

BETWEEN CHAOS AND COSMOS: TONY WEIR IN THE CAMBRIDGE LAW JOURNAL

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ABSTRACT. *This article surveys Tony Weir’s case notes and book reviews for the Cambridge Law Journal between 1963 and 2002 in order to illuminate Tony’s unique genius as a legal academic and thinker. Reading Tony’s case notes and book reviews reveals that he cannot be characterised as either a “lumper” (someone who seeks to reduce the law down to a few elemental ideas and concepts) or as a “splitter” (someone who resists such a reduction). Instead, Tony’s genius lay in his possessing the Keatsian quality of “negative capability”. This quality allowed Tony to be both a lumper and a splitter at the same time, refusing to identify himself definitively with either way of thinking about the law.*

KEYWORDS: *tort, contract, negligence, economic torts, duty of care, insurance.*

I. LUMPERS AND SPLITTERS

Remarkably, Tony Weir never wrote an article for the Cambridge Law Journal. His contributions were confined to the case note and book review sections of the Journal, writing 31 case notes and 28 book reviews between 1963 and 2002. Of the 40 volumes of the Cambridge Law Journal that cover that period,¹ only eight of them are not graced with either a case note or book review by Tony.²

In this article, I will review Tony’s contributions to the Cambridge Law Journal through the lens provided by a distinction that first appeared in the field of botany, primarily in the correspondence of Charles

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¹ I disregard the special volume of the Cambridge Law Journal issued alongside its regular one in 1972, to mark the 50th anniversary of the Journal.

² The ‘missing’ volumes are 25 (1967), 29 (1971), 33 (1974), 38 (1979), 39 (1980), 42 (1983), 46 (1987) and 56 (1996). Tony’s absences in 1967, 1974, 1979, 1983 and 1996 can be easily explained: those years corresponded with the publication of, respectively, the 1st, 3rd, 4th, 5th and 8th editions of his classic *Casebook on Tort*. So, with the exception of 1971, 1980 and 1987, Tony contributed a case note or a book review (or both) to the Cambridge Law Journal every year that he could have been realistically expected to do so in the 40 years from 1963 to 2002.

Darwin.³ Writing to Darwin on 13 August 1855, Hewett C. Watson observed of two botanists that they were “representative men for the opposite factions in botany – ‘lumpers and splitters’”. “Lumpers”, Watson observed, “would reduce the species of Vascular plants to three score thousand, or perhaps much fewer” while “splitters” “would raise them to three hundred thousand”. Darwin seems to have been pleased with this distinction, using it himself in letters to J.D. Hooker on 1 August 1857⁴ and 17 April 1865.⁵

The distinction between Lumpers and Splitters – or the analogous one drawn by Isaiah Berlin between “hedgehogs” and “foxes”⁶ – is one of temperament, not effect. A Lumper is enchanted by elegance: if she can give a simple account of a seemingly complex phenomenon, she will take great satisfaction in doing so. A Splitter is delighted by detail: he is instinctively resistant to simplifications, and always inclined to make difficulties for Lumpers. But as Edward Newman, the true originator of the distinction between Lumpers and Splitters, observed in 1845: “The talents described under the respective names of ‘hair-splitting’ and ‘lumping’ are unquestionably yielding their power to the mightier power of Truth.”⁷ A conscientious Lumper will yield to a Splitter if the facts on the ground resist being reduced to the more elemental simplicity proposed by the Lumper; and a conscientious Splitter will yield to a Lumper if the facts do so allow.

It seems obvious that Lumpers dominated thinking about English private law over the course of the twentieth century – perhaps because law becomes ever easier to remember and teach the more Occam’s Razor is applied to it. The “must” in Lord Atkin’s famous statement that “there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances”⁸ marks him out as a Lumper. Similarly, Peter Birks was a Lumper. He initially sought to explain all instances of restitution in private law as based on a fourfold formula, where a claimant would be entitled to sue a defendant for restitution if: (1) the defendant was enriched (2) at the claimant’s expense; (3) the enrichment was “unjust” and (4) the claimant has no defence to the defendant’s claim.⁹ Birks subsequently argued that all cases where a defendant could be said to have been “unjustly enriched” at a claimant’s expense were cases where a defendant received a benefit

³ Darwin’s correspondence has been placed online by Cambridge University: “Darwin Correspondence Project”, available at www.darwinproject.ac.uk (last accessed 29 March 2021).

⁴ “It is good to have hair-splitters and lumpers.”

⁵ “How impartially Thomson adjusts the claims of ‘hair-splitters’ and ‘lumpers.’”

⁶ I. Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy’s View of History* (London 1953).

⁷ E. Newman, “Query Concerning the First Section of Mr Babington’s Genus *Centaurea*” (1845) 2 *The Phytologist* 924, 925.

⁸ *Donoghue v Stevenson* [1932] A.C. 562 (H.L.), 580.

⁹ P.B.H. Birks, *An Introduction to the Law of Restitution*, revised ed. (Oxford 1989).

from the claimant when there was no legal basis for the defendant's receiving that benefit.¹⁰

The twenty-first century has seen a retreat from these lumpy positions. It is generally acknowledged now that duties of care arise in a variety of different situations and no "general conception" of the situations giving rise to a duty of care is available to us.¹¹ Similarly, it is increasingly acknowledged that the concept of "unjust enrichment" is of limited utility in explaining the variety of situations when a claimant will be entitled to sue a defendant for restitution, or even just a significant number of those situations.¹² However, these retreats do not reflect a general shift towards adopting a Splitter mentality in thinking about private law, but are rather a case of "yielding... to the mightier power of Truth". The Lumpers have been forced to admit that they have overreached. But the Lumpers are still as dominant as ever, particularly when it comes to explaining at a deep level what private law is up to. At that level, Splitters are thin on the ground.¹³ Instead, those who are interested in the "philosophical foundations of private law" are nowadays presented with a huge menu of alternative, lumpy explanations of private law to choose from.¹⁴

So what was Tony? A Lumper, or a Splitter? I will argue that a close reading of his case notes and book reviews for the Cambridge Law Journal reveals that he was both, and that by being both, he was neither. He was something altogether more interesting, and it was part of his genius to be neither a Lumper nor a Splitter, but a *tertium quid* instead.

II. AGAINST THE MONOTHEORISTS

There are plenty of statements in Tony's case notes and book reviews that could be taken as indicating that he was a dyed in the wool Splitter. Tony seemed instinctively opposed to what he called "monotheorists": legal

¹⁰ P.B.H. Birks, *Unjust Enrichment*, 2nd ed. (Oxford 2000).

¹¹ *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] A.C. 736, at [21]–[30].

