Contemporary Tort Theory and Tort Law’s Evolution

John Murphy*

A. Introduction

Despite its being an admixture of the ancient and the modern, of statute and of common law, many contemporary commonwealth tort theorists believe that tort law is highly coherent. They are probably right to think so;¹ but what is certainly contentious is the related claim made by some of them about the necessarily limited shelf life of those relatively rare decisions, rules or doctrines that cannot be seen to cohere with the rest of tort law.² These, they think, are aberrations that will, in the fullness of time, be corrected. Ernest Weinrib, for example, insists that although “[n]ot every decision is a felicitous expression of the system’s coherence³” it is nonetheless true that “private law [including tort] strives to avoid contradiction, to smooth out inconsistencies, and to realize a self-adjusting harmony of principles”⁴. This process of legal development – which he refers to as the law’s tendency to “work itself pure”⁵ – involves “incremental transformation or reinterpretation or even the repudiation of specific decisions so as to make them conform to a wider pattern of coherence”⁶ where “[c]oherence implies integration within a unified structure”⁷. Put simply, for Weinrib, the law is continually adjusting itself so as to become more coherent, with its coherence to be judged according to the degree of conformity with his corrective justice based theory of tort.

Allan Beever thinks similarly. In his view, tort law’s development is now, and always has been, characterized by a tendency towards ever greater coherence; and the reader is again invited to judge such coherence by reference to the tenets of his particular theory. Indeed, in his book, A Theory of Tort Liability, he speaks with startling boldness of tort law “attempting to work itself towards the theory presented here”.⁸

Finally, the rights theorist, Robert Stevens, is also of the view that tort law’s development will ultimately be in the direction of greater coherence (which, for him, means within the tramlines of his rights-based theory). He admits that, at present, “[i]t cannot be claimed that the common law, in any jurisdiction is in a state of Panglossian perfection”.⁹ Yet, recognising that “the common law is judge-made law ... [which] changes over time”, he goes on to argue that, “like a painter working on a vast canvass which has been, is being and will be worked on by others”, a judge must seek “to paint the best picture of the law that he can”.¹⁰ In other words, “the power of the courts to change the law is circumscribed”:¹¹ incremental development is governed by the need “to treat

¹ Lancaster University. Thanks to Sara Fovargue, Josh Getzler, James Goudkamp, Phil Handler, William Lucy and the anonymous referee for their comments on earlier versions. The usual caveat applies.
² Successfully subjecting human conduct to the governance of rules – as tort broadly does – requires some degree of coherence in those rules: see N MacCormick, Legal Reasoning and Legal Theory (OUP, 1978) ch VII.
³ Arthur Ripstein is the notable exception. In Private Wrongs (Harvard UP, 2016) he is completely silent on this matter and his theory is immune from the central claim in this article.
⁵ ibid., 12. Although they are connected, Weinrib erroneously elides inconsistent and incoherent rules. Rules can be incoherent without being inconsistent: see text associated with n 134.
⁶ ibid., 13
⁷ ibid.
⁹ R Stevens, Torts and Rights (OUP, 207) 348.
¹⁰ ibid, 315.
¹¹ ibid, 318.
like cases alike and to apply consistency of principle”. Of course, for Stevens, the relevant principles are those that correspond to, or can be distilled from, the web of private law rights that we possess. It therefore follows that, for him, the “best picture” of the law that can be painted will reflect this web of rights (and therefore lend credibility to his particular theory of tort law).13

It is unsurprising that these various theorists are so firmly wedded to the idea that tort law is, or aspires to be, coherent. Such coherence is, after all, foundational to the success of their respective theories given that they all seek to identify, and then build upon, some or other unifying norm, principle or structural feature which underpins, and thereby renders coherent the whole of tort law.

In saying this, I am conscious of one obvious objection to what follows, namely, that the theorists in question ought not to be challenged in relation to the ability of their theories to explain the origin and content of various statutory interventions in tort law. It is certainly true that Weinrib’s theory is contains no discussion of statutes. It is possible that he does not regard statutes as part of tort law. It is equally true that Stevens’ claims (above) about tort law’s development are specifically limited to the common law of torts. However, there are at least four good reasons why this objection should either be dismissed, or at least seen as having only limited bite.

First, and most fundamentally, as Andrew Burrows has shown, we must now “shatter once and for all the myth that common law and statute are very separate bodies of law that should not be treated as if merged in an integrated whole”.14 This old “oil and water” thesis – which posited that statute and common law flow in parallel (but not intermingling) streams – has been completely discredited,15 and it is highly improbable if not impossible that a satisfactory grasp of one can be gained without reference to the other. Secondly, any explicit reason for Weinrib’s possible hostility to seeing statutes as part of tort law is conspicuously absent from his theory; while any that might be regarded as implicit have been shown elsewhere to be unconvincing.16 Thirdly, even though Stevens speaks only of the judges (not the legislature) being obliged to develop the law with “consistency of principle”, it is telling that he – like Beever – nonetheless tries strenuously to explain certain tort statutes in terms that chime with his theory.17 Finally, even if the various theorists were able to construct arguments that enabled them to evade to problems posed for their theories by various tort statutes, this would in no way diminish the significance of the problems posed by the judge-made developments discussed in this article.

With that preliminary point made, I now turn to the central thesis of this article: that we must regard as ungrounded the whiggish claim that tort law is in the process of becoming steadily more coherent, that it is bound (in both senses of the word) to work itself pure. In order to make good my thesis, I shall seek to show two things. First, that tort law is sometimes developed in accordance with various factors that have nothing to do with the putative juridical imperatives identified by the various theories in view. The second is that these developments can often appear ad hoc, and thus confound the theorists’ shared claim that the law is becoming increasingly coherent over time.

12 ibid.
13 Stevens insists that his theory reveals the “truth of conceiving of torts as the infringement of primary rights”: ibid, 3. I assume that Stevens believes the true picture to be the best picture.
16 Although it is far from clear why Weinrib ignores statutes, the most likely reasons seem to be that he considers them incapable of forming part of tort law because (i) they are necessarily creatures of public (not private) law and (ii) they represent an exercise in seeing one’s theory to be the best picture.
That the first point must be empirically verified is self-evident: it is plainly insufficient merely to assert that changes in tort law may be driven by all manner of different stimuli. The need to substantiate the second point, however, is perhaps less obvious. An explanation is therefore warranted.

It would be perfectly possible for a theorist to concede that a particular development, X, was prompted by event Y, yet go on to maintain that development X is nonetheless consistent with her theory. For example, a theorist might concede that it was the rise of trade unionism that prompted the development of the economic torts. Yet this, of itself, would not preclude the possibility that these torts cohere with the rest of tort law. If they did so cohere, that would tend to support the theorists’ claim that the law is working itself pure for, in the wake their creation, a greater percentage of tort law could be regarded as coherent. Accordingly, if I am to secure my central claim, then I must show not only that tort law’s development is unconstrained by the straightjacket of any given theory, but also that many of the rules thereby produced cannot be reconciled with that theory.

As we shall see, many of the developments to which I shall advert do indeed clash with two claims that are fundamental to the target theories. These are (1) that tort law is ineluctably bilaterally structured linking two, and only two, parties, and (2) that policy-based rules and policy-based reasoning have no place in tort law.

In section B, I examine various milestone developments in tort which demonstrably constitute responses to a profound change in the social conditions of life. I then demonstrate the way in which these developments fail to cohere with aspects of tort law that are regarded by our target theorists as fundamental. In section C, I consider how tort law’s development has also been influenced by certain stand-out judicial figures, either in accordance with their deeply held personal convictions, or in accordance with juristic influence. Again, the developments in question are shown to clash with certain core claims made by the named theorists (thereby confounding the suggestion that tort is becoming progressively more coherent). In section D, I examine how changes in the ideological Zeitgeist have also impacted the shape of tort law with much the same result. Finally, in section E, I consider the implications for leading contemporary tort theories of the fact that the law’s development is not constrained, or driven, in the way that they suggest.

B. Ad hoc Stimuli and Tort Law’s Responses

(1) The Effect of Liability Insurance

One obvious influence on the development of the common law is significant change in the material conditions of social life. Lord Radeliffe was candid about judges shaping the law in response to such change in *Lister v Romford Ice & Cold Storage Co.* He said: “the common law is a body of law which develops in process of time in response to the development of the society in which it rules”. One important development was the advent of widespread liability insurance. Its impact

---

18 Suppose that, prior to the development of the economic torts, 80% of tort law was coherent. Suppose also, that after their creation the economic torts accounted for 10% of tort law. This would mean that, after their creation, 82% of tort law would now be coherent.
19 See, eg, Weinrib (n 3) 175; Stevens (n 9) 173.
20 See, eg, Beever (n 14) 52-54; Weinrib (n 3) 220-221; Stevens (n 9) 307.
21 The words “demonstrably constitute” are vital. They signal my endeavour to avoid a “realist legal history” according to which past events have been reconstructed in order to give events a convenient complexion. My claims are anchored firmly to precise dicta, and (regarding statutory initiatives) a range of archival sources such as Parliamentary debates and reports of the Law Revision Committee.
22 [1957] AC 555, 591-592. Winfield made a similar observation 20 years earlier likening the role of the courts to that of medical scientists devising new cures as more and more human ills come to light: P Winfield, *A Text-Book on the...*
on tort law can be measured along two axes. It not only prompted the extension of various existing rules of law, but also generated the development of entirely new ones.

As long ago as 1950, Fleming James and John Thornton noted a strong correlation between the increased prevalence of liability insurance and the expansion in the scope of negligence liability in the United States. David Ibbetson has since noted a similar correlation in the United Kingdom, particularly in contexts where liability insurance is compulsory. And while showing the existence of a correlation is importantly different from showing cause and effect, it cannot plausibly be doubted that liability insurance has directly impacted the development of tort law.

