

**MY BODY & I: A NOVEL JUSTIFICATION FOR A NO-FAULT  
COMPENSATION SCHEME**

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“The flesh is at the heart of the world.”

Maurice Merleau-Ponty, *The Visible and the Invisible* (1964)

## INTRODUCTION

Loss, in all its forms, is an ubiquitous feature of life. Throughout the common law world, the paradigm of tort law operates to compensate people who suffer losses to their body, property and, in some circumstances, their finances.<sup>1</sup> However, since 1974,<sup>2</sup> in New Zealand, if a loss to the body is covered by the Accident Compensation Scheme ('ACC'),<sup>3</sup> the injured party gives up the right to sue under tort law.<sup>4</sup> New Zealand's abandonment of such tort actions has been described as an "unparalleled event in our cultural history,"<sup>5</sup> and no other country in the world has made the transition from tortious liability to no-fault compensation in the context of bodily injury.<sup>6</sup>

Given the exceptional nature of New Zealand's approach to addressing bodily injuries, there have been numerous attempts to justify (or reject) a no-fault compensation scheme over the past 50 years.<sup>7</sup> The breadth and depth of this literature demonstrates that there are various ways to explore New Zealand's decision, from efficiency and economic justifications, to rejections of no-fault compensation based on social, political and cultural factors. However, the scope of this dissertation is limited to considering whether imposing no-fault compensation over the right to claim against a wrongdoer in tort in response to bodily injuries is justifiable in principle, or in philosophical terms.

While the political realities of New Zealand's ACC scheme may diverge from the account presented in this paper, the focus is on finding a philosophically rigorous account of no-fault compensation in general terms. Consequently, throughout the dissertation (unless otherwise specified), 'no-fault compensation' will be discussed in abstract terms, to encompass any scheme wherein damage to the body is addressed by the community, in lieu of referring to the ACC scheme as it currently exists. Similarly, 'bodily injuries' will be discussed generally, to include any instance where an individual suffers damage to their body, rather than denoting "personal injuries" as defined by New Zealand's Accident Compensation Act.<sup>8</sup>

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<sup>1</sup> Rt. Hon. Sir Geoffrey Palmer "New Zealand's Accident Compensation Scheme: Twenty Years On" (1994) 44 UTLJ 223 at 225.

<sup>2</sup> New Zealand's Accident Compensation Act 1972 was passed by Parliament in 1972, and took effect on 1 April 1974.

<sup>3</sup> Under the Accident Compensation Act 2001.

<sup>4</sup> Pursuant to section 317 Accident Compensation Act 2001, which imposes a statutory bar on proceedings. For completeness, it is noted that there are exceptions to this rule that are rare and beyond the scope of this dissertation.

<sup>5</sup> Melanie Nolan "Inequality of Luck: Accident Compensation in New Zealand and Australia" (2013) 104 Labour History 189 at 200, citing John G. Fleming and Pablo Drobny "A Word from the Editors" (1973) 21 AJCL at xi.

<sup>6</sup> Palmer, above n 1, at 225; see also Richard Gaskins "The Fate of 'No-Fault' in America" (2003) 34 VUWLR 213 at 214.

<sup>7</sup> From the formative Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) [The Woodhouse Report], to the recent discussion by Jesse Wall in "No-Fault Compensation and Unlocking Tort Law's Reciprocal Normative Embrace" (2016) 27 NZULR 125.

<sup>8</sup> Accident Compensation Act 2001, section 26.

The basis of the justification for no-fault compensation provided in this dissertation is the need to respond *publicly* to bodily injuries; as compared to other injuries, which should be addressed *privately*. Five key manoeuvres are used to generate this argument, forming the basis of the dissertation. These manoeuvres are outlined as follows:

- i. No-fault compensation differs from tort law in that it is a distributive, rather than corrective response to bodily injuries. However, the distinction between distributive and corrective justice is not justificatory;
- ii. To justify a distributive or corrective response, the moral norm engaging either a principle of community or individual responsibility must be identified, as this motivates a corresponding public or private legal response;
- iii. The moral norm underpinning tort law's *private* response is the principle of outcome responsibility;
- iv. The moral norm underpinning no-fault compensation's *public* response is the principle that the state owes certain duties to an autonomous and embodied person;
- v. In the context of bodily injuries, the normative property underpinning no-fault compensation outweighs the normative property underpinning tort law's corrective justice response, and therefore generates the need for a distributive response to bodily injuries.

The dissertation will explain these manoeuvres in two parts. I will begin the analysis in Part A by considering the first three propositions. Chapter I examines the pre-existing explanations for the distinction between tort law and no-fault compensation. In Chapter II, a framework is created to formulate a justification for no-fault compensation. This is based on the notion that tort law is a private response to loss, whereas no-fault compensation is a public response to loss; using criminal and tort law theory to aid the analysis.

Part B develops the argument in the fourth manoeuvre in two stages, using the framework created in Chapter II to generate a philosophical justification for New Zealand's choice to adopt a no-fault compensation scheme. Chapter III will consider why bodily injuries should be singled out by the law as requiring a unique response, on the basis that the experience of suffering a bodily injury is ontologically different to the experience of suffering an injury to external property. In Chapter IV, I will discuss how this ontological difference engages a corresponding normative property, given the need to ensure that individuals have access to a range of morally worthwhile options. Together, these responses form the moral principle identified in the fourth manoeuvre, that the state owes certain duties to embodied and autonomous people.

The first four manoeuvres prompt the logical conclusion expressed in the fifth manoeuvre, that bodily injuries uniquely engage a normative property that generates a principle of community responsibility. This norm outweighs the moral norm underpinning tort law, which simultaneously engenders the need for a distributive legal response to bodily injuries and justifies the loss of the principle of outcome responsibility when transitioning to a no-fault compensation scheme.

## PART A: IDENTIFYING THE INQUIRY

The aim of Part A is two-fold. First, the pre-existing ways in which a distinction between tort law and no-fault compensation has been drawn will be considered, to ascertain why this distinction cannot adequately justify prioritising one legal response to bodily injuries over the other. Second, an alternative and more effective means of analysing the choice between tort law and no-fault compensation will be proposed, to identify why a principle of either community or individual responsibility is engaged by the law.

Any analysis of New Zealand's decision to implement a no-fault compensation scheme must begin with the 'Woodhouse Report.'<sup>9</sup> In 1966, a Royal Commission was established to inquire into the law in New Zealand relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons in employment. However, the resulting Report recommended a comprehensive social insurance scheme for every injured person, regardless of fault or "whether the accident occurred in the factory, on the highway, or in the home."<sup>10</sup> Five key justifications or principles were identified for imposing such a system:<sup>11</sup>

- i. Community responsibility: in the national interest, and as a matter of national obligation, the community must protect all citizens (including the self-employed) and the housewives who sustain them from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity.
- ii. Community entitlement: all injured persons should receive compensation from any community-financed scheme on the same uniform method of assessment, regardless of the cause that gave rise to their injuries.
- iii. Complete rehabilitation: the scheme should be deliberately organised to urge forward their physical and vocational recovery while at the same time providing a real measure of money compensation for their losses.
- iv. Real compensation: real compensation demands that income-related benefits should be paid for the whole period of incapacity and recognition of the plain fact that any bodily impairment is a loss in itself, regardless of its effect on earning capacity.

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<sup>9</sup> Royal Commission of Inquiry, above n 7.

<sup>10</sup> Royal Commission of Inquiry, above n 7, at [18].

<sup>11</sup> Royal Commission of Inquiry, above n 7, at [484].

- v. Administrative efficiency: the achievements of the system must not be eroded in delays in compensation, inconsistencies in assessments or waste in administration.

While it has been suggested that it is “hard to see in what respects the[se] principles may be unsound,”<sup>12</sup> there are several reasons why I will not be directly engaging with the Woodhouse Report. To begin with, the focus of my dissertation is on the normative principles that underlie tort law and no-fault compensation, leaving aside the other facets of the Woodhouse Report (such as the administrative and procedural efficiency of systems of compensation, economic benefits, and analyses of injury prevention and recovery).

Furthermore, I am looking to find a novel justification for no-fault compensation, which moves away from the Report in two ways. First, I offer an account of no-fault compensation based on moral principles rather than policy reasoning. Second, I argue that no-fault compensation for bodily injuries cannot be justified with reference to the Report’s rejection of the philosophy underpinning tort law.<sup>13</sup> As the argument progresses, I will highlight more specifically how I have diverged from the ideas canvassed in the Report.

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<sup>12</sup> Palmer, above n 1, at 226-7.

<sup>13</sup> As identified by the Royal Commission of Inquiry, above n 7, at [78].

## Chapter I: The Existing Theoretical Framework

### A *Introduction*

Throughout our lives, we may experience various situations that cause us some form of loss. It is beneficial to begin by considering several such scenarios:

- i. a person, through a combination of exhaustion and inattention while driving, damages your bicycle beyond repair.
- ii. a building inspector fails to discover a design flaw in your home in a building inspection, and thereby allows the home to be built with defective (leaky) exterior walls.
- iii. a person, through a combination of exhaustion and inattention, drives into you while you are cycling, causing you to break your leg.
- iv. you fall off your bicycle while on an icy road and break your leg.

The most obvious way to characterise these examples is in terms of the nature of the loss. In the first two examples, the loss is in the form of damage to property. The third and fourth examples are situations where the loss is a bodily injury – one because of someone else’s actions, and the other with no third party involved. Given the nature of the loss, in New Zealand, we intuitively consider that the first two examples should be addressed by the private law, whereas the second two examples should be addressed by a no-fault compensation scheme (such as ACC). Comparatively, in other common law jurisdictions, the instinctual response would be to compensate the first three examples via the private law, while the final example would not be compensated at all, because there is no identifiable wrongdoer.

These intuitive responses are reflected doctrinally in respect of the third and fourth examples, where the loss is a bodily injury. In New Zealand, the cost of physical recovery from bodily injuries occasioned by accident is covered by a no-fault scheme.<sup>14</sup> Individuals who have suffered a “personal injury”<sup>15</sup> receive “entitlements”<sup>16</sup> under that scheme, which is administered by a Crown entity corporation and funded by

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<sup>14</sup> Accident Compensation Act 2001, section 20.

<sup>15</sup> As defined by section 26 of the Accident Compensation Act 2001.

<sup>16</sup> As per Accident Compensation Act 2001, section 69, these entitlements include compensation for treatment, lost earnings, lump sum compensation for permanent impairment, and social and vocational rehabilitation.

targeted levies and large investments.<sup>17</sup> The loss is addressed by the community at large, regardless of fault; but the corollary is that the injured party forgoes the right to bring any other proceedings for compensation.<sup>18</sup> Thus, regardless of whether the broken leg was caused by another person or not, New Zealand's law responds in the same way.

Elsewhere in the common law world, the injured party in the third example would be compensated by tort law, which, in the context of bodily injuries, commonly takes the form of an action in negligence.<sup>19</sup> Under tort law, if a defendant owes a duty to the claimant; the defendant breaches this duty; and the breach of duty causes the claimant loss; then the defendant is under a duty to repair the loss suffered, for which the claimant may personally seek compensation. Hence, tort law requires a defendant, or wrongdoer,<sup>20</sup> for the injured party to bring an action. Thus, the fourth example would not be compensated by tort law, because the injury is not attributable to an identifiable wrongdoer.

Even at this preliminary stage, there are clearly fundamental differences between these two modes of addressing the losses caused by bodily injuries. This chapter will expand on the first manoeuvre outlined in the introduction; to identify that, although no-fault compensation differs from tort law in that it is a distributive, rather than corrective response, this does not justify prioritising one response over the other.