¹² P. Watts, "Unjust Enrichment: The Potion that Induces Well-meaning Sloppiness of Thought" (2016) 69 C.L.P. 289; L. Smith, "Restitution: A New Start?" in P. Devonshire and R. Havelock (eds.), *The Impact of Equity and Restitution in Commerce* (Oxford 2018); N.J. McBride, *The Humanity of Private Law, Part I: Explanation* (Oxford 2019), 194–98. Hold-outs are R. Stevens, "The Unjust Enrichment Disaster" (2018) 134 L.Q.R. 574, and A. Burrows, "In Defence of Unjust Enrichment" [2019] C.L.J. 521: their disagreements over when we can properly say that a defendant has been unjustly enriched at a claimant's expense conceal the fact that they agree that the concept of "unjust enrichment" (however defined) still has a lot going for it in terms of helping us make sense of the law.

¹³ The two most prominent I can think of are John Murphy (J. Murphy, "The Heterogeneity of Tort Law" (2019) 39 O.J.L.S. 455; J. Murphy, "Hybrid Torts and Contemporary Tort Theory" (2018) 64 McGill L. J. 1; and J. Murphy and J. Goudkamp, "The Failure of Universal Theories of Tort Law" (2016) 21 Legal Theory 47) and Steve Hedley (S. Hedley, "The Rise and Fall of Private Law Theory" (2018) 134 L.Q.R. 214; and S. Hedley, "Corrective Justice: An Idea Whose Time Has Gone?" in M. Del Mar and M. Lobban (eds.), *Law in Theory and History* (Oxford 2016)).

¹⁴ The entrées include: A. Brudner and J. Nadler, *The Unity of the Common Law*, 2nd ed. (Oxford 2017); J. Gardner, *From Personal Life to Private Law* (Oxford 2018); J. Goldberg and B. Zipursky, *Recognizing Wrongs* (Boston 2020); McBride, *The Humanity of Private Law*; A. Ripstein, *Private Wrongs* (Boston 2016); E. Weinrib, *The Idea of Private Law*, revised ed. (Oxford 2012).

academics who seek to reduce private law down to a few elementary principles or ideas and “do violence to existing rules to make them fit. One is reminded of Procrustes tailoring his guests to the bed, or of Groucho Marx taking the shears to the bits of clothes which stuck out of his suitcase”.¹⁵

A. The One Principle

Perhaps Tony’s most glorious stance against such lumpen views of private law is to be found in his case note on *The Hansa Nord*.¹⁶ He condemned the Court of Appeal’s “moralism” in not allowing a buyer to reject goods for being of unsatisfactory quality (even though they were still perfectly good for the buyer’s purposes), arguing that they had become “Messianic... adherents of the One Principle – Behave Reasonably” under which “One Principle, all distinctions must be as dross, save only the Ying and Yang of Reasonable and Unreasonable, Fair and Unfair or What I Like and What I Don’t”.¹⁷

The great vehicle for this “One Principle” was, in Tony’s view, the law of negligence and Tony was strongly resistant to what he called elsewhere “[t]he staggering march of negligence”.¹⁸ As far back as 1965, Tony warned that the decision in *Lee Cooper Ltd. v CH Jeakins & Sons Ltd.*¹⁹ showed “how Lord Atkin’s snail can become an Unruly Horse, Progress leads to Disaster, and Tort, eventually to Tax”.²⁰ Before *Lee Cooper*, Tony explained, “in a case of *theft* occasioned by carelessness, the possessor was liable to his bailor . . . and . . . in a case of *damage* to goods, the person who carelessly caused it . . . was liable to their owner” but *Lee Cooper* had the effect of making a possessor “liable to the owner in respect of the theft of goods received from someone else”.²¹ The result is to undermine the contractual arrangements between the possessor, owner and bailor (and their insurers) as to who would bear the risk of the goods being stolen: “one flick of Leviathan’s tail smashes the sensible arrangements of several business men who knew very well what they were about.”²²

Tony went on to observe that *Lee Cooper* is “not only a case of tort swallowing contract; it is also negligence dining out on the other torts, eating them up, and waxing dangerously fat” – in this case, negligence undermining the law on conversion. “Surely *something* was left of the law after Lord Atkin spoke”,²³ Tony lamented, observing that “[t]he law is a delicate mechanism; one part is geared to another. Do violence in one place and

¹⁵ J.A. Weir, “Tort Law. Edited by Ernest J. Weinrib” [1992] C.L.J. 388, 389.

¹⁶ [1976] Q.B. 44 (C.A.).

¹⁷ J.A. Weir, “Contract: The Buyer’s Right to Reject Defective Goods” [1976] C.L.J. 33, 37–38.

¹⁸ J.A. Weir, “The Staggering March of Negligence” in P. Cane and J. Stapleton (eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford 1998), 97–138.

¹⁹ [1967] 2 Q.B. 1 (C.A.).

²⁰ J.A. Weir, “Tort, Contract and Bailment” [1965] C.L.J. 186.

²¹ *Ibid.*, at 187, emphases in original.

²² *Ibid.*, at 189.

²³ *Ibid.*, at 190, emphasis in original.

you can expect trouble elsewhere. This decision does violence, and consequently raises a host of technical problems” which Tony invited readers to submit answers to, supporting “their conclusions with legal reasoning of the kind that *used* to be the glory of our law reports”.²⁴

B. Contract Law

Just as Tony was resistant to tort law becoming homogenised by being taken over by the law of negligence,²⁵ he was suspicious of the idea that we have a law of *contract* (singular) as opposed to a law of *contracts* (plural) and regularly inveighed against “the English law of contracts . . . having a General Part which is much too big”.²⁶ As he observed in the above case note on *The Hansa Nord*: “*Assumpsit* was doubtless a single action at law, but there is more than one kind of transaction in fact, and it is not a merit of the common law to fail to distinguish what a child can tell apart, who knows better than to offer ‘rent’ to the bus-conductor or a ‘premium’ to his barber.”²⁷

Unsurprisingly, then, Tony’s hackles were raised by Hugh Collins’s attempt to homogenise, and thereby differentiate, nineteenth-century contract law (“the classical law of contract”) and twentieth-century contract law (“the modern law of contract”): “If the author makes us think there has been a revolution in the law, it is only because his ‘classical law’ is a travesty and his ‘modern vision of contract’ a fantasy.”²⁸ Collins’s insistence that “we can be sure” that the mass of technical rules making up contract law is underpinned by “more fundamental principles, because they are necessary to give meaning and coherence to the technical rules”²⁹ reminded Tony of “what the hippies used to shout outside Highgate Cemetery: ‘Come on out, Karl Marx, we know you’re in there’” and the “principle of the Duchess in *Wonderland* that ‘Everything’s got a moral, if only you can find it’”.³⁰ Tony’s ire with Collins’s approach to contract law only eased on those occasions when Collins “sometimes becomes pleasingly pluralist, like a normal person, and accepts (if only to deride the suppositious classical law) that different rules have different ends”.³¹

²⁴ *Ibid.*, emphasis added.