It is important to make this point because, in a well-known article, Jane Stapleton argued that whether tort litigants were insured or insurable was irrelevant to the formulation of substantive liability rules as both a normative and practical matter. Accordingly, although she acknowledged the “clear relevance of insurance to the operation of tort law” – for example, as a factor affecting the initial decision about whether or not to litigate – she nonetheless insisted that courts do not treat the presence or availability of liability insurance as a material consideration when deciding whether to expand the remit of tort liability. The authorities she invoked in support of her position included a case in which Viscount Simonds had said that “in determining the rights inter se of A and B the fact that one or other of them is insured is to be disregarded”. Since Stapleton’s article was published, however, the idea that defendants being insured (or insurable) makes no difference to tort’s liability rules has become indefensible. Several subsequent studies put beyond doubt the fact that present-day judges adopt a markedly different approach to the matter (perhaps taking their lead from some rather maverick early remarks made by Lord Denning). For instance, Jonathan Morgan highlights in one essay the “post-Stapleton” decision of the Court of Appeal in Vowles v Evans in which Lord Phillips MR stated unequivocally that “the availability of insurance … could bear on the policy question of whether it was fair, just and reasonable to impose a duty of care”. And Richard Lewis, in his essay, pinpoints various House of Lords’ dicta linking the appropriateness of imposing a duty in negligence to the defendant having liability insurance (or the facility to obtain it). More recently still, it has been held in one Supreme Court case that, “[t]here is no difficulty in identifying a number of policy


24 DJ Ibbetson, “The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries” in EJH Schrage, Negligence: The Comparative Legal History of the Law of Torts (Duncker & Humblot, 2001) pp 258-259. “[A]s the century progressed it became compulsory to take out such liability insurance … [so] as between an injured plaintiff and an anonymous (and wealthy) insurance company it was easy to have sympathy with the plaintiff; and losses could be spread widely and relatively painlessly rather than borne by the individual plaintiff”.


27 For a detailed study of the comparable impact of liability insurance on tort law in the USA, see KS Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11 (Harvard UP, 2008).

28 Nettleship v Weston [1971] 2 QB 691, at 699 (“[m]orally the learner driver is not at fault; but legally she is liable… because she is insured”); Morris v Ford Motor Co Ltd [1973] QB 792, at 798 (“[t]he courts … would not find negligence so readily … except on the footing that the damages are to be borne, not by the man himself, but by an insurance company”).


30 Stapleton made much of judicial equivocation in her rebuttal of the suggestion that insurance has impacted the shaping of tort’s liability rules: Stapleton (n 25) 827.

31 [2003] 1 WLR 1607, at [12].

32 See, eg, Marc Rich & Co v Bishop Rock Marine Co Ltd [1996] AC 211. Three key points were made: (i) liability insurance is integral to the proper functioning of the shipping industry; (ii) accurate computation of risk is central to the operation of the insurance market and (iii) accurate computation of risk requires there to be clear liability rules, hence their Lordships felt obliged to lay down such rules in this case. For other, comparable examples, see R Lewis, “Insurance and the Tort System” [2005] Legal Studies 85, 101-103.
reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer” including the fact that “[t]he employer … can be expected to have insured against that liability”. 33

Nor has the influence of widespread liability insurance been confined to the common law of torts. Statutes imposing strict liability on employers for work-related accidents are in no short supply, 34 and many such statutes were prompted in part by insurance-related considerations. 35 A good example is the Employer’s Liability (Defective Equipment) Act 1969. This statute was enacted despite the warning that imposing strict liability on employers for work-related injuries would “wreak havoc with the law of tort”. 36 Members of both Houses of Parliament were satisfied, however, that such concerns could be rebuffed given that employers would be covered by liability insurance. Lord Morris, for example – acutely aware that the Employer’s Liability (Compulsory Insurance) Act 1969 was due to enter into force more or less imminently – observed that because an employer “will already be insured … liability in these cases will not be a significant burden for him”. 37

The presence of insurance is also relevant to the imposition of liability under the Occupiers’ Liability Act 1957 in circumstances where an occupier attempts to exclude liability that would count as “business liability”. 38 The occupier is only entitled to do this only so long as the contract term or notice on which he relies is reasonable as per section 2(2) of the Unfair Contract Terms Act 1977. Such reasonableness is to be assessed in part by reference “how far it was open to him to cover himself by insurance”. 39 Similarly, liability insurance explains a particular provision in the Congenital Disabilities (Civil Liability) Act 1976. Under section 1 of that Act, a child born with disabilities caused by his mother’s negligence during pregnancy is not generally entitled to sue her in respect of those disabilities. However, an exception is made in the case of injuries caused by the pregnant mother’s negligent driving of a motor vehicle. 40 The exception’s rationale was specifically mentioned in the course of the statute’s passage through Parliament. Lord Stow Hill explained bluntly that pregnant women who drive “will in general be insured”. 41

Perhaps the most important development in statutory tort law to be prompted (at least partly) by the growing incidence of liability insurance is the Law Reform (Contributory Negligence) Act 1945. As Aneurin Bevan remarked in the relevant Parliamentary debates, there was little genuine cause for concern on behalf of industrialists about the fact that contributory negligence would no longer offer employers a complete defence. For, “one thing to which … [the draftsmen could] attach very great importance” was the fact that “modern insurance … relieved the employer of any financial liability with respect to compensation”. 42 In other words, workers who had played only a limited role in their getting injured need no longer go uncompensated since insurers (rather than employers) could now be expected to pay the damages.

Each of the developments just sketched represents a material extension in the reach of tort’s liability rules. They were all justified at least partly by reference to the fact that identifiable groups of prospective defendants would (or could be expected to) hold liability insurance. In other words, a significant change in the material conditions of social life was wholly or mainly responsible for

33 Catholic Child Welfare Society and Others v Various Claimants [2013] 2 AC 1, at [35]. The proclamation was refined by Lord Reed in Cox v Ministry of Justice [2016] AC 660, at [20]. He noted, first, that “employers insure themselves because they are liable: they are not liable because they have insured themselves”, but then added that “the absence or unavailability of insurance … might be a relevant consideration” when it comes to refusing to impose vicarious liability.

34 For examples, see Lewis (n 32).

35 Editorial (1968) 118 NLJ 1138, 1139.

36 HL Deb, vol 301, col 999 (May 1, 1969).

37 Unfair Contract Terms Act 1977, s 1(3).

38 ibid, s 11(1).


41 HC Deb, vol 408, col 1027 (Feb 22, 1945).
the relevant changes in the law.\textsuperscript{43} In none of these cases was there a discernible concern to ensure that the new rules of law would be consistent with any putative theoretical imperatives.

And nor did these developments, quite by chance, turn out to be instances of the law working itself pure (such purity being judged from the perspective of the theories under consideration, here). In particular, the overt invocation of insurance-related considerations in the negligence and vicarious liability contexts is completely inexplicable to them. For each of our target theorists is adamant that policy-based reasoning has no place in tort law.\textsuperscript{44} Yet judgments premised on the (near) certainty that the defendant will be insured are inescapably policy-based because a precondition of the claimant being granted a remedy is the fact that liability insurance will almost certainly be in place to ensure that losses are spread thereby insulating defendants from the possibly crushing costs of litigation and compensation.

(2) The Rise of Trade Unions

In 1868, the Trades Union Congress was formed with the ambition of securing important changes in the labour laws of England and Wales, and it was initially thought that a remarkable victory had been achieved in the shape of the Trade Union Act 1871 which exempted trade unionists from criminal prosecution for activities in restraint of trade. But celebrations were short-lived. For not long after it was enacted, Brett J held that trade unions could still be held liable for criminal conspiracy so long as the purpose of the conspiracy was something other than the restraint of trade.\textsuperscript{45} A few years later, the uncertain position of unions under the criminal law was finally resolved via section 3 of the Conspiracy and Protection of Property Act 1875\textsuperscript{46} making it clear that an act performed by a combination of persons in furtherance of a trade dispute would no longer be indictable as a conspiracy. But, within a decade and a half, the English judiciary began to develop tort law so as to moderate the effect of removing criminal responsibility for conspiracy.

The first major landmark on this judicially beaten path was the House of Lords’ decision in \textit{Mogul Steamship Co v McGregor, Gow & Co.}\textsuperscript{47} There it was said \textit{obiter} that conspiracy was in principle actionable as a tort so long as the means employed by the conspirators were independently unlawful acts (such as acts of fraud or breach of contract). Shortly thereafter, the Court of Appeal confirmed in \textit{Temperton v Russell}\textsuperscript{48} that trade unions could be held liable for tortious conspiracy where unlawful means had been used. And just a few years later still, the House of Lords added that, even in the absence of unlawful means, a union that acted with a preponderantly bad motive could also be held liable in tort.\textsuperscript{49}

It is noteworthy that each of these landmark decisions in the economic torts was rooted as much in judicial ideological commitments as in established juridical principles that were merely being extended in the familiar, incremental way. Take, for example, the departure in \textit{Quinn v Leathem}\textsuperscript{50} from the established principle that “an act prima facie lawful is not unlawful and actionable on account of the motive which dictated it”.\textsuperscript{51} The decision in that case – that persons

\textsuperscript{43} For many other tort law developments also prompted by social change, see P Mitchell, \textit{A History of Tort Law 1900–1950} (CUP, 2015).

\textsuperscript{44} See Beever (n 14) 190: “when a court denies or creates liability because of insurance … [this will] do violence to the coherence of tort law”. In similar vein see EJ Weinrib, “The Insurance Justification and Private Law” (1985) 14 JLS 681, 683 and id (n 3) 220-221; Stevens (n 9) 109.

\textsuperscript{45} \textit{R v Bunn} (1872) 12 Cox 316. Here, the illegal purpose was said to be the coercion of the employer’s free will.


