On Tort Abolition

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Abstract—This article hopes to make a novel case for the abolition of tort law. The first part is dedicated to a sequential critique of tort, beginning with a conceptual account of its essential features, followed by a moral evaluation of those features. Emphasis is placed on the tension between relief for injury and detriment for wrongdoing in tort. The second part seeks to explore and articulate potential alternatives to tort law, with a view to fill the vacuum left upon its hypothetical abolition. Particular attention is paid once more to the notions of relief and detriment in a post-tort world.

* Lady Margaret Hall, Oxford. A special thanks to the team at the OUULJ for their anonymous comments, to Dr. David Edward Campbell for his continued academic support, and to the Pavlin family for their logistical assistance. I am especially grateful to Moayad Karar for his invaluable advice and relentless loyalty. For that, and much more, I am grateful. All errors are my own.

Introduction

Tort is dead, and we have killed it.

What we call tort law occupies a central position in many legal systems[1] as the principal mechanism of civil remedy for wrongful injury. At its simplest, tort provides a way for injured individuals to seek relief for the wrongful[2] actions of others,[3] without the need for any contractual relationship between them.[4] This article argues for a move away from the orthodox framework of civil wrongs. It makes the case for tort abolition.[5]

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[1] See e.g. *Code civil* [C.civ.] [Civil Code] arts. 1382-1386 (France); *中华人民共和国侵权责任法* [Tort Liability Law of the People's Republic of China] (China); *Bürgerliches Gesetzbuch* [BGB] [Civil Code] § 241–853 (Germany); *Código Civil* [CC] [Civil Code] arts. 927, 186, 187 (Brazil).

[2] The concept of 'wrong' is inherent in the very etymology of the term 'tort,' tracing its roots to the Latin *tortum* meaning 'wrong, injustice'. In modern French '*un tort*' translates to 'a wrong'.

[3] *Dunnage (Terry) v Randall (Kathleen Bernadette) & Anr* [2015] EWCA Civ 673 at [129] (Vos LJ).

[4] The exact definition of tort has provoked enthusiastic discussion. See Percy Henry Winfield, *The Province of the Law of Tort* (CUP, 1931) 32; Tony Weir, *An Introduction to Tort Law* (OUP, 2006) ix; Glanville Williams & Bob Hepple, *Foundations of the Law of Tort* (Butterworths, 1984); Peter Cane, *The Anatomy of Tort Law* (Hart, 1997) 11-13; Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP, 1997).

[5] For earlier arguments on the abolition of tort law, specifically relating to personal injury, see: Patrick S Atiyah, *The Damages Lottery* (Hart, 1997); Peter Cane & James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (CUP, 2018); Lord Sumption, *Abolishing Personal injuries Law - A Project* (Personal Injuries Bar Association Annual Lecture, 2017).

A successful case for abolition follows from two key propositions:

(1) The object of abolition is fundamentally unjust.[6]
(2) There are adequate alternatives to the object of abolition.

Proposition (1) will be dealt with in the first part. There, it will be established that (i) in any given case, relief for tortious injury and detriment for tortious wrongdoing are by nature commensurate; and (ii) this relationship between relief and detriment leads to injustice.

Proposition (2) will be the subject of the second part. There, alternatives to tort will be explored, with a particular emphasis on (i) relief for injury after tort; and (ii) detriment for wrongdoing after tort.

The conclusions reached in this paper are not morally neutral. Nevertheless, if the normative assumptions presented hereafter are accepted, then the conclusions, I hope, must follow by logical consequence.

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[6] It is assumed that injustice is morally and legally problematic. This is a settled point in English law: *Jennings v Rice* [2002] EWCA Civ 159 at [36] (Aldous LJ); *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 (HL) at 438 (Lord Wilberforce); *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 (HL) at 509-510 (Lord Scarman); *Pickett v British Rail Engineering Ltd* [1980] AC 136 (HL) at 150 (Lord Wilberforce); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1054 (Lord Pearson).

1. Abolition

I am concerned, in this first part, with answering the question: *what's wrong with tort?* I will proceed in two stages: (i) describing the essence of tort; and (ii) critiquing that essence.

A. The Essence of Tort

I. Relief for Tortious Injury

Relief for wrongful injury is an essential feature of tort law.[7] Where a court rules in favor of a claimant, that claimant will be entitled to some form of remedy as solace for their injury.[8] This is what is meant by relief.