²⁵ Cf. J.A. Weir, “Liability for Knowingly Facilitating Mass Breaches of Copyright” [1988] C.L.J. 348, 350: “Perhaps copyright is a law unto itself. Perhaps it should be.”

²⁶ Weir, “Contract: The Buyer’s Right to Reject”, 38. See also J.A. Weir, “Exception Clauses. By Brian Coote” [1965] C.L.J. 301, 304: “He [Brian Coote] realises that far too much of the law of contract is put by academic writers in the General Part – an uncharacteristic fault, surely – and he clearly divides off the contracts of bailment from the contract of sale.”

²⁷ Weir, “Contract: The Buyer’s Right to Reject”, 38. The same point is made 16 years later and at greater length in J.A. Weir, “Contracts in Rome and England” (1992) 66 *Tulane L.R.* 1615, 1639–40.

²⁸ J.A. Weir, “The Law of Contract. By Hugh Collins” [1986] C.L.J. 503, 504.

²⁹ H. Collins, *The Law of Contract*, 1st ed. (London 1986), 16.

³⁰ Weir, “The Law of Contract”, 505.

³¹ *Ibid.*, at 507–08.

C. Simplification

Tony also seemed instinctively hostile to proposals that the law can or should be simplified. Applauding the House of Lords' acceptance in *Caparo Industries Plc. v Dickman*³² that it is impossible to come up with a determinate test that will tell us in any given case whether or not a defendant owed a claimant a duty of care, Tony observed:

we must not seek a magic phrase, charm or spell to get us out of the cave of obscurity, nor try to dream up a hermeneutic concept to light our path when it comes to the turning “Duty” or “No Duty” The categories of negligence may not be closed, but they are discrete, not reducible to examples of a statable principle. Cases in the individual categories have common factors, but the categories themselves have no common denominator.³³

Tony's hostility to simplification led him to be wary of proposals to rid the law of supposed anomalies, which Tony tersely defined as “distinctions [that] do not appeal to the observer”.³⁴ So Stephen Waddams's call, in his book on products liability,³⁵ for the courts to hold manufacturers of defective goods strictly liable for the harms caused by those goods being defective on the ground that doing so “would help to rationalise the law” earned the following response from Tony:

This is a refreshingly old-fashioned reason for innovation but it is nevertheless inadequate, for although nomopoly, the game professors get up to with laws, is played with funny money just like the more familiar pastime, the costs of implementation are real. One would therefore like to see some moral or economic argument for imposing on businesses the burden of paying for all the harm caused by the defective things they innocently provide or use.³⁶

Similarly, Tony observed of Nicholas Mullany and Peter Handford's “crusading book” on liability in tort for psychiatric illness,³⁷ which called for tort law to treat “damage to the mind, psychiatric illness, in just the same way as harm to the physical body” so that a defendant would be liable for causing a claimant to suffer “such harm [so long as it] was a reasonably foreseeable result of the defendant's misconduct”:

Their credo leads the authors to comminate most decisions in all jurisdictions, as well as reprobate some legislative interventions. We must ask, as they do not, whether those law-makers were simply stupid and brutal, or whether there may not be a credible, or at any rate statable, case for saying that the two kinds of harm do really call for differential treatment in law. After all,

³² [1990] 2 A.C. 605 (H.L.).

³³ J.A. Weir, “Statutory Auditor not Liable to Purchaser of Shares” [1990] C.L.J. 212, 212–13.

³⁴ J.A. Weir, “Products Liability. By S. M. Waddams” [1976] C.L.J. 178, 179.

³⁵ S. Waddams, *Products Liability* (Toronto 1974).

³⁶ Weir, “Products Liability”, 179.

³⁷ N.J. Mullany and P. Handford, *Tort Liability for Psychiatric Damage: The Law of 'Nervous Shock'* (Sydney 1993).

they receive different treatment from doctors. . . As to tort, is it really sensible to equate thin skins and thin skulls? Surely not.³⁸

III. CONSTRUCTING COSMOS

Tony's case notes and book reviews provide us with a great deal of evidence, then, of Tony's being a fully paid-up member of the Splitterati. However, there is at least as much evidence on the other side that, like any good Lumper, Tony was happy, on occasion, to adopt reductive formulations of the law despite the fact that doing so might involve doing "violence to existing rules to make them fit".

A. The Economic Torts

This tendency is nowhere more clearly evidenced than in Tony's early case note on *Rookes v Barnard*³⁹ and *Stratford (JT) Sons v Lindley*⁴⁰ from which this article derives its title.⁴¹ Tony argued that the decision in *Rookes* suggests "a principle of order for the private law of economic torts". He went on to make the Lumper style statement that "[i]t was high time that this house was put in order" (a Splitter would object "Given their differences, why do you think the economic torts are in the same house?") because "The current textbooks list many different economic torts with separate specifications, wholly lacking in principle, and therefore difficult and unprofitable to master". He continued:

If all that *Rookes* achieved was the christening of a new nutshell tort of "intimidation," then legal science would have no reason to be very grateful; but it may be seen to have authorised an explanatory and creative principle of great importance in this difficult area. The principle is that it is tortious intentionally to damage another by means of an act which the actor was not at liberty to commit. Not only does this principle explain and synthesise the torts of deceit, malicious falsehood, inducing breach of contract and intimidation, but it can be beneficially extended over the whole range of its logical application, if only certain fallacies are removed.⁴²

This was a theme that Tony would pursue over 30 years later in his 1996 Clarendon Law Lectures, and later book, on the economic torts,⁴³ arguing that the economic torts – including the tort of inducing a breach of contract⁴⁴ – are all instances of "the general tort of causing harm by

³⁸ J.A. Weir, "Tort Liability for Psychiatric Damage: The Law of 'Nervous Shock'. By Nicholas J. Mullany and Peter R. Handford" [1993] C.L.J. 520, 521.

³⁹ [1964] A.C. 1129 (H.L.).

⁴⁰ [1965] A.C. 269 (H.L.).

⁴¹ J.A. Weir, "Chaos or Cosmos? *Rookes*, *Stratford* and the Economic Torts" [1964] C.L.J. 225.

⁴² *Ibid.*, at 226.

⁴³ J.A. Weir, *Economic Torts* (Oxford 1997).

⁴⁴ *Ibid.*, at 28.

wrongful means whereunder the successful plaintiff must have been aimed at and hurt by a defendant using wrongful means in order to cause that harm”.⁴⁵

The problems with this synthesis are well-known. First, the torts of deceit and inducing breach of contract can be committed by a defendant in relation to a claimant even if the defendant was not aiming to hurt the claimant in deceiving the claimant or persuading a third party to breach their contract with the claimant. Second, the tort of lawful means conspiracy obviously does not require that any wrongful means be used by a defendant to harm the claimant. It is enough that the defendant had no “just cause or excuse” for combining with others in order to harm the claimant.⁴⁶ Of course, Tony was too good a lawyer not to be aware of these points. But he was also too fond of his synthesis to be able to give it up.

