Cambridge Law Journal, **81(2)**, July 2022, pp. 356–383 © Cambridge Law Journal and Contributors 2022
doi:10.1017/S0008197321001069

TORT'S HIERARCHY OF PROTECTED INTERESTS

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ABSTRACT. *It is widely accepted that tort law operates according to a hierarchy of protected interests. Some commentators suggest that this hierarchy can be put to dispositive uses in cases characterised by a clash of interests held respectively by the claimant and defendant (the inferior interest giving way). Others argue that thinking in terms of a hierarchy of interests sheds light on three unusual aspects of tort law: viz. the existence of torts that are actionable per se, the existence of strict liability torts, and the existence of actions in which injunctive relief is routinely awarded even though compensatory damages are tort law's default remedy. This article tests both claims. It concludes that an intuitively appealing hierarchy of interests can be identified, and that it might well possess dispositive significance all other things being equal. But it also observes that all other things are seldom equal, and that departures from the hierarchy occur for various reasons that can be clearly identified and which should be borne in mind when thinking about its dispositive utility. It also urges caution in making connections between the status of certain interests and the fact that they are protected by torts that are actionable per se, strict liability torts and torts in connection with which injunctions are awarded almost as a matter of course.*

KEYWORDS: *protected interests, strict liability, actionability per se, injunctions.*

I. INTRODUCTION

It is widely thought that there exists within tort law a discernible hierarchy of protected interests that can help illuminate at least two important things. The first is the way a case will be decided when superior interest X (held by one litigant) comes into conflict with inferior interest Y (held by the other litigant). According to proponents of this view, the case will be decided in favour of the first litigant they have the superior interest. As Richard O'Sullivan once put it: "the Common Law habitually uses a certain scale of objective values, the lesser of which it is ready to subordinate, and on

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occasions even sacrifice, to those of a higher rank."[1] I shall call this the dispositive function of the hierarchy. The second thing that the hierarchy is thought to illuminate is the relationship between certain interests and the fact that there exists (1) a small number of torts that are actionable per se, (2) another (largely overlapping) set of torts that are actionable on a strict liability basis, and (3) a third group of torts in which injunctive relief is routinely available, *even though*, "prima facie you do not obtain injunctions to restrain actionable wrongs [where damages would be an adequate remedy]".[2] As we shall see, some commentators think that these three curious features help explain the hierarchy, while others think it is the other way round. But either way, there is a perceived link between the three features and the status of the particular interests protected by the relevant torts. I shall therefore refer to thinking in terms of a hierarchy in this connection as its explanatory function.

This article explores how reliably tort's hierarchy of protected interests fulfils the two functions just mentioned. Section II begins by sketching, in rudimentary fashion, the different values ascribed to the various interests recognised by tort law. It then proceeds to several slightly more elaborate claims (all of which are broadly similar in tenor) before finally alighting upon (and borrowing) what is by far the most sophisticated account of what the hierarchy of protected interests looks like: the one advanced by Peter Cane.[3] In Section III, I sound two cautionary notes. The first of these concerns the extent to which we can safely think in terms of a clear-cut and inflexible hierarchy. In other words, I reflect in this context on whether (for any two interests) we can unswervingly claim that "interest X will trump interest Y". The doubts raised here are anchored to numerous departures from – and even sometimes inversions of[4] – the hierarchy such that, despite their usual standings, interest Y will *sometimes* take precedence over interest X (with no facility to invoke, just as easily, a different tort which abides by the usual ordering of these interests[5]).

[1] R. O'Sullivan, "A Scale of Values in the Common Law" (1937) 1 M.L.R. 26, 38.

[2] *London and Blackwall Railway Co. v Cross* (1886) 31 Ch. D. 354, 369. For the argument that reparative damages constitute the *default remedy* in tort, see J. Gardner, "Torts and Other Wrongs" (2011) 39 Florida State Univ. L. Rev. 52. For doubts, see J. Murphy, "The Heterogeneity of Tort Law" (2019) 39 O.J.L.S. 455.

[3] It is sketched explicitly in P. Cane, *The Anatomy of Tort Law* (Oxford 1997). But it is also implicit in Chapters 2 to 4 of his *Tort Law and Economic Interests*, 2nd ed. (Oxford 1995). The telling omission in the latter is any treatment of personal injuries (omitted since they did not fit Cane's definition of an economic interest: ibid., at 5).

[4] For clarity, I use the notion of a "departure from the hierarchy" in connection with situations where third-party interests (or other factors) are treated as relevant. And I use the phrase "inversion of the hierarchy" where the only interests at stake are those belonging to C and D. Where a departure occurs, this is not because (normally inferior) interest X is treated as trumping (normally superior) interest Y, but because interest X *in combination with a third party's interest* (or other relevant factor) trumps interest Y.

[5] If, within tort A, the usual standing of interests X and Y is departed from (or inverted), *and* no other tort can be invoked in place of tort A, then on the particular facts that enliven *only* tort A, it is possible to say not just that tort A reorders the standing of the two interests but that tort law as a whole does this.

The second cautionary note concerns the extent to which the putative explanatory function is in fact grounded. Thus, I question both the idea that the hierarchy constitutes the source of the three peculiar features, and also the suggestion that these unusual features help prop up the hierarchy.

In Section IV, the principal reasons that lie behind departures from, or inversions of, the hierarchy are identified. These, we will see, include variations in the moral culpability of D's wrongdoing, evidential problems associated with certain types of claim, antecedent wrongdoing on C's part and, in some cases, judicial worries about the potential consequences of a decision (including the effect of a decision for third parties' interests). Section V concludes.

II. The Hierarchy: A Brief Sketch

Interests, for present purposes, may be regarded as assets which, when threatened, damaged or destroyed by another's tortious conduct confer upon the asset holder (i.e., the claimant) the right to bring an action in tort. Although these interests are often capable of being described in terms of rights (such as the right to bodily integrity, or the right to one's reputation), this is not universally true.[6] At the same time, the notion of "tort's protected interests" is not so wide as to include many other interests we have – such as our interest in having a fiscally responsible government. This article is concerned only with those of our interests that may ground an action in tort.

Although many jurists signal their support for the idea that there exists a hierarchy of protected interests, the level of detail in which such support is expressed varies considerably. Take, for example, the following claim made by Tony Weir:

> There are several good things in life, such as liberty, bodily integrity, land, possessions, reputation, wealth, privacy, dignity, perhaps even life itself. Lawyers call these goods interests … but they are not all *equally* good … Because these interests are not equally good, the protection afforded to them by the law is not equal: the law protects better interests better.[7]

The trouble with Weir's remark is that it provides no real guidance on the relative goodness – or, as he elsewhere describes it, value[8] – of the various interests identified.[9] It does not, therefore, shed much light on what the

[6] See J. Murphy, "Rights, Reductionism and Tort Law" (2008) 28 O.J.L.S. 393.
[7] T. Weir, *A Casebook on Tort*, 10th ed. (London 2004), 6, emphasis in original.
[8] E.g. he speaks of "the differing values of the interests in health, things and wealth": ibid., at 7.
[9] It is not, however, a matter on which he was *always* completely silent. E.g. he elsewhere committed himself to the relative unimportance of financial interests saying: "in the hierarchy of proper values wealth, especially corporate wealth, is simply not as important as the well-being of the individual and does not deserve equal protection": T. Weir, *Economic Torts* (Oxford 1997), 9–10.

hierarchy looks like despite his claims that the interests "are not all *equally* good", and that the law protects some of them more than others.

A much fuller account of the interests protected by private law (which of course includes tort law) has been proffered by Nicholas McBride. Unlike Weir, McBride does rank each of the interests that he identifies; but he still only does this according to a three-tiered classification of "primary goods", "secondary goods" and "tertiary goods".[10] Accordingly, by McBride's own admission, things get tough from a dispositive perspective when D's primary good comes into conflict with a different primary good belonging to C. Such a case, he thinks, is irresolvable: for, when faced with the question, "how do you choose between different people's enjoyment of the primary goods, the answer is that you don't: you attempt to find a compromise".[11]

In marked contrast to the foregoing stands Cane's depiction of the hierarchy of protected interests in *The Anatomy of Tort Law*.[12] It comprises by far the most elaborate and sophisticated exposition of the various interests protected by tort law.[13] In compiling it, Cane is guided by the observation that, across tort law, "the protection given to some interests . . . [is] stronger than that given to others".[14] And it is this variation in the degree of protection afforded, he maintains, that "implies that tort law values some interests more highly than others".[15] With this animating pair of thoughts to the fore, he sedulously constructs a hierarchy comprising (in discernibly descending order of importance[16]) six broad categories: interests in one's person, property interests, contractual interests, non-contractual expectancies, trade values and purely financial interests.[17] Notably, unlike Weir and McBride, Cane does not commit himself wholeheartedly to the idea that the hierarchy fulfils a dispositive function.[18] But this does not detract from his rendition of it providing a highly detailed account of the relative value afforded to the many different interests that he identifies.

