

Using Tort Law to Enforce Environmental Regulations?

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The title of this article was the topic of the 2001 Ahrens Torts Symposium at Washburn Law School.¹ Titles perform two main functions: to stimulate interest, and to give an idea of what the article is about. It is normally not a good idea for an author to analyze their chosen title — if it is not self-explanatory, the writer would be well advised to replace it with something better. Analysis of the title is often a perfectly acceptable (and even wise) strategy in an examination, but is generally to be avoided in law review articles. However, since I did not choose the topic for this symposium, I felt able to treat it as a sort of exam question; and because the title itself suggests a particular view of the relationship between tort law and environmental regulation, it provides a good starting point for discussion.

The political background to the choice of topic for the symposium was the possibility of a reduction in federal environmental enforcement activity under the Bush Administration as compared with the position under the Clinton Administration. A consequent surge in citizen-initiated enforcement activity might be expected as happened in the early 1980s when the Reagan Administration was in power.² I interpreted my remit as being to introduce theoretical, policy-oriented and comparative perspectives into the proceedings. The main legal reference points will be English law (which, of course, must be viewed in the context of European Community law) and Australian law.

Many analyses of the relationship between tort law and regulation start from the position that tort law, like regulation, is a risk-control mechanism; and that from a policy point of view, tort law should be assessed in terms of the contribution it can make to the control of environmental and other risks. The reason Stephen Shavell gives for doing this is that compensation can be achieved indepen-

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1. The seminar took place in the immediate shadow of the tragic events of 11 September, 2001. Sincere thanks to Gerry Michaud for the generosity that made the seminar possible; to Jim Ahrens, who inspired that generosity, for warm hospitality; to Charlene Smith, for superb and tireless organization, and unfailing helpfulness, in trying conditions; to David Howarth for companionship and intellectual stimulation; and to all the students and colleagues who participated in the various sessions of the seminar for mind-broadening interactions.

2. See Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. & TECH. J. 55, 56 (1989); Jeffrey G. Miller, *The Standing of Citizens to Enforce against Violations of Environmental Statutes in the United States*, 12 J. ENVTL. L. 370, 371 (2000). For some relevant figures about statutory private enforcement actions, see Wendy Naysnerski & Tom Tietenberg, *Private Enforcement*, in INNOVATION IN ENVIRONMENTAL POLICY: ECONOMIC AND LEGAL ASPECTS OF RECENT DEVELOPMENTS IN ENVIRONMENTAL ENFORCEMENT AND LIABILITY 109, 114 (Thomas H. Tietenberg ed., 1992).

dently of tort law by other (and, he implies, equally good or even better) means.³ However, the mere possibility of providing compensation by means other than the imposition of tort liability does not establish that tort law is best treated as a risk-control mechanism, because risk-control can also be pursued independently of tort law by means that are (arguably) at least not inferior to tort law. This suggests that in evaluating tort law as a compensation mechanism on the one hand, or risk-control mechanism on the other, we should compare it with other available compensation and risk-control techniques respectively. On this basis, we might prefer tort law to other available techniques if it were judged to be superior to them, or use it in combination with other techniques if it were judged capable of supplementing those techniques in a useful way. In evaluating the potential of tort law as a compensation or risk-control mechanism, we need to attend not only to the rules and principles according to which tort liability is imposed, but also to the institutional structures through which those rules and principles are given practical effect. In other words, we need to assess "tort law in action" as well as "tort law in the books." So, for instance, the fact that juries play a central role in the U.S. tort system, whereas they play no such role in the tort systems of the main Commonwealth jurisdictions,⁴ is relevant to the analysis of the role of tort law in the context of environmental protection and its relationship to environmental regulation.

The most common view is that tort law operates both as a compensation mechanism⁵ and as a risk-control (deterrence) mechanism. In many discussions of the relationship between tort law and regulation, these two functions are considered more or less in isolation from one another. The motivation for this strategy is the desire to compare tort law with other available techniques for compensation and deterrence (respectively) in order to identify the most efficient technique for each purpose. A common conclusion of such comparative analysis is that tort law is an inferior technique both for compensation and for risk-control. Although such a conclusion does not rule out the use of tort as a supplementary technique for plugging gaps, or making up for deficiencies, in other techniques, it does leave open the possibility that

3. *E.g.*, STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 279 (1987). See also Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 *GEO. L.J.* 2167, 2181-83 (2000).

4. Such as England, Australia, Canada and New Zealand.

5. This description is too narrow because compensation is not the only tort remedy. Injunctions, which are important in "environmental tort law," prevent rather than repair harm. The important characteristic the injunction shares with compensation is that (by contrast with risk-control techniques) it is directed at harm suffered (or likely to be suffered) by individuals rather than risks of harm as such. The description is also too narrow because not all grounds of tort liability relate to harm suffered. Some are concerned with protection of rights independently of harm. But in the present context, harm resulting from environmental pollution is our concern.

an even better course of action might be to improve the alternative techniques themselves by filling their gaps and making good their deficiencies. If tort has no distinctive function which other techniques cannot perform, the conclusion that it is not needed at all deserves serious consideration.

This article does not attempt to resolve the complex empirical issues on which the choice between these two strategies — use of tort merely as a supplement versus its complete abandonment — must turn. This is because in my opinion, tort law *does* have a distinctive function, namely to justify the imposition of obligations to repair (or prevent) harm on parties responsible for the harm. Compensation goals can be pursued independently of tort law, as can risk-control goals. But in tort law these two goals are harnessed together: tort liability for harm rests on risk-creators. It is in the link between compensation and risk-control that the distinctiveness of tort law resides. Tort law is “two-sided,” looking both to harm and to the causation of harm.⁶ Both compensation and risk-control are (as it were) “unidirectional,” the former directed at harm and the latter at risky conduct. Tort law, by contrast, is “bipolar” or “bilateral.” Nevertheless, in tort law, compensation is analytically prior to risk-control in the sense that the focus of a tort claim is harm suffered. Without harm, and the causation of harm by someone other than the victim of harm, there can be no tort liability.⁷

The basic argument of this paper will be that because of its bilateral structure, the role that tort law is best suited to play in the environmental law context (as in other contexts) is that of a responsibility-based mechanism for repairing harm. Its potential as a compensation mechanism is limited by its focus on responsibility. More importantly for present purposes, its potential as a risk-control mechanism is limited by its focus on harm. From a policy point of view, this latter limitation is of central relevance to the design of regulatory systems.

The symposium title contains five elements that deserve comment: “using,” “tort law,” “alternative,” enforcement” and “environmental regulations”.⁸ I will start by commenting on each of these elements in turn and then discuss the idea they encapsulate as an ensemble.

6. For further analysis, see PETER CANE, *THE ANATOMY OF TORT LAW* (1997).

7. Subject, of course, to the qualification entered *supra* note 5.

8. I will leave “as,” “an,” “to” and “of” to the reader’s imagination!

I. USING

A. *Tort Law as Regulation*

The symposium title invites us to think about tort law (and the tort system) “instrumentally,” as a tool or a resource that people can use to achieve ends or objectives outside tort law itself — in this case, “the enforcement of environmental regulations.” (By “tort law” I mean the set of rules and principles that are discussed in a tort textbook or hornbook. By “tort system” I mean the institutional mechanisms for making, interpreting, applying and enforcing rules and principles of tort law.) Putting the point more bluntly, we are invited to think of tort law as “regulation.” I will have more to say later about what is meant by “regulation.” The point to make here is that regulation is an objective or a goal; and “regulatory law” is law directed towards that objective. Thinking about tort law as regulation involves conceptualizing it as regulatory law. Areas of law typically identified as regulatory include antitrust law, product and workplace safety laws, and securities law. We are less likely to describe central areas of “private law,” such as tort law, in terms of regulation. But in a recent book, Hugh Collins has suggested that we can think about contract law as concerned with the regulation of commercial activity.⁹ The challenge presented in this seminar is to think of tort law as a mechanism for regulating activity that (adversely) affects the environment.

B. *A Non-Instrumentalist Account of Tort Law*

This instrumentalist way of thinking about tort law can be contrasted with a non-instrumentalist approach according to which tort law is about rights and obligations, and the function of tort law is to protect rights and to enforce obligations. It is not that under the non-instrumentalist approach tort law has no function, but rather that its function is defined “internally” in terms of the rights it protects and the obligations it imposes. Under the instrumentalist approach, on the other hand, the point of protecting the rights that tort law protects and of imposing the obligations it imposes is not found in those rights and obligations themselves but outside or beyond them. Under the instrumentalist approach, tort law is not important in its own right, but only as a means to an “external” end.

Perhaps the most rigorous modern exponent of a non-instrumentalist approach to tort law is Ernest Weinrib in his book *The Idea of Private Law*.¹⁰ Central to Weinrib’s account of tort law is the concept

9. HUGH COLLINS, *REGULATING CONTRACTS* (1999).

10. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

of “corrective justice.” The essence of this concept is the idea of “correlativity.” According to Weinrib, tort law is correlative in the sense that it organizes human relationships in terms of two-party — “bilateral” — relationships between a person under an obligation and a person who has a right, which mirrors (or is “correlative” to) that obligation.¹¹ In tort law, one person’s obligation is another person’s right; and it is this that makes tort law a vehicle of corrective justice. As Weinrib puts it, corrective justice is a “formal” concept, primarily concerned with the structure of tort law, not with its content. This formalistic understanding of corrective justice is non-instrumentalist in a very strong sense, which Weinrib captures in the beguiling but opaque statement that “the purpose of private law is to be private law.”¹² In other words for him, form and function coincide. Tort law has no function other than to enforce the obligations it imposes and to vindicate the rights it recognizes: i.e., to “correct” wrongs.

C. *Tort Law as Insurance*

Not all “corrective justice theorists” of tort law understand the concept in this formalistic way. There is a less precise and more popular instrumentalist use of the term according to which the main and defining function of tort law is to compensate victims of harm, especially of personal injuries. Weinrib rejects this view of tort law on the simple basis that tort law does not purport to compensate all victims of personal injuries, let alone all victims of harm, but only those whose harm is caused in certain ways. The “compensatory” approach to tort law is largely a product of the growth of liability insurance in the late nineteenth and early twentieth centuries, and the enactment of statutory compulsory insurance schemes in respect of personal injuries suffered on the road and at work. The compensatory approach invites us to conceptualize tort law as an insurance-based system of harm-repair. The vast majority of tort claims are settled out of court by an administrative process run by private insurers. In this picture, courts provide a sort of appeal mechanism for parties dissatisfied with the outcome of the settlement process.

There are two main critiques of the “insurance” approach to tort law, which might be called the “internal” and the “external” respectively.¹³ The internal critique points out that in reality (as far as we can judge), the tort system delivers compensation to only a relatively small proportion of those who theoretically fall within its scope.

11. *Id.* at 63-66.

12. *Id.* at 5.

13. The various critiques of tort law and the tort system are discussed in detail in PETER CANE, *ATIYAH’S ACCIDENTS, COMPENSATION AND THE LAW* (6th ed., 1999) [hereinafter *ATIYAH*].

Moreover, as a result of defects in the tort process, of those who get compensation, the more seriously injured tend to be under-compensated, while those who suffer only minor injuries tend to be over-compensated. The external critique rests on the observation that tort law is grossly defective as a mechanism for compensating victims of personal injury because it only purports to provide compensation for injuries suffered in certain ways. For instance, while a child born blind as a result of negligence on the part of an obstetrician might recover tort compensation, a child born congenitally blind gets nothing, even though the disabilities of the two children and their resulting financial needs may be exactly similar.