\textsuperscript{47} [1892] AC 25.

\textsuperscript{48} [1893] 1 QB 715.

\textsuperscript{49} \textit{Quinn v Leathem} [1901] AC 495. Cf \textit{Allen v Flood} [1898] AC 1 (no unlawful means or malicious purpose present).

\textsuperscript{50} [1901] AC 495.

\textsuperscript{51} \textit{Allen v Flood} [1898] AC 1, 124 (Lord Herschell).
acting in combination may be liable for harmful conduct that would not be unlawful if done by someone acting alone – only becomes comprehensible once one realises that many judges of this era were ideologically committed to the twin principles of individual liberty and responsibility.\textsuperscript{52} The increasing frequency with which unions sought to enforce closed shops was perceived by certain judges as a particular concern from the perspective of liberty.\textsuperscript{53} In Quinn itself, for example, Lord Halsbury LC regarded unions that imposed closed shop arrangements as “mischievous and cruel”; and he described union activities more broadly as “organised and ruinous oppression”.\textsuperscript{54}

Equally, in the landmark Taff Vale case (which established that trade unions could be sued in their own name), Farwell J was remarkably candid about his view of unions. He said it would require “very clear and express words of enactment” in order for him to believe that Parliament had legalized such “irresponsible bodies” with a “wide capacity for evil”.\textsuperscript{55} He was therefore keen that they should, if possible, bear legal responsibility for such “evil”. Thus, even though unions had been granted very considerable immunity in respect of industrial action under the Trade Disputes Act 1906, he was nonetheless willing to pay scant regard to his judicial duty to apply dispassionately the laws laid down by the legislature. In the case of Conway v Wade, he described the purpose of the legislation as being to “destroy liberty” in “entire contradiction of those doctrines of personal freedom and equality before the law which have hitherto been its main aim and object”.\textsuperscript{56} True, he ultimately accepted the immunity granted by that Act. But he did so in a way that clearly revealed his being despondent about having to do so. Applying the immunity in the case before him, he reluctantly observed that “[t]he Legislature cannot make evil good, but it can make it not actionable”.\textsuperscript{57}

Farwell J was not the only judge to express openly his contempt for the 1906 Act. During its passage through Parliament, the then Lord Chancellor, Lord Halsbury – an ardent Tory who had appointed Farwell J to the bench – said of the very same provision that “so disgraceful a section has never appeared in an English Statute before”.\textsuperscript{58} More importantly from the perspective of the development of tort law, his anti-union stance was also evident in his handling of some of the early conspiracy cases. As Lord Chancellor, he took the remarkable step of summoning eight High Court judges to advise the House of Lords in the famous case of Allen v Flood.\textsuperscript{59} The step was remarkable not just because there was little justification for requesting such advice after the introduction of Lords of Appeal in Ordinary in 1877, but also because Lord Halsbury chose them without consulting any of the other Law Lords who heard the case. As one astute observer has put it: “having appointed many of these judges for their political views” he clearly “felt he could rely on them in his hour of need”.\textsuperscript{60}

As things turned out, his deliberate engineering of matters did not work out in the way he hoped. He found himself in the minority in that case. But in Quinn v Leathem, just three years later, he was careful in selecting the actual panel of Law Lords who would sit with him to hear the case.\textsuperscript{61}

\textsuperscript{52} On which see, eg, D Ibbetson, ““The Law of Business Rome’: Foundations of the Anglo-American Tort of Negligence” [1999] CLP 74, 84-87; id (n 24).

\textsuperscript{53} In a painstaking trawl of the closed shop cases, Michael Klarman provides clear evidence of a widespread “judicial preference for uncoerced individual action”: Klarman (n 46) 1574. Less convincingly, but nonetheless plausibly, he also suggests two further grounds for the view that, at the turn of the 20th Century, judges held a pronounced anti-union bias. The first was “the judges’ conscious desire to curtail union power that they perceived as threatening to the reigning economic...order”; the second, was rooted in “judges’ unconscious class prejudices”: ibid, 1574.

\textsuperscript{54} [1901] AC 495, 506. See also the very similar view expressed by Lord Macnaghten: ibid, 511-512.

\textsuperscript{55} Taff Vale Railway v A3R [1901] AC 426, 431.

\textsuperscript{56} [1908] 2 KB 844, 855-856.

\textsuperscript{57} ibid, 856.

\textsuperscript{58} HL Deb, vol 166, col 705 (Dec 4, 1969).

\textsuperscript{59} [1898] AC 1.


\textsuperscript{61} According to Stevens, “the most significant fact about [Quinn]… was that Halsbury had chosen his panel carefully. Herschell was dead, and the other two Liberals, Davey and James, were not invited to sit”: ibid. Cf Beever (n 8) 125-128 for the view that evidential matters best explain the difference between Allen and Quinn.
And when it came to formulating his judgment in _Quinn_, he made no attempt to conceal the fact that his decision was underpinned by what he thought were appropriate policy considerations. “If … the plaintiff could have no remedy” for lawful means conspiracy, he opined, “it could hardly be said that our jurisprudence was that of a civilized community”. And thus was formally minted a cause of action that could be used against unions for doing acts that would be lawful if done by a single agent, acting alone.

Whether the judges at around the turn of the 20th Century were motivated principally by their enthusiasm for the principles of individual liberty and responsibility, or by a shared (if largely unspoken) ideological opposition to trade unions, is not terribly important here. The key thing is that the legitimation of union activities by Parliament should have paved the way for a very significant change in the norms of industrial relations. But certain members of the judiciary had other ideas. They made sure that, notwithstanding the statutory immunities that had been enacted, the struggle between capital and labour would not travel unchecked in just one direction. Parliament conferred freedoms; and the courts imposed important common law limits on those freedoms via the creation of various economic torts. Thus, alongside lawful means conspiracy (conceived in the _Mogul Steamship_ case and formally “nurtured in _Quinn v Leathem_”) the courts also established at around the same time a sister tort of unlawful means conspiracy, as well as a tort now known as causing loss by unlawful means.66

The tort of intimidation – though it had ancient antecedents that had all but lapsed into desuetude (perhaps because the reports “gave away little about the bases on which they were decided”) – came much later. But the impetus for the development of this tort was much the same. As one Law Lord put it, the landmark decision in _Rookes v Barnard_ (in which the tort was first properly established), was a direct judicial response to “the circumstances of modern industrial relations”, circumstances in which powerful, pro-labour union activity was commonplace.

Now, of course, many key tort cases can be linked to particular legal problems arising from changes in the quotidian patterns of social life. So the bare fact that the decisions in _Mogul_, _Quinn_ and _Rookes_ were not driven by the tenets of _Theory A_ or _Theory B_ is, in itself, fairly unremarkable. Indeed, as Lord Sumption recently observed, it is entirely proper that “the development of the law should be warranted by current values and current social conditions”. What is noteworthy, however, is the fact that most of the torts to which these cases gave rise cannot be reconciled with core claims made by the theorists in view. For this reason, they contradict the theorists’ shared claim that the law is in the process of working itself pure.

Contrary to what rights theorists say, for example, all of them except intimidation are best seen as loss-based (rather than rights-based) torts since although tort law recognises no general

---

62 _Quinn v Leathem_ [1901] AC 495, 506. He was cognisant, too, of the clash with _Allen_, yet was content to observe (ibid) that “every lawyer must acknowledge that the law is not always logical”.


64 H Carty, _An Analysis of the Economic Torts_ (OUP, 2010) 139.

65 Charlesworth, though slightly equivocal, thought the tort was first properly conceived by analogy with the crime of conspiracy in the _Mogul Steamship_ case: see J Charlesworth, “Conspiracy as Ground for Civil Liability” (1920) 36 LQR 38, 38.

66 Sales and Stiltz have argued that, despite its many names, the “first recognizable formulation” occurred in _Allen v Flood_ [1898] AC 1: see P Sales and D Stiltz, “Intentional Infliction of Harm by Unlawful Means” (1999) 115 LQR 411, 411.

67 _Garret v Taylor_ (1620) Cro Jac 567; _Tartleton v McGawley_ (1793) Peake NP 270.

68 Hoffmann (n 63) 105.

69 [1964] AC 1129, 1185 (Lord Evershed). Writing extra-judicially, Lord Hoffmann likewise observed that “excessive trade union power … had alienated the judges”; Hoffmann (n 63) 112. On the tort of intimidation being “resuscitated” in order to get around the protections afforded by the 1906 Act, see J Murphy, “Understanding Intimidation” (2014) 77 MLR 33, 34.

70 _Willers v Feyer_ [2016] 016] 3 WLR 477, [179]. In similar vein, see _ibid_ [182] (Lord Reed).
right to economic welfare, they are all torts that are primarily invoked in connection with pure economic losses. Equally, the tort of causing loss by unlawful means also confounds the structural imperative we find in both Stevens’ and Weinrib’s theories. Stevens labels this structural imperative the “privity of torts”, while Weinrib prefers the language of tort law’s bipolarity. But the core claim is just the same: that torts link two, and only two, parties (the claimant and the defendant).

What the various economic torts considered here reveal is that tort law can and does respond to perceived social problems in a manner that is unconstrained by the strictures of any given tort theory. Lord Walker captured things neatly in Total Network SL v Revenue and Customs Commissioners when he explained that the economic torts were the courts’ response to:

The deep suspicion which the governing class had, in Georgian and Victorian England, of collective action in the political and economic spheres, as potential threats to the constitution and the framework of society.

Even more pithily, Lord Hoffmann attributed the emergence of these torts to “the accidental conjunction of two events: the ungentlemanly behaviour of a London opera impresario and the gathering strength of the trade union movement”. Neither judge considered (or, at least acknowledged) the development of these torts to have been constrained by a concern to maintain or enhance tort law’s coherence.

