

Rights, Loss and Compensation in the Law of Torts

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I. INTRODUCTION

There is a view, voiced perhaps more frequently in conversation than in print, that the best explanation of the basis of liability in the law of torts is a divided one. For simplicity I will call it the “Standard View”.¹ The Standard View begins with the observation that there are two kinds or classes of torts: the intentional torts, which are actionable *per se*, and those torts that require proof of harm or loss before a finding of liability will be made. Included in this latter class are the torts of negligence and, arguably, nuisance. With this distinction in place, the Standard View draws a further distinction between two models of liability. Thus, according to the Standard View the model of liability that best explains the intentional torts is based on interferences with rights, while the model that best explains the so-called harm-based torts is based on the culpable causation of loss. On the Standard View, then, the law of torts is bifurcated both in theory and in practice: it comprises two distinct classes of torts, and embraces two distinct models of liability.²

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¹ Throughout this paper I will do my best to talk about the law of torts (plural), rather than tort law (singular). This is because this area of private law seems to be a collection of individual causes of action, or *wrongs* — assault, battery, trespass, conversion, defamation, negligence, inducing breach of contract, false imprisonment, and so on. Thus, even though I will be arguing that there is something that these causes of action have in common — all involve violations of so-called primary rights — referring to this area of law as the law of torts reminds us that to be subject to a tort is to be wronged, and that there are different ways that a person’s primary rights can be interfered with. For a similar view see Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), at 2: “we have a law of torts (plural) not a law of tort, just as we have a law of wrongs not a law of wrong” [hereinafter “Stevens, *Torts and Rights*”].

² The bifurcation identified by the Standard View is by no means a modern invention: the ancient writs of trespass *vi et armis* and trespass on the case capture more or less the same distinction. For discussion, see c. 17 of S.F.C. Milsom, *Historical Foundations of the Common Law* (Oxford: Oxford University Press, 1981).

There is something compelling about the Standard View. We often distinguish the harm-based torts from the intentional or trespassory torts, and when introducing the law of torts to students we are often at pains to emphasize the doctrinal dissimilarities between these different areas of liability.³ Trespass involves strict liability, we say (you can commit trespass accidentally) and can be committed without causing harm — if I take a nap in your bed while you are at work, bringing along my own sheets and pillow-case and cleaning up after I leave, I am liable in trespass even though you have not suffered harm in any obvious sense⁴ — while negligence requires proof of carelessness and is subject to a “no harm, no foul” principle. Moreover, it is a very short step from the identification of these doctrinal dissimilarities to the assertion of underlying normative differences. By this I mean that it is very natural to conclude that, given the doctrinal differences between the intentional torts and the harm-based torts, their underlying bases of liability must differ as well. For if harm is a necessary condition for liability in negligence, but not in assault, is this not sufficient to establish that the nature of liability in the two cases must be fundamentally different as well?

The Standard View therefore offers a *prima facie* plausible interpretation of both doctrine and theory in the law of torts. Nonetheless, I want to argue that the Standard View is wrong. But showing *that* it is wrong, and perhaps more importantly, *why* it is wrong, takes some doing. Broadly speaking, there are two ways to challenge the Standard View. One could take issue with the Standard View’s claim that there are, as a matter of positive law, two distinct classes or kinds of torts. But it seems to me that this would be difficult to do since on their face battery and negligence are, or involve, different kinds of wrongs. Alternatively, one could take issue with the Standard View’s claim that there are, as a matter of normative theory, two distinct accounts of the basis of liability in the law of torts. I will pursue the second strategy here. First, I will argue that the Standard View’s account of the basis of liability for harm-based torts is inadequate and that another view, which I call the “Rights Model”, offers a better explanation. By this I mean that

³ By trespassory torts I have in mind both trespasses to person — assault and battery, for example — and trespasses to property, such as simple trespass and conversion.

⁴ See, e.g., *The Mediana*, [1900] A.C. 113, at 117 (H.L.), *per* Lord Halsbury: “Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing that I do not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd[.]”

that the Rights Model is simpler, more coherent, and gives a better explanation of the cases than does the Standard View.⁵ And second, I will suggest that once we recognize that the key concept in the law of torts is not culpable causation of loss but is instead the rectification of wrongs, we will see that negligence law, despite its requirement of harm, nonetheless sits conformably with the intentional torts. What makes the law of torts hang together is its emphasis on rights and corresponding duties; what threatens to pull it apart is an undue focus on harm, loss, and compensation. I will argue, in short, that the presence of two different classes or kinds of torts should not lead us to embrace two distinct models or modes of liability.

To be clear, I am not arguing that the concepts of compensation and loss are *practically* unimportant for the law of torts; they are not. Certainly for a plaintiff who has suffered physical injury at the hands of a negligent defendant, has had his or her reputation defamed, or has had property damaged or destroyed, compensation in the form of monetary damages are integral to making the plaintiff whole. All the same, I worry that in thinking about the law of torts an undue focus on the role played by the concepts of compensation and loss has distorted how we *reason* about the nature of tort liability, and that this distortion has had detrimental effects on how this area of law has been developed by judges, lawyers and academics.

The structure of the paper is as follows. I begin by expanding on the Standard View's account of the basis of liability in negligence and nuisance, contrasting it with the account of liability offered by the Rights Model. Next, I argue that although the Rights Model was explicit in the Canadian law of torts for a very long time it has recently become displaced by the Standard View. But I also argue that in order to sustain itself the Standard View must, and in fact does, appeal to the very concepts and distinctions that are constitutive of the Rights Model. I draw two conclusions from this, one interpretive, one prescriptive. The interpretive conclusion is that the best interpretation of the Canadian law of torts is one according to which liability is based on general principles involving rights and duties. The prescriptive conclusion is that this is the *only* interpretive conclusion that makes sense: a law of torts that based liability only on the concepts of fault and damage would, for that very reason, be a deficient one.

⁵ For further discussion of the notion of coherence see Jason Neyers, "A Coherent Law of Estoppel?" (2003) 2 J. Obligations & Remedies 25.

II. TWO VIEWS OF THE LAW OF TORTS

The preceding discussion is obviously sketchy and incomplete. All the same, it serves to identify the key point of disagreement between the Standard View and the Rights Model. In brief, the main point of disagreement between the two approaches has to do with the account of liability that is appropriate for the so-called harm-based torts. Both approaches agree, in other words, that with respect to the intentional torts, considerations having to do with harm, loss, or damage are largely irrelevant to questions of liability — while harm is sometimes relevant to remedial issues it is not a constitutive element of the cause of action in trespass or battery. Rather, what divides friends of the Standard View and friends of the Rights Model has to do with what account best explains the nature of liability for torts, such as negligence, that require proof of harm before liability will be imposed. Proponents of the Standard View — not implausibly — say that the best account is one that is based on considerations having to do with fault and loss, while proponents of the Rights Model insist that it is an account based in the first instance on rights and duties. Who is correct? It is to this question that I now turn.

1. The Standard View

As I noted above, the Standard View distinguishes two accounts of liability, and suggests that while the model of liability that explains the intentional torts is based on interferences with rights, the model that best explains the so-called harm-based torts is based on the culpable causation of loss. Let me discuss this second idea in a bit more detail.

The general principle animating this second idea is that there ought to be liability for all injuries, subject to exceptions. According to this principle, once damage has occurred as a result of the defendant's objectionable conduct, liability ought to be imposed on the defendant unless there is a good reason not to do so. To be sure, what constitutes "objectionable conduct" will vary from situation to situation, and from tort to tort. In some situations, such as those involving trespass to persons or property, conduct will be objectionable if it is intentional, while in other contexts, conduct will be objectionable if it is reckless or careless, as in negligence. Still, the idea that liability ought to be based on culpability together with loss is easy enough to understand. So, for example, in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, McLachlin J. (as she then was) said that "[a] fundamental

proposition underlies the law of tort: that a person who by his or her fault causes damage to another may be held responsible.”⁶ This proposition or idea goes by many names. Allan Beever calls it the “common law conception of tort”.⁷ Jason Neyers calls it the “modern approach” to tort law.⁸ And Robert Stevens simply calls it the “loss model” of tort law.⁹ In what follows I will call it the “Culpable Causation of Loss Model”, or the “CCL Model” for short.