D. *Tort Law as Social Security*

There are various possible responses to such critiques. The internal critique may be (and often is) addressed by proposals to reform the tort system so as to increase the effective coverage of tort law (by improving “access to justice”),¹⁴ and to remove, or at least ameliorate, the worst defects of the tort settlement process.¹⁵ Reforms directed at the external critique typically involve the formal or effective abolition of the tort system of compensating for personal injuries and its replacement by some form of no-fault compensation regime. The leading example of this approach is found in the New Zealand accident compensation system, which covers personal injury caused by accidents, medical misadventure and occupational diseases.¹⁶ It is funded by taxation and administered by a state agency. Such responses to criticisms of the tort system viewed as a compensation mechanism take seriously the instrumentalist approach to tort law, and seek to improve performance of the social security function by the tort system.

Weinrib’s strategy is, of course, quite different. He denies that tort law can properly be understood functionally in terms of compensation, precisely because it purports to compensate only injuries caused in certain ways.¹⁷ In other words, a right to tort compensation can arise only out of a (correlative) obligation to compensate. In Weinrib’s view, it follows from this that compensation cannot be said to be a function of tort law. In my view, all that follows is that we

14. See HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 256-64 (1999). This was one of the main justifications offered for the introduction in the UK of conditional fees and the abolition of legal aid for personal injury cases.

15. For example, the power to award pre-judgment interest on damages was introduced in part to discourage delay by defendants. Alternative dispute resolution techniques such as mediation and conciliation can also be seen as aids to settlement.

16. For an up-to-date account and analysis of the New Zealand scheme, see Stephen Todd, *Privatization of Accident Compensation: Policy and Politics in New Zealand*, 39 WASHBURN L.J. 404 (2000).

17. WEINRIB, *supra* note 10, at 40-41.

cannot fully understand tort law in terms of compensation. The fact that tort law is not “all about compensation” does not mean that it is not about compensation at all. In fact, tort law is a limited compensation mechanism; and in order to understand its compensatory function we need to understand the nature and limits of the obligations to compensate imposed by tort law. It is a function of tort law to compensate those who are harmed by breaches of obligations imposed by tort law. It is in this sense that tort law is essentially correlative.

E. *Tort Law and Incentives*

The instrumentalist interpretation of corrective justice takes a perspective on tort law that focuses on victims of harm. A major competing instrumentalist perspective, associated most strongly with economic analysis of law, is agent-focused. It sees the main role of tort law as being to prevent harm by deterring harm-causing conduct. Weinrib rejects this deterrence-focused approach to tort law on the straightforward ground that it cannot explain why, as a general rule, tort law is only concerned with harm that has actually occurred, and not also with risks of harm that have not yet materialized. A standard response to this point involves distinguishing “specific deterrence” from “general (or “market”) deterrence.” Specific deterrence is the harm-prevention technique utilized in the criminal law: potentially harm-causing conduct (such as dangerous driving) is prohibited, and various measures are adopted to enforce such prohibitions and to punish those who ignore them. By contrast, the theory of general deterrence says that if people can be required to pay compensation for harm resulting from their activities (such as driving), they will take appropriate steps to prevent harm resulting from their activities (by driving carefully, for instance) in order to avoid having to pay compensation.¹⁸ Tort law occasionally utilizes the technique of specific deterrence by allowing a person to be ordered (by an injunction) not to engage in (potentially) loss-causing conduct. This technique is of particular relevance in the environmental context because the cause of action for which injunctions are most commonly awarded as remedies is the “environmental tort” of nuisance.¹⁹ However, the typical technique of tort law is general deterrence, not specific deterrence.

Interpreting tort law in terms of deterring undesirable conduct and preventing harm is an important aspect of any account of tort law

18. Coffee says that whereas criminal law prohibits undesirable conduct, civil law (which includes tort law) puts a price on it. John C. Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models — And What Can Be Done About It*, 101 *YALE L.J.* 1875 (1992).

19. For a discussion of the economic approach to nuisance law see Anthony I. Ogus & G. M. Richardson, *Economics and the Environment: A Study of Private Nuisance*, 1977 *CAMBRIDGE L.J.* 284-325.

as a regulatory mechanism. But while the theory of general deterrence explains the sense in which we can say that deterrence is a function of tort law, it is open to serious objections as an account of the main point of tort law. However effective a mechanism of general deterrence tort law may be, we might still want to say that prevention of harm is preferable to cure; and that for this reason, a strategy of specific deterrence is always to be preferred to one of general deterrence unless it can be shown that the latter prevents more undesirable outcomes in total than the former. If deterrence is taken to be the only (or, perhaps the main) function of tort law, then if it were the case that some other mechanism could achieve better deterrence than tort law, it would clearly be desirable to shift the resources currently spent on the tort system to that other mechanism. In fact, we really do not know how effective tort law is as a deterrent, either in its own right or relative to other deterrence mechanisms. Taken as a whole, the evidence we have about the deterrent impact of tort law is inconclusive,²⁰ and studies of the relative impacts of tort law and other deterrent mechanisms — criminal law for instance — are all but non-existent.²¹

However, suppose it could be shown that tort law and tort liability have very little if any effect on the incidence of road accidents and injuries (for instance). Even so, many people would not consider this to be an argument for abolition of tort liability for road accidents because most people — even most people who consider that tort law plays an important deterrent role in this context — also attribute a compensatory function to tort law. According to the strict theory of general deterrence, it does not matter whether the victim is compensated so long as the harm-causer bears the cost of the harm. The value of compensation, this theory says, is purely pragmatic in that it provides incentives for private enforcement of standards of conduct. By contrast, the more common view sees tort law as a mechanism for deterrence via compensating victims of harm rather than a mechanism for deterrence regardless of whether victims are compensated or not. This is the force of Weinrib's objection to the economic analysis of tort law, that by ignoring the victim's right to compensation it ignores the correlative substance and structure of tort law. The fact that in

20. DON DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* (1996). For some more recent studies suggesting that tort law does have a significant deterrent impact, see Frank A. Sloan et al., *Liability, Risk Perceptions, and Precautions at Bars*, 43 J.L. & ECON. 473 (2000); Scott E. Harrington & Patricia M. Danzon, *Rate Regulation, Safety Incentives and Loss Growth in Workers Compensation Insurance*, 73 J. BUS. 569 (2000); J. David Cummins et al., *The Incentive Effects of No-Fault Automobile Insurance*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262304.

21. For an analysis of the deterrent effect of the criminal law in the environmental context, see Mark A. Cohen, *Criminal Law as an Instrument of Environmental Policy: Theory and Empirics*, in *THE LAW AND ECONOMICS OF THE ENVIRONMENT* 198-216 (Anthony Heyes ed., 2001).

tort law, people who engage in risky activities incur liability only if their activity causes harm, imposes a fundamental constraint on the capacity of tort law to prevent harm and deter harm-causing activities.²²

F. *The Nature and Uses of Tort Law*

We should not accept Weinrib's view that tort law in particular, and private law more generally, has no function other than being itself. On the other hand, his approach holds some very important lessons for those who would analyze tort law in functional terms. Instrumentalist theories of tort law may be either descriptive (telling us what tort law does) or prescriptive (telling us what tort law ought to do). Weinrib's approach suggests that a descriptive functional theory of tort law will be convincing only if it is consistent with the substance and structure of rules and principles of tort law, and with what we know about the way the tort system operates in practice. Similarly, a normative instrumentalist theory of tort law (for instance, a theory that says that tort law should aim at deterrence) is likely to carry conviction only if its prescriptions take account of the substance and structure of tort law and of the way the tort system operates in practice.

These points are equally relevant to those whose interest in tort law is not theoretical but practical. Treated as a tool, tort law is like any other tool — there are some tasks for which it is well suited by reason of its nature and operation, some tasks that it can be used to perform more or less successfully, and some tasks for which it is totally unsuited. Structurally, tort law is a system of correlative rights and obligations directed primarily to the repair of harm. Substantively, its scope is limited to the catalogue of interests to which it attaches rights of repair and the types of conduct to which it attaches obligations of repair. The extent to which tort law can vindicate the interests it purports to protect and attach sanctions to the types of conduct it purports to proscribe depends on the institutional mechanisms for applying tort law in practice. People who look to tort law for compensation must accept that there are many harms that tort law does not purport to repair, and that there are many practical barriers to obtaining reparation even for harms that it does purport to repair. Similarly, people who look to tort law to deter harm-causing conduct must accept that tort law purports to proscribe only certain types of harm-causing conduct, and that there are many practical barriers to

22. See also Stewart, *supra* note 3, at 2173-75.

effective deterrence even of the types of conduct that tort law purports to proscribe.

The fact that there is often a gap between what people want and expect from tort law and what it can and does deliver is not, I think, always or even usually a product of corrigible defects in the law. Rather it tells us something about the very nature of law in general and tort law in particular.²³ There is an important sense in which law is autonomous and separate from the society in which it exists and the life of which it purports to regulate. As a social system, law consists not only of sets of norms of human behavior, but also of rules about how such norms can be made, altered, repealed and enforced. The autonomy of law does not mean that law is not influenced by other autonomous social systems, such as politics and commerce. But it does mean that the law may remain impervious to such influences and that if and when such outside influences are absorbed into the law, they are translated into legal terms and given the “force” and “form” of law. Conversely, the autonomy of law does not mean that law does not influence human behavior in other social systems. But other systems may remain impervious to the law’s influence or may absorb the law by translating the law’s requirements into their own terms, thereby altering the content and force of the law.

Concepts such as “duty of care,” “fault,” “causation,” “nuisance,” “strict liability,” and so on have special legal meanings in tort law, and they relate to and interact with one another in complex ways that can be understood only by reference to the internal conceptual and normative geography of tort law. In this sense, tort law is an “autonomous” system of norms and rules. At the same time, tort law is influenced by “policy,” “morality,” “community expectations,” and so on — i.e., by other social systems. But such outside influences will be absorbed into the law only to the extent that they are, or can be made, consistent with the law’s internal normative and conceptual logic. Conversely, because tort law is separate from the social activities it purports to regulate, there is no guarantee that those activities will be conducted in accordance with the law because those activities may have their own logic and values that conflict with the law. And just as the law can resist outside influences or translate them into its own language, so other social systems can do the same to law.

This abstract discussion can be made a little more concrete. In its traditional form, tort law is a set of rules and principles of personal responsibility for harm. However, in the past 100 years, personal injury tort law has been reinterpreted by many as a system for meeting

23. What follows is much influenced by GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993).

the needs of the disabled. This perspective was made possible by the invention of liability insurance. Insurance is a technique for spreading risk, and when liability insurance became common and compulsory in certain situations, tort law itself came increasingly to be viewed as a mechanism for spreading risks and losses. However, the risk-spreading logic of insurance is inconsistent with the responsibility-based logic of tort law. This is why it is generally considered to be irrelevant to the incidence of tort liability whether either or both of the parties were or could have been insured. Nevertheless, the desire to use tort law as a form of insurance causes litigants to apply constant pressure to extend the boundaries of tort liability. In order to be absorbed by tort law, this pressure has to be translated from insurance terms into responsibility terms. The historic shift from fault-based to strict product liability (“enterprise liability” as it is often called) is an important manifestation of this translation process. But the responsibility-based logic of tort law imposes limits on the extent to which tort law can meet the aspirations of those who want it to be a form of loss insurance. The inherent instability of product-liability law is a symptom of the struggle by courts (especially in the U.S.) to reconcile strict liability with deeply-held ideas about the proper bounds of personal responsibility.

