

RISK, HARM AND WRONGDOING IN THE LAW OF NEGLIGENCE

by

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This paper is written from within a particular, traditional, way of thinking about tort law, and concerns a dispute within that tradition. The tradition within which I am writing holds that liability in tort arises out of someone's committing a wrong, and that the central case where someone is held liable in tort to pay damages to another is the case where the defendant has violated a legal right of the claimant, or – to put it another, identical, way – has breached a legal duty owed to the claimant. This view of tort law used to be commonplace, but fell out of favour in the 20th century in favour of the view that tort law determines when one person should be held civilly liable for a loss that someone else has suffered. However, the traditional view of tort law does have some modern-day adherents, notably John Goldberg and Benjamin Zipursky in the United States, and myself and Robert Stevens here in the UK. But we do not agree on everything, and one of the main points of dispute between us is over the nature of the duty of care that A will owe B in a case where it is reasonably foreseeable that A's doing *x* will result in B suffering some kind of physical injury. To save words, I'll give this situation the name *Foreseeable Danger*.

Here, we are in total disagreement:

(1) *Stevens* takes the view that the duty that A owes B in *Foreseeable Danger* is a duty not to injure B by carelessly doing *x*. So if A carelessly does *x*, but his carelessly doing *x* does not result in B's being injured, A will not have breached the duty of care he owes B. His duty was a duty not to injure B by carelessly doing *x*, and B has not been injured. As A has done nothing legally wrong to B in this situation, there can be no basis for finding A liable in tort to pay damages to B.

(2) *McBride* takes the view that in *Foreseeable Danger*, A will owe B a duty to take care not to do *x*. So if A carelessly does *x*, he will have breached the duty of care he owed B, even if A's carelessly doing *x* does not result in any kind of injury to B. So where A carelessly does *x*, he commits a legal wrong to B, and the fact that A has wronged B *might* provide the basis for holding A liable in tort to pay some sort of damages to B.

(3) *Goldberg and Zipursky* occupy a middle position, arguing that in *Foreseeable Danger*, A owes B *two* duties of care, not one – a duty to take care not to do *x* (which they call a duty of 'non-injuriousness') *and* a duty not to injure B by breaching the duty A owes B to take care not to do *x* (which they call a duty of 'non-injury').¹ Only

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¹ Ripstein & Zipursky, 'Corrective justice in an age of mass torts' in Postema (ed), *Philosophy and the Law of Torts* (CUP, 2001), 218, 220. Technically – and for the sake of clarity – Goldberg and Zipursky might want to reserve the phrase 'duty of care' for the first duty, and simply call the second duty a 'qualified duty of non-injury'. But I don't think it does any harm – for the sake of simplifying the discussion in this paper – to call the second duty a 'duty of care', and Goldberg and Zipursky have referred to this second duty as a 'duty of care' in the past. See, for example, the quote at n 57, below.

breach of the latter kind of duty will amount to a tort. So if A carelessly does *x* and B is not injured as a result, B cannot claim that she is the victim of a tort and therefore has no basis for suing A for damages in tort.

So – the lines of battle are drawn up. We have Stevens on the one side, arguing that in *Foreseeable Danger*, A will owe B what we can call an *injury-avoiding* duty of care: a duty not to injure B by carelessly doing *x*. We have me on the other side arguing that in *Foreseeable Danger* A will owe B a *risk-avoiding* duty of care: a duty to take care not to do the very thing (*x*) that would put B at risk of suffering some kind of physical injury. And we have Goldberg and Zipursky somewhere in the middle, arguing that in *Foreseeable Danger*, A owes B *both* a risk-avoiding duty of care *and* an injury-avoiding duty. In this paper, I will argue that my view is correct: in *Foreseeable Danger*, A owes B only one duty of care, and that duty is risk-avoiding.

The paper is split into two parts. The first part assumes (contrary to Goldberg and Zipursky's position) that there is only *one* duty of care that A owes B in *Foreseeable Danger*, and explains why – if this is true – we should take the view that the duty of care A owes B is risk-avoiding, rather than injury-avoiding; in so doing, I hope to show why the dispute over the nature of the duty of care A owes B is practically important. The second part addresses four sets of arguments that can be made against the position I am defending in this paper – that A owes B only one duty of care in *Foreseeable Danger*, and that that duty of care is risk-avoiding – and tries to show that none of them work.

I. THE LAW

If A only owes B *one* duty of care in *Foreseeable Danger*, would it be more accurate to say that that duty of care is risk-avoiding rather than injury-avoiding? This is a question about what the law says – not about what it should say. My view is that – if we assume that A owes B *one* duty of care in *Foreseeable Danger* – the available authorities support the view that that duty of care is risk-avoiding. When I talk about the available authorities, I am not referring in any way to *dicta* in the cases that might have a bearing on the issue of whether the² duty of care A owes B is risk-avoiding or injury-avoiding. For every

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour³

that I can raise on my side of the argument, there is always going to be

an action on the *case* (of which a claim in negligence is the paradigm example) regards damage as the essence of the wrong⁴

that the opposition can throw back at me. I don't think judicial *dicta* are going to take us very far in resolving this dispute, not least because I don't think any judge has

² Again it should be emphasised that I am *assuming* in this part of the paper that A only owes B *one* duty of care in *Foreseeable Danger*, and we are concerned to identify whether that *one* duty of care is risk-avoiding *or* injury-avoiding. Any reference to 'the' duty of care that A owes B in *Foreseeable Danger* in Part I of this paper should be read as being subject to this assumption.

³ *Donoghue v Stevenson* [1932] AC 562, 580 (per Lord Atkin).

⁴ *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, at [64] (per Lord Dyson).

really considered explicitly whether or not the duty of care A owes B in *Foreseeable Danger* is injury-avoiding or risk-avoiding. However, in terms of how cases are *decided*, I think the view that the duty of care that A owes B is risk-avoiding comes out clearly on top.

This claim may surprise some. Consider *Near Miss*: D drunkenly drives a car down the street at 40 mph over the speed limit, and narrowly avoids running over C. In this situation, C will *not* be able to sue D for nominal damages. Surely, it might be argued, if the duty of care D owed C was a risk-avoiding duty to care not to drive dangerously, then we would expect the courts to respond to the breach of that duty of care by awarding C nominal damages to mark the fact that D has violated C's rights? The absence of a right to sue for nominal damages might be taken to indicate that D has *not* violated C's rights in this case, and that the only duty he owed C was an injury-avoiding duty not to injure C by driving carelessly. I think this is wrong. The reason why it is wrong is that I don't think that English law is religiously committed to the idea that '*ubi ius, ibi remedium*'.⁵

For example, in *Watkins v Secretary of State for the Home Department*,⁶ the House of Lords had to decide whether misfeasance in public office was a tort that was actionable *per se*, or whether a claimant had to prove that they had suffered loss as a result of a misfeasance in public office in order to sue the misfeasor for damages. *Watkins* concerned three incidents where prison officers opened the claimant prisoner's legal correspondence, deliberately or recklessly disregarding the Prison Rules that required that prisoners' legal correspondence remain confidential. The House of Lords decided that as the claimant had suffered no loss as a result of the prison officers' actions, he could not sue for misfeasance in public office. What is interesting for our purposes is that when the case was argued and decided, no one seemed to question that the the prison officers in *Watkins* had violated a duty owed to the claimant in acting as they did. The question in *Watkins* was whether it would be a *good idea* to allow the claimant a remedy given that the prison officers' wrongdoing had not actually caused the claimant to suffer any loss. So counsel for the defendant argued that:

The inclusion of a requirement of material damage [before a claimant can sue for misfeasance in public office] is generally an appropriate and robust way of ensuring that the law of tort is kept within proper bounds and strikes a fair and proper balance between all the interests at stake.⁷

Lord Bingham explicitly acknowledged that whether or not the House of Lords should rule that the tort of misfeasance in public office was actionable *per se* rested on pragmatic considerations:

8 There is great force in the [claimant's] submission that if a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands. There is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity.

9 On the other hand, it is correctly said that the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not. If public officers behave with outrageous disregard for their legal duties, but without causing material damage, there are

⁵ 'Where there is a right, there is a remedy.'

⁶ [2006] 2 AC 395.

⁷ *ibid*, 398.

other and more appropriate ways of bringing them to book. It is said to be unnecessary and untimely to develop this tort beyond the bounds hitherto recognised.

Lord Carswell considered:

...whether the law should continue to support a distinction between those actions in which proof of material damage is needed and those in which there is no such requirement. It might not unreasonably be said that any civil wrong should carry damages and that those who deliberately flout the law and deprive others of their rights by abusing their position should be liable to the victims of such acts... It might therefore be theoretically possible to abolish the distinction and hold that all torts are actionable without proof of material damage.⁸

But he went on to say that he was ‘not satisfied...that it would be *advisable* for the House to take such a course...’⁹ So – it seems – Lord Carswell thought that there would be no reason *in principle* why all torts should not be actionable *per se*, but *in practice* he thought it would be a bad idea to take such a step.

So sometimes – it seems – the courts will recognise that someone’s rights have been violated, but refuse to award a remedy in the absence of proof that the violation has caused the right-holder to suffer some kind of loss. As the *Watkins* case makes clear, this will be the case in misfeasance in public office cases. And this *may* also be the case in negligence cases. The reason why C is not allowed to sue D for nominal damages in *Near Miss* *may* be that her rights have been violated in this case, but for pragmatic reasons the court will simply refuse to give her a remedy because D’s violation of her rights has not caused her any loss. I emphasise the word ‘may’ because we have not, of course, established that the duty of care D owed C was risk-avoiding rather than injury-avoiding. All I am concerned to establish at the present moment is that the fact that C cannot sue D for nominal damages in *Near Miss* does not tell us *anything* about whether D violated C’s rights.

With that objection cleared out of the way, let’s now look at some features of our law that seem to support the view that in *Foreseeable Danger*, the duty of care A will owe B will be risk-avoiding, rather than injury-avoiding.

(1) *Breach of duty cases*. First of all, there is the obvious point that in negligence cases, when the courts deal with the issue of whether a defendant has breached a duty of care owed to the claimant, they do not consider *at all* whether the defendant’s actions have caused the claimant any kind of harm. So it is quite routine for a court to find that a defendant breached a duty of care owed to the claimant, but the breach did not cause the claimant any kind of harm.¹⁰ This fact, all on its own, tends strongly to indicate that the duty of care A owes B in *Foreseeable Danger* is risk-avoiding, rather than injury-avoiding. If it were injury-avoiding, the courts could only find that A breached the duty of care he owed B if his actions had resulted in B being injured. Of course, in *Near Miss*, the courts would never have occasion to find that D had breached a duty of care owed to C, as there would be no point in C trying to sue D in negligence; but were C to do so (and managed to avoid having her claim struck out as an abuse of process), there is no doubt that on normal principles, the courts would

⁸ *ibid*, at [80].