But tort is not content with providing *any* remedy: it seeks to identify and administer the *right* remedy in any given

[7] *Johnston v NEI International Combustion Ltd* [2007] UKHL 39 at [44] (Lord Hope); *Letang v Cooper* [1965] 1 QB 232 (CA) at 242-243 (Diplock LJ); *Phillips v The London and South Western Railway Company* (1879) 5 CPD 280 (CA) at 287-288 (Bramwell LJ); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 749 (Sir Thomas Bingham MR); *Athey v Leonati* [1996] 3 SCR 458 at [23] (Major J) (Canada); *Clements v Clements* [2012] 2 SCR 181 at [19] (McLachlin CJ) (Canada). See also Glanville Williams, 'The Aims of the Law of Tort' (1951) Current Legal Problems 137; Mark A. Geistfeld, 'Compensation as a Tort Norm' in John Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (OUP, 2014) 85; George Edward White, *Tort Law in America: An Intellectual History*, (OUP, 1980) 149.

[8] *Johnston* (n 7) at [44] (Lord Hope).

case.[9] Thus, tort asks: *what relief ought we provide?*[10] That inquiry embodies two relevant concepts. The first is the deserved relief of a wrongfully injured person; this I will term $\kappa(value)$.[11] The second is the *process* through which the injured party's deserved relief is identified; this I will call $Formula\ \kappa$.[12]

II. Detriment for Tortious Wrongdoing

Detriment for wrongdoing is another essential feature of tort law.[13] Where a court rules against a defendant, that defendant will be liable to endure some adverse consequence in response to their wrongdoing. This is what is meant by detriment.

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[9] *John v MGN Ltd* [1997] QB 586 (CA) at 611 (Sir Thomas Bingham MR).

[10] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 (HL) at 39 (Lord Blackburn); *Corr (Adminstratrix of the Estate of Thomas Corr (deceased) v IBC Vehicles Limited* [2008] UKHL 13 at [30] (Lord Scott); Law Reform (Contributory Negligence) Act 1945, s 1.

[11] This is the answer to tort's question.

[12] This is tort's question itself. Possible factors relevant to *Formula* κ may include the nature of the injury suffered (e.g. physical injury: *Donoghue v Stevenson* [1932] AC 562 (HL); property damage: *Cambridge Water v Eastern Counties Leather plc* [1994] 2 AC 264; economic loss: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL); interference with property rights: *Entick v Carrington* [1765] EWHC KB J98; damage to reputation: *McDonald's Corporation v Steel & Morris* [1997] EWHC 366 (QB)), the extent of the injury suffered (*Johnston* (n 7) at [8]) and any contribution by the claimant to their own injury (Law Reform (Contributory Negligence) Act 1945, s 1). For the purposes of this paper, however, the precise contents of *Formula* κ are immaterial.

[13] *Donoghue* (n 12) at 580 (Lord Atkin); *Fairchild v Glenhaven Funeral Services Ltd and others etc.* [2002] UKHL 22 at [9] (Lord Bingham); Williams (n 7) 137.

But once more, tort aspires to be normative. Since the imposition of a detriment will typically involve interference with the defendant's interests, sometimes even with their rights,[14] the courts must justify themselves in doing so.[15] Tort does not seek to impose undue, arbitrary, or disproportionate consequences upon a wrongdoer – it claims to impose no more than an appropriate burden.[16] Thus, tort asks: *how much detriment ought we impose?*[17] That question involves two additional concepts. The first is the detriment which a wrongdoer deserves; this I will coin ***Δ(value)***. The second is the *process* through which the wrongdoer's deserved detriment is identified; this I will call ***Formula Δ***.[18]

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[14] e.g. financial damages may *prima facie* interfere with the right to property under the Human Rights Act 1998, s 1(1)(b), incorporating the First Protocol to the European Convention on Human Rights, art 1.

[15] *Heil v Rankin and another and other appeals* [2001] QB 272 (CA) at [27] (Lord Woolf MR).

[16] *Heil* (n 15) at [36] (Lord Woolf MR).

[17] *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) at 212 (Lord Hoffmann); *Rookes v Barnard* [1964] AC 1129 (HL) at 1228 (Lord Devlin); *Lamb v Camden London Borough Council* [1981] 2 WLR 1038 (CA) at 1045 (Lord Denning MR); *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 618 (Lord Bridge).

[18] Possible factors relevant to *Formula ⊿* may include the wrongdoer's motives (*Rookes* (n 17)), the wrongdoer's age (*Mullin v Richards* [1998] 1 All ER 920), and their particular relationship to the injured party (e.g. Children Act 1989 s. 2, 3). For the purposes of this paper, the precise contents of *Formula ⊿* are immaterial. Nevertheless, for one proposition, see Robert Nozick, *Philosophical Explanations* (Harvard University Press, 1981) 363.