On the other side, the aspirations of those who look to tort law to provide a mechanism for controlling risk and preventing harm are also confronted by the responsibility-based logic of tort law. Legal concepts of responsibility may hinder the search for the “cheapest cost avoider.”²⁴ For instance, although it is drivers who are most commonly sued and held liable for road accidents, there is reason to think that the cheapest way of avoiding many road accidents would be better road design. But legal doctrine and procedures make road designers very unattractive targets for litigation. More fundamentally, viewed in terms of cost-benefit analysis, the bilateral structure of tort law makes it an unsuitable vehicle for achieving efficient accident and harm prevention at the social level.²⁵ On the other hand, the potential of tort law as a risk-control device is limited because the risky and harm-causing behavior to be regulated is embedded in social systems (such as manufacturing and commerce) that themselves display a certain degree of autonomy and may be able to resist or modify the demands of the law to suit their own internal imperatives and values. For instance, manufacturers who consider environmental regulations and tort liability laws to be a hindrance to profitable competition are

24. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

25. Peter Cane, *Justice and Justifications for Tort Liability*, 2 *OXFORD J. LEGAL STUD.* 30, 43-44 (1982).

provided with many opportunities by the legal system to resist the effective application of such laws to their activities, and to argue that they should be interpreted and applied in ways congenial to the values of the regulated activity.

The “usefulness” of law in general and of tort law in particular is limited by the fact that law is only one of a number of relatively autonomous systems that compete with one another for control over social life. Autonomous social systems each have their own peculiar internal logic and values that define their nature and limit their potentialities. Being autonomous, each system may be able to resist the influence of others or accept that influence only on its own terms. In influencing other social systems, law has the advantage of being underwritten by the state’s monopoly of legitimate force. But state force is very far from being omnipotent, and this severely limits law’s influence on other social systems. The influence of law is also limited by its internal logic and values. To appreciate the uses of law in general, and of tort law in particular, we must understand their limitations, both those related to their internal structure and logic and those related to their ability to influence other social systems.

It might be argued that limitations arising from the structure of tort law and its conceptual and normative geography should be viewed as opportunities for law reform rather than as barriers to the achievement of desired goals. At one level, this is a good point. A possible response to the compensatory limitations of tort law is to replace it with an accident compensation scheme. A possible response to the limitations on tort law as a risk-control device is to make more use of the criminal law and other regulatory techniques to reduce the incidence of risky conduct. But such solutions involve displacing tort law as we currently understand it, not redesigning it. The bilateral structure of tort law is not a corrigible feature, but the very essence, of tort law. Talk about using *tort law* to achieve desired goals is necessarily about using an institution with that structure, not about finding better tools for the job at hand.

II. TORTS

In the previous section I defined tort law in terms of the contents of a torts hornbook. Viewed in this way, the “torts” most relevant in the environmental context are trespass, negligence, nuisance (public and private), *Rylands v Fletcher*,²⁶ and the “innominate tort” of breach of a statutory prohibition or duty (which, in England and Com-

26. L.R. 3 H.L. 330 (1868).

monwealth countries usually goes under the name “breach of statutory duty”).

One way to assess the role of tort law in the environmental context is by analyzing the elements of these various torts and measuring the usefulness of each against some criterion of “environmental protection.” This is precisely what one would expect a practical instrumentalist approach to tort law to look like. According to this approach, tort law is a toolbox containing a variety of different but related instruments from which the lawyer can choose the one best fitted to the job at hand. From a theoretical point of view the fact that tort law (unlike contract law for instance, and, in one view at least, the law of restitution)²⁷ is apparently not based on a single principle or small set of principles but is made up of a “loose federation of causes of action,”²⁸ is often seen as a problem to be overcome. The thrust of the main theoretical approaches to tort law — such as economic analysis and corrective justice — is the search for a single large idea or concept of which the various grounds of tort liability can be seen as applications or manifestations. Aspects of tort law that cannot be fitted into the theorist’s chosen conceptual framework are either written off as not really part of tort law, or treated as candidates for reform. By contrast, to the practical instrumentalist, the fragmented nature of tort law is an opportunity, not a problem. If one tort, or one “theory of liability,” will not do the trick, another might. The more theories of liability and the more torts there are, the more chances there are to find one that fits your case.

In my view there is no single principle or concept common to the ragbag of causes of action we call torts. Unlike family law or corporations law or environmental law, tort law is not identified with any particular area of human activity. Nor, unlike contract law (in the view of some, at least) is it identified with a unifying concept such as agreement, or a unifying institution such as promising.²⁹ On the other hand, there is not much to be gained for present purposes from embarking upon a comparative analysis of tort doctrine designed to highlight (relatively small) differences between the relevant law in various common law countries. I am not saying that these differences may not be important. If the topic under discussion were transnational environmental tort litigation, they would be central to the analysis. But the symposium challenges us to think strategically rather than tacti-

27. See, e.g., Stephen A. Smith, *Justifying the Law of Unjust Enrichment*, 79 TEX. L. REV. 2177 (2001).

28. PETER CANE, *TORT LAW AND ECONOMIC INTERESTS* 447 (2d ed. 1996).

29. Of course, from some points of view, areas of the law such as family law also lack unity; and that the proposition the notions of agreement or promise unify contract law is contentious. But my basic point is simply that family law and contract law can be seen as unified in a way that tort law cannot.

cally about the relationship between tort law and environmental protection. For this project, the similarities between the tort law of the main common law jurisdictions (the UK, the U.S., Canada, Australia, and so on) are more important than the differences. So the aim of this section is to identify some basic characteristics of “torts” that are fundamental to their role in the environmental context.

A. *Basic Characteristics of Torts*

The first basic characteristic of tort law I want to highlight is its concern with interpersonal relationships.³⁰ A good way of explaining this point is to contrast tort law as a mechanism for dealing with personal injuries with a compensation scheme of the sort found in New Zealand. Under such a scheme the injured person makes a claim on a fund, not against a person. The basis of the claim is the injury suffered by the claimant. Under a limited compensation scheme (the New Zealand scheme is broad in scope but is nevertheless basically confined to accidents, medical misadventure, and occupational diseases), the claimant will also have to show that the injury was caused in a way contemplated by the terms of the scheme (in New Zealand, by an accident, medical misadventure or occupational disease). Typically the limits of such schemes are defined in terms of some activity (such as the use of a motor vehicle on a public road) rather than in terms of specific human conduct (such as driving a motor vehicle). Under many such schemes, an injured person may qualify for benefits even if the injury was not caused by human conduct, but by some natural event. In that case it will not be necessary for the claimant to identify a person, let alone the person, whose conduct caused the injuries. By contrast, a tort claim in respect of harm suffered is, first, a claim against a person. Secondly, it is a claim in relation to human conduct that is alleged to have caused harm. Thirdly, a tort claim is a claim against a person whose conduct was causally related to the harm in some way.³¹

These various features of tort law explain an important sense in which it is inaccurate to view the tort system as a form of insurance against personal injuries. In some ways, a tort liability insurance fund looks like a compensation fund. The crucial difference is that with

30. So, for instance, a person cannot be held liable in tort for polluting their own land.

31. At first sight, this may not appear to be true in relation to vicarious liability claims. But although the vicariously liable person will typically not have been immediately involved in bringing about the harm, by employing the tortfeasor they will have created the situation in which the tort could occur. From an instrumentalist point of view, causation may be seen as an inconvenient “evidentiary” requirement. David E. Pierce, *The Emerging Role of “Liability-Forcing” in Environmental Protection*, 30 WASHBURN L.J. 381, 416-17 (1991).

minor exceptions,³² an injured person cannot make a claim directly against a tort liability insurance fund, but only indirectly by suing a tortfeasor. As a result, the tort system can operate like a compensation fund only if and to the extent that tortfeasors are insured or are personally capable of paying compensation out of their own resources. If the injured person cannot identify another person whose conduct was causally related to injuries in a relevant way, or if they can identify such a person but the latter is uninsured against liability and lacks significant personal resources, the interpersonal nature of tort law will render it useless as a compensation mechanism.

The second basic characteristic of tort law to be noted is that it focuses on bad outcomes, not good outcomes. A major preoccupation of contract law and property law, for instance, is to provide a framework for productive human interaction by allocating resources. Tort law, by contrast, only comes onto the scene when something has gone wrong.

Thirdly, even in relation to bad outcomes, tort law is much more concerned with cure than prevention. The distinction between prevention and cure should not be confused with that between acts and omissions (misfeasance and nonfeasance). Although the supposed general principle that tort law is unwilling to recognize duties of positive action is honored as much in the breach as in the observance,³³ duties of affirmative action in tort law typically provide the basis for curing bad outcomes after they have occurred rather than seeking to prevent them. The bias in tort law towards cure is manifested in the fact that the archetypal tort remedy is damages. It is usually assumed that an injunction would not be available in a negligence action. Injunctions in tort law are predominantly used to protect property rights (as opposed to the interest in personal health and safety). So, for instance, interference with a person's property may be restrained by injunction regardless of whether it will cause harm to that person. The obvious example is trespass to land — intrusion onto land or into airspace can be restrained by injunction even if it causes no damage to the land or to its owner. It is because nuisance is conceptualized as an interference with rights that the injunction is the basic remedy for that tort. Even here, however, the bias towards cure is also shown by the fact that the typical use of injunctions in tort law is to restrain the continuance of tortious conduct rather than its initiation;³⁴ and by the

32. See, e.g., Third Parties (Rights Against Insurers) Act, 1930, (Eng.); THE LAW COMM'N & THE SCOTTISH LAW COMM'N, THIRD PARTIES — RIGHTS AGAINST INSURERS (LC 272, SLC 184, 2001).

33. ATIYAH, *supra* note 13, at 60-69.

34. See Keith Stanton & Christine Willmore, *Tort and Environmental Pluralism*, in ENVIRONMENTAL PROTECTION AND THE COMMON LAW 101-03 (John Lowy & Rod Edmunds eds., 2000).

fact that mandatory injunctions ordering a defendant to take action to forestall harm, are awarded only subject to very stringent conditions.

The idea that tort law is more concerned with prevention than with cure is most strongly associated with the economic analysis of tort law. According to economic theory, curing is incidental to preventing: the only point of curing is to give the injured person an incentive to make a claim that will ensure that the tortfeasor bears the cost of the tort, and so will be forced to take it into account in deciding how to behave in the future. So far as economic theory is concerned, it would do just as well if the costs of torts were extracted from tortfeasors in the form of taxes or fines (calculated by reference to harm caused) and paid into a central fund out of which injured persons were compensated on the basis of need. But if this is the conclusion of the premise that tort law is primarily concerned with prevention, it shows that there is something wrong with the premise. Even when tort law allows a tortfeasor to be fined (by being ordered to pay punitive damages), it requires the fine to be paid to the claimant.

A fourth notable characteristic of tort law is that it is concerned primarily with reparation, not punishment. This is a fundamental difference between tort law and criminal law. The most common form of criminal punishment is the same as that of the most common tort remedy — namely a money payment. But a fine, however small, carries (or is intended to carry) a social stigma that an award of damages, however large, does (or is) not. This partly explains why insurance against having to pay a criminal fine seems objectionable in a way that insurance against having to pay tort damages (even punitive damages)³⁵ does not. Although the typical crime involves the infliction of harm, victims are more or less invisible in the criminal justice process,³⁶ whereas they are at the center of the tort process. The importance of reparation in tort law and of punishment in criminal law partly explains why deterrence is widely viewed as a goal of the criminal justice system, but only as a by-product of the tort system. Because reparation is intrinsically good, tort law might seem justifiable even if it performs very badly as a deterrent. By contrast, punishment is widely considered to be intrinsically undesirable, and so the quality of its performance as a deterrent is considered by many to be central to the justifiability of the criminal law. The importance of introducing the contrast between tort law and criminal law at this stage lies in the

35. *Lamb v. Cotogno*, (1987) 164 C.L.R. 1.

36. It is true that in Commonwealth jurisdictions victims may be free to prosecute crimes "privately," in some cases subject to the consent of a public official, but often even without it. In practice, however, the vast majority of criminal prosecutions are initiated and conducted by public officials.

significant role played by the latter in the environmental context. Some people think that the stigma attaching to criminal liability gives it a significant advantage over civil liability (including tort liability) as a deterrent of undesirable conduct.