⁹ *ibid*, at [81] (emphasis added).

¹⁰ *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428; *Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281.

find that D had breached a duty of care owed to C in driving as he did, but that D's breach had caused C no loss.¹¹

(2) *Evidential uncertainty in causation cases*. In *Cook v Lewis*,¹² two defendants (Cook and Akenhead) who were out shooting birds were alleged to have carelessly fired their guns in the direction of a wood in which the claimant (Lewis) was standing. Lewis was hit by birdshot, but the jury could not decide whose gun the birdshot had come from. The Supreme Court of Canada held (by a 4:1 majority) that in such a case, both Cook and Akenhead should be held liable for Lewis' injury. It is pretty clear that the reason for the Court's decision was that if they had a choice between holding both Cook and Akenhead liable for Lewis' injury, and leaving Lewis without a remedy, they preferred to find Cook and Akenhead liable, because they were both in the wrong, and Lewis was blameless for his injury:

No liability will in any event attach to an innocent act of shooting, but the culpable actor, as against innocence, must bear the burden of exculpation.¹³

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers – both negligent towards plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence, it should rest with them each to absolve himself if he can.¹⁴

In *Fairchild v Glenhaven Funeral Services Ltd*,¹⁵ the House of Lords indicated that were the facts of *Cook v Lewis* to occur here, the same result would be reached, and for the same reason:

The unattractive consequence, that one of the hunters will be held liable for an injury that he did not inflict, is outweighed by the even less attractive alternative, that the innocent plaintiff should receive no recompense even though one of the negligent hunters injured him.¹⁶

And, of course, *Fairchild* was a *Cook v Lewis*-type situation where the individual defendants all breached the duty of care they owed the claimant by exposing him to excessive amounts of asbestos, and the claimant developed mesothelioma without being able to prove which exposure triggered the mesothelioma. All of the defendants were held liable for the claimant's mesothelioma on the basis that:

¹¹ It is perhaps revealing that Robert Stevens deals with 'breach of duty' cases under the heading 'Fault' in his book *Torts and Rights* (OUP, 2007), chapter 5. The language of 'fault' (as opposed to 'breach of duty') is usually favoured by those who believe that all talk of people owing other people duties of care is nonsense and that the law of negligence gives effect to the principle that if someone suffers harm as a result of your faulty conduct, you should compensate them unless public policy dictates otherwise. But Stevens has to adopt the language of the duty skeptics (which he is not) in talking about the cases on when a defendant will be held to have breached a duty of care owed to the claimant as talking about a defendant committing a 'breach of duty' independently of a finding that his actions had caused the claimant any harm would create intellectual difficulties for him.

¹² [1951] SCR 830.

¹³ *ibid*, at 835 (per Rand J).

¹⁴ *ibid*, at 842 (per Cartwright, Estey and Fauteux JJ, quoting from the decision of the Supreme Court of California in the very similar case of *Summers v Tice*, 33 Cal 2d 180, 199 P 2d 1 (1948)).

¹⁵ [2003] 1 AC 32.

¹⁶ *ibid*, at [39] (per Lord Nicholls). Also at [110] (per Lord Hutton), and [164] (per Lord Rodger).

...there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered. I am of the opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim.¹⁷

The [claimants] did nothing wrong, whereas all the defendants wrongly exposed them to the risk of developing a fatal cancer, a risk that has eventuated in these cases. At best, it was only good luck if any particular defendant's negligence did not trigger the victim's mesothelioma. The defendants, in effect, say that it is because they are all wrongdoers that the claimants have no case. In other words: the greater the risk that the men have run at the hands of successive negligent employers, the smaller the claimants' chances of obtaining damages. In these circumstances, one might think, in dubio the law should favour the claimants.¹⁸

In the recent case of *Sienkiewicz v Greif (UK) Ltd*,¹⁹ the Supreme Court recast the basis of recovery in a *Fairchild*-type situation, arguing that the normal rule that a claimant should have to prove on the balance of probabilities that his injury was a result of the defendant's negligence was relaxed in mesothelioma cases because it is currently impossible determine what the probability is that a particular defendant's negligence in exposing a claimant to asbestos triggered the claimant's mesothelioma. If scientific knowledge advanced to such an extent that we could tell what the probability was that a given exposure triggered a claimant's mesothelioma, the '*Fairchild* exception' to the normal requirement that a claimant show, on the balance of probabilities, that the defendant's negligence caused her injury would disappear. Except in one case:

...there would [in a world where we could tell the probability that a given exposure triggered the claimant's mesothelioma] still be justification for the application of the *Fairchild* rule where all the exposure was wrongful. Imagine four defendants each of whom had contributed 25% to the victim's exposure so that there was a 25% likelihood in the case of each defendant that he had caused the disease. The considerations of fairness that had moved the House in *Fairchild* would justify holding each of the defendants liable, notwithstanding the impossibility of proving causation on balance of probability.²⁰

We can, of course, debate whether it would be fair and just to set aside the normal rules on causation in such a case, or in a *Cook v Lewis*-type situation. But the important point for our purposes here is that none of the above *dicta* make any sense *at all* unless we assume that the duty of care that A will owe B in *Foreseeable Danger* is risk-avoiding rather than injury-avoiding. For if the duty of care that A owes B is injury-avoiding, the Supreme Court of Canada should *not* have found that the defendants in *Cook v Lewis* did anything *wrong* in firing their guns in the direction of the claimant: if Cook's shot did not *hit* Lewis, Cook could not have done anything wrong to Lewis by firing his gun. But the Supreme Court of Canada plainly thought that Cook *had* done something wrong: it clearly thought that the duty of care Cook owed Lewis was a risk-avoiding duty to take care not to fire his gun in Lewis'

¹⁷ *ibid*, at [33] (per Lord Bingham).

¹⁸ *ibid*, at [155] (per Lord Rodger).

¹⁹ [2011] 2 WLR 523.

²⁰ *ibid*, at [105] (per Lord Phillips).

direction, with the result that Cook *did* do something wrong in firing his gun in that direction.

The same point applies in the case where an employer carelessly exposes an employee to an excessive quantity of asbestos dust. If the duty of care that the employer owes his employee in this case is an injury-avoiding duty, then it makes no sense to think that an employer who has carelessly exposed an employee to an excessive quantity of asbestos dust has done anything wrong to the claimant in the absence of proof that the exposure has actually caused the claimant harm. But plainly the House of Lords in *Fairchild* and the Supreme Court in *Sienkiewicz* thought that we *could* say that carelessly exposing an employee to excessive quantities of asbestos dust was wrongful, even in the absence of proof that that exposure caused any harm to the employee. So the House of Lords in *Fairchild* and the Supreme Court in *Sienkiewicz* clearly took the view that the duty of care that an employer owes his employee in relation to asbestos dust is risk-avoiding rather than injury-avoiding. It is a duty to take care not to expose the employee to an excessive quantity of asbestos dust; not a duty not to injure the employee by carelessly exposing him to excessive quantities of asbestos dust.

Robert Stevens concedes that this last point is correct,²¹ but argues that the duty of care that an employer owes his employee in relation to asbestos dust is risk-avoiding rather than injury-avoiding because the employer has ‘assumed responsibility’ to the employee.²² So cases like *Fairchild* and *Sienkiewicz* tell us nothing about the nature of the duty of care A will owe B in *Foreseeable Danger*. There are two problems with this rationalisation of *Fairchild*.

First of all, the duty of care that an employer owes his employee in relation to asbestos dust is obviously not voluntarily assumed. If I employ you to work for me, and make it abundantly clear at your interview that you will be working for me up to your neck in asbestos dust, I will still owe you a duty to take care not to expose you to excessive quantities of asbestos dust even though I have told you I have no intention of assuming such a duty.

Secondly, there is not even a whisper of a suggestion in *Fairchild* that the status of the claimants and the defendants played any part in the decision in that case. Suppose that one of the claimants in *Fairchild* had developed mesothelioma after having been exposed to excessive quantities of asbestos dust by: (1) E, a builder who was doing work next door to the claimant’s house; and (2) F, a contractor who was doing work in the street outside the claimant’s favourite pub. There is no doubt that the House of Lords in *Fairchild* would have found both E and F liable for the claimant’s mesothelioma. And this is so, even though the duty of care that both E and F owed the claimant in relation to asbestos dust was not voluntarily assumed, and could only be based on the fact that it was reasonably foreseeable that exposing the claimant to excessive quantities of asbestos dust would result in the claimant being injured.

(3) *Sanctions for harmless negligence*. In a couple of cases, the courts have held a defendant liable in negligence even though, according to the normal rules on causation, his actions did not actually cause any harm. In *Reeves v Commissioner of*

²¹ So far as *Cook v Lewis* is concerned, Stevens thinks that was wrongly decided: Stevens, *Torts and Rights*, 150. But there are only so many cases that you can put in the ‘wrongly decided’ basket before you end up in the same boat as the law and economics movement, describing a fantasy tort law that bears no relation to the real tort law that is applied in the courts.

²² Stevens, *Torts and Rights*, 148.

Police of the Metropolis,²³ the police were held liable for the death in custody of a prisoner who took advantage of the police's carelessness in leaving a hatch in the prisoner's cell door open to kill himself. The police's carelessness did not – according to the normal rules on causation – cause the death of the prisoner, but the House of Lords held that the police had breached a duty of care owed to the prisoner in acting as they did, and the normal rules on causation had to be suspended so as to ensure that the police suffered some sanction for breaching that duty:

[where] the law imposes a duty to guard against loss caused by the free, deliberate and informed act of a human being...[i]t would make nonsense of the existence of such a duty if the law were to hold that the occurrence of the very act which ought to have prevented negated causal connection between the breach of duty and the loss.²⁴

In *Chester v Afshar*,²⁵ the claimant was partially paralysed after having an operation that involved a 1-2% risk of this sort of thing happening. The defendant had failed to inform the claimant of this risk, but his failure to do this had not caused the claimant to become paralysed as she would have had the operation at some stage even if she had been told about the risk, and she would have run exactly the same risk of paralysis when she had that operation. Nevertheless, the House of Lords held that the defendant had breached a duty of care owed to the claimant in acting as he did, and held that the defendant should incur some kind of liability for doing so. Lord Hoffmann, in the minority, held that the claimant should be awarded a 'modest solatium' for being deprived of the opportunity to consider the risk of paralysis in deciding whether or not to have the operation.²⁶ The majority held that even though the defendant's negligence had not caused the claimant's paralysis, he should still be held liable for it:

The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. On policy grounds therefore I would hold that the test of causation is satisfied in this case.²⁷

Clearly, in both of these cases, the duty of care that the defendant owed the claimant (or, in the case of *Reeves*, the claimant's partner) was *not* an injury-avoiding one. The defendants in these cases could not have breached a duty not to injure the claimant by acting carelessly in some way as their carelessness did not cause the claimant injury. The duties of care that were owed in these cases must have been risk-avoiding: a duty to take care not to give the prisoner in *Reeves* an opportunity to kill himself, or a duty to take care to give the patient in *Chester* the opportunity to decide for herself whether or not to undergo an operation, given the risks involved.

