# WHAT DOES TORT LAW PROTECT?

Tort lawyers have become used to the notion that, though focused on wrongs and remedies, the law can fruitfully be analysed in terms of the primary rights that underlie its actions. However, this article argues that these rights are frequently misidentified. By way of example, the article shows that it is mistaken or at least misleading to speak of a right to reputation or bodily integrity as underlying the torts of defamation or trespass to the person respectively. The article also suggests an alternative way of understanding the rights to which tort law responds, a suggestion that in turn serves to uncover the fundamental significance of tort law.

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## I. Introduction

1 Modern tort law portrays itself to its students in two main ways. Most obviously, it presents a rather long list of actions – battery, assault, false imprisonment, negligence, defamation, conspiracy and so on – and criteria for determining when those actions are available. In this way, tort law casts itself as a law of wrongs: a law detailing when defendants are said to have committed the named legal wrongs against plaintiffs. Many also maintain that the law presents itself as or as part of society's response to loss. In fact, however, this is not strictly so. There is nothing in the legal actions themselves that requires this interpretation. Nevertheless, during the course of the last century, this became the received view. Thus, at the beginning of the current century, Lord Bingham was able to state without argument that "the overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another".[1] For convenience, this can be referred to as the *loss model*.[2]

2 An important trend in recent tort law scholarship has been to shift attention from these faces of the law to focus on more implicit dimensions. There has been a tendency in particular to concentrate on the rights tort law implicitly recognises. As tort law acknowledges a set of wrongs that defendants commit against plaintiffs, it must also indirectly recognise a set of rights that plaintiffs hold against defendants.

1 *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32 at [9].
2 Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at p 2.

Focusing on this implicit dimension of the law has been enlightening, because it has enabled solutions to seemingly intractable problems to come to light – most notably to the problem of the recovery of economic loss in the law of negligence.[3]

3 Importantly, this shift in emphasis from the actions themselves to the rights that underlie them has led to first a questioning of and now a rejection of the loss model. This has occurred because the rights underlying the law do not appear to be focused on the prevention of loss *per se*. Of course, this view does not deny that tort law compensates for loss, but it understands compensation differently from the loss model. Instead of regarding loss as recoverable in tort because individuals have a general entitlement to be free from hurt, the new understanding holds that loss is recoverable because it is the result of the violation of the plaintiff's rights; and it is the rights, not the loss itself, with which the law is directly concerned. According to this understanding, tort law is not correctly viewed as society's response to social cost; the loss model is in error.

4 This article is not a defence of this new way of thinking about tort law or an attack on the loss model. It begins with the acceptance that the loss model has been defeated. With that in mind, however, the article has two main aims. The first is to show that the dismantling of the loss model remains incomplete. Ironically, despite the fact that the focus on rights led to the rejection of the loss model, that model has inappropriately influenced understandings of the rights in question. As indicated above, these rights are implicit. They are the logical consequences of tort law's recognition of its list of wrongs. In determining their content, then, one would be influenced by one's understanding of what tort law is doing in general. Specifically, if one thinks that tort law is primarily concerned with loss, then one would tend to identify rights that also have an intimate connection with loss.[4] This is what has occurred. Rights were identified before the loss model

3 The landmark here is Peter Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law" in *Philosophical Foundations of Tort Law* (David Owen ed) (Oxford: Oxford University Press, 1995) at p 427. Benson's position was adopted in, *eg*, Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) ch 7 and Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at pp 20–43.

4 This claim appears to be in tension with that made in para 4 above: that the focus on rights has undermined the loss model. In fact, however, the tension exists within the loss model itself. It will be seen at paras 19–29 below that the loss model has infected the understanding of certain rights. That it has done so without enabling the formulation of a set of rights consistent with the model is just yet one more piece of evidence for the failure of that model. The basic problem is that the loss model is thoroughly inconsistent with the law of tort.

was abandoned; thus, the model influenced the identification. As will be seen in the following,[5] this has distorted our understanding of the law.

5 The second main aim is to begin to reveal tort law's genuine focus. If the law is not primarily concerned with loss, what is it concerned with?[6] A definitive answer to this question cannot be provided here but general suggestions can be made. The result is a far more morally attractive picture of the law of tort than that suggested by the loss model. Thus, the importance of tort law is revealed and clarified.