A fifth important feature of tort law is that it focuses on bad outcomes affecting persons (both human beings and corporations) and property. The term “property” does not refer to things, but to things that are the subjects of legal property regimes. Things as such have no status in tort law. The earth’s atmosphere, for instance, is not subject to any legal property regime and so is not within the scope of tort law.³⁷ In this way, tort law can be seen as exclusively concerned with persons because only persons can own property. This is another aspect of the interpersonal nature of tort law. Tort law defines bad outcomes in two different ways: harming and interfering with rights. As we just saw, interfering with someone’s rights can be tortious even if it causes no harm. Conversely, causing harm may be tortious even if it does not interfere with a legally protected right. This is most obviously true in relation to personal injury because a person has no legal rights in their body as such. The rights protected from interference by tort law are property rights (in land, chattels, and “intellectual property” such as trade marks and patents), “dignitary” rights such as reputation and personal freedom and, to a rather limited extent, contractual rights. The archetypal harms recognized by tort law are injury to the human body and mind, damage to tangible property, and financial loss. More marginal are intangible harms to the person such as grief, fear, and insult. Significantly for present purposes, aesthetic harm resulting from visual pollution, for instance, and emotional harm resulting from biodiversity damage, for instance, are not, as such, recognized by tort law. It must be noted, however, that while the focus on persons is intrinsic to tort law — being an aspect of its interpersonal structure — the catalog of rights and harms it recognizes is contingent. It can and does change. For instance, in the past 100 years or so the scope of tort liability for mental harm has increased greatly.

Sixthly, tort law focuses on harms, not risks. This proposition is really a corollary of the point that tort law is concerned with cure, not prevention. It does not mean that tort law does not take account of risk. This is obviously not true. For instance, an important component of the negligence (or “reasonableness”) calculus is the

37. In order to aid their conservation and preservation, natural resources that are unowned as a matter of common law may be subjected to statutory property regimes by the vesting of ownership in the government, for instance. *See, e.g.*, Fisheries Act, 1995, s 10 (Vict. Acts); Nature Conservation Act, 1992, s 83, 84 (Queensl. Stat.). For an exploration of the potential of ideas of “equitable property” to aid environmental protection, see Kevin Gray, *Equitable Property*, 47 *CURRENT LEGAL PROBLEMS* 157, pt. 2, 188-206 (1994).

probability of the harm. The core idea of foreseeability is also related to risk — the less probable the harm, the less likely it will be classified as foreseeable. The point is that tort law is not much concerned with risks as such. Even in cases where an injunction may be awarded to prevent harm occurring in the future, an injunction will issue only if the court is satisfied that harm is imminent or very likely, and not merely on the basis that the defendant is involved in a risky activity. There is a contrast here between the approach of tort law and the so-called “precautionary principle,” which is increasingly finding favor as an approach to environmental protection. In one of its many formulations, this principle recommends not only that action should be taken to control risks, but also that “where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”³⁸ As a legal technique for addressing risks independently of harm, criminal law has distinct advantages over tort law.

Seventhly, tort liability is predominantly fault-based liability; and in tort law fault typically means negligence. In the context of environmental law, the trend towards fault-based liability can be seen both in England, where the House of Lords held (in the *Cambridge Water* case)³⁹ that foreseeability of harm is a precondition of liability under the principle in *Rylands v Fletcher*, and in Australia where the High Court (in the *Burnie Port Authority* case)⁴⁰ assimilated the principle into the tort of negligence.⁴¹ On the other hand, the “polluter-pays” principle, beloved of environmental lawyers, is usually assumed to dictate strict liability. There is a contrast here with criminal law. Many so-called “regulatory” criminal offenses, including environmental offenses, are basically offenses of strict liability, although often subject to a fault-based defense. However, empirical research in the UK and elsewhere⁴² suggests that the regulator’s discretion to prosecute environmental offenses is rarely exercised in cases where the polluter was not at fault; and typically, prosecutions are only launched in cases of egregious fault going beyond mere negligence.

People’s attitudes to the choice between strict and fault-based tort liability depend on their views about the nature and function of

38. PERSPECTIVES ON THE PRECAUTIONARY PRINCIPLE 3 (Ronnie Harding & Elizabeth Fisher eds., 1999). For an instance of English judicial wariness about the precautionary principle, see *R. v. Sec’y of State for Trade & Indus. ex parte. Duddridge*, 1995 Env. L.R. 151.

39. *Cambridge Water Co. v. E. Counties Leather Plc*, [1994] 2 A.C. 264.

40. *Burnie Port Auth. v. Gen. Jones Pty. Ltd.*, (1994) 179 C.L.R. 520; Peter Cane, *The Changing Fortunes of Rylands v. Fletcher*, 24 W. AUSTL. L. REV. 237 (1994).

41. But at the same time it apparently extended the scope of strict vicarious liability under the rubric of non-delegable duties.

42. See e.g., KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION (1984).

tort law. Those who see tort law as based on moral principles of responsibility tend to favor fault over strict liability. The traditional approach is that moral responsibility requires fault. Tony Honoré has challenged this view,⁴³ and rightly so it seems to me. Aversion to strict liability is a result of focusing unduly on the agent of harm and giving too little weight to the interests of victims of harm.⁴⁴ In the legal context, this focus on agents is encouraged by adopting a criminal law model of responsibility. Criminal law is primarily concerned with punishing and deterring seriously unacceptable behavior. Although the *actus reus* of the typical criminal offense involves the infliction of harm,⁴⁵ victims play very little role in the criminal justice process. By contrast, the main focus of tort law is on reparation, and the victim plays as central a role in tort law as the injurer. While we may have doubts about the fairness of punishment regardless of fault, it is not difficult to think of situations in which there seems to be no unfairness in expecting people to (do something to) repair harm regardless of their fault in causing it.

The correlative or relational nature of tort law helps to explain why negligence, rather than intention, is the dominant fault requirement in tort law: in most contexts, a requirement of intention would strike the balance between the interests of injurers and the interests of victims too heavily in favor of injurers.⁴⁶ Conversely, it suggests that strict tort liability is not morally objectionable as such. Ultimately, the choice between fault and strict liability is a distributional one. Fault distributes the costs of harm differently from strict liability.⁴⁷ The critical question is not whether the polluter should pay, but under what conditions. Is polluting the environment so morally objectionable, or are environmental harms so worthy of repair, that their costs should be distributed differently from the costs of road accidents, for example?⁴⁸ In U.S. law, the main testing ground for answering such distributional questions has been the law of product liability. The convoluted history of U.S. product liability law in the twentieth century shows how contested and difficult these issues are.⁴⁹

Amongst theories of tort law, the economic concept of general deterrence can be compared with the criminal law model of responsibility in its focus on the agents of harm. Indeed, from a strictly economic perspective, there is no functional difference between criminal

43. TONY HONORÉ, *RESPONSIBILITY AND FAULT* 14-40 (1999).

44. I develop this argument in detail in *RESPONSIBILITY IN LAW AND MORALITY* 65-111 (2002) [hereinafter *RESPONSIBILITY*].

45. But there are "victimless" and inchoate crimes.

46. Peter Cane, *Mens Rea in Tort Law*, 20 *OXFORD J. LEGAL STUD.* 533 (2000).

47. *RESPONSIBILITY*, *supra* note 44, at 181-224.

48. Peter Cane, *Are Environmental Harms Special?*, 13 *J. ENVTL. L.* 3 (2001).

49. JANE STAPLETON, *PRODUCT LIABILITY* 9-36 (1994).

finer and awards of tort damages. But if we take off the economic spectacles we can clearly see differences between criminal fines and tort damages. For one thing, they are calculated differently: criminal fines are meant to reflect the nature and seriousness of the criminal conduct, whereas tort damages represent the harm suffered by the victim.⁵⁰ Even if we see the main function of tort law as being deterrence, tort damages still look more like a tax than a fine because they do not carry the stigma that criminal penalties do. Of course, many taxes are designed solely to redistribute wealth and not to discourage undesirable activities. Indeed, the potentially disincentive effect of income taxation, for instance, is one of the fundamental problems facing tax-policy makers. But taxes (“green taxes,” for instance) can be used to regulate the levels at which activities are carried on without stigmatizing those who engage in such activities in the way that criminal fines do.⁵¹ So we might view tort law as a mechanism for taxing certain activities.

Does viewing tort law as a sort of tax system support fault-based or strict liability? Two points seem important in answering this question. The first concerns the way “tort taxes” are calculated — with reference to the harm inflicted. The second point is that activity taxes are a technique for regulating the level at which an activity is carried on, not for stamping out the activity altogether. If the aim were to eliminate the activity, taxation would not be the obvious tool to use.⁵² Put together, these two points suggest that tort liability ought to be fault-based. Tax liability is typically strict, of course. But because strict tort liability is quantified by reference to the harm done, it may discourage people from engaging in the risky activity at all. The level of activity taxes can be set so as to avoid wiping out the taxed activity entirely, whereas the level of tort damages is limited only by the amount of harm the activity inflicts. Tort liability should be strict only if we are prepared to take the risk that activities subject to tort liability may sink under the weight of tort claims. According to the pure theory of micro-economic analysis of tort law, we should be prepared to take this risk — if an activity generates more costs than benefits, it should be abandoned. In practice, of course, difficulties in assessing the costs and benefits of activities, coupled with our adherence to values other than economic efficiency, lead us to depart from the pure theory. Moreover, various barriers to the full enforcement of tort liability make the threat presented by strict liability to the continued viability of activities subject to it much less in practice than it is in theory.

50. Fines for criminal conduct that causes harm may be more or less than the cost of the harm caused.

51. Smoking was taxed long before it attracted widespread social stigma.

52. We do not tax murder, for instance.

In reality, the choice between strict and fault-based liability is likely, at most, to affect the ways in which and the levels at which activities are carried on. Ultimately, the main difficulty in defending the choice one way or the other between fault-based and strict liability on deterrence-based grounds is lack of reliable empirical evidence about the relative effects of the two regimes on activities subject to them.

B. *Tort Liability and the Superfund*

At this point it is useful to compare and contrast the tort model of liability with that under the Superfund legislation (CERCLA)⁵³ and analogous regimes in other jurisdictions.⁵⁴ CERCLA established a public fund to pay for cleaning up contaminated sites, and made provision for the recovery of clean-up costs from polluters. It also allows individuals who clean up contaminated sites to recover the cost from responsible parties. Secondly, it provided for the recovery of “natural resource damages.” The main departure from the tort model in the cost-recovery provisions of the CERCLA clean-up regime is found in the fact that the liability is not interpersonal. Under the Act, land contamination is treated as public harm, not harm to individual landowners. Indeed, one of the objectives is to make polluters pay for contamination of land they owned at the time the contamination occurred. CERCLA has been heavily criticized on the ground that it imposes strict liability and that it can attach to parties whose causal responsibility for the contamination was tenuous.⁵⁵ Although tort liability is predominantly fault-based, strict liability is not conceptually foreign to the tort model. Nor is the imposition of liability for harm on what have been dubbed “peripheral parties”⁵⁶ — i.e., parties who made only a minor causal contribution to the harm; although in practice, Commonwealth courts have, to varying degrees, been wary of imposing tort liability on such parties.

The natural-resource-damage provisions depart from the tort model in other ways too. First, whereas the clean-up provisions primarily address harm that would fall within the tort model (damage to tangible property and financial loss), “natural resources” may, in principle at least, be part of the unowned environment and, as such,

53. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1994).

54. *E.g.*, Environment Act 1995 (Eng.) (discussed in relation to lender liability by Richard Hooley, *Lender Liability for Environmental Damage*, 60 CAMBRIDGE L.J. 405 (2001)).

55. *E.g.*, John C. O’Quinn, Note, *Not-So-Strict Liability: A Foreseeability Test for Rylands v. Fletcher and Other Lessons from Cambridge Water Co. v. Eastern Counties Leather Plc*, 24 HARV. ENVTL. L. REV. 287 (2000).