Regardless of what it is called, however, what is characteristic about this model is a particular view about the nature of liability appropriate for harm-based torts. According to Beever:

There are two parts to this conception. The first part consists of a general principle, according to which persons are responsible for the injuries they cause others. The second part holds that the strict application of this principle would lead to overly extensive liability and so the principle must, for reasons of broad social and economic policy, be accompanied by a long list of exceptions.¹⁰

As Neyers summarizes the view:

First, one determines if, according to the generalised legal rules, the behaviour of the defendant was wrongful and caused loss (*i.e.*, if there was fault plus causation of loss). In the case of negligence, this would mean determining whether the defendant behaved negligently and thereby caused reasonably foreseeable injury to the claimant If one reaches a positive conclusion on the first step, then at the second step one asks whether there are any policy reasons “which ought to negative, or to reduce or limit” this liability.¹¹

And as Stevens succinctly puts it, what characterizes the CCL is the idea that “the defendant should be liable where he is at fault for causing the claimant loss unless there is a good reason why not”.¹²

⁶ *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] S.C.J. No. 40, [1992] 1 S.C.R. 1021, at 1137 (S.C.C.) [hereinafter “*Norsk*”].

⁷ Allan Beever, “Justice and Punishment in Tort” in Charles Rickett, ed., *Justifying Private Law Remedies* (Oxford: Hart Publishing, 2008), at 249. See also Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007).

⁸ Jason Neyers, “*Tate & Lyle Food & Distribution Ltd. v. Greater London Council* (1983)” [hereinafter “*Neyers*”] in Charles Mitchell & Paul Mitchell, eds., *Landmark Cases in the Law of Tort* (Oxford: Hart Publishing, 2010), at 227.

⁹ Stevens, *Torts and Rights*, *supra*, note 1, at 1.

¹⁰ Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007), at 272.

¹¹ Neyers, *supra*, note 8, at 234-35.

¹² Stevens, *Torts and Rights*, *supra*, note 1, at 1.

In short, according to the CCL Model all harms or losses culpably caused by the objectionable conduct of others are presumptively unlawful. Thus, where as a result of wrongful conduct there has been foreseeable causation of harm or loss what needs justification on the CCL Model is not, as one might expect, the *imposition* of liability. Rather, what needs justification is the *failure* to impose liability. According to the CCL, in other words, if A harms B but does not owe B compensation, that can only be because of the presence of other factors that negate the imposition of liability on A. What might such other factors be? Potential candidates include the fact that imposing liability would carry with it a spectre of indeterminate or unlimited liability;¹³ that imposing liability would encourage moral hazard, *i.e.*, careless or risky behaviour; that the plaintiff was best placed to insure against the loss; the presence of residual economic policy concerns; and so on.¹⁴

Although I will criticize the CCL Model in what follows — and, by extension, the Standard View — it is worth pausing to note that there are reasons to take the model seriously. This is because it is natural to think that, other things being equal, when a defendant acts in an objectionable manner and causes harm or loss to another individual, that defendant ought to be held responsible for the damage that he or she has brought about. Thus, suppose D by his objectionable conduct causes foreseeable damage or loss to P. Since the loss has already occurred, the only question is whether to let the loss lie where it falls, or to shift it from P to another party. But according to our ordinary intuitions, as between D, who has acted badly and caused the loss, and the innocent plaintiff P who has suffered the loss, surely the loss ought to be shifted (or “spread”, or distributed, as it is sometimes said) from P to D; for had D not acted badly in the first place P would not have suffered the loss in question. In other words, it is very natural to think that where we have fault together with loss, there are strong reasons to impose liability on the individual who caused the loss in question. Or as Jules Coleman has said: “[t]ort

¹³ As suggested by a superficial reading of Cardozo J.’s judgment in *Ultramares v. Touche*, 174 N.E. 441 (N.Y. C.A. 1931) [hereinafter “*Ultramares*”].

¹⁴ Jane Stapleton has identified no fewer than 50 factors that might be appealed to at the duty of care stage in a negligence inquiry in order to support or negate the imposition of liability. See Jane Stapleton, “Duty of Care Factors: a Selection from the Judicial Menu” in Peter Cane & Jane Stapleton, eds., *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Oxford University Press, 1998), at 59.

law is about messes. A mess has been made, and the only question before the Court is, who is to clean it up?”¹⁵

2. The Rights Model

Now contrast the CCL Model with what I will call, following a number of other authors, the Rights Model.¹⁶ According to an interpretation of the Rights Model that I find attractive, the law of torts serves to set fair terms of interaction between individuals. It does this in the first instance by assigning primary rights to individuals, and in the second instance, by giving legal effect to secondary rights of repair. Let me explain. A *primary right* is a right that is recognized by substantive legal doctrine, and that exists prior to the wrong complained of.¹⁷ Examples of primary rights include the right to bodily autonomy, the right to bodily integrity, and rights to real property and chattels.¹⁸ A *secondary right* is a right that arises when a primary right is violated. So, for example, if I negligently hit you with my car and break your leg, I have violated your primary right to bodily integrity. The violation of

¹⁵ Jules Coleman, “Second Thoughts and Other First Impressions” in Brian Bix, ed., *Analyzing Law* (Oxford: Oxford University Press, 1998) 257, at 302.

¹⁶ For articulation and discussion of the Rights Model see, among others, Stevens, *Torts and Rights*, *supra*, note 1; Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) [hereinafter “Beever”]; George Fletcher, “Fairness and Utility in Tort Law” (1972) 85 Harv. L. Rev. 537; Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992); Gregory Keating, “Reasonableness and Rationality in Negligence Theory” (1995-1996) 48 Stan. L. Rev. 311; John Goldberg & Benjamin Zipursky, “Torts as Wrongs” (2010) 88 Tex. L. Rev. 917; John Gardner, “What is Tort Law For? Part 1: The Place of Corrective Justice” (2011) 30:1 Law & Phil. 1; Nicholas McBride, “Rights and the Basis of Tort Law” in D. Nolan & A. Robertson, eds., *Rights and Private Law* (Oxford: Hart Publishing, 2012), at 331; Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999), “Philosophy of Tort Law” in J. Coleman & S. Shapiro, eds., *The Oxford Handbook of Jurisprudence and Legal Philosophy* (Oxford: Oxford University Press, 2001), and “As If It Had Never Happened” (2007) 48 Wm. & Mary L. Rev. 1957; and Ernest Weinrib, *The Idea of Private Law*, 2d ed. (Oxford: Oxford University Press, 2012) [hereinafter “Weinrib, *Private Law*”] and *Corrective Justice* (Oxford: Oxford University Press, 2012) [hereinafter Weinrib, *Corrective Justice*”].

¹⁷ For discussion see Peter Birks, “The Concept of a Civil Wrong” in D. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995) 29, at 38ff. See also, and again, Beever, *id.* and Stevens, *Torts and Rights*, *id.* It is an interesting question what, exactly, the relation between primary rights and secondary rights is. Are they distinct rights? Is the secondary right merely the primary right in another guise? I set this interesting and important issue aside, since it is not relevant to the present discussion.

¹⁸ For simplicity I am assuming that it makes sense to talk about a right to bodily integrity and autonomy. Some would object to this by saying instead that you have a right that your bodily integrity not be intentionally or negligently interfered with. I take no stand on this issue here, since the argument of the paper goes through regardless of how primary rights are understood.

your primary right, however, gives rise to a secondary right, and that corresponds to a secondary, or remedial, obligation on my part to make it as if the violation of your primary right had never occurred. This is typically done by a payment of monetary damages. What is of particular importance on the Rights Model is the necessity of identifying a primary right held by the plaintiff, and exigible against the defendant, that the defendant's allegedly objectionable conduct is said to have violated. If no primary right is violated, either because no primary right can be identified, or because the defendant's conduct was not objectionable in the relevant sense, then the defendant should not be held liable for the damage suffered by the plaintiff for the simple reason that the defendant has not done anything that he or she was not entitled to do.