6 The article focuses on two areas of the law: the torts of defamation and the law of trespass to the person. It does so because there is a relatively clear consensus on the rights protected by these torts. But this article argues that these purported rights either do not exist or are mere implications of more fundamental rights, rights that more clearly delineate the nature of the actions in question.

## II. The law of defamation

7 It is not uncommon to assert that the law of defamation is a mess.[7] How bad things are is a matter of debate. However, there is one thing that most commentators can agree on as clear and well established: the law protects a right to reputation. Unfortunately, however, there is no such thing.

8 What is a reputation? The *Oxford English Dictionary* defines reputation as "The condition, quality, or fact of being highly regarded or esteemed; credit, fame, distinction; respectability, good report". As this helps to reveal, one's reputation is the product of the opinions of others. However, it must be clear that there can be no right to this, at least not in jurisdictions that respect freedom of thought. Even if *A*'s despite of *B* is entirely unwarranted, *B* has no entitlement to have *A*'s mind changed. There is no right to another's opinions of *B*. That must mean that there is no right to reputation either.

5 See paras 19–29 below.

6 "Rights" is not an adequate answer, not because it is wrong, but because it is insufficiently informative. In principle, one could have a right to anything, so simply saying that tort law protects rights does not tell us what we need to know. A theory of tort law focusing on rights is informative only if it reveals something significant about the type of rights found in that area of the law.

7 *Eg*, Tony Weir, *A Casebook on Tort* (London: Sweet & Maxwell, 8th Ed, 1996) at p 519.

9 It might be said in reply that "the right to reputation" is really shorthand for the idea that individuals are entitled not to have their reputations unfairly attacked, or some such notion. On this view, then, the right in question is not really a right to a reputation but a right not to have one's reputation unfairly damaged. However, this suggestion raises important questions. One that may immediately come to mind is: What constitutes an attack on a reputation that is *unfair*? But there is an even more basic question: What does it mean to *attack* a reputation? This question must be asked because "attacking a reputation" is a metaphor. A reputation is not a thing that can be attacked in any literal fashion. What is meant, then, when one speaks of attacking a person's reputation?

10 Imagine a case in which *A* intentionally publishes a defamatory statement about *B* to *C* in an effort to discredit *B*. If it is said that *A* attacks *B*'s reputation in this case, what does this mean? What *A* does is say something to *C* designed negatively to affect *C*'s opinion of *B*, but of course that opinion is not what the law of defamation is trying to protect, not literally. If that were so, as the opinion is *C*'s not *B*'s, it would be *C* and not *B* who would have a cause of action against *A* (and the tort would be deceit or something of the kind). If *B*'s reputation is constituted by the opinions that *C* (and others) have about him, then only *C*, not *B*, could have a right to *B*'s reputation. The wrong *A* does *B* is not changing *C*'s opinion of *B simpliciter*. *B* has no right to that whatsoever.

11 Beginning investigation of the law of defamation with the notion that the tort protects a right to reputation is a bad start. Why, then, has it been thought that this is where analysis should begin? The answer is that this picture is suggested by the loss model. In a case of defamation, the loss that the plaintiff suffers is characteristically a loss of reputation. Hence, the influence of the loss model has led to the view that the right protected by the law of defamation must be a right to reputation. However, if the loss model is abandoned, this conclusion should be abandoned too.

12 If the law of defamation is not concerned with a right to reputation, what is it concerned with? It is not possible to answer this question definitively here, but the following[8] is intended as a suggestion as to how the basis of the law of defamation might be reconceptualised, a suggestion that will be useful also where the law of trespass to the person is concerned, as will be discussed below. Let us begin with a paradigm case.

8 See paras 13–18 below.

13 Imagine that I claim on national television that you are a paedophile. Naturally, you are likely to be distressed by this. However, what exactly is the nature of the wrong that I do you? You do not want people to think ill of you; but if that were your complaint, then your grievance would be with the people who believe what I told them and not with me.