## ***B The corrective and distributive justice dichotomy***

The first, and perhaps most obvious, theoretical inquiry that must be asked of any legal system is, 'what is that system trying to achieve?' or, 'what is the purpose of bringing certain conduct within the scope of the law?' Accordingly, a logical starting point for considering the difference between tort law and no-fault compensation in theoretical terms is to isolate the purpose of these systems of law.

While tort law offers pure monetary compensation for loss ('compensating loss'), the priorities of no-fault compensation include rehabilitation of injured people and accident prevention ('addressing loss').<sup>21</sup> However, both areas of the law can ultimately be described as having a reparative purpose.<sup>22</sup> Despite this commonality, the means by which each system achieves its reparative purpose have been understood in

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<sup>17</sup> Tiho Mijatov, Tom Barraclough and Warren Forster "The Idea of Access to Justice: Reflections on New Zealand's Accident Compensation (or Personal Injury) System" (2016) 33 Windsor Y B Access Just 197 at 200.

<sup>18</sup> Accident Compensation Act 2001, section 317.

<sup>19</sup> See Danuta Mendelson *The New Law of Torts* (Oxford University Press, South Melbourne, 2007) at 238.

<sup>20</sup> In the sense that the defendant has deviated from a required standard of behaviour.

<sup>21</sup> Nolan, above n 5, at 199.

<sup>22</sup> As recognised by Simon Connell in "Justice for victims of injury: The influence of New Zealand's Accident Compensation Scheme on the civil and criminal law" (2012) 25 NZULR 181 at 181, there is a difference between the law's performative and purposive function. Thus, tort law or no-fault compensation may produce outcomes that provide justice in a non-reparative sense, but this is not the *purpose* of these systems.

opposing terms, characterised by the Aristotelian division between corrective and distributive justice.<sup>23</sup> The “ability of the distinction between corrective and distributive justice to provide competing accounts for a just outcome for victims and causers of injury”<sup>24</sup> has been a primary focus for theorists engaging with the distinction between tortious liability and no-fault compensation.<sup>25</sup>

Tort law is generally described as being a ‘corrective justice’ response to loss, as it is concerned with wrongful losses inflicted by one person on another.<sup>26</sup> According to the orthodox understanding of corrective justice, loss is conceived in ‘agent-relative’ terms,<sup>27</sup> in the sense that it is measured by the interaction between two people. As Weinrib describes, “liability consists in a legal relationship between two parties, each of whose position is intelligible only in the light of the other’s.”<sup>28</sup> Norms of corrective justice are to be understood on an ‘arithmetic’ model of addition and subtraction. Only two potential holders are involved at a time, one of whom has “gained certain goods or ills from, or lost certain goods or ills to, the other.”<sup>29</sup> The question is whether and how this transaction should be corrected or reversed.

In this agent-relative sense, you suffer a loss if a car hits your bicycle and you break your leg, but if you accidentally fall off your bicycle and break your leg, there is no such loss. Accordingly, loss is allocated as between the wronged and wrongdoer, to the wrongdoer. We can therefore see corrective justice as being a *private* response to loss. For corrective justice, a just outcome following a wrongful loss inflicted by one person on another is that the wrongdoer puts right the loss he or she has caused, typically by payment of compensation.<sup>30</sup> Tort law is a corrective justice response because it allows the victim to sue the person who has caused them loss to recover compensation directly from that individual.

Comparatively, no-fault compensation has been characterised as a ‘distributive justice’ response to loss, concerned with the distribution of a benefit or burden across society.<sup>31</sup> Under this approach, loss is conceived in absolute, or ‘agent-neutral’ terms,<sup>32</sup> as it is measured against a standard independent of that which caused it to occur. Norms of distributive justice are therefore to be understood on a ‘geometric’

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<sup>23</sup> John Gardner “What is Tort Law For? Part 1: The Place of Corrective Justice” (2011) 30(1) L & Phil 1 at 9, citing Aristotle, *Nicomachean Ethics* [1131b 12-15] and [1132a 1-6].

<sup>24</sup> Connell, above n 22, at 181.

<sup>25</sup> For example, see Palmer, above n 1, at 247; Wall, above n 7, at 125; and Ernest J. Weinrib “Corrective Justice in a Nutshell” (2002) 52 UTLJ 349 at 349.

<sup>26</sup> Connell, above n 22, at 182.

<sup>27</sup> Wall, above n 7, at 138.

<sup>28</sup> Weinrib, above n 25, at 350-351.

<sup>29</sup> Gardner, above n 23, at 9.

<sup>30</sup> Connell, above n 22, at 182.

<sup>31</sup> Connell, above n 22, at 183.

<sup>32</sup> Wall, above n 7, at 142.

model of division, wherein there are several potential holders of certain goods or ills and the question is how to allocate or divide those goods or ills between the potential set of bearers.<sup>33</sup>

Under this agent-neutral conception, breaking your leg causes a loss in the sense that no-one should break their leg without having that loss addressed. Accordingly, it is appropriate to allocate loss more broadly than between the wronged and wrongdoer, among the members of a group or community to whom the parties belong. We can thus see distributive justice as being a *public* response to loss. Compensation serves the purpose of alleviating the victim of some or the entire burden of injury.<sup>34</sup> New Zealand's ACC scheme (and no-fault compensation more generally) has been explained as a distributive justice response, as it allocates the losses from "personal injuries"<sup>35</sup> amongst the community through the levies and / or contributions made to the scheme.

A key theoretical distinction between tort law and no-fault compensation has therefore been centred on each system's allocation of loss; whether that be correctively or distributively. The orthodox view is that the introduction of New Zealand's ACC scheme represented an 'abandonment' of corrective justice in favour of distributive justice.<sup>36</sup> While it has been identified that, in doctrinal terms, New Zealand law continues to pursue corrective justice for injury victims following the introduction of ACC,<sup>37</sup> the focus of this dissertation is on the underlying norms which are gained and lost in the transition from tort law to no-fault compensation. In this normative sense, the corrective and distributive justice dichotomy remains a useful starting point.

### **C      *Why is this distinction insufficient?***

Equally, however, it is not enough simply to say that the people of New Zealand abandoned the tort system in favour of a no-fault scheme because they preferred a system that provides compensation to all victims of injury over a system that makes wrongdoers who cause injuries make up for the harm they inflict. While the distinction between corrective and distributive modes of justice is important, it does not have *justificatory* power. Rather, the distinction merely holds *explanatory* power. We can use the dichotomy between corrective and distributive justice to explain tortious liability and no-fault compensation in terms of the way they allocate loss, but this does not justify why one approach is preferable over the other in the context of bodily injuries.

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<sup>33</sup> Gardner, above n 23, at 9.

<sup>34</sup> Connell, above n 22, at 183.

<sup>35</sup> As defined by section 26 of the Accident Compensation Act 2001.

<sup>36</sup> Wall, above n 7, at 126.

<sup>37</sup> See Connell, above n 22, at 181 for further discussion of this point.

As identified by Jules Coleman:<sup>38</sup>

There is an important and familiar distinction between theoretical explanations and theoretical justifications. While both can illuminate or deepen our understanding, explanations do so by telling us what the nature of a thing is, or by telling us why things are as they are; by contrast, justifications seek to defend or legitimate certain kinds of things – for example, actions, rules, courses of conduct, practices, institutions and the like.

This quote isolates two distinct analytical tasks. First, *conceptual analysis*, or theoretical explanation, aims to identify the essential features of the concepts that currently exist (given that these features may have normative implications for public officials or private individuals). The conceptual analysis of tort law and no-fault compensation is satisfied by identifying the underlying norms of corrective and distributive justice.

However, this may be compared to the second task of *normative analysis*, or theoretical justification, which aims to identify the things that ought to belong to these concepts, that then (given the conceptual analysis) have normative implications for public officials or private individuals. To analyse New Zealand's prioritisation of no-fault compensation over tort law in philosophical terms, a justificatory classification, or theoretical justification, is required, which looks beyond the descriptive preference for corrective or distributive justice to the normative legitimacy of each system.

According to Gardner, the difference between norms of distributive justice and norms of corrective justice lies in the fact that each norm regulates a different subject matter.<sup>39</sup> Norms of distributive justice regulate the allocation of goods among people (or 'division'). Comparatively, norms of corrective justice regulate the allocation of goods back from one person to another (or 'addition and subtraction'). However, no norm is made *sound* or *unsound* simply by virtue of what it regulates. To be a sound norm, it must also do a good job of regulating whatever it regulates – there needs to be an adequate reason for regulating that subject matter by that norm.

Thus, it is necessary to isolate the moral norms underpinning the corrective and distributive justice responses to provide a justificatory account of the law, and more specifically, to vindicate the imposition of a distributive justice response in the context of bodily injury. This inquiry will be focused on the distinction between public and private responses. Tort law (and corrective justice generally) conceptualises loss as private, and therefore arrives at a principle of *individual responsibility*. No-fault compensation (and distributive justice generally) conceptualises loss as public, and therefore arrives at a principle of *community responsibility*. The focus of the analysis is to ascertain the moral norms underpinning the principles of

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<sup>38</sup> Jules Coleman *The Practice of Principle* (Oxford, Oxford University Press, 2001) at 3.

<sup>39</sup> Gardner, above n 23, at 14.

individual and community responsibility respectively, and to determine whether one norm takes precedence over the other; thereby compelling a particular legal response to bodily injuries.

It has also been suggested that the corrective justice arguments for tort law do not carry much weight in New Zealand, perhaps because collectivist solutions are more acceptable in New Zealand than other places, or because corrective justice as a philosophical construct has intellectual attractions which are so diffused and compromised in the practical world that the paradigm lacks real power in the minds of people.<sup>40</sup> Indeed, the Woodhouse Report itself recommended the imposition of a no-fault scheme for addressing bodily injuries at least partially because of flaws in the status quo.<sup>41</sup>

However, justifying no-fault compensation for bodily injuries because of tort law's undesirability is problematic, as it fails to explain why New Zealand retains tortious liability in respect of all other forms of loss, and indeed why we do not see these issues as being 'flaws' in the other branches of private law. We have no issue with tort law, and the principles that underpin tort law, governing many aspects of our lives. For example, we are comfortable with a building inspector facing liability for a defective building, or an individual facing liability for damaging someone's bicycle. Equally, however, in New Zealand, we consider it appropriate to depart from these principles where the injury suffered is to the body. Accordingly, this dissertation aims to identify why no-fault compensation in the context of bodily injuries is a justified *exception* to the ordinary paradigm of tortious liability.

## **D**      **Summary**

A common means of distinguishing tort law and no-fault compensation is between the norms of corrective justice, which govern tort law; and the norms of distributive justice, which regulate no-fault compensation. However, merely recognising these different norms does not provide a reason to favour one system over the other, either generally, or in the context of bodily injuries. Rather, analysis of the normative properties underpinning the legal norms of corrective and distributive justice is required. In the following chapter, a method for examining these normative properties will be proposed, focusing on the distinction between corrective justice as a *private* response, engaging a principle of individual responsibility and distributive justice as a *public* response, engaging a principle of community responsibility.

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<sup>40</sup> See Palmer, above n 1, at 247-8.

<sup>41</sup> See the Royal Commission of Inquiry, above n 7, at [78]: "There are four principal criticisms of the common law action. They describe the philosophy upon which it depends as illogical, the verdicts as entirely uncertain and affected by mere chance, the procedure as costly and slow moving, and the nature of the award and the whole process as an impediment to rehabilitation."

