

Patrick Atiyah has long been a critic of tort law as an approach to accidents. His 1970 *Accidents, Compensation, and the Law*<sup>1</sup> offered a six-count 'indictment' of the fault system. It featured unfavourable contrasts between tort liability and other means of dealing with accidental injuries and losses. That book is now in its fifth edition, and Peter Cane has replaced Atiyah as its author. Nonetheless, the general thrust of the book remains unchanged. Atiyah's most recent book, *The Damages Lottery*, expands those arguments for a broader audience. It opens with a striking pair of examples: a young girl loses her leg as a result of meningitis, but receives no compensation; a man slips on an over-polished dance floor, breaking his leg, and recovers a substantial sum from the local authority that operates the dance hall. The basic argument is already contained in the examples. Those who are injured as a result of the negligence of others collect huge damage awards, which seek to provide full compensation, while those who fall ill or are injured in almost any other way – by non-negligent behaviour, by natural forces, or through the negligence of people who lack liability insurance – at most recover a fraction of their losses from some specialized social insurance scheme. This result is utterly arbitrary, because it shows an unfair preference for those who are injured in certain ways. This is unjust, since it is manifest that a person's need for compensation does not depend on the source of his or her injury. The situation is made worse by the fact that damages are paid either by insurance or (if the injurer is a public authority) by taxpayers. Either way, the costs are passed on to the public, in the

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† A review of Patrick Atiyah, *The Damages Lottery*, (Oxford: Hart Publishing, 1997) viii+201 pp., £19.99 cloth, £7.99 paper, and Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997) xviii+243 pp., £35.00 cloth, £14.99 paper.

1 P. Atiyah, *Accidents, Compensation, and the Law*, 1st ed. (London, UK: Weidenfeld & Nicolson, 1970).

form of higher prices for goods and services, and higher taxes both directly through the costs of awards, and indirectly because insurance premiums are deducted by businesses. As a result, the award of damages has no real impact on the injurer. Thus the prospect of liability will not deter carelessness. Since most cases are settled out of court, the system does not even provide an occasion for public accountability. Nonetheless, huge sums that might go to those in need are spent instead on determining liability. Thus, Atiyah concludes, it is an unjust and inefficient system.

While Atiyah's objections to the tort system have not changed, his view of the alternatives certainly have. In the first edition of *Accidents, Compensation, and the Law*, he found it 'difficult to resist the conclusion that the right path for reform is to abolish the tort system so far as personal injuries are concerned, and to use the money at present being poured into the tort system to improve the social security benefits, and the social services more generally.'<sup>2</sup> His support for such programs was avowedly egalitarian, and rested on the idea that a person's life prospects ought not to depend on chance. Atiyah now regards such programs as bureaucratic and paternalistic. He even speculates that the rise in British tort claims may be the result of a sort of generalized dependency borne of compensation programs and the welfare state. Such programs, he now opines, leave people unwilling to take responsibility for protecting themselves against misfortune. Worse, they lead people to look for someone to blame every time something goes wrong.

Despite his new-found misgivings about social security programs, Atiyah still advocates abolishing the tort system for personal injuries. His opening examples suggest that he still supposes that misfortunes should be addressed on the basis of their urgency. He turns out to suppose no such thing. Instead, he advocates a mandatory no-fault system for road accidents, and a free market in private, first-party insurance. Universal coverage providing full compensation for everyone would be too expensive. Allowing people to choose the degree of protection they want for their own persons, income, and property is the obvious alternative. It will ensure that each person will receive the amount of compensation he or she is willing to pay for. (The one exception is motorists, who Atiyah thinks should be required to carry a mandatory minimum for their own good.) The government will be left only with a fall-back role for those unable to afford insurance. Although he sometimes talks as though he advocates taking the money that goes to compensating 'pop singers and tennis stars' and giving it to those who are in need, as it turns out, Atiyah objects only

2 Ibid. at 611.

to high earners receiving large tort awards. He offers no objection to their large incomes as such, and would allow them to insure those incomes.