B. The Law of Negligence

Likewise, when it came to the law of negligence, Tony was happy to adopt a reductive approach to the four requirements that traditionally have to be satisfied if a claimant (C) is to be allowed to sue a defendant (D) in negligence: (1) D owed C a duty of care; (2) D breached that duty of care; (3) D’s breach caused C to suffer loss; and (4) that loss was not too remote a consequence of D’s breach of duty.

On requirement (1), Tony argued that in asking whether D owed C a duty of care, we are not asking “whether [D] was actually under a ‘duty’ (which can never be anything other than a mere notion) but whether in the circumstances he should be held liable, *i.e.* laid by the heels and made to cough up”.⁴⁷ As such, “our notion of ‘the duty of care’ is really quite useful, not a fifth wheel on the carriage, as Buckland said, but a brake, and a necessary one, more open than the French habit of surreptitiously putting a foot on the ground while keeping one’s head in the air”.⁴⁸ However, thinking of duties of care in this way renders requirement (2) problematic – what can D have breached if the duty of care he is said to have owed C under (1) does not actually exist? So for requirement (2), we have to substitute the requirement that D was “careless”, or “at fault”, or (probably Tony’s preferred formulation) “acted unreasonably”.

Tony seems to have thought that requirement (4) could be subsumed under requirement (3) – that considerations of remoteness of damage go to the question of what losses could be said to have been caused by D’s

⁴⁵ *Ibid.*, at 27.

⁴⁶ *JSC BTA Bank v Abyazov (No 14)* [2018] UKSC 19, [2020] A.C. 727, at [10].

⁴⁷ J.A. Weir, “Fixing the Foundations” [1991] C.L.J. 24, 24.

⁴⁸ J.A. Weir, “The Limits of Liability: Keeping the Floodgates Shut. Edited by J. Spier” [1999] C.L.J. 643, 644.

unreasonable conduct.⁴⁹ Perhaps for this reason, Tony was hostile to *The Wagon Mound (No 1)*'s ruling⁵⁰ that a negligent defendant could only be held liable for the foreseeable consequences of their negligence: "it is now clear to most people. . .that the foreseeability doctrine is not only delusive but actually impractical: it simply does not work in cases of egg-shell skulls or ulterior harm."⁵¹ Whether or not D's negligence caused C to suffer a particular loss seems only remotely (!) connected with the question of whether it was foreseeable that C would suffer that kind of loss as a result of D's negligence. After all, it was not foreseeable at the time that (a) Marie Curie's handling of pitchblende and radioactive isotopes would result in (b) her dying of cancer, but no one in their right mind would rely on that fact to deny that (a) caused (b).

Following Tony's line of reasoning, we can say that the four requirements for C to be able to sue D in negligence that we began with can be reduced to two, so that C will be allowed to sue D in negligence if (i) D's unreasonable conduct caused C to suffer some kind of loss, (ii) in circumstances where the law will hold D liable to compensate C for suffering that kind of loss.

If this is right, it is no wonder that Tony thought that the law of negligence had the potential to swallow up the rest of tort law. The only part of tort law that could be left undisturbed by the law of negligence is that part that makes defendants liable for losses caused by their acting *reasonably*. But, as Tony observed in a case note on *Chic Fashions (West Wales) Ltd. v Jones*⁵² – where the Court of Appeal refused to hold the police liable for losses caused by their seizing goods belonging to the defendant that they reasonably thought were stolen but had no authority to seize – examples of defendants being held liable for causing loss by acting reasonably were becoming rarer and rarer in the law of tort:

The great new text is that just as one is responsible for the damage one unreasonably causes so one is not responsible for the damage one reasonably causes – a simple text, like the mottoes done in poker work over tiny fireplaces or graven on seaside mementoes. And it is no more suitable than they for the resolution of complex matters.⁵³

That Tony thought that the four traditional requirements for C to be able to sue D in negligence could be reduced down to requirements (i) and (ii) is confirmed by his nonplussed reaction to the Court of Appeal's decision in *Reeves v Commissioner of Police of the Metropolis*.⁵⁴ In that case, Martin

⁴⁹ Tony's other writings confirm this point. In his *An Introduction to Tort Law*, 2nd ed. (Oxford 2006), the law on remoteness of damage is dealt with in his chapter on 'Causation'. The same approach is taken in his *A Casebook on Tort*, 10th ed. (London 2004), at 215–22.

⁵⁰ [1961] A.C. 388 (P.C.).

⁵¹ J.A. Weir, "Causation in the Law. By H.L.A. Hart and Tony Honore" [1985] C.L.J. 477, 478.

⁵² [1968] 2 Q.B. 299 (C.A.).

⁵³ J.A. Weir, "Police Power to Seize Suspicious Goods" (1968) 26 C.L.J. 193, 194–95.

⁵⁴ [1999] Q.B. 169 (C.A.).

Lynch – being of sound mind – killed himself by hanging while he was held in a police cell in Kentish Town. It was conceded that the police had owed Lynch a duty of care to see that he did not kill himself while in their custody, and had breached that duty by not checking regularly enough on Lynch. However, the police argued that for the purposes of a claim against them under the Fatal Accidents Act 1976, their breach did not cause Lynch’s death as his attempting to kill himself amounted to a *novus actus interveniens*. They further argued that even if this were not so, his dependants were disabled from suing under the 1976 Act as Lynch was *volenti* the risk of being injured as a result of his suicide attempt and would therefore have not been able to sue the police had he survived the attempt.

The majority of the Court of Appeal held that these arguments could not succeed: “If the police’s obligation was to guard against suicide, that is, to protect Mr. Lynch from a deliberate act against his own life, I do not see how they can be or should be exempted from liability because that deliberate act in fact occurred.”⁵⁵ In other words, allowing the police to escape liability on the basis of *novus actus* or *volenti* would make the police’s duty of care meaningless: they could go so far as to hand Lynch a revolver and tort law could not touch them if Lynch used it on himself. However, this argument only works if we accept that duties of care actually exist and are meant to be complied with and therefore cannot be rendered futile by the operation of other legal doctrines. As Tony observed in a different context: “Rights must be vindicated, not just declared: the law must get out of the books and into the streets.”⁵⁶

Tony’s reductionist view of the law of negligence led him to reject the Court of Appeal’s decision in *Reeves*, resting as it did on a non-reductionist interpretation of negligence that sees duty, and the importance of defendants being held liable for their breaches of duty, as lying at the heart of liability in negligence. Arguing that “[d]uty’ is an operator, not a real number”, Tony dismissed the majority’s reasoning in the Court of Appeal as “nothing short of dotty”,⁵⁷ and as amounting to an “algebraic and Q.E.D. approach”⁵⁸ to the case. While Tony did not write a case note on the House of Lords’ decision in *Reeves*, he cannot have been any more impressed with that decision, which affirmed the Court of Appeal’s reasoning on this point, ruling that “it would make nonsense of the existence of...a duty [to guard against loss caused by the free, deliberate and informed act of a human being] if the law were to hold that the occurrence

⁵⁵ *Ibid.*, at 178 (Buxton L.J.). See also 196–97 (Lord Bingham C.J.).