## Chapter II: A Justificatory Framework

### A *Introduction*

As outlined in the second introductory manoeuvre, to justify the imposition of no-fault compensation over tort law as a response to bodily injuries, the moral norms underpinning the principles of community or individual responsibility must be ascertained, as this is what motivates either a *public* or *private* legal reaction. A secondary layer of analysis must be superimposed onto Weinrib's corrective and distributive justice division,<sup>42</sup> to identify the underlying normative properties that engage the principle of individual responsibility in the context of tortious liability; and the principle of community responsibility in the context of no-fault compensation. The aim of this chapter is to create a framework enabling the identification of these underlying normative properties, given the contrast between public and private responsibility that characterises the distinction between no-fault compensation and tort law.

### B *Structural questions*

The analysis of tort law and no-fault compensation is centred upon the distinction between corrective justice as a private response (engaging a principle of individual responsibility), and distributive justice as a public response (engaging a principle of community responsibility). Criminal law theory provides a useful starting point, because parallels may be drawn between the 'criminalisation decision,' which determines whether wrongful conduct should be a crime or a tort, and the decision as to whether wrongful losses should be addressed by tort law or a no-fault scheme. In both instances, certain kinds of wrongs (either wrongful conduct or wrongful losses) have normative implications for public officials, whereas others have normative implications for private individuals. No-fault compensation is a *public* response, which is analogous to the criminal law. However, no-fault compensation is also analogous to tort law, in that repairing the loss suffered by the victim is the central purpose (as opposed to a retributive purpose).<sup>43</sup>

In the context of criminal law theory, Marshall and Duff identify a useful framework for understanding the 'criminalisation decision,' which revolves around three key questions:<sup>44</sup>

Different aspects of the concept [of crime] raise different questions. We need to ask what kinds of conduct merit social proscription; a 'criminal' process; punishment – and we cannot suppose in advance either that the answers to these questions will be just the same, or that the considerations relevant to answering each of them will be just the same.

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<sup>42</sup> Weinrib, above n 25, at 349.

<sup>43</sup> Jeremy Waldron "Moments of Carelessness and Massive Loss" in David G. Owen (ed) *The Philosophical Foundations of Tort Law* (Oxford University Press, Oxford, 1997) 387 at 390.

<sup>44</sup> S.E Marshall and R. A. Duff "Criminalisation and Sharing Wrongs" (1998) 22 CILJ 7 at 233.

Extrapolated in broad terms, these are questions that any system must answer to conceptually justify its existence. Thus, expressed generally, any area of law must identify:

- i. what conduct is included or covered by the area of law (the ‘scope question’);
- ii. who controls the relevant legal processes and / or procedures (the ‘process question’); and
- iii. how the remedy warranted by the doctrine applies (the ‘remedial question’).

While we cannot suppose that the answers to these questions will be just the same, or that the considerations will be just the same,<sup>45</sup> the questions may well raise the same considerations. Marshall and Duff merely recognise that because we cannot *assume* each question has the same features, we ought to consider them on their own merits. Thus, although Marshall and Duff have highlighted these questions, which in combination have significant justificatory power, they do not make clear whether the questions are analytically separable, or what the appropriate relationship between them is. However, I propose that the questions may relate to each other in the sense that the nature of the wrong (wrongful conduct or wrongful loss) explains the appropriate remedial response; which then (together) justifies the normative implications the wrong has for public officials or private individuals. Thus, the scope question informs the remedial question, which then (together) justifies the process question.<sup>46</sup>

This ordering follows logically when the questions are applied in the context of a criminalisation decision. For example, we can consider whether an individual carrying out an instance of ‘cyber-bullying’ (such as sending messages to harass someone on Facebook) has committed a criminal or tortious ‘wrong.’ First, to identify the nature of the wrong (the scope question), we must ask ‘what wrongful conduct are we trying to prohibit?’, or, to use Marshall and Duff’s formulation, “what kinds of conduct merit social proscription?”<sup>47</sup> Generally, criminal conduct is thought of as being blameworthy, or culpable in some sense, because the conduct violates a particular value.<sup>48</sup> Thus, we might argue that the action of cyber-bullying violates the value of personal security, and is therefore ‘blameworthy’ conduct that may fall within the scope of the criminal law.

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<sup>45</sup> Marshall and Duff, above n 44, at 233.

<sup>46</sup> Note that this is a change to the ordering in Marshall and Duff’s quote, and therefore to the ordering in general terms above.

<sup>47</sup> Marshall and Duff, above n 44, at 233.

<sup>48</sup> Grant Lamond “What is a Crime?” (2007) 27 Oxford Journal of Legal Studies 609 at 621. For completeness, it is noted that there is some disagreement about the nature of such values between Lamond and Marshall and Duff, above n 44, at 236, but this falls outside the scope of the dissertation.

The answer to the scope question then informs the remedial question, or, ‘what wrongs deserve punishment?’ As John Gardner recognises,<sup>49</sup> punishment is by its nature exacted *for* something. Anyone who starts out by saying, “let’s punish some people today” is making no sense until we have an answer to the question, “punish them for what? What are they supposed to have done?” Thus, punishment presupposes blameworthy conduct.<sup>50</sup> However, not all blameworthy conduct requires punishment. According to Grant Lamond, it is blameworthy conduct that manifests a *disrespect* for the interest or value that has been violated that deserves to be punished – where the wrongdoer is unwilling to be guided by the value in the appropriate way.<sup>51</sup> In sending a Facebook message to harass someone, the wrongdoer accused of cyber-bullying is unwilling to be guided by the value of personal security, thus their conduct should be addressed retributively (i.e. by punishing the perpetrator). Equally, this is evidently not a matter for the civil law, because it is not a case of requiring the wrongdoer to undo, or compensate the wrong, but them being morally blameworthy in respect of that wrongful conduct.

The process question then asks, ‘why do public officials control the prosecutorial process?’ The answer to this question flows from the remedial and scope questions as a tertiary inquiry. Having identified certain wrongs which violate certain values, that may deserve punishment; it follows that these wrongs ought to be punished *by the state* because of the condemnatory force of conviction in the name of the community as a whole,<sup>52</sup> and to avoid relying on private individuals to punish one another’s culpable behaviour. Thus, if cyber-bullying violates a value that requires a retributive response, it follows that public officials ought to control that process. Crimes are therefore public wrongs because they are blameworthy wrongs that the public is responsible for punishing.<sup>53</sup> By answering the three questions proposed by Marshall and Duff, we are able to justify how the criminal law arrives at a principle of community responsibility, requiring a *public* response, in a normatively significant sense, rather than relying on a procedural explanation.<sup>54</sup>

Furthermore, applying the three questions to the criminal law supports an ordering of the questions wherein identification of the relevant wrong is followed by the appropriate remedial response, which then justifies the procedural implications of that wrong for public officials or private individuals, engaging a principle of community or individual responsibility. This analytical priority can then be applied to tort law and no-fault compensation. Comparing the answers in these areas with the answers generated by the criminal law will

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<sup>49</sup> Gardner, above n 23, at 7.

<sup>50</sup> Lamond, above n 48, at 621.

<sup>51</sup> Lamond, above n 48, at 622.

<sup>52</sup> Lamond, above n 48, at 627.

<sup>53</sup> Lamond, above n 48, at 629.

<sup>54</sup> See James Edwards and Andrew Simester in “What’s Public About Crime” (2017) 37 Oxford Journal of Legal Studies 105 at 133, where it is suggested that public officials control the prosecutorial process simply because they are best placed to do so.

help to determine the normatively significant features of each concept for either public officials or private individuals, or the moral norms underpinning the principles of community or individual responsibility.

### **C      *Application to tort law***

Unlike the criminal law, wherein wrongful conduct is punished by the state, tort law involves wrongful conduct which is corrected by the wrongdoer. Consequently, the first (scope) question may be, ‘what rights are we trying to protect?’ According to tort law theory, we owe *primary* duties or obligations not to do certain prohibited acts, and conduct is considered wrongful if it amounts to a breach of this duty.<sup>55</sup> For example, we owe primary obligations not to breach a duty of care, or to interfere with someone’s right to use or enjoyment of their land, hence acting carelessly or interfering with someone’s right to use or enjoy their land is considered wrongful by the law, as it amounts to a breach of the primary obligation. We can distinguish the duties owed under tort law from the values protected by the criminal law, because the wrongdoer in tort is not necessarily ‘blameworthy’ or ‘culpable.’ Rather, conduct that deviates from the defendant’s primary obligation is wrongful (with regards to an objective standard), but does not necessarily attract moral censure in that it was the ‘wrong thing to do.’<sup>56</sup>

As with the criminal law analysis, the answer to the remedial question, or, ‘what conduct should be corrected,’ flows from the scope question. If a primary obligation is breached, and that breach causes a loss, tort law theory imposes a corresponding *remedial* obligation,<sup>57</sup> requiring the wrongdoer to correct the loss by compensating the injured party.<sup>58</sup> Generally, wrongful conduct, which amounts to a breach of duty, must be corrected only if it causes a loss, or if the defendant “actually injures the plaintiff.”<sup>59</sup> For instance, it is axiomatic that no liability can arise in negligence unless the plaintiff suffers damage, and proof of negligent conduct without consequences will not generate liability.<sup>60</sup> The primary focus of tort law is thus the outcome of the conduct, rather than the moral quality of the wrongdoer’s actions.<sup>61</sup>

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<sup>55</sup> See Peter Birks “The Concept of a Civil Wrong” in David G. Owen (ed) *The Philosophical Foundations of Tort Law* (Oxford University Press, Oxford, 1997) 31 at 37-38; and John Gardner “Torts and Other Wrongs” (2011) 39(1) Florida State University Law Review 42 at 45-46.

<sup>56</sup> Wall, above n 7, at 130.

<sup>57</sup> Birks, above n 55, at 38.

<sup>58</sup> Gardner, above n 55, at 59-60.

<sup>59</sup> John Gardner “Obligations and outcomes in the law of torts” in Peter Cane (ed) *Relating to Responsibility: Essays in honour of Tony Honore on his 80<sup>th</sup> Birthday* (Hart, Oxford, 2011) 111 at 126, 134.

<sup>60</sup> Philip H. Osborne *The Law of Torts* (4<sup>th</sup> ed., Irwin Law Inc., Toronto, 2011) at 66.

<sup>61</sup> It is noted for completeness that some torts, such as defamation, are actionable per se, rather than on proof of loss. However, these torts still require an identifiable plaintiff for liability to be imposed (e.g. the defamatory statement must be made towards someone), and therefore the primacy of outcomes over duties is retained to an extent. Furthermore, as negligence is the paradigmatic tortious response to bodily injuries, this will be the focus of the inquiry.