Now – the fact that *these* duties of care were risk-avoiding does not establish that the duty of care in *Foreseeable Danger* is also risk-avoiding. But it does raise the question: if the duties of care in *Reeves* and *Chester* were risk-avoiding, why isn't the duty of care in *Foreseeable Danger*? Of course, it is possible to come up with some

²³ [2000] 1 AC 360.

²⁴ *ibid*, 368 (per Lord Hoffmann).

²⁵ [2005] 1 AC 134.

²⁶ *ibid*, at [34].

²⁷ *ibid*, at [87] (per Lord Hope).

subtle explanations as to why the duties of care in *Reeves* and *Chester* are special²⁸ but it is doubtful whether any such explanations will really satisfy.²⁹ Given this, *Reeves* and *Chester* leave adherents to the view that the duty of care A owes B in *Foreseeable Danger* is injury-avoiding with a puzzle. But there is no puzzle for those who take the view that in *Foreseeable Danger*, the duty of care A will owe B will be risk-avoiding, not injury-avoiding – just like the duties of care in *Reeves* and *Chester*.

(4) *Claims for wrongful death*. Section 1(1) of the Fatal Accidents Act 1976 provides that:

If death is caused by any *wrongful* act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the persons injured.³⁰

The requirement that a *wrong* be committed before an action for wrongful death can be brought has sometimes troubled the legislature.

For example, if G's cat caused H some kind of physical harm due to the cat's having an uncommon characteristic, known to G, that meant the cat was likely to cause that sort of harm, G will be held strictly liable to compensate H for that harm under s 2(2) of the Animals Act 1971. G's liability in this case is not based on his having done anything *wrong* to H. Section 2(2) merely sets up a liability rule: if H is harmed, then G is liable. But if H dies as a result of his injuries, we might well want his dependants to be able to sue G for loss of support. In order to allow them to do this – to bring an action for wrongful death even though no wrong has necessarily been committed – s 10 of the Animals Act 1971 provides that 'For the purposes of the Fatal Accidents Acts...any damage for which a person is liable under sections 2 to 4 of this Act shall be treated as due to his fault.'

The same trick is pulled in relation to the Consumer Protection Act 1987, which again sets up a liability rule: if you are injured as a result of a product being dangerously defective, then the producer will be liable for your injury. In order to allow the dependants of someone who has been killed by a dangerously defective product to bring a claim for loss of support under the Fatal Accidents Act 1976 – again, to bring a wrongful death claim where no wrong has necessarily been committed – s 6(1) of the Act sets up a fiction that 'Any damage for which a person is liable under [the Act] shall be deemed to have been caused...for the purposes of the Fatal Accidents Act 1976, by that person's wrongful act, neglect or default.'

The requirement that a *wrong* be committed before a claim for wrongful death can be brought under the 1976 Act can also be expected to trouble those who adhere

²⁸ Stevens seems to recast *Reeves* as a false imprisonment case, arguing that the police had no right to detain the prisoner in *Reeves* if they did not look after his physical health (Stevens, *Torts and Rights*, 105). As for *Chester*: '[the claimant in *Chester* had a] right to make an informed choice arising from the [defendant's] assumption of responsibility towards her' (Stevens, *Torts and Rights*, 169).

²⁹ Neither of Stevens' explanations (footnote immediately above) seem to work. It is very likely that the police would have owed the prisoner in *Reeves* a duty of care even if they were not detaining him, but just allowing him to sleep off his drunkenness in the cells. While 'assumption of responsibility' is the best explanation of the doctor's duty of care in *Chester*, there is – yet again – not the remotest suggestion in *Chester* that the fact that the duty of care in *Chester* was voluntarily assumed made any difference to the decision.

³⁰ Emphasis added.

to the view that the duty of care that A owes B in *Foreseeable Danger* is injury-avoiding, rather than risk-avoiding.

For example, in *Hicks v Chief Constable of South Yorkshire Police*,³¹ the estates of two girls – Sarah and Victoria Hicks – who died in the Hillsborough tragedy (at the ages of 19 and 15 respectively) brought actions for damages against the police whose carelessness was responsible for the tragedy under the Law Reform (Miscellaneous Provisions) Act 1934. The actions were dismissed on the basis that Sarah and Victoria had suffered no actionable losses before they died: it was found as a matter of fact that they only suffered physical injuries as a result of being crushed in the crowd of supporters at Hillsborough at the same time as they died. The question I want to ask is: Could Sarah and Victoria’s parents have brought a wrongful death claim against the police under the Fatal Accidents Act 1976? We know the answer is ‘yes’ because Lord Bridge addressed this very point in his judgment in *Hicks*, holding that while a claim for loss of support could not be brought by the parents (because it was not possible to quantify what sort of support they could have expected from Sarah and Victoria had they not been killed at Hillsborough), the parents *could* bring a claim for bereavement under the 1976 Act in respect of Victoria’s death, as she was under 18 when she died.³²

This finding is hard to explain if we think that the duty of care that the police owed Sarah and Victoria was injury-avoiding. As Sarah and Victoria suffered no relevant injury before they died, if you adopt the view that the duty of care the police owed them was injury-avoiding, it is hard to say that the police committed a wrong in relation to Sarah and Victoria that caused their death. But this cannot be right. The duty of care that the police owed Sarah and Victoria in this case must have been risk-avoiding. It was reasonably foreseeable that ushering more and more spectators into an already crowded spectator pen with fences at the front of the pen to keep spectators would result in physical injury to people like Sarah and Victoria who were at the front of the pen. As a result the police owed people like Sarah and Victoria a risk-avoiding duty to take care not to usher more spectators into their pen. Their breach of that duty amounted to a wrongful act which – as it caused Sarah and Victoria’s deaths – could form the basis of a wrongful death claim by Sarah and Victoria’s parents for bereavement damages in respect of Victoria’s death. What could be simpler?

(5) *Torts that are not actionable per se*. Robert Stevens would agree with the argument I made above that the law is not religiously wedded to the principle that ‘*ubi ius, ibi remedium*’ and that in a case where a claimant has suffered no loss as a result of a defendant’s actions, the fact that the claimant is not allowed to sue the defendant for nominal damages is not necessarily a sign that the defendant has not violated the claimant’s rights in acting as he did:

There are torts where the infringement of the right is only actionable upon proof of consequential loss. Four examples are public slander, misfeasance in public office, deceit, and the breach of rights arising from gratuitous undertakings.³³

³¹ [1992] 2 All ER 65.

³² *ibid*, 67. Under s 1A(2)(b) of the 1976 Act, a claim for bereavement damages can only be brought by a parent of a deceased *minor*.

³³ Stevens, *Torts and Rights*, 88.

Missing from that list is, obviously, negligence.³⁴ The omission is a startling one, as most people would regard negligence as being the most obvious example of a tort that is not actionable *per se*. But Stevens would argue that in *Near Miss*, the reason why C cannot sue D for damages is that D has *not* violated C's rights, and that it would be *wrong* to say that D *has* violated C's rights, but the law, for pragmatic reasons, does not afford C a remedy for the violation. The duty D owed C in *Near Miss* was 'a duty not to injure, and not a duty not to expose to the risk of injury'.³⁵

However, the cases do not draw such a firm distinction between negligence on the one hand (according to Stevens, not actionable *per se* in cases like *Foreseeable Danger* because in the absence of proof of damage no tort has been committed) and misfeasance in public office and slander and deceit on the other (according to Stevens, not actionable *per se* because in the absence of proof of damage the courts will refuse to grant any remedy for the tort that has been committed).

For example, in *Karagozlu v Commissioner of Police of the Metropolis*,³⁶ the claimant was a prisoner who was transferred from an open prison to a closed prison. The claimant argued that he should not have been transferred to the more restrictive prison, and was only transferred because he was being victimised by the police officers who had arrested him. He sued for both negligence and misfeasance in public office. It was assumed that as *both* of these torts were not actionable *per se*, for *either* claim to succeed the claimant would have to establish that he had suffered some damage as a result of the transfer to the more restrictive prison.

I think the courts that decided *Karagozlu* would have reacted with some bemusement to the suggestion that if the claimant could not establish that the relative loss of liberty resulting from his transfer amounted to 'damage' for the purposes of the law of tort, the claimant's claim in negligence would have had to fail because *no wrong* (under the law of negligence) would have been done to him in transferring him to the closed prison, while the claimant's claim for misfeasance in public office would have had to fail because while a wrong (under the law on misfeasance in public office) *would* have been done to him in transferring him to the closed prison, for pragmatic reasons the law declines to grant a remedy for that wrong in the absence of proof of loss resulting from the wrong.

It would seem much more straightforward to take the position that negligence is *like* slander, deceit, and misfeasance in public office in that a defendant can commit *all* of these torts without causing a claimant to suffer any damage; but for pragmatic reasons, the law will not grant the claimant a remedy where committing one of these torts has not resulted in the claimant suffering any harm.

I hope I have shown by now just how much of the law becomes very difficult to understand if we adopt the view that the duty of care A owes B in *Foreseeable Danger* is injury-avoiding, rather than risk-avoiding.³⁷ I would also argue that a significant point in favour of the position I am adopting in this paper is that if the duty of care A owes B in *Foreseeable Danger* were injury-avoiding, the law would

³⁴ Though negligence arising out of a breach of a duty of care based on an 'assumption of responsibility' by the defendant to the claimant is included.

³⁵ Stevens, 'Rights and other things' in Nolan and Robertson (eds), *Rights and Private Law* (Hart Publishing, 2011), ch [redacted].