14 One might maintain that your complaint is rightly directed at me because I *cause* people to believe that you are a paedophile, but causation cannot provide the answer here, as the people who believe me likewise cause the relevant beliefs and yet are not wrongdoers. Perhaps the notion is that, unlike others, I *wrongfully* cause the beliefs, but this is unhelpful. If "wrongful" here refers to fault, then this cannot be the key to understanding the issues in question as the tort of defamation is not fault based. On the other hand, if wrongdoing in this context does not require fault, then it is unclear why the third parties are not also wrongdoers.

15 Fundamentally, the problem is that a reputation is constituted by beliefs and beliefs themselves cannot be characterised as wrongful. Even if they are arrived at on a false basis, beliefs are protected by the right to freedom of thought. Put simply, you have no entitlement to force the third parties to change their beliefs about you. What, then, is the wrong that my defamatory statement does you?

16 If you were placed in this situation, it is likely that you would be fearful about meeting people in public. You would worry that they had heard the allegations that I made and would despise you. You would be concerned about the kinds of interactions that you might have with people in the future. For instance, you may be concerned that you will be subject to acts of violence or intimidation. You may be worried about vigilante actions. You would feel that your life had been seriously affected by my accusations in these kinds of ways, and though you may eventually clear your name, you would be concerned that your life would continue to be affected by those unaware of your evidence or by those who discount it. This suggests that the basis of your complaint is not merely that my statement causes people to think less of you, that is, that it damages your reputation, it is that the statement causes people to think less of you, triggering them to alter their behaviour towards you in a detrimental fashion. This is well captured in the second Restatement's[9] assertion that:[10]

9 *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965).

10 *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965) § 559.

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

This indicates, contrary to the general impression given by the Restatement,[11] that the right involved is not a right to reputation but a right somehow tied up with being able to associate with others that is violated by having one's reputation attacked. Reputation is not the right protected. Rather, the attack on reputation is the mechanism for violating the right protected, whatever that right is.

17 This further suggests that the wrong involved in defamation is not damaging reputation *per se*, but gaining a kind of control over an important area of the plaintiff's life (or causing the plaintiff to lose control over that area of her life) by getting third parties to think ill of that person. In the example above, because of what others will think of you, you will no longer be able to express yourself in the world as you would have been able to, so much so that it is natural to regard my statement as coercive. The point is not that my statement will cause loss to you, though it may well do so. The point is rather that in making the statement I exercise control over you through others.

18 This thought will not be further pursued here. Much evidence would need to be produced in order to show that these notions provide a utile basis for conceptualising the law of defamation. However, these suggestions are useful for setting up the discussion of trespass that follows.

## III. Trespass to the person

### *A. Battery*

19 If a defendant batters a plaintiff, with what right in the plaintiff does the defendant interfere? The standard answer is that the defendant interferes with the plaintiff's bodily integrity.[12] This, then, is the right said to underlie the tort of battery. Against this view, however, this article maintains that this right is either mislabelled or is a mere consequence of a more general right, a right more useful for developing

11 *Eg*, *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965) ch 24 defines defamation as involving "invasions of interest in reputation".

12 An answer given also by the author's past self. See, *eg*, Allan Beever, "Our Most Fundamental Rights" in *Rights and Private Law* (Andrew Robertson & Donal Nolan eds) (Oxford: Hart Publishing, 2011) at p 63.

one's understanding of the law of battery and of the law of trespass to the person more generally.

20 It is first important to examine what "bodily integrity" might mean. In this context at least, "bodily" provides no special difficulties, but what is meant by "integrity"? The *Oxford English Dictionary* first defines "integrity" as "[t]he condition of having no part or element taken away or wanting; undivided or unbroken state; material wholeness, completeness, entirety". Given this, the right to bodily integrity may be understood as most fundamentally protecting the body from injury.[13]

21 This helps to reveal that the notion that the law of battery protects a right to bodily integrity is suggested by the loss model. If integrity is the opposite of injury, as the loss model holds that tort law protects against injury, this implies that the tort of battery protects integrity. What is the loss to the plaintiff normally associated with an act of battery? It is loss to or relating to the integrity of the plaintiff's body. So, if *A* stabs or shoots *B*, *B*'s loss is the result of the damage to the integrity of his body. Moreover, the tort of battery is frequently illustrated by a list of paradigm cases: stabbings, shootings, punchings, *etc*. These cases paradigmatically cause an interference with the integrity of the plaintiff's body. Thus one has the notion that a right to bodily integrity is in play here. Note also that each of these features is suggested by the loss model. The paradigm cases are paradigms because they involve actions that typically have a certain kind of consequence for the plaintiff, *viz* loss of or in relation to the integrity of the body.