Jeremy Waldron provides a useful example to illustrate this point in the context of negligence:<sup>62</sup> Two drivers were on a city street in their cars, both driving on or near the speed limit. As they passed through a shopping district, each turned her head to look at a sale advertised in a store window. For one driver, this momentary distraction passed without incident. The other driver, however, failed to notice that the traffic ahead had slowed down, and her car ploughed into a motorcycle. The motorcycle driver was gravely injured, and when the Police arrived the car driver readily admitted that she had been driving carelessly. Consequently, the motorcycle driver later sued the car driver for negligence. In terms of conduct, the two car drivers' situations are identical – they both breached their primary obligation not to drive carelessly. However, it is only the driver who caused a loss that is required to perform the corresponding remedial obligation.<sup>63</sup> In this sense, there is a primacy of outcomes over duties in the context of tort law.<sup>64</sup>

Notwithstanding this primacy of outcomes over duties, tort law is not entirely ignorant of the wrongdoer's actions, as demonstrated by the answer to the third structural question, or, 'why do private individuals correct the loss?' As in the criminal law, this is a tertiary inquiry. Because conduct in breach of a primary obligation generates a corresponding remedial obligation, the onus falls on the wrongdoer to correct the loss caused by the breach. This "reciprocal normative embrace"<sup>65</sup> between the wronged and the wrongdoer is based on the moral norm of "outcome responsibility."<sup>66</sup> According to this principle, private individuals are responsible for all the losses that occur due to their conduct, as they created a risk by breaching the primary obligation.<sup>67</sup> However, the outcome responsibility norm is concerned with reparation, rather than moral culpability.<sup>68</sup> Thus, private individuals must *correct*, or compensate, the losses they have created, and tort law analysis arrives at the notion of individual responsibility for addressing private wrongs.

This analysis applies to strict liability torts just as it applies to what may be called 'fault-based' torts (such as negligence). For example, if the plaintiff brought something inherently dangerous onto their land and it escaped, they will only be liable for that escape under the tort of *Rylands v Fletcher*<sup>69</sup> where the dangerous item causes damage to the plaintiff's possessory interest in land.<sup>70</sup> Equally, in the same way that the negligent individual is held responsible for their actions, the defendant has breached the primary obligation not to

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<sup>62</sup> Waldron, above n 43, at 387.

<sup>63</sup> It is noted that while criminal sanctions may be imposed on the drivers, this does not affect the arguments in relation to the primacy of outcomes over duties in tort law.

<sup>64</sup> See Gardner, above n 59, at 128-130.

<sup>65</sup> Ernest J. Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012) at 142.

<sup>66</sup> Tony Honoré "Responsibility and Fault" (1988) 104 *Law Quarterly Review* 530, reprinted in *Responsibility and Fault* (Hart, Oxford, 1999) 14 at 27.

<sup>67</sup> Wall, above n 7, at 138.

<sup>68</sup> See Wall, above n 7, at 130 for further discussion of this idea.

<sup>69</sup> *Rylands v Fletcher* (1868) LR 3 HL 330.

<sup>70</sup> See *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61 at [9] per Lord Bingham.

allow the dangerous thing to escape, and therefore owes a reciprocal remedial obligation to correct that loss, due to the moral norm of outcome responsibility.

However, the connections between corrective justice, tort law, and the principle of outcome responsibility are not universally accepted. Alan Beever rejects this orthodox understanding of tortious liability, arguing that corrective justice and the principle of outcome responsibility are not intrinsically linked.<sup>71</sup> Beever explains this distinction as such:<sup>72</sup>

... Personal responsibility focuses on an agent, typically the defendant in the legal context. To ask whether someone is personally responsible is to ask a question that focuses on that particular person. Corrective justice, on the other hand, focuses on interactions between persons. Hence, corrective justice is concerned, not with agents per se, but with relationships between agents.

The implication of Beever's position is that although the appropriate remedial response to a breach of the primary obligation is corrective, this is not necessarily because private individuals must be held responsible for their wrongdoing.<sup>73</sup>

While this is an interesting theoretical issue, it is problematic for two reasons. First, Beever appears to equate the principle of *outcome* responsibility with the notion of *personal* responsibility. It is certainly true that personal responsibility focuses on the individual, and private law focuses on the interaction between people. However, outcome responsibility as it is understood by tort law theorists is a response to wrongdoing *between individuals*, and is therefore concerned with the relationships between agents.

Second, to the extent that the important normative consequence of the distinction between corrective and distributive justice is the value of outcome responsibility, Beever's analysis is somewhat redundant. Consequently, I will adopt an orthodox understanding of the corrective justice response, preserving the links between the scope, remedial and process questions. Answering these three questions therefore demonstrates that tort law arrives at a principle of individual responsibility, which requires a corrective response from the law, via the moral norm of outcome responsibility.

Although the Woodhouse Report argues that the philosophy of tort actions is "illogical,"<sup>74</sup> the analysis above suggests that outcome responsibility is a sound moral norm. Thus, as Jesse Wall recognises, although

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<sup>71</sup> Alan Beever "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28 Oxford Journal of Legal Studies 475 at 483.

<sup>72</sup> Beever, above n 71, at 483.

<sup>73</sup> See Beever, above n 71, at 498-499 for further discussion as to why a corrective justice theorist may be able to accept a no-fault compensation scheme such as ACC.

<sup>74</sup> Royal Commission of Inquiry, above n 7, at [78].

New Zealand's move away from tort law actions as the remedial response to bodily injuries may be sensible, it is nonetheless at the expense of this normatively significant principle.<sup>75</sup> To justify the loss of outcome responsibility, it is necessary to identify the moral norm that underpins the principle of community responsibility engaged by no-fault compensation, and consider whether, in the context of bodily injuries, this outweighs the moral norm of outcome responsibility that underpins the principle of individual responsibility engaged by tort law.

By applying Marshall and Duff's questions to criminal law and tort law, it becomes clear that each area arrives at a different principle – community responsibility and individual responsibility respectively – through a series of decisions about what conduct should be included by the law, and how the law should respond to that conduct. Answering the remedial and scope questions justifies those legal responses (whether public or private), by revealing the moral norms underpinning the principles of community and individual responsibility. Consequently, it is through the framework of Marshall and Duff's three questions that the moral norm underpinning the principle of community responsibility engaged by no-fault compensation will be identified.

#### ***D Application to no-fault compensation***

A no-fault compensation scheme involves the distribution of wrongful losses by the state. Thus, the scope question may be, 'what losses (or burdens) are we trying to address?' At the most basic level, the answer to this question is that we are trying to address losses in the form of bodily injuries, because they are wrongful regardless of whether they are caused by another party. In other words, loss is conceived of in agent-neutral terms. However, this does not explain why bodily injuries should be distinguished from any other kind of loss (such as pure economic loss or property damage), in the same way that we were able to isolate the wrongful conduct in the tort and criminal law analysis.

The remedial question may then be framed as, 'what losses should be distributed?' There are many ways that this question may be answered. For example, the Woodhouse Report suggests that there are risks of "personal injury" in socially worthwhile activities, which should be redistributed among the community because we all benefit from those activities.<sup>76</sup> However, this justification renders bodily health instrumental to another goal – getting back to work. It is necessary to fix the instrument (the body) to achieve this goal.<sup>77</sup> Consequently, the resulting principle of community responsibility is ultimately based on policy,<sup>78</sup> rather

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<sup>75</sup> Wall, above n 7, at 126.

<sup>76</sup> Royal Commission of Inquiry, above n 7, at [56].

<sup>77</sup> Equally, this does not justify a distinction between bodily injuries and other injuries – socially worthwhile activities may also cause property damage.

<sup>78</sup> That is, the policy decision to prioritise getting people back to work.

than a moral norm. Comparatively, I am looking to identify why bodily injuries generate a particular response in and of themselves, rather than instrumentally, by locating a normative value, absent in other areas of private law, which engages a principle of community responsibility for public officials.

Analogous to the criminal law analysis, in the context of no-fault compensation, the process question asks, ‘why does the state distribute the losses?’ One answer to this question may be derived from the ‘compulsory insurance’ model of no-fault compensation, which suggests that public officials are best placed to distribute losses in the form of bodily injuries, as this replaces one inefficient mode of insurance with another more efficient mode of insurance.<sup>79</sup> However, this answer is merely explanatory, not justificatory. By overlooking the analytical connection between the three questions or ‘aspects’ of the concept of wrongful loss, it is impossible to justify the abandonment of the idea that we are responsible for the outcomes of our actions in the context of bodily injuries.

The notion that there was a ‘community responsibility’ to the statistically inevitable victims of injury was the collective principle on which New Zealand’s ACC scheme was first founded.<sup>80</sup> However, the analysis of Marshall and Duff’s three questions reveals that there is no clear moral norm justifying why bodily injuries are wrongful losses that should be redistributed by the state, and therefore why no-fault compensation engages a principle of community responsibility.

## ***E***      ***Summary***

Extrapolated in general terms, Marshall and Duff’s three analytical questions reveal some important insights when applied in the context of criminal law, tort law and no-fault compensation. An analysis of the three questions in the context of criminal law theory arrived at a notion of community responsibility, underpinned by the moral norm of culpability, or blameworthiness, which justifies the criminal law’s *public* response. Evaluating tort law theory using the three questions generated a notion of individual responsibility, underpinned by the moral norm of outcome responsibility, which justifies tort law’s *private* response.

However, an analysis of the three questions in the context of no-fault compensation exposed a clear theoretical gap. No moral norm underpinning the notion of community responsibility could be identified, rendering no-fault compensation’s *public* response to bodily injuries unable to be justified conceptually. The focus of Part B is therefore to consider whether such a competing moral norm does exist, which may justify a departure from tort law (and the corresponding loss of the norm of outcome responsibility) to a no-fault compensation scheme in the context of bodily injuries.

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<sup>79</sup> Connell, above n 22, at 187.

<sup>80</sup> Palmer, above n 1, at 247.

## PART B: FINDING A NOVEL JUSTIFICATION

In Part A, three key structural questions were identified, referred to as the scope, remedial and process questions respectively. When applied to no-fault compensation, those questions may be phrased as follows:

- i. What losses (or burdens) are we trying to address?
- ii. What losses should be distributed?
- iii. Why does the state distribute those losses?

In the context of the criminal and tort law, answering the three questions revealed a moral norm engaging either a public or private legal response (via the principles of community and individual responsibility). However, the analysis in Part A further established that these three questions have not been answered adequately in the context of no-fault compensation, as a comparative moral principle was not identified.

Thus, the aim of Part B is to use the three structural questions to generate a normative justification for a no-fault compensation scheme in the context of bodily injuries, by identifying the moral norm underpinning the principle of community responsibility, which justifies no-fault compensation's *public* response to loss.

These inquiries will be undertaken at a philosophical, rather than policy level.<sup>81</sup> It is first necessary to conceptualise what a bodily injury is, and whether such injuries have any qualities, properties or attributes that distinguish them from other losses. This requires consideration of competing philosophical understandings regarding the nature of our existence in the world. Then, having identified such qualities, it must be established that those attributes motivate us to treat bodily injuries differently in both a normative and legal sense. Consequently, a moral norm underpinning no-fault compensation's distributive justice response must be identified, and that norm must outweigh the moral norm underpinning tort law's corrective justice response (i.e. outcome responsibility).

Ultimately, Part B will attempt to resolve the theoretical gap identified in Part A by providing a justification for arriving at a principle of community responsibility in the context of bodily injuries, thereby engaging a *public*, or distributive, response to those injuries via a no-fault compensation scheme.

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<sup>81</sup> Thereby distinguishing the Woodhouse Report, as identified in Chapter II.

## Chapter III: Why Bodily Injuries?

### A *Introduction*

The introduction of a no-fault compensation scheme in New Zealand had the effect of building a statutory fence around the common law action in tort for bodily injuries, rather than abolishing tort law altogether.<sup>82</sup> Thus, when answering the first structural question identified in Part A, or ‘what losses are we trying to address?’, it is necessary to consider whether demarcating common law rights in relation to bodily injuries is justifiable, and on what basis.

It is useful at this juncture to adopt a wider perspective. Thus, forgetting the implications of which form of compensation might be preferable for the moment, consider a hypothetical situation:

You are riding your bicycle along a busy road. A car is coming towards you, and you have no time to move out of the way – it will inevitably crash into you. You have a choice – either the impact of the crash damages your bicycle and leaves you unharmed, or you suffer some minor injuries but the bicycle is left undamaged.