³⁶ [2007] 1 WLR 1881 (CA).

³⁷ Yet again, it should be emphasised that I am assuming at the moment that there is only *one* duty of care that A owes B, and we have to determine whether (given the state of the law) *it* is risk-avoiding *or* injury-avoiding.

become difficult to understand in a different sense: it would become difficult for A to understand what the law was telling him to *do*. If we regard legal duties as existing to guide our decisions, then what exactly would the law be telling A to do by imposing on him an injury-avoiding duty of care in *Foreseeable Danger*? Most likely – ‘It’s okay to do *x* carelessly, so long as your doing *x* does not result in B’s being injured.’³⁸ Such an injunction could be expected to leave A in some degree of uncertainty as to what he is allowed to do, and what he is not allowed to do. Whether or not he is allowed to do *x* depends on the outcome of his doing *x* – which is not something he can predict. There is a reason why parents tell their children to go to bed at a reasonable hour and do not tell them, ‘You can stay up as long as you like, so long as you are not tired in the morning.’ Such an instruction is almost useless as a guide to the child as to what he is supposed to do when it gets dark. Returning to *Foreseeable Danger*, only a risk-avoiding duty makes it clear to A what he is supposed to do, and can effectively guide his conduct.

II. FOUR COUNTER-ARGUMENTS

Having set out the positive case for thinking that, assuming A only owes B *one* duty of care in *Foreseeable Danger*, that duty of care is risk-avoiding rather than injury-avoiding, I will now consider four sets of arguments against the position I am adopting in this paper (that there *is* only one duty of care that A owes B in *Foreseeable Danger*, and that that duty of care is risk-avoiding).

II.1. Moore

Michael Moore is, assuredly, someone who does *not* subscribe to the traditional way of thinking about tort law within which this paper is written. Like other criminal lawyers who take an interest in tort law, he endorses without any question the 20th century idea that tort law is about allocating responsibility for losses suffered. However, I thought that something he said in his book on *Causation and Responsibility*³⁹ could be adapted to form the basis of an argument that the duty of care A owes B in *Foreseeable Danger* must be injury-avoiding rather than risk-avoiding. This is what he said:

...[I]t makes no sense to regard getting ‘hit’ with a risk as being itself a harm or a punishment... Since to ‘hit another with a risk’ is literally to hit the other with nothing at all, we cannot regard risks as harms.⁴⁰

It is, I think, an exaggeration to regard risks as ‘nothing at all’. *Ex post*, it is true that risks are nothing. After the event, when we discover that we have been flying all night on two engines rather than four, but have landed safely, the risk that we ran all night of our airplane crashing will have no effect on us. But *ex ante* – which is when the law subjects us to legal duties – risks are very important, and we will try very hard to avoid unnecessary risks. So passengers on a flight who are told beforehand that their

³⁸ An alternative would be ‘If you carelessly do *x*, ensure that your doing *x* does not result in B’s being injured.’ I don’t think this reading of what the law is saying is compatible with the generally accepted view that the law imposes a *negative* duty (a duty *not* to do something) on A in *Foreseeable Danger*.

³⁹ OUP, 2009.

⁴⁰ *ibid*, 172-173.

plane has only two functioning engines rather than the normal four could be expected to refuse to board the plane. However, Moore's remarks do provide the basis for an argument that could be made against the position I am adopting here.

The argument supposes that the reason why the law imposes a duty of care on A in *Foreseeable Danger* is to help ensure that B will not suffer any *harm* at A's hands. If this is right – so the argument runs – then we could expect the courts to impose on A a duty of care that is injury-avoiding, rather than risk-avoiding. This is because breach of a risk-avoiding duty to take care not to do *x* will not necessarily harm B. If A carelessly does *x*, B might not suffer any harm as a result of A's doing *x*. So imposing a risk-avoiding duty on A will amount to a form of overkill – trying to prevent A from harming B by enjoining A from doing something that *might* (but also *might not*) cause B harm. Only an injury-avoiding duty that requires A not to injure B by carelessly doing *x* is carefully tailored to target precisely the sort of thing that the law wants to avoid, which is A harming B.⁴¹

This argument assumes: (1) that when the law imposes a duty of care on A, it does so in order to prevent A harming B; and (2) that A will harm B if A injures B. Unfortunately for this argument, there is no reason to believe that (2) is true. Whether or not a physical injury is harmful to the person who suffers the injury depends on what happens next. Consider the example posited by Sellers LJ in *Wise v Kaye*, where the 'complete loss of sight [brings] a serenity and calm of life which [leads] to a happiness hitherto unknown.'⁴² In such a case, I think we would be hard pushed to say that the claimant who has lost his sight has actually been harmed. The same point is made very nicely at the end of the film *Charlie Wilson's War* (2007), when – in a quiet moment during a party to celebrate the role Congressman Charlie Wilson played in bringing down the Soviet empire by covertly funding the *mujahideen* resistance to Soviet forces in Afghanistan – Charlie Wilson's CIA contact, Gust Avrakotos, tells Charlie Wilson a Zen fable of obvious relevance to the subsequent events in New York on September 11 2001:

There's a little boy. On his 14th birthday he gets a horse and everybody in the village says, 'How wonderful – the boy got a horse!' And the Zen Master says, 'We'll see.' Two years later, the boy falls off the horse, breaks his leg and everyone in the village says, 'How terrible!' And the Zen Master says, 'We'll see.' Then, a war breaks out and all the young men have to go off and fight, except the boy can't because his leg's all messed up and everyone in the village says, 'How wonderful!'⁴³

At this stage in the story, we would again be hard pushed to say that the boy's broken leg caused him harm. But the Zen Master's response to the villagers' saying how

⁴¹ Compare Hurd, 'What in the world is wrong?' (1994) 5 *Journal of Contemporary Legal Issues* 157, at 193: 'We do not want people just to try not to torture; we want them not to torture. We do not want people just to intend not to kill the innocent; we want the innocent not to be killed.'

⁴² [1962] 1 QB 638, 651.

⁴³ The story does not appear in George Crile's book *Charlie Wilson's War* (Atlantic Books, 2002), on which the film was based, and therefore owes its place in the film to the inspiration of the screenwriter, Aaron Sorkin, as well as Tom Hanks' unhappiness with the ending of the film's original screenplay, which had Gust Avrakotos ringing Charlie Wilson on September 11 2001 to tell him to switch on his TV. The story is, though, a genuine Zen fable and not an invention of Sorkin's. An alternative version has it that a farmer's horse runs away. When the farmer's neighbours commiserate, he says 'We'll see.' The next day, the horse comes back with three wild horses in tow. The neighbours celebrate but the farmer still says, 'We'll see.' The next day the farmer's son tries to ride one of the wild horses, and is thrown and breaks his leg. The neighbours commiserate and the farmer still says, 'We'll see.' The following day, the son avoids being drafted into the army because his leg is broken. The neighbours' congratulations are met with another 'We'll see.'

wonderful it is that the boy cannot go to war is again to say, ‘We’ll see’ – so it might be that the boy’s breaking his leg will ultimately prove to be harmful to him. It all depends on how things turn out.

Some would question whether this is correct. They might argue that an injury is unquestionably harmful – and that these examples are simply cases where the harm caused by a particular injury has been offset by certain benefits that the injury has resulted in the injured person obtaining. So while an injured person might not be worse off *overall* as a result of having been injured, the injury *of and in itself* still undoubtedly counts as a harm in the ledger of harms and benefits that have been visited on the injured person in the course of his life. I think this view is too crude to be sustainable.

Consider, for example, a woman who gives up a kidney to her sister so as to save her sister’s life. I don’t think the woman in this case would think of herself as having suffered a harm *in any way, shape or form* because she now only has one kidney. And I don’t think that she is wrong to think this. Indeed, the fact that she thinks nothing of the fact that she now only has one kidney identifies precisely what is so admirable about her. Her virtue lies *not* in the fact that she willingly underwent a harm in order to save her sister’s life, but in the fact that her sister’s life meant so much to her that she does not actually regard giving up a kidney as being harmful to her. And if it is rational, indeed laudable, for her not to regard losing a kidney as being a harm to her, why should *we* think of it as being a harm? I think the Greek philosopher Epictetus had it almost right when he said that, ‘no one shall harm you without your consent; you will only be harmed, when you think you are harmed.’⁴⁴ *Almost* right because people can be deluded about whether or not a particular injury has harmed them. But I would contend that it *can* be rational for someone not to regard an injury as being harmful to them, depending on what the consequences were of their suffering that injury.⁴⁵

So *if* the law’s aim in imposing a duty of care on A in *Foreseeable Danger* is to prevent A harming B, the law will *also* be guilty of overkill if it imposes an injury-avoiding duty on A not to injure B by carelessly doing *x*. This is because A’s injuring B by carelessly doing *x* only *might* harm B. Of course, the degree of overkill is less than it would be if the law imposed a risk-avoiding duty on A. If the law imposes a risk-avoiding duty on A there is overkill *both* because A’s carelessly doing *x* only *might* injure B *and* because A’s injuring B only *might* harm B. If, on the other hand, the law imposes an injury-avoiding duty on A, only the latter sort of overkill is involved. But *if* the law’s aim in imposing a duty of care on A is to prevent A harming B, the choice of what sort of duty of care to impose on A cannot be *determined* by the reasons why it is imposing that duty of care on A. Instead, what sort of duty of care the law will impose on A will be determined by pragmatic considerations as to *how much* overkill we are happy to put up with in imposing a duty of care on A. We may end up preferring more overkill to less on the basis that imposing a risk-avoiding duty on A has advantages that imposing an injury-avoiding duty on A does not – such as making it clear to A exactly what he is required to do, and not holding out to him the possibility that he might be able to do *x* without incurring any kind of legal sanction.⁴⁶

⁴⁴ Epictetus, *Handbook*, section 30.

⁴⁵ So, for example, the kidney donor in our example might start feeling very differently about whether her loss of a kidney is a harm to her if her sister’s body rejects the donated kidney, so that the donation is in vain.

⁴⁶ Jeremy Waldron suggests that we should only seek to minimise overkill (or, in his phrase, ‘chilling action’) in cases where there is a ‘strong background right to liberty’ (see Waldron, ‘Vagueness and the

Of course, the fact that we cannot actually tell whether or not a given injury will be harmful or not – and perhaps will not be able to tell until the end of the person’s life, when we see what role that injury has played in how that person’s life has panned out – might make us skeptical of the whole idea that when the law imposes a duty of care on A in *Foreseeable Danger*, it does so in order to prevent A harming B. This possibility is explored by the next objector to the position I am taking in this paper.