III. The Ontology of Tort

With regards to relief and detriment, tort rests on two essential assumptions: (i) that $\textit{Formula } \kappa = \textit{Formula } \Delta$; and (ii) that $\kappa(value) = \Delta(value)$.

In other words, tort assumes that the inquiry by which we should identify the claimant's relief and the defendant's detriment is one and the same, and that the output of that inquiry is also one and the same.[19] To be clear, neither of these assumptions is endorsed as correct. They are simply two theoretical suppositions upon which tort rests—no more, and no less.

We know that tort assumes that $\textit{Formula } \kappa = \textit{Formula } \Delta$ because a given tort proceeding embodies, at once, the process of determining the claimant's due relief, and the process of determining the defendant's due detriment.[20] The questions asked in tort, and the answers given, have an equal bearing on both the claimant and defendant. There is no identifiable moment at which

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[19] Ernest Weinrib has referred to this as the 'correlativity' of tort: *The Idea of Private Law*, (OUP, 2012) 114-141. Wayne Courtney and James Goudkamp have referred to it as the 'bilateral structure' of tort: Elise Bant, James Goudkamp, Jeannie Paterson, & Wayne Courtney, *Punishment and Private Law* (Hart, 2021) 5.

[20] *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 (HL) at 209 (Lord Hobhouse); *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146 at [154] (Roth J); quoting from the headnote in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388.

the court stops considering the one and begins considering the other.[21] Tort *is* κ and Δ.

We know that tort assumes that $\kappa(value) = \Delta(value)$ because, in all but exceptional instances,[22] the output of a tort proceeding will be a single award.[23] What the claimant gains is precisely what the defendant loses.

This remains true regardless of the particular form of relief. In the case of monetary damages, the claimant will gain one sum, and the defendant will lose that very sum.[24] In the case of a mandatory injunction, the defendant's detriment will be the compulsory performance of some obligation, and the claimant's relief will be that very same act.[25] Equally, in the case of a prohibitory injunction, the claimant's relief as well as the

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[21] ibid.

[22] The narrow exception to this rule relates social security benefits received by a claimant pursuant to tortious injury, which are deducted from the claimant's damages, but remain payable by the defendant to the Secretary of State via the Compensation Recovery Unit: Social Security (Recovery of Benefits) Act 1997. In such cases, the defendant's detriment will not align neatly with the claimant's relief.

[23] *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 (HL) at 29 (Lord Atkinson). Even where multiple tortfeasors separately contribute to a single indivisible injury, each will be liable in full: *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162 (CA) at 188 (Devlin LJ); *Rahman v Arearose Ltd* [2001] QB 351 (CA) at [17] (Laws LJ). The same rule applies to joint tortfeasors: *Cassell & Co Ltd v Broome* [1972] AC 1027 at (HL) 1063 (Lord Hailsham LC).

[24] See e.g. *Lim Poh Choo v Camden and Islington AHA* [1980] AC 174 (HL); *H West & Son Ltd v Shepherd* [1963] UKHL 3; *Alexander v Home Office* [1988] 1 WLR 968 (CA); *Reynolds v Times Newspapers* [1998] 3 WLR 862 (CA).

[25] See e.g. *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16.

defendant's detriment, will be a prohibition placed upon the defendant.[26] Finally, in the case of specific restitution, the claimant will receive a given item as relief, and the defendant will lose that very item as detriment.[27] In the ordinary course of things, relief and detriment will be equivalent.

The logical structure of tort therefore runs as follows—

The Tort Theorem[28]

$$\begin{array}{ccc} \textit{Formula } \kappa = \textit{Formula } \Delta \\ \downarrow \qquad\qquad \downarrow \\ \kappa(\textit{value}) \;=\; \Delta(\textit{value}) \end{array}$$

The Tort Theorem pervades the law of tort[29] as a whole. The account given in the preceding paragraphs is not particular to any specific tort, or class of torts: it embraces them all. Equally, however, the Tort Theorem is neither comprehensive nor exhaustive – it does not tell us everything about tort, it merely elucidates those features which will be relevant for the purpose of the ensuing critique.

B. The Wrongs of Tort

The deficiencies of tort are felt at both stages of our theorem: (i) in the assumption that $\textit{Formula } \kappa = \textit{Formula } \Delta$; and (ii) in the

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[26] See e.g. *Wollerton and Wilson Ltd v Costain Ltd* [1970] 1 WLR 411 (Ch); *Redland Bricks Ltd v Morris* [1970] AC 652 (HL); *Patel v WH Smith (Eziot) Ltd* [1987] 2 All ER 569 (CA).