The changes in Atiyah's proposed alternatives to tort reflect the temper of the times, coming as they do on the heels of the erosion of the welfare state. He presents the tort system as a wasteful government program that should be cut. But where his earlier alternatives were at least consonant with the moral impetus of his critiques, the adoption of his more recent proposals would exacerbate many of the problems for which he faults the tort system. Other advocates of private insurance argue on economic grounds that the tort system in general, and products liability law in particular, forces consumers to effectively purchase insurance against certain injuries.<sup>3</sup> Since consumers pay for the insurance anyway, it is best left to consumers to choose the precise coverage they want. Atiyah's argument, by contrast, is supposed to derive from concerns about the fact that some people get huge damage awards while others receive nothing. His proposed alternative does nothing to remedy *that* problem. In a first-party system, the amount of compensation one receives is proportional to the insurance one buys. Although this may appear to be a principle that makes compensation proportional to prudence, in practice it would be compensation in proportion to wealth. Consider some examples of first-party insurance. High-income earners typically carry high levels of long-term disability insurance; low-income earners do not. The reason is not that people with high incomes are prudent ants, and those with small incomes feckless grasshoppers. It is that those with large incomes are better able to afford the costs of insuring. Again, Atiyah points to homeowner's insurance as an example of a successful first-party system that has pretty much displaced the tort system for property damage. Homeowner's policies cover falling trees no less than careless neighbours. Yet a system of homeowner's insurance is vulnerable to Atiyah's stated objection to the tort system. Opulent fixtures that suffer water damage are replaced at their full value, as are stolen furs and jewellery. But if a homeless person loses all of his or her possessions, the system of private homeowner's insurance does nothing. Even among those who purchase it, first-party insurance often magnifies distributive inequalities. Insurers, who are in business to make money, typically offer preferred rates to the least vulnerable, so that it costs almost as much to insure the contents of a small apartment as those of a large house. The point of these examples is not to malign those who sell or purchase first-party insurance. Any system that seeks to make up losses as they

3 See, for example, R. Epstein, 'Products Liability as an Insurance Market' (1985) 14 J. Legal Stud. 645 at 667-68. The same point is discussed in A. Schwartz, 'Proposals for Products Liability Reform: A Theoretical Synthesis' (1988) 97 Yale L.J. 353 at 384-88.



occur will leave existing distributive inequities in place, and sometimes magnify them. If those inequities trouble us – as they should – replacing tort law with first-party insurance does nothing to address them.

In the end, the main benefit Atiyah's alternative offers to the needy is reduced prices for goods and services, and perhaps reduced taxes, because manufacturers will not need to buy liability insurance. No numbers are offered, but even this promised side benefit sits uneasily with his other arguments. He is attuned to the ability of companies to pass the costs of liability insurance on to their customers.<sup>4</sup> In contrast, he does not consider the ability of those with market power to pass the costs of their own first-party coverage on to their customers. Nor does he mention that under his proposed system, people would need to pay for their own first-party insurance, including insurance against the carelessness of others.

The failure of Atiyah's proposal to address the problem that motivates his criticism reflects a deeper tension in his views. His criticisms of the tort system presuppose more general objections to the distributional effects of schemes of private ordering. Tort law is a form of private ordering, inasmuch as it shifts burdens from one private citizen to another, without looking to the needs of either those involved, or third parties. Although Atiyah makes heavy weather of the role of legal institutions in leading to the outcomes he bemoans, other forms of legally sustained private ordering – most notably markets – have parallel effects. It is a pervasive feature of market society that vast disparities in wealth and well-being result from the relative scarcity of various assets and abilities. Like the tort system, markets are not primarily responsive to needs. In itself, this is not necessarily a bad thing. According to standard defences of market allocations, the mere fact that some people end up with more resources than others is not objectionable, provided that shifts in resources from one person to another come about in acceptable ways. Of course, which ways of changing holdings are acceptable is a matter of controversy, as is the appropriate range within which markets should operate. But almost everyone accepts that markets have a significant place in determining who does what and who owns what. In the same way, almost everyone accepts that some ways