[10] N.J. McBride, *The Humanity of Private Law* (Oxford 2019), 124.
[11] Ibid., at 129.
[12] Cane, *Anatomy*.
[13] The one that comes closest to it in terms of detail is getting on for 100 years old: see O'Sullivan, "Scale of Values".
[14] Ibid., at 90.
[15] Ibid.
[16] Cane does *not* expressly say they appear in descending order of importance. But this may reasonably be inferred from the fact that actionability per se and strict liability—features he treats as indicative of an interest's value—are readily associated with the personal interests that begin his list, but increasingly alien to the interests which follow.
[17] Cane, *Anatomy*, 123–66.
[18] He does advert briefly—under the banner "countervailing interests"—to several defences designed to protect D's private interests; and he argues also that freedom of contract can be considered a countervailing interest insofar as it entitles D to create by bargain an exemption from liability: ibid., at 92–94. Davies, too, explains the defence of justification in the accessory liability setting in this way: P. Davies, *Accessory Liability* (Oxford 2015), 230–34. But neither author offers a *general* claim about the hierarchy's dispositive function.

As just a *soupçon* of the detail, interests in one's person can, according to Cane's scheme, be broken down into physical interests, dignitary interests and the interest we all have in freedom of movement. Similarly, property interests can be divided into rights over real property, interests in relation to chattels and rights in relation to intangible property. And so it goes on in relation to each of the successive broad categories of interests that he discusses.[19] But this is no mere exercise in listing. Within the category of property interests, for example, Cane deduces from the fact that interests in real property are more highly protected than "mere" chattels that the former are more valuable in the eyes of tort law.[20]

In terms of intuitive appeal, Cane's scheme has a great deal going for it. There is obvious attraction, for example, in regarding our personal interests as the most valuable of all. If one were tasked with constructing a law of torts from scratch, one would almost certainly begin by creating a series of wrongs designed to protect a person's physical and mental well-being, as well as, probably, their liberty. Furthermore, there is concrete support from the legislature and the judiciary alike for the idea that these interests should be placed at the apex of the hierarchy. Both the Occupiers' Liability 1984 and the Unfair Contract Terms Act 1979 give special legislative treatment to personal injury;[21] while in terms of judicial support, Lord Halsbury said in *Allen v Flood* that there exists

> "no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty".[22]

Equally, whereas in private nuisance – a tort that protects proprietary interests – the claimant encounters the rule, *de minimis non curat lex*,[23] things are very different in trespass to the person. There, as it is trite to state, "any touching of another person, however slight may amount to a battery".[24]

There is also very considerable appeal in the idea that purely pecuniary interests are those that are least valuable in the eyes of the law. They are not invariably recoverable. Indeed, they may fairly be depicted as sitting right on the border between the compensable and the non-compensable (hence

[19] Cane, *Anatomy*, chs. 3, 5.

[20] Thus, whereas "[t]he basic remedy for misappropriation of real property is an order for possession… [i]n the case of chattels … this happens only rarely": ibid., at 145. He also argues that private property is generally more highly valued than commercial property. In large part this is anchored to the fact that the Defective Premises Act 1972 allows claims for the cost of repair of defective premises *but only so long as they were "dwellings"*: ibid., at 166, emphasis added.

[21] Under section 1(8) of the 1984 Act, damages are available if trespassers suffer personal injury but not if they suffer only damage to chattels. Under section 2 of the 1979 Act, negligence liability resulting in death or personal injury cannot be excluded by contract, whereas—under certain circumstances—this is possible in respect of other losses.

[22] [1898] A.C. 1, 72. There are very clear echoes of this in O'Sullivan, "Scale of Values".

[23] *Sturges v Bridgman* (1879) 11 Ch. D. 852, 863.

[24] *Collins v Wilcock* [1984] 1 W.L.R. 1172, 1177.

the description of the instances in which they may be recovered as "isolated islands" of liability in an "ocean of no-liability"[25]). Donal Nolan and James Goudkamp are assuredly right to observe that "it is possible to detect in the cases a perception among judges that pure economic loss is less serious, all other things being equal, than physical damage".[26] And it is a point that has been noted by many other jurists,[27] including those who regard tort law's limited protection of pure economic loss as an indicator of there being no *general right* to wealth or financial well-being.[28]

At the same time, the idea that the middle ground is occupied by proprietary and contractual interests has similar intuitive appeal, as does Cane's assertion that the former are more highly valued than the latter. For him, "[t]he considerable breadth and depth of the protection afforded to various property interests … is matched by a powerful disinclination to provide significant protection for contractual interests".[29] His saying this seems perfectly sensible; for, in general terms, contracts "only" provide the means by which we can improve our financial position in the world,[30] whereas (as McBride points out) interests in property offer much more, providing the gateway to "a huge range of beneficial activities that would not be possible in the absence of such interests".[31] Simply put, property (unlike most contracts) provides considerably more than merely the facility to augment our pelf.

In the light of these observations, it is hard to deny from a dispositive perspective the immediate attractiveness of Cane's hierarchy. And there are certainly arguments, too, that can be marshalled in support of its putative explanatory function: the idea, that is, that thinking in terms of a hierarchy of protected interests sheds light on the three unusual features of tort law sketched earlier. We may conveniently begin with the first of these – the fact that certain torts (and in particular the trespass torts) are actionable per se. Notably, there is fairly widespread support for the view that the facility to sue without the need to prove tangible loss is bound up with the especial value that tort law affords to the interests concerned. Take, for example, Robert Stevens' contention that

> "[i]n principle, the division between wrongs actionable per se and those only actionable upon proof of consequential loss should reflect a choice between

[25] R. Stevens, *Torts and Rights* (Oxford 2007), 21.
[26] J. Goudkamp and D. Nolan, *Winfield and Jolowicz on Tort*, 20th ed. (London 2020), 106.
[27] See e.g. McBride, *Humanity of Private Law*, 131: "the tertiary good of having and making money is not important enough … to justify my owing you a general duty to take care not to cause you to suffer pure economic loss"; H. Carty, *An Analysis of the Economic Torts*, 2nd ed. (Oxford 2010), 4–5: "in the hierarchy of interests … economic interests come lower than physical integrity, property rights/enjoyment and reputation."
[28] See e.g. A. Beever, *Rediscovering the Law of Negligence* (Oxford 2007), 267; P. Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law" in D.G. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford 1995), 444; J. Stapleton, *Three Essays on Torts* (Oxford 2021), 46.
[29] Cane, *Economic Interests*, 106.
[30] See Weir, *Economic Torts*, 2: "A person's contractual relations are the source of his income … and his future income depends on his maintaining or renewing or entering fresh contracts."
[31] McBride, *Humanity of Private Law*, 78.

> those rights which are, and are not, as a question of social fact sufficiently important to be deserving of protection irrespective of the consequences of violation".[32]

Lord Dyson made a similar remark in the false imprisonment case of *R. (on the application of Lumba) v Secretary of State for the Home Department*: he declared, the "[t]respassory torts … are actionable per se" because the "the law attaches supreme importance to the liberty of the individual".[33] On top of this, the actionability per se of trespass to land has also been said to reflect the fact that "the law gives strong protection to the owner's right to control entry [onto their land]".[34]

Turning next to the second "unusual feature" – the fact that a handful of torts are actionable on a strict liability basis – there is again weighty academic support for the view that it is the importance of the relevant protected interests that explains things. In Keating's view, what is key is that these torts involve the infringement of "important autonomy rights".[35] "Batteries, trespasses and conversions," he maintains, "can all be committed without intending either the wrongs or the harms involved … *because the rights in question are autonomy rights*".[36] It is, he adds, the "rights that they protect [that] require this strictness".[37] Relatedly, for Cane, the absence of the need to prove fault in certain "vertical torts"[38] – i.e., those designed to protect just a single interest – "expresses the very high value which we put on [the interest concerned]" by "making it easy for people to recover".[39]

The idea that the third unusual feature – the largely routine availability of inunctions within a limited number of torts – may equally be said to hinge upon the value of the interests protected is also defended by some authors. For Cane, easy access to injunctive relief is to be found within torts designed to protect proprietary interests. And this, he maintains, "reflects the high value that tort law puts on interests classified as 'property' interests".[40] Like-mindedly, Waddams argues that "a right that can never be enforced by injunction might plausibly be classified as *something less than a proprietary right*".[41] Underpinning both contentions is the notion

[32] Stevens, *Torts and Rights*, 89.
[33] [2011] UKSC 12, [2012] 1 A.C. 245, at [64]. The latter part of this remark is a quotation from *Murray v Ministry of Defence* [1988] 1 W.L.R. 692, 703.
[34] Cane, *Anatomy*, 142.
[35] G.C. Keating, "Strict Liability Wrongs" in J. Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford 2014), 299.
[36] Ibid., at 298, emphasis added.
[37] Ibid., at 311.
[38] The idea of a "vertical tort" is borrowed from Descheemaeker. They are torts "shaped with reference to the [particular] interest which the law is trying to protect": E. Descheemaeker, "Protecting Reputation: Defamation and Negligence" (2009) 29 O.J.L.S. 603, 603. Such torts contrast with "transversal wrongs", like negligence, which are "not defined (either directly or indirectly) in terms of protected interests": ibid.
[39] Cane, *Anatomy*, 45.
[40] Ibid., at 100.
[41] S. Waddams, *Dimensions of Private Law* (Cambridge 2002), 177–78, emphasis added.

that the law provides the best possible protection[42] to those things that we value most.[43]

At least ostensibly, then, there is as much to ground the explanatory function of the hierarchy as there is to ground its dispositive function. But whether the hierarchy is as stable as first impressions would suggest, and whether there are alternative – perhaps even better – explanations concerning the three unusual features of tort law highlighted in the introduction, are matters that deserve closer inspection.