56. Jane Stapleton, *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence*, 111 L. Q. REV. 301 (1995).

outside the scope of tort law. Secondly, the basic rule of tort law is that although tort damages are designed to compensate for and repair harm, the claimant is under no obligation to use the damages award for this purpose. By contrast, natural resource damages recovered under CERCLA must be used to repair the natural resource in question or, if this is not possible, to seek to make up for the loss in some way. The requirement of remediation reflects the forward-looking focus of the CERCLA regime on environmental quality, just as the absence of such a requirement reflects the backward-looking focus of tort law on reparation.

In other respects, however, there are important parallels between the tort and the CERCLA models of liability.⁵⁷

C. Summary

Tort law has seven characteristics relevant to its potential role in environmental protection: it is interpersonal, it focuses on bad outcomes, and its main concern is cure rather than prevention. Tort law is primarily a vehicle for reparation rather than punishment, and for reparation of harm to persons. It is not much concerned with risks as such, and tort liability is predominantly fault-based. The CERCLA regime differs from tort law chiefly in not being interpersonal, in extending beyond harm to persons, and in its focus on remediation.

III. ALTERNATIVE

The title of the symposium invites us to think about tort law as a supplement rather than as a complement to enforcement of environmental regulations by regulatory agencies. The issue to be considered is not whether tort might perform some function in the environmental field that is different from but complementary to regulatory enforcement, but whether it can perform the same function.

IV. ENFORCEMENT

For present purposes, we can distinguish various aspects of regulation: choosing regulatory objectives and instruments (such as standards of conduct, taxes, licensing, bonds and so on) to achieve those objectives; establishing an appropriate regime of legal rights and obligations to give effect to those choices; and enforcing that regime. Our seminar title invites us to think of tort law as involved only in the enforcement phase. It does not envisage tort law itself as establishing

57. For a comparison between the transaction costs of Superfund litigation and tort litigation, see Hilary Sigman, *Environmental Liability in Practice: Liability for Clean-up of Contaminated Sites under Superfund*, in *THE LAW AND ECONOMICS OF THE ENVIRONMENT* 138-39 (Anthony Heyes ed., 2001).

regulatory objectives, or as a regulatory instrument, or as embodying an appropriate regime of rights and obligations. Rather we are invited to consider the potential of tort law to be used as a means of enforcing compliance with an “external” regulatory regime. So the question, we might say, is not what contribution tort law might make as a standard-setter in the environmental field, but rather what contribution tort law might make to the enforcement of environmental standards.

The distinction between standard-setting and enforcement is analytically important. For instance, it is relevant to the debate about the so-called “regulatory compliance defense” under which it would be an answer to a tort claim that the allegedly tortious conduct complied with relevant regulatory standards.⁵⁸ Allowing the defense obviously makes sense if tort law is conceived purely as an enforcement mechanism. On that basis, tort liability should be imposed in cases of non-compliance, but not in cases of compliance. By contrast, if tort law is conceived as having a standard-setting (as well as an enforcement) role, it is precisely in cases of compliance that tort law can perform that function by imposing standards higher than those embodied in the relevant regulatory scheme. In relation to the tort of negligence, the doctrinal foundation for such standard-setting is the rule that compliance with relevant regulatory standards does not, by itself, establish that reasonable care was taken.⁵⁹

Two other points: first, the word “enforcement” is ambiguous as between “securing compliance with” and “making accountable for non-compliance with.” For instance, in the criminal law context, the presumption of innocence more or less rules out measures designed to prevent breaches of the law as opposed to punishing them after the event. Similarly, we have seen that tort law deals primarily with harms, not risks. Secondly, a distinction can be drawn between what might be termed “direct” and “indirect” enforcement respectively. In the environmental context, “direct” enforcement refers to measures taken against polluters, and “indirect” enforcement refers to measures taken against regulators in order to stimulate the taking of measures against polluters. Of course, the ambiguity in the notion of enforcement as between compliance and accountability for non-compliance is relevant to both direct and indirect enforcement.

As a vehicle for direct enforcement, tort law can operate in two ways: either by treating breach of a regulatory (typically a statutory or

58. See, e.g., Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L. J. 2049 (2000); Stewart, *supra* note 3. Such a defense may, of course, be expressly provided by statute; but the debate I am referring to concerns whether courts should recognize the defense.

59. FRANCIS TRINDADE & PETER CANE, *THE LAW OF TORTS IN AUSTRALIA* 456-58 (3d ed. 1999).

quasi-statutory) standard as itself a tort; or by construing such a breach as “negligence” (“negligence *per se*”),⁶⁰ trespass, nuisance or a contravention of the rule in *Rylands v. Fletcher*. These two techniques are also available for indirect enforcement. In this context, the relevant standard will relate to the powers and duties of the regulator, and the relevant heads of tort liability are negligence and the “public law tort” of misfeasance in a public office (which involves deliberate abuse of power).⁶¹

Concerning indirect enforcement, tort litigation against regulators has been a significant feature of the UK legal scene in the past thirty years. Initial willingness in the 1970s to contemplate, in principle at least, the imposition of damages liability for regulatory failure,⁶² gave way in the 1980s and early 1990s to a trend towards conferring immunity on regulators as a group in the name of “policy” (“blanket immunity” as it has come to be called).⁶³ Recently, however, objections to this approach by the European Court of Human Rights⁶⁴ have led the House of Lords to adopt a more case-specific approach.⁶⁵ Now, it appears, the question to be asked is whether or not the regulatory failure in issue was the result of a genuine weighing of competing “policy” considerations that the courts are not prepared to second-guess. If so, the challenged regulatory (in)action will not attract tort liability, being treated instead as a reasonable exercise of the regulator’s powers.

V. ENVIRONMENTAL REGULATIONS

“Regulation” is a vague and imprecise term. In a narrow sense, it is often used to refer to what has become known as “command-and-control” regulation. In relation to the environment, this form of regulation essentially involves the establishment by government of standards, duties, and prohibitions addressed to those engaged in potentially polluting activities, and recourse to criminal, civil, and ad-

60. JOHN G. FLEMING, *THE LAW OF TORTS* 137-39 (9th ed. 1998).

61. P. P. CRAIG, *ADMINISTRATIVE LAW* 875-80 (4th ed. 1999).

62. The high-water mark was *Anns v. Merton London Borough Council*, [1978] A.C. 728.

63. *Murphy v. Brentwood Dist. Council*, [1991] A.C. 398 was the high-water mark of this reaction, which was consolidated in cases such as *X v. Bedfordshire County Council*, [1995] 2 A.C. 633 (discussed in Peter Cane, *Suing Public Authorities in Tort*, 112 L. Q. REV. 13 (1996) and *Stovin v. Wise*, [1996] A.C. 923). The European Court of Human Rights has held that the decision in *X v. Bedfordshire* violated Article 13 of the European Convention on Human Rights. *Z v. United Kingdom*, (Application No. 29392/95) (unreported 10 May 2001).

64. In particular, in *Osman v. United Kingdom*, 29 E.H.R.R. 245 (1998).

65. *Barrett v. Enfield London Borough Council*, [1999] 3 W.L.R. 79; *Phelps v. Hillingdon London Borough Council*, [2000] 3 W.L.R. 776. For analysis, see Paul Craig & Duncan Fairgrieve, *Barrett, Negligence and Discretionary Powers*, 1999 PUB. LAW 626. Courts in other major Commonwealth jurisdictions have generally been more willing than English courts to impose tort liability for regulatory failure. Concerning Australia, see TRINDADE & CANE, *supra* note 59, at 693-716.

ministrative penalties⁶⁶ (and the threat of such penalties) as a response to non-compliance (or anticipated non-compliance). By contrast, in a very broad sense, regulation is more or less synonymous with “control” or, even more passively, “constraint.” In this usage, market forces, for instance, may qualify as a form of regulation.⁶⁷ Somewhat more narrowly, it is now recognized that governments have available to them a variety of “regulatory instruments” ranging from statutory duties and prohibitions supported by the criminal law, through taxes, subsidies, and licensing (for instance), to mandatory (or non-mandatory) self-regulation, negotiation, education and so on.⁶⁸ The relevant point for present purposes is that the idea of using tort as an alternative to enforcement of environmental regulations seems to refer to a narrow sense of regulation in terms of command-and-control techniques, and this is the sense in which the term has been used so far in this paper. It encourages us to think about tort law in terms of standards, duties, and prohibitions addressed to potential polluters, and tort litigation as a means of enforcing compliance. From this perspective, a critical difference between tort law and regulation as modes of enforcement is (adopting the standard terminology of the U.S. literature) that tort law is a form of “private enforcement” as opposed to “public enforcement” by government.

Private enforcement through tort law should be distinguished from private enforcement provisions that are a noteworthy feature of U.S. environmental legislation.⁶⁹ Such provisions enable private individuals and groups (such as Friends of the Earth) to bring actions (“citizen suits” as they are often called) against both regulators and polluters for injunctions and statutory (civil) penalties. In other words, they contemplate both direct and indirect enforcement. Injunctions are, of course, designed to secure compliance (or, more typically, cessation of non-compliance), while penalties are designed to

66. In terms of this threefold classification, administrative penalties can be imposed by a regulator without recourse to a court. Criminal penalties are the culmination of criminal prosecutions, and civil penalties result from application to a civil court. The Australian Law Reform Commission is currently conducting a major investigation of the various types of regulatory penalties. The concept of non-criminal penalties is problematic. Recently the English Court of Appeal held that the imposition of administrative penalties for dishonest tax evasion involves a “criminal charge” for the purposes of Article 6 of the European Convention on Human Rights. *Han & Yau v. Comm’rs of Customs & Excise*, [2001] H.R.L.R. 54.

67. For an excellent discussion of the bewildering range of understandings of the concept of regulation, see J. Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World*, 54 *CURRENT LEGAL PROBLEMS* 103 (2001).

68. NEIL GUNNINGHAM & PETER GRABOSKY, *SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY* 37-91 (1998).

69. From the large literature about such provisions, a recent supportive assessment can be found in Barton H. Thompson Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 *U. ILL. L. REV.* 185; and for a powerful negative analysis, see Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 *TUL. L. REV.* 339 (1990). Private enforcement provisions in environmental statutes are not confined to the U.S. See, e.g., *ENVIRONMENTAL PLANNING AND ASSESSMENT ACT* 1979 (N.S.W. Acts) s 123.

secure accountability for non-compliance. There are several fundamental differences between the tort liability model and such private enforcement regimes. First, in the U.S. damages are not recoverable under statutory private enforcement provisions.⁷⁰ This is a corollary of the fact, secondly, that claimants under such provisions need not, and typically will not, have suffered any harm to their person or property. Precisely what harm they must have suffered has been the subject of a significant number of U.S. Supreme Court decisions in the past twenty years under the rubric of “standing to sue,” the most recent being *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*⁷¹ The issue typically arises in enforcement actions initiated by environmental groups. There has been much academic criticism of the regulatory impact of private enforcement provisions,⁷² but also of those courts and judges who have sought to impose narrow standing rules on private enforcement actions.⁷³ The two bodies of criticism often proceed in relative isolation from one another, although they are clearly intimately related: the more liberal the standing rule for citizen suits, the greater their potential number and impact on the pattern of public enforcement by regulators.

By contrast, Dutch law allows environmental organizations to recover costs incurred in repairing environmental damage;⁷⁴ and the Commission of the European Communities has proposed a regime of environmental liability under which environmental groups would be entitled to recover costs of urgent measures to protect the environment.⁷⁵ Such damages awards are designed to provide environmental organizations with an incentive to engage in environmental remediation and protection, rather than to take action to enforce compliance

70. For a proposal that “natural resource damages” should be recoverable in private enforcement actions, see Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law* 24 WAKE FOREST L. REV. 851 (1989).