It should be clear enough why there should be no liability when no primary right exists. After all, if I have no primary right that you not behave in a particular way, I cannot complain when you do behave in that way. But what does it mean to say that the defendant should be absolved from liability when his or her conduct was not objectionable in the relevant sense? For an example of such conduct, consider *Palsgraf v. Long Island Railway Co.*¹⁹ The plaintiff in *Palsgraf* was standing on a railway platform when a train stopped at the station. A man carrying a package tried to jump aboard the train, a guard on the platform pushed him from behind, and as a result the man's package fell. As it turned out, the package contained fireworks, and when the package fell the fireworks exploded, causing some scales at the other end of the platform to fall on the plaintiff. The plaintiff sued the railway company in negligence, arguing that it was under an obligation to ensure that she was not injured by the negligent conduct of its employees. In his reasons denying recovery Cardozo J. said the following: "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all."²⁰ According to Cardozo J., in other words, even if it was accepted that the guard's conduct in pushing the passenger onto the train and dislodging the package was objectionable — *i.e.*, careless — it did not follow that the guard's conduct was objectionable in relation to the plaintiff since the defendant was under no duty to guard against the kind of injury suffered by the

¹⁹ 248 N.Y. 339, 162 N.E. 99 (N.Y. CA 1928) [hereinafter "*Palsgraf*"]. See also *Bourhill v. Young*, [1943] A.C. 92 (H.L.).

²⁰ *Palsgraf, id.*, at 99.

plaintiff. Again, although the conduct of the defendant's guard might have been negligent in relation to the passenger who was pushed, "in its relation to the plaintiff, standing far away ... it was not negligence at all." And why not? Because the guard did not owe her a duty of care. Said Cardozo J.: "the risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension ...".²¹ What made the conduct of the defendant's guard objectionable were the risks it imposed on the passenger and his property. What did not make the conduct objectionable were the risks — if any — it imposed on the plaintiff. Consequently, the guard was under no duty of care with respect to her. The guard's conduct could not constitute a violation of the duty of care owed *to* the plaintiff because the injury that the plaintiff suffered was not within the ambit of the risk — or in Cardozo J.'s language, within "the range of apprehension" — created by the guard's objectionable conduct. To reiterate, what made it objectionable for the guard to push the passenger onto the train was that in doing so the *passenger* might be injured, or his property damaged. What did not make it objectionable was the possibility that due to the unforeseeable contents of the package that was dislodged, a passenger standing at the other end of the platform might suffer injury.²² This is what it means to say that the defendant's conduct might not be objectionable in the relevant sense.

There are a number of different ways to articulate and explain the Rights Model, but let me try to do so in as theoretically neutral a way as possible. The simplest way to make sense of the Rights Model is to begin by thinking about the manner in which individuals ought, ideally, to

²¹ *Id.*, at 100.

²² *Palsgraf* is often held up as a case where liability was denied on the basis of proximate cause or remoteness — this on the grounds that the plaintiff's injury was too remote from the guard's careless conduct. So, for example, Saul Levmore begins his discussion of *Palsgraf* in his otherwise excellent "*The Wagon Mound Cases: Foreseeability, Causation, and Mrs. Palsgraf*", his contribution to R. Rabin & S. Sugarman, eds., *Torts Stories* (New York: Foundation Press, 2003), at 129, as follows: "Consider now that most famous of all causation cases, *Palsgraf v. Long Island Rail Road* ...". But this view of *Palsgraf* is surely wrong. It clearly was not the view of Cardozo J., who explicitly said that "[t]he law of causation, remote or proximate, is thus foreign to the case before us" (*Palsgraf, id.*, at 101). Rather, and for the reasons given above, *Palsgraf* is a duty of care case. For further defence and elaboration of the duty of care interpretation of *Palsgraf* see, e.g., Weinrib, *Private Law, supra*, note 16, c. 6 and *Corrective Justice, supra*, note 16, c. 2 "The Disintegration of Duty".

interact with one another in a modern society.²³ It is tautological, but true nonetheless, that in a modern society individuals ought to treat each other with respect. To treat individuals with respect involves, at a minimum, taking the interests of those individuals into account when acting, and doing one's best to act in a way that others would accept. In *Political Liberalism*²⁴ John Rawls drew a distinction between the rational and the reasonable. According to Rawls, reasonable persons "desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept".²⁵ Rational persons, on the other hand, lack "the desire to engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse".²⁶ In short, a rational person acts in order to further his or her own ends, whatever they may be, asking how he or she ought to behave given the ends that he or she in fact has. A reasonable person, to the contrary, acts in a manner that recognizes the freedom of others: a reasonable person asks him- or herself what he or she should do given the ends that he or she in fact has measured against the competing interests of others, and given his or her desire to interact with others on terms all can accept.

So we have a distinction between two ways of interacting with others. We can engage with others in a (purely) rational manner, which involves treating others as things to be used or manipulated in pursuit of one's own goals or ends. Or we can engage with others in a reasonable manner, by taking their interests into account when considering what it would be appropriate for us to do. It is implicit in the Rights Model that individuals ought to act in a reasonable manner, and that when things go wrong it is the reasonableness of one's conduct that is often of crucial importance in determining the scope of one's liability.

But this picture gives rise to an obvious question, namely: what is to count as an appropriate limit on my freedom, or an appropriate limit on yours? I said earlier that on the Rights view we have primary rights, the violation of which give rise to secondary rights to repair. My suggestion is that the assignment of primary rights is one way in which the law sets

²³ What follows owes much to George Fletcher, "Fairness and Utility in Tort Law" (1972) 85 Harv. L. Rev. 537; Gregory Keating, "Reasonableness and Rationality in Negligence Theory" (1995-1996) 48 Stan. L. Rev. 311; and Arthur Ripstein, "The Division of Responsibility and the Law of Tort" (2004) 72 Fordham L. Rev. 1811, and *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999).

²⁴ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

²⁵ *Id.*, at 50.

²⁶ *Id.*, at 51.

reasonable, or fair, terms of interaction between individuals. In other words, the law recognizes a primary right to bodily integrity to ensure that in the exercise of their freedom others cannot interfere with my body; and the law recognizes a primary right to autonomy to ensure that in the exercise of their freedom others cannot interfere with my ability to choose the ends to which my means may be put. Or more simply: the law recognizes primary rights in order to ensure that others do not get to tell me what to do with myself or my things. Consider in this respect the primary right to bodily autonomy: why does the law protect that right? The answer is surely that the body is the medium through which individuals act in and on the world; consequently, to be limited in what one can do with one's body by the arbitrary actions or choices of others is to have one's freedom unfairly diminished. This is not the same, however, as saying that to be limited in what one can do with one's body is to have one's freedom diminished. For it may be that my freedom must be curtailed in order to render it consistent with the freedom of others. But that is not a *diminishment* of my freedom, since on the present view I was never entitled to freedom inconsistent with the equal freedom of others. If you take the last apple from the supermarket shelf, I am limited in what I can do: I cannot, for example, eat that apple for lunch. But that is not a diminishment of my freedom since I was never entitled to the apple to begin with. And if I lock my front door at night, you are again limited in what you can do: you cannot enter my house. But it would be odd to say that your freedom is thereby diminished given that you had no right to enter my house without my permission in the first place.

Now, of course, it sometimes happens that my freedom *is* interfered with. Sometimes, that is, others interfere with my bodily integrity, as when they punch me on the nose (battery), or lead me to believe that they will punch me on the nose (assault), or carelessly hit me with their car (negligence). Sometimes others interfere with my autonomy, as when they wrongfully confine me (false imprisonment). And sometimes others interfere with my property, as when they enter my home without my permission (trespass), take something that belongs to me and use it for their own purposes (conversion), or behave in a manner that substantially interferes with the use or enjoyment of my property (nuisance). In cases such as these — that is, in cases where a primary right is interfered with — the law will recognize a secondary right to repair and allow the plaintiff to sue for damages or an injunction. This is what I will call the Rights Model.