⁵⁶ J.A. Weir, “The Quest for Security: Employees, Tenants, Wives. By Tony Honoré” [1984] C.L.J. 377, 378.

⁵⁷ J.A. Weir, “Suicide in Custody” [1998] C.L.J. 241, 243.

⁵⁸ *Ibid.*, at 244.

of the very act which ought to have been prevented negated causal connection between the breach of duty and the loss”.⁵⁹

C. Theory

We have already seen that Tony in his Splitter mode was highly critical of “monotheorists” of private law. But on other occasions, he showed some attraction to their claims. In discussing Brian Coote’s book on exemption clauses⁶⁰ – which argues that exemption clauses work not to shield a wrongdoer from liability for their wrong but to prevent someone becoming a wrongdoer by allowing them to do what would otherwise be wrong – Tony pointed out the difficulties with this view,⁶¹ but at the same time observed that “it would surely be better to have a theory which is too broad than to have no theory at all”.⁶² Tony also lavished praise on Ernest Weinrib’s work,⁶³ despite both Weinrib’s being the monotheorist’s monotheorist, and Tony’s concession that Weinrib’s theory of tort law cannot explain tort liability for omissions.⁶⁴ Perhaps because of Weinrib’s influence, Tony observed that an inquiry into tort law that proposed to ignore “the concept of corrective justice” because it “is not suitable for empirical testing” was guilty of “ignoring the baby in the bath”.⁶⁵

IV. NEGATIVE CAPABILITY

One way of making sense of the seeming tergiversations set out in the previous two sections is to say that Tony was neither a Lumper nor a Splitter. He was a neutral umpire, always “yielding to the mightier power of Truth”. As a result, Tony adopted a lumpy view of the law where it was warranted and refused to do so when it was not. However, it should be obvious from the previous two sections that Tony did not write like a neutral umpire, dispassionately calling balls and strikes as he saw them, but rather a valiant

⁵⁹ [2000] 1 A.C. 360 (H.L.), 367–68 (Lord Hoffmann). Tony’s *Casebook on Tort*, 10th ed., contains a substantial extract from the House of Lords’ decision in *Reeves* at 242–45 but nothing from Lord Hoffmann’s judgment and no commentary (critical or otherwise) on it. *Reeves* is described as ‘astounding’ in Tony’s *An Introduction to Tort Law*, 2nd ed. (at 6), but more for the finding of a duty to protect people from harming themselves, than for its reasoning on the *novus actus/volenti* point, which is set out (at 90) without comment.

⁶⁰ B. Coote, *Exception Clauses* (London 1964).

⁶¹ J.A. Weir, “Exception Clauses” [1965] C.L.J. 301, 302–03.

⁶² *Ibid.*, at 303.

⁶³ J.A. Weir, “Liability and Responsibility. Essays in Law and Morals. Edited by R.G. Frey and Christopher W. Morris” [1991] C.L.J. 553, 554: “‘The fecundity of private law as an area of philosophic reflection’ is amply demonstrated by a beautifully composed piece by Ernest Weinrib. He responds to the asserted tension between individual liberty and the community of society by demonstrating the coherence of the law of tort when seen as an attempt to realise corrective justice and do obeisance to the ‘juridical honour’ of the parties: Aristotle and Kant provide the first and second subjects in this admirably developed sonata”; Weir, “Tort Law” [1992] C.L.J. 388: “‘Tort theorising involves a transition from the lawyer’s understanding of tort law into an inquiry into the nature of this understanding’, as Ernest Weinrib tells us in his admirable essay.”

⁶⁴ *Ibid.*, at 389.

⁶⁵ J.A. Weir, “Essays for Patrick Atiyah. Edited by Peter Cane and Jane Stapleton” [1992] C.L.J. 375, 376.

warrior for whichever side – Lumper or Splitter – he was representing at the time. The puzzle is to explain how he seems to have ended up fighting for both sides *at the same time*, and with equal conviction in each case.

In my view, the solution to the puzzle is that Tony possessed an extremely rare quality, which the poet John Keats called “negative capability”. Understanding what this is, and how it works, is extremely difficult for the vast majority of us (including me, a conscientious Lumper) who do not possess “negative capability”. This is for the same reason that underlay Wittgenstein’s observation that “[i]f a lion could talk, we could not understand him”.⁶⁶ Only lions can understand lions. But we lambs are at least capable of understanding what a lion is, and to understand why Tony was a lion and not like the rest of us, I think we have to go back to Keats.

A. Keats⁶⁷

The term “negative capability” was coined by Keats in a letter written in December 1817:

I had not a dispute but a disquisition with Dilke, on various subjects; several things dovetailed in my mind, & at once it struck me, what quality went to form a Man of Achievement especially in Literature & which Shakespeare possessed so enormously – I mean *Negative Capability*, that is when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason.⁶⁸

This ability – or capability – is *negative*, because it allows the holder to *abstain* from doing what comes naturally to any human being, which is that when you are in “uncertainties, Mysteries, doubts” you will try to resolve them and try to come down on one side or the other of the issue by “reaching after fact & reason”. Keats’s friend Dilke lacked this ability to abstain from doing what comes naturally: “Dilke was a Man who cannot feel he has a personal identity unless he has made up his Mind about every thing.” Whereas Keats thought that “[t]he only means of strengthening one’s intellect is to make up ones mind about nothing – to let the mind be a thoroughfare for all thoughts”.⁶⁹ Possessing this negative capability, as Shakespeare did, allows one to achieve

⁶⁶ L. Wittgenstein, *Philosophical Investigations*, 3rd ed. (London 1968), 225. Two paragraphs before this observation, Wittgenstein writes: “We also say of some people that they are transparent to us. It is, however, important as regards this observation that one human being can be a complete enigma to another. We learn this when we come into a strange country with entirely strange traditions; and, what is more, even given a mastery of the country’s language. We do not understand the people. (And not because of not knowing what they are saying to themselves.) We cannot find our feet with them.”

⁶⁷ See L. Ou, *Keats and Negative Capability* (London 2009), on which the following section draws heavily.

⁶⁸ H.E. Rollins (ed.), *The Letters of John Keats, 1814–1821* (Boston 1958), vol. I, 193, emphasis in original.

