

Diego M Papayannis*

Tort Law without Interpersonal Justice

<https://doi.org/10.1515/jetl-2025-0004>

Abstract: Gregory C Keating's *Reasonableness and Risk* presents a sophisticated analysis of tort law, intertwining considerations of distributive and interpersonal justice. While his treatment of the distributive aspect of tort law and its role in protecting core interests, such as safety and bodily integrity, is compelling and influential, I argue that his conception of strict liability introduces significant theoretical distortions. In particular, Keating asserts that in strict liability torts, agents are not under a duty not to harm, but are only under a duty to pay compensation. This creates a dissonance with negligence law that ultimately undermines interpersonal justice as an explanation for the normative structure of tort law. I contend that this is due to his overemphasis on the aggregative-distributive framework. My critique suggests that Keating's theory can be adjusted to better reflect the way that tort law is committed to both social and interpersonal justice.

I Introduction

Over the past three decades, Gregory C Keating has meticulously developed a comprehensive theory of tort law, culminating in his latest book, *Reasonableness and Risk*.¹ Much of Keating's theory resonates strongly with me, particularly his insights into the distributive aspect of tort law. Beyond its role in ordering private interactions and rectifying interpersonal wrongs, tort law is part of the basic structure of society. It distributes what I have elsewhere called 'indemnity rights and duties' – that is, rights not to be harmed in certain ways and circumstances, correlative to

1 GC Keating, *Reasonableness and Risk. Right and Responsibility in the Law of Torts* (2022).

Note: With the support of the project PID2023-152057NB-I00, financed by the Ministry of Science, Innovation and Universities (Spain).

***Corresponding author: Diego M Papayannis**, Professor in Legal Philosophy, University of Girona, and Senior member of BIAP (Barcelona Institute of Analytic Philosophy), 'Maria de Maeztu' Unit of Excellence (2023–2027), CEX2021-001169-M, financed by MCIN/AEI/10.13039/501100011033, E-Mail: diegomartin.papayannis@udg.edu, Orcid: <https://orcid.org/0000-0002-0857-0580>

duties not to harm under those same conditions.² Indemnity rights can be deemed primary goods in Rawlsian terms, useful for any life plan a person wishes to pursue.³ Keating defends a similar view by pointing out that tort law defines what we owe to each other in our interactions. When engaging with others, our first relational duty is to respect (ie, not interfere with) the other person's core interests. Among these interests, the paramount concern we all share as human beings is *safety*. We cannot begin to understand tort law without realising the interests it protects, particularly our interest in bodily integrity.⁴ Since tort law is part of the set of institutions that protect all persons from unacceptable interference by others, and this protection is a precondition of human agency – the ability to pursue one's conception of the good – tort law is part of the basic structure of society, 'with its own distinctive role and concerns'.⁵

Consequently, Keating endorses a pluralist theory of tort law that highlights the public relevance of private law institutions. The challenge for any pluralist theory is to integrate the dimensions of distributive and interpersonal justice in a plausible manner. In this commentary, I will point out some difficulties in the way Keating articulates the interpersonal justice aspect of tort law. Ultimately, the distributive-aggregative perspective takes over in Keating's book and introduces some distortion in the analysis, misrepresenting the way that tort law regulates respectful interaction among equals. I will then also suggest that Keating's theory understates the contribution of interpersonal justice to justice writ large, thereby neglecting the distinctive value of tort law.

II The standard view of interpersonal justice and the trouble with strict liability

Despite the doctrine's strong focus on remedies, tort law goes beyond reparation. I agree with those who argue that tort law encompasses both guidance and reparatory dimensions. Its guidance aspect requires parties to respect the rights of others in their interactions. First, parties have a duty not to harm others under the conditions established by the legal system. It would indeed be odd if our civil responsibilities (ie, our duties to our fellow citizens) only came into play once harm has been

² See *DM Papayannis*, *Derechos y deberes de indemnidad* (2012) 35 *Doxa*. Cuadernos de filosofía del derecho (Doxa) 691.

³ *J Rawls*, *A Theory of Justice* (1999) 54, 79.

⁴ *Keating* (fn 1) 193ff.

⁵ *Keating* (fn 1) 81.

caused.⁶ However, when this guidance component fails and one person wrongs another, liability serves as a corrective mechanism to address the breach that has occurred.⁷

There are many ways to reconstruct this standard deontological picture of tort law.⁸ The variant I favour presents the normative structure of tort law as comprising two levels of rights and correlative duties. All parties have the right not to be harmed, which is correlative to a duty not to harm, under the conditions set by the legal system. If one party breaches its duty not to harm (and thus violates the correlative right of the other), the secondary-compensatory level is triggered. An agent who has breached their duty not to harm is now under the obligation to pay damages, and the victim has a correlative right to recover these damages from the agent. This is the only normative structure that enables the parties to relate to each other as peers: as persons deserving equal respect.⁹

Keating adheres to this framework up to a point, but then he dramatically departs from it in his treatment of strict liability. According to Keating, in the most prominent cases of modern strict liability – such as abnormally dangerous (though lawful) activities, defective products, some nuisance cases, or necessity – parties are not constrained by a duty not to harm. Instead, in those cases, people owe each other only a duty to repair the harm caused in such situations. Hence, the wrong in a strict liability tort is ‘unjustifiably-failing-to-repair-the-harm-justifiably-inflicted’.¹⁰ The reason for this theoretical stand is that in strict liability torts, we do not claim that ‘it was wrong for the defendant to have undertaken that dangerous activity or that the defendant should have conducted its activity more carefully’.¹¹ Strict liability ‘is imposed on inflictions of injury that the law does not think the defendant should have avoided’.¹²

6 See *DM Papayannis*, Civil responsibility (2025), IVR Encyclopedia. The science of law and the social sciences (forthcoming). I am using the term ‘responsibility’ in two of the senses ascribed to it by Hart, namely, as duty and liability. See *HLA Hart*, Punishment and Responsibility: Essays in the Philosophy of Law (2008) 212.

7 See *H Sheinman*, Tort Law and Corrective Justice (2003) 22 *Law and Philosophy* (Law Philos) 21, 68f.

8 Compare, among many others, the unity thesis of right and remedy, defended by Weinrib and Ripstein, with Gardner’s continuity thesis linking primary and secondary duties. See *EJ Weinrib*, The Idea of Private Law (1995); *A Ripstein*, Private Wrongs (2016); and *J Gardner*, What is tort law for? Part 1. The place of corrective justice (2011) 30 *Law and Philosophy* 1.