[27] Torts (Interference with Goods) Act 1977, s 3.

[28] The Tort Theorem admits as its variables the facts of a given case.

[29] Or, if one prefers, the law of *torts*.

consequent upshot that $\kappa(value) = \Delta(value)$. Tort is wrong both in its method and in its results.

The claims made hereafter are not empirical. The reader is called to engage, in the following sections, their moral conscience: that inner sense of right and wrong.[30] It is upon that instinct that my case rests.

I. Wrong Process

The first wrong of tort lays in its assumption that the process by which we determine the claimant's rightful relief is, and ought to be, the same as that by which we determine the defendant's due detriment.

Contrary to tort's claim, *Formula* κ and *Formula* Δ require distinct moral analyses.[31] Some common variables may

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[30] Conscience is accepted to be, at minimum, an important factor in legal reasoning: see generally Sinéad Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) Cambridge Law Journal 479; Lord Kerr of Tonaghmore, 'Dissenting judgments - self-indulgence or self-sacrifice?' (Birkenhead Lecture, 2012) 22; *Dorset Yacht* (n 6) at 1054 (Lord Pearson); *Tinsley v Milligan* [1992] Ch 310 at 319 (Nicholls LJ); *R v Powell, R v English* [1999] 1 AC 1 at 28 (Lord Hutton); *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719 (HL) at [45] (Lord Bingham); *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55 at [92] (Lord Walker).

[31] Delivering his seminal judgement on punitive damages, Lord Devlin almost seems to tacitly endorse this claim, stating that 'a sum awarded as punishment [cannot] be arrived at in just the same way as a sum awarded as compensation. Clearly, they are different and… must be arrived at in different ways.' (*Rookes* (n 17) at 1230). In fairness, Lord Devlin's analysis is strictly restricted to punitive damages, as distinct from compensatory damages, but he certainly seems to gesture towards a normative and conceptual boundary between *Formula* $\varkappa$ and *Formula* $\measuredangle$.

inform our understanding of both formulae, but that is not quite the same as saying that they are identical.

For example, the claimant's revenue might have a bearing on the appropriate relief, but tells us nothing about the due detriment. Consider that Ammanuel and Shivanii are two claimants. Ammanuel earns £1000 monthly, while Shivanii earns £5000 monthly. Imagine then that due to negligent injury, Ammanuel and Shivanii lose the ability to work for a month. It may well be fair for Shivanii to recover a greater sum than Ammanuel given her greater loss of earnings.[32] However, it seems rather strange to expect a defendant to pay more simply because the person they injured is wealthier.[33]

Conversely, the financial means of the defendant might tell us about the appropriate detriment, but not the adequate relief.[34] It may be fair, for instance, to impose a greater detriment upon Grace, a wealthy corporate banker, than Saf a struggling single mother, for the same tortious act, simply because Saf would otherwise suffer disproportionately for the same conduct. But this tells us nothing about the adequate relief – where two claimants have suffered the exact same wrongful injury in the

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[32] See e.g. *British Transport Commission v Gourley* [1956] AC 185 (HL); *Dews v National Coal Board* [1988] AC 1 (HL).

[33] See generally discussions on the thin skull rule: Andrew Ashworth, 'Defining Criminal Offences without Harm' in Peter Smith (ed.) *Criminal Law: Essays in Honour of J.C. Smith* (Butterworths, 1987); Andrew Ashworth, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' (1988) Rutgers Law Journal 725; Sanford H. Kadish, 'Criminal Law and the Luck of the Draw' (1994) Journal of Criminal Law and Criminology 679; Thomas Nagel, *Mortal Questions* (CUP, 1979) 24-38.

[34] *Cassell* (n 23) at 1090 (Lord Reid).

exact same circumstances, it is not clear why one should recover more simply because their respective wrongdoer is wealthier.[35]

It is not my intention to provide an exhaustive account of the differences between ***Formula κ*** and ***Formula Δ***. Doing so would require me to delve into the precise contents of our formulae, and I have neither the ambition nor the authority to do so. But such an account is not necessary. If the reader accepts that any given factor (i) relates *exclusively* to relief but not detriment; or (ii) relates *exclusively* to detriment but not relief; or (iii) relates *differently* to relief than to detriment, then the case succeeds. If there is any difference, whatsoever, in the adequate measure of the claimant's relief compared to the defendant's detriment, then tort is wrong.[36]

II. Wrong Outcomes

The distinct moral *analyses* embodied in ***Formula κ*** and ***Formula Δ*** lead to distinct moral *outcomes*. If the ways in which we identify rightful relief and due detriment are different, then the output of those analyses will also differ.[37] This is tort's second wrong.