71. 528 U.S. 167 (2000); Miller, *supra* note 2. The High Court of Australia has taken a rather narrow approach to standing in environmental cases not covered by a statutory standing provision. The leading case is *Australian Conservation Found., Inc. v. Commonwealth* (1979) 146 C.L.R. 493 in which a “special interest” test of standing was laid down. But the Court has recently held (in *Truth About Motorways Pty Ltd. v. Macquarie Infrastructure Inv. Mgmt., Ltd.* (1999) 200 C.L.R. 591, 594) that the word “matter” in Chapter III of the Australian Constitution does not import a minimum standing requirement in the way that the phrase “case or controversy” in Article III of the U.S. Constitution has been held to do. This means that “any person” standing provisions, interpreted literally, are within the legislative power of the Commonwealth, as they are within the legislative power of the Australian States. The English common law of environmental standing is generous. Peter Cane, *Standing, Representation and the Environment, in A SPECIAL RELATIONSHIP?: AMERICAN INFLUENCES ON PUBLIC LAW IN THE UK* 123 (Ian Loveland ed., 1995).

72. *E.g.*, Cross, *supra* note 2.

73. *E.g.*, Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

74. Gerrit Betlem, *Standing for Ecosystems — Going Dutch*, 54 CAMBRIDGE L.J. 153 (1995).

75. Environmental Liability, White Paper for the European Commission, COM (2000) 66 final.

per se with environmental regulations. What incentives are there for citizens to enforce compliance with environmental regulations? Emotional and ideological concern for the environment and for the well-being of future generations is undoubtedly important. The way the costs of enforcement are borne also plays a part. Under both the English loser-pays-all rule and the American system, which requires each party to bear their own costs, financial cost is a significant disincentive to litigation. This disincentive can be counteracted by state-funded legal aid, by legal-expenses insurance, or by a system of contingent or conditional fees⁷⁶ (coupled, where the English rule applies, with insurance against the risk of having to pay the other party's costs in case of failure of the suit). But a contingent-fee system only works in cases where damages are available as a remedy. Nor would insurance to cover legal costs be available in relation to private enforcement actions because one of the essential triggers of the insurer's liability — the initiation of an enforcement action — is in the control of the insured. The costs disincentive can be lessened by replacing the American rule with the English rule,⁷⁷ but only in cases of the most egregious non-compliance where the suit would be almost certain to succeed. In this light, the focus of tort law on harm and compensation can be seen to give it a positive advantage over citizen suits as a private enforcement mechanism because the availability of damages as a remedy provides a significant incentive to would-be enforcers. In practice, the incentive provided by the prospect of monetary reward has been added to the citizen suit procedure by settlement bargains under which polluters agree to give financial support to environmental projects nominated by the enforcer. However, some see this feature of citizen suits as one of the most objectionable.⁷⁸

A third difference between tort actions and private enforcement actions is that the latter are typically based on alleged breach of relatively concrete statutory standards, duties, and prohibitions. By contrast, although breach of a statutory provision may provide the basis for tort liability (if the statute so provides or if the court decides that tort liability is not precluded by the statute), most commonly tort actions are for breach of abstract common law standards such as “negligence,” “unreasonable use of land” (in private nuisance), or the conduct of “dangerous” activities (in *Rylands v. Fletcher*). Fourthly, unlike tort actions, private enforcement actions (as their name im-

76. Both types of systems involve no-win-no-fee arrangements between lawyers and clients. The difference between the two relates to the success premium: under a contingent fee system, a proportion of the damages recovered, and under a conditional fee system a fixed proportion of the lawyer's fees for services rendered.

77. As under all U.S. citizen suits provisions. Thompson, *supra* note 69, at 193-94.

78. Greve, *supra* note 69.

plies) are designed to complement enforcement by a public regulator. Thus, a person who wishes to bring such an action must give notice to the regulator, who can then decide whether to take action itself *in lieu* of the private action.⁷⁹ The regulatory function of private enforcement actions is reinforced by the rule that they cannot be brought in relation to purely past statutory violations.⁸⁰

The closest thing in tort law to the statutory citizen suit is public nuisance.⁸¹ Public nuisance consists of unreasonable interference with a public right. Pollution — of a river, for instance — can constitute a public nuisance. Public nuisance is a common-law crime, as well as a tort actionable by an individual who suffers personal harm — such as financial loss or personal injury — as a result of the nuisance. The remedies for public nuisance are injunction and damages. Public nuisance is also actionable by public bodies (such as the Attorney General and local authorities) on behalf of the public. For example, in a recent case an English local authority recovered damages against a railway company that allowed feral pigeons to nest under a bridge and foul the roadway and pavement beneath, for which the local authority was responsible.⁸² An important difference between public nuisance and a statutory private enforcement regime resides in the source of the standards being enforced — in the case of public nuisance, a court, and in the case of a statutory private enforcement regime, the legislature (or some delegate of the legislature). Another difference lies in the standing rule for the two types of action. Even those who favor a narrower rather than a broader standing rule for citizen suits do not think that the rule should be as restrictive as that which applies to private, or even public, nuisance actions. In particular, the typical private enforcer is an environmental group. In its own right, such a group cannot bring a tort action for nuisance.⁸³

As forms of private enforcement of environmental protection standards, both tort law and statutory citizen-suit regimes rest on a narrow conception of regulation in terms of the command-and-control technique. When considering the possible role of tort law in any scheme of environmental protection, it needs to be remembered that enforcement of legally binding standards, duties, and prohibitions by

79. Cross, *supra* note 2, at 60-61.

80. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). It has been suggested, however, that this rule imposes no practical limitation on citizen suits. Cross, *supra* note 2, at 63-64.

81. See James A. Sevinsky, *Public Nuisance — A Common-Law Remedy Amongst the Statutes*, 5 NAT. RES. & ENV'T 29 (1990); TRINDADE & CANE, *supra* note 59, at 654-61.

82. *Railtrack Plc. v. Wandsworth London Borough Council*, [2002] Env. L. R. 9.

83. For an argument that the standing rule for public nuisance should be relaxed in order to improve the tort's use as an environmental protection device, see Stanton & Willmore, *supra* note 34; Denise Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 2001 *ECOLOGY* L.Q. 757.

formal legal processes (command-and-control regulation) is only one of a variety of regulatory tools. There is a large regulatory literature pointing out various defects of the command-and-control technique and the desirability of utilizing a range of other regulatory tools.⁸⁴ The regulatory potential of tort law must be assessed not only with reference to its possible role as an alternative to command-and-control regulation, but also in light of the acknowledged limitations of the command-and-control technique itself, and the existence and potentialities of other available regulatory techniques.

VI. THE RELATIONSHIP BETWEEN TORT LAW AND REGULATION IN PROTECTING THE ENVIRONMENT

A. *Direct Enforcement*

As was argued earlier, it is important to distinguish between the setting of environmental standards on the one hand and their enforcement on the other. Direct enforcement, it will be recalled, involves suing a polluter in order to obtain an order to prevent non-compliance with regulatory standards. A common argument for viewing tort law as a direct enforcement mechanism (as opposed to a responsibility-based harm-repair mechanism) is that regulatory agencies lack the resources required to achieve the optimal level of enforcement of regulatory standards. Unfortunately, this argument is typically not accompanied by a specification of the optimal level of enforcement or by reliable empirical evidence about the respective and relative efficacy of the various available modes of enforcement in achieving that level. Furthermore, the argument from resources can be and is also used to justify private enforcement through citizen suits. So we need to ask not only whether public enforcement by regulatory agencies needs to be supplemented by private enforcement, but also whether we need two forms of private enforcement — citizen suits and tort law. The argument for an affirmative answer to this latter question would presumably rest on an (implicit) assertion that the incentives to bring citizen suits are inadequate to generate the optimal level of private enforcement. Once again, however, in the absence of a specification of the optimal level of private enforcement, this argument is difficult to assess. The argument from resources is commonly supplemented by an argument that public enforcement is likely to be suboptimal because of the influence of the regulated population over the regulator (the argument from “agency capture”). This argument tends to be accepted uncritically by scholars who favor the regulatory

84. *E.g.*, ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 34-62 (1999); GUNNINGHAM & GRABOSKY, *supra* note 68.

use of tort law, despite doubts cast on its validity in regulatory literature.⁸⁵

In terms of incentives for enforcement, the advantage of tort law over citizen suits is seen to lie in the availability of damages as a remedy for harm suffered by the enforcer. On the other hand, as an enforcement mechanism, tort may be judged inferior to citizen suits precisely because tort liability is conditional on the suffering of personal injury, property damage or economic loss by the claimant, or on invasion of the claimant's property interests. Tort law gives individuals an incentive to enforce environmental regulations only after harm has occurred. By contrast, citizen suits can be directed, in principle anyway, at conduct that is in breach of regulatory standards regardless of whether it has caused or is imminently likely to cause harm (or, at least, physical or financial harm) to the applicant. For this reason, it would arguably be preferable (at least if it is assumed that more private enforcement is better than less) to improve incentives for citizen suits than to look to tort law to make up for any gap in public enforcement. Although in principle damages are not available in a citizen suit, in practice a citizen suit may be settled partly in return for a monetary payment to the private enforcer or to some other party for the furtherance of its environmental-protection objectives. Susan Rose-Ackerman, for one, seems sanguine about the possibility of regularizing this practice by allowing the award of "damages" to the enforcer in such actions,⁸⁶ although such a development would run counter to her objection to private enforcement that it creates a risk that agency enforcement priorities will be distorted and possibly even that agency objectives and effectiveness will be undermined. Another technique for providing incentives for private enforcement actions is a costs rule under which the loser pays the winners costs, coupled with legal expenses insurance to cover the risk that the enforcer will be required to pay both sets of costs if the suit fails. A problem with the insurance part of this solution is moral hazard — the most likely purchasers of such insurance would be environmental groups and individuals who intended to bring an enforcement action or saw themselves as likely to do so.

Some opponents of citizens suits argue that standing to sue should be restricted to individuals who have suffered harm of the sort traditionally redressed by tort law.⁸⁷ If this were done, it would be

85. *E.g.*, ANTHONY I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 57-58, 94-95, 106-07 (1994).

86. Susan Rose-Ackerman, *Public Law Versus Private Law in Environmental Regulation: European Union Proposals in the Light of United States Experience*, 4 REV. EUR. COMMUNITY & INT'L ENVTL. L. 312, 316 (1995).

87. *E.g.*, Cross, *supra* note 2, at 76.

difficult to identify any advantage for the applicant of a citizen suit over a tort action, even if damages were recoverable in citizen suits. Presumably the basic argument for citizen suits is that they provide enforcement opportunities that tort law does not. If they do not provide such opportunities, there would seem little reason to have them.

An underlying issue in the debate about the regulatory role of tort law revolves around the distinction between an adversarial, coercive style of regulation on the one hand, and a cooperative, negotiatory style on the other. Tort law is adversarial and, in principle at least, coercive — although the vast majority of tort actions are settled by negotiation and are not terminated by a coercive order. By contrast, many regulatory agencies adopt an aggressive, coercive enforcement stance only as a last resort when cooperative, negotiatory techniques of securing regulatory compliance have failed.⁸⁸ Those who favor the supplementary use of private enforcement techniques often seem to assume that cooperative regulatory styles are adopted primarily because they are cheaper and make lesser demands on limited enforcement resources, or because of agency capture. Implicit in this assumption is the view that putting considerations of cost and agency capture aside, coercive enforcement is more efficacious than, or is ideologically preferable to, cooperative regulation (or both). By contrast, there is an important body of regulatory literature that argues, on grounds of cost, efficiency, and ideology, for a regulatory style which seeks compliance first by negotiation and persuasion, and only when this has failed, by a series of increasingly coercive and aggressive measures.⁸⁹ The basic point to be made here is that the question of what role tort law should be given in regulatory enforcement raises issues not only about the relative merits of private and public enforcement, but also about the relative merits of different regulatory styles.

