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I.

Does tort law have a future? Not long ago this question would have referred to the prospect that compensation plans might supplant significant portions of tort law.[1] During the twentieth century such plans washed over the common law world in successive tides, reaching a high water mark in the comprehensive New Zealand scheme of 1974. Since then, for better or worse, the movement to replace tort law has waned, as some of its most influential champions have acknowledged.[2]

By asking about tort law's future today, I refer not to this external threat but to the internal corruption of tort law's conceptual structure. In my Monsanto Lecture twelve years ago[3] (and in other work),[4] I contended that the doctrinal elements of liability relate the defendant and the plaintiff to each other as the doer and the sufferer of the same injustice. Understood in this way, tort law is utterly incompatible with instrumentalist accounts, which inevitably treat the parties in relationship not to each other but to goals that apply independently to each of them.

The future of tort law is tied to these issues in the following way. Tort law is a normative practice under which courts determine liability in accordance with the justifications that inform its characteristic concepts. Because liability is bipolar - the liability of the defendant is necessarily a liability to the plaintiff - those justifications are coherent only if they simultaneously embrace both parties by treating them as correlatively situated through the injustice done by the defendant and suffered by the plaintiff. Then a reason for considering the defendant to have done an injustice is also a reason for considering the plaintiff to have suffered that injustice. Conversely, a justification that does not match this bipolarity favours one of the parties at the expense of the other. It thereby fails to be fair from the standpoint of both. When such

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1 John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193 (1984).

2 Rt, Hon. Prof. Sir Geoffrey Palmer, *The Design of Compensation Systems: Tort Principles Rule, O.K.?*, 29 VAL. U. L. REV. 1115 (1995); Patrick Atiyah, THE DAMAGES LOTTERY (1997).

3 Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

4 *See* Ernest J. Weinrib, THE IDEA OF PRIVATE LAW (1995).

justifications become entrenched, the concepts and institutions expressive of bipolarity (for example, causation or the bilateral civil action) become external façades emptied of their inner normative meaning. Tort law then forfeits its future as a fair and coherent justificatory enterprise

In this symposium of millennial reflections, I focus on the negligence categories of duty and proximate cause. The elucidation of these categories in landmark cases throughout the common law world was perhaps the outstanding achievement of tort law in the twentieth century. The significance of these cases is that they articulate the bipolarity of the relationship between the doer and the sufferer of negligent injury. In the United States this significance has in recent years been largely overlooked - as is hardly surprising given the instrumentalism that has held American legal thinking firmly in its grip over the last decades. More surprising, as I shall indicate, are developments in my own country, Canada, where instrumentalism's legal roots are comparatively shallow.

II.

How do duty and proximate cause relate the parties to each other? Negligence liability spans the sequence from the defendant's creation of an unreasonable risk to the materialization of that risk in injury to the plaintiff. For this sequence to constitute the same injustice for the two parties, the wrongfulness of both the defendant's action and the plaintiff's injury must be referable to the same sort of risk. Accordingly, the function of duty and proximate cause is to link wrongdoing and injury through the description of the risk appropriate to the facts of the case. Duty connects the defendant as a wrongdoer to the plaintiff as a member of the class of persons wrongfully put at risk. Similarly, proximate cause connects the defendant's negligence to the plaintiff's suffering of the kind of injury or accident the risk of which rendered the defendant's act wrongful.

The leading twentieth century cases on duty and proximate cause gave legal expression to this conception of negligence liability. Three developments were particularly noteworthy. The first was the great decision by the House of Lords in *Donoghue v. Stevenson*[5] (and its

[5] 1932 App. Cas. 562 (H.L.).

American predecessor *MacPherson v. Buick Motor Co.*).[6] In place of a fragmented set of duties that varied according to the particular contractual status of the parties, *Donoghue* articulated "a general conception of relations giving rise to a duty of care."[7] This general duty mandated the exercise of due care towards anyone whose injury was the reasonably foreseeable consequence of one's conduct. *Donoghue* established that, for purposes of negligence, the doing and suffering of injustice flowed from the doer's risk-creating action as such and from its reasonably foreseeable effect on the sufferer, rather than from particular social and contractual relationships that were but instances of such risk-creation.