**(3) Social Crises**

Whereas the previous section focused on the way that tort law developed in response to the challenges posed by the rise of trade unionism, this section considers changes prompted by a miscellany of what might be called social crises. Again, the contention is that the developments in question were neither driven by, nor ended up consistent with, the core juridical characteristics of tort law as identified by the theories under consideration.

It is easy to understand why this should be the case. For it is when particular crises occur, and the courts are called upon to devise novel responses to them that they do least to ensure coherence between the new rule being formulated and existing rules or principles. Rather, the paramount concern of the innovator-judge is to develop a rule of law that will meet the particular challenge thrown up by the case at bar. Many examples of tort law having developed in this way could be cited; but I limit myself to just four.

---


72 Stevens (n 9) ch 8.

73 Weinrib, for example, maintains that “so far as corrective justice is concerned, the norms of tort law – and indeed of private law more generally reflect... the bipolar structure of private law”: EJ Weinrib, ‘Deterrence and Corrective Justice’ (2002-3) 50 *UCLA Law Rev* 621, 623.

74 Beever does not explicitly sign up to the structural imperative, but it seems to be implicit in his claim that the three-party economic torts discussed here can be explained in terms of a supposedly pervasive coercion principle according to which, in tort, A will be liable to B “if he constrains B and that constraint is not consistent with equal maximum freedom”: Beever (n 8) 26 and 154. Whether even a generous interpretation of the leading cases genuinely reveals such a principle at work is questionable; but that is a separate matter.

75 [2008] 1 AC 1174, at [77].

76 Hoffmann (n 63) 105. His opera impresario remark is a reference to the tort of inducing breach of contract minted in *Lumley v Gyr* (1853) 2 El & Bl 216.

77 I recognise that “crises” are rarely univocally constructed. My use of the terms is justified according to the level of celebrity attached to each of the examples I invoke.
The landmark decision in *Rylands v Fletcher* is best understood against the backdrop of a particular social evil that had arisen just a few years earlier. As Brian Simpson famously showed, it was the then novel problem of bursting dams causing significant loss of life and huge amounts of property damage that prompted the development of this particular rule of law. Though no-one actually drowned in the *Rylands* case, it is clear that the bursting dam at Dale Dyke near Sheffield was firmly impressed upon the mind of Blackburn J. For, in the course of his judgment (in a passage containing an oblique reference to an equally famous nuisance case), he said: “[t]here is no difference … between chlorine and water; both will, if they escape, do damage, the one by scorching, and the other by *drowning*.” Accordingly, as Simpson rightly observes, the decision in *Rylands* was fundamentally “about what the common law should say about a catastrophe like the Dale Dyke disaster, which did drown many people”.

Particularly pertinent for present purposes is the fact that the rule in that case bucked the trend to towards an increasingly fault-based law of torts; and it did so for reasons that had nothing to do with the stipulations of a given theory. The decision was simply the product of a judicial endeavour to tackle a pressing, high-profile, social problem. Yet such a departure from the norm was it, that it has provided a rich source of debate for torts theorists ever since.

Secondly, in Australia (though admittedly not elsewhere in the Commonwealth), far-reaching reforms to substantive tort law rules were wrought at the start of the 21st Century in order to rein in the spiralling costs of liability insurance premiums. The new Millennium brought with it frequent headlines in the Australian press devoted to what has since been labelled the “insurance crisis”. Rightly or wrongly, the runaway costs of insurance premiums were regularly blamed on a malfunctioning law of torts. Consequently, in the wake of a series of recommendations made in the *Ipp Report*, major tort law reforms were enacted in all the Australian States and Territories. Detailed descriptions of the particular reforms made are unnecessary here. We need note just two things. The first is that it was the Australian insurance crisis of 2001-02 that led to this massive overhaul of tort law; and the second is that the reforms enacted culminated in what has been described as “statutory chaos”. This, of course, is a far cry from the supposed steady march towards an increasingly coherent law of torts suggested by the theorists under consideration. And it is certainly the case that several of the reforms – such as the introduction of minimum thresholds for, and statutory caps upon, compensatory damages – clash fundamentally with our tort theorists’ shared commitment to the *restitutio in integrum* principle which governs compensatory damages in to tort.

---

78 (1868) LR 3 HL.
79 *St Helen’s Smelting Co v Tipping* (1865) 11 HLC 642.
80 (1865-66) LR 1 Ex 265, 286 (emphasis added).
82 For details of the steady growth in the fault principle during the era in which *Rylands* was decided see section D, below.
83 In fact, strict liability is regarded as being completely incompatible with Weinrib’s theory of tort law. For him, corrective justice – *by virtue of it being a principle of justice* – demands fault on the part of D. How could it possibly be just to impose liability on D when D was not at fault? Weinrib spends all of chapter 7 in *The Idea of Private Law* tackling the problem of “apparently” strict liability torts. Prime among the ones that he identifies as awkward is the rule in *Rylands v Fletcher*. He attempts to show that, properly understood, it is best seen as instantiating fault-based liability. Since his arguments to this effect ultimately fail (on which, see J Murphy, “The Heterogeneity of Tort Law” (2019) 39 OJLS (forthcoming)), *Rylands* must be seen as a strict liability tort which, given that it was first formulated in an era dominated by a move towards an increasingly fault-based law renders it an example of move away from an increasingly coherent law of tort.
85 ibid, 6-7.
86 See Goudkamp (n 84) 12.
87 See Goudkamp and Murphy (n 14), 153-156; id, “The Failure of Universal Theories of Tort Law” (2015) 21 Legal Theory 47, 71-77.
The third example centres on the law’s response to the Thalidomide tragedy. As with the Australian episode just described, it was the high level of publicity that attended this unfortunate episode that prompted first, a Law Commission report on the law concerning pre-natal injuries and, later, the introduction of the Congenital Disabilities (Civil Liability) Act 1976. The Act introduced a cause of action which contradicts the structural imperative adverted to earlier, as well as the rights theorists’ claim that tort law operates to address the wrongful infringement of ex-ante private law rights. Under that Act, a child born with certain disabilities is granted a cause of action that is parasitic upon the breach of a duty that had been owed to his mother, prior to his birth. At the relevant time, there was no bilateral relation between the child and tortfeasor for the simple reason that the unborn child held no ex-ante private law rights of his own.

The Fatal Accidents Act of 1846 – a piece of legislation that has been copied in many common law jurisdictions since then – furnishes the fourth example of an important development in tort law which emerged from a particular social crisis. An important common law principle enunciated in 1808 in Baker v Bolton was that A’s causing the wrongful death of B does not give rise to a claim in tort by, or on behalf of, those detrimentally affected by B’s death. As the 19th Century wore on, however, and as industrialisation increased, the effects of this rule grew in social significance: there was, after all, “a nearly threefold increase in the frequency of accidental death between 1800 and 1840”. By the middle of the century, it was clear that something had to be done; and that something was the enactment of the Fatal Accidents Act 1846 which was intended to be “a pragmatic and rational response to the problem of wrongful death in the mid-nineteenth century”. Certainly, as Rande Kostal has shown, deaths on railways and steamships attracted a very high level of press coverage at the time, squarely placing fatal accidents at the forefront of public consciousness and mainstream politics. Mining fatalities, too, were a prominent cause of public concern. There is little doubt, then, that although Baker set the ball rolling, the prime mover behind the legislation was the widespread, mid-century phenomenon of industrial fatal accidents.

What is especially notable about the 1846 Act, is that it established a cause of action on behalf of dependents who suffered no breach of an ex-ante duty owed to them by the tortfeasor. The creation of a dependency action, in other words, was another departure from the theorists’ structural imperative described earlier. And the Act as a whole conflicts with the apolitical conception of tort law forcefully espoused by both Weinrib and Beever in two key ways. First, it was a measure in furtherance of the concern to ensure that those widowed by fatal industrial

---

88 The tragedy concerned children all over the world born with serious deformities caused by the sedative drug, Thalidomide, taken by their mothers during pregnancy.
90 The Thalidomide tragedy was also a driver behind the European Directive on liability for defective products and, in turn, Part I of the Consumer Protection Act 1987.
91 For the argument that a specifically Canadian action may lie in respect of tortuously inflicted pre-natal injuries, see I.E. Weinrib and E J Weinrib, “Constitutional Values and Private Law in Canada” in D Friedmann and D Barak-Erez (eds), Human Rights in Private Law (Hart, 2003). Their arguments, however, do not impinge on the claims made here in relation to the action under the English Congenital Disabilities (Civil Liability) Act.
92 (1808) 1 Camp 493.
94 ibid, 132.
97 The dependency action cannot be reconciled with the structural imperative (and thus the theories in view) on the basis that it produces a just result (in the way of which stands Baker). This is because the theoretical claim in issue here is concerned with the structure of tort actions, and not with the remedies that such actions are capable of providing. For details of the admission, and extent, of the problem of fit caused by this action for rights theory, see Goudkamp and Murphy (n 14) 147-149.
accidents should be compensated otherwise than at the public expense. 98 And secondly, it was also intended to function as a deterrent: something that would help fulfil the political “desire to reduce the incidence of fatal accidents”. 99 In none of this was the legislature driven by a desire to ensure coherence between the 1846 Act and the kinds of juridical and structural features that are routinely paraded by our target theorists as core features of tort law. 100 And nor, as we saw, did the dependency action achieve quite by chance any such coherence.

