him. I last saw him a few months before his untimely death in 2019, when I visited his home in Pimlico to deliver a copy of the recent judgments in the case of *Privacy International* [2019] UKSC 22. My own leading judgment was in some ways a personal tribute, for which I had drawn heavily on his judgments and extra-judicial writings. But he was by then more interested in catching up with judicial gossip over lunch at his local Indian restaurant. Although I knew of his Cambridge lectures, I was not then aware that he was in the process of turning them into the present book. I would love to have been able to debate some of the themes with him in person. It is a greater public misfortune that he did not live to take part in the current debate, reflected in the recent Queen's Speech, in which the Government has promised legislation to "restore the balance of power between the executive, legislature and the courts". It is to be hoped that this study is already required reading for those seeking to advise the Lord Chancellor as to how the balance should be set.

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Three Essays on Torts. By Jane Stapleton. [Oxford University Press, 2021. xx + 101 pp. Hardback £60.00. ISBN 978-0-192-89373-4.]

Legal monographs, at least for any scholar who takes their subject seriously, comprise a vitally important resource. But they are often, in my experience, far easier to start than to finish. Ploughing through them, from cover to cover, can all too often seem such a chore: the defence of a single, not always earth shattering thesis being hammered out in every conceivable detail. Refreshingly, Jane Stapleton's *Three Essays on Torts* is nothing like this. For one thing, it's not very long: it runs to just 101 pages! It also reads very well; and, although there is a clear theme that underscores the three substantive chapters – something she calls "reflexive tort scholarship" – they nonetheless strike me as having been assembled in much the same way that the ideal three course meal is put together. Each course is very different from the other two. And yet somehow they complement each other wonderfully well.

In the first of the three essays, the nature, aims and perceived virtues of reflexive tort scholarship are described in general terms. It is defined as a brand of scholarship that "places judges centre stage and seeks a constructive dialogue with them" (p. 2). The notion of reflexivity is employed to capture the hoped-for two-way conversation between academics on the one hand, and both Bench and Bar on the other. But there is another sense, too, in which judges are placed centre stage: what they say (together with the reasons they give for saying it) are afforded prime importance.

Now, of course, the sceptic might say, making judicial pronouncements the focal point of one's analysis is hardly novel. What then, she may persist, is so distinctive about reflexive tort scholarship? The answer is comprehensively supplied in the second half of Chapter 1 (even though the first real clue can be found in its title: "Taking the Judges Seriously v. Grand Theories"). What emerges from it is Stapleton's keenness to distance her project's ambitions and style from the in-vogue style of torts scholarship that treats tort law as being all about one thing, whether that be "all about economic efficiency, or all about the principle that no-one is in charge of their neighbour, or all about the infringement of primary rights" (pp. 25–26).

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There are numerous strands to her opposition to such Grand Theories. One especially hard-hitting charge is that proponents of Grand Theories routinely claim to proffer, but seldom deliver, faithful *explanations* of the law as it presents itself. As Stapleton argues convincingly, "when confronted with tort phenomena that cannot be made to fit the descriptive claim, the Theorist in some way attempts to edit out or ignore these phenomena" (p. 25). Another claim that does as much to undermine the projects of Kantians and rights theorists alike (although she only addresses it to the latter) is that such theories are beset by an "inability to account for ubiquitous judicial reasoning that affords substantial weight to collective concerns" (p. 26). Other arguments are mounted, too, but by this point it feels rather like she is stabbing a corpse. So, given present constraints of space, it is perhaps apt to turn here to the first part of the chapter's title, the bit that proclaims Stapleton's concern to take the judges seriously.

On this front, the reader is quickly disabused of the notion that what Stapleton advocates is any kind of presumptive deference to judicial pronouncements. True: she abhors the Grand Theorists' tendency to dismiss authorities glibly as "wrong, anomalous, exceptional or sui generis" (p. 24). But she nonetheless countenances various other forms of criticism. These include exposing the fact that certain holdings were "poorly reasoned… incoherently reasoned or indeed *per incuriam* by a failure to advert to an applicable statute" (p. 18). The difference here is the one between reasoned engagement with, and the unreasonable rejection of, decisions made by our most senior judges.

The starting point for such engagement is a recognition of certain practical constraints concerning the way judges decide cases as well as an appreciation of what Stapleton calls the "Living Common Law" (pp. 4–10). It is the latter – the idea of the Living Common Law – that is, in my view, especially noteworthy (although I suspect that it is her defence of the role of policy in judicial decision-making that will attract most attention from other jurists).