The second development was Cardozo's judgment in *Palsgraf v. Long Island Railroad Co.*,[8] which precluded liability unless the defendant's breach of duty was a wrong in relation to the plaintiff's right. Because in that case the defendant's conduct was not wrongful toward the plaintiff (although it was arguably wrongful toward someone else), the defendant was held not to be under a duty with respect to the plaintiff's loss. Only if the wrongfulness of the defendant's risk-creation was relative to the plaintiff's right could the parties be regarded as doer and sufferer of the same injustice. Cardozo's achievement was to align the relational significance of risk, as a foreseeable effect on another, with the relational nature of tortious wrongdoing as the violation of the plaintiff's right. Consequently, the plaintiff had to be within the class of persons whose rights were foreseeably affected by the defendant's unreasonable creation of risk.

The third development was the Privy Council's decision in the *Wagon Mound* case,[9] which held the requirement of proximate cause unsatisfied when the defendant negligently exposes the plaintiff to the risk of one kind of injury, but the plaintiff suffers an injury of a different kind. This decision made proximate cause run parallel to Cardozo's conception of duty, by requiring that the plaintiff suffer the kind of harm that was within the ambit of the risk unreasonably created by the defendant.[10] Only when the prospect of a loss like the one the plaintiff

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[6] 111 N.E. 1050 (N.Y. 1916). *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1773 (1998).

[7] Donoghue v. Stevenson, 1932 App. Cas. 562, 580 (H.L.).

[8] 162 N.E. 99 (N.Y. 1928).

[9] Overseas Tankship (UK) v. Morts Dock and Engineering (Wagon Mound No. 1), 1961 App. Cas. 388 (P.C.).

[10] The connection of *Wagon Mound* and *Palsgraf* is sharply put in the leading text on tort law in the United States: "The decision is the logical aftermath of Cardozo's decision in the

suffered is what renders the defendant's conduct wrongful do the parties stand to each other as the active and passive poles of the same injustice.

As a result of this complex of leading cases, the main categories of negligence liability - duty, breach of duty, proximate cause, factual cause - form a coherent set that traces the sequence from the defendant's negligent act to the plaintiff's injury. Breach of duty and factual causation are the termini of this sequence, with the former referring to the defendant's creation of unreasonable risk and the latter to the materialization of risk in injury to the plaintiff. Duty and proximate cause link these termini by characterizing the wrongfulness of what the defendant did and what the plaintiff suffered in terms of the same risk. The result is that the parties can be seen as the doer and sufferer of the same injustice, which the law then remedies by holding the doer liable to the sufferer.

Although versions of this conception of negligence law had prominent advocates in the United States - for example, Warren Seavey[11] and Robert Keeton[12] - it never fully took hold there. The reason for this is that for decades, highly sophisticated instrumental approaches have dominated tort thinking in the United States. Nurtured by the Realists' scepticism about the stability of legal concepts and by the Holmsian preoccupation with policy, these instrumentalisms analyse tort law in terms of goals that are independent both of one another and of the relationship between the parties. For example, Guido Calabresi's classic article on the very cases I have mentioned treats negligence law as an unintegrated amalgam of competing goals (market deterrence, collective deterrence, spreading, and wealth distribution) that operate through disconnected legal concepts.[13] This kind of thinking leaves no room for a conception of negligence law in which each party's position is the correlate of the other's because the same wrong applies to both sides.

Palsgraf case, since there is an obvious absurdity in holding that one who can foresee some harm to A is liable to consequences to A which he cannot foresee, but is not liable for similar consequences to B." W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS 296 (5th ed. 1984). A similar point was made in the *Wagon Mound* opinion. *Wagon Mound*, 1961 App. Cas. at 425.

[11] Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372 (1939). Concurrently published in 39 COLUM. L. REV. 20 (1939) and 48 YALE L.J. 390.

[12] ROBERT KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963).

[13] Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

In contrast, in the Commonwealth this conception of negligence formed the backbone of analysis. Commonwealth courts had to determine whether the plaintiff's injury could plausibly be regarded as the fruition of the unreasonable risk that rendered the defendant's action wrongful. This exercise required a contextualized treatment of the plaintiff's injury in terms of the reason for considering the defendant's action to be wrongful, with wrongfulness itself being evaluated by reference to who and what was at risk and to how danger might come to pass.[14] The analysis involved not mechanically applicable tests, but casuistic assessments of each case and analogic reasoning from one case to another. Certain formulae arose to orient the mind (for example, that liability required foreseeability of the type of the injury but not of the extent or the precise manner of its occurrence). Decided cases illustrated the leeways of judgment. Of course, in interpreting the facts for purposes of liability, the judge had to have an idea of what to look for, and the general conception of duty was useful as "a guide to characteristics that will be found to exist in conduct and relationships."[15] In this way the casuistic determination of liability was conducted under the aegis of concepts of duty and proximate cause that link the plaintiff's action and the plaintiff's suffering through a single notion of wrongful risk applied correlatively to both parties.