C. The Role of Judicial Predilection and Juristic Influence

(1) Judges’ Personal Convictions

It is trite to observe that the common law is the product of countless different judges, living and working in very different eras, each moulding and adapting the law according to the circumstances of the day. But notwithstanding this fairly obvious observation, it is possible to identify a number of leading judicial figures who forged important developments in tort law on the anvil of personal ideological commitments. Thus, although Jerome Frank indubitably overstated things when he said that, as a general matter, “[t]he law varies with the personality of the judge”, 101 so too was Roscoe Pound a little bit hasty in dismissing Frank’s selective invocation of particular cases in order to support his claim. 102 For even a small number of decisions driven by personal ideological beliefs have the capacity to leave a lasting imprint on the law. I have adverted already to the way in which a handful of judges played a major role in the development of economic torts on account of their distrust of trade unionism generally, and their vehement contempt for closed shop arrangements in particular. But these are by no means the only examples. Rather, there are quite a few judges who, in key cases, can be shown to have moulded particular aspects of tort law in line with their personal ideological commitments.

Take, for example, the decision of Lord Abinger CB in Priestly v Fowler 103 which Kostal describes as “one of modern English legal history’s clearest examples of judicial wilfulness and ideological conviction”. 104 In that case – which is generally taken to be the source of the now discredited doctrine of common employment – Lord Abinger began by clearing the path for a little judicial legislation by observing that there was, “no precedent for the present action by a servant against a master”. 105 He then declared that, in the absence of a direct precedent, he was free “therefore to decide the case upon general principles”. 106 Tellingly, however, he failed to elaborate on what he thought those “general principles” were. Nor did he try – even tenuously – to link their supposed existence to any earlier cases. Instead, he simply asserted that the only important thing for him to do was to focus on “the consequences of a decision the one way or the other”. 107 In other words, he was acutely aware that he was making new law; and he was perfectly happy to take

98 The Poor Law Amendment Act 1834, which was “designed to curb expenditure upon the poor” (Simpson (n 81) 123), had been passed just about a decade earlier and was symptomatic of a growing concern to cut back on the cost of poor relief.
99 Nolan (n 94).
100 In fact, it would have been impossible for it to have done so since it was only in the late 19th Century (in the work of figures like of Holmes and Pollock) that pioneering efforts to offer a principled, coherent account of tort law began to emerge.
102 R Pound, ‘The Call for a Realist Jurisprudence’ (1931) 44 Harv LR 697.
103 (1837) 3 M & W 1.
104 Kostal (n 95) 263.
105 (1837) 3 M & W 1, 5.
106 ibid. For a concession that judges will decide such cases et aequo et bono (ie, according to a discretion guided by the judge’s personal assessment of the merits of the case), see P Devlin, The Judge (OUP, 1979) 101-2.
107 ibid.
the opportunity presented to him in Priestly to mould the law in line with his personal view of what the better overall outcome would be.

Importantly, his vision of the better overall outcome was shaped (at least partly) in accordance with his well-documented commitment to the ideals of personal responsibility, liberty and self-reliance.\(^{108}\) Thus, he said, “the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself”.\(^{109}\) And in so saying were sown the seeds for the doctrine of common employment; for it was Lord Abinger’s emphasis in Priestly upon a servant’s personal responsibility that was routinely invoked as the basis for that doctrine in the years that followed.\(^{110}\)

There was seemingly, however, an additional driver at play in his judgment: raw politics. Lord Wright, many years after Priestly had been decided, described Lord Abinger’s decision as having “originated in the old Tory attitude to labour”.\(^{111}\) True, there was nothing said explicitly in Priestly which supports this interpretation; yet it is not a view that can be dismissed lightly. For, in a former political life, Lord Abinger had left the Whigs in the early 1830s and defected to the Tory Party under which banner he served as a Member of Parliament. He served, first, as the Tory MP for Cockermouth (in 1831) and then Norwich (from 1832 to 1835) before immediately thereafter becoming Lord Chief Baron of the Exchequer.

For present purposes it does not matter which had the upper hand: his commitment to the values of liberty and personal responsibility, or his traditional Tory attitude towards labour. Either way, his conclusion about the best overall outcome in that case can aptly be described as having been driven by matters of personal conviction rather than by the stare decisis principle. Nor was it anchored to any fundamental concern to maintain or enhance the putative coherence of the law. Quite the opposite, in fact, for Priestly created (or at least paved the way for) an indefensible divide in the application of the vicarious liability principle. After Priestly, the question of whether an action could be brought against an employer for torts committed by his employees turned artificially on the question of whether the injured party was a fellow employee of the immediate wrongdoer, or some third party.\(^{112}\)

Though Lord Wright admitted his personal dislike of the common employment doctrine,\(^{113}\) he was nonetheless committed to the view that he, quia judge, had no power to overturn it. Only Parliament, he thought, had the authority to remove a rule of law that stood on House of Lords’ authority.\(^{114}\) Yet there were limits to his conservatism. In particular, he was perfectly content that judges might seek extra judicially to influence Parliament regarding change in the law. During the 1930s, he chaired the Law Revision Committee to which body a number of other judicial appointments were made.\(^{115}\) This Committee was set up with the following terms of reference:

---

108 As one historian notes: Abinger was “an anti-slavery Whig who, in the previous decade had championed Benthamite reform of the Poor Laws”: see Kostal (n 104) 265-266.
109 (1837) 3 M & W 1, 6.
110 It is stretching things to say, as some do, that the doctrine of common employment was properly formed in Priestly. However, the case was undoubtedly interpreted in this way in later cases on both sides of the Atlantic: see, eg, Farwell v Boston and Worcester Railroad (1842) 4 Metc (Mass) 49; Hutchinson v York, Newcastle and Berwick Ry (1850) 5 Ex 343.
111 Lord Wright, Legal Essays and Addresses (CUP, 1939) 398.
112 A supposed justification for the differential treatment was linked to a fictional implied term that employees agreed to run the risk of injury at work: see Bartonhill Coal Co v Reid (1858) 3 Macq 266, 284 (Lord Cranworth). But the idea that 19th Century manual workers – the ones mainly at risk – genuinely agreed to such a term is fanciful: most took jobs out of financial necessity.
113 As he remarked in Wilson v Clyde Coal Co v English [1938] AC 57 (at 82): the fact a “workman takes the risk of a fellow workman’s negligence” does not imply also that he “take[s] the risk of his master’s negligence” in the form of, say, employing incompetent co-workers.
115 For personnel details, see Viscount Kilmuir, “Law Reform” (1958) 4 JSPTL 75, 81.
to consider how far, having regard to the statute law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the Committee require revision in modern conditions.\textsuperscript{116}

During Lord Wright’s tenure, the Committee issued four Reports, one of which concerned contributory negligence.\textsuperscript{117} This Report, after the somewhat inconvenient delay caused by the Second World War, ultimately formed the blueprint for what was to become the Law Reform (Contributory Negligence) Act 1945.

Two particular points can usefully be made about this legislation. First, the suggestion that that Committee should seek to reform the law concerning contributory negligence came from Lord Wright personally.\textsuperscript{118} Secondly, the apportionment provisions of the Act simply added to the incoherence of tort law from the perspective of contemporary tort theories. For example, as Gardner points out, “the modernized law of contributory negligence” can be seen to “lack a corrective justice rationale [since] corrective justice … knows only addition and subtraction. It has no room for division, which is the business of distributive justice”.\textsuperscript{119} Equally, in being concerned exclusively with the question of how losses are to be divided between claimants and defendants, the Act is naturally more in tune with the loss model of tort law against which rights theorists such as Stevens so resolutely set their face. Indeed, it has been shown at length elsewhere that the contributory fault regime is inexplicable in terms of rights theory precisely because the contributory fault regime is concerned solely with allocating responsibility for losses: it pays no heed to rights; and thus sits in diametric opposition to a right-based model of tort law.\textsuperscript{120} Stevens freely concedes the point.\textsuperscript{121}

Lords Halsbury, Abinger and Wright are but three prominent judicial figures who were instrumental in introducing novel developments to the law of torts that appear aberrant from the perspective of contemporary tort theories (therefore contradicting the claim that tort law is in the process of working itself pure). They are, however, by no means alone. Lord Denning, for example, was personally responsible for creating much of the incoherence that attended the development of the economic torts during the latter part of the 20th Century. And he, like Lord Abinger before him, was seemingly driven by a personal ideological commitment in conducting, via numerous cases, what Carty has called a “vigorous campaign … to expand economic tort coverage in the face of the increasing muscle of trade unions” which he found abhorrent.\textsuperscript{122}

Likewise, at roughly the same juncture, it was Lord Reid’s firm belief in the idea that there should be a duty of common humanity that motivated his development of a subjective element in the test applied to determine an occupier’s liability towards trespassers in \textit{Horrington v British Railways Board}.\textsuperscript{123} Departing from the usual objective approach to setting the standard of care, he openly keyed liability to the particular occupier’s resources. He said: “an impecunious occupier with little

\textsuperscript{117} Law Revision Committee, \textit{Eighth Report: Contributory Negligence} Cmd. 6032 (HMSO, 1939). Lord Wright is also on record as having enthusiastically endorsed the final version of the Bill: see Mitchell (n 43) 326, n 96.
\textsuperscript{118} Mitchell (n 43) 313: “[r]ight at the start of the report it was made clear that the Committee favoured apportionment as the ‘fairer’ method of dealing with contributory negligence”.
\textsuperscript{120} See Goudkamp and Murphy (n 14) 149-152.
\textsuperscript{122} H Carty, “The Tort of Conspiracy as a Can of Worms” in S Pitel \textit{et al} (eds), \textit{Tort Law: Challenging Orthodoxy} (Hart Publishing, 2013) 395. Thus motivated, Lord Denning was the prime mover behind the maverick and theoretically mystifying decisions in, among other cases, \textit{Torquay Hotel v Cousins} [1969] 2 Ch 106; \textit{Arrow (Automation) Ltd v Rex Chainbelt Inc} [1971] 1 WLR 1676 and \textit{Associated Newspapers Group Ltd v Wade} [1979] 1 WLR 697.
\textsuperscript{123} [1972] AC 877.
assistance at hand would often be excused from doing something which a large organisation with ample staff would be expected to do”.  

