and about fact situations which have, in the past, been held to give rise to tort liability. The typical common lawyer would not (in a professional capacity, at least) think of the law

[1] B. Rudden (1991–2) 6/7 *Tulane Civil Law Forum* 105.

[2] See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd edn (Oxford, 1987), 656.

of tort as a set of ethical principles of personal responsibility, principles about how people ought and ought not to behave in their dealings with others.

The common law way of thinking about tort law can be traced historically to the "forms of action" which were central to the "formulary system" of pleading cases before courts.[3] Under a formulary system of litigation, an action can be started (and will succeed) only if the facts of the plaintiff's case fit one of the formulae which the courts recognize, or if the plaintiff can persuade the court to recognize a new formula. In the heyday of the English formulary system, the courts would process a claim only if it could be and was appropriately "packaged". If a container (called a "writ") of the right shape was not available, the claim would fail even if, had the court processed the claim, it would have found the claim to be meritorious. In short, under a formulary system, the way a claim is packaged is as important as the claim's strength. Changing the metaphor, forms of action were a bit like recipes – recipes for success in litigation. The prime concern of the lawyer in a formulary system is to follow the recipe faithfully.

The English formulary system was gradually replaced in the 19th century by the modern system under which what matters (in theory, anyway) is not how a complaint is packaged but whether the complaint is a good one. In other words, what is important is not the "form" of the claim but rather whether it states a "good cause of action". The forms of action have been replaced by causes of action. A cause of action provides a court with a legally recognized ground for granting a remedy to a claimant. This change from forms to causes of action was of enormous importance in the history of the law and of legal thought because it shifted attention away from the mechanics and procedure of making legal claims (were they properly packaged?) to the substance and merits of claims.[4] Under a formulary system it is impossible to understand the law without also understanding procedures for litigating, because claims have to be packaged in a way which is recognized by the processing authorities, the courts. By contrast, the typical modern text on the law of contract or tort, for instance, contains almost nothing about procedural law but is primarily concerned with the "*substance*" of the law or, in

[3] J.H. Baker, *An Introduction to English Legal History*, 3rd edn (London, 1990), ch. 4.

[4] There is one area in which a sort of formulary system still operates, namely that of applications for judicial review in public law. See generally P. Cane, *An Introduction to Administrative Law*, 3rd edn (Oxford, 1996).

other words, with the grounds on which courts will award legal remedies.

Because, in practice, the procedures for making legal claims have subtle and complex effects on the substance of the law relevant to resolving such claims, this distinction between procedure and substance is, to a certain extent, misleading – but only to a certain extent. We can gain a great deal of useful knowledge about the law without knowing much, if anything, about the procedures for litigation. One important reason for this is that civil law (as opposed to criminal law), of which the law of tort is a "department", has both backward-looking functions and forward-looking functions. The backward-looking functions are concerned with the resolution of disputes and the provision of remedies. The procedures which were central to the formulary system were procedures for resolving disputes in the courts and for obtaining judicial remedies. Even under our modern, non-formulary system, a knowledge and understanding of relevant procedures for resolving legal disputes is important to success in making a legal claim. This is true whether the claim is heard by a court or, as is most commonly the case, it is resolved by an out-of-court settlement. For instance, if a legal claim is not made within a specified period (the "limitation period"), it will fail, however strong the substance of the claim might be; and one of the commonest causes of complaint against solicitors is delay beyond the limitation period in making legal claims.[5]

One of the forward-looking functions of civil law is to guide conduct. If people know the sorts of conduct the law allows and those it prohibits, or the interests which the law protects and those it does not, people can attempt to plan their lives in such a way as to minimize the chance of being involved in a legal dispute or of breaching the law. Knowledge of procedures for resolving disputes is quite unimportant if one's interest is in using the law in this prophylactic or precautionary way. Moreover, for most people most of the time, the law is much more important as a guide to conduct than as a set of rules for resolving disputes. Relatively speaking, only a tiny proportion of human conduct which is regulated or affected by law gives rise to legal disputes which become the subject of litigation or other formal modes of dispute resolution. For this reason alone, knowledge and understanding of the substance of the law is much more important than knowledge of the procedures of litigation.