9 See *S Darwall/J Darwall*, Civil Recourse as Mutual Accountability (2011) 39 *Florida State University Law Review* (Fla St UL Rev) 17, 20.

10 Keating (fn 1) 55.

11 Keating (fn 1) 102f.

12 Keating (fn 1) 231.

The analysis of *Boomer v Atlantic Cement* provides a good illustration.¹³ Keating says: ‘Once it took all possible precautions to reduce the plant’s pollution it was not wrong for the defendant to operate its cement plant, even though the operation of that plant interfered with the plaintiffs’ reasonable use and enjoyment of their property. But it was wrong for the defendant not to compensate the plaintiff for the harm done by the defendant’s interference with the plaintiff’s reasonable use and enjoyment of its property.’¹⁴

Here I think Keating’s distributivist (hence, aggregative) approach neglects the role of interpersonal justice in tort law. From a macro-aggregative perspective, it would be a mistake to dissociate an activity from its statistical consequences. It therefore makes sense to treat the latter as defining the former, as Keating does.¹⁵ If *A* is a valuable activity that entails certain risks *R*, then *R* and the harm it brings about are part of the activity. You cannot have *A* without *R*. The claim that *A* is a valuable risky activity and should not be stopped means that, as a society, we must tolerate the harm caused by the activity. However, this does not imply that individual victims must also tolerate the harm they suffer. In this context, Keating argues, strict liability aligns society’s interests with individual interests by recognising a less stringent duty than the duty not to harm. Instead, injurers are under a duty to repair the harm they cause in the course of their valuable but risky activities.

However, the above analysis overlooks an important point: things are quite different from an interpersonal perspective. Even if the injurer did nothing wrong when engaging in *A* and thereby imposing *R* on others, the harm caused by the injurer still breaches the fair terms of interaction, as it violates the victim’s right to personal indemnity. This, I contend, is the best interpretation of strict liability from the viewpoint of interpersonal justice.

Consider Keating’s analysis of the harm caused by the Coast Guard’s ‘drunk sailors in and around its ships when they are docked for shore leave’.¹⁶ According to Keating, shore leave might well be a justified practice, although we can expect some harm due to the sailors’ misbehaviour. This harm derives from a *characteristic risk* that the valuable activity imposes on others; therefore, the activity is a good candidate for enterprise liability, a harm-based strict liability. But is it really the case that citizens do not have a right not to be harmed by drunk sailors enjoying their shore leave?

The most natural answer is that they do. Keating would certainly reply that this is so because *sailors* – not the Coast Guard – are under a duty not to harm. When a

¹³ *Boomer v Atlantic Cement Co*, 257 North Eastern Reporter, Second Series (NE 2d) 870 (NY 1970).

¹⁴ Keating (fn 1) 233f.

¹⁵ Keating (fn 1) 201.

¹⁶ Keating (fn 1) 275.

sailor hurts a citizen, the Coast Guard does not breach any duty towards them. The only duty on the Coast Guard's side is to pay damages. However, this reconstruction fails to embrace a different understanding of strict liability that is better aligned with the micro (one-on-one) level of interpersonal justice. According to this view, the Coast Guard has a duty to guarantee that the sailors will behave properly while on shore leave. They have a duty to ensure (not merely *to try* to ensure) that the sailors will behave. When sailors wreak havoc, the Coast Guard falls short of this duty. That is why we think that the Coast Guard is somehow involved in the relational wrong when sailors harm a citizen. The Coast Guard is liable not just because it has enough money to pay damages or because it benefits from the risky activity, but because it is its responsibility (ie, its duty) to ensure that no one is harmed by the sailors' misbehaviour.

One source of unease with this reconstruction may lie in the 'ought implies can' (OIC) principle. The fact that it is, arguably, impossible for the Coast Guard to guarantee that no harm will result from shore leave suggests that the Coast Guard cannot be under a duty to guarantee that no one is harmed by the sailors. Nevertheless, it is not clear that it is beyond the Coast Guard's control to prevent this kind of misbehaviour. They could enhance the enforcement of sanctions by imposing loss of privileges, reprimands, or even discharge from service when the sailors cause non-trivial harm, or provide mandatory courses for sailors on civic behaviour, among other possibilities. But let us assume that none of these measures brings about the desired deterrence. Even so, this does not negate the existence of the duty on the Coast Guard. The OIC principle does not apply to personal or contextual limitations that make it impossible for the agent to fulfil their duty. Sometimes, unfortunately, we are bound by impossible duties¹⁷ and this is routinely the case in tort law. When the injurer inadvertently breaches their duty of care, it is (by definition) impossible for the defendant to meet the required standard of conduct. The defendant might be excused, but never justified in being negligent.

On the other hand, the objective standard of care, which is in force in most legal systems, can be seen as incompatible with a broad interpretation of the OIC principle.¹⁸ In fact, under OIC, we are forced to conclude that many instances of failing to take reasonable precautions do not genuinely constitute negligence. It could be argued that occasional innocent omissions do not amount to a breach of duty in tort law, as it is unrealistic to expect anyone to maintain a flawless record throughout

¹⁷ See, in general, *J Gardner*, Reasons and Abilities: Some Preliminaries (2013) 58 *American Journal of Jurisprudence* 63; see also *F Wilmot-Smith*, Law, 'Ought', and 'Can' (2023) 133 *Ethics* 529, for a powerful defence of the value of impossible legal duties.

¹⁸ See *B Chapman*, Ethical Issues in the Law of Tort (1982) 20 *University of Western Ontario Law Review* (U W Ontario L Rev) 1, 16ff.

their entire lifetime. Even the most conscientious drivers cannot guarantee that they will never become momentarily distracted. The cost of perfect compliance with required standards of care is prohibitive, as it is beyond human capacity to consistently meet all standards without ever faltering.¹⁹

However, tort law seems to operate differently. The impossibility of avoiding all distractions does not allow a defendant with a perfect record to justify their first mishap. When drivers become distracted, they breach their duty to exercise reasonable care, regardless of how responsibly they generally carry out their activities. Similarly, it is irrelevant that the Coast Guard cannot completely prevent sailors from misbehaving. When such misbehaviour occurs and causes harm, the Coast Guard fails to fulfil its duty to prevent that harm. This is the essence of strict liability, which imposes a duty not merely to compensate for harm, but to guarantee that harm will not be caused by the sailors on shore leave.