In technical terms, the debate about whether tort law should be given a direct regulatory enforcement role revolves around the issue of statutory preclusion (i.e., exclusion) of common law tort liability.⁹⁰ In the law of many Commonwealth jurisdictions there is, effectively, a presumption in favor of statutory preclusion of tort liability for regulatory non-compliance (except in relation to occupational health and

88. BALDWIN & CAVE, *supra* note 84, at 96-101.

89. *E.g.*, IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE REGULATION DEBATE* (1992).

90. *See* Thomas McGarity, *Beyond Buckman: Wrongful Manipulation of the Regulatory Process in the Common Law of Torts*, 41 WASHBURN L.J. 549 (2002) (presented at the Ahrens Advanced Tort Seminar, Washburn School of Law, Fall 2001). Preclusion deprives tort of a role as both an enforcement mechanism and a standard-setting mechanism. A “regulatory compliance defense” prevents tort from operating as a standard-setting-cum-enforcement mechanism but leaves it a pure enforcement role in cases of non-compliance with regulatory standards.

safety).⁹¹ In the U.S., federalist considerations support a presumption against preclusion of tort liability under state law for breach of federal regulatory standards. Like the positive case in favor of private enforcement, the federalist argument against statutory preclusion is typically supported by reference to agency capture and lack of enforcement resources. In an ideal world, the choice between, and the mix of, various enforcement techniques would be based on rigorous empirical evidence about their respective and relative efficiency and efficacy. Although it is widely accepted that the risk of tort litigation, especially class actions for damages, may affect corporate behavior,⁹² we certainly do not possess the sort of evidence we would need to make scientifically reliable judgments either about the optimal level of enforcement of environmental regulation, about the optimal mix of public and private enforcement, or about the optimal mix of tort litigation and citizen enforcement suits. In the absence of such evidence, many arguments in favor of (and against) private enforcement via tort law seem based primarily on an ideological preference for the values that tort law embodies and promotes. Because this is inevitable, the point is not to criticize such arguments but only be alert to their nature.

B. *Indirect Enforcement*

Indirect enforcement, it will be recalled, involves suing a regulator to obtain an order requiring it to enforce regulatory standards. As in the case of direct enforcement, a citizen suit provides an alternative to tort as a mechanism for private enforcement. As in that context, there are two policy questions to be asked: should there be a mixed system of public and private enforcement? If so, should private enforcement take the form of citizen suits, or tort actions, or a combination of the two? From a regulatory point of view, tort law deserves a role in indirect enforcement only if we conclude both that we need a mixed system of public and private indirect enforcement, and that tort law is preferable to, or at least capable of usefully supplementing, the citizen suit as an indirect enforcement mechanism. As in the context of direct enforcement, in the absence of reliable evidence about the respective and relative regulatory efficacy and efficiency of tort litigation and citizen suits, judgment on this issue will necessarily be based on ideological preference.

91. ATIYAH, *supra* note 13, at 78-81.

92. See, e.g., DEBORA H. R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 431-34 (2000); Mark Curriden, *The Power of 12*, A.B.A. J. 36-41 (Aug. 2001). Recent examples include the Firestone tire recall in the U.S., and the rush by airlines in Australia to issue warnings about deep vein thrombosis in the wake of widespread media coverage of the condition and in the face of a proposed class action for damages.

Concerning the choice between public and private indirect enforcement, Susan Rose-Ackerman, whose *prima facie* preference is for public rather than private *direct* enforcement, objects to indirect enforcement via citizen suits on the ground that courts should not second-guess the enforcement policies of regulators.⁹³ In her view (it seems) regulators should be free to decide, without judicial interference, whether and when to enforce regulatory standards.⁹⁴ This objection is equally applicable to indirect enforcement via tort law; and it rests, presumably, on separation-of-powers ideas, and on the proposition that by reason of their procedures and expertise, courts are not qualified to make decisions about proper levels of enforcement of environmental regulations. It might be argued that the question of whether courts should be involved in regulatory enforcement raises significantly different issues in the context of indirect enforcement than it does in relation to direct enforcement. It does not follow from the proposition that citizens should not be allowed to use the courts to enforce environmental regulations against polluters that citizens should not be allowed to engage the judicial process to challenge the enforcement policies and decisions of regulatory agencies and to force agencies to enforce regulatory standards. In terms of principle, even if not of practical politics, support for indirect citizen enforcement would not be inconsistent with opposition to direct citizen enforcement. It is one thing to say that the power and duty to enforce the law should rest with the executive branch of government in the form of regulatory agencies, but quite another to say that the exercise of that power and the performance of that duty should not be subject to judicial scrutiny initiated by citizens.

Of course, citizen scrutiny of executive action need not involve the judicial branch. In Australia, for instance, Commonwealth administrative tribunals (which have jurisdiction to review decisions of the executive) constitutionally belong to the executive branch (established under Chapter II of the Australian Constitution), not the judicial branch (established under Chapter III). But it is arguable that this is more a matter of form than substance, and that Commonwealth administrative tribunals (especially the Administrative Appeals Tribunal) are effectively judicial bodies.⁹⁵ In Australia, the Commonwealth Parliament has power to immunize executive action from scrutiny by

93. Rose-Ackerman, *supra* note 86, at 315-16.

94. *Id.* Surprisingly, she does not make a similar objection to citizen suits against polluters, even though the regulator can prevent such suits only by itself taking enforcement action. More complete integration could be achieved by requiring that a citizen suit could be brought only with the consent of the regulator, or by giving the regulator power to stop citizen suits, subject to some appropriate form of external accountability.

95. Peter Cane, *Merits Review and Judicial Review: The AAT as Trojan Horse*, 28 *FED. L. REV.* 213 (2000).

administrative tribunals and courts, subject to the residual jurisdiction of the High Court of Australia under section 75(v) of the Constitution.⁹⁶ There are non-judicial avenues for scrutiny of the activities of the executive branch of government through Parliament and ombudsmen. But the constitutional entrenchment of the original judicial-review jurisdiction of the High Court vis-à-vis the executive may be seen as providing an essential bulwark against abuse of governmental power and non-performance of governmental duties. It is not unreasonable to think that even (or especially) if citizens are given no role in the direct enforcement of environmental regulations, they should have a role in regulating the regulators.

C. Standard-Setting

When we turn to regulatory standard setting, a common starting-point for debate about the role of tort law is Steven Shavell's view that public regulation is likely to be more effective at controlling pollution than tort law.⁹⁷ A careful discussion of the issues in the context of the environment is that of Susan Rose-Ackerman.⁹⁸ Adopting Shavell's view, she asks how tort law can be made complementary rather than antagonistic to regulatory structures. She is prepared to accept that "very low probability events that harm easily identifiable individuals may be most cheaply controlled through the tort system."⁹⁹ She also thinks that courts may play a complementary role in relation to "diffuse and complex problems" (concerning the environment, for instance), provided their activities "further rather than distort the deterrence goal" of command-and-control regulation.¹⁰⁰ Although Rose-Ackerman locates the fundamental differences between command-and-control regulation and tort law in matters of "procedure" rather than "substance,"¹⁰¹ her discussion of the interaction between the two focuses on standard-setting, not on enforcement issues. She thinks that tort law may have a role in filling gaps in the coverage of regulatory standards (assuming that doing so does not conflict with

96. *Abebe v. Commonwealth of Australia* (1999) 197 C.L.R. 510, 511.

97. Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984). *But see* Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 748-52 (1996) (pollution taxes set equal to estimated harm preferable to command-and-control regulation).

98. SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 118-31 (1992) [hereinafter *RETHINKING*]; Rose-Ackerman, *supra* note 86, at 312-20; Susan Rose-Ackerman, *Environmental Liability Law*, in *INNOVATION IN ENVIRONMENTAL POLICY: ECONOMIC AND LEGAL ASPECTS OF RECENT DEVELOPMENTS IN ENVIRONMENTAL ENFORCEMENT AND LIABILITY* 223-43 (Thomas H. Tietenberg ed., 1992).

99. Rose-Ackerman, *supra* note 86, at 314. It is not clear what she has in mind here, but perhaps transport accidents are an example. In this instance, at least, her view seems highly contestable.

100. *Id.*

101. *RETHINKING*, *supra* note 98, at 120.

the basic purposes of the regulatory regime),¹⁰² and that tort law may appropriately set standards higher than those imposed under a regulatory regime, provided the regime was established as one of minimum standards.¹⁰³ In other cases, she is prepared to accept tort liability only as a supplementary enforcement mechanism and not as an independent standard-setter.

An important issue raised by Rose-Ackerman is that of double jeopardy — that is the possibility that a polluter might be subject to both regulatory enforcement and a tort action. She argues that from a regulatory point of view, this is a problem only where the tort standard is higher than the regulatory standard. Her reasoning is that where the two standards are the same (or the tort standard is lower than the regulatory standard) then although a polluter may be subject to two proceedings in relation to the same conduct, this will not (in theory at least) generate over-deterrence (in the sense of encouraging the taking of greater precautions against pollution than the relevant regulatory standard requires) because the polluter can avoid both types of liability by complying with the regulatory standard. Similarly, she argues that where tort liability is strict — i.e., cause-based — then provided tort damages are equal to the harm caused, it will merely give the polluter an extra incentive to comply with the regulatory standard.¹⁰⁴ By contrast, she says, where the tort standard is higher than the regulatory standard, being subject to two forms of liability may encourage the polluter to aim for the higher tort standard because it is only by meeting this higher standard that the polluter can avoid both forms of liability. In this way, tort law may override regulatory standards. Of course, from Rose-Ackerman's perspective, this is not objectionable in cases where the lower regulatory standards were designed as minima.¹⁰⁵ On the other hand, from a "fairness" (as op-

102. For an English discussion of this gap-filling function, see John Murphy, *Noxious Emissions and Common Law Liability: Tort in the Shadow of Regulation*, in ENVIRONMENTAL PROTECTION AND THE COMMON LAW 51-76 (John Lowry & I. R. Edmonds eds., 2000). In this way, tort may operate as a regulation "forcer" — an example might be gun control where tort actions against gun manufacturers by victims of shooting attacks and their relatives have become increasingly common. Tort litigation might encourage stricter regulation even (or perhaps especially) if it is unsuccessful. Of course, by reason of its interpersonal and local orientation, tort law can contribute very little to dealing with the largest environmental problems such as global warming.

103. Unless the regulatory regime is expressed to establish only minimum standards, the court will be left more or less free to decide this issue for itself. In Commonwealth jurisdictions, environmental legislation often expressly preserves common law rights of action (in nuisance, for instance: Environmental Protection Act 1994 s 21 (Queensl. Stat.); Environment Protection Act 1970, s 65(1) (Vict. Acts)), but without expressing the purpose of the preservation, which a court might interpret as compensatory, regulatory or both.

104. Rose-Ackerman, *supra* note 86, at 315.

105. Rose-Ackerman also discusses the problem of over-deterrence in the context of systems under which polluters can buy the right to pollute either from the government (by paying fees) or by purchase in the market (by acquiring tradeable pollution permits issued by government). The solution she suggests in this context is the preclusion of tort liability by statute. *Id.* at 317. An analogous issue in Commonwealth tort law concerns whether planning permission bars an

posed to a regulatory) point of view, double jeopardy may seem to be a problem in all of these cases. But if the main function of tort law is taken to be compensation for harm rather than standard-enforcement and the penalizing of breach of standards, the fairness problem disappears.

It seems to me that double jeopardy and the risk of over-deterrence are more serious issues than Rose-Ackerman allows because of the possibility that adding tort liability to regulatory enforcement may affect not only the standards according to which a polluting activity is conducted, but also the level at which it is carried on and the amount invested in research and development aimed at reducing pollution. This is particularly clear in the case of strict tort liability. Merely complying with the statutory standard would not protect the polluter from tort liability unless compliance with the regulatory standard was a defense to tort liability. But if it was, tort liability would not be strict in the cause-based sense adopted by Rose-Ackerman. In order to avoid tort liability the polluter might invest more in pollution-control research and development than would be justified if legal liability could be avoided by complying with the regulatory standard, or it might scale down its activities to reduce its potential exposure to tort liability. But even if tort liability could be avoided by complying with the statutory standard, the risk of incurring double liability for non-compliance might cause the polluter to invest more in pollution control (or to carry on the activity at a lower level) than would be justified if only one sanction attached to non-compliance.