[5] A lawyer who is guilty of such delay may be liable to pay damages to a client whose claim fails as a result.

The emergence of legal textbooks as we know them today was partly a result of the demise of the formulary system. This encouraged lawyers to think about the substantive principles underlying the forms of action and to organize causes of action according to these principles. One of the most important products of this new intellectual approach was the development of what is now often referred to as "the classical law of contract", that is, a set of rules and principles governing the formation and termination of contracts. Exposition of these rules and principles (concerned with offer and acceptance, consideration and so on) occupies a substantial part of most modern contract texts; and although the law recognizes specific contracts, such as contracts for the sale of goods and contracts of guarantee, which are governed by special sets of rules, these special rules are usually seen as applications or adaptations of the general principles of the law of contract to meet particular circumstances. No one doubts that we have a law of contract (singular) rather than (or, perhaps, in addition to) a law of contracts (plural).

However, although the forms of action were replaced by causes of action, the thinking underlying the formulary system continued to exert a powerful influence on the way textbook writers (and courts) thought about the law in general and tort law in particular. So, for instance, some of the old forms of action, such as trespass or nuisance, took on new life as causes of action: and today, texts on the law of tort still contain sections dealing with trespass and nuisance in their various manifestations. Furthermore, in certain respects, such causes of action are just as formulaic as the forms of action were. If some "element" of a modern cause of action "in tort" is not present in the plaintiff's claim, the plaintiff may lose even if some notion of fairness or justice would suggest that the plaintiff should win. For instance, since the days of the formulary system, it has been the law that in order to succeed in an action in nuisance, the plaintiff must have an "interest in land". This means, for example, that if a family has noisy neighbours, the only member of the family who can bring a nuisance action against the neighbours is the member who owns or rents their house, even if the whole family suffers equally from the noise. In some contexts, this rule is now thought by many to produce unsatisfactory results; but judges have had great difficulty in deciding whether to allow a person who does not have an interest in land to bring a nuisance action or whether, instead, the law should recognize a new tort which would not be encumbered with the "interest in land" requirement and which might be used to deal, for instance, with cases of "harassment" of people in their homes, whatever the nature of their interest in the property.[6]

On the other hand, abolition of the formulary system did have at least one effect of fundamental importance on the law of tort. This effect took some time to develop, reaching maturity in 1932 in the decision of the House of Lords in the famous case of *Donoghue* v. *Stevenson*,[7] which is commonly treated as having recognized the tort of negligence. This development exemplified the non-formulary mode of thinking about law in the sense that underlying it lay an ethical injunction of extremely wide potential scope – namely "take care not to injure your 'neighbours'".[8] As a legal principle, this injunction is hedged about with a complex web of qualifications and exceptions; but still, the foundation of the tort of negligence is not a set of specific rules and principles such as exemplified the forms of action, but an ethical principle of great generality. Furthermore, the tort of negligence operates in a very wide range of situations to provide remedies for carelessly caused injury. Nevertheless, despite the breadth of its operation, a plaintiff can succeed "in the tort of negligence" only by persuading the court that the "elements" of the tort are present in the claim. Common law courts typically do not decide "negligence cases" in tort by reasoning from general principles but by seeing whether the plaintiff's claim fits into a previously recognized pattern of liability; and, if it does not, by deciding whether a new pattern into which it would fit should be recognized. *Donoghue* v. *Stevenson* concerned the liability of a manufacturer of ginger beer to a woman who, it was alleged, suffered illness as a result of drinking a bottle of beer containing the decomposed remains of a snail. The leading judgment of Lord Atkin contained a very general principle (called the "neighbour principle") sanctioning[9] careless conduct, and much more specific principles dealing with the liability of manufacturers for defective products.

Ever since *Donoghue* v. *Stevenson* was decided, there has been debate about the status of the neighbour principle: is it a legal principle which can be used as the basis for deciding particular cases, or is it just an ethical and aspirational statement of little or no legal force? In the 1970s and 1980s in England some courts appeared to opt

[6] See further p. 72 below.

[7] [1932] AC 562.

[8] For discussion of the legal meaning of this word, see p. 125 below.