22 The problem with this understanding of the law is that there are many other cases, just as much batteries as the ones under examination, where no loss and violation of the integrity of the body occur. For instance, if you tell me that you do not want to be touched and I intentionally make contact with you nevertheless, I batter you even if I cause no injury to you at all. In these cases, it is misleading at best to say that there has been any interference with the *integrity* of your body. Though punchings, stabbings and the like are regarded as paradigm cases of batteries, mere touchings of the kind just examined are no less central instances of batteries in the eyes of the relevant legal principles. As far as those principles are concerned, it makes not one iota of difference how hard the contact with the plaintiff was, for example, and the tort is said to be actionable *per se*, meaning that loss is quite

13 Particularly from injury that involves the severing of parts of the body, though it seems clearly wrong to place any emphasis on this notion in this context.

irrelevant.[14] It is not the law itself that identifies punchings, stabbings, *etc*, as paradigms, but that law in conjunction with the loss model. The notion that the law is concerned with the integrity of the body is produced in the same fashion.

23 Consider also the nature of sexual battery. These are serious and yet do not necessarily infringe the integrity of the plaintiff's body. What is more, even when that integrity is violated, it is often not this that constitutes the essence of the plaintiff's complaint against the defendant. In a case of rape, for instance, the integrity of the victim's body is certainly violated, but, as will be seen in more detail shortly,[15] this observation does not come close to recognising the wrong to the victim that the defendant commits.

24 It is important to say that this criticism of the notion that a right to bodily integrity lies behind the law of battery does not imply that the law of battery leaves the integrity of the body unprotected, that there is no right to bodily integrity, or even that that law of battery is unconcerned with this right. The position advanced here is rather that, though the law of battery does protect the integrity of one's body, bodily integrity is not the law's basis. The law protects the integrity of the body because it protects something even more fundamental, something that entails the protection of integrity. What might this thing be?

25 Famously, in *Schloendorff v Society of New York Hospital*,[16] Cardozo CJ maintained that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body".[17] This does not say that the law protects the integrity of the plaintiff's body. It says that the law protects the plaintiff's right to control the use of his own body.

26 The basic idea is simple. A person's body is his. It is absolutely fundamental that only he has the power to choose the purposes to which it is put. If another puts his body to her purposes without his consent, then she infringes that fundamental right. This is a concern, not with integrity, but with control. Thus, while the integrity of a person's body is interfered with when someone punches, shoots, or stabs him without his consent, the essential reason these are batteries is because they violate his right to control the use of his own body. These actions put his body to her purposes without his consent. This is also

14 For the position in the US, compare *Restatement (Third) of Torts: Physical and Emotional Harm* (St Paul, Minnesota: American Law Institute Publishers, 2010) § 5.

15 See para 27 below.

16 105 NE 92 (NYCA, 1914).

17 *Schloendorff v Society of New York Hospital* 105 NE 92 at 93 (NYCA, 1914).

why it is no less a battery to kiss or touch a person in any way to which he does not consent, even in the absence of harm or even if the touching is of benefit to him. Though such actions leave the integrity of his body unaffected, they violate his right to control the use of his body.

27 Think again of the example of rape. The loss model is forced to understand the loss that the plaintiff suffers as the result of a rape as belonging to the essence of her claim against the defendant in tort. A rape is not wrongful merely because of the consequences that follow from it; but on the loss model, it is only these consequences that concern the law of tort. This is a deeply unattractive view. On the view advanced here, on the other hand, the fundamental reason rape is wrongful in the eyes of tort law is not because the victim suffers loss, but because her body is used in a way to which she has not given her consent. Only this picture is able to treat these plaintiffs as persons deserving not merely of compensation but of respect.

28 Thus, this tort is actionable *per se*, not merely because of historical accident, but because the law is concerned to protect the plaintiff's right to control the use of her own body. That right can be violated even in the absence of any loss or damage to the integrity of the plaintiff's body. Accordingly, the idea that battery is concerned with the right to bodily integrity is a creature of the loss model. It should be abandoned along with that model. The law is in fact concerned with the right to control.