In technical terms, the debate about the role of tort law in setting regulatory standards revolves around the so-called "regulatory compliance defense" under which having met relevant regulatory standards is a complete answer to a tort claim in respect of the compliant conduct. Tort law can operate to set standards higher than relevant regulatory standards only if compliance with relevant regulatory standards is not a defense to a tort action.¹⁰⁶ The effect of the absence of a regulatory compliance defense is that regulatory standards represent minimum requirements for the conduct of the regulated activity. Robert Rabin concedes that courts are not as well qualified to set regulatory standards as agencies.¹⁰⁷ However, he argues against a regula-

action in tort for nuisance. An important difference in incentive terms is that planning permission is not purchased (although planning authorities may exact functionally equivalent planning gains in return for the permission). An argument against barring the tort claim is that tort law can provide a compensatory remedy for regulatory mistake (as opposed to failure). However, in terms of the objectives of both tort law and the land-use planning system, such compensation ought to be paid by the planning authority, not the polluter. The argument also begs the question of what is to count as a planning "mistake" and who should decide this issue.

106. And, *a fortiori*, if tort liability for non-compliance is not precluded.

107. See Rabin, *supra* note 58.

tory compliance defense on the ground that tort plays an important compensatory role, and also that it gives individuals an incentive to uncover information about risks that regulated industries have failed to disclose to regulators.¹⁰⁸ Of course, tort only provides an incentive to search for undisclosed information about risks after they have materialized. Moreover, Richard Stewart argues that these informational and compensatory benefits can be secured just as well or better without recourse to tort law.¹⁰⁹ Stewart's positive case for the defense rests on the deficiencies of the tort system for setting regulatory standards.¹¹⁰ The U.S. tort system fares particularly badly in this respect because of the widespread use of juries in civil cases. But even in Commonwealth countries, where juries are more or less unknown in this context, the adversary structure of tort litigation and the associated procedures of the courts are widely thought to be less than ideal for resolving the complex scientific and political issues relevant to environmental standard-setting.

So far as compensation is concerned, it is arguable that harm caused by compliant conduct should be treated as a cost of regulation rather than of the regulated activity. One way of internalizing such cost to the regulatory system would be an administrative no-fault compensation scheme of the sort advocated by Stewart.¹¹¹ If tort is chosen as the (or a) mechanism for delivering the compensation it will, of course, be directed at the regulator, not at the polluter. The central technical issue of tort law in this context concerns the standard of liability. Typically, the allegedly tortious conduct will consist of the exercise or non-exercise of a discretionary power as opposed to the breach or non-performance of a statutory duty. If one assumes that the relevant regulatory standard will have been set on the basis of a cost-benefit analysis, and that the tort standard will be similarly set,¹¹² the function of the tort action against the regulator is to fine-tune the regulatory standard to take account of the risk imposed by the regulated activity on the claimant(s) before the court and of the harm suffered when the risk materializes.¹¹³ This would involve straightforward second-guessing of the regulator's standard-setting decision by the court in the context of the case before it. The element

108. *Id.* Regulators are heavily dependent on information provided to them by the regulated population, whereas the tort system encourages resources to be devoted to searching for information about risk and the causes of harm, and provides coercive "discovery" mechanisms to facilitate it.

109. Stewart, *supra* note 3, at 2180-81.

110. *Id.*

111. *Id.* at 2181-83.

112. As Stewart points out, it is highly unlikely that courts in the U.S. or the Commonwealth would impose strict tort liability for regulatory failure. *Id.* at 2183-84.

113. Another way of putting this is to say that tort litigation facilitates the collection of detailed information about risks that regulators do not have the resources to acquire.

of second-guessing would be less if tort liability could be imposed only in case the costs of regulatory compliance, taking account of the harm to the claimant(s), were judged by the court to outweigh its benefits by a much greater margin than if that harm were ignored. In Commonwealth law, this approach is embodied in the idea that in a negligence action against a regulator or other public functionary in respect of the exercise of a discretionary function, conduct will not be adjudged negligent if it was merely unreasonable, but only if it was so unreasonable that no reasonable functionary could consider it non-negligent. This latter standard is analogous to a deferential standard of judicial review of agency action in an indirect enforcement action,¹¹⁴ and both can be justified in terms of relative institutional competence and constitutional separation of powers concerns.

Such an approach would be consistent with Kenneth Abraham's argument in favor of a mix of regulatory and tort-based standard-setting. His view is that such a regime is desirable because it encourages entrepreneurial risk-taking by allowing general regulatory standards to be set lower in the confidence that the tort system is available to set higher standards in appropriate cases.¹¹⁵ However, he is arguing for the use of tort as a regulatory, not a compensatory, device, and against polluters, not regulators. If the higher standards set in tort cases were seen as having a purely compensatory function in cases where the harm suffered by individual claimants significantly altered the cost/benefit balance as assessed by the regulator, it might be possible in practice for regulators to resist the temptation (or pressure) to raise regulatory standards to the level of the tort standard. But if tort litigation were viewed primarily as a standard-setting (regulatory) device, it seems inevitable that successful suits against regulators (or against polluters) in relation to compliant conduct would result in the driving-up of regulatory standards. In other words, tort litigation would provide a form of appeal against standards set by regulators.

At the end of the day, any justification for using tort law as a standard-setter must be found in the desirability of providing a mechanism for judicial input into the regulatory standard-setting process, not for the delivery of compensation. From a regulatory point of view, compensation is important only as an incentive to engage the judicial process. From this perspective, too, a deferential standard of tort liability can easily be defended when applied either to regulators or polluters. In the former case, it can be said to strike a sensitive

114. PETER CANE, AN INTRODUCTION TO ADMINISTRATIVE LAW 208-12 (3d ed. 1996) [hereinafter ADMINISTRATIVE LAW].

115. Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379 (2002) (presented at the Ahrens Advanced Tort Seminar, Washburn School of Law, Fall 2001).

balance between regulatory discretion and judicial accountability; and in the latter case between external and self regulation.¹¹⁶ From a compensatory point of view, by contrast, a deferential standard can be criticized as striking an inappropriate balance between the interests of injurers and victims of harm.

It is widely accepted that courts properly have a role to play in reviewing the setting of regulatory standards by regulators and, under self-regulatory regimes, by the regulated.¹¹⁷ Views differ about how deferential courts should be in exercising this supervisory function, but it is generally agreed that judicial control ought to be “residual” in some sense, and exercised only in a small minority of extreme cases. It is sometimes argued that tort law is inferior to regulation as a standard-setting mechanism because tort standards are abstract and give much less guidance to the regulated group than do carefully crafted and technically precise regulatory rules.¹¹⁸ But abstract, flexible, context-sensitive standards such as are found in tort law are well-suited to a residual judicial role that is sensitive to the limitations of courts as standard-setters. The argument against using tort law as a regulatory standard-setter does not lie in the content or nature of its standards. Rather it rests on its correlative structure and the compensation-oriented interpersonal nature of its liability rules. The primary function of the court in a tort case is not to exercise residual control over the defendant’s standard-setting, but to resolve claims for reparation on the basis of a balance struck between the plaintiff’s interest in security of person and property and the defendant’s interest in freedom of action. It is one thing to say that courts should second-guess environmental standard-setters only in extreme cases, but quite another to say that victims of environmental harms should be compensated only in extreme cases. The proper role of the courts in supervising the setting of environmental standards is different from their role in establishing

116. In this latter context, deferential standards of tort liability have traditionally been used in tort actions against medical practitioners. TRINDADE & CANE, *supra* note 59, at 453-56. In such cases, tort law establishes a general standard of reasonableness, but allows the regulated group to define what counts as unreasonable conduct, subject to over-ruling only in the most extreme cases.

117. Concerning self-regulation, see for instance Julia Black, *Constitutionalising Self-Regulation*, 59 MOD. L. REV. 24 (1996).

118. Note, however, that the idea of an abstract regulatory standard — such as a “duty of care for the environment” — that can be tailored to the requirements of particular circumstances by the regulated population through industry codes of practice and the like, has recently been recognized as a potentially useful regulatory technique. Alex Gardner, *The Duty of Care for Sustainable Land Management*, 5 AUSTRALASIAN J. NAT. RES. L. & POL’Y 29-63 (1998); Gerry Bates, *A Duty of Care for the Protection of Biodiversity on Land*, Consultancy Report to the Productivity Commission, available at <http://www.pc.gov.au/research/consultancy/docpobol/docpobol.pdf> (AusInfo, Canberra, 2001). Note also that in the British integrated pollution prevention and control regime the standard that polluters are required to meet is expressed in abstract terms of the “best available techniques” for pollution control. See Pollution Prevention and Control Act 1999 (Eng.).

principles of personal responsibility as a basis for the imposition of obligations to repair harm.

Structurally, tort law is not a suitable vehicle for environmental standard-setting because the residual role that courts properly play in that activity does not provide an acceptable basis for the construction of responsibility-based obligations of repair. This helps to explain why courts continue to find cases that lie on the interface between tort law and administrative law so difficult.¹¹⁹ Private law, of which tort law is a part, is concerned with interpersonal relationships while public law (of which administrative law and regulatory law are parts) is concerned with issues of social design.¹²⁰ The proper role of courts is different in the two areas. Private law structures are not suited to performing public law tasks.

VII. CONCLUSION

From a regulatory perspective, the best argument for treating tort law as a regulatory tool may be that it has regulatory effects. It is widely accepted, for instance, that (the risk of) tort litigation, especially class actions for damages, may affect corporate behavior.¹²¹ This explains Rose-Ackerman's view that tort law should be allowed to exist for compensation purposes only if its regulatory effects are acceptable. If the best we can say for tort law from a regulatory perspective is that it is not unacceptable, why keep it? Why keep tort law as a gap-filler rather than adopt some mechanism for monitoring regulatory programs and filling gaps in them by legislative action as they are detected? Nor does it seem desirable from a policy point of view that the job of reviewing standard-setting by regulators and fashioning standards above the minima established by a regulatory regime should be committed to tort law, given its compensatory focus. The case for seeking a regulatory role for tort law seems even weaker in the light of its association with the command-and-control technique and the contemporary consensus that successful regulation demands a subtle mix of various regulatory tools.

The justification for tort law in the regulatory state must rest on its role as a mechanism for imposing obligations of repair on the basis of ideas of personal responsibility. It is only from that perspective that it seems worth asking the question of whether any conflicts between regulatory policy and tort law are acceptable. The case for tort law cannot rest on its regulatory potential. If its worth as a system of responsibility-based harm-repair does not outweigh the damage its

119. ADMINISTRATIVE LAW, *supra* note 114, at 241-56.

120. RESPONSIBILITY, *supra* note 44, at 251-78.

121. *See supra* text accompanying note 88.

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regulatory effects do in the context of environmental protection, for instance, the best course is to abolish it and find other techniques for repairing harm and enforcing principles of personal responsibility that do not have those negative regulatory effects. From a policy perspective, the fact that tort law exists is no reason to assume that it must have a regulatory role in the modern state. Similarly, if the worth of tort law as a system of responsibility-based harm-repair does not outweigh its defects as a compensation mechanism, the best course is to abolish it and find other techniques for enforcing principles of personal responsibility that do not interfere with our compensatory aspirations. If the worth of tort law as a responsibility-based harm-repair mechanism *does* outweigh its negative regulatory effects and its defects as a compensation system, we should simply accept its costs for the sake of its benefits.