4 Atiyah's emphasis on this ability might lead readers to conclude that such insurance makes up a substantial portion of the costs of goods and services. This does not appear to be his considered view. In the preface to *The Damages Lottery*, the reader is referred to *Accidents, Compensation, and the Law* for details on factual matters. In a discussion of the ability of liability judgments to deter, Atiyah (and later Cane) argues that they are unlikely to do so because liability insurance premiums are an 'insignificant' part of the cost of doing business. See Atiyah, *supra* note 1, at 496–97, and P. Cane, *Atiyah's Accidents, Compensation, and the Law*, 5<sup>th</sup> ed. (London: Butterworths, 1993) at 390–91.

of changing holdings, such as gifts and voluntary exchanges, are acceptable, while others, such as force and fraud, are not. Almost everyone also accepts that at least some losses appropriately lie where they fall.

Negligence law is best understood against the broader background of private ordering. If the results of private interactions are to be acceptable, changes in holdings that come about in the wrong ways need to be made up. A system of private ordering requires that one person not be able to displace the costs of his activities onto others. Those who take or damage the property of others in the course of pursuing their own ends need to repair what they have done. The same point applies to personal injuries: if one person carelessly injures another in the course of carrying out his purposes, it is appropriate that the injurer bear the costs of the injuries. That is why the fault system supposes that those who are wrongfully injured must be 'made whole' by their injurers, even if that means restoring a large income. Tort law thus gives expression to a familiar idea of responsibility, according to which the person who makes a mess must clean it up. The standard of care serves to determine who has made which mess in light of the amount of risk it is acceptable to impose on others. Those who exercise appropriate care are not responsible for injuries that result from their actions. From the point of view of the fault system, such accidents are matters of luck rather than responsibility. Those who fail to exercise appropriate care take risks with the safety of others. As a result, they must bear the costs if those risks ripen into injuries. In this sense, negligence liability is a basic element of a culture of responsibility.

Atiyah's rhetoric obscures the role of responsibility in tort law. To say that someone should 'take responsibility' for safety is ambiguous. Sometimes it means that someone should take precautions to avoid injuring others. Other times it means that someone should take precautions to avoid injuring herself. Still other times it means that people who choose to take risks ought to insure themselves, rather than becoming burdens to the public purse. Atiyah trades on this ambiguity by putting forward a litany of examples in which the law has been 'stretched' by plaintiffs seeking compensation from defendants whose responsibility is dubious. As he describes the cases, the defendants typically appear blameless. In some of them, we are left with the impression that if anyone ought to have been more careful, it was the plaintiff. Reflection on these examples is supposed to lead us to conclude that people should insure against their own carelessness, and perhaps also against their own bad luck. They should bear the costs of their choices, rather than trying to displace those costs onto others. Because they are examples in which we are not inclined to think that the defendant is not responsible for the plaintiff's injury, though, they distract us from the cases that are the central concern of the



tort system, namely those in which the defendant is responsible. In those cases, the sort of reasoning that Atiyah invokes – don't try to find someone else to pin your problems on – leads to the conclusion that injurers should pay. If cases in which people with 'deep pockets' act at their peril involve troubling evasions of responsibility, so too does his system in which the security of accident victims is simply their problem.

Consider Atiyah's example of homeowner's insurance in this light. Homeowner's policies protect against deliberate wrongdoing, as well as against accidents and natural disasters. The person who does not carry adequate insurance against burglary may be foolish, even irresponsible. But that does not change the fact that the burglar is primarily responsible for the loss, and that a kind of justice is done if the stolen goods are recovered. The reason that damages for negligence seem compelling is the same. People do not have a responsibility to bear the costs of other people's wrongdoing. Justice requires that those who wrongfully injure others through their negligence must bear the costs their wrongdoing creates.