When faced with such a choice, it is obvious that most people would rather suffer damage to their bicycle than to their body – even if the compensatory response to each loss is the same. This self-evident response unlocks an important intuition. Having disengaged from the context of attempting to justify either a corrective or distributive response to bodily injuries, most people would intuitively agree that the experience, or felt-character, of suffering a bodily injury is, on some level, different to the experience of suffering an injury to property or an economic loss. Thus, consideration of the scope question – that is, the losses a no-fault scheme ought to address – is grounded by the notion that there is something categorically different about bodily injuries as a form of loss.

However, merely identifying an intuitive response to a particular scenario does not differentiate the body from other objects at a conceptual level. Consequently, this chapter looks to give a philosophical explanation to the intuition that bodily experiences are different to other experiences, such as a property or economic loss. The foundation for such an explanation ultimately lies in our understanding of ‘ourselves.’ This is an ontological question, relating to the nature of our existence in the world. Drawing on the significant philosophical discussion in this area reveals two competing conceptions of ‘ourselves.’

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<sup>82</sup> Palmer, above n 1, at 239.

One way of understanding ourselves is to say that we have certain thoughts, experiences and attitudes towards the world, which we tend to think of as ‘internal’ to ourselves, and we often think of our bodies as being distinct from those things. Thus, we create a division in our thinking between our inner selves (which may be referred to as the subject, our subjectivity, or “being”<sup>83</sup>) and our external selves. This can be described as a ‘disembodied’ view of the world.

Alternatively, we could characterise the relationship between our internal and external selves as being one and the same, such that there is no distinction between our subjectivity and our bodies. This can be described as an ‘embodied’ view of the world.

While these explanations of the nature of our being are ontological, rather than legal, the way that we understand ‘ourselves’ is legally significant, because it influences the appropriate response of the law to bodily injuries. Recognising the unique relationship that we have with our bodies in ontological terms provides a justification for differentiating those injuries in conceptual terms; corresponding to the first stage of the fourth manoeuvre outlined in the introduction (that the state owes duties to an *embodied* person). Furthermore, as I will explain in the following chapter, the distinctive quality of bodily injuries generates a corresponding moral norm, which engages a principle of community responsibility and justifies differentiating those injuries in legal terms.

## **B      A disembodied perspective**

In jurisdictions where tort law is the default response to bodily injuries, losses to the body are equated with other forms of loss. For example, to establish the tort of negligence, the plaintiff must prove that they have incurred damage, which can include both damage to property and bodily injuries.<sup>84</sup> The plaintiff must also prove, on the balance of probabilities, four elements of the cause of action before they can obtain compensation, regardless of whether the damage is personal or property-based:<sup>85</sup>

- i. A duty of care: the plaintiff must have a legal right to sue the defendant, based on the creation of a relationship of legal neighbourhood or proximity via reasonable foresight of risk of harm.<sup>86</sup>
- ii. Breach of duty: negligence is a fault-based cause of action, and fault lies in failure to exercise reasonable care to avoid a risk of injury to the plaintiff that was reasonably foreseeable.<sup>87</sup>

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<sup>83</sup> Maurice Merleau-Ponty *Phenomenology of Perception* (Routledge, London, 2012) at 84.

<sup>84</sup> Mendelson, above n 19, at 236.

<sup>85</sup> Mendelson, above n 19, at 238.

<sup>86</sup> See *Tame v New South Wales* (2002) 211 CLR 317.

<sup>87</sup> Mendelson, above n 19, at 238.

- iii. Causation: generally, plaintiffs must establish a factual connection between the defendant's particular breach of duty of care and their injury. They then have to persuade the court that the defendant should bear legal liability for the injury.<sup>88</sup> This requirement of causation links to the notion of outcome responsibility discussed in Part A.
- iv. Remoteness of damage: the plaintiff must show that the kind of injury caused by the defendant was reasonably foreseeable.

Although there are some disparities between bodily and property injuries within these requirements,<sup>89</sup> the fundamental elements of the tort do not change depending on the category of damage. If the plaintiff fails to prove any one of the four requirements, the action in negligence will fail. However, if all the elements are established on the balance of probabilities (and there are no applicable defences), the general restitutionary principle of compensatory damages is applicable to bodily injury and property claims alike.<sup>90</sup>

In the context of the bicycle crash example, regardless of whether the loss suffered is to the body or the bicycle, to bring an action in negligence, the plaintiff must prove the four requirements identified above. If successful, the assessment of compensation will be based on the same principles of restoring the plaintiff to the position they were in prior to the injury. In this sense, the paradigm of tort law equates bodily injuries with other injuries, thereby determining the mechanisms of liability in jurisdictions where tort law operates.

Tort law's assumption that bodily injuries are the same as other injuries can be traced to a disembodied understanding of the relationship between the body and the subject (or the attributes, experiences and thoughts that we have towards the world). According to philosophers such as René Descartes and the usual contemporary view of the body, the body is a biomedical object or a vehicle of consciousness.<sup>91</sup> Accordingly, a disembodied understanding of the nature of our beings suggests that our thoughts and feelings are 'us', while the body is an objective physiological system in which we (or our subjectivity) is encased.<sup>92</sup> As the body and the self are seen as two distinct entities, this is referred to as a 'dualist' understanding of the relationship between ourselves and our bodies.

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<sup>88</sup> Mendelson, above n 19, at 238.

<sup>89</sup> For example, attribution of responsibility for personal injury is governed by different principles to those applied when attributing causation for property damage. See Mendelson, above n 19, at 270, for further discussion.

<sup>90</sup> Osborn, above n 60, at 119.

<sup>91</sup> David Morris "Body" in Rosalyn Diprose and Jack Reynolds (ed) *Merleau-Ponty: Key Concepts* (2<sup>nd</sup> ed, Routledge, Oxon, 2014) 111 at 111.

<sup>92</sup> Jesse Wall *Being and Owning: The Body, Bodily Material and the Law* (Oxford University Press, Oxford, 2015) at 57.

The dualist perspective recognises that there is a close connection between a person's subjectivity and their body, in the sense that the body mediates the interaction between the subject and the world.<sup>93</sup> As explained by Immanuel Kant, "our life is entirely conditioned by our body, so that we cannot conceive of a life not mediated by the body and we cannot make use of our freedom except through the body."<sup>94</sup> Thus, there is an immediate connection between a subject's will, preferences or rationally motivated judgments (i.e. their subjectivity), and the body – pleasure and pain is felt through the body. The will of the individual, or the content of the person's subjectivity, cannot have value in the abstract – rather, it needs to be expressed through engagement in the external and physical world,<sup>95</sup> and it is the body that facilitates this interaction.

However, while acknowledging the immediate and necessary connection between the body and the well-being of the person, from a disembodied perspective, there is a *dualism* between the subject, as the will, rationality and consciousness of the person, and the body as a type of physical entity in the world of objects. We have become used to thinking of ourselves as having two levels of existence, characterised by the subject as an inner entity that uses the body to work with, and extend itself into, the physical world of objects.<sup>96</sup> This represents an objective understanding of the body, as a determinative object in itself, or a "mere physical object in the world."<sup>97</sup> In this disembodied sense, the body is understood as being arbitrarily or contingently associated with the subject, or 'being'.<sup>98</sup> The underlying assumption is that there is an ontological separation between the experiencing 'I' and the body as one lives it.<sup>99</sup>

If a disembodied perspective is adopted, there is no conceptual justification for demarcating bodily injuries from any other injuries that one might suffer, because an injury to the body is simply an injury to an object in the physical world. Furthermore, if a person's body is only contingently associated with them, the person's identity and the basis of our duties towards them can be understood without reference to the person's body, and the body is a mere instrumental object or material resource that the subject, or others, may use to achieve certain ends.<sup>100</sup> For instance, if we view the body and the bicycle in the example described above as both being objects located in space that our 'subjective selves' may interact with, there is no justification for distinguishing an injury to the body from an injury to the bicycle.

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<sup>93</sup> Wall, above n 92, at 41.

<sup>94</sup> Immanuel Kant *Lectures on Ethics* (Harper & Row, New York, 1964) at 147-8.

<sup>95</sup> Georg W.F. Hegel *Elements of the Philosophy of Right* (Cambridge University Press, Cambridge, 1991) at [34].

<sup>96</sup> Wall, above n 92, at 57.

<sup>97</sup> Donald A. Landes *The Merleau-Ponty Dictionary* (Bloomsbury, London, 2013) at 34.

<sup>98</sup> Wall, above n 92, at 40.

<sup>99</sup> Morris, above n 91, at 111.

<sup>100</sup> Wall, above n 92, at 41.

Accordingly, this objective understanding of the relationship between a person's subjectivity and their body, which equates the body with other objects in space, does not fit well with the intuition that there is something unique about the experience of a bodily injury. We are thus forced to consider whether tortious liability is based on assumptions about the body which are philosophically unsound, and whether an alternative paradigm better reflects the intuitive understanding of ourselves reflected by the bicycle example.

### **C      *An embodied perspective***

Comparatively, under a no-fault compensation scheme such as New Zealand's, bodily injuries are demarcated from other forms of loss as requiring a unique mode of compensation.<sup>101</sup> This legal response assumes that bodily injuries are in some way different to other forms of loss. Such a supposition may be derived from an *embodied* perspective of the relationship between 'ourselves' and our bodies, which directly contrasts with the disembodied understanding of the body and subject described above.

The post-structuralist philosopher Maurice Merleau-Ponty rejected a dualist understanding of the body, and insisted that philosophy return to embodied and lived experience<sup>102</sup> when considering the nature of our existence. According to such an embodied perspective, the body cannot be characterised as a mere object in the world, but rather, the relationship between our bodies and our subjectivity is identical – as Merleau-Ponty writes, “I *am* my body.”<sup>103</sup> Merleau-Ponty developed his claim that the body escapes the orthodox division between first-person (subjective) and third-person (objective) perspectives by drawing on experimental data and description of disrupted bodily experience, such as the experience of phantom limbs by amputees.<sup>104</sup> Morris describes Merleau-Ponty's observations as such:<sup>105</sup>

Illness reveals itself not simply as an absence of the property function of an objective body or its parts, but as a vividly experienced change in one's access to the world. This is especially the case in drastic or chronic illness. Such an illness changes what one can hope for, project or do in one's world, and correlatively changes the sense of oneself, even one's consciousness. But this change is irreducible to objective modifications of the biological body, for these are mediated by attitudes to the world and ourselves, by habits and projects.

Applying this to the phantom limb example, a man who has lost his leg may experience the feeling of his leg if stimulus is applied to the path between the man's stump and his brain. Merleau-Ponty suggests that

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<sup>101</sup> Palmer, above n 1, at 223.

<sup>102</sup> Landes, above n 97, at 33.

<sup>103</sup> Merleau-Ponty, above n 83, at 151.

<sup>104</sup> Morris, above n 91, at 113.

<sup>105</sup> Morris, above n 91, at 113.

this phenomenon “admit[s] of neither a physiological explanation, a psychological explanation, nor a mixed explanation,”<sup>106</sup> but rather, “to have a phantom limb is to remain open to all of the actions of which the arm alone is capable and to stay within the practical field that one had prior to the mutilation.”<sup>107</sup> Physiology alone cannot account for the phenomenon, because the imaginary limb retains the position in which the real arm was at the moment of injury, and cannot be removed by anaesthesia.<sup>108</sup> Equally, a psychological explanation cannot account for the fact that the severance of nerves abolished the phantom limb.<sup>109</sup> However, the phantom limb cannot be understood simply as a combination of the physiological and psychological. It must be understood in terms of the person, as the living body rising toward the world with its various projects in mind as it does so; it must be understood as the relationship between the subjective person and the objective world.