Boomer v Atlantic Cement warrants the same analysis. The cement plant can, in fact, prevent the harm – it could buy the neighbour's land and create a buffer zone around its operations. Such a precaution, however, cannot be demanded of it because it is unreasonably expensive. But this does not mean that it is acceptable to pollute the neighbour's property. It is not. The plant has a duty not to harm, even when that harm is unavoidable due to specific limitations (such as insufficient space to create a buffer zone). The plant is therefore under a duty it cannot currently fulfil, but this duty still provides guidance and allows us to conclude that the cement plant *wrongs* the neighbour through its pollution. This, in turn, provides a neat explanation of why the cement plant is under a secondary duty to pay damages.

More importantly, Keating's view of strict liability is difficult to reconcile with his strong claim that rights have priority over reparation, which he considers 'tort law's second-best solution'.²⁰ Keating might reply that in these cases, potential plaintiffs do not have *a right* not to be harmed that is to be prioritised. Insisting on this point raises a new problem: since rights are institutionally protected interests,²¹ why should the interest in physical integrity be less important or less protected when the injurer is in the blasting business compared to when they drive a car or ride a bicycle? In Keating's theory, when driving or biking, the injurer owes others a duty not to harm; when conducting a blasting business, the injurer only owes others a duty to repair all the harms caused during this highly dangerous and profitable

¹⁹ This view can be defended with equal plausibility from consequentialist and deontological perspectives. See *MF Grady*, *Res Ipsa Loquitur and Compliance Error* (1994) 142 *University Pennsylvania Law Review* (Univ PA Law Rev) 887, 897, 905; and *OJ Herstein*, *Nobody's Perfect: Moral Responsibility in Negligence* (2019) 32 *The Canadian Journal of Law & Jurisprudence* (Can J L Juris) 109, 116.

²⁰ *Keating* (fn 1) 35ff.

²¹ *Keating* (fn 1) 84.

activity. Why is this the case? Stressing the social value of the activity that cannot survive without its characteristic risk will not suffice. As I have already mentioned, compliance with the duty not to harm requires that the agent *does not harm* the victim, *not that they abandon* the lawful activity: blasting, operating a cement plant, or massively producing and selling food are all lawful activities. Harming others as a consequence of undertaking those activities is not. In some countries, such as Argentina or Spain, car accidents are subject to strict liability. Driving is a lawful and valuable activity that we do not want to discourage as a society. However, running over pedestrians in non-fault accidents is not justified. No matter how frequent and statistically unavoidable this harm is, it is not supported by good reasons.

Maybe the basic problem is that Keating's analysis is ambiguous. Sometimes he claims that harm-based strict liability involves cases in which '*accidents should not be avoided*',²² other times '*harm that either cannot be – should not be – avoided*',²³ and still other times '*risks which cannot or should not be avoided*'.²⁴ Regardless of what we think about the nature of accidents and the ability to avoid them, it makes sense to distinguish between *risks* and *harms* and to assert that some risks are worth taking, hence they should not be avoided, without implying that the resulting harms should not be avoided either. We might have reasons to live with certain risks, to allow their imposition, but this does not immediately translate into reasons to allow for harm. In *The Deer Hunter*, Mike Vronsky might have had good reasons to play Russian roulette with three bullets in the gun. It was his only chance of escaping captivity, so he had good reasons to take the risk of killing himself, but he had no good reason to kill himself. Good reasons to take or impose risks are pervasive in modern societies; good reasons to suffer or cause harm are rare, quite exceptional, and will be discussed in Section V below.

Finally, to complete the picture, Keating notes that '[h]arm-based strict liabilities are the only primary obligations in tort that are, in part, corrective The wrong occurs when an actor – having inflicted harm – fails to discharge its primary obligation to make reparation for that harm. A lawsuit based on a strict liability harm therefore enforces a preexisting duty of repair just as a negligence suit does, albeit a different preexisting duty of repair'.²⁵

I find the idea of a *primary obligation* that is simultaneously *rectificatory* puzzling. A primary obligation is one that exists from the outset, whereas a remedy is a legal means to undo the wrong, as much as possible. Conceptually, a remedy is appropriate to rectify a previous wrong: it arises after the commission of a *wrong*. For

²² Keating (fn 1) 104 and 279 (my emphasis).

²³ Keating (fn 1) 110 and 237 (my emphasis).

²⁴ Keating (fn 1) 201 and 236 (my emphasis).

²⁵ Keating (fn 1) 261.

instance, if I promise to return an object I borrowed from you by March 13 and fail to do so, you rectify the wrong by enforcing my promise through a remedy.

When we apply these concepts to Keating's conception of strict liability, the problem is that the harm triggers the obligation to pay damages. If there is no duty not to harm, then this obligation is the first one the injurer has toward the victim. It is primary in the sense that it is not linked to a previous wrong. But if the obligation to pay compensation is additionally labelled as a 'remedy', then, it presupposes the commission of a wrong. Otherwise, what is there to remedy or make right again? Therefore, the obligation to pay damages cannot be corrective unless there is an implicit assumption that the harm suffered by the plaintiff is something that *should not have occurred*. And if it is corrective, then it is a secondary obligation, not a primary one. This would be inconsistent with Keating's assertion that in strict liability torts, harming is not inherently wrong. This conceptual inconsistency forces Keating to abandon one of two propositions: strict liabilities are either corrective or primary obligations, they cannot be both.

III Relational wrongs in enterprise liability

If correct, the above objection also explains why Keating's approach to enterprise liability is somewhat misleading. In his view, enterprise liability embodies a principle of *collective* responsibility that recommends spreading the costs of accidents. Keating introduces the contrast between individual responsibility and collective responsibility by analysing Waldron's famous *Fate and Fortune* example.²⁶ To cut a long story short, both Fate and Fortune act negligently. Fate, however, causes serious harm, while Fortune's fault is innocuous. Commentators have differing views on this example. Some authors, such as Keating and Waldron, argue that 'Fate did not do anything different from Fortune, he was just unlucky.'²⁷ Other authors, such as Ripstein, disagree with this analysis:²⁸ Fate and Fortune did two very different things, because Fortune's negligence did not have consequences in the real world beyond the wrongful imposition of risk, while Fate did cause harm to the victim. Unreasonable risk imposition might be wrong. It might even constitute a relational wrong.²⁹ But it is not the kind of wrong that grounds a tort action in law. Moreover, in purely moral terms, material harm and the imposition of risk of material harm

²⁶ J Waldron, Moments of Carelessness and Massive Loss, in: DG Owen (ed), *Philosophical Foundations of Tort Law* (1995) 387.