II.2. Stevens

Robert Stevens does not think that tort law exists to protect us from being harmed by other people. He argues that the ‘infringement of rights, not the infliction of loss, is the gist of the law of torts.’⁴⁷ He also argues that in *Near Miss*, C cannot claim that D committed a tort in relation to her by driving so badly.⁴⁸ The only duty that D owes C – which correlates to a right that C has against D – is a duty that D not injure C by driving badly. I will leave aside until section II.4 the one specifically *legal* argument that Stevens makes in favour of the view that D’s duty is ‘a duty not to injure, and not a duty not to expose to the risk of injury’, and want in this section to consider whether there is anything in Stevens’ general view of tort law that compels us to accept that the duty of care A will owe B in *Foreseeable Danger* is injury-avoiding rather than risk-avoiding.

It seems to me that we can actually find *two* different rights-based theories of tort law within Stevens’ writings on tort law. We can call these two different theories, the *protective view* of tort law, and the *moral view* of tort law.

(1) The *protective view* is that tort law exists to protect various primary legal rights to certain goods (such as bodily integrity, or freedom of movement, or reputation, or property) by: (a) imposing duties on us not to interfere with those rights in various ways and (b) providing remedies when those duties are breached. So tort law performs two different functions: a duty-imposing function and a remedial function.

The duty-imposing function arises out of the fact that:

Our rights good against everyone else are not absolute, and it would be unacceptable if they were. If my right to bodily safety was absolute, this would require a real correlative duty on all others that they refrain from all conduct which posed some risk of harm to me. If all persons had a right of such a kind it would entail that all of us were under a duty that we refrain from any conduct which exposed any other to the risk of harm. We would all, therefore, be under a duty to each other not to drive a car, not to manufacture anything and, indeed, not to get out of bed in the morning in case we harmed anyone else by so doing.⁴⁹

In order to avoid such horrors, tort law has to specify exactly when interfering with one of our rights to a particular good will be *wrongful*, thereby imposing a duty on other people not to interfere with your right to that good *in that way* (with a correlative right in you that other people not interfere with your right to that good in

guidance of action’ in Marmor and Soames (eds), *Philosophical Foundations of Language in the Law* (OUP, 2011), ch [redacted], section 10). This is hardly the case in *Foreseeable Danger*.

⁴⁷ Stevens, *Torts and Rights*, 3.

⁴⁸ Stevens, ‘Rights and other things’, text at n 8.

⁴⁹ Stevens, *Torts and Rights*, 99.

that way, which correlative right is merely an instance of, or aspect of, your more general right to that good).⁵⁰

(2) The *moral view* is that while *some* of the legal rights we have against other people are justified on the basis of the good that is done by giving us such rights, *most* of the rights we have against other people – in particular, judge-created legal rights⁵¹ – give effect to moral rights that we have against other people:

It is just wrong to negligently run other people over (*malum in se*) and a judge should, if she were at road side with a magic court order which could stop it, order in any individual instance for it not to be done.⁵²

But how do we determine what moral rights we have against other people? In his book *Torts and Rights*, Stevens argues that:

...the moral rights we have, and those which ought to be given the force of law, are capable of being deduced from the nature and experience of ourselves, and the world and society in which we live. Rational people can recognize such rights independently of their being given force of law.⁵³

In a later paper, Stevens argues that in reasoning about what moral rights we have against other people, we should employ Derek Parfit's reformulation of the Golden Rule (traditionally, 'do to others what you would have them do to you' or 'don't do to others what you wouldn't have them do to you') in his book *On What Matters*.⁵⁴ In that book, Parfit puts forward the *Kantian Contractualist Formula* which, he argues, 'might be what Kant was trying to find: the supreme principle of morality.'⁵⁵ According to the *Kantian Contractualist Formula*:

Everyone ought to follow the principles whose universal acceptance everyone could rationally will.

The formula provides an attractive basis for determining what legal rights we have against other people, as legal rights – by definition – will be universally enjoyed and obeyed (thus universally accepted) and legal rights whose universal acceptance everyone could rationally will, will be legitimate.

So – those are the two rights-based theories of tort law that I believe we can find in Stevens' writings on tort law. Do either of them provide any support for the view that the duty of care A will owe B in *Foreseeable Danger* will be injury-avoiding rather than risk-avoiding?

The protective view does. According to the protective view, tort law is concerned to determine what duties we will owe other people not to interfere with the rights to certain goods that those people enjoy against us. So, by definition, the duties that tort law imposes on us will be duties not to interfere with a particular good that someone has a right to enjoy. So in *Foreseeable Danger*, the only duty that tort law can impose on A is a duty not to interfere with B's bodily safety either by doing x or by carelessly doing x. It follows that if A's carelessly doing x does not result in B's

⁵⁰ Stevens, *Torts and Rights*, 4.

⁵¹ Which, according to Stevens, 'are inevitably derived from moral rights': *Torts and Rights*, 331.

⁵² Stevens, 'Rights and other things' section 5, para 9.

⁵³ Stevens, *Torts and Rights*, 330.

⁵⁴ 'Rights and other things', text at n 95.

⁵⁵ Parfit, *On What Matters, Volume One* (OUP, 2011), 342.

bodily integrity being interfered with, A will not have done anything wrong to B so far as tort law is concerned. So, for example, in *Near Miss*, C cannot argue that D has done anything wrong to her because D's dangerous driving did not result in C's bodily integrity being interfered with, and the only duty tort law could have imposed on D – according to the protective view of tort law – is a duty not to interfere with C's bodily integrity by driving badly.

Unfortunately for this argument, the protective view of tort law is plain wrong. In another paper, I have explained that the protective view of tort law is completely upside down.⁵⁶ Tort law does not impose duties on us because we have legal rights to certain goods such as bodily safety or reputation or freedom of movement and so on. We have legal rights to such goods because tort law imposes duties on us. To say that 'I have a legal right to *G*' is simply to say that the law protects my enjoyment of *G* in certain ways – including by imposing duties on other people that protect my enjoyment of *G*. So the fact that in *Foreseeable Danger* B has a legal right to bodily integrity cannot tell us anything about the nature of the duty of care A owes B. The duty of care A owes B (whether it is injury-avoiding or risk-avoiding) is constitutive of B's legal right to bodily integrity – it contributes to B having a legal right to bodily integrity; it is not derived from the fact that B has a legal right to bodily integrity.

What about the moral view? Stevens says that A owes B an injury-avoiding duty of care in *Near Miss* because 'it is just wrong to negligently run other people over'. But is it also 'just wrong' to play dice with other people's lives? If it is, and the moral view of tort law is correct, then Stevens' rights-based view of tort law would actually *demand* that we say that the duty of care A owes B in *Foreseeable Danger* is risk-avoiding rather than injury-avoiding. I don't have much doubt myself that it is morally wrong to play dice with other people's lives. Someone who regularly drove blind drunk or drove like a maniac would incur general moral disapproval even if he had luckily managed to avoid injuring anyone so far. A company that carelessly spilled a load of radioactive uranium on a public road would incur general moral disapproval even in the absence of any proof that anyone had been made ill as a result of the spillage. A man who had sex with a woman being uncertain as to whether she was willing to having sex with him would incur general moral disapproval even if we did not know whether or not the woman was in fact happy to have sex with him. Applying Parfit's *Kantian Contractualist Formula*, I think everyone could rationally will the universal acceptance of the principle 'Take reasonable care to avoid doing things that you can reasonably foresee will expose other people to an unreasonable risk of suffering physical injury.'

It follows from the above that Stevens does not make any arguments about the nature of tort law that would compel us to accept that in *Foreseeable Danger*, the duty of care A owes B will be injury-avoiding rather than risk-avoiding. The protective view of tort law – which does support the idea that the duty of care A owes B is injury-avoiding – is simply wrong. If the moral view of tort law is correct, then that would tend to indicate that the duty of care A owes B is risk-avoiding rather than injury-avoiding.

However, the moral view of tort law may not be correct. It may be that tort law is concerned with a more restricted range of wrongs than all the moral wrongs that one person can commit in relation to another. This is Goldberg and Zipursky's view and they are up next.

⁵⁶ McBride, 'Rights and the basis of tort law' in Nolan and Robertson (eds), *Rights and Private Law* (Hart Publishing, 2011), ch 1.

II.3. Goldberg and Zipursky

So far I have assumed that there is only *one* duty of care that A owes B in *Foreseeable Danger*, and I have argued that if this is true, that duty of care is risk-avoiding rather than injury-avoiding. As we have seen, Goldberg and Zipursky take a different view. They admit (for the reasons set out in Part I of this paper) that A owes B a risk-avoiding duty of care; but they think that A *also* owes B an injury-avoiding duty of care. The significance of the distinction between the two duties is that breach of the first (risk-avoiding) duty does not amount to a tort.⁵⁷ Only breach of the second (injury-avoiding) duty amounts a tort:

The duty of care owed in most instances of *actionable negligence* is a duty to take care to avoid causing an ultimate harm, not a duty to take care to avoid causing the intermediate harm of heightened risk. It is a duty to take care not to injure, rather than a duty to take care not to engage in injurious conduct (that is, conduct that risks causing an ultimate injury).⁵⁸

So in *Near Miss*, C cannot sue D because she is not the victim of a tort. While D did breach a risk-avoiding duty of care owed to C in driving as he did, breach of that duty does not amount to a tort. For C to allege that D has committed a tort in relation to her, C has to show that D has breached an injury-avoiding duty of care that he owed to her: a duty not to injure her by driving carelessly.

Occam's Razor (the principle that the simplest explanations are likely to be the most correct) should strongly prejudice us against any attempt to assert that in *Foreseeable Danger* A owes B *two* duties of care, not one. If Goldberg and Zipursky are prepared to admit that A owes B a risk-avoiding duty of care in *Foreseeable Danger*, why do we *need* to say that A owes B a *further* (injury-avoiding) duty of care? As we have just seen, the reason is that, for Goldberg and Zipursky, breach of a risk-avoiding duty of care does not amount to a tort. So if A injures B by carelessly doing *x* in *Foreseeable Danger*, we cannot explain why A has committed a tort in relation to B in this situation by focussing on A's breach of the *risk*-avoiding duty he owed B to take care not to do *x*. We have to assume the existence of a further *injury*-avoiding duty of care that A owes B, which was breached when A injured B by carelessly doing *x*, and breach of which *does* amount to a tort.