The Living Common Law is a convenient shorthand expression designed to capture the way the common law evolves. She writes: "as society changes and develops, so too does the common law change and evolve in line with this" (p. 6). But, crucially, changes in the law are not attributed to particular judicial decisions. Rather, they are identified as occurring purely as a response to (or reflection of) changes in the sizeable array of social facts, values and concerns that underpin our rules of common law. When value X and concern Y – which once underscored the existence of rule Z – cease to exist, so too does rule Z: *cessante ratione legis, cessat lex ipsa*. What, then, is the role of the judges? They, according to Stapleton, "identify and articulate this evolution" (p. 6). In this way, she argues, judges can be insulated against the charge that they have changed the law at the time of the relevant litigation and thus ensnared the losing litigant with a retroactive decision.

Stapleton's notion of the Living Common Law is certainly clever; and it has obvious attraction insofar as it shields judges from accusations of retroactive decision-making. However, the case for accepting the existence of this phenomenon is, by Stapleton's own admission, not fully made here. Tucked into a footnote is *both* the concession that "this volume is not the place to examine this concept [of the Living Common Law] in detail" *and* an expression of hope that "younger scholars will evaluate its worth" (p. 6, fn. 18). Also, one wonders whether the Grand Theorists might not strike back here. In just the same way that Stapleton says of them that "[j]udges do not describe the law of torts as being all about the central thing that any of these theorists assert it is about" (p. 25); it is certainly conceivable that they will retort: "True. But nor do they make mention of any Living Common Law". If the Grand Theorists do essay such a retort, I suspect that Stapleton would

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fare very well indeed in any such exchange since – as is clear from her discussion of the way the Supreme Court in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] 2 W.L.R. 768 moved away from the law as stated in *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] A.C. 871 – the courts clearly do not need to invoke the precise language of the Living Common Law in order to act in accordance with it.

Stapleton's second essay bears the not-immediately-transparent title, "Co-operation and Economic Self-Reliance in Commercial Arrangements". Thankfully, its chief concern – the non-recoverability of pure economic loss in negligence actions involving litigants who are participants in a multi-party commercial arrangement – soon becomes clear. The essay (which also contains some discussion of physical loss cases) is an exemplar of reflexive tort scholarship. It is clearly aimed at Bench and Bar. But I think any academic with a particular interest in the law of negligence would do well to reflect on its contents.

The principal contention advanced in this essay is that there is, immanent within the law, a principle according to which tort will support cooperative arrangements that exist between non-contracting parties who are nonetheless linked by their common participation in a complex commercial arrangement. Stapleton has a name for the particular support provided. She calls it "tort's cooperation principle" (p. 35). But before she can get down to the main business of unearthing the operation of this principle in relation to *two* particular types of economic loss case; and before she can address the mystifying contrast that exists between these two types of case and a third in which the operation of the principle is conspicuous by its absence, a certain amount of path clearing is undertaken.

She begins by clarifying what she means when she speaks of cooperation in complex commercial arrangements. A typical kind of situation that she has in mind is one in which A contracts with B for the provision of some or other thing or service; and then A subsequently subcontracts some part of its contractual duty to C. Crucial to the scenario is the existence of a non-contractual understanding between commercial participants B and C that B will have no facility to sue C in the event of C's negligence causing loss to B. In short, she has in mind arrangements akin to the one that existed in the *Eurymedon* [1975] A.C. 154, but with the twist that the loss concerned be purely financial rather than physical. It is in such circumstances, argues Stapleton, that tort's cooperation principle comes into effect. It manifests itself, she argues, in the fact that "tort law vindicates the cooperative arrangement [between B and C]" (p. 37).

Here, of course, the question that inevitably is prompted is: "What exactly does she mean by vindication of an arrangement?" But the reader is soon enlightened. The term, she explains, is used to capture the fact that tort law will stand firm against B's undermining the understanding that exists between B and C by refusing to grant B a remedy in tort against C. In this way, says Stapleton, tort sends out a message about "the value society … sees in human cooperation" by exhibiting "a preference for protecting the security of the voluntary coming together of [the litigants] … in beneficial arm's length arrangements" (p. 38). The denial of a tort remedy lends support to the voluntary (but non-contractual) arrangement insofar as it *prevents* the granting of a remedy that "would circumvent the existing arrangement, which the claimant had [with C]" (p. 38).