Assessing the occupier’s liability by reference to his personal financial wherewithal is incompatible with corrective justice based theories of tort. As Weinrib explains, “[f]rom a corrective justice standpoint, disregard of [the cost to the defendant of avoiding the accident] makes sense, because it is the risk, not the cost of eliminating it, that connects the parties as doer and sufferer”. The subjective element in Herrington seems equally incompatible with rights-based theories of tort law given that the cost to the defendant of avoiding an accident has nothing whatever to do with the claimant’s rights. From neither perspective is it possible to consider the development of the law in Herrington as an example of the law of torts working itself pure. Nor can it be dismissed as mere judicial aberration, for just over a decade later, Parliament considered the matter anew and elected to place the subjective considerations in Lord Reid’s common humanity test on a statutory footing in the Occupiers’ Liability Act 1984.

One final way in which judicial political beliefs have patently affected the development of tort law so as to contradict the claim that it tends towards an increasingly coherent state can be seen in the way that judges sometimes arrogated to themselves matters that had formerly been left to the discretion of juries. By transforming into a doctrinal (and therefore, legal) question, something that had previously been considered a question of fact (for the jury), the judges could exert greater control over the outcome of cases that otherwise would have been likely to attract claimant-friendly treatment at the hands of a jury. As others have shown, this desire for greater judicial control manifested itself in cases where juries would have been predisposed towards injured claimants who were seeking to sue a corporate defendant. In so doing, it played an important part in the development of the modern law of negligence via the duty of care concept.

For, in very simple terms, the use of the duty device served to place certain cases beyond the reach of any jury. If the court held that no duty existed, there was nothing for a jury to decide. Nor was such “tinkering” confined to the tort of negligence. Rather, as Joshua Getzler notes, a number of “Victorian judges… could be shown to … believe in market competition and the natural selection of the economically fit” and they “were determined to stamp out the antiquated commercial morality represented by the jury”, especially in cases of malicious prosecution. So, for example, in Abrath v NE Railway Co, the requirement of absence of reasonable and probable cause in that tort was re-packaged as a question of law. That this was done for the reason suggested by Getzler seems clear. Lord Bramwell said openly: “everyone … knows that the only reason why a railway company is selected for an action of this sort is that a jury would be more

---

124 ibid, 899. He justified this departure from the normal objective approach by noting that occupiers do not “voluntarily assume a relationship with trespassers”: ibid.

125 Weinrib (n 3) 169. In similar vein, see Beever (n 8) 183.

126 Stevens certainly fails to deal satisfactorily with the problem. He acknowledges the lower standard of care enunciated in Herrington (and replicated in the 1984 Act) before simply asserting that this lower standard “is not explained by any moral culpability on the part of the claimant … [but instead] justified because of the exceptional nature of the right being invoked”: Stevens (n 9) 124. Puzzlingly, he does not spell out what this exceptional right is, although he does speak of the duty being one to “protect those on his land” (ibid). So saying suggests merely that the familiar right to bodily integrity is implicated given Stevens’ commitment to the correlativity of rights and duties. If this be so, then there is no extraordinary right in play which explains the lower standard of care.

127 Under section 1(3) of the Act, “An occupier of premises owes a duty to another… if [among other things] the risk is one against which… he may reasonably be expected to offer the other some protection”. Note that the duty is keyed to the particular occupier “he” (as emphasised).

128 See, eg, Ibbetson (n 24).

129 Eg, in Metropolitan Railway v Jackson (1877) 3 App Cas 193, Lord Cairns was unequivocal (at 197) about not wanting to “place in the hands of the jurors a power which might be exercised in the most arbitrary manner”.


131 Cf Lister v Perryman (1870) LR 4 HL 535 where the House of Lords admitted openly that in malicious prosecution actions a judge would act as a trier of fact (not law), and that he or she could not look to any precedents to help decide whether there was reasonable and probable cause in the present case.
likely to give a verdict against a company than against an individual”. 132 And with that thought in mind, he nakedly manipulated the “reasonable and probable cause” test in order to shield corporate defendants from the otherwise likely imposition of liability that would result if the question were left to a jury. 133

“Engineering” certain pockets of tort doctrine in order to facilitate the reaching of “politically more acceptable” outcomes obviously has the capacity to undermine the coherence of tort law because relevant parts of the law end up being underpinned by a policy or value that is absent elsewhere. Such incoherence may be masked to some extent by the fact that the relevant pockets of doctrine may not, strictly, be inconsistent with the rest of tort law. But the absence of inconsistency must not be mistaken for the presence of coherence. As Neil MacCormick explains:

One can imagine a random set of norms none of which contradict each other but which taken together involve the pursuit of no intelligible value or policy. A trivial example: a rule that all yellow motor cars must observe a maximum speed limit of 20 … does not contradict or logically conflict with a rule that all red, green, or blue motor cars must observe … a maximum of 70… But on the face of it, no principled reason can be given for such a difference. 134

The crucial point here is that coherence requires the presence of a single common value that suberves every segment of the law. Kantians think that, within tort law, such a value exists in the form of a commitment to the normative equality of litigants. But no such normative equality can be said to undergird the developments just considered in which doctrine was openly manipulated in order to create rules that favour a certain class of defendants.

To summarise: a number of important developments in tort law are better explained by reference to the personal convictions of certain prominent judges than in terms of a ubiquitous commitment to the furtherance of some or other theoretical imperative. As a consequence, tort law becomes less rather than more coherent from time to time. As my various examples show, tort law is cannot be thought to moving gradually in the direction of still greater coherence so long as judges are able to act in the ways just described. 135 Stepping outside the explanatory ambitions he sets for himself, Stevens maintains that “our rights should not be decided, or altered, according to a judge’s personal assessment … of policy concerns”. 136 Yet history reveals that some judges think otherwise. The drivers for legal change are sometimes quite different from the juridical factors specified by our target theorists. And as a consequence, the law sometimes develops in ways that produce incoherence in the law (from the perspective of the theorists in view).

Furthermore, the fact that a relatively small number of prominent judges should have exerted such an influence over the development of the law should not really surprise us. For, as Paul Mitchell explains, during the first half of the 20th Century,

there were only three divisions of the Court of Appeal (consisting of three judges each), and nine Lords of Appeal … [Thus] [a]s a matter of raw probability, the same names could be expected to turn up reasonably frequently… and [d]ifferences in judicial attitudes to fundamental questions, such

---

132 (1886) 11 App Cas 247, at 252 (Lord Bramwell).
135 In suggesting that judges remain empowered to bring personal convictions to bear on the development of the law I do not ignore the fact that there is a difference between what a judge ought to do and what a judge is able to do. My point in the text relies on the latter not the former. Similarly, my claim in respect of the changes that are sometimes brought about by “maverick judges” is a limited one. I do not mean to suggest that such changes are irreversible, only that the law is not destined to roll forwards smoothly within the tramlines of some or other theory.
136 Stevens (n 9) 309.
as the constraints of precedent, or the need for the common law to reflect social changes, were particularly likely to come to the surface, and to be played out, in certain kinds of tort cases.\textsuperscript{137}

In the previous century, the group of senior judges routinely hearing tort cases comprised an even more select club than this.

\textbf{(2) Juristic Influence}

From time to time judges have been influenced by jurists’ ideas in deciding cases that extend or modify the law of torts. In some cases, the decisions reached confound the claim that tort law is in the process of working itself pure. For reasons of space, I do not pretend to give anything approaching a fully comprehensive account of the occasions on which this has happened.\textsuperscript{138} I simply advert to several notable examples which (for reasons I shall come to) support the central claim of this article.

In setting out the now authoritative definition of misfeasance in a public office in the \textit{Three Rivers} case, Lord Steyn was happy to endorse an established textbook’s account of the tort.\textsuperscript{139} Similar influence was at play in \textit{OBG Ltd v Allan} where Lord Hoffmann began by acknowledging that the law had got itself into a mess concerning the economic torts. He then swept away a lot of the earlier case law and sought to establish a new, clear framework stating candidly that:

\begin{quote}
In arriving at these statements of general principle, I have derived great assistance from many who have written on the subject in addition to those whom I have specifically cited and in particular, if what I have said does anything to clarify what has been described as an extremely obscure branch of the law, much is owing to Hazel Carty’s book \textit{An Analysis of the Economic Torts} (2001).\textsuperscript{140}
\end{quote}

He was not, however, the first Law Lord to turn to juristic opinion in this highly politicised field. When the tort of intimidation was first properly established in \textit{Rookes v Barnard},\textsuperscript{141} Lord Devlin was openly content to define the new tort along the lines proposed in Salmond’s textbook on torts.\textsuperscript{142} When, during the latter part of the 20\textsuperscript{th} Century, some scholars began to think that perhaps the rule in \textit{Rylands v Fletcher} had been eclipsed by the burgeoning tort of negligence, it was the influence of FH Newark’s classic article on \textit{Rylands} that saw new life breathed into it in the \textit{Cambridge Water} case.\textsuperscript{143} Equally, in the tricky negligence case of \textit{White v Jones}, it was similarly clear that Lord Goff had been guided by juristic writing (not just on English law, but also on German law) in finding for the claimants in the way that he did.\textsuperscript{144}

Much the same story can be told of the House of Lords’ invocation of \textit{Archbold: Criminal Pleading, Evidence and Practice} in order to help remould the law of public nuisance in \textit{R v Rimmington}.\textsuperscript{145} Significantly, their Lordships were – in line with \textit{Archbold} – insistent in that case, that “the requirement of common injury [\textit{i.e.}, the breach of a public right]… is the distinguishing feature” of a public nuisance. Thus, although it had once been held that a “private nuisance situation affecting

\begin{thebibliography}{99}
\bibitem{MITCHELL43} Mitchell (n 43) 6-7.
\bibitem{104AN} As one study of 104 House of Lords cases over a 20 year period makes clear, “[t]here can be no doubt that critical and constructive scholarship has had a significant impact on the development of particular parts of the law of tort by the House of Lords”: K Stanton, “Use of Scholarship by the House of Lords in Tort Cases” in J Lee (ed), \textit{From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging} (Hart Publishing, 2011) 215.
\bibitem{TREES} Three Rivers DC and Others v Governor and Company of The Bank of England (No 3) [2003] 2 AC 1, 190.
\bibitem{2008} [2008] AC 1, 65.
\bibitem{1964} [1964] AC 1129.
\bibitem{ibid} \textit{ibid}, at 1205.
\bibitem{1994} [1994] 2 AC 264.
\bibitem{1995} [1995] AC 207. That academic materials should have played a part is unsurprising once one recalls that both Professor Jolowicz and Professor Markesinis acted as counsel in that case.
\bibitem{2006} [2006] 1 AC 459.
\end{thebibliography}
large numbers could be treated as a public nuisance, it was clear, in the wake of Rimmington, that public nuisances would henceforth invariably require the infringement of public rights.