III. Limitations in the Hierarchy's Dispositive and Explanatory Functions

Although the idea that tort law has a discernible hierarchy of protected interests possesses much intuitive appeal, and although a fair array of primary sources may be cited in support of Cane's depiction of this hierarchy, there are nonetheless numerous aspects of tort law that are inconsistent with the idea that it can be a reliable guide to the way cases get decided. Some constitute fixed inversions of the hierarchy (in that, despite the usual ranking afforded to (ordinarily superior) interest X and (ordinarily inferior) interest Y, there are certain torts in which the former will give way to the latter). Other departures from the usual ranking of certain protected interests are also discernible here and there. But unlike the fixed inversions just mentioned, these additional departures occur only in certain circumstances. They can therefore be thought of as "contingent departures" from the hierarchy *qua* dispositive tool. As we shall see in Section IV, these contingent departures are explicable by reference to a range of factors – such as third-party interests – that are sometimes (but by no means always) in play.

As regards the putative explanatory function of the hierarchy, a close examination of various historical and other sources provides reason to doubt whether it genuinely is the importance of certain interests that explains why a number of torts are actionable per se, actionable on a strict liability basis, or conspicuously injunction-friendly. Instead, what emerges is a range of competing explanations that have little or nothing to do with the value of the interests protected by the torts in question.

A. Dispositive Limitations

Despite the obvious appeal of regarding interests in the person as our most valuable ones, and of considering proprietary interests as more valuable

[42] Note: non-compliance with an injunction may result in imprisonment.

[43] Arguably, injunctions mark out as special the interest they protect insofar as such protection may come at a cost not just to D but to society more generally. E.g. a patent protected by an injunction will not just prhobit the manufacture of copycat products by D, it will also undermine consumer choice. (Conversely, the availability of injunctions to protect patents promotes innovation which *may* ultimately benefit consumers.)

than our interests in either contractual performance or wealth more generally, it is clear that tort cases are not invariably decided by invoking the hierarchy as a dispositive tool. Indeed, there are so many fixed or contingent departures from (or inversions of) the hierarchy of protected interests that we must exercise caution in describing its usefulness as a guide to the way tort cases get decided. The qualification runs thus: the hierarchy should be considered no more than *a starting point* when it comes to resolving cases in which C's and D's respective interests collide. To appreciate why the hierarchy can constitute no more than a starting point, we must explore the numerous circumstances in which it will not reliably determine the outcome of litigation.

One such instance involves the tort of private nuisance where an inversion in the respective standing of a claimant's personal and proprietary interests occurs. This inversion can conveniently be illustrated by way of a hypothetical.

Suppose my neighbour uses her premises to run a factory which emits noxious fumes. If the fumes damage shrubs in my garden, then, as the owner of the land affected, I can invoke private nuisance to obtain damages. But if the fumes cause me a bronchial condition, my personal injury is not compensable under this tort. True, I can rely on private nuisance insofar as there is "injury to the amenity of the land [which] consists in the fact that the persons upon it are liable to suffer . . . illness".[44] But this is not the same thing as obtaining compensation for the personal injury itself. Furthermore, if the land affected is owned jointly by me and my partner, and we both suffer bronchial illness, then the damages available are not doubled to reflect the adverse physical effect on both of us. This is because the diminution in the amenity of the land remains the same regardless of how many people become ill. According to Lord Hoffmann in *Hunter v Canary Wharf Ltd*, "where more than one person has an interest in the property, the damages will have to be divided among them".[45] It is with such considerations in mind that McBride and Bagshaw conclude that, in this setting, "the law attaches greater importance to protecting people's land . . . than it does to protecting people's physical welfare".[46]

A possible rejoinder here is that the putative inversion of the standing of C's personal and proprietary interests is in truth illusory. For, the key point is not that private nuisance prioritises interests in land over personal interests, but that private nuisance is completely unconcerned with personal interests. This, after all, was a key component of the decision in *Hunter*.[47] However, the rejoinder, which relies on what was said in

[44] *Hunter v Canary Wharf Ltd.* [1997] A.C. 655, at 706 (Lord Hoffmann).
[45] Ibid., at 706–07.
[46] N.J. McBride and R. Bagshaw, *Tort Law*, 6th ed. (London 2018), 399.
[47] *Hunter* [1997] A.C. 655.

Hunter, soon runs aground, for this was not the only message to emanate from that case. At one point in his dictum, Lord Hoffmann stated:

> in addition to damages for injury to his land, the owner or occupier is able to recover damages for consequential loss. He will, for example, be entitled to loss of profits which are the result of inability to use the land for the purposes of his business . . . [and] he may also be able to recover damages for chattels or livestock lost as a result.[48]

Conspicuously, his Lordship did not include in the category of recoverable consequential losses a claimant's personal injuries. Noting this omission, Goudkamp and Nolan contend: "it is difficult to see why the same approach should not be taken in cases of personal injury."[49] Yet, whatever may have been his Lordship's thinking, it is hard to deny that this case rendered private nuisance an area of tort law in which our interest in health and well-being receives less protection than the various proprietary interests protected by this tort.

One conceivable surrejoinder to the claim just made is that the putative shortcoming in private nuisance is negated by the fact that, in the scenario just sketched, an action for personal injury will lie, instead, under the law of negligence. If this were so, it could then be argued that *tort law as a whole* continues to provide suitable protection for our health, even if one has to look beyond the tort of private nuisance to find it. But the surrejoinder rests on flawed premises. A negligence action will only lie if *either* the factory owner failed to take reasonable care in running his works *or* it could be deemed negligent for him to have set up and operated a factory in that location in the near certainty that his running it would be a source of harm to a neighbour.[50] In the absence of any negligence of the second variety, any claimant suffering personal injury would have to prove a lack of reasonable care in running the works. And, crucially, this need to show an absence of care would not be required in private nuisance.[51] Accordingly, in some situations, it will inescapably be true that a claimant's proprietary interests receive greater protection than their interest in health and well-being.

A comparable inversion of the standing of rather different interests occurs within the sphere of the economic torts. As noted already, economic

[48] Ibid., at 706.

[49] Goudkamp and Nolan, *Winfield and Jolowicz on Tort*, 466.

[50] In *Miller v Jackson* [1977] Q.B. 966, at 984, Geoffrey Lane L.J. held there to be negligence by virtue of the fact that "there was no way in which they [the defendants] could stop balls going into the [claimants'] premises in Brackenridge from time to time". Although this case therefore recognises that it may be negligence simply to run a particular factory at a specific location, this is not true of all factories run in all locations.

[51] Private nuisance requires an unreasonable interference with C's rights (and D's unreasonable user will be relevant here). But unreasonable interferences do not require negligence. A carefully run industrial plant might well constitute an unreasonable user of land without D acting negligently. As Lord Goff explained, in nuisance, "the defendant will be liable, even though he may have exercised reasonable care and skill to avoid [the interference]": *Cambridge Water Co. Ltd. v Eastern Counties Leather plc* [1994] 2 A.C. 264, 299.

interests are widely thought to occupy the lowest rung on the ladder. Yet, within the context of the economic torts, such interests may well be afforded greater protection than other, ordinarily more valuable, interests *even though* it is easy to imagine ways in which those other interests could be infringed by conduct that results in economic tort liability. It seems obvious, for example, that the tort of intimidation (based as it is on unlawful threats) might affect our mental health. Yet it continues to be regarded by many jurists as a tort confined to the protection of economic interests.[52] It is almost as easy to imagine ways in which the torts of inducing breach of contract and causing loss by unlawful means might also cause serious, non-pecuniary losses.[53] Yet leading commentators continue to insist that all of these torts are intended to protect only economic interests. Deakin and Randall, for example, write:

> The economic torts exist to govern market relations and in particular to police the competitive process; they do not, and should not, form the basis for a more general principle of tortious liability …. It follows that doctrinal coherence in the economic torts would be assisted by closer attention to the interests which they protect (substantial interests in a trade, business or livelihood).[54]

Likewise, Hazel Carty claims that "the economic torts … have as their primary function the protection of economic interests".[55] If this be right – if it be actionable, for example, for me to induce your stockbroker to break her contract with you, but not (all other aspects of the action being in place) for me to induce your private dentist to perform a tooth extraction without the care and skill required by law[56] such that you suffer considerable pain – then another inversion of the usual ranking of two different interests can be said to arise by virtue of the narrow focus of the tort of inducing breach of contract. The investor's financial loss is recoverable from me, but the dental patient's pain and suffering are not.