In other words, when we suffer an illness or modification to the body (such as an amputation), this affects the way that we access the world, or the subjective self. The body and the subject cannot be conceptualised as distinct entities, because the body is both *necessary* and *constitutive* of the subject – the subject cannot exist without the body; and the body is part of the subject. Consequently, for Merleau-Ponty, “the body is the vehicle of being in the world and, for a living being, having a body means being united with a definite milieu [environment], merging with certain projects, and being perpetually engaged therein.”<sup>110</sup> The body is a natural subject and expresses the existential dimensions of a person’s “being in the world,”<sup>111</sup> because it is the way in which one exists in the world, experiences the world, connects with others and engages in tasks and projects.<sup>112</sup> In this sense, the body cannot be distinguished from the subjective self.

Furthermore, the body cannot be equated with other objects, because it is the way in which we encounter those external objects.<sup>113</sup> According to Merleau-Ponty, “I observe external objects with my body, I handle them, inspect them and walk around them. But when it comes to my body, I never observe it itself. I would need a second body to be able to do so, which would itself be unobservable.”<sup>114</sup> Paradigmatically, while we may touch, pick up or alter an external object, it remains the object that it is despite gaining and losing characteristics, and despite the varying perspectives that we have on it.<sup>115</sup> Comparatively, our bodies cannot

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<sup>106</sup> Merleau-Ponty, above n 83, at 82.

<sup>107</sup> Merleau-Ponty, above n 83, at 84.

<sup>108</sup> Merleau-Ponty, above n 83, at 78.

<sup>109</sup> Merleau-Ponty, above n 83, at 79.

<sup>110</sup> Merleau-Ponty, above n 83, at 84.

<sup>111</sup> Landes, above n 97, at 34.

<sup>112</sup> Wall, above n 92, at 76.

<sup>113</sup> Merleau-Ponty, above n 83, at 92.

<sup>114</sup> Merleau-Ponty, above n 83, at 93.

<sup>115</sup> Stephen Priest “Merleau-Ponty’s Concept of the Body Subject” (2002) 1(2) *Nursing Philosophy* 173 at 173.

be investigated or explored in a wholly detached way, because they are always active in any perceptions we have, and therefore cannot be perceived objectively, or encountered in objective space.<sup>116</sup>

Having been revealed as the way that we access and experience the world, the body escapes traditional conceptual divisions between subject and object.<sup>117</sup> While the body's relation to the world serves as the essential background for the experience of any particular thing, the body itself is experienced in ways that distinguish it in kind from all other things: it is a permanent part of one's perceptual field, even though one cannot in principle experience all of it directly.<sup>118</sup> Applying this observation to the bicycle example, while you existed before you had the bicycle, and could have thoughts, memories and experiences prior to your ownership of the bicycle, it is not possible for you to have those experiences independent of your body.

Merleau-Ponty's embodied understanding of the relationship between the subject, body, and external objects is highly significant. Because our ability to 'be in the world' can only be grasped through the lived body,<sup>119</sup> we can no longer abstract the basis of a person's value (their subjectivity, or thoughts, attitudes and experiences) from their body and the physical environment. Our bodies are thus valuable in a non-instrumental way, which differs from the instrumental relationship that we have with external objects, such as the bicycle. In other words, we have a *non-contingent* relationship with our bodies, as they are essential and intrinsic to who we are as individuals and members of society.<sup>120</sup> Comparatively, we have a *contingent* relationship with external items of property – while they may be good or desirable, there is nothing necessary about them at a fundamental level, as they can be replaced or exchanged.<sup>121</sup>

An embodied perspective of the relationship between our bodies and ourselves more accurately reflects the intuition that we would rather suffer an injury to external property than to ourselves, because external property can be replaced or exchanged, whereas an injury to our bodies affects our ability to access and engage with the world. In the context of the bicycle analogy, even if we know with certainty that the cost of cure for the bicycle and our body is the same, we would still choose to avoid the experience of the bodily injury. Thus, regardless of whether both areas are identical in doctrinal terms, we still have a different response to the bicycle vis-à-vis the body. Accordingly, when answering the scope question, or 'what losses are we trying to address?', there is a conceptual difference between our bodies and external objects, which justifies the demarcation of bodily injuries from other losses we may suffer.

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<sup>116</sup> Priest, above n 115, at 173.

<sup>117</sup> Morris, above n 91, at 113.

<sup>118</sup> Ted Todavine "Maurice Merleau-Ponty" (Winter 2016) *The Stanford Encyclopaedia of Philosophy* Edward N. Zalta (ed) <<https://plato.stanford.edu/archives/win2016/entries/merleau-ponty/>> (Accessed 12 August 2017).

<sup>119</sup> Morris, above n 91, at 114.

<sup>120</sup> Wall, above n 92, at 65.

<sup>121</sup> Wall, above n 92, at 65.

## ***D***      ***Summary***

This chapter makes the ontological claim that, if our intuitions about the felt-character of bodily injuries are valid, we ought to adopt an embodied perspective of the nature of our beings, as this recognises that the relationship we have with our bodies is fundamentally and categorically different to the relationship we have with the external world. This provides the justification for separating bodily injuries from any other injuries we may suffer when determining what kind of losses ought to fall within a no-fault compensation scheme. The following chapter will consider whether this ontological difference is *normatively* significant, in that it engages a principle of community responsibility requiring a public response to bodily injuries.

## Chapter IV: The Need for a Distributive Response to Bodily Injuries

### A *Introduction*

Given that there is a conceptual difference between our bodies, which we are non-contingently related to, and external property, which we are contingently related to, it must be established that those attributes motivate us to treat bodily injuries differently in both a normative and legal sense. This requires us to consider whether a principle of community responsibility is engaged where we have an interest in things that are necessarily associated with us (i.e. our bodies, and bodily injuries), but a principle of individual responsibility applies in respect of injuries to things that are contingently associated with us.

Consequently, this chapter responds to the ‘remedial’ and ‘process’ questions identified in Part A, or, ‘what losses (if any) should be distributed,’ and, ‘should those losses be distributed by the state?’ In answering these two questions, I will argue that the conceptual difference between bodily injuries and other forms of loss identified in Chapter III (that the body is uniquely related to our inner selves) generates a corresponding moral norm; the principle that the state owes certain duties to an autonomous and embodied person (as stated in the fourth manoeuvre outlined in the introduction). This moral norm engages a principle of community responsibility in the context of bodily injuries, and outweighs the normative property underpinning tort law’s corrective justice response, highlighted by the fifth manoeuvre in the introduction.

### B *A philosophical question*

There will inevitably be disagreements between rational individuals and societies over the strength of the interest generated by the connection between a person’s subjectivity and their body, relative to other competing interests or social goods which support tortious liability (such as the value of the outcome responsibility norm<sup>122</sup>). It is therefore possible to resolve the remedial and process questions on the basis that there is no normatively ‘right’ or ‘wrong’ answer, and each society must decide on the appropriate response to bodily injuries based on their own values.<sup>123</sup> However, on closer examination, a deeper moral or philosophical choice is revealed, which requires a particular calibration of the competing values. Several examples from different contexts are used to highlight this underlying moral choice.

In the context of the criminal law, we could say that crimes have a certain character, defined by the fact that they are an affront to values that society thinks are important, but the conceptual analysis cannot give

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<sup>122</sup> See Chapter II for a detailed discussion of the principle of outcome responsibility and how this applies to tortious liability.

<sup>123</sup> For example, Simon Connell, above n 22, at 184 argues that the question of which conception of justice ought to prevail when there is a conflict cannot be answered with logic, but rather is a political question that should be addressed through the democratic process.

any final answer as to what these values are, because it depends on what is significant in each society. According to Lamond, “different communities will differ on the relative importance of some values, due to the plurality of some socially dependent values and sheer moral fallibility.”<sup>124</sup> Thus, the granular determination of what a crime is in any given society cannot be determined from an abstract perspective.

However, Lamond himself imposes an intrinsic limit on state punishment, by suggesting that for a wrong to warrant state punishment, it must be the type of wrong that *ought* to be punished by the state.<sup>125</sup> Accordingly, the only wrongs that should be criminalised are those that are reasonably grave, or involve the violation of an important value.<sup>126</sup> Lamond then goes on to argue that, in a liberal society, the types of wrongs that will be grave enough for punishment will tend to reflect the great importance attached to individual autonomy.<sup>127</sup> Thus, the decision about what wrongs should be punished is not simply sociological, but underpinned by a moral or normative decision about the relative importance of the values.

Furthermore, while no other country has adopted a comprehensive accident compensation scheme analogous to New Zealand’s, many societies have introduced some form of public healthcare. Indeed, nearly all wealthy developed countries provide universal access to a broad range of public health and personal medical services.<sup>128</sup> Consequently, it is useful to draw on theory from this area. It has been suggested that universal access to healthcare is simply a matter of social policy that some countries adopt and others do not, or a commodity that is to be purchased in the market like other commodities.<sup>129</sup> However, below this sociological debate is again a deeper moral issue, about the nature of public healthcare and whether it is a requirement of social justice. Thus, to justify (or reject) public healthcare on a normative level, it is necessary to consider how and why the underlying values ought to be understood.

Equally, New Zealand’s decision to impose an accident compensation scheme has been characterised as a sociological response, in the sense that New Zealand’s societal values differ from societies where tort law remains. For example, David Hackett Fischer has compared New Zealand’s accident compensation scheme and the United States’ (‘US’) tortious liability on this basis.<sup>130</sup> Hackett Fischer argues that in the US, the ‘dream of living free’ operates, and the value of freedom is prioritised, whereas in New Zealand ‘fairness

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<sup>124</sup> Lamond, above n 48, at 617-8.

<sup>125</sup> Lamond, above n 48, at 627.

<sup>126</sup> Lamond, above n 48, at 627.

<sup>127</sup> Lamond, above n 48, at 628.

<sup>128</sup> Norman Daniels "Justice and Access to Health Care" (Spring 2013) *The Stanford Encyclopedia of Philosophy* Edward N. Zalta (ed.) <<https://plato.stanford.edu/archives/spr2013/entries/justice-healthcareaccess/>>.

<sup>129</sup> Daniels, above n 128.

<sup>130</sup> Nolan, above n 5, at 192-3, citing David Hackett Fischer, *Fairness and Freedom: A History of Two Open Societies, New Zealand and the United States* (Oxford University Press, New York, 2012), at 471-72.

and natural justice' characterise political responses, and the value of fairness takes precedence.<sup>131</sup> Thus, Hackett Fischer suggests that New Zealand developed a culture of compensation and fairness in which its accident compensation system was conspicuous, whereas the US simply could not have adopted such a measure because of the different cultural milieu.<sup>132</sup>

However, while Hackett Fischer is correct in saying that the divergent responses to bodily injuries are value-based, he fails to examine the philosophical consequences of those values, which represent an underlying debate between libertarianism and egalitarianism. In basic terms, we can say that the value of freedom is underpinned by a libertarian concern for autonomy and individual rights, whereas the value of fairness is underpinned by an egalitarian concern for social cohesion. Furthermore, the decision between no-fault compensation and tort law is not simply a reflection of a preference for the values of either fairness or freedom. One can equally supply a 'fairness' account in favour of the tort system, for instance on the basis that one goal of the tort system is to ensure that injured people are compensated.<sup>133</sup> Thus, to justify the appropriate response to bodily injuries, one must consider how the competing values should be calibrated.