Juristic influence over legal development has not always been brought to bear by reason of Scholar A’s work having persuaded Judge B (in the context of case C) about the virtue of would-be rule of law D. Jurists have also influenced judicial thinking in other pertinent contexts. For example, the judges who were involved in drafting the influential reports of law reform committees during the first half of the 20th Century were clearly susceptible to juristic influence. As Mitchell records:

> the creation of law reform committees, in particular the Law Revision Committee [which as noted already was the source of the Law Reform (Contributory Negligence) Act 1945] … provided the opportunity for certain, carefully selected, judges and academics to work together, and … the workings of these committees reveal a surprisingly pervasive academic influence.

All of the above are good examples of tort developing in ways that cannot be described as “working itself pure” (at least where such purity is judged from the perspective of the theories in view). On the one hand, both the misfeasance tort and public nuisance clash with the rights theorist’s insistence that tort law responds to the infringement of private (not public) rights. While on the other, both the tort of causing loss by unlawful means and the decision in White v Jones confound the structural imperative to which most if not all of our target theorists subscribe.

Professor Birks possibly went slightly too far in his claim that “[t]he common law is to be found in its library, and the law library is nowadays not written only by its judges but also by its jurists”. Yet it is certainly true that jurists have exerted considerable influence over the judicial development of tort law. And not infrequently, this influence has led to the creation of doctrines and rules that prove problematic not only for the explanatory ambitions of leading contemporary tort theories, but also for their claims about the likely trajectory of tort’s future development.

Equally noteworthy is the fact that, although the judges have been receptive to the work of certain jurists in developing the law, there is little evidence that those who have proved most influential include the theorists considered here. Electronic searches of legal databases certainly reveal next to no influence on their part. Stevens has been cited several times, but he has only really been influential in developmental terms in relation to unjust enrichment. In connection with tort, the greatest engagement with his work is to be found in Revenue and Customs Commissioners v Total Network SL, and in that case, the House of Lords disagreed with his analysis of the tort of unlawful means conspiracy. Weinrib’s influence, seems to have been confined to the illegality defence. His work was cited with approval in one notable Canadian case: Hall v Hebert, and the

---


147 *A-G v PYA Quarries* [1957] 2 QB 169.

148 Mitchell (n 43) 9. Emphasis added. For the precise role that the jurists played in connection with the Law Reform (Contributory Negligence) Act 1945, see ibid, 303-304.

149 Both rights theorists and corrective justice theorists see tort as belonging exclusively to the domain of private law and for this reason they struggle to explain the misfeasance tort: see J Murphy, “Misfeasance in a Public Office: A Tort Law Misfit” (2012) 32 OJLS 51. Jason Neyers has argued that public nuisance can be reconceptualised so as to cohere with a rights-based understanding of tort law. But by his own admission, his approach only works in relation to obstructed highway and public fishery cases thereby leaving some of the existing law unaccounted for: see J Neyers, “Reconceptualising the Tort of Public Nuisance” [2017] CLJ 1, 28.

150 See text accompanying nn 72-74.


152 See Lord Rodger, “Judges and Academics in the United Kingdom” (2010) 29 Univ Queensland LJ 29, 40: “Nowadays, more many judges have done law degrees and so they know of, and appreciate, the work of leading academics”. See also J Beatson, “Legal Academics: Forgotten Players or Interlopers?” in A Burrows et al (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (OUP, 2013).


154 ibid, [225]-[226] (Lord Neuberger).

relevant passage has been quoted numerous times since. Critically, however, on each subsequent occasion, the relevant article was invoked merely to confirm an extant understanding of the illegality rule. It was not used as the platform for any further development of the law.\footnote{\textit{Patel v Mirza} (2017) AC 467, 191; \textit{Les Laboratoires Servier v Apotec Inc} [2012] EWCA Civ 593, [67]; \textit{Stone & Rolls Ltd v Moore Stephens} [2009] 1 AC 1391, [7]; \textit{Hewson v Meridian Shipping Services Ltd} [2003] ICR 766, [82].}

D. Changes in the Ideological \textit{Zeitgeist}

In the Middle Ages, tort liability was ostensibly strict, the key question being one of causation rather than fault. However, it is hyperbole to suggest that, in this era, there was universally in play “an unmoral standard of acting at one’s peril”.\footnote{JB Ames, “Law and Morals” (1908) 22 Harv L Rev 97, 99.} For, although the early law of trespass ostensibly involved strict liability, assiduous work by legal historians has unearthed evidence that considerations of blameworthiness not only influenced jury verdicts from time to time,\footnote{See SFC Milsom, \textit{The Legal Revolution} (OUP, 1999) 59-60.} but also insinuated themselves into questions of causation.\footnote{DJ Ibbetson, \textit{A Historical Introduction to the Law of Obligations} (OUP, 1999) 59-60.} On the other hand, however, it is undoubtedly true that this was not a period in which fault-based liability was anything like the norm. The dominant principle – albeit that it was in practice sometimes softened in the ways just described – was that, “[i]f a man suffers damage, it is right that he be compensated”.\footnote{Another, not insignificant, reason was the fact that the a number of procedural rules applicable to actions on the case, but not trespass, made the former much more attractive to claimants such that case (which paved the way for the modern day action for negligence) became the action of choice in tort: see Ibbetson (n 159) 156-157.}

A significant explanation of why things changed, of why fault came to occupy centre stage in modern tort law, can be found in the influence exerted by certain moral philosophers and Natural Lawyers. Prominent among these was Samuel Pufendorf.\footnote{S Pufendorf, \textit{The Law of Nature and Nations} (OUP, 1999) 59-60.} He argued that liability could only be attached morally to those things that we do “with full purpose and premeditated guilt, or by negligence” but not to those things that we do “by mere chance”.\footnote{S Pufendorf, \textit{On the Law of Nature and Nations} (B Kennett tr, 4th ed, Walthoe \textit{et al}, 1729) 3.1.6.} And, as Ibbetson records:

\begin{quote}
These writings gained considerable popularity in England around 1700, and they remained important throughout the eighteenth Century. In such an atmosphere it is unsurprising that they came to affect the perception of [what renders a person liable].\footnote{Ibbetson (n 159) 158.}
\end{quote}

Pufendorf’s principal work, \textit{The Law of Nature and Nations}, often formed the basis of university courses; and the fact that it went through five annotated English editions during the course of the 18th Century gives a clear indication of how widely his ideas were disseminated. In particular, it was the educated classes, including the judiciary, that were attracted to the ideas promulgated by Pufendorf and other Natural Lawyers. And the fact that “[r]efferences to the law of nature abound in the [law] reports of the seventeenth and eighteenth centuries”,\footnote{See eg, NE Simmonds, “Reason, History and Privilege: Blackstone’s Debt to Natural Law” (1988) 105 \textit{Zeitschrift der Savigny-Stiftung für Rechtsgeschichte} (GA) 200.} is good evidence of this influence at work.

It was not just the judges upon whom an impression was made by the Natural Lawyers. Prominent early jurists – such as William Blackstone and Francis Buller – were also heavily influenced by them.\footnote{“Every man ought to take reasonable care that he does not injure his neighbour; therefore when a man receives hurt through default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law
\footnote{165 See, eg, NE Simmonds, “Reason, History and Privilege: Blackstone’s Debt to Natural Law” (1988) 105 \textit{Zeitschrift der Savigny-Stiftung für Rechtsgeschichte} (GA) 200.}
remotely like this [negligence principle] in the earlier common law” that could be seen as Buller’s inspiration, his adoption of that principle could, by contrast, be traced with ease to Pufendorf. Ibbetson goes so far as to suggest that Buller’s words were “fairly clearly borrowed straight from Pufendorf, who was the first theorist to formulate the general principle of an antecedent duty to take reasonable care, with liability arising for breach of that duty”.167

Thus, regardless of whether judges came directly to Pufendorf’s ideas in the course of their own education, or whether they picked them up, indirectly, via Buller or Blackstone, it is fair to say that the emergence and spread of the negligence principle in English tort law had more to do with the growth in popularity of a particular ideology within educated society than with the strictures of any given theory of tort law.

Importantly, an ideological commitment to fault-based liability ought not to be understood as either necessary or inevitable in tort law. True, the influence of the Natural lawyers contributed significantly to the view that it was morally more justifiable to anchor liability to the defendant’s wrongdoing rather than to the mere fact that the defendant had caused a claimant loss. But there could be no guarantee, once the fault principle had become established, that judges and legislatures of the future would (like Weinrib) commit themselves unwaveringly to it going forwards. As noted already, the formulation of the rule in Rylands v Fletcher marked a notable judicial move in the other direction; and Parliament, too, has had occasion to introduce tort statutes imposing strict liability.