[9] The verb "to sanction" can mean either "to authorize or reward", or "to penalize". In this book it is used in the latter sense.

briefly for the former view, but now the latter approach is preferred. Courts in some other common law countries (such as New Zealand and Canada) still profess adherence to the former approach, but in practice tend to decide negligence cases in tort in much the same way as the English courts – that is by developing detailed rules and principles to deal with individual cases and resisting the idea that such rules and principles can be deduced in any straightforward way from a general principle such as "take care not to injure your neighbours".

Despite the abolition of the formulary system, the prevalent approach to tort law is still essentially formulaic. Under this approach, the modern torts are treated as formulae, or sets of technical legal rules which define the conditions for success in litigation: winning in a tort action depends largely on finding a formula which fits one's case. Causes of action in tort operate in a similar way to the forms of action – they regulate and shape the resolution of legal disputes by litigation and other modes of dispute settlement. However, causes of action in tort are also important in relation to the forward-looking functions of the law, because through them we organize the substantive law of tort liability into manageable portions. A lawyer advises a client whether planned action might attract tort liability by surveying the causes of action in tort and determining whether the proposed activity falls within any of them.[10] The mind of the tort lawyer, whether as litigator or adviser, tends to be dominated by the recipes for forensic success which the individual torts represent.

Does it matter whether or not we take a formulaic approach to the law of tort? Different legal actors might answer this question differently. A practising lawyer whose concern is to advise a client about what a court will do or to persuade a court to decide in the client's favour is well-advised to present the client's case in terms of the established formulae of tort law. For the practising lawyer whose main concern is to further his or her client's interests, a formulaic approach may not only be adequate but also, in most circumstances, the most economical and successful one. However, if our concern is to deepen our understanding of the structure and functions of the law of tort or of its relationship to other areas of the law, or if our concern is that tort law should develop in a just and rational way, we can gain much by analyzing the law not in terms of torts but in terms of a set of ethical principles of personal responsibility which can be found to

[10] A very good example of this sort of approach is J. Conaghan, "Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment", (1996) 16 *OJLS* 407.

underlie the traditional torts. The formulaic approach makes it difficult to explain and understand tort law as a system of ethical precepts about personal responsibility, and to think clearly about when tort liability ought to be imposed as contrasted with when it has been or might be imposed.

Besides the obvious value of making explicit the ethical nature of tort law, several more mundane (and technical) reasons can be given in favour of a non-formulaic approach. First, the coverage of torts may overlap with one another in the sense that a claim which falls "within" one tort (such as negligence) may also fall within another tort (such as nuisance). Such overlaps are confusing and suggest that the accepted distinctions between the overlapping torts do not accurately reflect the (ethical) principles underlying their scope and operation. Secondly, as we saw above in relation to the example of nuisance and harassment, too close a concentration on the traditional formulae may make it unnecessarily difficult to reform the law in ways widely agreed to be desirable. Thirdly, the division of the law into torts may conceal important organizing categories in the law. For example, one of the main foci of the law of tort is personal injury and illness; but there is no single tort which is concerned exclusively with such misfortunes, and a number of torts can be "used" to obtain compensation for personal injuries. We can learn a great deal about tort law by focusing on personal injuries (for instance) as an organizing category. Fourthly, concentration on the formulae of tort law makes it unduly difficult to understand the relationship between it and other related areas of the law (such as the law of contract or restitution) because these other areas are not, of course, organized around the formulae of tort law. In fact, no other area of civil law is as formulaic as tort law.[11] We are much more likely to be able to understand the relationship between different but related areas of the law if we can develop a common set of concepts and principles for analyzing them.

Fifthly, the area of operation of the tort of negligence is so wide that it may be positively misleading to treat it as a single legal formula. We may learn much more about liability for negligent conduct by looking at the different interests which the law of negligence protects, such as the interest in personal health and safety, the interest that tangible property not be damaged, and the interest in the preservation of intangible wealth. Indeed, on closer examination we find that

[11] Criminal law is highly formulaic. For an attempt to expound the "general part" of criminal law or, in other words, to identify general principles underlying the plethora of crimes, see Glanville Williams, *Criminal Law: The General Part* (London, 1964).

the tort of negligence protects various interests differently even though there are also features common to the protection it gives to the various interests.