29 Before turning to other torts, it is important to consider the possibility that "integrity" has been defined too narrowly. The *Oxford English Dictionary* also defines "integrity" as an "[u]nimpaired moral state; freedom from moral corruption; innocence, sinlessness". Perhaps the idea might be that the right to bodily integrity entails not only an entitlement against injury but also freedom from any immoral, corrupt, guilty, sinful, *etc*, interference. No doubt many who have used the term "bodily integrity" have intended it in something like this manner. The problem with this view, however, is that it does not itself identify what counts as immoral, corrupt, *etc*, interference in this context. On the other hand, that is precisely what the theory advanced here provides. Control is a far more illuminating window through which to view the law of battery than is integrity.

### *B. Assault*

30 An assault is the intentional creation in another of an apprehension of an imminent battery. This too is an exercise of control. To start with a paradigm case: The defendant pulls a gun on the plaintiff and leads the plaintiff to believe that he will be shot. Naturally, if the

defendant fires and hits the plaintiff, the defendant will exercise control over the plaintiff's body. However, it takes little imagination to see that, even before the trigger has been pulled or even if it is not pulled, the defendant asserts control over the plaintiff's body. This can be brought out by observing that the plaintiff will normally feel compelled to flee or at least flinch in response to the threat. In general, the point is that the plaintiff's realisation that he may be shot leads him to experience his body as the mechanism through which the defendant threatens his death. The threatened shooting makes the plaintiff experience his body as a means to another's ends.

31 Anyone who has faced the threat of physical violence understands the nature of this observation. If I threaten to punch you on the arm, your arm is experienced as a potential source of the pain I am looking to inflict on you. You are likely to flee, flinch, move to protect yourself or something of the kind. But even if you do none of these things, even if you are entirely unafraid, the fact that you apprehend that I am about to strike you on the arm means that you can no longer view your arm as under your control free of my purposes.

32 This is also true of nonviolent cases. Imagine, for instance, that I shape to kiss you on the cheek. Here, in order to avoid the use of your body to which you have not consented, you are forced to act, by moving away or blocking me for example. More fundamentally, while it appears that I am about to kiss you, you cannot regard your cheek as under your control free of my purposes.

33 This analysis explains why assault and battery are separate actions. A battery is the exercise of control over another by putting that person's body to one's purposes. An assault is the exercise of control over another by threatening to put that person's body to one's purposes. It further explains why the plaintiff's level of fear or concern is irrelevant. The tort is focused, not on loss, but on coercion. The issue is whether control over the plaintiff has been exercised, not the psychological, emotional or other impact on the plaintiff. For the same reason, it makes no difference if the defendant believes that he will be able to defend himself with ease from the threatened attack. That shows only that the potential loss was small or non-existent. That the defendant planned to defend himself reveals the control successfully exercised by the defendant.

34 It is not a requirement for assault that the defendant ever be in the position to batter the plaintiff. The defendant in *Stephens v Myers*[18] advanced on the plaintiff with a clenched fist but was halted by others

18 (1840) 4 C & P 349; (1840) 172 ER 735.

before getting close enough to throw a punch. The court held this to be an assault.[19] This is because the plaintiff was subject to the defendant's control, a fact that can be brought out by seeing that the plaintiff would likely have been inclined to rise, flee, protect himself and so on.[20] On the other hand, if the plaintiff knows that he cannot be struck, say because he knows that the gun being held by the defendant is not loaded, or is unaware of the defendant's activity, then there can be no assault.[21] This is because this plaintiff is not subject to the defendant's control in these circumstances.

35 This analysis further explains what would otherwise appear to be a quite incongruous feature of the law: the demand that the plaintiff apprehend an *imminent* battery.[22] On the face of it, the rationale for this rule is opaque. Why is it an assault to shape to kiss someone but slip and miss when it is not an assault to threaten to kill the person a month from now, even if there is no reason to doubt that the threat can and will be carried out? The first action seems comparatively trivial. The second is very significant and may in itself cause serious harm. In that light, the law's insistence on imminence appears irrational. It is obvious that the threat to kill is likely to have a greater influence on the person's life than the attempt to kiss and yet only the latter is an assault.