Of course, Atiyah is right to point out that as things stand, injured people typically recover their losses only if their injurers are adequately insured. But he overplays the importance of that fact. It is simply a reflection of the idea that people should take responsibility for their own affairs, both by taking precautions against injuring others and by making sure they have the resources to make up any losses they bring about. He also complains bitterly about the fact that taxpayers often bear the costs of liability judgments against public officials. Here too, he fails to take his own admonishments about responsibility seriously. Just as individuals must not pursue their own ends at the cost of the safety of others, so too, when society sets itself a goal through its elected officials, it must not do so at the expense of the safety of particular citizens. Where public officials carelessly injure private citizens, the public, in whose interest those officials were acting, must bear the costs. The fact that some people are too ready to look for someone with 'deep pockets' to blame for their injuries does not change the fact that people sometimes have legitimate grievances against their injurers.

Atiyah's position thus seems to be in tension with itself. He is willing to accept the distributive effects of markets, but objects to restoring them so as to cancel the effects of wrongdoing.<sup>5</sup> He is keen on responsibility, but unwilling to follow his commitments through to cases of responsibility to

5 Defenders of 'corrective justice' often deny that it requires a just initial distribution. See, for example, E. Weinrib, *The Idea of Private Law* (Cambridge MA: Harvard University Press, 1995). Wherever one stands in that debate, it is difficult to see grounds for objection to restoring an acceptable distribution when it has been disturbed by unjust steps.

others. For Atiyah, the difference is that the tort system is a publicly funded compensation system, whereas the market, including the private-insurance market, is a matter of individual choice and responsibility. He tells us that '[i]t is time that the public understood that they themselves are paying for these damages awards.'<sup>6</sup> A few pages later, he parlays this into a more general claim: 'Nobody would set up a social security or welfare program which only compensated those injured through the fault of others. Once it is grasped that the public is paying to the whole system, the basic structure of the system – the fault principle – becomes an absurdity.'<sup>7</sup> But the only argument offered to show that the tort system is publicly funded rests on the claim that compensation costs are passed on to consumers in the form of higher prices. The same argument could be used to show that all incomes in a market society are always reflected in the prices of goods and services, and so they too are publicly funded. So understood, the idea of public funding loses all of its content. As a result, the contrast between the acceptable inequalities of the insurance market and the unacceptable inequalities of the tort system collapses.

*The Damages Lottery* is written with great passion and urgency. Readers unfamiliar with Atiyah's earlier work are likely to experience the thrill of reading an exposé. One result of that passion is that almost every weakness he sees in current arrangements is pressed into service as a virtue of his proposed alternative. This is unfortunate, since some of the critical arguments are of independent interest. His objections to pain and suffering awards, his doubts about lump-sum payments, and his unease at the ways in which some have sought to stretch the law are all worth taking seriously. So too are his concerns about the resources consumed in determining responsibility. In each case, objections should give pause to those who see in private law a regime of responsibility. His disquiet over the fact that some people find their life prospects compromised by accident or illness, though less fashionable in our current culture of responsibility, is also worth taking seriously. Perhaps a regime of responsibility is only compelling if some measure of distributive justice has been achieved. But the distributive injustices that increasingly plague contemporary societies will not be alleviated by abolishing tort liability for negligent injuries.

## II

Peter Cane's *The Anatomy of Tort Law* is more attuned to the role of personal responsibility in tort law. Its central thesis is that tort law is not a unified

6 *The Damages Lottery* at 113.