While we can access these examples sociologically, they also reflect deeper moral or philosophical questions. Consequently, when considering whether losses in the form of bodily injuries ought to be distributed by the state, a moral lens will be adopted.<sup>134</sup> A satisfying defence of the distributive moral norm that underpins no-fault compensation for bodily injuries will demonstrate that this norm is binding irrespective of the extent to which it is in social use. If the distributive norm is "use-independent"<sup>135</sup> in this sense, regardless of whether it is followed in fact, it *ought* to be followed in principle.

### **C        *The general normative property***

The aim of this dissertation is not to assert a general theory of morality. However, it is useful to identify the applicable normative claim in general terms, before demonstrating how it is relevant to the ontological claim made in Chapter III, and therefore how it engages a principle of community responsibility in the context of bodily injuries.

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<sup>131</sup> Hackett Fischer, above n 130, at 27-8.

<sup>132</sup> Nolan, above n 5, at 193.

<sup>133</sup> W. Bradley Wendel "Political culture and the rule of law: comparing the United States and New Zealand" (2012) 12 *Otago L. Rev* 663 at 695. See George P. Fletcher "Fairness and Utility in Tort Theory" (1972) 85 *Harv L. Rev* 537 for further discussion of the role of fairness in tort law.

<sup>134</sup> However, this is not to invalidate accounts of no-fault compensation that take a political approach. Rather, the inquiry merely has a different focus.

<sup>135</sup> Gardner, above n 23, at 27.

To engage in any convincing justification for imposing a no-fault compensation scheme over tortious liability in response to bodily injuries, it is important to recognise that adopting one single morality is impossible, given the fact of reason and the fact of plurality. However, this does not mean that we must nihilistically end our moral evaluations – or simply leave the appropriate response to bodily injuries as a decision for each society to make. Rather, the overarching principles when making ethical decisions should strike a balance between individual autonomy and social cohesion (that is, the values of fairness and freedom).<sup>136</sup> These two values are reflected in the general moral claim made by various political philosophers, including John Rawls<sup>137</sup> and Joseph Raz,<sup>138</sup> that the state is required to provide individuals with a range of opportunities or options, as a minimum baseline of membership in any given society.

According to Rawls, a key criterion of justice is “fair equality of opportunity,”<sup>139</sup> derived from the fundamental notion of “justice as fairness.”<sup>140</sup> The principle of fair equality of opportunity holds that everyone should have “the same legal rights of access to all advantaged social positions.”<sup>141</sup> Thus, the state has social obligations to protect the opportunity range open to individuals in any given society. However, this egalitarian conclusion is derived from individualistic premises – for Rawls, basic liberties, such as opportunity, wealth and income, and self-respect, called “primary goods,”<sup>142</sup> are lexically prior to the determination of the principle of fair equality of opportunity. Thus, individual rights cannot be sacrificed for the sake of social welfare,<sup>143</sup> and a Rawlsian account of justice, while yielding a principle for the distribution of resources that is egalitarian, utilises a choice procedure that is highly respectful of individual freedom.<sup>144</sup> Indeed, Rawls holds that justice as fairness is the most egalitarian, and the most plausible, interpretation of fundamental concepts of liberalism.<sup>145</sup>

Raz’s focus on the liberal value of autonomy may be contrasted with the Rawlsian focus on justice as fairness. However, Raz recognises that the conditions of autonomy include both opportunity and the ability to use it, thereby adopting an egalitarian premise.<sup>146</sup> Individuals must have an adequate range and variety of

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<sup>136</sup> Wendel, above n 133, at 700.

<sup>137</sup> See John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge MA, 1972).

<sup>138</sup> See Joseph Raz, *The Morality of Freedom* (Oxford University Press, Oxford, 1986).

<sup>139</sup> Rawls, above n 137, at 83.

<sup>140</sup> Rawls, above n 137, at 11.

<sup>141</sup> Rawls, above n 137, at 72.

<sup>142</sup> Andrew Mason *Levelling the Playing Field: The Idea of Equal Opportunity and Its Place in Egalitarian Thought* (Oxford University Press, Oxford, 2006) at 69.

<sup>143</sup> Wendel, above n 133, at 698.

<sup>144</sup> Wendel, above n 133, at 698.

<sup>145</sup> Leif Wenar “John Rawls” (Spring 2017) *The Stanford Encyclopaedia of Philosophy* Edward N. Zalta (ed) <<https://plato.stanford.edu/archives/spr2017/entries/rawls/>>.

<sup>146</sup> Raz, above n 138, at 381.

choices, which includes both options with long-term pervasive consequences and short-term options of little consequence, and those options must be morally worthwhile – according to Raz, autonomy is only valuable if “exercised in pursuit of the good.”<sup>147</sup> Equally, every decision cannot be extracted by coercion, and a person is not autonomous if he is paralysed and cannot take advantage of the options which are offered to him. Since significant autonomy presupposes a choice of ways of life among morally worthwhile possibilities, it requires that the state should make morally worthwhile options available and accessible to individuals.<sup>148</sup> Thus, Raz affirms the social and political responsibility of the state to engender a societal framework that ensures individuals have reasonable opportunities for a worthwhile autonomous life; thereby recognising both egalitarian and libertarian values.

We can superimpose Rawls and Raz’s principles to generate a singular moral norm: the state has a responsibility to protect and promote the range of opportunities available to individuals in society (either as a requirement of justice, or to promote autonomy). Thus, the predominant philosophical view is that for a person to be autonomous, or for society to be just, individuals must be able to exercise a range of options. This normative principle underpins the answer to the remedial and process questions identified above – the losses that ought to be distributed (by the state) are those which inhibit an individual’s ability to access a range of morally worthwhile options or fair equality of opportunities.

#### **D      *The specific normative property***

Thus far, I have identified an ontological claim – that injuries to the body are conceptually different to other injuries that one might suffer, because of the unique relationship between ‘ourselves’ and our bodies; and a normative claim – that the state has a responsibility to protect and promote the range of opportunities available to individuals in society. I will now intersect these two claims, to synthesise a specific normative property in relation to bodily injuries. As identified in the fourth introductory manoeuvre, the moral norm underpinning no-fault compensation’s *public* response to bodily injuries is the principle that the state owes certain duties to an autonomous and embodied person. That is, in order to protect and promote the range of opportunities available to individuals in society, the state has a responsibility to address loss in the form of bodily injuries, because bodily functioning is intrinsically linked to our ability to engage in society and pursue worthwhile projects.

At this juncture, it is advantageous to return to public healthcare theory, as the specific normative claim in relation to bodily injuries fits within this theoretical framework. One basis for the argument that universal access to healthcare is a requirement of justice is founded on a Rawlsian understanding, or the contention

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<sup>147</sup> Raz, above n 138, at 381.

<sup>148</sup> Joseph Raz “Liberalism, Autonomy and the Politics of Neutral Concern” in G.W. Smith (ed) *Liberalism: Critical Concepts in Political Theory*, Vol III: *Justice and Reason* (Routledge, London, 2002) 178 at 207.

that there is a broad commitment to secure a sufficient level of health for all, and to narrow unjust inequalities, because this is a requirement of justice as fairness.<sup>149</sup> We can formalise this justification for universal access to healthcare so as to encompass the *general* normative principle (that the state has a responsibility to protect and promote the range of opportunities available to individuals) as follows:<sup>150</sup>

- i. Health consists of functioning normally for some appropriate reference class (e.g. a gender specific subgroup) of a species – in effect, health is the absence of a specific pathology;
- ii. Maintaining normal functioning – that is, health – makes a significant (if limited) contribution to protecting the range of opportunities or morally worthwhile options individuals can reasonably exercise; and departures from normal functioning decrease the range of plans of life we can reasonably choose among, to the extent that it diminishes the functions we can exercise (our capabilities);
- iii. Various socially controllable factors contribute to maintaining normal functioning in a population and distributing health fairly in it, including traditional public health and medical interventions, as well as the distribution of social determinants of health such as income and wealth, education and control over life and work;
- iv. If we have social obligations to protect the opportunity range open to individuals (the general normative claim), then we have obligations to protect and promote normal functioning for all;
- v. Providing universal access to a reasonable array of public health and medical interventions in part meets our social obligations to protect the opportunity range of individuals, though reasonable people may disagree about what is included within such an array of interventions, given resource and technological limits.

State provision of healthcare is therefore justifiable on the basis that certain social goods or opportunities are only available if an individual reaches a certain minimum level of wellbeing, and there is a *community responsibility* to ensure individuals have access to those social goods. Thus, the application of the general normative claim (the state has a responsibility to promote and protect the opportunity range open to individuals) engages a principle of community responsibility in the context of public healthcare.

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<sup>149</sup> Ruth Faden and Sirine Shebaya “Public Health Ethics” (Winter 2016) *The Stanford Encyclopaedia of Philosophy* Edward N. Zalta (ed) <<https://plato.stanford.edu/archives/win2016/entries/publichealth-ethics/>>.

<sup>150</sup> Adapted from Daniels, above n 128.

If we accept this application of the general normative claim, and we have social obligations to protect the opportunity range open to individuals, there is no conceptual or non-arbitrary justification for distinguishing between public healthcare and a comprehensive no-fault compensation scheme for all bodily injuries. Given what has been established ontologically in Chapter III – that is, the body is inherently linked to our ability to engage with the external world and to our ‘subjective’ or internal selves – a bodily injury limits the range of options or opportunities available to an individual, in a way that conflicts with the general normative claim. For example, if you shatter a bone in your leg, you cannot meaningfully engage with the options or opportunities provided by the state; and society is not being just or allowing you to be autonomous.

Accordingly, in order to protect the opportunity range open to individuals, the state has a moral duty to provide a minimum standard of *bodily wellbeing* as a community, because a feature of the body as a “being-in-the-world”<sup>151</sup> is that the opportunity to ‘pursue a plan of life’ or ‘engage in projects’ is only possible through the body.<sup>152</sup> When a person’s wellbeing falls below this minimum baseline due to a bodily injury they have suffered, the duty of community responsibility is triggered.

The ability to access opportunities is not affected when other losses are suffered by an individual (e.g. to property), because there is not the same immediate connection between external objects and the individual’s will, interests, autonomy and ability to engage in meaningful projects. To use the bicycle example from Chapter III, if you damage your bicycle, it does not prevent you from accessing the morally worthwhile options that are available to you.<sup>153</sup> However, if you injure yourself, your ability to access the options available to you is compromised, and a principle of community responsibility is engaged to uphold the conditions of autonomy and / or justice. In other words, the bicycle is only contingently related to your ability to access opportunities – it can be replaced or exchanged; whereas your body is non-contingently related to your ability to access opportunities – it is essential and intrinsic to who you are as a member of society. The conceptual difference between bodily injuries and other injuries is therefore normatively significant because the subjective nature of our bodies is such that they are intrinsically linked to our ability to exercise morally worthwhile options.

Thus, we have identified a moral norm that engages a principle of community responsibility in the context of bodily injuries (that is, that the state owes duties to autonomous and embodied individuals to ensure they have access to a range of opportunities). This moral norm is *non-instrumental*, thereby differentiating it from the Woodhouse Report. Recall that the Woodhouse Report is focused on the contribution that

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<sup>151</sup> Merleau-Ponty, above n 83, at 84.