Negligence law also provides evidence of the fluidity of the hierarchy. As is well known, it possible to invoke this tort to recover damages for the loss of a chance of financial benefit, but not for the loss of a chance of avoiding a particular medical condition.[57] In what was doubtless an attempt to justify this position, Weir once wrote:

[52] Deakin and Randall, for example, specifically consider intimidation to be tied to the protection of "trade, business or employment interests": S. Deakin and J. Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519, 552.

[53] See e.g. McBride and Bagshaw, *Tort Law*, 669–73.

[54] Deakin and Randall, "Rethinking the Economic Torts", 520. For a sustained refutation of the supposed basis for this stance, see J. Murphy, *The Province and Politics of the Economic Torts* (Oxford 2022).

[55] Carty, *Analysis of the Economic Torts*, 1.

[56] Under the Supply of Goods and Services Act 1982, s. 3, there is an implied term a person who supplies a service in the course of a business will "carry out the service with reasonable care and skill". The Act clearly applies to dentists, see e.g. *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245, [2020] 1 All E.R. (Comm) 799.

[57] Compare *Allied Maples Group Ltd. v Simmons & Simmons* [1995] 1 W.L.R. 1602 (loss of a chance of a financial benefit recoverable) and *Gregg v Scott* [2005] UKHL 2, [2005] 2 A.C. 176 (claim for a reduced chance of recovering from cancer not permitted).

> in cases of financial harm it is enough to show that the claimant had a chance of gain which the defendant has probably caused him to lose. There is nothing irrational in this …. Losing a chance of gain is a loss like the loss of the gain itself, alike in quality, just less in quantity: losing a chance of not losing a leg is not at all the same kind of thing as losing the leg.[58]

Yet pointing out that the loss of a chance of a financial gain is of the same type as the loss of an actual financial gain, is not per se a justification for allowing such a claim. Nor does it explain why recovery for loss of a chance of financial gain is permissible while the loss of a chance of avoiding pain, suffering or a deterioration in the state of one's health is irrecoverable. Instead, what Weir proffers is a mere observation. And observations and justifications are very different beasts. A justification would explain *why* this form of economic loss is compensable while the loss of a chance of retaining the use of a leg is not.[59]

Leaving aside these fixed inversions of the hierarchy, we may turn next to the various contingent inversions of, and departures from, the hierarchy that occur. We can conveniently start with a return to private nuisance. For, sometimes, where C seeks an injunction to restrain D from conducting a particular nuisance-causing activity, a court may afford less weight to C's proprietary interests than D's (or possibly a third party's[60]) countervailing interest, *even though* D's interest would ordinarily be regarded as being more lowly in kind. For example, D's financial interests may sometimes triumph over C's proprietary interest. As Lord Neuberger once put it: a defendant's interest in financial security may "justify the court refusing … an injunction", if such an order would mean that "a defendant's business may have to shut down".[61]

Two further contingent departures from the hierarchy qua dispositive tool involve property rights. The first occurs where A's alleged tort is prompted by B's trespassing on A's land. Here, A may use reasonable force to evict forcibly the trespasser.[62] The conflict of interests is plainly between A's proprietary interest in exclusive possession, and B's personal interest in bodily integrity. Yet if B were to sue A for battery, B's interest in the non-violation of his bodily integrity would not trump A's countervailing proprietary interest. As Lord Denning MR explained in *McPhail v Persons, Names Unknown*:

[58] T. Weir, *An Introduction to Tort Law*, 2nd ed. (Oxford 2006), 80.

[59] For the avoidance of doubt, I suggest nothing about the soundness of the law in this context. I simply note that, here, where C is deprived of the chance to avoid a pure financial loss tort law tort allows recovery, while this is not so where C is deprived of the chance to avoid pain and suffering.

[60] In *Coventry v Lawrence* [2014] UKSC 13, [2014] A.C. 822, at [161], Lord Sumption said: "[t]here is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests."

[61] *Coventry v Lawrence* [2014] UKSC 13, at [124].

[62] *Polkinhorn v Wright* (1845) 8 Q.B. 197, 206.

> [t]he owner is not obliged to go to the courts . . . He is entitled, if he so desires, to take the remedy into his own hands. He can go in himself and turn [the trespasser] out.[63]

The second contingent departure from the hierarchy qua dispositive tool involves personal property. Where a chattel belonging to D came to be on C's land by unlawful means – for example, a conversion (including a good faith detention[64]) by C – D is entitled to enter C's land to recapture the chattel. Any subsequent trespass action brought by C against D will fail.[65] It was even suggested in one case that D's interest in (re)possessing the chattel will take precedence over C's right to the exclusive possession of his land where the chattel in question was placed on C's land by a thief acting independently of C.[66] Thus, although according to the putative dispositive function of the hierarchy sketched earlier, possessory interests in land will ordinarily be ranked higher than possessory interests in chattels, this will not unswervingly determine the outcome of a case. A prior wrong committed by C in relation to the chattel will result in D's interest in that chattel being protected at the expense of C's interest in the exclusive possession of land.

In combination, the various fixed and contingent inversions of, and departures from, the hierarchy compel us to recognise (1) that the ranking of the various interests within it is not set in stone for these purposes, and (2) that departures from the normal scheme come in various different forms. Property interests – which ordinarily occupy the second tier – can sometimes trump first-tier personal interests. But on other occasions they may give way to (lower tier) contractual interests or (even more lowly still) purely financial interests.

B. Explanatory Limitations

In the introductory section of this article, I flagged up *two* major claims concerning the hierarchy of protected interests. The first was that it fulfils a dispositive role (allowing clashes between competing interests to be resolved by reference to their respective standings). The second was that the hierarchy performs an explanatory function: i.e. it illuminates why certain torts are actionable per se, involve strict liability, or allow injunctions to be obtained with relative ease. In the first part of this section, I observed that the hierarchy cannot *always* be invoked as a reliable tool with which to resolve tort cases in which the respective interests of C and D collide. In

[63] [1973] Ch. 447, 456.
[64] In one case it was made clear that no theft is required. Wrongful detention, it was held, amounts to the "the same violation of the right of property as the taking of the chattels out of the actual possession of the owner": *Blades v Higgs* (1861) 142 E.R. 634.
[65] *Patrick v Colerick* (1838) 150 E.R. 1235.
[66] *Anthony v Haney* (1832) 131 E.R. 372, 374 (obiter).

this second part, I subject to scrutiny the extent to which it fulfils the explanatory function.

1. Torts actionable per se

Certain "vertical torts" are actionable per se. As noted already,[67] this characteristic (most readily associated with the various trespass torts), is sometimes said to be bound up with the high-ranking status of the interests they protect.[68] According to proponents of this view, the especial value associated with a particular interest is what justifies the merest infringement of that interest being actionable. But are things really so straightforward? Can we simply take at face value the occasional (as opposed to routinely recited) judicial assertion that a certain tort is actionable per se in view of the importance of the interest it protects? For two reasons, I would suggest that the answer is "No". I say this, first, because there are certain uncontroverted aspects of English legal history that suggest other plausible bases for their being actionable per se. And I say it, secondly, because in relation to one form of slander, it would patently be a mistake to think that there is a correlation between the importance of the interest at stake and the facility to sue without having to prove harm.

Let us begin, however, with the trespass torts. We have already encountered Lord Dyson's claim in *Lumba* that actionability per se reflects the "supreme importance" of the interest protected. A similar remark was made in *Entick v Carrington* when Lord Camden said:

> the law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does it is a trespass though he does no damage.[69]

But at variance with this is an alternative (avowedly historical) reason referred to in two leading treatises on torts. In the words of one them, the actionability per se of trespass is linked to "earlier times [when] trespass was so likely to lead to a breach of the peace that even trivial deviations on to another person's land were reckoned unlawful".[70] But with respect, this is not the true historical reason. It is rather that, before the advent of actions on the case, although claims in trespass routinely alleged that D caused loss to C, the assessment of damages was a matter for the jury. The loss was – to use the technical phrase – not traversable. It was not possible, in other words, for D to plead, "I admit that I punched C, but doing this caused

[67] See text associated with notes 32–34 above.