With such prefatory matters out of the way Stapleton sedulously unearths the operation of the cooperation principle in two types of negligence case involving economic losses arising within the context of complex commercial arrangements. The first is the defective manufacture type of case (of which *Simaan v Pilkington Glass* [1988] 1 All E.R. 791 is a well-known example). The second is an investment

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decision type of case – such as the *James McNaughton v Hicks Anderson* [1991] 2 Q.B. 295 – in which the courts refuse to recognise the existence of a tortious duty of care. In contrast to these, Stapleton also identifies a third class of case: a type of case centring on investment decisions in which (for no compelling reason that Stapleton can find) the courts exhibit a perplexing willingness to hold that a duty of care can be imposed as between the relevant non-contracting commercial parties. *Henderson v Merrett Syndicates* [1995] 2 A.C. 145 would be a prime example of such a case.

Stapleton's analysis of the complex collection of pertinent decided cases is rigorous and thought-provoking in equal measure. And her conclusion that those cases in the first two groups – the ones where the existence of a tortious duty was denied – are best understood according to the prevailing "market expectation of economic self-reliance" among commercial players (p. 50) certainly has its attractions. (It also goes some way towards buttressing her thesis about the Living Common Law since the judges' role here is merely to give expression, in the form of legal rules, to salient expectations.) At the very least, Stapleton is assuredly correct to assert that we still await a "coherent normative story that justifies allowing a non-vulnerable commercial participant to sue a non-privy participant … for economic loss" (p. 54).

Few need reminding of the many thorny questions thrown up by economic loss cases. And I doubt that, even armed with both an appreciation of, and a willingness to implement, tort's cooperation principle they will all suddenly disappear. For one thing, if Stapleton is right that the expectation of economic self-reliance only operates to justify the absence of a duty of care where the relevant parties are both commercial entities, how is their commercial status to be determined? Imagine a three-party cooperative arrangement – purchaser, vendor, surveyor – involved with the sale of a house in, say, the Lake District with a view to its becoming both the purchaser's home and bed-and breakfast business. Should that purchaser count as a commercial entity and trigger the cooperation principle? Equally, given that reflexive tort scholarship insists that we take the seriously what the judges say, it would have been helpful for the reader had there been some elaboration on why it was appropriate for Stapleton to disregard something said by Lord Goff as "mere judicial assertion … that adds nothing" (p. 54). (I suspect the answer here would be something along the lines of there being a key difference between judicial words that are uttered on the basis of *contentious foundations*, and those lacking any foundations at all. But I speculate, here.)

Chapter 3, entitled "Conceptual Interplay between Elements of the Tort of Negligence", provides another exemplar of reflexive tort scholarship. There is no opacity here with the title, but for all that, a surprise may be in store for many an experienced tort lawyer. This is because, Stapleton sits among the small (but growing) number of jurists in this country who reject the popular idea that there are just four discrete elements in an negligence action, namely, duty, breach, causation and remoteness. In her final essay, Stapleton identifies five such elements, with "actionable damage" being added to the list (p. 66). For the most part in this chapter, her attention is devoted to the twin questions of (1) what it means to say that that something is "a cause" of something else and (2) where the appropriate limits of legal responsibility for the consequences of a breach of duty lie.

The chapter begins by making a plea for terminological and conceptual tidiness. The practical value of such conceptual tidiness is obvious, and clearly in line with Stapleton's reflexive tort scholarship agenda. Stapleton provides numerous examples of the problems that can arise in the absence of such conceptual clarity, but three particular problems stand out. First, Stapleton highlights the potential for inapt use of causal language to obfuscate the fundamental difference between the

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factual nature of the causation enquiry and the *normative* quality of the question concerning the limits of responsibility for consequences. Second, she flags up the awkwardness of describing in terms of remoteness harm that may well have been close in space and time to the defendant's impugned conduct (pp. 66–67). Third, she stresses the need to keep separate the scope of duty idea and the enquiry into the appropriate limits of responsibility for consequences (p. 73).

Thereafter the chapter works its way carefully through the five different elements in a negligence action. Along the way, a number of un(der)-explored issues are identified as topics worthy of closer attention by other scholars. And there is especially valuable discussion of the way that the five different elements relate to one another. For instance, Stapleton explains how the "actionable damage" component "determines what kind of duty analysis is judicially thought appropriate" (p. 72). And she likewise contends that the "scope of duty [concept] confines the sorts of breach allegations that can be made", and that "the way the claimant chooses to formulate the allegation of breach determines the form of the … factual causation question" (p. 77). These all seem perfectly valid observations. But I do have my doubts about the claim that where A owes an affirmative duty to safeguard B at place X, and time Y, any action brought by B in relation to an accident that befalls her at a different time and place (where A gives no assistance) "fails at breach stage" (p. 77). It seems more natural to me to say that such a claim fails at the duty stage *partly because*, as Stapleton elsewhere acknowledges, the duty is "limited by time and space" (p. 74), but also because the sizeable body of nonfeasance literature seems compellingly to treat such cases as illustrations of the absence of a duty to rescue.