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[35] *Heil* (n 15) at [33] (Lord Woolf MR); *Wells v Wells* [1999] 1 AC 345 at 373 (Lord Lloyd); quoting from *Lim Poh Choo* (n 24) at 187 (Lord Scarman).

[36] Studies have shown that people often take different factors into account when considering, on the one hand, penalties for wrongdoing, and on the other, compensation for injury: Jonathan Baron & Ilana Ritov, *Intuitions about Penalties and Compensation in the Context of Tort Law* (1993) Journal of Risk and Uncertainty 17.

[37] Baron & Ritov (n 36).

The tensions between the $\kappa(value)$ and $\Delta(value)$ are best understood with reference to tangible fact patterns. I will consider two core cases: (i) due detriment in excess of due relief; and (ii) due relief in excess of due detriment.

(1) Detriment in Excess of Relief

First, there is the case where the wrongdoer's due detriment exceeds the claimant's appropriate relief—where $\Delta(value) > \kappa(value)$.[38]

Imagine that Lucas is the owner and dedicated caretaker of a sacred religious field, and that Taha is a member of a vicious hate group which views Lucas' religion as sickening. Taha, wishing to insult Lucas, attempts to drive his truck over the sacred land, but mistakenly drives over land belonging to Tiago: Lucas' friendly neighbour whose lands have no religious significance. No actual property damage occurs in the process, but Taha is nonetheless liable to Tiago for trespass.[39]

In this case, Taha has done wrong, and Tiago has suffered injury, but Tiago's recoverable loss is only nominal,[40] while Taha's rightful detriment might greatly exceed that figure

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[38] For real cases, see *Jacque v Steenberg Homes, Inc.* 209 Wis.2d 605, 563 N.W.2d 154 (1997) (WI, United States); *Owen and Smith (trading as Nuagin Car Service) v Reo Motors (Ltd Britain).* (1934) 151 LT 274 (HC); *Loudon v Ryder* [1953] 2 QB 202 (CA).

[39] See *Jacque* (n 38); *Entick* (n 12); *Blundell v Catterall* (1821) 5 B & Ald 268.

[40] ibid.

given his morally reprehensible motives.[41] In formal terms: $\Delta(value) > \kappa(value)$.

(2) Relief in Excess of Detriment

Second, and more morally problematic, is the case where the injury caused by a wrongful act calls for greater relief than the detriment which is justified in the circumstances—where $\kappa(value) > \Delta(value)$.[42]

Imagine the case where Dan, a young student seeking to finance his studies in law, works as a self-employed paperboy, delivering newspapers to his neighbours on early mornings. One day, after a particularly late night of studying, Dan inadvertently throws a newspaper onto a passerby, Juliette, lightly injuring her wrist. By some tragic twist of ill-fate, it so happens that Juliette is an acclaimed violinist, set to perform the next day at a major concert for which she would have been paid £80 000. Unfortunately, due to the minor injury, Juliette is unable to perform, and loses the totality of her pay for the event.

Here, tort leaves us at an impasse. We feel, on one hand, that Juliette merits relief for her injury, as well as the loss resulting therefrom. But equally, we understand that a minor act of

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[41] Tort will ordinarily deal with such asymmetries through punitive damages: *Rookes* (n 17); *AB v South West Water Services Ltd* [1993] QB 507 (CA).

[42] For real cases, see *Brockhill Prison, Ex p Evans* [1997] QB 443 (DC); *Rylands v Fletcher* [1868] UKHL 1; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11; *Smith v Leech Brain & Co* [1962] 2 QB 405 (QB); *Robinson v The Post Office* [1974] 1 WLR 1176 (CA). See also *Stansbie v Troman* [1948] 2 KB 48 (CA); *Nettleship v Weston* [1971] 2 QB 691 (CA); and *The Arpad* [1934] All ER Rep 326 at 331 (Scrutton LJ).

negligence from Dan, a young student struggling to make ends meet, simply does not justify what is, in effect, an £80 000 penalty.

We have thus reached the point of critical failure of tort. Where tort chooses to prioritize relief of the injured party, it does so at the expense of the innocent.[43] Where tort responds fairly to wrongdoing, it does so at the expense of the injured. In any event, tort must choose what to prioritize, and what to overlook – it is left with a choice between one injustice or another.[44]

III. Vindicating Abolition

Where the law interferes with the lives of ordinary people, it must do so for the right reasons, and in the right way. Tort fails on both accounts.