To repeat: what is central to the Rights Model is the idea that before liability can be imposed on a defendant a plaintiff must point to a primary right that the defendant's objectionable conduct has interfered with. By way of illustration, consider *Bradford v. Pickles*.²⁷ The town of Bradford received a significant amount of its municipal water from a natural spring that flowed underneath the defendant's land. The defendant proceeded to divert the water from the spring for work on his own land (although the hunch was that his true motive was to encourage the town to either purchase his land or pay him to refrain from interfering with the flow of water from the natural spring). The result was that less water flowed to the town, and the town sought an injunction to prevent the defendant from continuing his water-diverting activities. The injunction, however, was denied. Why? Because despite the harm suffered by the town, there was no primary right that the defendant's conduct violated: there was nothing that the defendant acquired to which the town could point and say, that is ours. Here, then, was a case in which harm was foreseeably caused, but in which no liability was imposed. And the reason why liability was not imposed was because there was nothing that Pickles had done that he was not legally entitled to do. As Lord Halsbury put it, "if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which would otherwise go into the possession of [the town], I see no reason why he should not insist on their purchasing his interest from which [the town] desires to make profit."²⁸ In short, *Bradford* stands for the following proposition: if there has been no violation of a primary right, there can be no liability; or, equivalently, if there is liability, there must have been a violation of a primary right.

To be sure, the reception of *Bradford* in Canada has not been uniformly positive, and several cases indicate that the principle suggested by *Bradford*, that property owners are entitled to unrestricted use of their property, ought to be applied "cautiously". For example, in *Pugliese v. National Capital Commission*,²⁹ Howland J.A. said that "[t]o conclude that those who abstract percolating water have unbridled licence to wreak havoc on their neighbours would be harsh and entirely out of keeping

²⁷ [1895] A.C. 587 (H.L.) [hereinafter "*Bradford*"].

²⁸ *Id.*, at 595.

²⁹ [1977] O.J. No. 2370, 79 D.L.R. (3d) 592 (Ont. C.A.), affd [1979] S.C.J. No. 34, [1979] 2 S.C.R. 104 (S.C.C.) [hereinafter "*Pugliese*"].

with the law of torts as it exists today.”³⁰ Indeed it would, but that is not the principle for which *Bradford* stands. *Bradford* does not say that property owners have unbridled licence to use their property as they see fit. Rather, it stands for the proposition that property owners are entitled to use their property as they see fit provided that its use does not violate the primary rights of anyone else.

In this respect the situation in *Bradford* was importantly different from the situation in *Pugliese*. There the Regional Municipality of Ottawa-Carleton (“RMOC”), with the consent of the National Capital Commission (“NCC”), entered into an agreement with two private contractors, B and C, to construct a collection sewer on lands owned by the NCC. Unfortunately, the total amount of water pumped by B and C greatly exceeded the daily maximum permitted under the relevant sections of the *Ontario Water Resources Act*.³¹ Moreover, it was undisputed that B and C’s diversion of water resulted in physical damage to the plaintiff’s property, including severe cracking and faulting to the floors, foundations, walls, ceilings and fireplaces of the residential structures, and cracking to curbs, laneways, sidewalks and landings. This was because the dewatering served to undermine the land on which the plaintiff’s properties were built. From a factual point of view, then, the two cases differ: in *Bradford* there was loss, but no physical damage, while in *Pugliese* the plaintiffs could point to significant physical harm to their property. But from a doctrinal point of view the two cases are indistinguishable, since among the primary rights enjoyed by residential property owners is the right that the negligent conduct of others not cause physical damage to their property. Had that right not been violated in *Pugliese*, liability would not have been imposed.³²

Other cases illustrate the converse of this proposition, *viz.*, that if there has been a violation of a primary right, there can or will be liability even in the absence of loss. For example, in *Edwards v. Lee’s Administrator*³³ the defendant invited tourists to explore caves under his property and in so doing led them underground to caves located under the plaintiff’s property. Because the only entrance to the plaintiff’s caves was located on the defendant’s property, the plaintiff had no way to

³⁰ *Id.*, at 615.

³¹ R.S.O. 1970, c. 332.

³² For further discussion see *Quality Woodwork Ltd. v. Vet’s Trucking and Cartage Ltd.*, [1992] N.B.J. No. 100, 122 N.B.R. (2d) 251 (N.B.C.A.).

³³ 96 S.W.2d 1028 (Kentucky C.A. 1936) [hereinafter “*Edwards*”]. See also *Stewart Estate v. TAQA North Ltd.*, [2013] A.J. No. 1310, 2013 ABQB 691, at para. 640 (Alta. Q.B.).

exploit the caves to his own advantage. Nonetheless, the Court concluded that in using the caves without the plaintiff's consent the defendant was required to disgorge his profits. The reason is simple: because the caves belonged to the plaintiff, the defendant's unauthorized use of those caves was inconsistent with the plaintiff's ownership of them, and any gains realized by that use were owed to the plaintiff.

Similarly, in *Olwell v. Nye & Nissen Co.*³⁴ the plaintiff and defendant had been co-owners of an egg business. The plaintiff eventually sold his interest in the business to the defendant. Not included in the sale was an egg-washing machine; rather, the plaintiff retained ownership of the machine and stored it on its property, which was located next to the defendant's property. Sometime after the sale of the business, however, the defendant, without discussion or consent, took the machine out of storage and used it about once a week for three years. While it was accepted that the plaintiff — who had in fact forgotten about the machine — would not have used the machine in those three years, the Court nonetheless held that the defendant was liable. Again, the natural explanation is not that the plaintiff suffered loss but rather that the defendant's liability flowed from the fact that the plaintiff was the only one who was entitled to determine the purposes to which the machine should be put. In using the machine without the plaintiff's consent, the defendant was violating the plaintiff's primary right to the machine, and so was required to pay an amount equivalent to the amount of money it saved by using the machine and not having to pay labourers to wash the eggs by hand.

Together, *Bradford*, *Edwards*, and *Olwell* yield the following biconditional: liability will be imposed on a defendant if and only if the defendant's conduct violated a primary right held by the plaintiff. I take this to be at the core of the Rights Model's account of liability in the law of torts.

Let me summarize the argument to this point. I have described two models of liability for harm-based torts such as negligence and nuisance. One model — the Culpable Causation of Loss Model — is based on the principle that all culpably caused losses are presumptively wrongful. It therefore imposes liability unless reasons can be found for not doing so. The other model — the Rights Model — is based on the principle that even where there has been the culpable causation of loss no liability

³⁴ 173 P.2d 652 (Wash. S.C. 1946) [hereinafter "*Olwell*"].

should be imposed on a defendant unless it can be shown that the defendant's culpable conduct violated a primary right held by the plaintiff. To be sure, in remedying rights-violations injured plaintiffs are normally compensated. But according to the Rights Model such awards are best thought of as vindicating rights, rather than compensating for losses. That is, according to the Rights Model the purpose of such awards is to make it as if the *wrong* — that is, the violation of the primary right — had never occurred.

III. DISCUSSION

At the outset I indicated that part of my goal was to argue that the Rights Model is preferable to the CCL Model, and by extension, to the Standard View, as an account of the basis of liability in the law of torts. And I said that the reason why it is preferable is that it is simpler, more coherent, and fits better with the cases. Let me now try to make good on these claims.

Consider first the claim that the Rights Model is more coherent than the Standard View. This claim is, it seems to me, obvious. First, the Rights Model offers a unified explanation of liability in the law of torts, based on a plausible principle: no liability should be imposed on a defendant unless it can be shown that the defendant's culpable conduct violated a primary right held by the plaintiff, and good against the defendant. This explanation applies to both the intentional torts and the harm-based torts. The Standard View, on the other hand, is explicit in proposing two accounts of liability, one that (in its view) is appropriate for the intentional torts and another that is appropriate for the harm-based torts.