²⁷ Keating (fn 1) 118.

²⁸ See A Ripstein, *Equality, Responsibility, and the Law* (1999) 82f.

²⁹ See J Oberdiek, *Imposing Risk. A Normative Framework* (2017) 86.

should be distinguished. I therefore also believe that Fate and Fortune did something quite different, and Keating should agree with this to maintain coherence with other theoretical commitments he makes in other parts of his book.

Keating's analysis is that 'both Ripstein's and Waldron's descriptions of Fate and Fortune's respective actions are plausible ... Descriptions like Ripstein's very strongly dispose us to see the matter in terms of individual responsibility. Descriptions like Waldron's very strongly dispose us to see the matter in terms of collective responsibility Collective responsibility is evident in forms of enterprise liability within and outside the law of torts. Within the law of torts, enterprise responsibility manifests itself in aspects of vicarious liability, products liability, abnormally dangerous activity liability, and nuisance liability'.³⁰

It is true that there are several descriptions available in almost every situation. However, not all of them are equally plausible or compatible with Keating's theory. First, *harm* – not *risk* – is the central concept in Keating's approach. Accordingly, Fate does indeed do something quite different from Fortune, as Fate impairs the victim. Keating should accept this description as it aligns with his objection to Fletcher's theory. Fletcher argues that the negligence rule fairly distributes the costs and benefits of risky activities within a community of reciprocal risk imposition, while strict liability is the fair rule when risks are nonreciprocal.³¹ Fletcher adopts a collective stance, not an individual one, to argue for the adequacy of different rules in different risk contexts. Keating responds by saying that risk imposition is not 'the most important aspect of tortious wrongdoing In the law of torts, the significance of risk is largely parasitic on the significance of harm'.³² If that is the case, as I think it is, then Fate and Fortune indeed do something quite different. The emphasis on Fortune's risks to include the case under a principle of collective responsibility seems misplaced. The harm Fate caused is normatively significant in a way that Fortune's mere risk is not.

The most problematic aspect of the argument is that using *Fate and Fortune* to defend the idea that collective responsibility is the key concept underlying enterprise liability immediately raises the question of why in enterprise liability there is only a duty to repair the harm caused and not a duty not to harm. In effect, Fate's harm blatantly fails the test of being unavoidable. Fate breached his duty of care; he had reasonable precautions available to him and failed to take them. If this is a case of collective responsibility, then it is unclear why enterprise liability would neces-

³⁰ Keating (fn 1) 117–119.

³¹ GP Fletcher, Fairness and Utility in Tort Theory (1972) 85 Harvard Law Review (Harvard L Rev) 537, 547–549.

³² Keating (fn 1) 284.

sarily consist only of reparatory duties, as Keating claims. This is an important point because Keating's argument seems to undermine his own view.

Maybe this is not a conceptual error in Keating's theory, and the *Fate and Fortune* example is simply unsuitable for his purposes. Whether this is the case depends on what defines enterprise liability. If enterprise liability is characterised by the lawfulness of the shared activity, then the Fate and Fortune example is indeed inadequate as an illustration of this type of liability. However, discarding the example might not be sufficient. Later in the book, Keating revisits the foundations of enterprise liability and states that:

When an activity is actuarially large, 'accidental' harm is statistically certain to result from the risks that it routinely creates. If you make enough Coke bottles, some are sure to rupture; if you transport enough gasoline, some tankers trailers are sure to explode; if you leave water mains uninspected in the ground long enough, some are sure to break; if you turn loose enough sailors on shore leave, some of them are bound to get drunk and wreak havoc. In the 'world of activities', both actors and activities are large. The cost of accidents can therefore be dispersed and distributed.³³

Then he adds that '[e]nterprise liability is liability for "characteristic risk", meaning reasonable risks of a particular kind of injury which exceed the background level of risk and flow from the long-run activity of an enterprise'.³⁴

The problem of Keating's reconstruction of enterprise liability is that *systematic negligence* also fits his description. Paraphrasing Keating, one could say that if you engage in enough driving, some drivers will inevitably get distracted, just as some fuel tankers' trailers will explode; if you treat enough patients, some will surely die due to mistakes in treatment; if you do enough hunting, some fellow hunters will be injured by stray shotgun pellets; and so on. It is impossible to practise any activity without occasionally missing the mark.³⁵

Following the same logic, we might also view many instances of negligent harm as part of the *social costs* to be spread among as many people as possible. In fact, some literature on liability in clinical settings and car accident prevention suggests shifting the focus from *personal* to *collective* responsibility.³⁶

³³ Keating (fn 1) 287.

³⁴ Keating (fn 1) 297.

³⁵ See JCP Goldberg/BC Zipursky, The Strict Liability in Fault and the Fault in Strict Liability (2016) 85 Fordham Law Review (Fordham L Rev) 743, 773.

³⁶ See A Lie/C Tingvall, Are crash causation studies the best way to understand system failures – Who can we blame? (2024) 196 Accident Analysis and Prevention (Accid Anal Prev) 1, 5ff; R Heywood, Systemic Negligence and NHS Hospitals: An Underutilised Argument (2021) 32 King's Law Journal (King's LJ) 437, 457ff.

If we adopt this approach, why not claim that drivers are only under a duty to pay compensation? Why not regard medical malpractice as a ‘characteristic risk’ of health systems? Systematic errors are unavoidable, and it is reasonable to continue the practice of medicine knowing we must tolerate the harm, but not the unrepaired harm. As mentioned in the previous section, perfect compliance is impossible in negligence law. A good driver might get distracted and cause an accident; a physician might overlook a crucial detail about a patient, resulting in harm. These mistakes, distractions, or blunders are systematically unavoidable, but it would be odd to infer that the harm should not have been avoided and, therefore, that agents are not guided by a duty not to harm in these cases.