The first wrong of tort (*Formula κ = Formula Δ*) is conceptual. Tort is 'wrong' in the sense of 'untrue' or 'incorrect.' The second wrong of tort (*κ(value) = Δ(value)*) is normative. Tort is 'wrong' in the sense of 'unethical' or 'immoral.'

In the closing stages of this part, it is important to emphasize that these wrongs of tort relate, not to some secondary characteristic, but to its very essence. So long as tort as we know it continues to exist, it will lead to injustice. The only fix is to rethink the

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[43] The term 'innocent' is not to be understood as 'wholly innocent' but 'relatively innocent,' as in *Cassell* (n 23) at 1069 (Lord Hailsham LC), and 1105 (Lord Reid).

[44] Studies have shown that, when asked to consider hypothetical injuries, most people will intuitively assign different amounts in penalty and compensation: Baron & Ritov (n 36). This bolsters our case by providing it with a democratic basis of collective morality.

relationship between *Formula κ* and *Formula Δ* – to deform tort beyond recognition. The only solution is abolition.

2. Substitution

I am concerned, in this second part, with answering the question: *what comes after tort?*

The primary claim of this part is that because *Formula κ* and *Formula Δ* entail distinct legal and moral analyses, the law must deploy distinct legal mechanisms to deal with each *on its own terms*.

The broad contours of those legal mechanisms will form the substance of the sections to follow. I am concerned here with identifying a *framework* for relief and detriment after tort. The contents of that framework, that is to say, the specific rules contained therein, are beyond the scope of this paper.

A. Relief for Injury after Tort

The remedial function of tort serves a critical moral and social function. Without tort, or some adequate alternative, countless victims of wrongful injury would be left without redress. Understanding compensation after tort thus hinges on one key question: *how ought we provide relief?* In other words, how do we best implement *Formula κ*?

This paper proposes to replace tort with an administrative body responsible for reviewing claims of injury and granting compensatory awards based on the merit of each

application.[45] Under that scheme, any injured person would be able to submit a claim, along with any supporting evidence of loss, to the relevant agency. The administrative body would then proceed to award damages based on legally recognized guidelines: *Formula κ*.

The concept of a compensatory scheme is not foreign to English law.[46] Since 1964, the Criminal Injuries Compensation Board and its successor, the Criminal Injuries Compensation Authority (CICA), have been responsible for compensating victims of violent crime in England, Scotland, and Wales.[47] In that time, the CICA has received upwards of 2.2 million applications and paid out almost £6.25 billion in compensation.[48] This makes it one of the most generous criminal compensation funds globally.[49]

A more expansive approach is in effect in New Zealand, where all personal injury claims, regardless of fault, have been dealt with under the Accident Compensation Corporation (ACC)

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[45] For earlier propositions see Cane & Goudkamp (n 5); Arthur Owen Woodhouse*, Compensation for Personal Injury in New Zealand* (New Zealand Royal Commission of Inquiry, 1967).

[46] See e.g. the Vaccine Damage Payment Act 1979 and the Land Compensation Act 1973.

[47] Criminal Injuries Compensation Act 1995, s 1.

[48] Criminal Injuries Compensation Authority Annual Report and Accounts 2016-2017, HC256SG/2017/67, 7.

[49] Compare the Criminal Injuries Compensation Board (Maryland Code of Criminal Procedure [MD Crim. Pro. Code] § 11-819) (Maryland, United States); *Fonds d'aide aux victimes d'actes criminels* (*Recueil des lois et des règlements du Québec* [RLRQ] [Compilation of Québec Laws and Regulations] ch. A-13.2) (Québec, Canada); *Fonds de Garantie des Victimes des actes de Terrorisme et d'autres Infractions* (Code des Assurances [C. assur.] [Insurance Code] art. R. 422-1) (France).

since 1972.[50] In 2022, the ACC spent $2.1 billion (NZ) in compensatory awards,[51] and recorded a 65% public trust & confidence score.[52]

Of course, existing compensatory schemes have not avoided controversy, but the criticism they face relates, almost without fail, to the rules of eligibility,[53] as opposed to their detachment from fault.[54] Naturally, the proposed compensatory agency would be subject to judicial review.[55] Applicants who feel that their case was not assessed fairly would be entitled to appeal to the judiciary.

The proposed change creates a branch of law dedicated exclusively to developing and executing ***Formula κ*** and administering a finely calibrated ***κ(value).*** The agency would have

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[50] Accident Compensation Act 1972 (New Zealand); Accident Compensation Act 2001 (New Zealand).