7 *Ibid.* at 115.



whole, but rather a series of principles of personal responsibility that are best understood in terms of the interests they protect and the conduct they sanction. Cane is particularly critical of the vestigial effects of the old forms of action. One such effect is that courts sometimes decide cases as though there are a number of distinct heads of tort liability, rather than a number of distinctive interests protected by tort law. Understood in terms of the interests it protects, tort law lacks a general structure. The title is thus misleading. Where Atiyah sought to abolish tort law, Cane advocates abolishing 'tort law' as a category, while keeping pretty much all of the law the category is thought to contain.

Cane's book offers a brisk walk through what he takes to be the key elements in any tort action: sanctioned conduct, protected interests, and sanctions, describing the variety in which each can be found in the law. He then goes on to reconstruct tort in terms of protected interests and sanctioned conduct. He examines the relation between tort and other areas of private law, and looks at the functions and effects of a tort regime. The book concludes with a defence of tort against unnamed 'critics' who offer arguments not unlike those found in Atiyah's work. The cover explains that the book is 'neither an introduction to tort law nor a comprehensive text,' and it is certainly neither of those things. There is much to be learned from this book at the level of detail, but Cane's broader conclusions are sometimes at odds with his insights.

Cane explains that he is not offering a normative view of tort law, and contrasts his approach with that taken by economic and philosophical approaches to the subject. As an expository and analytic enterprise, though, the book is more ambitious than Cane intends. His focus on personal responsibility, and his appeal to the ethical underpinnings of tort, show him to be engaged in a normative project. Like economic analysts and corrective justice theorists, he offers an account that is supposed to explain and unify much of the settled law. Like economic and philosophical approaches, Cane's approach also leads to calls for reform in other areas, such as the availability of remedies in both tort and contract where the same interest has been violated in the same way. And like practitioners of the approaches he rejects, he sometimes disparages aspects of the law as arbitrary and inexplicable. The idea that the puzzling mass of tort doctrine resolves itself into protected interests, sanctioned conduct and sanctions thus plays a normative as well as an explanatory role. The claim that tort law is justified both by the principles of personal responsibility that it expresses, and by the social goals that it serves, is similarly normative. Not only is it supposed to establish that tort law is a good thing to have, it is also supposed to remind us that tort law is appropriate to some purposes but not others.



The explanatory key to understanding tort law is correlativity, by which Cane means the idea that 'civil law organizes relationships between individuals on a one-to-one basis.'<sup>8</sup> As a result, conduct is assessed in relation to the freedom of others. Moreover, he plausibly supposes that tort law articulates the boundaries of acceptable behaviour, rather than simply responding to unacceptable behaviour. In this, his view is at one with both traditional and contemporary treatments of the subject. He deploys it in ways that are often insightful. But he also qualifies his approach, insisting that the concept of correlativity does not exhaust tort law. While such modesty is admirable, there are times when it gets in the way of his analytical project. Those things that cannot be explained in terms of correlativity fall into two categories. Some are rejected as unprincipled. Others are explained as the results of other, often unnamed, ethical considerations. For example, he suggests that public interest can modify the contours of personal responsibility, without giving any account of the relative weight public interest should carry, when it should carry it, or how that weight should be integrated into more general doctrines of responsibility.<sup>9</sup>

The same pluralistic approach leads Cane to avoid offering explanations even where his account appears to have the resources to provide them. For example, the concept of duty is said to be 'a repository of principles relevant to the concepts of protected interests and sanctioned conduct which, for purely organizational reasons, it is convenient to separate out from those concepts and which lend themselves to be explained in terms of the concept of "duty".'<sup>10</sup> Unfortunately, no account is offered of what those organizational reasons are, nor why the concept of duty might be a convenient way of organizing them. Cane's unwillingness to say more seems to be a result of his running together two questions. The first asks whether we can deduce the particular duties imposed by tort law from the concept of duty itself. Cane answers this first question in the negative, rightly noting that the particular duties imposed by the law protect particular interests. Mere examination of the concept of duty will not tell us which interests merit protection. The second question, which Cane also seems to think he has answered, is whether the legal concept of duty provides a distinctive way of protecting those interests, so that, as Cardozo J. put it in his celebrated opinion in the *Palsgraf* case, one person does not collect damages as the vicarious beneficiary of a breach of duty to another.<sup>11</sup> Cane's concept of correlativity might seem to offer a way of looking

8 *Anatomy of Tort Law* at 12.