At roughly the same time that many people argued in favour of replacing the tort system with some or other no fault compensation scheme,168 powerful arguments were also made in favour of the introduction of strict liability for defective products. The ideological justifications for such a move varied. Some advocates offered economic arguments. Others favoured the essentially moral arguments bound up with enterprise liability and loss distribution.169 Still others thought that strict liability for harm caused by defective products was warranted in view of what had been learned from the Thalidomide tragedy. For present purposes, it is immaterial which of these schools of thought marshalled the most convincing arguments. It suffices merely to note that, despite the ascendancy of the fault principle, strict liability for defective products was introduced via the Consumer Protection Act 1987 while other statutes – especially in the field of health and safety at work – did likewise. The idea, therefore, that there is but one proper form of tort liability is without foundation.

As the dominant ideology changes, so too may substantive rules of tort law be formulated to reflect that change.170 Indeed, it seems tolerably clear that changes in the form, content and reach of tort law are influenced more by shifts in the dominant ideology than they are by an assiduous endeavour on the part of lawmakers to craft or mould tort law in line with the central tenets of particular grand theories.171 Oliver Wendell Holmes was assuredly right when he remarked – looking to tort law’s history – that “[t]he law did not begin with a theory”.172 He was also correct in stating that the trajectory of tort law’s development can be much more accurately understood in terms of the “[t]he philosophical habit of the day … and the ease with which the law may be changed to meet the opinions and wishes of the public”.173 And his compatriot, Ted

---

167 Ibbetson (n 164) 19.
169 For a summary of each, see J Stapleton, “Products Liability Reform – Real or Illusory?” (1986) 6 OJLS 392, 394-397.
170 In saying this, I do not mean to suggest that any changes thus wrought will inevitably render tort law less coherent than it presently is (judged from the perspective of one or more of my target theories). My point is merely that changes in the ideological Zeitgeist have the capacity to ground changes that render tort less coherent.
171 For other examples of tort statutes thus inspired, see the various Acts of Parliament discussed in Arvind and Steele (n 93) 3, 6, 7 and 9.
173 ibid, 72.
White, certainly makes a compelling case that a marked increase in the commitment to philosophical “principle of moral answerability” did much to drive at least four major aspects of tort reform in the USA.\textsuperscript{174}

E. Conclusion

My purpose in this article has been to show that tort law is not developmentally constrained in the way suggested by the theories with which I engage. Rather than working itself pure in the way they suggest, it is clear that tort law’s evolution can sometimes be explained best, not in terms of grand theories which serve as formulae or recipes for tort law’s development, but in terms of judicial predilection, juristic influence and an ongoing need to meet the multifarious challenges posed by changes in the material and intellectual conditions of social life. From the 19\textsuperscript{th} Century problems of bursting dams and widespread fatal accidents, to the 20\textsuperscript{th} Century phenomena of compulsory liability insurance and pharmaceutically induced fetal disabilities; from the influence exerted by moral philosophy to the economically driven case for a strict liability regime concerning defective products; and from the rise of trade unionism to crises afflicting the insurance industry, tort law has unfailingly responded in one way or another.\textsuperscript{175} Sometimes, the response of judges and legislators has been quite momentous. On other occasions it has been much more modest. But the various reconfigurations that tort law has undergone in meeting these challenges have frequently produced explanatory difficulties for contemporary theories of tort law. Taken together, the various developments considered here lend support to the thesis that tort law is not inexorably working itself pure, that it is not steadily heading in the direction of greater conceptual and structural coherence.

In his pioneering endeavour to paint a picture of tort law as a distinctive legal category, Frederick Pollock thought that he could distil from the large array of different torts a general “duty of fellow-citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to one another”.\textsuperscript{176} He believed that this general duty could be broken down into three main types of duty, but nonetheless argued that those three main types of duty – “to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others” – are all alike.\textsuperscript{177} By contrast, some years later, Percy Winfield doubted whether anything like such a straightforward or systematic account of what binds torts together could ever be supplied. Winfield linked what he perceived to be the inescapable disunity of torts to the way in which tort law develops. Beginning with the observation that the “plasticity of the action on the case made the birth of new remedies easy”, he went on to observe (correctly I think) that “[i]t was more difficult for jurists to state this branch of the law scientifically than for judges to make the law itself”.\textsuperscript{178}

But there is more to this than simply the elusiveness of a golden thread linking all torts together. For my examples also reveal instances of patent inconsistency. It is very well known, for example, that numerous senior judges have declared on many occasions that bad motive/malice alone provides no basis at all for the imposition of tortious liability.\textsuperscript{179} Yet, in the tort of simple

\textsuperscript{174} GE White, “Tort Reform in the Twentieth Century: An Historical Perspective” (1987) 32 Villanova LR 1265, 1288.
\textsuperscript{175} For its responsiveness, in the USA, to other factors – like the introduction of contingent fee arrangements, and the relaxation of witness disqualification rules – see GE White, “The Emergence and Doctrinal Development of Tort Law, 1870-1930” (2014) 11 University of St Thomas LJ 463, 478-483.
\textsuperscript{176} F Pollock, The Law of Torts (Stevens & Sons, 1901) 22.
\textsuperscript{177} ibid.
\textsuperscript{178} Winfield (n 22) 5.
\textsuperscript{179} For a classic statement to this effect, see Allen v Flood [1898] AC 1, at 92 (Lord Watson): “the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due”. See also, to like effect, ibid, at 123 (Lord Herschell) and Crofter Hand Woven Harris Tweed Company Ltd v Veitch [1942] AC 435, at 442 (Lord Simon LC).
conspiracy, malice became an essential touchstone of liability.\textsuperscript{180} Similarly, although it is trite to state that tort law ordinarily stands firm against the imposition of liability for carelessly exposing another to a mere risk of harm, there is a small pocket of case-law – stemming from the decision in \textit{Fairchild v Glenhaven Funeral Services}\textsuperscript{181} – which effectively contradicts this norm.\textsuperscript{182}

In relation to both these examples, it is worth noting that each of the aberrant strands of the law was created on grounds of public policy. Simple conspiracy was minted in order to curtail what actions could be done in the name of trade unionism,\textsuperscript{183} while the \textit{Fairchild} exception was openly formulated in line with certain, expressly enumerated policy concerns.\textsuperscript{184} In neither case would it be remotely true to say that the relevant development was crafted with one eye firmly on the tramlines of the some or other over-arching theory of tort law.

Tort law is not now – nor has it ever been – in the process of working itself pure. Legislatures are, of course, entirely free to give the law whatever shape they see fit. And from time to time, influential judges seem to have considered themselves similarly empowered. Writing extra-judicially, Lord Hoffman candidly revealed that:

There are usually three levels of explanation for a controversial decision… First, there are the reasons given in the judgment, often of a fairly formalistic kind by reference to previous authorities. Secondly, there are the real reasons why the judges decided the case in the way they did… Finally, there are the explanations offered by academic writers which relate the case to their theory of what the law should be… theories will usually have played no part in the decision because the judges will not have heard of them.\textsuperscript{185}

He is not the only judge to think this way. Also writing extra-judicially, Lord Goff once suggested that changes in the law are best explained by reference to the fact that it “has to reflect all the untidy complexity of life”\textsuperscript{186} thus rendering judicial work not an assiduous endeavour to adhere to the tenets of any given theory, but merely “an educated reflex to facts.”\textsuperscript{187} “Our laws”, he continued, “are subject to the ebb and flow of the tides of fashion and opinion”.\textsuperscript{188}

These judicial admissions serve to reinforce an important point I made earlier, namely, that those of my target theorists who are hazy about the relation between their theories and statutory tort law\textsuperscript{189} cannot completely insulate themselves from the arguments of this article by claiming that their theory does not purport to explain tort statutes. There are, as I have attempted to show, plenty of common law developments that serve to confound their claims about tort law’s putatively predestined trajectory. In other words, even if statutory interventions are left to one side, there is little or nothing win the common law of torts is either pre-ordained or forever off the agenda.\textsuperscript{190}

\textsuperscript{180} See \textit{Quinn v Leathem} [1901] AC 495, at 506 and 524-5 (Lords Halsbury and Brampton respectively).
\textsuperscript{181} [2003] 1 AC 32.
\textsuperscript{182} The cases concern negligently caused mesothelioma, and liability may be attributed to D, even if (as a matter of non-provable) fact, the fatal asbestos fibres were yet to be inhaled at a workplace run by D. All that D ever did was expose C to the risk of inhaling potentially fatal asbestos fibres; and yet D may be held liable in negligence.
\textsuperscript{183} For evidence of a conscious judicial effort to do this, see Klarman (n 46) 1501. Note, too, the argument that the overly anti-trade union Lord Chancellor, Lord Halsbury, “almost invariably put service to the Conservative Party above judicial qualities” when appointing new members of the judiciary: see B Abel-Smith & R Stevens, \textit{Lawyers and the Courts: A Sociological Study of the English Legal System, 1750-1965} (Heinemann, 1967) 129.
\textsuperscript{184} For an enumeration and analysis of these policy concerns, see S Green, \textit{Causation in Negligence} (Hart Publishing, 2015) ch 6.
\textsuperscript{187} ibid, 82. Note, too, the free hand of Powys J when he formulated (the forerunner to) the misfeasance tort: “This action is prima facie impossession; never the like action was brought before”: \textit{Ashby v White} (1703) 2 Ld Raym 938, at 944.
\textsuperscript{188} ibid.
\textsuperscript{189} See above (n 14).
\textsuperscript{190} In the early days of the English writ-system new remedies were created freely enough: see Winfield (n 22), 2. And in much more recent times, Lord Clarke has expressed his faith in “the capacity of our tort law for pragmatic growth in response to true necessities” whatever they may be: \textit{Willers v Joyce} [2016] UKSC 43, at [89].