Given this, Keating has two options: either he admits that enterprise liability should be much broader than it currently is, covering cases of systematic or chronic negligence, or he acknowledges that it is perfectly coherent to claim that in enterprise liability (as in cases of systematic negligence), there could be a duty not to harm. This second alternative, which I favour, is compatible with recognising that these duties are sometimes very difficult (or impossible) to fulfil and that they do not normally justify injunctions to stop the risky-but-lawful activity that causes harm. This view of enterprise liability aligns better with the micro-level perspective of interpersonal justice and offers a unified account of the normative structure of tort law.

IV Some problems with correlativity

Keating is surely right when he claims that orthodox advocates of corrective justice such as Weinrib and Ripstein have difficulty explaining the difference between fault and strict liability, or, for that matter, the existence of cases of genuine strict liability that cannot be reduced to a species of fault liability. They tend to regard all strict liability cases as extensions of the fault rule or, if not possible, they marginalise them as an unjustified departure from corrective justice.³⁷ In my view, however, Keating’s understanding of strict liability commits the opposite sin: it drives strict liability too far away from fault.

According to Keating, under the fault rule, non-fault accidents should not be avoided. The same applies to harm-based strict liability. The primary difference between the two rules is that they place the burden on different parties: fault leaves the burden on victims, while strict liability shifts it to the injurer.³⁸ Note that there is

³⁷ Keating (fn 1) 95; see also Weinrib (fn 8) 177–179; Ripstein (fn 8) 144.

³⁸ Keating (fn 1) 104.

an asymmetry in both cases. Under the fault rule, the victim bears the non-fault harm because they have a right only not to be harmed by unreasonable behaviour. Non-fault injurers do not violate this right and are therefore not liable in this respect. Under strict liability, agents do not violate a victim's right not to be harmed, because the victim does not enjoy such a right. The only right they have is the right to recover damages.³⁹ So, why is the agent under a duty to repair the lawful harm? If the harm in itself is not a wrong – as it does not violate any of the victim's rights, because by hypothesis the law does not impose a duty not to harm on potential injurers – why are injurers obliged to pay damages? If no wrong has been committed, what links the plaintiff to the particular injurer?

At this point Keating introduces a different idea than before. Previously, he had defined the wrong as harming-without-repairing.⁴⁰ Later in the book, he states that '[h]arm-based strict liabilities are corrective insofar as they undo *wrongs whose essence lies in benefiting through harming* a particular person and thereby benefiting at that person's expense'.⁴¹ Now the wrong is defined as 'benefiting through harming'. But this new definition is problematic. If benefiting through harming is wrong, the injurer should not have done it! They were, after all, under a duty not to harm. Of course, you can conform to the rule that prohibits *benefiting though harming* by either not harming, or by *not benefiting* from the harm. It would be absurd to claim that those who harm without obtaining any benefit from the harm do not breach their duty to others because they commit no wrong according to the interaction rule. A better understanding is that from a macro-perspective, the group to which injurers belong usually benefits from their risky activities, so they have a duty to compensate the victims to avoid a kind of inter-group exploitation. However, this only justifies collective responsibility, not individual responsibility. Even if the particular defendant has benefited from the imposition of risks, they are not the only one who benefits from the practice: other injurers or even victims might also benefit from it. Why should the burden fall solely on individual injurers? The pervasive presence of insurance does not change the fact that, in tort law, the only responsible party is the injurer. If the insurance company goes bankrupt, the injurer will bear the full cost of compensation. Why is this so in a conceptual scheme that portrays the injurer as someone who did not violate any of the victim's rights?

Elsewhere, I have defended a different, more homogenous account of the rights and duties the parties have under fault and strict liability.⁴² This account properly

³⁹ Keating (fn 1) 250.

⁴⁰ Keating (fn 1) 53, 55, 102, and 233.

⁴¹ Keating (fn 1) 263 (my emphasis).

⁴² See *DM Papayannis, Is There a Legal Duty Not to Harm in Tort Law?* in: D Beyleveld/S Berteau (eds), *Theories of Legal Obligation* (2024) 129ff.

captures the difference between the two liability regimes and presents them both as compatible with interpersonal justice. It is also more faithful to Keating's core thesis in that we share two important interests: preserving valuable activities and preventing serious physical impairment. Strict liability rules are the legal response to the violation of a right not to be harmed by the risky (but lawful) activity of the defendant; fault liability is the legal response to the violation of a right not to be harmed as a consequence of the defendant's lack of reasonable care. This simple scheme preserves bilaterality as an analytical framework and makes it unnecessary to commit to what it seems to be an *ad hoc* explanation of strict liability in some cases.

For example, when Keating criticises theories of corrective justice and civil recourse, he asserts:

when liability is strict and sovereignty-based, the wrong committed is 'conduct-based' in only the most attenuated sense of the term. The core of the wrong is the violation of the plaintiff's right. The duty breached by the defendant is a duty not to violate the right; conduct that violates the right is wrongful because – and merely because – it violates the right. *The plaintiff's right, not the defendant's conduct, does the work.* Viewed in isolation from the right, the conduct may be innocent and even justified. The defendant doctor in *Mohr v. Williams*, for example, benefited the plaintiff by curing her disease. He also wronged the plaintiff – because he operated on her ear without her permission. If you operate on someone without their permission, you violate their right to determine who may touch their body and for what purpose. You commit a wrong because you violate a right. And this is true even if your conduct, considered without reference to the right, is commendable. The fact that your conduct cures the plaintiff's diseased condition, though, makes describing it as a conduct-based wrong less than perspicuous. Instead of inflicting harm, the conduct confers benefit. It's not the conduct that makes the wrong, it's the violation of the right.⁴³

This passage is troublesome for at least two reasons. First, Keating asserts that it is the victim's right, rather than the defendant's conduct, that carries normative significance. However, how can these two elements be separated? Analytically, the right not to be touched without consent can only be violated by the *wrongful act* of touching someone without their consent. This is true for any right, which, by definition, is correlative to a duty. In all torts, the normative work is performed by the violation of a right, which simultaneously constitutes a breach of a duty owed to the victim. It is impossible to ground tort liability on a unilateral consideration, such as the violation of the victim's right unconnected with the breach of a correlative duty.