[51] Accident Compensation Corporation Annual Report 2022 (New Zealand) 11.

[52] ibid 10.

[53] See e.g. Richard S. Miller, 'An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme' (1993) Maryland Law Review 1070; Marie Bismark & Ron Paterson, 'No-Fault Compensation In New Zealand: Harmonizing Injury Compensation, Provider Accountability, And Patient Safety' (2006) Health Affairs 280. See finally the issues arising out of the facts in *R v Ministry of Defence ex p Walker* [2000] 1 WLR 806.

[54] Compensatory funds tend to register high levels of public satisfaction: ACC Report (n 50) 10; Criminal Injuries Compensation Authority *Annual Report & Accounts 2021-22* (HC 527 SG/2022/133) 5.

[55] See e.g. Criminal Injuries Compensation Act 1995, s 4; Accident Compensation Act 2001, Part 5 (New Zealand).

one task and one task only: delivering due relief to injured persons.

B. Detriment for Wrongdoing after Tort

The detriment imposed in tort serves an equally remarkable moral and social function. Without tort, or some adequate alternative, countless wrongdoers would be left unaccountable. Understanding detriment after tort thus hinges on one key question: *how ought we impose detriment?* In other words, how do we best implement *Formula Δ*?

This paper proposes to replace tort with a parallel system of public liability: a regulatory framework designed to hold wrongdoers liable looking solely to their desert. English law already knows such a concept – the criminal law.

The language of crime evokes strong feelings, and for good reason: the label of 'criminal' should not be handed out lightly.[56] But public liability for minor acts of misconduct is well recorded in the law of England and Wales. For example, a plethora of road traffic regulations govern the operation of motor

[56] James Chalmers & Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) Modern Law Review 217; Barry Mitchell, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) Modern Law Review 394.

vehicles on British roads,[57] and similar provisions are made in environmental law to limit pollution.[58]

In the interest of fair labelling, the language of 'public tort' or 'misdemeanour' may be better suited for our purposes than the term 'crime.' In substance, however, what is proposed is essentially a parallel branch of 'criminal' liability for acts which would otherwise amount to torts.

The proposed change enhances public regulatory powers and establishes a distinct legal regime dedicated to developing and executing ***Formula Δ*** and imposing a just ***Δ(value).*** The framework would have one task and one task only: dispensing due detriment upon wrongdoers.

C. Optimizing Justice[59]

The feasibility of tort abolition remains a hotly debated issue and merits brief consideration at the closing stages of this paper.

Arguments from optimization, although relevant, bear limited moral weight. In the final instance, we care (and *should* care) more about a fair legal system than a cheap one. Nevertheless, this is not enough to propose a moral system – the

[57] See e.g. Road Traffic Act 1988; *Highway Code*, Rules 89-102.
[58] See e.g. the Environmental Permitting (England and Wales) Regulations (EPR 2010), SI 2010/675.
[59] I am grateful to Oban Lopez-Bassols for his specialist help in undertaking the necessary research for this section.

suggestion must be feasible. Accordingly, the efficiency as well as probable costs of alternatives to tort will be considered in turn.[60]

I. Temporal Efficiency

By standardizing remedial measures and streamlining investigative procedures, public compensatory bodies can administer relief with much greater efficiency than tort.

One example is Québec's no-fault automobile accident compensation scheme, which emphatically illustrates the relative efficiency of compensatory bodies. The experience in Québec is summarized in the table below.

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[60] For relevant studies, see Don Dewees & Michael J. Trebilcock, 'The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence' (1992) Osgoode Hall Law Journal 57; Cecili Thompson Williams, Virginia P. Reno, & John F. Burton, 'Workers' Compensation: Benefits, Coverage, and Costs' (National Academy of Social Insurance 2003); Bismark & Paterson (n 53); Jeffrey O'Connell, 'Tort versus no-fault: Compensation and injury prevention' (1987) Accident Analysis & Prevention 63; Kirsten Armstrong & Daniel Tess, 'Fault versus No Fault - Reviewing the International Evidence' (Institute of Actuaries of Australia, 16th General Insurance Seminar); Gerhard Wagner, 'Tort, Social Security, and No-Fault Schemes: Lessons from Real-World Experiments' (2012) Duke Journal of Comparative & International Law 1

Fig. 1: Percentage of Victims Compensated by Month (Québec)[61]

Duration	*Tort System*	*No-Fault*
Less Than One Month	5%	32%
Less Than Two Months	12%	70%
Less Than Three Months	18%	84%
Less Than Six Months	35%	96%
More Than Six Months	65%	4%