9 *Ibid.* at 92.

10 *Ibid.* at 125.

11 *Palsgraf v. Long Island R.R.* 162 N.E. 99,100 (C.A.N.Y. 1928).

at this question: duties are owed on a one-to-one basis, rather than to the world at large, and the first question before a court is whether defendant owed plaintiff a duty not to bring about the result in question. He resists that conclusion, though, in favour of a view not unlike Prosser's claim that '[t]here is a duty if the court says there is a duty; the law ... is what we make of it.'<sup>12</sup> In the same vein, Cane notes that tort duties typically protect interests against misfeasance but not nonfeasance, but explains that striking feature in terms of 'value judgments in individual cases.'<sup>13</sup>

Again, remedies are not to be understood in terms of correlativity, but as sanctions 'chosen to protect interests and sanction conduct according to moral judgments which are not inherent in any of those concepts but reflect views about the value of the interest to be protected and the culpability of the conduct.'<sup>14</sup> This is because particular remedies are 'not part of the idea of a publicly enforceable set of ethical rules and principles of personal responsibility.'<sup>15</sup> Cane does not tell us how one goes about figuring out whether or not something is inherent in concepts or what is and is not part of an idea. Does one simply compare the ideas in isolation? Or does one see how far one can go explaining one idea in light of the other? Cane's conclusion about the independence of remedies appears to depend on adopting the former approach. His actual discussion of particular remedies adopts the latter, and as a result is more sophisticated. In that discussion, correlativity and protected interests go some distance toward explaining particular sanctions. Remedies are described as 'means of expressing the law's attitude to the conduct sanctioned by it,'<sup>16</sup> and explained in terms of setting things right between individuals on a one-to-one basis. At some points, Cane explains this structure in terms of setting things right between the parties. At others, he seems to regard it as accidental from the point of view of personal responsibility that those who wrong others are required to (for example) make up the losses for which they are responsible. In another echo of Prosser, he concludes instead that, given the choice between a negligent defendant and an innocent plaintiff, it is not unfair to make the defendant bear the burden of a loss. Like Prosser, he gives no explanation of why that is the choice a court faces, or why negligence leading up to the injury should be the grounds on which the comparative worth of the parties is evaluated.

12 W.L. Prosser, 'Palsgraf Revisited' in W.L. Prosser, *Selected Topics on the Law of Torts* (Ann Arbor: University of Michigan Law School, 1953) 100 at 213.

13 *Anatomy of Tort Law* at 64.

14 *Ibid.* at 12.

15 *Ibid.* at 215.

16 *Ibid.* at 217.



Still, Cane's focus on responsibility marks an advance over Atiyah's insistence that liability be thought of as a question of how 'society' spends its compensation budget. Its power to illuminate tort law and its appropriate purview is limited, though, unless other questions are addressed. What is distinctive about responsibility in tort law – what makes it different, for example, from the concept of responsibility at work in the criminal law? How, if at all, is the distinctive concept of responsibility related to the structure of a tort action: an aggrieved plaintiff sues the defendant thought to be responsible; if the plaintiff prevails, a remedy is awarded to the plaintiff, the cost of which is borne by the defendant? How is the question of whether someone is responsible for some outcome related to questions about what that person had a responsibility to do?<sup>17</sup> Cane wants no part of such questions. It is almost as though a fear of overarching theories makes him unwilling to take the final step and see tort as a distinctive way of protecting interests through principles of responsibility.