Ironically, the tort of negligence also illustrates a pitfall which may be encountered in searching for ethical principles of personal responsibility underlying the formulae of the law of tort. One of the reasons why the tort of negligence conceals important differences in the way it protects various interests is that at bottom, the tort is based on an extremely general principle: take care not to harm your neighbours. Principles of this generality tell us little about the law because in order to be useful, they need to be heavily qualified and modified to deal with individual cases. There are many situations in which failure to take care not to harm others does not (and by general agreement should not) incur tort liability. The sort of principles which will help us to understand tort law are those which are general enough to explain a significant category of instances of liability (as opposed to single instances), but which are not so broad that they encompass categories which are importantly different from one another. To be useful, principles must be broad enough to enable us to spot legally relevant similarities between different fact situations, but narrow enough to enable us to spot legally relevant differences.

How, then, should we go about identifying such principles? In the next section, I shall explain how I intend to approach this task.

THE ANATOMY OF A TORT

The law of tort is part of a larger body of civil (as opposed to criminal) law sometimes called "the law of obligations". Other parts of the law of obligations are the law of contract, the law of restitution and the law of trusts. The law of obligations may be contrasted with the law of property. The law of property consists of rules (which we might call "constitutive rules") which establish (proprietary) rights and interests which the law of obligations protects by what might be called "protective rules". For example, tort law protects real property through the tort of trespass: to enter someone's land without their permission and without legal justification is to commit the tort of trespass to land. Property law defines who owns what land, and tort law protects the rights of the owner against unwanted intruders.

Although contract law and the law of trusts may be treated as part of the law of obligations, in fact these bodies of law contain both constitutive and protective rules. The law of contract not only establishes

an obligation to keep contracts, but it also lays down rules about how contracts are formed or, in other words, about what constitutes a binding contractual undertaking which there is a legal obligation to fulfil. Similarly, the law of trusts not only establishes an obligation to comply with trusts, but it also contains the rules which determine whether a trust has been created. In fact, the interest of a beneficiary under a trust is a form of property, and the law of trusts is often treated as part of the law of property rather than as part of the law of obligations. By contrast, tort law and the law of restitution are purely protective – they establish obligations designed to protect interests created by constitutive rules of the law of property, trusts and contract or which arise in some other way.[12]

Confusingly, too, not all protective causes of action encompassed within the law of obligations are causes of action for breach of an obligation in any meaningful sense. For instance, liability resting on A to restore to B money paid by B to A as a result of an uninduced mistake (which is restitutionary liability) is not liability for breach of an obligation by A because A has, by definition, not done anything to cause the payment to be made. Again, a person may be vicariously liable for the tort of another, even if that person has breached no obligation, simply by virtue of being in a certain relationship with that person (such as that of employer-employee). Nevertheless, very many causes of action in the law of obligations are based on breaches of obligations, that is on action which a person ought not to have taken or on failure to take action which a person ought to have taken.

Both the law of obligations and the law of property are part of what we call "civil law" as opposed to criminal law. Civil law is a social institution by which we organize and interpret human conduct in a particular way. A central feature of civil (or, as it is sometimes called, "private")[13] law is "bilateralness" or (more euphoniously)

[12] The most important interest in this last category is the interest in personal health and safety, which each human being has by virtue of being human. The point made in the text – that tort law does not create the interests it protects – is not inconsistent with the argument made below (*see* pp. 18, 208) that causes of action in tort may themselves be viewed as a form of wealth. Even if such causes of action were treated as a form of property (see F.H. Lawson and B. Rudden, *The Law of Property*, 2nd edn (Oxford, 1982), 27–8), this would be by virtue of property law, not tort law.

[13] Private law may be contrasted with "public law". Private law is about relationships between citizens whereas public law is a about relationships between citizens and the state and between different "organs" of the state. In this sense, criminal law may be categorized as public law. But the main departments of public law are constitutional law and administrative law. Confusingly, however, private law rules, such as rules of contract or tort law, can apply to dealings between individuals and the state. For discussion of these difficult issues see P. Cane, *An Introduction to Administrative Law*, 3rd edn (Oxford, 1996), esp. chs 2 and 11–14.