<sup>152</sup> Wall, above n 92, at 58.

<sup>153</sup> Although it may make accessing those opportunities more difficult.

individuals engaged in risky activities provide to society.<sup>154</sup> According to the Report, there are risks of bodily injury in socially worthwhile activities, and those risks should be redistributed among the community because we all benefit from the activities. However, this justification renders bodily health instrumental to another goal – getting back to work.

Comparatively, a justification based on the moral norm of state duties to autonomous and embodied individuals conceptualises bodily health in non-instrumental terms, by recognising that the immediate relationship between our inner selves and our bodies renders bodily health valuable in and of itself, rather than a means to further value. The principle of community responsibility is therefore engaged on a different basis to the Woodhouse Report; because of a collective concern for wellbeing and bodily integrity, as opposed to a collective benefit from a particular activity.

### ***E Application to the law***

Having identified a moral norm engaging a principle of community responsibility in the context of bodily injuries, it is then necessary to consider whether this translates to a corresponding legal response. When making a choice between tort law and no-fault compensation, we are faced with two competing moral norms. The state's duty to ensure that autonomous and embodied individuals are able to access morally worthwhile options, by ensuring a minimum level of bodily wellbeing, generates a principle of community responsibility which underpins no-fault compensation's distributive response. Comparatively, the need to ensure that individuals are held responsible for their actions by requiring them to correct losses that they have caused generates a principle of individual responsibility which underpins tort law's corrective response. These moral norms are both *sound*, and indeed important.<sup>155</sup>

However, to use Gardner's phraseology, in this instance, the relevant norms of corrective justice lack sufficient force to repel the competing considerations in favour of a distributive justice response to bodily injuries.<sup>156</sup> The need for distributive justice "supersedes"<sup>157</sup> the need for corrective justice in the context of bodily injuries, because the state's duty to ensure that everyone who suffers a bodily injury reaches a minimum level of wellbeing (regardless of fault) is *weightier* than the principle of outcome responsibility. In the context of other injuries, nothing competes with the norm of outcome responsibility. This explains why we do not have a no-fault compensation scheme in response to property damage, such as for leaky homes. Comparatively, in the context of bodily injuries, the competing moral norm triggers a certain (distributive) legal response, which justifies abandoning the idea that we are responsible for the outcomes of our actions.

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<sup>154</sup> Royal Commission of Inquiry, above n 7, at [56].

<sup>155</sup> See Chapter II for a more detailed discussion of the value of the norm of outcome responsibility, which underpins tort law.

<sup>156</sup> Gardner, above n 23, at 4.

<sup>157</sup> Jules Coleman *Risks and Wrongs* (Cambridge University Press, Cambridge, 1992) at 403.

Returning to the three structural questions that any area of law must answer to justify its existence, this argument may be formally proposed as such:

- i. No-fault compensation distinguishes bodily injuries from other forms of loss because the body is ontologically different to other objects in the world;
- ii. This warrants a public, or distributive response because it engages a corresponding normative property, requiring the state to ensure individuals have a range of morally worthwhile opportunities, which is breached if losses in the form of bodily injuries are not distributed;
- iii. A distributive response generates the need for public officials to control the relevant legal processes;
- iv. Therefore, bodily injuries are wrongful losses that should be redistributed by the state in a no-fault compensation scheme.

Thus, following these premises, the moral norm engaging a principle of community responsibility generates the need for a corresponding distributive legal response to bodily injuries (by allocating the losses among the community).

While the principle of community responsibility justifies a distributive legal response to bodily injuries, this is not necessarily inconsistent with tort law. When determining what the appropriate legal response to loss is, we must choose whether to focus on duties or outcomes (i.e. losses). For example, if someone suffered a loss but there has been no breach of duty, we could compensate that loss. Equally, we could rely on a combination of a breach of duty and a loss. Different areas of law choose between the combinations of duties and outcomes that they rely upon. Tort law represents one way of choosing between duties and outcomes – as Gardner identifies, tort law prioritises outcomes over duties to the extent that liability is contingent on the plaintiff having suffered an identifiable loss.<sup>158</sup> In this sense, tort law (and the tort of negligence in particular) requires us to make priority decisions on the basis of outcomes.

We can therefore see no-fault compensation as being an extension of this prioritisation, rather than being inconsistent with tort law theory. No-fault compensation represents a particular way of choosing between duties and outcomes. There is nothing defective about tort law, there are just certain instances where a different norm requires a different priority. The need to address loss in the form of bodily injuries

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<sup>158</sup> See Gardner, above n 59, at 128-130. See also Chapter II for further discussion of this prioritisation.

supersedes the need to recognise the duty of outcome responsibility altogether, because of the competing principle of ensuring equality of opportunities (which does not apply to other forms of loss). The disruption of the normatively significant connection between the wronged and wrongdoer is therefore justified in the context of bodily injuries, because society must give effect to the weightier moral norm (by addressing loss in the form of a bodily injury distributively). However, this does not invalidate the moral norm that underpins tort law, or tort law's functionality in respect of all other losses.

It is useful to return to the private law scenarios identified in Chapter I:

- i. a person, through a combination of exhaustion and inattention while driving, damages your bicycle beyond repair.
- ii. a building inspector fails to discover a design flaw in your home in a building inspection, and thereby allows the home to be built with defective (leaky) exterior walls.
- iii. a person, through a combination of exhaustion and inattention, drives into you while you are cycling, causing you to break your leg.
- iv. you fall off your bicycle while on an icy road and break your leg.

The intuitive response in New Zealand – that the first two examples should be compensated via tort law, while the second two examples should be addressed via no-fault compensation – can be justified by means of the competing moral norms. The moral norm in favour of outcome responsibility takes precedence in response to damage to property (e.g. the destroyed bicycle and defective building), so the wrongdoer should be responsible for correcting the loss, and tort law should be retained in the context of injuries that do not relate to the body. However, the moral norm in favour of community responsibility takes precedence in response to damage to the body (e.g. the broken leg). Hence, there is no justification for drawing a legal distinction between the two bodily injuries in the third and fourth examples – they both ought to be compensated distributively among the community, regardless of whether there is an identifiable wrongdoer.

Having established that no-fault compensation is, in general terms, justifiable philosophically, I will briefly consider the practical implications of the identified moral norm (that the state has a duty to ensure that autonomous and embodied individuals are able to access morally worthwhile options, by ensuring a minimum level of bodily wellbeing) for New Zealand's ACC scheme as it currently stands. The present no-fault compensation system creates boundary issues that are not easily resolved, and the separate funding arrangements for injury-related and non-injury related conditions raises some questions about

discrimination and horizontal inequity.<sup>159</sup> While further deliberation beyond the scope of this dissertation is required, if the foundation for a no-fault compensation scheme is the moral norm that requires bodily wellbeing to be addressed by the community, there does not appear to be a theoretical justification for distinguishing incapacity or disablement arising out of illness from injuries to the body.<sup>160</sup> Equally, the entitlements provided by ACC<sup>161</sup> to individuals who have suffered “personal injuries”<sup>162</sup> under the scheme, including the provision for lost earnings, are justifiable because they address the loss of worthwhile options engendered by the bodily injury (rather than being characterised as ‘property’).

## **F**      **Summary**

In this chapter, the remedial and process questions – or, why bodily injuries should be addressed distributively, by the state – have been answered by synthesising the fourth and fifth manoeuvres outlined in the introduction. The ontological, or conceptual distinction, between bodily injuries and other forms of loss identified in Chapter III (the embodied perspective) engaged a corresponding normative claim (that the state has a duty to guarantee that individuals are able to access a range of opportunities), to generate the specific moral norm that the state owes a duty to autonomous embodied individuals to ensure they reach a minimum level of wellbeing, because wellbeing affects an individual’s ability to access a range of morally worthwhile options in a way that other losses do not.

This specific moral norm engages a principle of community responsibility in the context of bodily injuries, and requires a corresponding distributive legal response, because it *outweighs* the moral norm of outcome responsibility that engages a principle of individual responsibility and underpins tort law’s corrective response. Thus, Chapter IV has identified a justification for addressing the losses caused by bodily injuries distributively, in a no-fault compensation scheme such as ACC.

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<sup>159</sup> The Treasury *Briefings to Incoming Ministers Information Release* (2014) <<http://www.treasury.govt.nz/publications/briefings/2014-health/bim-14-health.pdf>>.

<sup>160</sup> Palmer, above n 1, at 234.

<sup>161</sup> An entitlement under section 69 of the Accident Compensation Act 2001.

<sup>162</sup> Accident Compensation Act 2001, section 26.

## CONCLUSION

In New Zealand, we have an intuitive appreciation for the existence of a no-fault compensation scheme to address bodily injuries. However, it can be difficult to explain this intuitive response, and to justify why – despite the obvious practical benefits of such a scheme – no-fault compensation is normatively preferable to the alternative of tortious liability, when tort law is retained by every other common law jurisdiction.

In this paper, I have recognised that there is a sound moral norm underpinning tort law's *private* response to loss – the norm of outcome responsibility. However, I have also identified a competing, and novel, sound moral norm underpinning no-fault compensation's *public* response to loss – the norm that the state has a duty to ensure that autonomous and embodied individuals are able to access morally worthwhile options, by ensuring a minimum level of bodily wellbeing. This norm differs from the Woodhouse Report, because it engages the principle of community responsibility (requiring a public response) on a *non-instrumental* basis.

Having recognised these two competing moral norms, the question became which norm takes precedence, and on what basis. It is my contention that the moral norm underpinning no-fault compensation *outweighs* the moral norm in favour of tort law in the context of bodily injuries, thereby justifying a departure from the paradigm of tortious liability and generating the need for a distributive legal response to such injuries (in the form of a no-fault scheme).

These arguments have been structured around five theoretical manoeuvres, which I will return to:

- i. No-fault compensation differs from tort law in that it is a distributive, rather than corrective response to bodily injuries. However, the distinction between distributive and corrective justice is not justificatory;
- ii. To justify a distributive or corrective response, the moral norm engaging either a principle of community or individual responsibility must be identified, as this motivates a corresponding public or private legal response;
- iii. The moral norm underpinning tort law's *private* response is the principle of outcome responsibility;
- iv. The moral norm underpinning no-fault compensation's *public* response is the principle that the state owes certain duties to an autonomous and embodied person;

- v. In the context of bodily injuries, the normative property underpinning no-fault compensation outweighs the normative property underpinning tort law's corrective justice response, and therefore generates the need for a distributive response to bodily injuries.

If the proposition made in each chapter is accepted, there is a syllogistic logic to the conclusion reached in the fifth manoeuvre, that the appropriate legal response to bodily injuries is distributive, in the form of a no-fault compensation scheme such as New Zealand's. However, this is not to invalidate or reject the philosophical norm underpinning tort law, but merely to extend the prioritisation of outcomes over duties recognised by tort law in a limited context.

This justification for no-fault compensation touches on some familiar concepts, while also traversing some unfamiliar philosophical territory. There are many different ways to understand New Zealand's unparalleled decision to transition from tortious liability to no-fault compensation as a legal response to bodily injuries. However, by isolating the competing moral norms underpinning each area of law, we can appreciate in clearer philosophical terms both what has been lost and what has been gained by rejecting tort law actions in favour of a no-fault scheme. In doing so, to use Aquinas' phrase, "a certain ordering of reason"<sup>163</sup> is revealed, which supports a distributive legal response to bodily injuries.

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<sup>163</sup> Thomas Aquinas *Summa Theologica* I-II Q. 90 A. 4 ("*quaedam rationis ordinatio*").

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