A good deal of the material, including a fair number of the cases, covered in this chapter has been dealt with by Stapleton in previous work. This is especially true in relation her analysis of the causation component in a negligence action. But let me be clear: the essay is none the poorer for this. This is because it provides an extremely helpful and highly accessible conspectus of a fair amount of that earlier work. Its doing so should be especially welcome to those who lack the time to digest her voluminous earlier work on the topic. I think, here, in particular of Bench and Bar at whom the essay is primarily aimed. But I think also of younger scholars whom she also addresses in this essay and who may well have a lot of catching up to do when it comes to the discussion of causation by, on any measure, the standout voice in the Commonwealth.

Torts scholarship over the last 40 years seems to have come in various theoretical waves. Overwhelmingly, each of those waves has been dominated by Grand Theorists. How refreshing, then, that Stapleton should have published this wonderful little collection of essays in which the reader is offered three veritable gems that depart from this style of writing. In the first essay, there is a welcome reminder of the virtues of scholarship that has more modest, more practically useful ambitions. In the second, the reader is enticed, once more, into the thickets of pure economic loss in negligence, but with Stapleton charting an attractive and novel way forwards for several types of case that frequently arise. In her third essay, there is a clear invitation to think progressively about just how many elements there are in the tort of negligence, how best to label them, and how best to conceive of the way that they inter-relate in conceptual terms.

If I have one last minor disagreement, it is this: the book is being seriously undersold by Stapleton when she says, right from the get go, that it is "addressed to and seeks dialogue with Bench and Bar" (p. xvii). It is being undersold because it clearly comprises a major contribution to, and source of inspiration for, academic debate on perennially difficult tort law topics. These qualities, in my view, should

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be trumpeted just as loudly. Chapter 3 stands out in this respect. It not only holds out several research batons with the express intention that early career researchers should now grasp and run with them, but it also shakes up orthodoxy in suggesting that we would do well to jettison (1) our conceptualising those things that count as "a cause" in but-for terms (pp. 81–82) and (2) the *novus actus interveniens* concept (pp. 92–95). On these bases alone – although many others could be given – no academic tort lawyer can afford to overlook the rich and provocative scholarship on offer in this refreshing, slender, but nonetheless superb volume.

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The Evolution from Strict Liability to Fault in the Law of Torts. By ANTHONY GRAY [Oxford: Hart Publishing, 2021. 278 pp. Hardback £85.00. ISBN 978-1-50994-099-8.]

As its title indicates, Anthony Gray's book is an investigation of the evolution of tort law usually, though not always and not always linearly, from strict to fault-based liability. But it is more than this. It is a sustained argument to the effect that this evolution should be celebrated and that it has not gone far enough. In fact, Gray maintains, all strict liability needs to be replaced. Thus, Gray concludes his investigation with four bold claims: that *Rylands v Fletcher* should be killed off, that the tort of nuisance should be absorbed into the law of negligence, that the same thing should happen to the law of defamation unless comprehensive statutory reform is commenced that would make this area of the law fault-based, and that the tort of trespass to the person should also either be subsumed into the law of negligence or so reformed that it too becomes clearly fault-based (p. 266). The author even suggests that the common law might view Article 1382 of the *Code Civil* as at least an inspiration for this development (p. 262). Accordingly, as is surely apparent already, the argument of this book will be of great interest to many tort lawyers.

The book begins with a general overview of the place of strict liability in the history of tort law. It then examines the rather curious fragmentary actions that deal with the liability of common carriers and innkeepers and for fire, firearms and animals. It concludes, as I suspect most would be inclined to accept already, that the law is a bit of a mess here.

The real work begins with the investigation of *Rylands v Fletcher*. Gray examines the background to the decision itself and its subsequent judicial treatment. He also explores the influence of the case in Australia, Canada and the US. He then analyses the theoretical debates that have occurred in this area, concluding that the arguments in favour of *Rylands v Fletcher*, and generally of strict liability in this context, do not stack up.

In this regard, one of the very positive things about this book is the frankness with which its author expresses himself; specifically, that he does not try to conceal his impatience at what he is surely right to regard as an unacceptable state of affairs. Two things in particular rile him: the half-baked nature of the kind of policy analysis that is de rigueur in this area of tort scholarship and the timidity of judges who appear to recognise that something must be done but who cannot quite bring themselves to do it. For example, "Judges frankly acknowledge that the doctrine is 'not worth the effort', but timorously refuse to take the decision to get rid of it … it is time to put the doctrine out of its misery but, frankly, this requires judges with the

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