III.

In recent years, however, Commonwealth jurisdictions have experimented with a different approach to duty and proximate cause. Cutting through the need for casuistic elucidations, the English courts formulated and subsequently abandoned a two-stage test that the Supreme Court of Canada has continued to apply. In its current Canadian formulation the two-stage test goes as follows:

> In order to decide whether or not a private law duty of care existed, two questions must be asked:
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> > 1. is there a sufficiently close relationship between the parties . . . so that in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to [the plaintiff]? If so,

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[14] As Cardozo observed in *Palsgraf*, "risk imports relation." *Palsgraf*, 162 N.E. at 100.

[15] Home Office v. Dorset Yacht, 1970 App. Cas. 1004, 1060 (Lord Diplock) (providing the most extensive judicial discussion of the methodology of applying Lord Atkin's general conception of duty).

> 2. are there any considerations that ought to negative or limit (a) the scope of the duty (b) the class of persons to whom it is owed or (c) the damages to which the breach of it may give rise?[16]

The first stage of this formulation incorporates the traditional language of foreseeability to establish a *prima facie* duty. At this stage the judge attempts to discern "whether, as a matter of simple justice, the defendant may be said to have had an obligation to be mindful of the plaintiff's interests."[17] The second stage allows that *prima facie* duty to be circumscribed or cancelled because of the presence of "policy concerns that are extrinsic to simple justice but that are nevertheless fundamentally important."[18]

The two-stage test has radically altered negligence law in Canada. Negligence analysis no longer consists in scrutinizing the parties' relationship in the light of a coherent series of concepts. The mode of argument that underpinned the great doctrinal achievements that I mentioned earlier has been abandoned. Instead of examining whether the materialization of the risk created by the defendant is an injustice to the plaintiff, the Court now canvasses a melange of justice and policy considerations. This momentous change has several questionable features.

First, in the final analysis the decisive factor in liability is the importance of the policy considerations relevant to the second stage. These considerations are uncontrolled by the relationship between the parties and indeed may be beyond the court's institutional competence to judge. A plaintiff can therefore be denied compensation on the basis of policy considerations that, while one-sidedly pertinent to the defendant or to persons carrying on a similar activity, have no normative bearing on the position of the plaintiff as the sufferer of an injustice. From the plaintiff's point of view, the denial of recovery, operating (as the Court says) extrinsically to simple justice, amounts to the judicial confiscation of what is rightly due to the plaintiff in order to subsidize policy objectives unilaterally favorable to the defendant and those similarly situated.

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[16] Kamloops v. Nielsen [1984] 10 D.L.R.4th 641, 662 (Can.).
[17] Hercules Managements v. Ernst & Young [1997] 146 D.L.R.4th 577, 591 (Can.).
[18] *Id.*

Second, even as policy analysis the second stage is one-sided. It refers only to policy considerations that negative liability, not to those that might confirm liability. Under the Court's formulation, the plaintiff's claim for compensation is entirely constituted by the first stage; the second stage deals only with factors favourable to defendants. For example, a recent case decided that a mother was not liable for the pre-natal injuries that she caused her own child by her negligent driving.[19] Although injury was foreseeable under the first stage, the Court negated liability on policy grounds in order to safeguard the pregnant woman's autonomy and privacy. However, the Court also rejected the suggestion that the existence of a mandatory automobile insurance regime justified liability on policy grounds. Thus, a judicially enunciated policy prevented the victim of negligent driving from gaining access to insurance proceeds whose availability had been legislated. Elsewhere the Court had affirmed that insurance is a policy factor that negatives liability,[20] but apparently it cannot be invoked to support liability.

Third, the relationship between plaintiff and defendant is fragmented not only by the recourse to instrumental policy concerns, but also by the disjunction between the justice and policy considerations of the two stages. This disjunction, in turn, requires judges to balance categorically different considerations, in order to determine whether in a given case the policy considerations are more important than the justice considerations that they can displace. How is this balancing of incommensurables to be done? In effect, the two-stage test puts into circulation two different normative currencies between which no rate of exchange exists.