⁶⁹ *Ibid.*, vol. II, at 213.

the poetical Character [which is a character that] is not itself – it has no self – it is every thing and nothing – It has no character – it enjoys light and shade; it lives in gusto, be it foul or fair, high or low, rich or poor, mean or elevated – It has as much delight in conceiving an Iago as an Imogen. What shocks the virtuous philosop[h]er, delights the camelion Poet . . . A poet is the most unpoetical of any thing in existence; because he has no Identity – he is continually in for – and filling some other Body.⁷⁰

Keats's language echoed that of his contemporary, the critic William Hazlitt, who argued that:

The striking peculiarity of Shakespeare's mind was its generic quality, its power of communication with all other minds – so that it contained a universe of thought and feeling within itself, and had no one peculiar bias, or exclusive excellence more than another. He was just like any other man, but that he was like all other men. He was the least of an egotist that it was possible to be. He was nothing in himself; but he was all that others were, or that they could become.⁷¹

The kind of negative capability that Keats focused on and that he thought Shakespeare possessed – being capable of being in uncertainty and not seeking to resolve the uncertainty – is only one kind of negative capability, one kind of ability to abstain from doing what comes naturally to human beings. I think that the kind of negative capability that Tony possessed was a different and stronger kind of negative capability, one that was best captured by F Scott Fitzgerald when he wrote that “the test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function”.⁷² This is a stronger kind of negative capability than the one Keats identified because it is surely easier for a human being to live with “uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason” than it is for a human being to violate Aristotle's law of non-contradiction (“[i]t is impossible for anyone to suppose that the same thing is and is not”)⁷³ and take their stand with Walt Whitman instead:

Do I contradict myself?
Very well then I contradict myself,
(I am large, I contain multitudes.)⁷⁴

⁷⁰ *Ibid.*, vol. I, at 386–87.

⁷¹ A.R. Waller and A. Glover (eds.), *The Collected Works of William Hazlitt* (London 1902), vol. V, 47. To the same effect, see H. Bloom, *Shakespeare: The Invention of the Human* (New York 1998).

⁷² F.S. Fitzgerald, “The Crack-up: Part I”, *Esquire Magazine*, available at <https://www.esquire.com/life-style/a4310/the-crack-up/> (last accessed 29 March 2021). On the subject of first-rate intellects, see J. A. Weir, “The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century. By Oldham James” [1993] 52 C.L.J. 319, 320: “Mansfield undoubtedly had a first-rate *legal* mind, but that is hardly ‘real superiority’” (emphasis in original).

⁷³ Aristotle, *Metaphysics*, IV:3, line 10 (translated), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:abo:tlg:0086,025:4> (last accessed 29 March 2021).

⁷⁴ W. Whitman, “Song of Myself” in W. Whitman, *Leaves of Grass*, 5th ed. (New York 1871), section 51.

The two contradictory beliefs that vied within Tony's mind were, of course, the belief that private law represents an intelligible moral order, or is at least capable of being rendered intelligible, and the belief that private law is a hopelessly and irredeemably confused mess. As I now hope to show, Tony's genius lay in his refusal to finally come down on one side or the other of these beliefs but to allow these two beliefs free rein to contend with each other in his writings.

B. The Uses of Contradiction

The principal virtue of Tony's negative capability was its unpredictability. Almost all legal writers who want to argue a point plod along well-worn track lines to a pre-determined terminus: they set out some premises that they hope their readers accept and then combine them to produce a conclusion that the readers will be forced to accept by sheer force of logic. But with Tony you could not know where he was going in a case note because his negative capability injected an element of drama into the proceedings. In reading a Tony case note you are watching two opposed belief systems fighting it out, and it is impossible to tell who will win, or even who has won when the battle is over. This is nowhere better shown than in a brilliant series of case notes written by Tony on cases involving three parties or more.⁷⁵

These kinds of cases are especially troubling for those Lumpers who believe that private law represents a coherent and intelligible body of law. This is because private law's "classifications of wrongfulness deal in pairs only; two is legal company; the third man seems *de trop*".⁷⁶ When the bipolar relationships established by private law start combining together, the effects can be unsatisfactory.

Consider, for example, the situation where A negligently damages property belonging to B, which is insured against such damage with C. B claims on her insurance policy with C, who pays up. Tony in Lumper mode ("*Simple*") remarks: "what could be more satisfactory?"⁷⁷ But Tony in Splitter mode ("*Complex*") is quick to point out the host of difficulties to which C's payment gives rise. First, C's payment to B should have no effect on B's right to sue A for damages, because then the premiums B paid on her insurance policy with C will have benefited A, not B.⁷⁸ But if B goes on to sue A for damages for the damage to her property she "would be profiting from a double recovery, and [her] enrichment would

⁷⁵ Weir, "Tort, Contract and Bailment"; J.A. Weir, "Title to Sue in Negligence for Property Damage" [1968] C.L.J. 18; J.A. Weir, "Doing Good by Mistake: Restitution and Remedies" [1973] C.L.J. 23; J.A. Weir, "Subrogation and Indemnity" [2012] C.L.J. 1; J.A. Weir, "Suit by First Contractor for Damage to Second Contractor's Goods" [1977] C.L.J. 24.

⁷⁶ Weir, "Chaos or Cosmos?", 227.

⁷⁷ Weir, "Suit by First Contractor", 24.

⁷⁸ *Bradburn v Great Western Railway Co.* (1874) L.R. 10 Exch. 1.

be unjust since [she] is entitled to compensation only, whether from tortfeasor or insurer".⁷⁹ *Simple* observes that the law deals with this problem by subrogating C to B's rights to sue A so that only C benefits from the exercise of those rights.⁸⁰

But *Complex* points out that doing this creates a second, more substantial difficulty. If C is subrogated to B's rights to sue A, C can bring a claim against A in B's name and thereby effectively get A to compensate it for the fact that it has had to pay out to B. This is so even though, had C sought to sue A for such compensation in its own name, the claim would have dismissed on the basis that C's claim was for pure economic loss and that loss was caused by a stranger, A.⁸¹ So the effect of subrogating C to B's right to sue A is

to procure that the *only* persons who have a claim in respect of the financial loss caused to them by the carelessness of strangers are those who have been paid to take the risk of that loss – strange bedfellows to put in the best room while those who have suffered financial loss they have neither undertaken nor caused are put in an outhouse.⁸²

To deal with this problem, *Simple* proposes to bring the law in line with the "basic value-judgments"⁸³ of tort law in refusing to allow those who suffer pure economic loss at the hands of strangers to recover. This could be done through

quite a simple little Act . . . to the effect that insurers should no longer be able to sue, whether by subrogation or assignment, persons liable to their insured save, perhaps, to the extent that those persons are themselves insured against liability. The best way to achieve this result would no doubt be to take the bull by the horns and provide that a person who is entitled and able to recover in respect of any loss or liability from an insurer or other indemnitor should to that extent be unable to recover from any other person, unless, perhaps, that other person is himself entitled and able to recover from an indemnity insurer.⁸⁴

Complex counters that "[i]t need hardly be said that there is not the slightest chance of this being done"⁸⁵ and also points out that *Simple*'s "simple little Act" seems inconsistent with "the root principle of the law of tort . . . that the person at fault should pay".⁸⁶ Against this, *Simple* argues, perhaps a little weakly, that "fault need not nowadays be serious to entail liability" and

⁷⁹ Weir, "Subrogation and Indemnity", 2.