36 The answer to this difficulty is to note again that the law is unconcerned with loss *per se* but is focused instead on the right to control the use of the body. Given that focus, it is natural to regard a threat of *immediate* unconsented to touching as interfering with that right. Again, this can be supported by noting that people react to imminent threats in physical ways, by flinching or fleeing, *etc*, but not to distant ones. Because of this, the threat to touch someone now interferes with her right now, while the threat to kill someone in a month does not violate that right now (though it might violate a different right now). The first is a threat that violates her right to control her body, while the second is a threat to violate that right in the future.

19 See also *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965) § 33.

20 Again, it is important to stress that these inclinations reveal the wrong; they do not constitute the wrong. The claim is not, for example, that assaults are wrongful because they cause people to flee.

21 *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965) §§ 22 and 24.

22 See especially *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965) § 29(2).

### *C. False imprisonment*

37 The tort of false imprisonment is commonly said to protect the right to freedom of movement. That can be a helpful definition, but it is not strictly correct. It is another error produced by the loss model. Again, the idea is that the harm usually caused by an act of false imprisonment is loss of movement and so it is thought that the tort protects a right to freedom of movement. However, the tort generates no right to move wherever one wants.[23] Moreover, it would not be a false imprisonment wrongfully to refuse permission for someone to leave the country. It is not flatly wrong to say that false imprisonment is about the right to freedom of movement, but it is more accurate to say that the tort protects one's right to control the use of one's body.

38 If a person is locked in a room, he is deprived of his ability to move around. That is wrongful because it is an assertion of control over the use of his body. However, though it in some way interferes with freedom of movement, it is not an assertion of control over his body to prevent him moving in one particular direction (without committing an assault, battery or other relevant wrong)[24] when he can easily go elsewhere.[25] Similarly, if the plaintiff is easily able to "escape" the area of alleged imprisonment, then no control has been exercised.

39 Moreover, in order for there to be a false imprisonment, the defendant must intend to and succeed in controlling the plaintiff's body through imprisonment. The issue is not whether the defendant intends to or succeeds in imprisoning the plaintiff. Again, the focus is control, not loss. So, a defendant who places the plaintiff in a room with an unlocked door and convinces the plaintiff that the doorknob is electrified commits a false imprisonment even if the doorknob is not electrified and thus the plaintiff not in fact imprisoned.[26] What matters is that, by convincing the plaintiff that he cannot touch the doorknob, the defendant has gained control over the plaintiff's body where the form of control is imprisonment, that is, preventing the plaintiff from moving. That the plaintiff is not in fact imprisoned is beside the point.

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23 *Bird v Jones* (1845) 7 Ad & El (NS) 742; (1845) 115 ER 688.

24 Hence, it is accepted that if the defendant in *Bird v Jones* (1845) 7 Ad & El (NS) 742; (1845) 115 ER 688 had not been a policeman, then a tort would have been committed. However, that is because such a defendant could have prevented the plaintiff's continuing only by completely restraining the plaintiff or by committing a tort on the plaintiff other than false imprisonment.

25 *Bird v Jones* (1845) 7 Ad & El (NS) 742; (1845) 115 ER 688; *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965) § 36.

26 *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965) §§ 38–40.

This is also why it can be a false imprisonment wrongfully to assert legal authority over a person, restraining his movements.[27]

40 Similarly, it is possible to be falsely imprisoned even in circumstances in which one is incapable of movement: for example, when one is too ill to move.[28] Again, the issue is not whether the defendant's actions caused loss to the plaintiff. It is whether the defendant exercised control over the plaintiff's body. If the defendant locks the plaintiff in a room then the defendant exercises that control even if the plaintiff is unable to leave the room had the defendant not locked it.