Secondly, Keating assumes too quickly that the doctor's behaviour is commendable simply because it benefited the patient. From *the legal point of view*, the doctor had a duty not to touch the patient for purposes other than those agreed upon, regardless of how beneficial bypassing the patient's will might appear. The whole

⁴³ Keating (fn 1) 239 (my emphasis).

point of this norm governing the patient-doctor relationship is to prevent doctors from imposing their own judgement on patients.⁴⁴ This rule is a red line in terms of interpersonal justice. Under a particular description that overlooks the fact that the patient has a right not to be treated without consent, the doctor's action might seem commendable. However, this is not the legally relevant description. Under the proper description, the doctor unquestionably wronged the plaintiff, even if they acted in good faith with the intention of benefiting them.⁴⁵

V Wrongful harm, necessity and lawful losses

An important consequence of Keating's reconstruction is that by adopting such an aggregative view of strict liability, we lose sight of the varying significance of harm in different harmful or detrimental interactions. There are three categories that should be distinguished: 1) lawful harm or losses (such as those suffered in market competition); 2) justifiable harm (as in cases of necessity); and 3) unjustifiable harm resulting from lawful activities (such as those caused by abnormally dangerous activities). In my view, lawful harm (or if you prefer, losses) are not objectionable and do not constitute an interpersonal wrong. In contrast, justifiable harm is not entirely unobjectionable: at the very least, it involves the infringement of the victim's legal rights.⁴⁶ This harm is peculiar in that, while it is supported by undefeated reasons, it still imposes a sacrifice on the victim for the benefit of others. Finally, strict liability harm is not supported by good reasons. There is never a good reason to poison a consumer with a defective can of tuna or to blow up a neighbour's house during a controlled blast that goes wrong. It is important to remember that reasons for imposing risk are not the same as reasons for causing harm.

In Keating's view, liability in necessity cases is an instance of what Calabresi termed 'market deterrence':⁴⁷

Vincent is a case where *efficient precaution* is the proper standard of precaution. The dock and the ship are both fungible pieces of property. Their value is their use or consumption value,

⁴⁴ See J McHale, Consent to Treatment: The Competent Patient, in: JM Laing/J McHale, Principles of Medical Law (2017) 419ff. And this is so even from a paternalistic perspective on the patient-doctor relationship. See EH Loewy, In Defense of Paternalism (2005) 26 Theoretical Medicine and Bioethics (Theor Med Bioeth) 445, 448ff.

⁴⁵ I think that these situations might justify, depending on the circumstances of the case, reducing liability for fairness reasons, but only after recognising that the doctor did something that should not have been done. See art 10:401 of the Principles of European Tort Law.

⁴⁶ See JJ Thomson, Rights, Restitution, and Risk. Essays in Moral Theory (1986) 40.

⁴⁷ G Calabresi, The Costs of Accidents. A Legal and Economic Analysis (1970) 68ff.

and it can be fully cashed out in dollars The rational course of action in *Vincent* is to minimize combined harm and maximize combined benefit. The question of who should bear the cost of the ship's salvation – the owner of the ship or the owner of the dock – can be addressed after the harm has been done.⁴⁸

Two aspects of this paragraph deserve attention. First, *Vincent* is considered a case where *reasonable* precaution aligns with *efficient* precaution. The law generally requires everyone to take reasonable steps to avoid harming others. In this case, according to Keating, the reasonable precaution happens to be the efficient one. However, Keating may be missing an important point about the duty of care: it is inherently relational. Regarding the dock's owner, the defendant took no precautions at all. To avoid harming the dock, it would have been reasonable to untie the ship. Yet, the reasons for meeting this standard are outweighed by the fact that the storm would have destroyed the ship, and the expected damage was purely pecuniary. The defendant had a justification for not taking reasonable precautions. But the defendant was not under the obligation to protect their property at the expense of the dock's owner property: they merely had the privilege of being able to do so. Thus, the best understanding of necessity cases sees them as justified breaches of the duty not to harm by omitting reasonable precautions. The duty of care is not simply about doing what is rational or reasonable in general, but about doing what is reasonable to *avoid harming others*. Concerning the plaintiff's interests, the defendant was at fault. Actually, they inflicted harm intentionally. Nevertheless, all things considered, they were justified in doing so, for the reasons Keating points out.

I understand that Keating might insist that the reasonable precautions to save the dock in this case were zero. But the reconstruction I propose has an important advantage: it not only explains all the aspects that Keating's theory addresses but also provides a more consistent and homogenous conceptual framework for fault liability, strict liability, and liability in necessity cases. Under any of these liability rules, the victim has a right not to be harmed. Fault and strict liability involve unjustifiable harm (with fault also involving unjustifiable *risk*). In necessity cases, the harm is justifiable, but it still infringes the victim's right. It is clearly harm supported by undefeated reasons, and this is why, in some jurisdictions, compensation for justifiable harm may be reduced based on considerations of fairness.⁴⁹

Additionally, in Keating's reconstruction, sacrificing someone else's property for one's benefit is like paying the bill in a restaurant: you eat the food, so you must pay for the meal they served you. But I think it is plausible to argue that, while the customer who refuses to pay the bill commits their first wrong against the restau-

⁴⁸ Keating (fn 1) 217 (my emphasis).

⁴⁹ This is the case in Argentina's Civil and Commercial Code, art 1718(c).

rant owner, if Lake Erie Transportation refuses to pay damages, they commit a second wrong. The first was justified, but it was still a wrong. The second is unjustified.⁵⁰

This approach to necessity cases aligns better with interpersonal justice. My property is my property, and it is up to me to decide how to use it. When you interfere with my property, you exceed the limits of your liberty, violate my rights, and owe me compensation for that interference. Perhaps Keating's analysis is biased by the specific circumstances of *Vincent*, where the harm was solely pecuniary. However, necessity cases can also affect physical integrity. Suppose I drive my car over the speed limit to take a child that needs urgent medical attention to the hospital. I impose significant risks on others. It cannot be said that I am taking reasonable precautions regarding pedestrians. I take fewer precaution than would be reasonable to avoid hitting them with my car. Is this imposition of risk justified? In other words, is the breach of my duty of care justified? That depends entirely on the circumstances of the case – how urgent is it to reach the hospital? How populated is the area where I am speeding? and so on. Assuming that in this case the level of risk imposed is justified, it would still be odd to claim that cost-justification is the norm implicit in this case of necessity. And if it is not implicit here, perhaps it is also misleading to read *Vincent* as Keating does. *Vincent* is better understood as a justifiable breach of the duty not to harm through omitting reasonable precautions. It is not a strict liability case; it is a case of justifiable intentional harm, which is something entirely different.