But there is another measure of coherence worth considering. According to this measure, "a coherent theory must be able to fit the doctrine to be explained with the larger area of the law in which, by common definition and practice, it is seen to reside".³⁵ On this measure the Standard View also fares poorly. This is because the Standard View results in a lack of fit between different areas of private law. Consider again *Bradford*. From the perspective of the orthodox law of property, the town of Bradford had no primary right to the percolating water that flowed downhill to the town. But if the Standard View's analysis of that

³⁵ Jason Neyers, "A Coherent Law of Estoppel?" (2003) 2 J. Obligations & Remedies 25, at 27.

case is adopted, it follows that from the perspective of the law of obligations the town of Bradford *did* have a primary right to the water (given that Pickles' intentional diversion of the water caused loss to the town). Now, there is nothing wrong with the law of property saying one thing and the law of obligations saying something else. The problem, rather, is that the Standard View implies that the reason why, in diverting the flow of water, Pickles wronged the Town of Bradford was because the town was entitled to continue to receive the water. But this claim only makes sense if it is interpreted in a proprietary manner. Thus, the Standard View implies that the town of Bradford both had, and did not have, a proprietary right to the percolating water. This incoherence is another strike against the Standard View.

The Rights Model also fares better when we consider issues having to do with simplicity. In this context, simplicity has both a practical and a theoretical dimension. The idea that liability ought to be based on interferences with primary rights rather than on the culpable causation of loss is theoretically simpler for the same reasons that it is theoretically more coherent: it is based on a single unifying account of liability rather than on the union of two contrasting ones. Moreover, and perhaps more importantly, from a practical point of view the Rights Model is also simpler than the Standard View. To see why, consider the situation of a trial judge faced with questions of liability in the law of negligence. The Rights Model says that the first thing he or she must ask him- or herself is whether the defendant's conduct interfered with a legally recognized primary right held by the plaintiff. If no such right can be identified, or if the defendant's objectionable conduct did not, in fact, constitute a violation of that right, the negligence inquiry ends. The Standard View, on the other hand, proposes that liability in negligence ought to be based on the idea that "the defendant should be liable where he is at fault for causing the claimant loss unless there is a good reason why not".³⁶ But as a matter of fact the "reasons why not" are so varied and open-ended as to be practically useless. Since in principle *any* consideration could be relevant to the question whether liability ought to be imposed, the CCL Model entails that the negligence inquiry is unbounded and open-ended.³⁷ But then as a practical matter where are judges supposed to begin their inquiry? And where should they end it? The answer is not

³⁶ Stevens, *Torts and Rights*, *supra*, note 1, at 1.

³⁷ For similar complaints see again Stevens, *Torts and Rights*, *id.*

clear. In short, when considering the practical problems and questions confronting lawyers and judges in the law of torts the Rights Model can also be seen to be simpler than the Standard View, and ought to be preferred to it.

So much for coherence and simplicity. Still, saying that the Rights Model is simpler and more coherent than the Standard View is not yet to say that it offers a better account of liability than the Standard View. For the Standard View might, quite simply, get the law right; and the Rights Model might simply get the law wrong. So let me turn now to discussion of my claim that the Rights Model fits the cases better than does the Standard View. To do so, I will begin with some exceedingly brief remarks about legal history before turning to a more theoretical discussion.

1. History

The idea that that no liability should be imposed on a defendant unless it can be shown that the defendant's conduct violated a primary right held by the plaintiff was, for a long time, a staple of Canadian law. Many early cases stand for the proposition that in the absence of a legal wrong, no liability will lie even where the defendant's actions caused damage to the plaintiff or to her property.

For example, in the 1898 case of *Perrault v. Gauthier*, the plaintiff, a stone-cutter, alleged that the defendants, who were officers of a legally recognized stone cutter's union, had conspired against him to prevent him from gainfully pursuing his trade. The plaintiff had found work at a stone-yard. However, when his unionized co-workers learned that he was a member of an opposition union they promptly left work "without saying a word". As a result, the plaintiff was required to quit his job at the stone-yard to prevent his employers (one of which was his brother) from losing money, and was unable to find work as a stone-cutter going forward. In finding for the defendants the Supreme Court of Canada endorsed the view that "one who acts within the limits of his rights commits no fault, that is legal fault, and is not liable in damages."³⁸ Indeed, Girouard J. went so far as to say that this view "simply enunciates an elementary maxim of universal or natural law adopted by all civilized nations ..."³⁹ It therefore concluded that the defendants were not liable for the plaintiff's losses.

³⁸ *Perrault v. Gauthier*, [1898] S.C.J. No. 1, 28 S.C.R. 241, at 253 (S.C.C.) [hereinafter "*Perrault*"], relying heavily on *Allan v. Flood*, [1898] A.C. 1 (H.L.).

³⁹ *Perrault v. Gauthier*, *id.*, at 254.

Similarly, in the 1915 case of *Hamilton Street Railway Co. v. Weir*,⁴⁰ the defendants had been hired to erect and maintain trolley poles and wires pursuant to a contract with the city of Hamilton. The plaintiff, who was driving his car along King Street in Hamilton, collided with a pole supporting some trolley wires belonging to the defendants. As a result, the plaintiff's automobile was damaged and the plaintiff himself was injured. He sued the defendants, who were responsible for erecting and maintaining the poles and wires pursuant to a contract with the City of Hamilton. In finding for the defendants Duff J. said that "[t]he precise thing that was done was authorized by the legislature. It, therefore, could not be a nuisance in contemplation of law. If harm arises from the placing of poles where the legislature directs they shall be put, such harm, as Lord Blackburn said, is *damnum absque injuria*."⁴¹

In other words, it was always the position of the law that there will be no liability for loss if the damage was caused by the defendant acting within or in the exercise of his or her legal rights, but that liability will arise only where the damage was the result of the defendant's interference with the legal rights of another. Or in the terminology of the present paper, it has always been the case that there can be no liability unless the loss complained of was consequential on the defendant's violation of a primary right held by the plaintiff. This is simply another way of stating the Rights Model's general account of liability.

2. Eclipse

At some point in the recent past, however, the account of liability championed by Rights Model was eclipsed by the model of liability characteristic of the Standard View. Although it is difficult to say why or when this happened, it seems plausible to suppose that this was due in no small part to the emphasis placed on considerations of policy in the law of negligence in particular.⁴² Moreover, it is also arguable that this has been a detrimental development for the law of torts. As Nicholas McBride argues, the CCL Model:

⁴⁰ [1915] S.C.J. No. 30, 51 S.C.R. 506 (S.C.C.) [hereinafter "*Hamilton Street*"].

⁴¹ *Id.*, at 514 (S.C.C.). For similar pronouncements, see also *Pion v. North Shore Railway Co.*, [1887] S.C.J. No. 30, 14 S.C.R. 677 (S.C.C.) and *Toronto (City) v. J.F. Brown Co.*, [1917] S.C.J. No. 19, 55 S.C.R. 153 (S.C.C.).

⁴² See Weinrib, "The Disintegration of Duty", c. 2 of *Corrective Justice*, *supra*, note 16.

... creates the impression that judges in tort cases are simply concerned to determine whether it would be “fair, just and reasonable” to allow the plaintiff to sue the defendant for compensation for a loss that the plaintiff has suffered. [It] also creates a danger that judges will begin to buy into this myth of what happens in tort law cases and start arrogating to themselves powers to redistribute losses as they see fit, according to their own private notions of what is “fair, just and reasonable”.⁴³

The nature of this eclipse can be seen most clearly by considering some economic loss cases where the focus on primary rights was largely replaced by considerations having to do with compensation and the culpable causation of loss.

I will begin with *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*⁴⁴ In *Norsk* a barge being towed down the Fraser River by the defendant, Norsk Pacific Steamship Co., collided with a bridge owned by Public Works Canada (“PWC”), and used by, among others, the plaintiff Canadian National Railway Co. (“CN”). CN had a contract with PWC that excluded PWC from liability for lost profits due to damage to the bridge. As a result of the collision the bridge had to be temporarily closed down for repairs, and as a result, CN suffered a decline in its profits. PWC repaired the bridge and recovered the costs of its repairs from Norsk at trial; CN, which was precluded from recovering in contract, sued Norsk in tort. The issue before the Courts was therefore whether Norsk was liable for the relational economic loss suffered by CN and caused by Norsk’s negligence in damaging PWC’s bridge.⁴⁵

On the Rights Model, a suit for pure economic loss should be treated no differently from any other action in negligence. The key issue is whether the plaintiff had a primary right, good against the defendant, to be protected from the loss that occurred as a result of the defendant’s

⁴³ See the discussion in Nicholas McBride, “Rights and the Basis of Tort Law” in D. Nolan & A. Robertson, eds., *Rights and Private Law* (Oxford: Hart Publishing, 2012) 331, at 334.