41 US law maintains that a plaintiff unaware of his imprisonment can have no cause of action.[29] The reasoning for this appears to be that a plaintiff unaware of her imprisonment cannot have suffered loss. As the law of the Commonwealth recognises, however, that is the wrong approach.[30] Loss is not the issue. If the defendant locks the plaintiff in a room, the defendant is exerting control over the plaintiff even if the plaintiff is unaware of it. Thus, the House of Lords has held that a school that refused to allow a child's parents to collect him for the holidays on the basis that they had failed to pay his school fees falsely imprisoned the child though the child was unaware of the situation.[31]

### *D. Implications*

42 Of course, there is much more that could be said about these issues, but special attention should be drawn to the most significant. It is that, on the understanding presented here, tort law is of far more fundamental importance than the standard view has it.[32] Tort law is not merely society's response to loss but is rather a primary legal mechanism for the recognition and protection of some of the most fundamental human rights – in fact, of rights that are more fundamental than most

27 *Symes v Mahon* [1922] SASR 447; *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965) § 41.

28 *Grainger v Hill* (1838) 4 Bing NC 212; (1838) 132 ER 769.

29 *Restatement (Second) of Torts* (St Paul, Minnesota: American Law Institute Publishers, 1965) §§ 35(c) and 42.

30 *Meering v Graham-White Aviation Co Ltd* (1920) 122 LT 44; *Murray v Ministry of Defence* [1988] 1 WLR 692.

31 *Murray v Ministry of Defence* [1988] 1 WLR 692, discussing *Herring v Boyle* (1834) 1 Cr M & R 377; (1834) 149 ER 1126.

32 By "fundamental", it is intended that the rights that tort law protects belong to the bedrock of the legal system, that these rights are in that sense foundational. For discussion, see Allan Beever, "Our Most Fundamental Rights" in *Rights and Private Law* (Andrew Robertson & Donal Nolan eds) (Oxford: Hart Publishing, 2011) at p 63.

found on lists of so-called human rights.[33] The law of trespass to the person deals with the right to control the use of one's own body. A more fundamental right cannot be imagined. To put this into Rawlsian terms, it is possible to say that tort law is not properly viewed as a political institution, or at least not merely as one. The rights that tort law protects are not the products of political compromise in a society governed by principles of distributive justice. On the contrary, tort law deals with "natural duties" that "apply to us without regard to our voluntary acts", that "have no necessary connection with institutions or social practices; their content is not, in general, defined by the rules of these arrangements".[34] In other words, the rights that tort law protects are held by individuals prior to existence of the social contract.[35]

43 What is more, it is of the utmost importance that tort law provides a forum in which individuals assert these rights for themselves and in their own name. This is most clearly contrasted with a standard criminal prosecution, in which the victim's interests are represented (to the extent that they are represented) by the State.

44 On the view advanced here, then, a claim for battery is not properly understood as a request made to a court for compensation for an injury of a particular kind. It is rather an assertion that an individual has failed to respect one's moral personality and a demand that this failure be recognised, acknowledged and remedied by the court. Interpreted in this way, the bringing of a claim in tort is itself viewed as an assertion of the moral personality of the plaintiff. It is worth reflecting on the fact that if tort law is unable to provide a vehicle for assertions of this kind, then the law itself fails in this regard, there being no other area of the law able to achieve this.

45 Consequently, the loss model should be abandoned in favour of the view advanced here, not only because the loss model provides a poor basis for understanding the law, but also because it undermines the law's ability properly to respect the moral personality of individuals. The right to control the use of one's own body, for instance, is not merely something that the State should protect through the criminal justice system and so on; it is something that one ought to be able to assert for oneself. One also ought to be able to demand from courts that this right

33 Because of this, it is possible to support views of the kind advanced here while being even hostile to even what passes today for what could be described as the human rights industry.

34 John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, Mass: Belknap Press, 1999) at p 98.

35 For discussion, and a partial criticism of Rawls' theory in this regard, see Allan Beever, *Forgotten Justice: A History of Political and Legal Theory* (Oxford: Oxford University Press, 2013) at pp 14–22.

be respected. It is not enough merely to be permitted to request compensation from courts for the consequences of violations of the right.

46 Against this view, one might assert that these claims appear inconsistent with the operation of tort law. For instance, as Lord Bingham maintained, one might insist that the law is most basically concerned with compensation for loss and that the protection of fundamental rights fits poorly with such a focus.