But why can't we say that breach of a risk-avoiding duty of care amounts a tort? Goldberg and Zipursky make two arguments for thinking that it would be a mistake to do this. The first argument – which we can call the *principled argument* – focuses on the nature of the wrongs recognised as torts by tort law. The second argument – which we can call the *pragmatic argument* – focuses on the undesirable consequences that would follow from finding that breach of a risk-avoiding duty of care amounts to a tort.

(1) *The principled argument.* Goldberg and Zipursky argue, first, that not all wrongs amount to torts. A wrong will only amount to a tort if it is of a sufficient degree of seriousness that the victim of that wrong should be entitled to some kind of redress for that wrong. When we ask whether defendant has committed a tort in relation to a particular claimant, 'the right question to ask is "Has the [claimant] been wronged

⁵⁷ Goldberg and Zipursky would be more cautious and say that breach of a risk-avoiding duty of care does not *usually* amount to a tort; but for the sake of simplifying the discussion, I will ignore this qualifier.

⁵⁸ Goldberg & Zipursky, 'Unrealized torts' (2002) 88 *Virginia LR* 1625, 1652 (emphasis added).

such that she is now entitled to seek recourse?”⁵⁹ This question should always receive a negative answer if the claimant has not suffered any kind of injury as a result of the defendant’s actions: ‘...there is never a tort without an *injury*.’⁶⁰ So in a case like *Near Miss*, C cannot claim that D has *tortiously* wronged her because she has suffered no injury as a result of D’s actions:

Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person’s well being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition.⁶¹

As C has suffered no such interference in *Near Miss*, she has no basis for arguing that she has been tortiously wronged by D. D can only be found to have tortiously wronged C if he wrongfully injured her; that is, if he breached an injury-avoiding duty of care owed to C.

(2) *The pragmatic argument.* Goldberg and Zipursky follow up the above argument by pointing out a number of considerations that tend to indicate that it would be undesirable for the law to recognise that exposing someone to a heightened risk of injury amounts to a tort:

First...a system that permitted suits for intermediate harms [i.e. exposing someone to a heightened risk of injury] would invite all sorts of administrative headaches. The volume of litigation would presumably increase substantially simply because many more persons are exposed to risk than suffer a realized risk of harm...

Second, until an ultimate harm has happened, decision-makers will often have poor information about the risks in question, which means they will have a harder time than they already do in determining whether conduct should even be deemed careless, and, if so, how much compensation is owed to the plaintiff...

Third...recognition of duties of non-injuriousness creates serious prioritization concerns. For any case in which the defendant has insufficient funds to pay all claims for enhanced risk and ultimate harms, it is likely that the former will frequently be compensated at the expense of the latter, simply because the former will arise earlier in time.

Fourth...a system built around duties of non-injuriousness would potentially create undue de facto burdens on citizens’ freedom of action. There is a sense in which each of us benefits from tort law being restricted to the enforcement of duties to take care not to cause ultimate harms. In this sense, tort law’s notorious tolerance of so-called “moral luck”...is not a tolerance for luck at all. Rather it is a justified feature of a scheme of government and laws concerned with recognizing liberty of action... [T]he insistence on realization [of ultimate harm] is not arbitrary. Rather it harnesses chance to create a kind of buffer for free action: unless and until injurious conduct actually causes an ultimate harm, it is not subject to sanction through a privately commenced lawsuit... A system in which litigation could be instituted by anyone put at risk by allegedly unreasonable conduct would be likely be seen and felt as burdensome, if not intolerable.⁶²

What is striking about both of these arguments is their assumption that if a tort has been committed, the victim of that tort will *always* be able to obtain some kind of

⁵⁹ Goldberg & Zipursky, ‘Unrealized torts’, 1672-1673.

⁶⁰ Goldberg & Zipursky, ‘Torts as wrongs’ (2010) 88 *Texas LR* 917, 954. Also ‘Unrealized torts’, 1643-1644: ‘When defendant D argues that plaintiff P has suffered no injury...D is arguing that *this* plaintiff ought not be permitted a right of action because, even granted that D acted wrongfully, P has not actually been wronged by her...’

⁶¹ Goldberg & Zipursky, ‘Torts as wrongs’, 937.

⁶² Goldberg & Zipursky, ‘Unrealized torts’, 1652-1655.

remedy for that tort.⁶³ So the principled argument says that we should only say that a defendant's treatment of the claimant amounts to a tort if we think that the claimant should be entitled to obtain sort of remedy for what the defendant has done to (or failed to do for) the claimant. And the pragmatic argument says that if we said that the breach of a risk-avoiding duty of care amounted to a tort, A's merely exposing B to a heightened risk of injury would entitle B to sue A for damages, and that would have various undesirable consequences. As we have already seen, both Robert Stevens and I are prepared to accept that there will be occasions when a tort has been committed, but no remedy will be available for that tort.⁶⁴ Goldberg and Zipursky reject that view.⁶⁵ Indeed, in their article 'Torts as wrongs' they twice approvingly quote the 'hoary common law maxim "Where there's a right, there's a remedy"'⁶⁶ as expressing the essence of tort law.⁶⁷

This, I would suggest, is not an accident. Goldberg and Zipursky's *civil recourse theory of tort law* ('CRT') *demand*s that whenever we recognise that a tort has been committed, some sort of remedy be made available to the victim of that tort. The theory goes as follows:

CRT(1): There are some wrongs that entitle the victim of those wrongs to some form of redress. We can call these wrongs 'redress-entitling wrongs'.⁶⁸

CRT(2): However, the State – in order to preserve a monopoly of force within society – prevents the victim of a redress-entitling wrong from taking direct action against the perpetrator of that wrong to obtain redress for the fact that that wrong has been committed.

CRT(3): As a result, victims of redress-entitling wrongs have a right against the State that it provide them with a peaceful means of seeking redress against the person or persons who have committed those wrongs against them.

CRT(4): Tort law exists to provide victims of redress-entitling wrongs with such a peaceful means of seeking redress. The function of tort law is to determine when

⁶³ The same assumption is made by Heidi Hurd in 'The deontology of negligence' (1996) 76 Boston University Law Review 249, arguing at 262 that (1) because the law 'does not premise *liability* upon a defendant's creation of risks' (emphasis added), (2) 'the law embraces a concept of wrongdoing within which is embedded the causation of harm'. (2) does not follow from (1) unless we assume that those who are recognised by the law as having committed a wrong are always held liable for what they have done.

⁶⁴ Above, text at nn 5-9, and 33.

⁶⁵ John Goldberg conceded in his piece 'Wrongs without recourse: a comment on Jason Solomon's *Judging Plaintiffs*' (2008) 61 *Vanderbilt Law Review En Banc* 9, at 18 that there may be situations where a claimant is denied any remedy 'for reasons having little or nothing to do with an assessment of the defendant's conduct, and everything to do with whether the legal system is prepared to entertain a claim of the sort raised by the [claimant].' But I think Goldberg would argue that in almost all of these situations, the legal system's unwillingness to entertain the claimant's claim will manifest itself in a denial that the claimant has been the victim of a *tort* (= treatment that the law is willing to recognise as a redressable wrong).

⁶⁶ Goldberg & Zipursky, 'Torts as wrongs', 973.

⁶⁷ *ibid*, and at 986.

⁶⁸ Note that the phrase 'redress-entitling wrong' is a phrase I have coined to make it easier to set out and understand Goldberg and Zipursky's civil recourse theory of tort law: it is not a phrase that occurs in Goldberg and Zipursky's work. The same point applies to my splitting their theory into four parts and labelling them 'CRT(1)', 'CRT(2)', and so on. This is done for convenience alone, and does not reflect the way Goldberg and Zipursky present their theory of tort law.

someone has been the victim of a redress-entitling wrong and to provide a remedy where something that is recognised as a redress-entitling wrong by the law of tort has been committed.

CRT yokes together the idea of a tort having been committed and a remedy being made available for that tort. This is because – according to CRT – the *whole point* of tort law is to provide an avenue of redress when someone has suffered a redress-entitling wrong. On this view, it would be impossible for tort law to say, ‘We think you have suffered a redress-entitling wrong, but we will grant no remedy for it.’ Such a statement would be a contradiction in terms.

But is it true to say – as CRT suggests – that whenever a tort is committed,⁶⁹ there will be a remedy? If it is not, then we have no need to say that A owes B an injury-avoiding duty of care in *Foreseeable Danger*. We can simply say that in a case like *Foreseeable Danger*, A will commit a tort if he breaches the risk-avoiding duty of care that Goldberg and Zipursky acknowledge he owes B, but for various reasons (including the ones identified by Goldberg and Zipursky above), the law will deny B a remedy for A’s tort unless B has suffered some harm as a result of A’s tort.

If CRT is correct, then we *do* have to say that whenever a tort is committed, there will be a remedy – with the result that we have to admit (as Goldberg and Zipursky contend) that in *Foreseeable Danger* A *not only* owes B a *risk*-avoiding duty of care (breach of which will not amount to a tort because a remedy will not be available for breach of that duty) *but also* an *injury*-avoiding duty of care (breach of which will amount to a tort). But if CRT is not correct, then – I would argue – we have no reason to accept that whenever a tort is committed, there will always be a remedy, and as a result we will have no reason to think that A *must* owe B an injury-avoiding duty of care in *Foreseeable Danger*, on top of the risk-avoiding duty of care that Goldberg and Zipursky acknowledge A owes B.

So is CRT correct? Obviously, CRT provides a much more elegant explanation of the institution of tort law than predecessor theories according to which, for example, tort law exists to maximise economic efficiency, or to ensure that defendants who have caused other people harm are made to pay compensation for that harm when it would be ‘fair, just and reasonable’ for them to do so. But that does not establish that CRT is correct. Newton’s inverse square law of gravitation provides a much more elegant explanation of the movement of the planets than predecessor theories (according to which, for example, the planets were embedded in rotating spheres). But we now know that Newton’s inverse square law is not completely accurate. I think CRT is destined to share the same fate as Newton’s inverse square law: (infinitely) better than what has come before, but still not good enough for us to think that the foundations of tort law have finally been settled.

Newton’s inverse square law was brought into question by the fact that it did not fully explain the movement of the planet Mercury (which had not been discovered when Newton was alive): Mercury’s position in the heavens was always slightly different from where it would have been expected to be if Newton’s inverse square law were correct. The equivalent of Mercury’s misalignment for CRT is the fact that there is a persistent misalignment between what actually does count as a tort for tort law and what we would expect to count as a tort for tort law if CRT were correct. In order to understand this point, it is important to remember that the word ‘wrong’ in

⁶⁹ More accurately, ‘has been established as having been committed’. The fact that there are times when a claimant will be prevented from establishing that a tort has been committed by, for example, limitation rules is not relevant here.