⁴⁴ *Norsk*, *supra*, note 6. I realize that *Norsk* has been largely overtaken by *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] S.C.J. No. 111, [1997] 3 S.C.R. 1210 (S.C.C.). Nonetheless, because it is such a clear application of the CCL Model it remains a useful case to think about. I will return to discuss *Bow Valley Husky* below.

⁴⁵ The law typically distinguishes between three kinds of economic loss: *consequential economic loss*, *i.e.*, loss that follows from the plaintiff suffering personal injury or damage to his or her property; *pure economic loss*, *i.e.*, loss that is not related to personal injury or property damage either to the plaintiff or to a third party; and *relational economic loss*, *i.e.*, loss that is caused by damage to a third party’s person or property. Thus, although framed as a case involving pure economic loss, the issue in *Norsk* ultimately concerned relational economic loss in the above sense, given that Norsk’s negligence damaged the property not of the plaintiff CN, but of a third party (PWC).

negligence. In cases of negligently inflicted consequential economic loss — economic loss that is the consequence of a violation of a personal or proprietary right — the answer is relatively straightforward. Since, in such cases, the defendant has wrongfully interfered with a primary right to his or her body, or to his or her property, there is no question that the defendant is liable for losses that are consequences of the interference. The secondary right that arises when the primary right is violated is an entitlement to make it as if the (primary) wrong had not occurred; and to do that the defendant must not only repair the damaged limb or property, but also compensate the plaintiff for any reasonable losses suffered as a result of, *i.e.*, consequential upon, that damage.⁴⁶

In cases of pure or relational economic loss, on the other hand, it is less clear that liability ought to be imposed; and indeed, in such cases the law adopts a general exclusionary rule. What justifies such a rule? The Rights Model has an answer. In cases of pure or relational economic loss a general exclusionary rule is imposed because in such cases there is typically nothing to which the plaintiff can point and say, as against the defendant, you had no right to interfere with that thing. In *Norsk*, for example, while CN had a contract with PWC to use the bridge, and so had an *in personam* right good against PWC, that right was only *in personam*, that is, was good *only* against PWC; it did not bind Norsk. With respect to Norsk, in other words, CN could assert no primary right to the bridge. To be sure, as against PWC — the owner of the bridge — the defendant Norsk acted badly, and was therefore liable for the costs of repair. But CN's contractual relationship with PWC was not relevant to Norsk's obligations to CN in tort.

The problem, of course, is that this was not the conclusion reached by the Supreme Court. I will focus in particular on the reasons of McLachlin J. (as she then was). In her view relational economic loss is simply another form of loss. Consequently, she reasoned that because it was foreseeable that Norsk's negligence in damaging PWC's bridge could result in harm or loss to CN there was a *prima facie* case for imposing liability on Norsk. The only issue was whether there were any reasons not to impose liability, that is, whether recovery was desirable

⁴⁶ For insightful discussions of these issues see Peter Benson, "The Basis for Excluding Economic Loss in Tort Law" in D. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995), at 427 and Peter Benson, "The Problem with Pure Economic Loss" (2009) 60 S.C.L. Rev. 823.

from a practical point of view.⁴⁷ Justice McLachlin canvassed a number of considerations that might be thought to negate liability but eventually reached the conclusion that because CN's operations were so closely allied to the operation of PWC's bridge, it was as if CN and PWC were engaged in a joint venture. And since the joint venture principle had previously allowed for the recovery of economic loss in maritime cases, it followed that CN's economic loss was recoverable in tort from the defendant Norsk notwithstanding the fact that no primary right had been identified. *Norsk* is therefore a textbook application of the CCL Model: objectionable conduct together with the foreseeable causation of loss entails liability, subject to exceptions.

A similar conclusion was reached by the Supreme Court of Canada in another economic loss case, *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*⁴⁸ Simplifying somewhat, the facts are as follows. In 1972 a land developer contracted with the defendant construction company to build an apartment building. The building was completed in 1974. It was eventually converted into a condominium, and in 1978 the land developer sold the land and the building to the plaintiff corporation. The plaintiff's directors subsequently became concerned about the masonry work on the outside of the building and in 1989 a storey-high section of the exterior cladding fell from the building to the ground. Further inspection revealed structural defects in the masonry work, and the entire exterior cladding was eventually replaced at the owner's expense. This was considered an economic loss case, rather than a straightforward negligence case, because the defendant's negligence had not resulted in physical damage to person or property. Rather, what the plaintiff sought to recover were the costs of returning the negligently constructed building to a non-dangerous state.

The issue at the Supreme Court was therefore whether a builder responsible for the construction of a building may be held liable in negligence to a subsequent purchaser of the building, who is not in contractual privity with the builder, for the cost of repairing defects in the building arising out of negligent construction; the Court answered this question in the affirmative. In its view, builders "will owe a duty in tort [negligence] to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial

⁴⁷ *Norsk*, *supra*, note 6, at 1160.

⁴⁸ [1995] S.C.J. No. 2, [1995] 1 S.C.R. 85 (S.C.C.) [hereinafter "*Winnipeg Condominium*"].

danger to the health and safety of the occupants”.⁴⁹ Moreover, even where such defects are discovered before any damage to person or property occurs, builders “should ... be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state”.⁵⁰

In *Winnipeg Condominium* the Supreme Court applied the so-called two-stage *Anns* test for the duty of care.⁵¹ According to this test, in order to determine whether the defendant owed the plaintiff a duty of care a Court must determine, first, whether there is a relationship of proximity between the parties sufficient to give rise to a *prima facie* duty of care on the part of the defendant. If the Court is satisfied that sufficient proximity exists, it must then consider whether there are any policy factors that might negative the imposition of a duty of care. It should be clear that this is just the CCL Model applied to the duty of care analysis: the defendant should be subject to a duty of care where loss is foreseeable unless there is a good reason why not. It should also be clear that the crux of the Supreme Court’s reasoning in *Winnipeg Condominium* was based primarily on considerations having to do with harm or loss, or better, with the *likelihood* of harm or loss. What was central to the Court’s decision was the fact that due to the defendant’s negligence, the condominium building constituted “a substantial danger to the health and safety of the occupants”,⁵² to say nothing of passersby. It was the likelihood of physical harm to others that led the plaintiff to repair the exterior cladding, and triggered the plaintiff’s financial loss due to the costs of the repairs. Because this was a loss that was a foreseeable consequence of the defendant’s negligence the Supreme Court was of the view that the defendant was under a duty to compensate the plaintiff for its financial loss. Consequently, it would appear that *Winnipeg Condominium* is also best understood as an instance of the CCL Model of liability.

3. Reinterpreting the Standard View in Light of the Rights Model

But even if the Standard View — and with it, the CCL Model of liability for the harm-based torts — has recently been on the rise, it seems to me that the Standard View can only succeed if, in fact, it helps

⁴⁹ *Id.*, at para. 43.

⁵⁰ *Id.*

⁵¹ Taken from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).

⁵² *Winnipeg Condominium*, *supra*, note 48, at para. 43.

itself to the very sorts of concepts that it is at pains to distance itself from. By this I mean that an argument can be made that the Standard View must inevitably appeal, if only implicitly, to primary and secondary rights in order to reach plausible conclusions regarding liability. However, if this is right, then it turns out that the promise of the Standard View to make sense of the harm-based torts using the CCL Model of liability is largely illusory, since the CCL Model is neither as simple nor as coherent as the Rights Model, and only makes sense if we assume that the Rights Model is operating in the background.