It is true that *Vincent* is a case of *ex ante* efficiency and *ex post* fairness.⁵¹ However, the fact that the harm in *Vincent* is efficient only contributes to justifying the violation of the plaintiff's right. This implies that the plaintiff's right not to be harmed still holds in necessity cases. Consequently, *ex post* compensation is due as a matter of corrective justice, aimed at rectifying an infringement of the victim's right. In contrast, Keating's analysis of *Vincent* makes all rights, especially, but not exclusively, property rights, into mere precarious possessions available to anyone who needs them in critical circumstances.⁵² In Keating's theory, it seems that our property rights (and, indeed, all our rights) are part of a common pool, which we are allowed to use as long as no one else has a more pressing need to satisfy. The alternative reconstruction I have offered avoids this conclusion.

⁵⁰ For a detailed explanation of this argument, see Papayannis (fn 42) 136.

⁵¹ Keating (fn 1) 225.

⁵² See *CS Nino*, Los límites del derecho penal. Una teoría liberal del delito (1980) 477.

VI Is tort law necessary for justice writ large?

The question posed in the title of this section receives an explicit answer in *Reasonableness and Risk*: it is not.⁵³ To see why, we must bear in mind that in Keating's view, '[w]e cannot understand or justify the law of torts without attending to the interests that it protects'.⁵⁴ Keating places great importance on interests. Orthodox private law advocates would point out that interests are a unilateral consideration and therefore cannot explain the normative structure of tort law, which is bilateral. This objection is partly correct. It does not refute what Keating sees as obvious in tort law: that our interest in avoiding severe impairment partly justifies the primary rights and duties we hold. However, the bilaterality objection seems accurate in other respects. Interests themselves and the extent to which they are protected do not, in isolation, justify tort law, as many other institutions also protect these same interests against severe impairment. The question of 'why tort law?' still remains unanswered.

To find a plausible answer to the 'why tort law?' question, we need to focus on the typical bilateral remedy, which is addressed against the injurer. This institutional feature is what distinguishes tort law from other branches of the legal system. To truly understand tort law, it is crucial to elucidate the rationale behind the normative connection between primary and secondary rights and duties. Put differently, before the harmful interaction, everyone's interest in physical integrity justifies the imposition of a duty not to harm on everyone else. After the harmful interaction, that same interest does not necessarily justify the typical tort law remedy as an institutional response, as tort law may be (and in many jurisdictions usually is) a poor alternative for securing actual compensation for victims of wrongful interactions. In Keating's words:

The law of torts has been with us for a long time; administrative alternatives to it are a recent invention. But tort law's position as the default legal institution for the enforcement of the right to the physical integrity of one's person is also due, as corrective justice theorists think, to tort's instantiation of basic and intuitive ideas of responsibility. When one person violates another person's right, responsibility to repair the harm wrongly done naturally falls on the wrongdoer. But this is only the natural default. The private law of tort can be justifiably displaced by administrative alternatives on condition that those alternatives are defensible ways of instituting the underlying right to the security of one's person. And once we see that *these institutions share the common mission of protecting our urgent interest in the physical integrity* of our persons, we have a starting point for thinking about how and when tort is preferable to its administrative alternatives, and vice versa.⁵⁵

⁵³ Keating (fn 1) 114.

⁵⁴ Keating (fn 1) 70.

⁵⁵ Keating (fn 1) 45 (my emphasis); see also *ibid.*, 111.

According to Keating, it is all about the right to safety. Tort law is just a contingently useful and highly intuitive way of guaranteeing everyone a safe environment but holds no intrinsic value. It is simply a starting point that can be abandoned without moral loss once we discover that some other institution, such as a compensation fund, is better suited than tort law to ensure a reasonable level of personal safety. In this respect, Keating is committed to the same instrumentalist approach embraced by legal economists.⁵⁶

Now, Keating's theory might find itself in trouble if there is a *distinctive* value that is not shared with other institutional arrangements – and I believe there is such a value in tort law. Compensation funds are sometimes effective in providing urgent aid to victims of wrongful harm, but they are not well-suited to establishing a setting for interaction in which parties can relate to each other as equals. Compensation funds do not empower victims to hold injurers accountable; that is, they do not set a normative framework for mutual accountability and correlative authority.⁵⁷ Only tort law grants all members of society equal authority to hold others accountable for the harm done. Moreover, this is an important element of the quality of life in a liberal society. One of the central capabilities listed by Nussbaum (Affiliation)⁵⁸ is closely related to tort law (and private law in general). The ability to engage with others with mutual respect entails the private powers that only tort law implements between individuals.

The objection I am raising finds further support in the way Keating recasts his argument for the priority of primary rights over reparation in terms of the continuity thesis. Following Sandy Steel, Keating distinguishes between reasons-continuity, duty-continuity and rights-continuity.⁵⁹ Keating argues that the case for the priority of no-harm can be expressed by any of these different versions of the continuity thesis, but he favours rights-continuity because it is a more perspicuous presentation:

People's rights, grounded in their urgent interests, impose obligations on others. The breach of those primary obligations gives rise to secondary duties of repair and secondary powers to summon the assistance of courts Normally, what the continuing reasons require is that the party who has violated the right and impaired the interest repair the damage that they have done. Without remedies, legal rights are not coercively enforceable constraints on the conduct of others and the protection that they promise is illusory.⁶⁰

⁵⁶ In Calabresi's words: 'there is ... no necessary relationship between the criteria for allocating compensation and those of assigning the costs of compensation. All these alternatives are real possibilities depending on the policies we wish to pursue and the goals we wish accident law to accomplish'. See *G Calabresi, The Costs of Accidents* (1970) 22f.

⁵⁷ See *S Darwall, The Second-Person Standpoint: Morality, Respect, and Accountability* (2006) 121.

⁵⁸ See *M Nussbaum, Creating Capabilities. The Human Development Approach* (2011) 34.

⁵⁹ See *S Steel, Compensation and Continuity* (2020) 26 *Legal Theory* 250, 252.

⁶⁰ *Keating* (fn 1) 46.