CRT(1) – the first step in CRT – refers to a *moral* wrong. The law only kicks in at CRT(4). Every statement in CRT until we get to CRT(4) operates at the level of morality.⁷⁰ So CRT(1) tells us that there are some *moral* wrongs that entitle the victims of those wrongs to redress. And CRT(4) tells us that the task of tort law is to determine when someone has suffered – at the *moral* level – a redress-entitling wrong and in a case where tort law thinks that someone has suffered – again, at the *moral* level – a redress-entitling wrong, to provide them with some legal (and thus orderly and peaceful) means of obtaining redress for that wrong.⁷¹

If CRT is correct, we would *not* expect to find *many* examples of: (1) tort law counting as a tort something that – at a moral level – we would be hard-pushed to say was a redress-entitling wrong; and (2) tort law refusing to acknowledge as a tort something that – at a moral level – we would readily recognise was a redress-entitling wrong. Of course, we might well expect to find *a few* examples of both (1) and (2). We have no reason to think that tort law will always perfectly perform the job that CRT says that it performs. But if we find too many examples of both (1) and (2), then that would bring into question whether CRT is correct at all. If tort law does not do a very good job *at all* of providing the victims of redress-entitling wrongs with remedies for those wrongs, then we are entitled to start to doubt that CRT is correct. Unfortunately for CRT, examples of both (1) and (2) can readily be found in the law of tort.⁷²

As examples of (1), we could point to: (a) an employer being held liable in negligence for injuries suffered by an employee who was injured as a result of an independent contractor's unreasonable failure to protect the employee from that kind of injury; (b) a newspaper being held liable to a claimant in defamation for publishing a story that could have been read by a reasonable person as referring to the claimant in a derogatory way, even though the newspaper could not have known of the existence of the claimant at the time it published the story; (c) an auctioneer being held liable in

⁷⁰ For example, CRT(3) is explained by Goldberg and Zipursky as arising out of the fact that 'An individual relinquishes the raw liberty to respond aggressively to having been wronged and receives in return a certain level of security against responsive aggression by others, plus the assurance that a civil avenue of redress against wrongdoers will be supplied' (Goldberg & Zipursky, 'Torts as wrongs', 974). It is quite clear here that the word 'wronged' here means '*morally* wronged'; likewise the word 'wrongdoers'.

⁷¹ The point that, according to CRT, the foundation of a victim of a tort's right to sue for damages lies in the fact that she is regarded by tort law as having suffered – at the moral level – a redress-entitling wrong is sometimes obscured by the fact that the word 'wrong' has both a moral and legal meaning. So, for example, when Goldberg and Zipursky say that 'By recognizing relational duties of noninjury, tort law identifies and enjoins actions that constitute mistreatments of others. In turn, it identifies and confers on each of us a set of rights not to be mistreated. When one of these directives is violated – when a tort is committed – the victim of the mistreatment not only has suffered a setback in the eyes of the law, but is also recognized as having a legitimate grievance against the wrongdoer. The defendant has violated her legal rights and that violation entitles her to a remedy as against the wrongdoer' (Goldberg & Zipursky, 'Torts as wrongs', 973), they are in danger of making the violation of the *legal* right the foundation of the claimant's right to sue for damages. But the real foundation of the right to sue for damages, according to CRT, is the fact that the claimant is recognised by the law as having been – at the *moral* level – the victim of a redress-entitling wrong.

⁷² Goldberg and Zipursky themselves acknowledge that 'one cannot characterize torts as moral wrongs without losing the ability to account for large swaths of doctrine' (Goldberg & Zipursky, 'Torts as wrongs', 947) but feel that that point does not touch their theory because there is a conceptual space between the notion of a tort (= conduct that the law recognises as wrongful (and therefore tells us not to engage in)) and a moral wrong (= conduct that is actually wrongful). But if CRT is correct we would not expect to see *lots* of examples of torts that are not (redress-entitling) moral wrongs and *lots* of examples of (redress-entitling) moral wrongs that are not torts. I don't think Goldberg and Zipursky have ever really addressed this point.

conversion for selling goods that belonged to the claimant when the auctioneer had no reason to believe that the goods belonged to anyone except the third party who had asked the auctioneer to sell them off; (d) a neighbour being held liable in nuisance to pay damages for noise disturbance to the claimant who owns the house next door, but was never there at the time of the disturbance.

As examples of (2), we could point to the fact that you will *not* be held liable in tort for: (a) deliberately destroying someone else's business so long as you used lawful means to drive him out of business; (b) leaving someone to overdose on drugs, so long as you were not responsible for their overdosing in the first place and have done nothing to put anyone else off helping them; (c) causing someone to lose the life savings they invested in a retirement by carelessly writing a report recommending the investment, so long as the report was presented to the claimant in someone else's name; (d) seducing a married woman, for the sole purpose of ruining her and her husband's marriage; (e) cutting your children out of your will because you consider their last set of Christmas presents were not quite up to scratch; (f) letting someone know that you have been watching them (without their knowledge) take a shower or have sex for the past two months; (g) leaving a car outside a claimant's house and going on holiday for six months.

These examples lead me to think that CRT – beautiful though it is as a theory of tort law – is incorrect. If CRT *is* incorrect, we have no reason to think that whenever a tort has been committed, a remedy will always be available, and as a result we have no need to suppose that A must owe B an injury-avoiding duty of care in *Foreseeable Danger*, on top of the risk-avoiding duty of care that Goldberg and Zipursky (rightly) acknowledge A owes B. We can simply say that A owes B *one* duty of care – a risk-avoiding duty of care – breach of which will amount to a tort, but whether a remedy will be available for that tort will depend (for one reason or another) on whether B suffers any harm as a result of A's breach.

II.4. McBride and Bagshaw

I promised earlier to address the one specifically legal argument Stevens makes in favour of his view that the duty of care a driver owes nearby drivers and pedestrians is 'a duty not to injure, and not a duty not to expose to the risk of injury'.⁷³ Stevens considers the situation where he drives 'drunkenly the wrong way around my local roundabout':

What is the result if my car hits another containing two children and their parents, but injuring only the mother. If the mother can no longer work or care for her children, all of the occupants of the car will, in the ordinary course, be worse off and have suffered a loss. However, the children despite having been exposed by me to an unacceptable risk of injury, and despite having suffered a loss as a result of my negligence, have no claim. It is only the injured mother who has suffered a wrong, which reflects the fact that in law it is the injuring which constitutes the wrong, the breach of the duty owed to another, not the exposure to risk.⁷⁴

The example does not quite work. Even if we can say – as I would – that Stevens wronged the children through his terrible driving, the loss the children have suffered as a result of their mother's being injured was not caused by the wrong that Stevens

⁷³ Stevens, 'Rights and other things', text at n 8.

⁷⁴ *ibid.*

did *to the children* by driving badly. The harm to the mother is a coincidence of Stevens' wrong to the children; it is not caused by Stevens' wrong to the children.

But – somewhat embarrassingly – the textbook on tort law that I co-author with Roderick Bagshaw contains *loads* of examples that help make Stevens' point for him.⁷⁵ Consider *Dangerous Building*: J constructs a house in such a shoddy manner that it soon threatens to fall down. K is the current owner-occupier of the house, having bought it from L, who paid J to build it. If the house falls down on K and injures him, K will be able to sue J for damages on the basis that J owed him a duty of care in constructing the building, and his injuries are a result of J's breach of that duty of care. But if K spends money having the building made safe to live in, K will not be able to sue J for damages.⁷⁶ Why not? Why can't K recover his expenditure on the basis that that was a result of J's breach of the duty of care that J owed K in constructing the house?

Stevens would have no problem explaining this result. He would say that the duty of care J owed K in building the house was an injury-avoiding duty not to injure K by constructing the house carelessly. In the case where the house falls down on K and K is injured, K can argue that J has now breached the injury-avoiding duty of care that he owed him in constructing the house. In the case where the house never falls down because K has spent money on making the house safe to live in, K cannot make this argument. K's expenditure has saved J from breaching the injury-avoiding duty of care that he owed K.

Goldberg and Zipursky would say something similar. While J may have owed K a *risk-avoiding* duty of care in building the house, K can only sue J in tort if J's breach of that duty resulted in J breaching an *injury-avoiding* duty of care owed to K. In the case where the house falls down on K and injures him, such a breach has occurred. In the case where the house is repaired before it falls down, no breach of an injury-avoiding duty of care has occurred. As they explain:

The plaintiff must...demonstrate that she suffered that injury because the defendant breached a duty to take care not to cause the type of injury of which the plaintiff complains. As a law of civil recourse, negligence law empowers a plaintiff to complain in a court that she has been injured as a result of the defendant failing to heed a duty to be vigilant of her well-being. The critical question then becomes: "Of what sort of harm was the defendant under a duty to be vigilant?"⁷⁷

Because I take the view that A owes B only one duty of care in *Foreseeable Danger* and that duty of care is risk-avoiding, and not injury-avoiding, I cannot adopt either of these explanations. J has breached a risk-avoiding duty of care owed to K not to construct a dangerously defective building *both* in the case where the house falls down and injures K *and* in the case where K spends money to make it safe before it falls down. And K has suffered harm as a result of J's breach of duty in *both* cases. So why can't K sue J in the second case? In the textbook, I explain this result on the basis

⁷⁵ See McBride and Bagshaw, *Tort Law*, 3rd ed (Pearson Education, 2008), 578-581.

⁷⁶ Though there is an emerging academic consensus among tort lawyers who think about such things that K should be able to bring a claim in *restitution* for the money he has spent on having the house made safe. The seminal article is Moran, 'Rethinking *Winnipeg Condominium*: restitution, economic loss, and anticipatory repairs' (1997) 47 *University of Toronto Law Journal* 115. It could also be argued that K should be allowed to recover the money he has spent on making the house safe to live in as a means of specifically enforcing the risk-avoiding duty J will owe K – having put K in danger of suffering physical harm – to take reasonable steps to avert that danger: see Goldberg & Zipursky, 'Unrealized torts', section V.

⁷⁷ Goldberg & Zipursky, 'Unrealized torts', 1673.

that K has suffered the ‘wrong kind of loss’ – not the sort of loss that the duty of care that J owed K was designed to safeguard K against. The risk-avoiding duty of care that J owed K was designed to protect K against the risk of being physically injured, not the risk of being left out of pocket as a result of having to repair a dangerously defective building.