To understand what I have in mind, let us return to *Norsk* and *Winnipeg Condominium*, cases that I have suggested are paradigmatic examples of the CCL Model of liability for harm-based torts. Consider in the first instance *Norsk*. As noted above, in *Norsk* McLachlin J. concluded that because CN and PWC were in a contractual relationship with respect to the use of PWC's bridge, and because CN's use of PWC's bridge was ongoing and significant — indeed, McLachlin J. took note of the fact that the bridge was colloquially referred to as “the CN bridge” — it was as if CN and PWC were engaged in a joint enterprise. As she put it,

... where the plaintiff's operations are so closely allied to the operations of the party suffering physical damage and to its property (which — as damaged — causes the plaintiff's loss) that it can be considered a joint venturer with the owner of the property, the plaintiff can recover its economic loss even though the plaintiff has suffered no physical damage to its own property. To deny recovery in such circumstances would be to deny it to a person who for practical purposes is in the same position as if he or she owned the property physically damaged.⁵³

To be sure, it is possible to quibble about the details of this argument. For example, there is ample reason to doubt (as La Forest J. did) whether, in fact, CN and PWC were in a relationship of sufficient proximity to make it plausible that they were engaged in what amounted to a joint venture. But let us set this issue to one side and ask instead: why is it relevant to *Norsk*'s liability to CN that the business affairs of PWC and CN were so intimately linked that it made sense to treat them as if they were engaged in a joint enterprise? What, in other words, is the legal significance of this conclusion? The answer, surely, is that had CN and PWC been in a joint venture, then CN would have enjoyed the same

⁵³ *Norsk*, *supra*, note 6, at 1162.

primary rights with respect to the bridge as those enjoyed by the true owner, PWC. In other words, the determination that CN was part of a joint venture with PWC would serve to indicate that Norsk's liability was being based on the identification of a primary right held by CN, as the Rights Model requires. So in arguing for liability based on a joint venture, McLachlin J. was in effect arguing that without the identification of a primary right exigible against the defendant, the plaintiff could not succeed.

In *Norsk* McLachlin J. asked, rhetorically, why the right to recover economic loss should:

... be dependent on whether physical damage, however minuscule, had been inflicted on the plaintiff's property? Why should a plaintiff who waits for a defective machine to break and cause physical injury or damage be able to recover, while one who prudently repairs the machine before the physical damage or injury occurs be left without remedy?⁵⁴

An answer is not far to find: while physical damage, however minuscule, typically indicates that the defendant's conduct has interfered with the plaintiff's primary right to be free from bodily harm or harm to property, there is in general no right outside of any contractual agreement to have in one's possession machines that are free from defect. In other words, the law historically, and quite plausibly, denied recovery to a plaintiff "who waits for a defective machine to break and cause physical injury or damage" because until damage occurs it is not clear that any primary right of the plaintiff has been violated.

With this in mind, consider again *Winnipeg Condominium*. The problem in *Winnipeg Condominium*, recall, was that it was not clear that the careless actions of the defendants in constructing a defective building violated any legal right held by the plaintiffs. Because the plaintiffs, who owned the defective condominium building, had no contractual relationship with the builders, they could not sue in contract. But neither was it clear that the defendants' construction of the building interfered with any primary right held by the plaintiffs given that there is in general no right to purchase or own non-defective goods. The plaintiffs wished to recover damages for the cost of putting the condominium building into a non-defective and non-dangerous condition — but the question remains: on what legal basis could this recovery be based?

⁵⁴ *Norsk*, *supra*, note 6, at 1137-38.

I want to suggest that in reaching its conclusion the Court was in fact attempting to identify the nature and boundary of the plaintiffs' legal rights and entitlements. First, consider La Forest J.'s claim that from the point of view of the law of negligence residences are in an important sense different from ordinary chattels. In *Murphy v. Brentwood District Council*,⁵⁵ Lord Keith of Kinkel argued that the cost of repairing a defective article or object cannot be viewed as a legally recoverable expense because the owner of the article has other options; the owner can, for example, simply discard it. In response La Forest J. said the following:

The weakness of the argument is that it is based upon an unrealistic view of the choice faced by home owners in deciding whether to repair a dangerous defect in their home. In fact, a choice to "discard" a home instead of repairing the dangerous defect is no choice at all: most home owners buy a home as a long term investment and few home owners, upon discovering a dangerous defect in the home, will choose to abandon or sell the building rather than to repair the defect. Indeed, in most cases, the cost of fixing a defect in a house or building, within the reasonable life of that house or building, will be far outweighed by the cost of replacing the house or buying a new one.⁵⁶

Although La Forest J.'s conclusion appears to be based on a cost-benefit calculation — because it is more efficient for homeowners to repair latent defects than to abandon or sell their property, the law ought to encourage that outcome by imposing liability on defendants who negligently create such defects — another possibility suggests itself. And that is the idea that, precisely because it would be unfair or unrealistic to require homeowners to mitigate their loss by abandoning or selling their homes, homeowners have a right not to be required to engage in that sort of behaviour. Once such a right is recognized, however, it follows that a negligent defendant should be precluded from relying on the possibility of abandonment or sale in order to avoid liability in tort. In other words, an alternative interpretation of La Forest J.'s argument is that homeowners have a right to repair latent defects and to be compensated for the costs of doing so, and that it is this right that the Court in *Winnipeg Condominium* is seeking to protect.⁵⁷

⁵⁵ [1991] 1 A.C. 398 (H.L.).

⁵⁶ *Winnipeg Condominium*, *supra*, note 48, at para. 40.

⁵⁷ For two other arguments concerning *Winnipeg Condominium*, *id.*, that also appeal to considerations having to do with rights, see Jason Neyers, "*Donoghue v. Stevenson* and the Rescue

A parallel with cases of wrongful birth is suggestive. When due to a physician's negligence a woman becomes pregnant she will sometimes sue the physician in tort for the added costs of caring for and raising her child. But it will not do for the physician to argue that having carried the fetus to term the woman should be responsible for the cost of caring for her child since another choice was always open to her, *viz.*, to have an abortion. That may be a factual choice that was available to her; but the law says that that is not a choice that it would be reasonable or fair to expect or require her to make.⁵⁸ Consequently, the law concludes that the woman has a right to continue the pregnancy, while also being entitled to sue the negligent physician for damages.⁵⁹

Second, consider the issue about defects and dangerousness. The problem was not simply that the condominium building in *Winnipeg Condominium* was defective. Rather, the problem was that it was virtually inevitable that if nothing was done the defective nature of the building would manifest itself in physical injury to persons. Justice La Forest stated:

In my view, the reasonable likelihood that a defect in a building will cause injury to its inhabitants is also sufficient to ground a contractor's duty in tort to subsequent purchasers of the building for the cost of repairing the defect if that defect is discovered prior to any injury and if it poses a real and substantial danger to the inhabitants of the building. ... If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building.⁶⁰

Doctrine" (1999) 49 U.T.L.J. 475 and Mayo Moran, "Rethinking *Winnipeg Condominium*: Restitution, Economic Loss, and Anticipatory Repairs" (1997) 47 U.T.L.J. 115.

⁵⁸ See, for example, *Kealey v. Berezowski*, [1996] O.J. No. 2460, 30 O.R. (3d) 37 (Ont. S.C.J.); *Paxton v. Ramji*, [2008] O.J. No. 3964, 2008 ONCA 697 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. No. 508 (S.C.C.).

⁵⁹ Similar issues arise in the context of so-called religious thin skulls in the law of torts. For discussion see Mark Ramsay, "The Religious Beliefs of Tort Victims: Religious Thin Skulls or Failures of Mitigation?" (2007) 20 Can. J.L. & Jur. 399 and c. 3 of Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law* (Syracuse, NY: Syracuse University Press, 1985).

⁶⁰ *Winnipeg Condominium*, *supra*, note 48, at para. 36.

To be sure, there is room to criticize this argument. For example, it might be objected that the fact that third parties — be they residents or passersby — might be injured by the plaintiff's defective building only gives those *third parties* a right to sue the defendants. Or it might be objected that until the defective nature of the building actually manifests itself in physical injury to persons there can be no negligence, since there is no harm to redress. But the point I want to make is that in this passage La Forest J. is doing precisely what the Rights Model says judges should do when attempting to determine the scope of a defendant's liability, *viz.*, identifying a primary right held by the plaintiff, and exigible against the defendant, that the defendant's objectionable conduct can be said to interfere with. And surely the right to bodily integrity is such a right.