This is, however, highly problematic. Even if we accept that the reasons-continuity thesis explains the connection between primary duties not to harm and the secondary obligation to pay damages, rights-continuity might be unable to do the same. Allow me to elaborate. According to the continuity thesis, if Olympia is under a duty not to harm Cleo and she harms her, Olympia is, *caeteris paribus*, under a duty to compensate Cleo after the harm occurs. The reasons justifying her primary duty also justify, all things being equal, her duty to make reparation.⁶¹ On the other hand, if the issue is framed as a right to personal security, once that right has been violated, there are many ways to restore the victim's right. As Keating acknowledges, compensation funds are a legitimate alternative to address the problem of serious impairment. Therefore, in this picture, tort law and corrective justice do not hold special significance.

In other words, primary obligations not to harm can be 'grounded in the fundamental interests of persons and which are therefore urgent enough to justify recognizing rights and imposing duties on others'.⁶² Certainly, the interest we have in personal safety imposes a duty on others to exercise reasonable care. In normal circumstances, but not always,⁶³ these interests might justify a duty on the wrongdoer to make reparations. However, this cannot automatically be used as an argument for the implementation of a tort law system over other alternatives. If a compensation fund proved to be more effective and efficient than tort law in addressing the victim's needs after the harm, then tort law would not be justified. The institutional protection of our interest in personal safety does not require the existence of tort law at all. Primary duties not to harm could be enforced by administrative or even criminal sanctions. Keating's theory thus neglects the importance of corrective justice in explaining and justifying tort law. In this account, tort law fulfils the security function for purely incidental historical reasons. Nothing in Keating's theory suggests that tort law has any distinctive value.

Finally, consider Keating's understanding of the foundations of a tort system as compared with an administrative compensatory system. Keating argues that it is unclear why choosing a tort law system over a compensation fund represents a 'radical division between a regime of right and responsibility on the one hand, and regimes that simply secure people against diverse bad outcomes in the manner of insurance, on the other'.⁶⁴ The modern law of torts can be seen as recognising that the harm we cause each other is a social problem. This also explains the develop-

⁶¹ Gardner (fn 8) 28–34.

⁶² Keating (fn 1) 51.

⁶³ For an argument against the (duty and right) continuity thesis, see *DM Papayannis*, The Morality of Compensation through Tort Law (2023) 36 Ratio Juris (Ratio Juris) 3, 13ff.

⁶⁴ Keating (fn 1) 83.

ment of enterprise liability, which is not liability for misconduct but liability for accidents which are a ‘characteristic feature of activities in an industrial and technological world’.⁶⁵ According to Keating, overlooking this difference obscures the different conceptions of responsibility that animate modern legal systems.⁶⁶ Later in the book, Keating adds, ‘administrative schemes are linked to the law of torts through the idea of enterprise liability and the principle of fairness that informs it’.⁶⁷

Keating observes a continuity between traditional tort law, modern tort law’s enterprise liability, and compensation funds. They are all mechanisms serving the same purpose, though they vary in effectiveness depending on the circumstances. In Keating’s words: ‘administrative schemes are important because they can institute the idea of fairness that animates enterprise liability in circumstances where tort law cannot do so. This contradicts the common belief that these schemes embody only loss-spreading or insurance ideas which have little or nothing in common with the law of torts’.⁶⁸

From a macro-aggregative perspective, Keating has a point. The continuity he observes holds if we conceive tort law as *one possible* institutional response to the problem of *how to distribute the costs and benefits of harmful interaction*. However, I have some reservations. The primary purpose of compensation funds is not necessarily to distribute the costs and benefits of socially valuable activities. For instance, Spain and Colombia have established special funds to compensate victims of terrorism. The goal of these funds is not to implement a principle of collective responsibility of terrorists, or to fairly distribute the costs and benefits of combating terrorism. Instead, it is to provide victims with the urgent aid they need. While some compensation funds may have similar goals to enterprise liability from a macro-aggregative perspective, this is not a defining characteristic of compensation funds.

Moreover, when we try to understand tort law in terms of interpersonal rights and responsibilities – that is, from a deontological perspective – two problems arise. First, while it may be true that compensation funds implement a regime of rights and responsibilities, their underlying principles are still quite different from those justifying enterprise liability. As I argued in Section III, enterprise liability is part of interpersonal justice for wrongful harm, whereas compensation funds address something entirely different. They focus on the needs of the victim rather than mutual accountability. Furthermore, compensation funds are not necessarily concerned with individual responsibility. For example, the law could impose the bur-

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Keating (fn 1) 296.

⁶⁸ Keating (fn 1) 292.

den of financing a compensation fund on the agents who create the risk, but this is not a necessary feature of such funds.

The only point at which tort law systems and compensation funds intersect is that both provide some measure of compensation to victims. However, there are still major differences. Tort law is limited to wrongful losses or harms, whereas compensation funds can have a much broader scope, covering natural disasters or social contingencies like the massive bankruptcy of an industry, among many other cases. The fact that compensation funds can replace tort law and may even be more effective in compensating victims should not lead us to assume that the two institutions share a similar justification. Tort law is about interpersonal justice, but interpersonal justice is not the only factor justifying a social institution. *Reasonableness and Risk* gets the latter point right, although it seems to overlook the former.

VII Final remarks

Gregory C Keating's *Reasonableness and Risk* is an in-depth study tackling complex theoretical issues. By adhering to a pluralistic theory, Keating faces the challenge of coherently integrating distributive and interpersonal justice within tort law. I find his analysis of distributive justice compelling, having learned much from it over the years. His account of how tort law is part of the basic structure of society, protecting core interests, such as safety and bodily integrity – prerequisites for human agency – is both original and has greatly influenced the development of my own work.

In this commentary, I have argued that Keating's account introduces certain theoretical tensions, particularly due to his conception of strict liability. In this area, he asserts that individuals are not under a duty not to harm, disrupting the uniformity with negligence law. I aimed to show that this occurs because Keating overemphasises the distributive-aggregative analytical framework. As a result, he appears to underplay the significance of interpersonal justice, which governs how individuals engage with one another as free and equal persons. However, I believe Keating's theory does not necessarily need to adhere to this specific conception of strict liability. Thus, in addition to offering a critical assessment of *Reasonableness and Risk*, I have suggested how the theory can simultaneously account for tort law's role in promoting social justice while maintaining its primary and distinctive function related to interpersonal justice.