[68] For Weir, for example, "there are some rights whose mere invasion is actionable even if it causes no damage. These are the most important rights": Weir, *Casebook on Tort*, 7.

[69] (1765) 95 E.R. 807, 817.

[70] Goudkamp and Nolan, *Winfield and Jolowicz on Tort*, 406. See in very similar vein, M. Jones (ed.), *Clerk and Lindsell on Torts*, 23rd ed. (London 2020), 1382: "[t]he reason for this principle [ie, the tort's actionability per se] seems to be that acts of direct interference with another's possession are likely to lead to breaches of the peace."

C no loss". It followed from D's inability to make such a plea that causation of loss was not part of the cause of action, not something that C had to prove in order for D to be held liable. Trespass, to put it plainly, was an action that – thanks to the separate tasks of judge and jury – was, right from its inception, actionable per se: "the only substantive concept was 'trespass' as 'wrong'";[71] and a wrong was done when D struck C, regardless of whether this caused any tangible harm.

Of course, it only takes us so far to note that "medieval culture seems to have been concerned more with dishonour than with loss",[72] or that "English trespass derived its vocabulary of *iniuria* from Roman law … [and] was not concerned with *damnum*".[73] But at least knowing this suggests a plausible reason why the trespass torts are still actionable per se, namely that actionability per se has remained a feature of these torts because no subsequent court has ever thought fit to remove it.

A second conceivable explanation is, however, possible. This is that some other reason for these torts remaining actionable per se has since emerged and eclipsed the historic one. One obvious candidate springs to mind. It is the idea portrayed in *Lumba* that actionability per se is nowadays justified by reference to the importance of the interest at stake (just as some hierarchy proponents suggest). So is there any compelling evidence of this having occurred? On the one hand, it is true that what Lord Dyson said was an *approximate* reiteration and endorsement of what had been said by Lord Griffiths in *Murray v Ministry of Defence*.[74] This would mean at least two Law Lords espousing the view. On the other hand, however, it is important to note the extent of the approximation here. For, unlike Lord Dyson, Lord Griffiths did not make reference to all the trespassory torts. Instead, he confined what he had to say about actionability per se to the specific tort of false imprisonment and, more importantly, the especial importance of our interest in *liberty*.[75] One might add to this the observation that all of the appellate court cases that have since invoked Lord Griffiths' dictum, including *Lumba*, have also been false imprisonment cases.[76] So, given that Lord Dyson himself only mentioned the especial value of liberty, it cannot safely be said that the case law concerning battery or trespass to land offers any concrete support for the claim that it is the high-ranking

[71] S.F.C. Milsom, *Historical Foundations of the Common Law* (Oxford 1981), 305.
[72] See D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 2000), 2.
[73] J.S. Beckerman, "Adding Insult to *Iniuria*: Affronts to Honor and the Origins of Trespass" in M.S. Arnold et al. (eds.), *On the Laws and Customs of England: Essays in Honor of Samuel E Thorne* (Chapel Hill 1976), 178.
[74] *Murray v Ministry of Defence* [1988] 1 W.L.R. 692.
[75] Ibid., at 703: "The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage."
[76] See *Weldon v Home Office* [1990] 3 W.L.R. 465; *R. v Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 A.C. 58; *Roberts v Chief Constable of Cheshire* [1999] 1 W.L.R. 662; *ID v Home Office* [2005] EWCA Civ 38, [2006] 1 W.L.R. 1003.

status of our interests in bodily integrity and the exclusive possession of land that explains their being actionable per se as well.[77]

A second alternative explanation for the enduring actionability per se of *all of the trespass torts* can be found in a report produced by the Australian Law Reform Commission on tortious invasions of privacy. This linked their actionability per se to the fact that the relevant torts protect intangible interests.[78] But conspicuous by its absence in the report is any authority in the case law for this claim. It too, therefore, offers no convincing modern rationale. Indeed, it is true to say that no such rationale can be said to have emerged in the case law for any tort other than false imprisonment.

In the absence of judicial authority to the contrary, then, I think there is good reason to take seriously the idea that true reason for certain torts being actionable per se is rooted in history. The reason may be archaic, but it is by no means unknown for rules of common law to endure long past the point where they still reflect prevailing social mores and expectations. For example, the rule in defamation that there is no publication to a third party where D says something to his own wife that is defamatory of C because "husband and wife are in point of law one person",[79] seems plainly anachronistic to modern eyes.[80]

Sticking with the tort of defamation, it is noteworthy that hierarchy-based arguments have also been offered to explain the actionability per se of this tort.[81] For Cane, the key to this being so resides in an analogy between reputation and property. He writes:

> The plaintiff in a defamation action need present no evidence that his or her reputation was actually damaged. Conceptually, this is probably a result of viewing reputation as a form of property. . . [And] [a]n important feature of tortious liability for interference with property is that it is actionable without proof of actual damage to the property.[82]

However, Cane's suggestion that defamation is actionable per se by virtue of this analogy is, again, not borne out by history. From the early sixteenth

[77] It is true that in *Collins v Wilcock* [1984] 1 W.L.R. 1172, 1177, Goff L.J. invoked Blackstone's claim that "every man's person being sacred . . . no other having a right to meddle with it, in any the slightest manner" (W. Blackstone, *Commentaries on the Laws of England*, 17th ed. (Oxford 1830), 120). But it is also true that a *Westlaw* search reveals that this passage has received hardly any endorsement in subsequent tort cases. Even more starkly, a similar *Westlaw* search reveals that Lord Camden's statement about the sacred nature of "the property of every man" (see text associated with note 69 above) has never once been reiterated in any subsequent tort case.

[78] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era (Report 123)* (Brisbane 2014), paragraph 8-40.

[79] *Wennhak v Morgan* (1888) 20 Q.B.D. 635, 637 (Manisty J.).

[80] There may be good grounds for a privilege in such circumstances; but the idea that there is no publication to a third party is clearly outdated.

[81] Admittedly, defamation is not always actionable per se: slander generally requires proof of special damage.

[82] Cane, *Anatomy*, 73.

century, defamation emerged as an action that could be heard by the royal courts dealing with matters of common law, rather than (as hitherto), the ecclesiastical courts.[83] It did so as an action on the case in respect of which proof of special damage was required.[84] The first case in which a libel was held to be actionable per se was not decided until the late seventeenth century. In it, Hale C.B. specifically considered the need to show harm. He drew a crucial distinction between libel and slander saying, "although … words spoken once, without writing them or publishing them would not be actionable", where they are "writ and published, *which contains more malice than if they had but been once spoken*, they are actionable".[85] It was, therefore, the supposed malice involved in writing down a defamatory statement, not the high-ranking status, or property-like quality of reputation, that, for Hale C.B., justified libel's actionability per se.[86] Here, again, no modern, alternative explanations can be traced in the case law.

Nor can the actionability per se of slandering someone in their office, profession, calling, trade or business[87] be linked to the value attached to C's reputation. The clear concern of this form of slander has always been to protect C's *economic interest* in making a living rather than his or her interest in having a good reputation. That being so, the putative link between actionability per se and the ranking of the interest at stake clearly breaks down.

2. Strict liability torts

In just the same way that it may be doubted (*pace* Stevens, Lord Dyson and others) that it is the intrinsic value of the interests protected that explains those torts that are actionable per se, so, too, is there reason to doubt whether it is inexorably true, as Cane asserts, that "interests protected by strict liability are more highly valued than interests protected by fault-based liability".[88] It is certainly true that vertical torts involving the misappropriation of private property are typically ones of strict liability. And it is undoubtedly worth noting Cane's companion observation that "such ample protection … [reflects the fact that] private property forms the

[83] Ibid., at 112–14.

[84] Pollock considered this a mistake, saying: "[t]he law went wrong … in making the damage and not the insult the cause of action": F. Pollock, *The Law of Torts*, 13th ed. (London 1929), 249.

[85] *King v Sir Edward Lake* 145 E.R. 522, 523, emphasis added.

[86] Just because there was no need to prove harm does not mean damage was irrelevant. It is just that, in libel, such damage was presumed. The fact that damage is presumed, however, in no way affects the claim in the main text, namely, that its being actionable in the way that it is has nothing at all to do with a putative analogy between property and reputation.

[87] See e.g. *D & L Caterers Ltd. v D'Ajou* [1945] K.B. 364, 367. There is a slightly different, but substantively equivalent, formulation in the Defamation Act 1952, s. 2: "calculated to disparage a man in his office [etc.]."