In short, my claim is that initial appearances to the contrary notwithstanding, the CCL Model cannot in fact account for the basis of liability in harm-based torts such as negligence and nuisance without incorporating into its analysis something very much like the concept of a primary right. This is because, notwithstanding the CCL's focus on the culpable causation of loss, the arguments for why certain harms or losses ought to be subject to compensation must inevitably appeal to considerations having to do with rights and entitlements. In the case of *Norsk*, this involved an argument for the conclusion that CN and PWC were in a joint endeavour with respect to the bridge; in the case of *Winnipeg Condominium* it involved the claim that the negligent construction of the exterior cladding carried with it a risk of significant bodily harm to residents and passersby, coupled with the implicit assumption that individuals have a right to be free from such risks.

IV. CONCLUSION

In this paper I have distinguished two models of tort liability, the Standard View — which is based in part on what I have called the CCL Model of liability — and the Rights Model. And I have argued that the Rights Model is to be preferred as an account of liability in the law of torts on the grounds that it is simpler and more coherent than the Standard View, which embraces two distinct models of liability, and because it makes better sense of the cases. This has consequences for how one approaches the concepts of compensation and loss in the analysis of liability in the law of torts. According to the CCL Model of liability for the harm-based torts, whenever a defendant is responsible for

causing loss or damage to a plaintiff, liability ought to be imposed unless there are good reasons not to do so. The default, in other words, is liability subject to exceptions. According to the Rights Model, on the other hand, even where damage is caused liability ought to be imposed only when the defendant's actions wrongfully interfered with a legally protected interest, or primary right, held by the plaintiff. The default, in other words, is no liability without the violation of a primary right. I have argued that the law of torts can be seen to be a normatively coherent enterprise only if the Rights Model is adopted both for those torts that are actionable *per se*, as well as for those torts that require proof of harm. The law of torts seeks to insulate individuals from wrongful interferences with their primary rights to bodily integrity, bodily autonomy, and property, and it does so in the first instance by seeking to protect and vindicate rights. It does not do so by compensating for harm culpably caused.

What, if anything, does this tell us about the law of torts going forward? If the argument of the present paper is correct and the Standard View in fact presupposes the very concepts and distinctions characteristic of the Rights Model, then we should expect the law of torts to return to the sort of reasoning exemplified by cases like *Perrault*⁶¹ and *Hamilton Street*,⁶² where the focus was squarely on the question whether the defendant's conduct interfered with any legally protected interest of or primary right held by the plaintiff. By way of illustration, take, for example, *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*⁶³ In *Bow Valley Husky* the Supreme Court of Canada had an opportunity to revisit its decision in *Norsk*. While the facts in *Bow Valley Husky* are somewhat complicated, at bottom they involved a fire on an oil-drilling rig. Husky Oil Operations Ltd. ("HOOL") and Bow Valley Industries Ltd. ("BVI") arranged to have an oil-drilling rig constructed by Saint John Ship Building ("SJSB"). In order to benefit from government funding, however, HOOL and BVI decided that they would form a separate company, Bow Valley Husky Bermuda ("BVHB"). The contract with SJSB was subsequently transferred to BVHB and BVHB became the owner of the rig. A heat trace system was required in order to prevent the rig's pipes from freezing during the winter, and BVHB wanted to use an anti-pipe freezing system manufactured by Raychem;

⁶¹ *Perrault*, *supra*, note 38.

⁶² *Hamilton Street*, *supra*, note 40 (S.C.C.).

⁶³ [1997] S.C.J. No. 111, [1997] 3 S.C.R. 1210 (S.C.C.) [hereinafter "*Bow Valley Husky*"].

unfortunately, this system became flammable under certain conditions, and both SJSB and Raychem failed to warn the BVHB about this possibility. HOOL and BVI maintained a contract with BVHB for the hire of the rig and for day rates paid if the rig was out of service. When a fire broke out because of the improper use of the pipe system substantial damages occurred and the rig had to be towed into harbour in order for repairs to be carried out. HOOL and BVI sought to recover from SJSB the day rates that they were contractually bound to pay BVHB during the period that the rig was out of service, together with other expenses incurred due to the fire.

While the litigation in *Bow Valley Husky* involved a number of issues (including questions having to do with the existence of a duty to warn, causation and contributory negligence) what interests me is the Court's treatment of the economic loss argument. This issue arose because HOOL and BVI were seeking to recover losses they suffered as a result of damage to the property of a third party, namely BVHB. In discussing this issue McLachlin J. (as she then was) said that "[t]he plaintiffs [HOOL and BVI] here had no possessory or proprietary interest in the rig and the case is not one of general averaging. While related contractually, the Court of Appeal correctly held that the plaintiff and the property owner cannot, on any view of the term, be viewed as joint venturers."⁶⁴ This is significant in light of *Norsk*. This is because the Court in *Bow Valley Husky* is clearly relying on the idea that damages in economic loss will flow only if the defendant's objectionable conduct interfered with a primary right held by the plaintiff. But according to McLachlin J. the plaintiffs HOOL and BVI had no property right in the oil-drilling rig — the rig was entirely owned by BVHB — nor was there any reason to suppose that the plaintiffs were in a joint venture with BVHB. Consequently, it followed that no primary right of the plaintiff was interfered with by the defendant's negligence.⁶⁵ As indicated above, this

⁶⁴ *Id.*, at para. 49.

⁶⁵ In my view this should have been the end of the matter. It was therefore unfortunate that McLachlin J. proceeded to consider whether there might not be other sources on which the plaintiffs' economic loss could be based, this on the grounds that "[t]he categories of recoverable contractual relational economic loss in tort are not closed" (*Bow Valley Husky*, *supra*, note 63, at para. 50). In considering this question the Court again relied on a too-casual reading of *Ultramares*, *supra*, note 13, in respect of which McLachlin J. said the following: "[t]he problem of indeterminate liability constitutes a policy consideration tending to negative a duty of care for contractual relational economic loss" (*Bow Valley Husky*, *supra*, note 63, at para. 68). While this is no doubt the position of the Supreme Court of Canada, it was not Cardozo J.'s point in *Ultramares*, a case involving negligent misrepresentation. What Cardozo J. said there was this: "If liability for negligence exists,

is a perfectly respectable way to approach issues involving economic loss and is exactly what we would expect to find if Courts were working with an account of liability that presupposes the basic commitments characteristic of the Rights Model.

It is impossible in a paper such as this to canvass every form of liability in the law of torts, or to analyze every negligence case, and that has not been my goal. Rather, I have been concerned to argue quite generally that as an account of the nature of liability in the law of torts the Rights Model deserves to be taken seriously. Moreover, it is in a sense the only model of liability in the law of torts that makes sense. Basing liability on considerations of culpable causation of loss alone results in a law of torts that is often uncertain, needlessly complex and theoretically incoherent. It has long been a bedrock principle of the law of torts — an “elementary maxim of universal or natural law adopted by all civilized nations”⁶⁶ — that liability will arise only where the damages resulted from the defendant’s interference with the legally protected interests of another. Or in the terminology of the present paper, it has always been the case that there can be no tortious liability for loss if the damage was not consequential on the defendant’s violation of a primary right held by the plaintiff. As I have argued, this was traditionally the position taken by Canadian Courts in respect of the law of torts, and I am hopeful that it will be again.

a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.” (*Ultramares*, *supra*, note 13, at 444.) In brief, Cardozo J.’s point was not that, having recognized on the basis of foreseeability and proximity a *prima facie* duty of care, considerations of indeterminate liability constitute policy reasons for negating that duty. Instead, his point was that the spectre of indeterminate liability reveals that the very idea that there could be a duty of care is conceptually incoherent. The issue for Cardozo J. was therefore one of principle, not of policy. If it is impossible *ex ante* to determine what the ambit of the risk is, or to say with reasonable certainty who falls within the range of apprehension associated with a particular form of conduct, it follows that there can be no duty of care not to engage in that conduct.

⁶⁶ *Perrault*, *supra*, note 38, at 254 (S.C.C.).