Experiences with centralized compensation schemes for medical malpractice in New Zealand[62] and worker injury in the United States[63] have revealed comparative efficiency gains. Similar findings have also been recorded in Sweden's no-fault Patient Insurance scheme.[64]

Empirical evidence from a range of jurisdictions, assessing a variety of spheres of tortious liability, points to one

[61] Table sourced from Dewees & Trebilcock (n 60) 73.
[62] Bismark & Paterson (n 53).
[63] Bruce Chapman & Michael J. Trebilcock, 'Making Hard Social Choices: Lessons from the Auto Accident Compensation Debate' (1992) Rutgers Law Review 886.
[64] Armstrong & Tess (n 60).

conclusion: compensatory funds are more temporally efficient than the tort system.

II. Economic Cost

It is important, finally, to consider the probable costs entailed by the proposed alternative to tort law.

From a macro-economic perspective, our model entails both a loss and a gain to the state. The loss stems from the new remedial function of the government: providing relief to injured persons. The gain arises out of the expanded regulatory powers of the state: extracting fines from wrongdoers.[65] The exact proportion of cost to revenue is impossible to pinpoint without defining the contents of $Formula\ \kappa$ and $Formula\ \Delta$, and that is a matter beyond the scope of this paper. The only plausible point of comparison, therefore, is the cost of *administering* relief, for which there is ample data.

A comparative analysis of automobile accident compensation in various American states measured an average net pay-out ratio which was 16.2% higher in no-fault states than tort-based states.[66] Similarly, various North American[67] and

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[65] Regulatory bodies generate substantial revenue: *New York City Budget Brief*, March 2016, Office of the New York City Comptroller, Scott M. Stringer; Environment and Climate Change Canada, '*Over $8.3 million from penalties for environmental infractions now available for conservation and restoration projects across Canada*' (March 17 News release – Gatineau, Quebec, Canada)

[66] Chapman & Trebilcock (n 63) 818.

[67] Dewees & Trebilcock (n 60) 131.

German[68] workers' compensation schemes have recorded significantly lower administrative costs (10-20%) compared to the tort system (approx. 50%).[69] Nearly identical figures are recorded on a comparative analysis of medical malpractice compensation schemes in New Zealand,[70] America,[71] and Sweden.[72] Existing studies paint a clear picture: public compensatory funds are not only more temporally efficient, they also carry lower administrative costs than tort.

Conclusion

'Uncontroversial ideas need not less but more critical scrutiny, since they generally get such an easy ride.'[73] The merits of the legal system are often taken for granted, and tort law is no exception.

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[68] German Social Accident Insurance (DGUV), *Annual Report* (2009).
[69] Dewees & Trebilcock (n 60) 131.
[70] Bismark & Paterson (n 53).
[71] P.C. Weiler, *Medical Malpractice on Trial* (Harvard University Press, 1991) 139.
[72] Armstrong & Tess (n 60).
[73] John Gardner, *From Personal Life to Private Law,* (OUP, 2018) 189-90.

Although a great deal of critical literature seeks to explain,[74] justify,[75] and improve[76] tort, too few have ventured to attack its most basic assumptions.[77]

Be that as it may, extraordinary claims require extraordinary evidence,[78] and the brief musings of one undergraduate do not (and *cannot*) conclusively substantiate the weighty proposition put forth in this article. This piece has merely sought to provide one argument, one perspective, on tort abolition.

If the criticisms put forth are accepted, then we are left to endorse systemic overhaul. I tentatively conclude that the interests of justice demand abolition – that the time has come to herald the death of tort.

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[74] See e.g. Weinrib (n 19); Robert Stevens, *Torts and Rights* (OUP, 2007); John Gardner, 'Tort Law and Its Theory' in John Tasioulas (ed.) *The Cambridge Companion to the Philosophy of Law* (CUP, 2020).

[75] In addition to the above, see Tony Honoré 'The Morality of Tort Law—Questions and Answers' in Owen (n 4); John Gardner, 'What is Tort Law for? Part I: The Place of Corrective Justice' (2011) Law and Philosophy 1.

[76] See e.g. Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart, 2018); Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998); Ernest J. Weinrib, 'The Case for a Duty to Rescue' (1980) Yale Law Journal 247.

[77] But see Atiyah (n 5); Cane & Goudkamp (n 5); Lord Sumption (n 5).

[78] David Hume & P. J. R. Millican, *An Enquiry concerning Human Understanding* (OUP, 2007) 80; Thomas Jefferson, *Letter to Daniel Salmon* (15 February 1808).