⁸⁰ *Lord Napier and Ettrick v Hunter* [1993] A.C. 713 (H.L.).

⁸¹ *Simpson & Co. v Thomson* (1877) 3 App. Cas. 279 (H.L.(Sc.)).

⁸² Weir, "Subrogation and Indemnity", 5, emphasis in original.

⁸³ *Ibid.*, at 5.

⁸⁴ *Ibid.*, at 7.

⁸⁵ *Ibid.*, at 7.

⁸⁶ *Ibid.*, at 4.

that the law on subrogation is “not part of the law of tort at all, whose role is exhausted once the primary victim is paid”.⁸⁷

Nothing is resolved at the end of this dialectic,⁸⁸ and indeed there are certain aspects of *Simple*'s position that are inconsistent with positions adopted by him in other contexts.⁸⁹ But by allowing his negative capability full rein over the issues raised by C's payment to B as a result of A's carelessly damaging B's property, Tony gives us a much better idea of the obstacles that lie in the way of seeing private law as a morally coherent body of law, as well as some idea as to how those obstacles might be overcome. But to do this took time – a drama has to have its beginning, middle and end. And that got Tony into trouble with the editors of the Cambridge Law Journal when it came to his 1973 case note on *Morris v Ford Motor Company*,⁹⁰ which was rejected for being over twice the word limit they were imposing on case notes.⁹¹ Tony was rightly affronted⁹² – genius has its privileges – and did not write another case note for the Cambridge Law Journal for three years. The editors won in the long-run: the lion was tamed and Tony's case notes after 1973 were much shorter than they were before 1973. But what we lost thereby were further opportunities to see Tony's negative capability given licence to express itself fully in discussing whether a particular case exposed the law as being an ass⁹³ or a stallion.⁹⁴

⁸⁷ *Ibid.*, at 4.

⁸⁸ Cf. Weir, “Doing Good by Mistake”, which concludes (at 28) “Question: What are the rights of a bona fide purchaser who improves a chattel to which he has no title?” when this was the very question that was the subject of the case note.

⁸⁹ See Weir, “Title to Sue in Negligence for Property Damage”, at 21, where *Simple* is much keener on making the tortfeasor pay in the case where A negligently damages property that belongs to B but which C has contracted to buy whatever its condition. C cannot sue A as C's loss is purely economic, but can B, even though B has suffered no financial loss as a result of his property being damaged? If B cannot “the result of denying [C]'s suit in tort is that [A] does not have to pay anyone for the damage done ... by his carelessness, [which] is odd”.

⁹⁰ [1973] Q.B. 792 (C.A.).

⁹¹ After Tony's death in 2011, the case note was published in [2012] C.L.J. 1.

⁹² See P. Giliker, “Mr Tony Weir (1936–2011)” in J. Goudkamp and D. Nolan (eds.), *Scholars of Tort Law* (Oxford 2019), 356: “not one to take defeat lightly, he had the note privately printed [and] to emphasise his sense of grievance ... had a cover printed [for the note] that exactly resembled the pale blue as well as the fonts of the *Cambridge Law Journal*.”

⁹³ See J.A. Weir, “Swag for the Injured Burglar” [1996] C.L.J. 182, 182: “This deliberate refusal to take manifestly material considerations into account can only confirm the layman's view that ‘the law is a ass – a idiot’” and, at 184: “This decision is the latest and worst example of the courts' very negative attitude to self-help Whose law do they think it is, anyway?” See also J.A. Weir, “*Nec Tam Consumebatur* ... : Frustration and Limitation Clauses” [1970] C.L.J. 189, 189: “You don't need hard cases to make bad laws these days.”

⁹⁴ See Weir, “Statutory Auditor”, 214: “Allegedly the directors of Fidelity were fraudulent. Greed foiled by fraud is not quite maiden virtue rudely strumpeted, but it is hurtful all the same, and none the less so when the fraud is facilitated by negligence. But if Caparo were conned out of their booty, let them go against the vendors for fraud or breach of contract. Let not the predator turn and rend those who failed to catch the fraudster who succeeded in catching him. *Caveat praedator* is a sound and moral rule ... Caparo's claim was apparently for £13m. They can sue Fidelity's previous directors, but all they can do to their auditors is sack them. Quite right too.”

C. Forms of Expression

Returning to where I began, seeing Tony as someone who was endowed with negative capability also helps explain why his contributions to the Cambridge Law Journal took the form of case notes and book reviews, rather than articles. With a case note or book review, the focus is on the case that is being commented on or the book that is being reviewed. There is no need, in writing a case note or a book review, for the author to commit to any particular position. Articles are different: in writing an article, there is a greater need to nail one's colours to the mast.

But this is not necessarily the case. The form of extended writing that would have most suited Tony's negative capability is the Platonic dialogue, and just as Shakespeare was the greatest exemplar of the kind of negative capability Keats focused on, Plato possessed to a greater degree than any human being in history the kind of negative capability that I believe Tony also possessed. Unfortunately for Tony, using Platonic dialogues as a means of discussing the law died out in the sixteenth century,⁹⁵ and while he was the only academic who had the literary style, wit and negative capability required to be able to revive the practice in the twentieth,⁹⁶ the possibility is likely never to have occurred to him.

Instead, when he did write articles, Tony's negative capability manifested itself in those articles by virtue of their being almost exclusively focused on the concept of *duality*, whether that was the duality involved in: (1) different legal systems having to co-ordinate together,⁹⁷ or (2) a legal system having both rules and also rules-about-rules that exist to modify how the law's rules operate,⁹⁸ or (3) comparing how different legal systems deal with similar problems,⁹⁹ or (4) comparing different approaches to the same problem;¹⁰⁰ or (5) comparing different legal personalities.¹⁰¹ It is no accident that the weakest article Tony ever wrote saw him come off the fence and down strongly on one side, when discussing the legal issues

⁹⁵ Christopher St. Germain's *Dialogus de Fundamentis Legume Anglie et de Conscientia* (or *Doctor and Student*) was published in 1528, and Sir John Fortescue's *De Laudibus Legem Angliae* was published in 1543.

⁹⁶ J.D. Gordon, "A Dialogue About the Doctrine of Consideration" (1990) 75 Cornell L.R. 987 makes the point for me. While Gordon's article is amusing, the client and the lawyer in Gordon's dialogue are sock puppets for his views on contract law and do not come alive and speak independently in the way the characters in a true Platonic dialogue would.