"correlativity".[14] What this means in simple terms is that civil law organizes relationships between individuals on a one-to-one basis. In the law of obligations, for instance, one person's obligation corresponds ("is correlative") to another person's right. The rules of the law of tort, contract and so on are couched in terms of bilateral relationships between individuals, and that every cause of action in the law of obligations is two-sided. For example, tort law recognizes no concept of negligence "in the air". Tortious negligence is conduct which affects another in particular ways. This does not mean, of course, that there may not be tort actions (for instance) involving more than one plaintiff or more than one defendant or more than one of both, but only that for the purpose of determining the legal rights and obligations of these multiple parties, the law deals with them in twos – one plaintiff versus one defendant.

The idea of correlativity can be explained more graphically by contrasting a tort action for personal injuries suffered in a road accident with a claim for social security benefits made by a victim of a road accident who is, for instance, rendered incapable of work. In the tort action there will be two parties, the victim and the injurer. If the injurer is found liable, he or she will be ordered to pay damages to the plaintiff calculated by reference to the injuries suffered in the accident because of the interaction (the road accident) between the two parties. By contrast, when a road accident victim makes a successful claim for social security benefit, he or she will receive payment out of a fund, not from an individual; and typically not because of any interaction between the claimant and any other individual but simply because the claimant has certain financial needs which the State has decided to meet. Social security law is not based on the idea of correlativity.

[14] For a difficult and extremely sophisticated exposition of this idea see E. Weinrib, *The Idea of Private Law* (Cambridge, Mass, 1995), reviewed by Cane (1996) 16 *OJLS* 471. However, it should be noted that the sense in which I use the word "correlativity" is rather different from the sense in which Weinrib uses it. In the first place, he correlates "rights" and "obligations" *per se*, not the positions of the two parties. More importantly, his concept of correlativity is much stronger than mine in the sense that for him, obligations are a normative expression of, or in some way normatively inherent in, rights. In my analysis, correlativity only expresses the fact that causes of action in tort are two-sided. I do not, for instance, see any necessary connection between interests and conduct on the one hand and particular remedies on the other. Sanctions are chosen to protect interests and sanction conduct according to moral judgements which are not inherent in any of those concepts but reflect views about the value of the interest to be protected and the culpability of the conduct to be sanctioned.

This idea of correlativity provides the framework within which I will analyze the law of tort. Every cause of action in tort and, therefore, every principle of tort liability, has two basic (sets of) elements, one concerned with the position of one party to a bilateral human interaction (the "victim" of the tortious conduct) and the other concerned with the position of the other party to that interaction (the perpetrator of the tortious conduct, or the "injurer"). For the sake of convenience (and following a practice common amongst legal writers), I shall often refer to the victim as the plaintiff (P) and to the injurer as the defendant (D). It is important to remember, however, that tort law is not concerned only, or even primarily, with litigation, with court actions between plaintiffs and defendants. Its main function is to enable people to know how to organize their lives in such a way as to avoid becoming a party to litigation. Even when disputes arise to which the law of tort is relevant, very rarely do such disputes end in the commencement of litigation, let alone in a court hearing.

The aim of this "correlative analysis" is to understand and explain the law of tort as a system of ethical principles of personal responsibility or, in other words, a system of precepts about how people may, ought and ought not to behave in their dealings with others. This analysis of the law of tort will be built on three basic concepts: sanctioned conduct, protected interests and sanctions. Let us look briefly at each of these concepts. First, sanctioned conduct. Tort law is concerned with people's responsibility for their acts and omissions. And because it deals with interactions between people, it contains principles relevant not only to the conduct of injurers but also to the conduct of victims. For example, in the tort of negligence, not only is there a principle that people should take reasonable care not to injure others, but there is also a principle that people should take reasonable care for their own safety. Every cause of action in tort has elements concerned with the conduct of the interacting parties. For our purposes, a "sanction' can be defined as some legal consequence adverse to the perpetrator of the sanctioned conduct. In the case of conduct of injurers, the sanction will typically be a remedy, such as an order to pay damages to the victim. In the case of conduct of victims, the sanction will typically be refusal of a remedy or a reduction of damages.

Because tort law rests on the idea of correlativity, the only conduct sanctioned by it is conduct relevant to or part of some interaction between the two parties. This point can be neatly illustrated by the following example: suppose that a person with a serious criminal