This hesitation about offering a unifying account of tort law has two apparent sources. The first is his view that tort law is not itself a unified subject. Cane's argument to establish that disunity rests on the diversity of the interests protected by tort – person, property, contractual rights, money and reputation. All of those interests are also frequently protected in other ways as well, through contract and fiduciary duties, and various aspects of public law. Yet neither the diversity of interests protected nor the variety of other ways in which they might be protected establishes that tort lacks a distinctive way of protecting those interests. Indeed, despite some claims to the contrary, Cane's considered view appears to be that tort protects the interests it does 'in their own right and for their own sake.'<sup>18</sup> Nothing he says shows that tort does not protect those interests in a distinctive way, and much of what he says suggests that it does.

Cane's refusal to offer a unifying account has a second source in a more general pluralism about value. 'No single concept can explain tort law because no single concept can explain human motivation.'<sup>19</sup> This is not simply a reminder that tort law has its *origins* in a variety of sources, but a claim that it gets its *justification* from many distinct sources of value. That claim is difficult to assess. It is not clear whether Cane is claiming that tort law requires plural justifications, or only that more than one justification is possible. One might argue, for example, that expressing principles of personal responsibility may be a sufficient justification for tort law, even

17 I attempt to offer answers to these questions in my *Equality, Responsibility and the Law* (Cambridge, UK: Cambridge University Press, 1998).

18 *Anatomy of Tort Law* at 197.

19 *Ibid.* at 225.

if other justifications are also possible in terms of extrinsic benefits. Moreover, not all of the irreducible plurality of values encountered in human life properly have a place in every human institution. (To take a familiar example, personal loyalty to friends is an important value, but one that has no place in the administration of justice.) Cane's actual analysis of legal doctrine is frequently attuned to these points, and when he considers other ethical values more concretely, he generally does so in terms of their relation to correlativity. His official pronouncements about his view only get in the way of that articulation and explanation. Here we find a third echo of Prosser, who sometimes expressed his doubts about the concept of duty in terms of a contrast between mysterious views about natural law and sensible views about human institutions. Like Prosser, Cane expresses his doubts in terms of general philosophical issues that make no real contact with the interpretive question of whether tort law analyzes and resolves disputes in a distinctive way.

Like Atiyah, Cane aims to contribute to debate about issues of public concern. Near the end, he writes 'the burning and unresolved issue of tort law is the proper province of personal responsibility as the basis for legal regulation of social life and human interaction ... . In the process of deciding how to organize social life through law, it is important to understand the nature of tort law, and to avoid setting it tasks, and expecting it to perform functions and meet goals, which it is structurally unsuited to achieve.'<sup>20</sup> By focussing on that structure, Cane has made a genuine contribution to that debate. His dislike of unifying explanations sometimes masks that contribution, and leaves the reader wondering whether he thinks tort law has a structure, or protects interests in a consistent way.

## III

Why does tort law seem to invite so many obituaries? Grant Gilmore wrote a book-length obituary for contract law, but it was offered as a retrospective account of doctrinal changes which supposedly marked the end of a doctrinal area.<sup>21</sup> Tort obituaries are different. Not only are they premature, they seem intended to hasten the patient's death. Why is that?

20 Ibid. at 236.

21 G. Gilmore, *The Death of Contract* (Columbus, OH: Ohio State University Press, 1974). Atiyah has also written a quasi-obituary of contract law: P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979). For reflections on the genre of legal obituaries, see A.W.B. Simpson, 'Contract: the Twitching Corpse' (1981) 1 Oxford J. Legal Stud. 265.



The two books under review represent the disappointments of two extreme approaches to tort law. Atiyah supposes tort law must have a certain purpose, namely compensation, and then finds it wanting as a system of compensation – expensive, ungenerous, and arbitrary. He thus concludes that it is pointless.