[88] Cane, *Anatomy*, 131. The thinking runs thus: ease of suit equates to added protection for the interests concerned which in turn equates to an augmentation in the value of those interests.

bedrock of our economic and social life".[89] But notwithstanding their superficial appeal, such remarks provide no licence for ignoring other, equally (perhaps even more) compelling explanations for the existence of certain strict liability torts.

Take defamation again. This – along with the proprietary torts of trespass to land, conversion and passing off – is a strict liability tort. In Cane's view, the strictness of liability is also explicable by reference to the perceived similarity between reputation and property: "[r]eputation," he avers, "is seen as analogous to property, and *as a result* liability for damage to reputation is very strict."[90] McBride, however, takes a different view. He makes no link between the strictness of liability in defamation and the intrinsic importance of reputation. Rather, he points out, when strict liability for defamation was first introduced via the decision in *E Hulton & Co. v Jones*,[91] it was done "without legal justification and out of [judicial] malice towards the press".[92] An essentially similar view is advanced by Paul Mitchell. He too identifies *Hulton* as the starting point for strict liability in defamation, and likewise argues that that case (along with several others that followed) make it hard "to avoid the conclusion that what was really driving the decision[s] [to make the tort one of strict liability] was the judges' own views about the proper tone and appearance of a newspaper".[93] What is certainly beyond doubt is that there is nothing in that landmark case to suggest it was the property-like quality of a person's reputation that justified the introduction of strict liability for defamation.[94] Thus, once one accepts the concrete evidence supplied by McBride and Mitchell for their "hostility to the press" explanation, it becomes hard to prefer Cane's understanding given that his understanding lacks any discernible judicial backing.

A similar story can be told be told about trespass to land. For right from its inception it was formally the case that "liability in trespass was strict rather than fault-based".[95] As Morris Arnold explains:

> "all the available evidence is that in fourteenth century trespass actions, civil liability was strict. It would be for a later age to invent the proposition that

[89] Ibid., at 140.
[90] Ibid., at 134, emphasis added.
[91] [1910] A.C. 20.
[92] McBride, *Humanity of Private Law*, 245.
[93] P. Mitchell, *A History of Tort Law 1900-1950* (Cambridge 2015), 153. He elsewhere attributes part of the explanation for the introduction of strict liability to "a succession of historical accidents and confusions": see P. Mitchell, "Malice in Defamation" (1998) 114 L.Q.R. 639, 663.
[94] In the House of Lords, only Lord Loreburn supplied a reasoned judgment (albeit one that ran to only two pages in length). In his view, the reason for there being no need to show fault or malice on the part of D could be expressed thus: "[i]f the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff": [1910] A.C. 20, 24.
[95] Ibbetson, *Historical Introduction*, 58. Saying "formally the case" is important because, sometimes, juries managed to soften the strictness of liability by showing sympathy towards defendants who acted without fault.

> some showing of fault was ordinarily necessary in order to impose on an actor the duty to compensate."[96]

Nowhere in the cases *from this period* is there any suggestion that strict liability was justified because of the especial value of the interest at stake. Instead, insofar as anything was emphasised – and this was not the age of fully reasoned judgments – it seems to have been the fact that D had caused loss or damage to C. Importantly, such emphasis as there was did not stress that the loss be of a particular kind, or that it represent damage to a highly cherished interest. In his landmark decision in *Hulle v Orynge* – the so-called *Case of Thorns* in which D trampled C's crops while gathering up thorns he had cut down on his own land, but which had fallen onto that of his neighbour – Littleton J said simply that "if a man is damaged, that is reason that he be compensated".[97] More expansively, Choke J. anchored the strictness of trespass liability to the *absence* of justification or inevitable accident. He made no mention at all of any need for fault. He said no more than this:

> [W]hen he cut the thorns and they fell, this falling was unlawful . . .. And as to what is said about their falling against his will, that is no plea . . . [it being immaterial] that he could not have acted in any other way.[98]

The strictness of liability in this tort has never gone away.[99] And as with defamation, there is nothing in the modern cases to suggest that the justification for its being a strict liability tort can nowadays be identified in the importance attached by the law to the exclusive possession of land.

3. Torts in which injunctive relief is readily available

In the same way that the hierarchy of protected interests seems not to supply a very convincing explanation of why some torts are actionable per se, or actionable on a strict liability basis, so too does the hierarchy provide a less-than-compelling rationale for why injunctions are so freely available in certain torts, when in theory they ought not to be granted unless damages would constitute an inadequate remedy.

To clarify, some scholars see injunctions as one of "the hallmarks of protection of property",[100] hence the idea that there is a link between the availability of injunctions and the standing of the interest protected. Waddams goes so far as to state that "the willingness of the court to grant specific remedies, binding on third parties, may itself supply the principal reason

[96] M.S. Arnold, "Accident, Mistake, and Rules of Liability in the Fourteenth-century Law of Torts" (1979) 128 U. Pa. L. Rev. 361, 377–78.
[97] (1466) 79 Y.B.M 6 Edw. IV 4, f. 7, pl. 18.
[98] Ibid.
[99] If C steps on land which he believes is his own, this in no way exonerates the trespass committed against C (to whom the land actually belongs): *Basely v Clarkson* (1682) 3 Lev. 37.
[100] Cane, *Anatomy*, 149.

for calling the plaintiff's interest 'proprietary'".[101] Doubtless, some hierarchy proponents would question this assertion. But even if they did, they would not resile from the claim that the easy availability of such orders reflects, as Cane puts it, the "the concern of the common law to preserve the rights of owners *to the full*".[102] Again, however, close examination reveals that things are not quite so straightforward. For one thing, injunctions are not confined to the protection of proprietary interests. And for another, their being readily available in some torts is demonstrably not a product of the high-ranking status of the interests at stake. Both points warrant some elaboration.

It is easy to rebut not just the claim that injunctions are *only* available in connection with proprietary interests, but also its sibling – recited in Waddams's work – that their availability may constitute a reliable indicator of proprietary status. One need look no further than the law of battery to find authority for the proposition that injunctions may be granted in connection with this tort.[103] That said, it is also true that the *personal interest* protected by this tort is no less valuable according to the hierarchy than the various types of proprietary interest recognised by tort law. So, the mere fact that injunctions can be obtained in connection with battery does nothing to undermine the more general claim that it is the intrinsic value of the interest at stake that explains the generous availability of these orders in certain torts. To rebut this contention, we must look elsewhere: to torts in which injunctions are regularly granted *even though* the interests they are awarded to protect are low-ranking ones.

In particular, we may look to a number of the economic torts which, as noted already,[104] commonly protect interests towards, or at, the base of the hierarchy. Take, for example, inducing breach of contract (for which injunctions can very comfortably be obtained[105]). Although it has been suggested numerous times, and in various ways, that this tort treats one's contractual rights as a species of property,[106] it is not an argument that withstands scrutiny. Two key reasons may be given for the failure of this "property thesis". First there is the problem that the supposed analogy between contractual rights and proprietary rights (based on the fact that they are both protected from third-party interferences) breaks down once

[101] Waddams, *Dimensions of Private Law*, 178.
[102] Ibid., at 141, emphasis added.
[103] See e.g. *Egan v Egan* [1975] Ch. 218 (injunction granted to a mother whose son repeatedly subjected her to violent attacks).
[104] See text associated with notes 54, 55.
[105] See e.g. *Govia Thameslink Railway Ltd. v ASLEF* [2016] EWHC 1320 (Q.B.), [2016] I.R.L.R. 686.
[106] See e.g. P.W Lee, "Inducing Breach of Contract, Conversion and Contract as Property" (2009) 29 O.J.L.S. 511, 524; R. Bagshaw, "Inducing Breach of Contract" in J. Horder (ed.), *Oxford Essays in Jurisprudence*, 4th ed. (Oxford 2000), 133–37; R. Epstein, "Inducement of Breach of Contract as a Problem of Ostensible Ownership" (1987) J.L.S. 1, 19–20; S.M. Waddams, "Johanna Wagner and the Rival Opera Houses" (2001) 117 L.Q.R. 431, 444; W. Anson, *Principles of the Law of Contract* (Oxford 1879), 199.

one considers the fact that, in order to commit the tort of inducing breach of contract, D must know that he is inducing a breach of contract.[107] Proprietary rights are never contingent on what D happens to know. If I walk across your land mistakenly thinking it is mine, I am just as much a trespasser as if I did so knowingly.[108] Secondly, the property thesis is circular insofar as it is fuelled by the observation that both contractual and property rights are protected from third-party interferences. If we want to know why contractual rights enjoy proprietary status, it is no use answering: "Because they offer protection against third party interference." For if we then ask the obvious question about why they enjoy such protection, the answer that comes back is: "Because they are a form of property." With no compelling reason to regard contractual rights as a species of property, it is clear that when injunctions are awarded in this tort, they are being granted to protect something more lowly than a proprietary interest.