Fourth, the two-stage test transfigures the notion of foreseeability itself. When considered within the framework of injustice done and suffered, foreseeability is an intrinsically bipolar notion that links the plaintiff's injury to the reason for characterizing the defendant's action as wrongful. Accordingly, foreseeability is internally limited by the scope of the wrongfulness to which it refers. In contrast, under the two-stage test, foreseeability constitutes a "relatively low threshold"[21] for recognizing a *prima facie* duty, which is then extrinsically limited by policy considerations. Any prospective damage counts as being

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[19] Dobson v. Dobson [1999] 174 D.L.R. 1, 31 (Can.).
[20] Canadian Nat'l Ry. v. Norsk Pacific S.S. [1992] 91 D.L.R.4th 289 (Can.).
[21] Ingles v. City of Toronto [2000] 183 D.L.R.4th 193, 202 (Can.); Ryan v. City of Victoria [1999] 168 D.L.R.4th 513, 524 (Can.).

foreseeable under the first stage of the test, without inquiry into why the defendant's action should be characterized as a wrongful infringement of the plaintiff's right.[22] Moreover, although the two-stage test postulates the existence of "a sufficiently close connection between the parties," that connection is not analyzed normatively, in terms of the reason for characterizing the defendant's action as a wrong relative to the plaintiff's right. Instead, the connection is pictured in terms of physical images of proximity that are motivated by the specter of unlimited liability that the two-stage test itself has let loose.[23] This broadening of foreseeability is accentuated by its functioning as part of a "test" rather than (as it was for Lord Atkin in *Donoghue v. Stevenson*)[24] merely an aspect of the framework for thinking of the relationship between the parties.

In short, the introduction of the two-stage test has transformed Canadian negligence law into an enquiry into one-sided policy factors that are extrinsic to justice between the parties and that are mysteriously balanced against an excessively expansive notion of foreseeability. This enquiry is hardly conducive to the elaboration of coherent and principled justifications for liability.

IV.

A pair of recent cases illustrates these themes. In the past few years the highest courts in England and then in Canada have dealt with the liability of auditors for negligently preparing the annual report of a corporation's accounts. As is well known, investors in the stock market rely on the information in these reports. Previously, accountants had been held liable for the reliance losses caused by negligence in a report

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[22] *See* KEETON ET AL., *supra* note 11, at 55. The author observes that:

> putting the crucial question in terms of whether the injuries were foreseeable . . . carries the misleading implication that the scope of legal responsibility extends to every consequence that is foreseeable as a possibility in any degree... The crucial standard is better expressed as the question whether all her injuries were within those risks by reason of which the defendants' conduct was characterized as negligence.

Id.

[23] A paradigmatic example is the treatment of liability for economic loss suffered by the plaintiff because of damage caused to something owned by a third party. *See* Canadian Nat'l Ry. v. Norsk Pacific S.S. [1992] 91 D.L.R.4th 289 (Can.).

[24] Donoghue v. Stevenson, 1932 App. Cas. 562, 580 (H.L.). In *Dorset Yacht v. Home Office*, Lord Diplock remarked about Lord Atkin's general conception of relations giving rise to a duty of care, that "misused as a universal it is manifestly false." Dorset Yacht v. Home Office, 1970 App. Cas. 1004, 1060.

they knew was prepared for the guidance of a specific class of investors with respect to a specific class of transactions.[25] The question that now arose was whether investors generally could recover for their admittedly foreseeable reliance on statements in a report prepared for the corporation's annual meeting. Both the English and the Canadian courts answered in the negative, but they used different modes of reasoning.

For the House of Lords,[26] the crucial issue was whether the requisite normative link existed between the defendant's negligence and the plaintiff's loss. Foreseeability of the loss could not ground liability, because the duty of care could not be considered in abstraction from the kind of damage which the defendant must avoid causing. In this case the audit was presented to fulfil a statutory obligation aimed at the informed exercise by the corporation's stakeholders of their powers of corporate governance. Because the plaintiff's loss was not connected to the purpose of the audit, the defendant owed no duty of care with respect to that loss.

The Canadian case[27] followed the English decision in result but transformed the structure of its thought. Applying the two-stage test, the Supreme Court of Canada determined that a *prima facie* duty of care arose because investor reliance on the audit was foreseeable. This duty, however, was negated by the undesirable social consequences of the indeterminate liability generated by so broad a conception of foreseeability. Among these consequences were the increased insurance premiums, the higher costs faced by accountants, the opportunity costs in time spent on litigation rather than on generating accounting revenue, reduction in the availability in accounting services as marginal firms are driven to the wall, and increased costs for consumers. Looking to the purpose of the auditor's report, as was done in the English case, was, "in reality, nothing more that a means by which to circumscribe - for reasons of policy - the scope of the representor's potentially unlimited liability"[28]

The contrast between these two cases is stark. The English judgment straightforwardly applied the mode of reasoning set out in the classic twentieth century cases mentioned earlier. The House of Lords examined whether the investor suffered the kind of loss that lies within

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[25] Haig v. Bamford [1976] 72 D.L.R.3d 68 (Can.).