Cane might protest that he seeks to explain tort law, not to bury it. Refusing to see tort law as unified is not the same as pronouncing it dead. But treating the concept of duty as a convenient but otherwise empty heading under which to bring together otherwise unrelated factors comes close to doing just that. So too does regarding damages as sanctions rather than remedies. Another of tort law's gravediggers, Sir Geoffrey Palmer, architect of New Zealand's no-fault compensation scheme, once remarked that he only teaches torts when he visits American law schools, since 'Teaching torts – especially negligence – without personal injury is like playing Hamlet without the Prince.'<sup>22</sup> Personal injury is pedagogically central to tort law because it is where the analytical structure of duty is clearest: did defendant owe plaintiff a duty to take care to avoid this kind of injury? The question allows certain kinds of factors to be brought to bear, but excludes others. Parallel questions arise throughout tort law. By ignoring them, Cane finds only a plethora of principles. Severed from a developed account of duty, the remaining idea of personal responsibility is neither exclusive to nor exhaustive of tort law. So he concludes that there is nothing distinctive about it.

On either view, tort law seems to have no particular point. Atiyah's obituary is substantive – he wants to abolish personal injury law. Cane's obituary is analytical – he wants us to think about legal regulation in terms of the interests it protects, rather than in terms of the way it protects them. Both are obituaries because each concludes, in its own way, that tort law is not a principled deployment of coercion. On Cane's view, which interests are protected, which conduct is sanctioned, and who recovers damages depend on which of the manifold of potentially significant ethical factors seems most compelling in a particular case. It is a short step from this kind of picture to the conclusion that behind the façade of personal responsibility and correlativity lurk nothing more than money, power, and devious lawyers, because there are no limits to the resources one can use to make one's client's case compelling. Cane's detailed analyses of doctrine sometimes provide ways of resisting such a conclusion, but his broader declarations do not.

Tort law has survived past obituaries, and is likely to survive these as well. Its longevity can be traced to the fact that it gives expression to a set

22 G. Palmer, 'The Design of Compensation Systems: Tort Principles Rule, O.K.?' (1995) 29 *Valparaiso U. L. Rev.* 1115.

of familiar and intuitively compelling ideas about responsibility and justice. When injured people clamour for recourse against their injurers, their concern is not just with compensation, but with justice. Tort law only protects certain interests against certain wrongs. Its choice of which interests to protect remains mysterious so long as one insists on driving a wedge between issues of responsibility and issues of damages. That mystery dissipates if we look at them together. Questions of responsibility in tort get their point from questions about whose problem something is. Damages serve to place a problem where it properly lies, that is, with the responsible party. If the loss is the result of the defendant's breach of a duty to the plaintiff, it is up to the defendant to deal with the plaintiff's loss. The ideal situation is one in which people interact on terms of reciprocity, each moderating his or her behaviour in light of the interests of others. Where people fail to interact in that way, wrongfully injuring others, or taking risks with their safety, the wrongdoer is responsible for the plaintiff's loss. Justice requires that wrongful losses be made good.

Understanding tort as a regime of responsibility does not answer every question about which interests of others are grounds for moderating one's behaviour, about how much care is appropriate in light of those interests, or about which wrongs can be remedied.<sup>23</sup> Nor does it tell us what kinds of procedure should be used for finding facts in tort disputes, or what to do about unequal access to the tort system, or how to respond when wrongdoers lack the resources to pay appropriate damages. Ideas of individual responsibility provide a distinctive way of thinking about such questions, but do not answer them. Those same ideas of responsibility make issues of implementation pressing. If many victims of wrongs do not get redress, the problem is not just one of undercompensation, but of injustice. If compensation is exacted from someone who is not responsible for an injury, the problem is again one of injustice, not just expense. When money, power, and the personal sympathies of judges speak too loud, it is the voice of justice that they silence. But the disappointments reveal the force of the animating idea of justice between persons.

23 For an example of how far the structure of tort law can go in explaining why some interests are not protected, see P. Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in D. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 427.