Much the same conclusion must be drawn in relation to the availability of injunctions in the torts of injurious falsehood and causing loss by unlawful means. In a case of injurious falsehood – unlike a case of passing off – there is no inexorable concern to protect from trade rivals C's goodwill (a form of intangible property).[109] So much is clear from the fact that liability for injurious falsehood may be imposed on parties *other than business rivals*. Newspaper editors, for example, may fall within the maw of this tort, even though they are not C's trade competitors and not out to capture for themselves some of C's existing customers.[110] Accordingly, the tort is best seen as one that is overwhelmingly used to protect against purely financial losses rather than the misappropriation of property.[111] This idea comes through very clearly in various cases in which its gist – special damage – has been recast as, "a general loss of business",[112] "pecuniary or temporal damage"[113] and the loss of a "potentially valuable right to sell the story of [an] … accident".[114] In fact, so consistently has this tort been linked to such financial losses that Carty goes so far as to declare it a tort about falsehoods "inherently likely to harm the claimant's *economic interests pure and simple*".[115] And yet, for all this, injunctions are readily granted for injurious falsehood.

[107] *OBG Ltd. v Allan* [2007] UKHL 21, [2008] 1 A.C. 1, at [39].
[108] *Basely v Clarkson* (1682) 3 Lev. 37.
[109] Note, however, the interest protected by passing off—i.e. goodwill—was not clearly articulated until the decision in *AG Spalding & Bros v AW Gamage Ltd.* [1915] R.P.C. 32. Prior to that, the House of Lords had both expressly denied that there was a property right at stake in passing off cases, yet still allowed injunctions to be granted: see *Reddaway v Banham* [1896] A.C. 199, 209–10.
[110] See e.g. *Joyce v Sengupta* [1993] 1 W.L.R. 337; *Cruddas v Calvert* [2015] EWCA Civ 171, [2015] E.M.L.R. 16.
[111] Overwhelmingly does not imply exclusively; and the tort is in principle capable of providing a remedy for other types of loss: see J. Murphy, "The Vitality of Injurious Falsehood" (2021) 137 L.Q.R. 658, 670–75.
[112] *Ratcliffe v Evans* [1892] 2 Q.B. 524, 533.
[113] *Chamberlain v Boyd* (1883) 11 Q.B.D. 407, 412.
[114] *Kaye v Robertson* [1991] F.S.R. 62, 68.
[115] Carty, *Analysis of the Economic Torts*, 220, emphasis added.

As regards causing loss by unlawful means, it is clear from *JT Stratford & Son Ltd v Lindley*[116] that injunctions can also be obtained in this tort to protect purely financial interests. In this case, D's industrial action brought C's business to a standstill. The terms of the injunction – centred as they were on C's existing and future contracts – reveal amply that the order was designed to protect purely pecuniary interests. Lord Upjohn granted "[a]n injunction restraining the respondents … from doing … any act which causes or procures a breach or breaches by customers of the appellant company of contracts made now or hereafter".[117] Thus, just as with injurious falsehood, an injunction may be obtained in this tort to protect a non-proprietary interest.[118]

Against this background, it cannot safely be asserted that the free availability of injunctions in tort law is linked to the high-ranking status of certain interests. And my contention that there is no necessary correlation between the interest at stake and the prospect of C obtaining injunctive relief can be fortified further by reference to the fact that *even where* a very highly ranked interest is in play, the courts sometimes refuse such an order. The non-availability of injunctions in negligence[119] helps illustrate this point.

Admittedly, it is not obvious how injunctions might feature within the law of negligence. Most negligence cases involve one-off, inadvertent acts by D that have already occurred, and have had their full effects felt before C seeks a remedy. But this needn't always be the case. It is possible, for example, for D's negligence to take the form of ongoing non-feasance. An employer failing to provide their employees with a safe place of work would be an example.[120] In any such case, it would be perfectly sensible to consider a mandatory injunction requiring the employer to comply with this duty a feasible remedy given the daily risk of personal injury to employees.[121] And yet, negligence law does not presently permit such relief. Accordingly, the claim that the free availability of injunctions is determined by the standing of the interest at stake founders.

In truth, the hierarchy of protected interests does not supply a particularly compelling account of why and where courts will be most willing to grant injunctive relief. Injunctions may be obtained with relative ease in various torts that overwhelmingly protect our most lowly interests; while, at the same time, they may also be denied where our most highly cherished interest (i.e. bodily integrity) is in jeopardy.

[116] [1965] A.C. 269.
[117] Ibid., at 339.
[118] The same is true of unlawful means conspiracy which, likewise, serves preponderantly to protect economic interests: see *Lonrho Plc v Al-Fayed (No 5)* [1993] 1 W.L.R. 1489, 1502.
[119] *Miller v Jackson* [1977] Q.B. 966, 980: "[t]he books are full of cases where an injunction has been granted to restrain the continuance of a nuisance. But there is no case, so far as I know, where it has been granted so as to stop a man being negligent."
[120] *Wilson's and Clyde Coal Co. v English* [1938] A.C. 57.
[121] See further J. Murphy, "Rethinking Injunctions in Tort Law" (2007) 27 O.J.L.S. 509, 523–24.

4. A possible objection

Although the preceding paragraphs have questioned the putative explanatory function of the hierarchy of protected interests, it might be objected that my arguments are misplaced insofar as proponents of the explanatory function do not do so in accordance *only* with what Dworkin called "the brute facts of legal history".[122] Rather, so the objection might go, those who say the hierarchy performs this explanatory function do so from an interpretivist perspective, grounding their explanation of the law's structure and features on the twin bases of "fit" and "justification"; for it is only (they would say) by being attentive to both fit *and* justification that an account of the law can present it in its best possible light.[123] We may label this objection the "interpretivism objection".

If the relevant authors are writing from this perspective, then there is, according to the interpretivism objection, a degree of latitude to disregard some of the brute facts of legal history to which I have attached considerable significance in explaining why various torts are actionable per se or on a strict liability basis. This licence for disregarding certain holdings stems from the fact that interpretivist accounts constitute ongoing narratives which, while they accommodate much of the past, also aspire to be morally and politically palatable in the here and now.[124] As Dworkin explained: the interpretive enterprise "begins in the present and pursues the past *only so far as and in the way that its contemporary focus dictates*".[125]

So can this interpretivism objection be rebuffed? I think it can; and on three grounds. First, none of those who make the claims that I questioned in the previous section provide any indication that what they say was intended as interpretivism. Indeed, Cane is overtly more interested in factual observations about the law than justificatory spins that may be placed upon it. Take, for example, what he says about the relationship between strict liability and proprietary interests. With no hint of justification on offer, he remarks simply that, once one realises that

> interests protected by strict liability are more highly valued by tort law than interests protected by fault-based liability, *a very significant fact emerges*, namely that [in such circumstances] tort law values property interests more than a person's interest in health and safety.[126]

The second basis on which the interpretivism objection may be rebuffed is by reference to the fact that even if the interpretivist may permissibly paper over a certain amount of legal history in order to produce the most

[122] R. Dworkin, *Law's Empire* (Cambridge, MA 1996), 255.
[123] Ibid.
[124] For Dworkin, "[l]aw as integrity … insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements": ibid., at 225.
[125] Ibid., at 227, emphasis added.
[126] Cane, *Anatomy*, 131, emphasis added.

https://doi.org/10.1017/S0008197321001069 Published online by Cambridge University Press

appealing explanation of the law, it still appears that the relevant authors have not undertaken such an exercise. This is because an explanation can hardly be regarded as the most palatable one possible when it remains beset by incoherence. Thus, even if we overlook those historical aspects of trespass to which I attached salience, there is still no convincing justification for that part of the law of slander which protects our commercial interest in plying a particular trade. Put another way, if the best justification for actionability per se resides in the status of the interest protected, then one would expect some rejection – some papering over – of this branch of the law, too. Without it, there is a conspicuous absence of the "horizontal rather than … vertical consistency of principle" towards which interpretivism aspires.[127] Yet none of the relevant authors seem troubled by this.

Thirdly, the interpretivism objection can be rebuffed by reference to the fact that the authors whose work I address ignore a great deal more of the law than "law as integrity" would ever permit. The interpretivist is at liberty to side-line a certain amount of what previous cases have established; but there are limits. Not all of the brute facts of legal history can be side-lined. Rather, as Dworkin himself put it, "the history or shape of a practice or object constrains the available interpretations of it".[128] So, in explaining the law, "fit will [still] provide a rough, threshold requirement that an interpretation … must meet if it is to be eligible at all".[129] Could anyone, then, in the name of interpretivism plausibly ignore a centuries-old line of case law that renders the trespass torts actionable per se for reasons that have nothing to do with the relative value of the interests at stake?