[26] Caparo Industries v. Dickman, 1 All E.R. 568 (1990). For an illuminating discussion of this case, see Chapman, *Limited Auditors' Liability: Economic Analysis and the Theory of Tort Law*, 20 CAN. BUS. L. J. 180 (1992).

[27] Hercules Managements v. Ernst & Young [1997] 146 D.L.R.4th 577, 591 (Can.).

[28] *Id.*

the scope of the auditor's duty, which, in turn, was defined and limited by the purpose for which the audit was required. Given that such audits are not prepared for the guidance of decisions to buy or sell shares, the defendant could not be viewed as having assumed responsibility for the plaintiff's losses. Because these investment transactions fell outside the range of the defendant's duty, the plaintiff's loss, despite being the foreseeable outcome of a negligently prepared report, did not count as the suffering of a wrong at the defendant's hands. In this judgment the purpose of the audit functions as the normative idea through which the court considers the connection between parties. The reasoning is relational throughout, and liability is denied because the plaintiff's loss is not normatively correlated to the defendant's negligence.[29]

The Canadian case transforms this relational reasoning into a policy-based restriction on liability. Foreseeability, now no longer situated within the framework of doing and suffering the same injustice, creates a *prima facie* duty that is "potentially infinite." To solve this problem of its own creation, the Court curtails the scope of the duty by reference to policy factors. Hence, what the Court calls the simple justice of the plaintiff's claim yields to the need to preserve the availability of accounting services in Canada. The Court does not explain why justice is to be sacrificed to the need for accounting services, or why the policy to maintain accounting services outweighs the policy of deterrence, or how the Court knows that the current level of accounting services in Canada is optimal. Instead of offering reasons for thinking that the defendant did not wrong the plaintiff, the Court indulges in speculations beyond its competence about the undesirable consequences of liability for the providers and consumers of accounting services.

These particular differences in the two judgments reflect a wider contrast between the nature of the justifications that they employ. The Engish judgment assumes that the justifications relevant to liability

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[29] The following passage from the English case is a striking judicial formulation of the notion of that the sequence from negligence to injury forms a single normative unit:

> [A] postulated duty of care must be stated with reference to the kind of damage that the plaintiff has suffered and in reference to the plaintiff or the class of which the plaintiff is a member...His duty of care is a thing written on the wind unless damage is caused by the breach of that duty; there is no actionable negligence unless duty, breach and consequential damage coincide...; for the purpose of determining liability in a given case, each element can be defined only in terms of the others.

Caparo Industries v. Dickman, 1 All E.R. 568, 599 (1990) (per Lord Oliver) (*quoting* Council of the Shire of Sutherland v. Heyman (1985) 60 A.L.R. 1, 48 (Austl.) (per Brennan, J.).

embrace both parties as the doer and the sufferer of the same injustice. Because of liability's correlative significance for both parties, such justifications are required if a judgment is to provide coherent reasons for considering whether one party is liable to the other. Conversely, a court that decided issues of liability without reference to such justifications fails to treat the parties fairly in relation to each other. The Canadian judgment provides an example of this. Its expansive conception of foreseeability at the first stage focuses on the prospective damage that might result from the defendant's action without articulating the reason for regarding that damage as a wrongful infringement of the plaintiff's right. Similarly, its restrictive elucidation of policy at the second stage deals only with the effect of liability on accountants and is thus unrelated to the plaintiff's claim to have suffered a wrong. The effect is that the judgment contains a series of unintegrated considerations that are divorced from the articulation of the wrong that might link the parties to the action. Such considerations are inherently incapable of fairly and coherently determining whether the defendant should be held liable to the plaintiff.

If tort law is to be a fair and coherent normative practice, it must determine liability on the basis of justifications that link the plaintiff and the defendant. This in turn requires that the central concepts of tort law be construed as the normative markers for the doing and suffering of a wrong. The great cases of twentieth century negligence law gave voice to this conception of liability. The challenge for the next century is whether this legacy can be maintained and developed. This project is inconsistent with the introduction of instrumentalist notions of policy that fragment the relationship between the parties and transform the law's concern from the wrong done and suffered to the choice of social goals. The Canadian example indicates that even jurisdictions without strong instrumentalist roots may lose sight of the need to elucidate tort law in terms of the normative relationship between the parties. When that happens, tort law has no future as a fair and coherent justificatory enterprise.