47 The first response to this challenge is simply to deny that the law is focused on compensation for loss. As noted above, despite it being the received wisdom of at least the latter 20th century, there is nothing in the law itself that requires the adoption of this view. Moreover, reflection on the law in operation reveals that this focus is myopic. While it is certainly true that the law compensates, it does much more than this. For one thing, compensation is far from the only remedy available in tort law. In this context, injunctions and self-help remedies are particularly important. They will be examined in turn.

48 In general, an injunction is awarded to prevent future violation of the plaintiff's rights. Students and teachers of law are perhaps most familiar with injunctions in tort law from the law of nuisance, but it seems that "there is no theoretical reason why an injunction should not be issued to restrain a tort of any kind",[36] including, of course, the torts of trespass to the person.[37] The loss model can conceptualise these as designed to prevent loss, but again there is no reason to do so. It is more attractive to view injunctions as preventing violations of plaintiffs' rights, as responding to the plaintiff's demand that her basic entitlements be respected. When a plaintiff asks a court to issue an injunction, then she is not property viewed as saying "Please prevent this potential loss to me", but "Prevent this person from infringing my rights".

49 When the plaintiff exercises a self-help remedy, she acts in accordance with her rights. Self-help remedies remedy wrongs in this very literal sense. So, for instance, if the defendant is trespassing on the plaintiff's property, the plaintiff is entitled to remove the defendant because his being on her land is a wrong to her, a wrong that she eliminates when the defendant is removed.[38] Again, this could be interpreted as preventing ongoing loss, as a kind of prospective

36 W V H Rogers, *Winfield and Jolowicz on Tort* (London: Sweet & Maxwell, 18th Ed, 2010) at pp 22–48.

37 *Eg*, *Egan v Egan* [1975] Ch 218.

38 Of course, this is not to say that the removal remedies all the wrong that has been committed.

compensation, but that would be to clutch at straws. In a case of self-help, the plaintiff is simply exercising her fundamental rights.

50 There is nothing in the law that requires that compensation be viewed as more primary, as more essential to the nature of tort law than these remedies. It may be true that compensation is far more commonly awarded and so on, but that is just a reflection of the way the world works, not of the nature of the law itself. It just so happens that it is easier to establish that someone's rights have been violated and that he suffered as a result than it is to show that someone's rights will be violated in the future. However, that does not prove that the former is conceptually closer to the heart of the law than the latter. Compensation may be what most tort litigation is designed to achieve, but it in no way follows from this that compensation is what tort law is all about. Most basically, tort law declares certain actions to be illegal. In conjunction with other areas of the law, then, tort law defines the boundaries of the permissible. In this way, it is capable of being as fundamental as any other area of the law.

51 A second reply to the objection under consideration is that there are good reasons why an area of the law dealing with fundamental rights would compensate. In general, making up for one's wrongdoing is about as basic a moral notion as there is.[39] The reason that this idea appears difficult when applied to the law is that, in this politico-legal realm, we have become used to thinking that only the State is genuinely fundamental. Thus, many find it intuitive to think that criminal or constitutional law must be in this sense more fundamental than tort law, as they more directly involve the State. However, this seems to be little more than a modern prejudice.[40]

52 Moreover, it is a mistake to think that the current remedies possessed by the law of tort are essential to it. Certainly, compensation has been part of the law of tort since its inception, but if there are better ways of correcting wrongs committed between individuals the law should be reformed accordingly. Tort law is not essentially connected to compensation.

39 A point once regarded as obvious. See, *eg*, Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (translation by: Michael Silverthorne) (Cambridge: Cambridge University Press, 2006) I 6.

40 This was examined this in detail in Allan Beever, *Forgotten Justice: A History of Political and Legal Theory* (Oxford: Oxford University Press, 2013).

## IV. Conclusion

53 If tort law is understood as delineating the boundaries of the permissible in accordance with individuals' fundamental rights and as mandating remedies for the violations of those rights, then tort law is rightly viewed as one of the most foundational elements in the legal system. It is the chief mechanism through which the moral personality of the individual is recognised, protected and enforced and it requires wrongdoers to fulfil their primary moral duty: to make good their wrongdoing. On this view, tort law is not correctly viewed as an almost wholly inadequate response to social cost. It is rather one of the most important protectors of individual liberty in existence.[41]

41 Or, at least, it would be were it to operate properly.