⁹⁷ J.A. Weir, "Divergent Legal Systems in a Single Member State" [1998] *Zeitschrift für Europäisches Privatrecht* 564; J.A. Weir, "European Directives Protective of the Individual Consumer" [2002] *Economia e diritto del terziario* 443; J.A. Weir, "Difficulties in Transposing Directives" [2004] *Zeitschrift für Europäisches Privatrecht* 595.

⁹⁸ P. Catela and J.A. Weir, "Delict and Torts: A Study in Parallel" (1964) 38 *Tulane L.R.* 221 (Part II, on abuse of rights); J.A. Weir, "Shields and Swords" (1983) 7 *Trent L.J.* 1.

⁹⁹ P. Catela and J.A. Weir, "Delict and Torts: A Study in Parallel" (1963) 37 *Tulane L.R.* 573 (Part I), (1964) 38 *Tulane L.R.* 664 (Part III, on damage), (1965) 39 *Tulane L.R.* 701 (Part IV, on damage); Weir, "Contracts in Rome and England".

¹⁰⁰ J.A. Weir, "All or Nothing?" (2004) 78 *Tulane L.R.* 511.

¹⁰¹ J.A. Weir, "Friendships in the Law" (1991-92) 6/7 *Tulane Civil Law Forum* 61; J.A. Weir, "Two Great Legislators" (2006) 21 *Tulane European & Civil Law Forum* 35.

raised by the 1984–85 miners' strike.¹⁰² With his genius for negative capability set aside (except for the question mark he inserted at the end of the title of his article), the article drags, and Tony's characteristic gusto and brio is almost wholly absent.

Also characteristic of Tony's negative capability in writing long-form works was his insistence that the Clarendon Press retitling the second edition of his book on tort law for the Clarendon Law Series. The first edition had been entitled (without consulting Tony) *Tort Law*, and Tony told them the second edition should be called *An Introduction to Tort Law*. His book was not intended to take a stand on any issues relating to tort law, but rather to help others begin to find their feet in the subject.

V. TONY

Tony's negative capability made him as inscrutable as his cats, Donoghue and Stevenson: one never knew exactly what Tony's position was in discussing an issue with him. The Tony who wrote that "[t]ort is what is in the tort books, and the only thing holding it together is their binding"¹⁰³ was the same Tony who objected to the law of negligence being made to cover both:

the facts of the typical negligence suit – a traffic accident – [and] those of the present case [*Hedley Byrne & Co. Ltd. v Heller & Partners*¹⁰⁴]... [which combine] the weakest form of act with the weakest form of causation and the weakest form of damage. [Negligence] can accommodate both only at a most un-English level of abstraction; the rule of the road is not easily applied to the labyrinths of commerce.¹⁰⁵

Why can't the law of negligence be that accommodating if tort law is the ultimate flexible friend, capable of covering any kind of wrongdoing or cause of action? However, the question is beside the point. If we look to Tony for definitive answers to such questions,¹⁰⁶ we will deprive ourselves of the real benefit of his marvellous company. And that is twofold.

The first is the sheer exhilarating fun involved in witnessing one of the great minds of our time working at double the intensity of normal mortals, and admiring the brilliant sparks thrown off as it proceeds.¹⁰⁷ The second is

¹⁰² J.A. Weir, "A Strike Against the Law?" (1986) 46 Maryland L.R. 133.

¹⁰³ Weir, *An Introduction to Tort Law*, ix.

¹⁰⁴ [1964] A.C. 465 (H.L.).

¹⁰⁵ J.A. Weir, "Liability for Syntax" [1963] C.L.J. 216, 219.

¹⁰⁶ Cf. Weir, *An Introduction to Tort Law*, ix: "The Dean of an American Law School once asked me over lunch 'And what is your normative theory of tort?' It was rather a poor lunch and, as I thought, a very stupid question."

¹⁰⁷ On the subject of fun, Jane Stapleton permits me to memorialise this anecdote, of her first time visiting Cambridge to deliver a paper, followed by dinner for a number of guests in a private room at Trinity College. At the dinner, Tony was at one end of the table with Jane beside him, and the then Master of Trinity at the other end. Jane and Tony became engrossed in a discussion on insurance and tort law. The discussion grew so animated that the Master seemed to become alarmed for Jane and got

the more serious one of expanding our minds so that each of us – Lumper and Splitter alike – is helped to see the weaknesses in our positions and are thereby made ready to yield “to the mightier power of Truth”, wherever that might be found.¹⁰⁸

It goes without saying that we are unlikely to see Tony’s like again. This is not just because the kind of genius Tony possessed is very rare, but also because our universities are increasingly unable to accommodate that kind of genius. Negative capability cannot exist in a university where the arts and humanities are increasingly made to model themselves on the sciences,¹⁰⁹ with the result that academics in the arts and humanities are required more and more to pursue “research agendas”¹¹⁰ that are expected to yield floods of five-star rated articles setting out their “findings”. Tony could not and would not have submitted to such a regime,¹¹¹ and quite right too. Tony himself had no doubt as to the nature of the times we live in, condemning our age as “effete and pusillanimous”¹¹² and inveighing against “our pathetically arid minds”.¹¹³ We show no signs at the moment of proving him wrong. *Quidni?*

up and went to whisper something in Tony’s ear – either a request that he tone things down, or a suggestion that he shouldn’t hog Jane’s company and it might be time for her to move next to someone else. Tony replied, “Why – aren’t we having fun?” Which Jane certainly was. As she observed to me, at that time Tony was one of the few academics who did not patronise her as a woman but instead took her seriously as an academic.

¹⁰⁸ Of course, Tony’s negative capability meant that the very idea of there being truths about the law that we can claim to discover (or yield to) was beyond his ken.

¹⁰⁹ On which, see J. Cottingham, “What Is Humane Philosophy and Why Is it at Risk?” (2009) 65 *Royal Institute of Philosophy Supplement 1* (special issue on *Conceptions of Philosophy*, edited by Anthony O’Hare).

¹¹⁰ A search of the journal’s section of Westlaw UK shows the term “research agenda” being used 413 times, the first time in 1986, and 299 times since 2010. The synonymous “research project” crops up 1,851 times, 930 times since 2010, and never before 1988. A search for the dread and scientific-sounding term “methodology” returns over 10,000 hits, Westlaw’s search limit. Of the most recent 10,000 times the word “methodology” has been used in a journal covered by Westlaw UK, 7,000 were in the last 10 years. The 10,000th hit is from just 15 years ago.

¹¹¹ I remember Tony telling me he was going to take a sabbatical the following academic year, and saying: “I didn’t mind having to ask the Faculty for permission to take the year off, but I did mind very much their asking me what I was going to do while I was away.”

¹¹² J.A. Weir, “The Institutions of the Law of Scotland. By James, Viscount of Stair” [1982] C.L.J. 183, 184.

¹¹³ Weir, “The Mansfield Manuscripts”, 319.