The explanation works as an explanation – but I would not blame anyone for thinking that it has been introduced to patch up a hole in my account of tort law that has been opened up by my endorsing the view that the duty of care in *Foreseeable Danger* is risk-avoiding and not injury-avoiding. I have long thought of it in that way myself – as a rule that must be there in the law, even though I could not explain why it is there. In my defence, no one would question that the ‘wrong kind of loss’ rule *does* operate in relation to the tort of breach of statutory duty⁷⁸ – and if it applies there, why should it not apply in relation to the tort of negligence as well? Moreover, there is strong evidence that the current rule governing remoteness of damage in negligence was initially adopted on ‘wrong kind of loss’ grounds – the idea being that you cannot sue me for an unforeseeable loss resulting from my breaching a duty of care owed to you as the duty of care I owed you could not have been imposed on me in order to protect you from suffering that kind of loss.⁷⁹ But if the ‘wrong kind of loss’ explanation of the result in *Dangerous Building* is to truly satisfy, we have to be able to understand why the law would place such a limit on the remedies available when a tort has been committed.

I now think it *is* possible to explain why the law would take the position that where a tort has been committed in relation to a claimant, the claimant will not be able to sue for damages in respect of a loss suffered as a result of that tort being committed if that loss amounts to the ‘wrong kind of loss’ – that is, not the sort of loss that the duty breached by the defendant was designed to help protect the claimant against suffering. If my explanation works, the last argument against the position I am taking in this paper falls away. *Dangerous Building* does not indicate that the duty of care owed in *Foreseeable Danger* is injury-avoiding, rather than risk-avoiding. The result in *Dangerous Building* can be explained, not on the basis that there is no tort committed in relation to K if the building constructed by J does not fall down on him and injure him, but on the basis that K has not suffered the ‘right kind of loss’ if J’s negligence does not result in K’s being physically injured.

The following general theory of tort law (‘GT’) explains why the courts will bar the victim of a tort from suing for damages in respect of the ‘wrong kind of loss’:

GT(1): Some of the legal duties we have are imposed on us for the benefit of the community as a whole; some of them are imposed on us for the benefit of particular individuals. The latter set of legal duties are called ‘legal duties owed to other people.’

GT(2): Tort law is one of the areas of law that determines what legal duties we owe to other people.

⁷⁸ The classic authority is, of course, *Gorris v Scott* (1874) LR 9 Ex 125 (breach of a statutory duty to keep sheep in pens while transporting them by ship resulted them in being swept overboard; held, no claim could be made for the loss of the sheep as the purpose of the duty to keep the sheep in pens was to prevent disease spreading among them).

⁷⁹ See Viscount Simonds’ judgment in *The Wagon Mound* [1961] AC 388, at 425.

GT(3): If a defendant breaches a legal duty owed to a claimant, the defendant will owe the claimant a duty to repair the breach so long as: (a) the breach is *reparable*; and (b) repairing the breach would not place an *undue burden* on the defendant.

GT(4): The breach of a legal duty owed to a claimant will be reparable if: (a) the breach has had the effect of depriving the claimant of the benefit that he was meant to obtain from proper performance of that duty; and (b) this effect is still being felt by the claimant. In such a case, the breach can be repaired by restoring (so far as is possible) to the claimant the benefit that he was meant to obtain from proper performance of the duty that was breached.

GT(5): If the defendant's breach of a legal duty owed to a claimant is reparable, the claimant will be entitled to obtain from the courts an order requiring the defendant to repair that breach. The order will usually take the form of an order requiring the defendant to pay the claimant *damages* designed to allow the claimant to obtain the benefit (or some part of the benefit) that he was meant to obtain from proper performance of the duty that was breached.⁸⁰

GT(6): The breach of a legal duty owed to a claimant will be irreparable if: (a) the breach has had no relevant effect on the claimant; or (b) it did have a relevant effect on the claimant but that effect is now in the past. In such a case, the defendant will not owe the claimant a duty to repair his breach.

GT(7): If the defendant's breach of a legal duty owed to a claimant is irreparable, that does not mean that the claimant will be left without a remedy. In the interests of ensuring that people like the defendant do not feel themselves free to breach the sort of duty that the defendant owed the claimant, the courts may allow the claimant to sue the defendant for a conventional (or vindictory) sum designed to mark the court's disapproval of the defendant's conduct and to ensure that breach of the duty that the defendant owed the claimant attracts some kind of sanction.

GT(8): Whether a defendant's breach of a legal duty that he owed the claimant was reparable or irreparable, other remedies other than those discussed above may also be available to the claimant, depending on the facts.

GT explains why there C will not be able to sue D for damages in *Near Miss*. As D's breach of the risk-avoiding duty of care that he owed C not to drive dangerously in C's vicinity has had no relevant effect on C, it is irreparable. This is because D's breach did not deprive C of the benefit (freedom from being physically harmed) that D's duty was designed to secure for C. And, for pragmatic reasons, the courts at the moment will not give a vindictory remedy to C in *Near Miss* – though it is not inconceivable that they might in future.

But GT *also* explains why K will not be able to sue J for damages in *Dangerous Building*. The risk-avoiding duty of care that J owed K in building the house that J now owns (a duty to take care not to construct a dangerously defective building) was imposed on J in order to protect someone like K from being physically injured. As J's breach of the duty that he owed K has not deprived K of this benefit, it is irreparable.

⁸⁰ The idea that the liability to pay damages to the victim of a tort might be based on the idea of repairing the breach of the primary duty owed to the victim is, of course, not new: see Weinrib, *The Idea of Private Law* (Harvard UP, 1995), 135; Stevens, *Torts and Rights*, 59.

The fact that J's breach has had another effect on K – K is economically worse off than he would have been had J not breached the duty of care he owes K – is irrelevant. So K will not be entitled to a reparatory remedy in this case. In theory, the courts *could* give him a vindictory remedy, designed to ensure that builders generally do not feel free to put up shoddily constructed buildings. At the moment, for pragmatic reasons, the courts will not do this – but it is not inconceivable that in future they could think that builders like J would be severely lacking in incentives to comply with the duties of care that they owe people like K if a vindictory remedy is not available. (For example, builders like J could easily think – ‘Don't worry too much about getting the building right; if there's a problem, it will soon become clear and the owners will have to lay out to repair it, and so no-one will get hurt and we won't be liable for the expense of correcting the building.’)

So GT helps us understand why the courts might refuse to allow a tort claimant to sue for damages if he has suffered the ‘wrong kind of loss’. But GT will only provide us with a *satisfactory* explanation of the outcome of cases like *Dangerous Building* if it is correct. Obviously, I think GT is correct. But others may think differently, and incline as a result to think that a case like *Dangerous Building* still shows that thinkers like Stevens and Goldberg and Zipursky are correct to think that in *Foreseeable Danger* the duty of care A will owe B is injury-avoiding rather than risk-avoiding. For the benefit of those who are tempted to dismiss GT as incorrect, I will wind up this paper by addressing a couple of objections that people might make to GT, and that might tempt them to think that GT is incorrect:

(1) *Power, not duty*. The first objection is that GT is wrong to say that a defendant who commits a breach of a legal duty owed to a claimant will then owe the claimant a legal *duty* to repair that breach.⁸¹ The claimant merely has a *power* to sue the defendant for damages. However, the fact that the claimant has a power to sue the defendant is not inconsistent with the proposition that the defendant owes a duty to the claimant: it will, after all, be up to the claimant whether or not to enforce that duty.⁸² Moreover, suppose that in *Car Crash*, M carelessly runs down N. After taking N to hospital, he leaves N with a substantial sum of money to ‘cover your pain and suffering and inconvenience.’ Suppose M gave N the money because he thought was legally bound to do this. I am not sure that a court would allow M to recover this money on the basis that M had paid it under a mistake of law: that he was not legally bound to pay the money at all and that N merely had a power to sue him for damages.

(2) *Temporary harms*. Suppose that in *Slap*, O slaps P in the face – an obvious battery. P suffers some temporary pain and reddening in his face, but is soon back to normal. According to GT, O's breach of duty is irreparable, and the only remedy P can obtain is a vindictory sum. But the law allows P to sue O for *compensation* for his past pain and suffering as a matter of course. I think anyone who adheres to GT would have to recharacterise this award as vindictory in nature – but I am not sure whether that should make us unwilling to accept GT. As Lady Hale observed in *Lumba v Secretary of State for the Home Department*, in many of the older trespass cases, damages may have been awarded for vindictory, rather than compensatory,

⁸¹ Zipursky, ‘Civil recourse, not corrective justice’ (2003) 91 *Georgetown LJ* 695.

⁸² Calnan, ‘In defense of the liberal justice theory of torts: a reply to Professors Goldberg and Zipursky’ (2005) 1 *New York University Journal of Law and Liberty* 1023.

reasons and it is only our ‘refined science’ that insists on seeing all awards in trespass cases as being compensatory in nature.⁸³

III. CONCLUSION

I have argued in this paper that in the situation where it is reasonably foreseeable that A’s doing *x* will result in B’s suffering some kind of physical injury, A will owe B a duty of care that is risk-avoiding, rather than injury-avoiding. The duty of care A will owe B is a duty to take care not to do *x*, not a duty not to injure B by carelessly doing *x*. Such a view makes more sense of the decided cases, and fits more closely our ideas as to the role legal duties are supposed to play in helping us to decide what we should do. None of the arguments that can be made against the position taken in this paper stand up:

(1) If tort law were concerned to prevent A from harming B, it might still choose to impose a risk-avoiding duty of care on A.

(2) If tort law were concerned to prevent A from violating B’s rights, it would probably regard itself as bound to impose a risk-avoiding duty of care on A.

(3) If tort law were concerned to provide B with some means of obtaining redress from A for committing a redress-entitling wrong against her, we would have to accept (to make sense of the law) that A owed B an injury-avoiding duty of care (breach of which would amount to a tort) as well as a risk-avoiding duty of care (breach of which would not amount to a tort); but this is unlikely to be tort law’s goal.

(4) The fact that the law will sometimes deny a remedy to the victim of a tort who has suffered the ‘wrong kind of loss’ as a result of that tort being committed does not indicate that the duty of care A owes B is injury-avoiding. On a proper understanding of the basis of tort law, we have no need of the hypothesis that the duty of care A owes B is injury-avoiding to explain the ‘wrong kind of loss’ limit on a claimant’s ability to recover damages from a defendant who has done her wrong.

⁸³ [2011] UKSC 12, at [217].