IV. Understanding the Hierarchy's Fluidity

It is one thing to note that the relative importance of two conflicting interests will not *always* be enough to determine the outcome of tort cases. But it is entirely another to understand *why* this is so. My aim in this section, therefore, is to illuminate this matter, to explain why Cane's sedulously constructed scheme is frequently best seen as no more than a starting point in deciding cases in which C's and D's respective interests collide. To this end, I identify four factors that can cause the weight attached to a particular interest to receive a considerable uplift (or downgrade) such that, despite its ordinary standing, it might nonetheless be judged to be (un)worthy of tort law's protection in a particular case.[130]

[127] Dworkin, *Law's Empire*, 227.
[128] Ibid., at 52.
[129] Ibid., at 255.
[130] This section of the article seeks merely to *identify* the relevant factors. I offer no comment on whether they are all good things for courts to consider.

A. Variations in D's Moral Culpability

The first factor that can contribute to a claimant's low-ranking interests receiving a boost is the degree of moral culpability attached to D's behaviour (such moral culpability being gleaned from the particular mindset that accompanies the commission of a wrong).[131] For example, we may contrast the way our mental integrity is protected by negligence law on the one hand, and the law of assault (or the revamped rule in *Wilkinson v Downton*[132]) on the other. In negligence – where D's moral wrongdoing is an irrelevance[133] – C's ability to sue for negligently inflicted psychiatric harm can be notoriously limited.[134] But where D's infliction of mental harm is intentional, tort law is markedly more willing to provide a remedy. In other words, the protection afforded to C's mental integrity receives an appreciable uplift in cases where D sets out intentionally to violate it.

In just the same way, the presence of intentional wrongdoing can serve to augment the protection afforded to pecuniary interests. Again, in stark contrast to the law of negligence, the economic torts typically require intentional or reckless wrongdoing on the part of D. And where such intentionality or recklessness is present – unlike in negligence where the recovery of pure economic loss is not normally possible – compensation for pecuniary damage is an entirely quotidian phenomenon. Indeed, there is sometimes so much of an uplift provided to the protection of pecuniary interests in this setting that, as we have seen, they may even become more readily recoverable than injuries to personal interests caused by identical acts.

B. Evidential Problems

A second factor that helps account for the fluidity of the hierarchy is the judicial circumspection that sometimes attends claims based on types of harm that present particular evidential difficulties. In negligence, establishing that a duty of care is owed in connection with one's proprietary interests is usually straightforward. But successfully establishing a duty of care in relation to one's *personal interest* in mental integrity can be a great deal

[131] Cane implicitly acknowledges this fact when he observes that "not all of the interests protected by tort law are protected against all of the types of sanctioned conduct": Cane, *Anatomy*, 28. But he does not consider assiduously the ramifications of this for the stability of the hierarchy he constructs. That he does not do so, however, should not be seen as a criticism, since his principal aim was not to defend the hierarchy of protected interests he adumbrates, but to argue for a novel way of understanding tort according to the three elements of protected interests, sanctioned conduct and sanctions.

[132] [1897] 2 Q.B. 57. In 2016, new life was breathed into this tort by the Supreme Court which held, among other things, that the tort contained a mental element comprising an "intention to cause physical harm or severe mental or emotional distress": *O v Rhodes* [2015] UKSC 32, [2016] A.C. 219, at [87].

[133] Negligence is a failure to meet an objectively determined standard of conduct. Thus, although in common parlance negligence is often treated as synonymous with carelessness, this is not the case within the law of torts.

[134] It is, admittedly, much easier to do this where one is a primary rather than a secondary victim.

more difficult, especially where one is a so-called secondary victim.[135] In other words, the courts are appreciably more willing to allow negligence claims in respect of property damage than they are claims by secondary victims suffering psychiatric harm. Accordingly, within the law of negligence, the latter appears to be more highly valued than the former. What, then, explains this reversal in the ranking of these two interests in this setting? The answer in large part lies with the evidential problems that attend claims for psychiatric harm. As the current editors of *Winfield & Jolowicz on Tort* explain:

> Although psychiatric injury is a form of personal injury special restrictions apply to the recovery of damages . . . [and] [o]ne reason why psychiatric injury is treated significantly less generously is that, despite advances in scientific knowledge regarding the working of the mind, there is still a belief, rightly or wrongly held, that it presents a greater risk of inaccurate diagnosis.[136]

C. Antecedent Wrongdoing on C's Part

It will be recalled that there exist several contingent departures from the hierarchy of protected interests. Examples considered in Section III included the eviction of trespassers and the recaption of chattels; and there is a common denominator here: the presence of antecedent wrongdoing on C's part. Trespass to land and conversion are both well-established wrongs and it is C's prior act of trespass or conversion that accounts for, respectively, the subsequent demotion of his or her interest in bodily integrity or the exclusive possession of land.

D. Consequences

However much one may oppose consequentialist reasoning in tort law adjudication – and powerful arguments along such lines can certainly be made[137] – the inescapable truth is that the fear of certain consequences does feature in courts' decision-making;[138] and it does so in significant measure. We have noted already the way that fears about the impact of an injunction on the productive activities of a given defendant might affect a court's willingness to grant such relief in private nuisance. At bottom, the concern is about how injunctions might stymie economically valuable endeavour by D. Such economic endeavour is beneficial to third parties as well as D and the aggregate loss at stake may result in

[135] Loosely, primary victims are those persons in physical danger of being injured themselves by D's negligence; secondary victims are those who witness injury to others (without themselves being imperilled): see *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310, 407, 411.
[136] Goudkamp and Nolan, *Winfield and Jolowicz on Tort*, 118.
[137] Stevens, *Torts and Rights*, 308–10; Beever, *Rediscovering the Law of Negligence*, 52–54; E.J. Weinrib, *The Idea of Private Law* (Cambridge, MA 1995), 220–21.
[138] For some discussion of this, see Stapleton, *Three Essays on Torts*, 26.

C being denied an injunction such that C's proprietary interest in the peaceful enjoyment of her land gives way to D's commercial interest when the two collide.

Also noteworthy in this context is the fact that floodgates fears once contributed significantly to the cautious way that judges approached secondary victims' claims for negligently inflicted psychiatric harm.[139] Such concerns still exert an influence where the deliberate infliction of a mental injury short of a recognised psychiatric condition is concerned. With an obvious desire to keep litigation levels within manageable bounds, Lord Hoffmann said in *Wainwright v Home Office* that

> [i]n institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation.[140]

The key point here is that floodgates fears render relevant the interests of third parties in the shape of the interest we all possess in having our courts able to function efficiently and effectively.

V. Conclusion

A clearly defined hierarchy of interests that is subject to no exceptions would undoubtedly be useful both to expositors of the law *and* judges required to decide cases at the heart of which lie conflicts between C's recognised interest, X, and D's recognised interest, Y. But we have no such hierarchy available to us. What we have, instead – thanks largely to Cane – is a sophisticated scheme that possesses deep intuitive appeal, but which must be handled cautiously in the classroom and in real-life litigation because a sizeable range of factors can and do disrupt the presumptive ordering of the interests protected by tort. Put another way, because tort law does not invariably reflect or adhere to the intuitively attractive hierarchy we have considered,[141] it follows that absolutist claims about its expository or dispositive utility cannot stand. We can neither claim that tort law will invariably treat personal or proprietary interests as more important than purely financial interests, nor assert that where interests of a different order collide, the inferior one will give way to the superior one.

Happily, though, an absolutist position is not essential. Cane's elaborate hierarchy is still a very useful starting point. With an awareness of the

[139] In his summary of the early case law in this area, Lord Bridge once observed that the only influential policy considerations in view "appear to have sprung from the fear that to cross the chosen line would be to open the floodgates to claims without limit": *McLoughlin v O'Brien* [1983] 1 A.C. 410, 433–34.

[140] [2003] UKHL 53, [2004] 2 A.C. 406, at [46].

[141] It even sometimes sends out mixed messages. For example, the strictness of liability in defamation might be thought indicative of the high value attached to reputations. By contrast, the fact that there is just a one year limitation period for such actions tends to indicate the opposite.

factors that cause the weight afforded to certain types of interest to be augmented or downgraded, it can still be a very helpful dispositive tool. What it cannot do, however, is provide a compelling account of why there exist the three particular tort law oddities examined in Section III. Certain bits of legal history seem to provide a much more compelling explanation in this connection (at least in respect those torts that are actionable per se or actionable on a strict liability basis). Whether the three oddities considered still deserve a place in the modern law of torts, and whether they *should be* treated as indicative of the status of certain interests, are important normative questions. But they are questions for another day.

https://doi.org/10.1017/S0008197321001069 Published online by Cambridge University Press