**The Secondary Legal Duty To Pay Damages**

S. Steel

R. Stevens

Most of us think that if we wrong another person we are morally obligated to repair the harms we proximately and reasonably foreseeably cause them by the wrong.[[1]](#footnote-1) One’s initial primary moral duty is replaced with a duty to do the next-best-thing. A family of theories of the common law of tort and contract, typically though rather unfortunately known as ‘corrective justice’ theories, builds upon this basic moral idea.[[2]](#footnote-2) These theories hold that awards of compensatory damages amount to the institutional, legal, recognition of the moral idea. Awards of compensatory damages are best understood, by and large, they claim, as the legal enforcement of moral duties of corrective justice: duties to do the next-best-thing having breached a primary duty.

For this kind of account to be successful, at least two conditions will need to be satisfied: (1) it will need to be shown that such moral duties do exist and (2) that tort and contract law can indeed be understood as giving effect to, or partly justified by, such duties. In this article, we focus upon a problem that has been raised in relation to the second condition – the problem of showing that the law *as it is* can be understood as giving effect to, or justified by, such moral duties.

The alleged problem, and it is thought by those who offer it to be a fundamental one,[[3]](#footnote-3) is that the law does not in fact recognise a legal *duty* to pay compensatory damages upon the commission of a harmful wrong – i.e. at the point the wrong has been committed. Rather, as John Golberg, Benjamin Zipursky, and Stephen Smith have argued, the law only recognises that a person is under a legal *liability* to pay, or to be ordered to pay, compensatory damages upon committing a harmful wrong. Let us call this the *liability view*.

The difference between a duty-imposing rule and liability-imposing rule is that a duty imposing rule tells a subject what they ought or must do; a liability-imposing rule merely, in Smith’s words, ‘tells citizens what the state may do to them (and what they may cause the state to do to others)’.[[4]](#footnote-4) Thus, it is natural to speak of criminal *liability to* punishment, rather than a duty to punish oneself. Upon commission of a criminal offence one is *liable to* punishment – the criminal law, so far as it looks post-crime, in its secondary guise, tells citizens what the state may do to them. Smith believes that tort and contract law, too, tell private wrongdoers what the state may do to them, and victims what they can cause to be done against private wrongdoers, rather than what a such a person herself ought to do immediately post-breach.[[5]](#footnote-5)

In short, then, the objection is this:

1. if corrective justice theory were explanatorily adequate, there would be a legal *duty* to pay compensatory damages upon commission of the wrong,
2. there is never such a duty
3. therefore corrective justice theory is explanatorily inadequate

In this short article, we will argue that (i) and (ii) are false. We will begin with premise (ii) and show that there is a duty to pay compensatory damages upon commission of an actionable harmful private wrong in the positive law. Then we will move to premise (i), and argue that, even if the liability view is correct as a matter of the positive law, it does not follow that moral duties of corrective justice play no role in justifying awards of compensatory damages.

*The existence of a legal duty to pay damages*

The argument in this part of the article will have a negative and positive component. First, we set out and respond to the arguments made against the existence of a duty to pay damages. Second, we offer some positive arguments for the existence of a duty to pay damages.

*Arguments against the existence of an immediate legal duty*

Consider four arguments for the claim that there is no legal duty to pay damages upon commission of an actionable wrong.

i. The argument from uncertainty

Smith argues that if there were a duty to pay damages it would ‘normally’ be a duty that it would be impossible to fulfil because ‘the duty’s content could not be determined prior to a judicial decision’.[[6]](#footnote-6) This is so, in particular, because some of the facts which determine the extent of an award of damages may be known only to the victim. Two doubts may be raised about this.

First, this point turns in part on the extent to which one believes that *ought implies can*. There are good reasons to doubt that private law insists upon a stringent version of the ought-implies-can principle. If one accepts the possibility of strict legal duties – duties that can be breached regardless of fault – this objection loses much of its force. These duties require us to achieve some result without it necessarily being the case that there are steps available (epistemically or practically) to us by which can achieve it. Within private law, in setting down what our rights are against each other, it is commonplace for the law to impose obligations that can be breached without fault. For instance, a person commits trespass to land if they build on their neighbour’s land even if the most competent, but incorrect, legal advice is that the land is their own.

Second, that the content of an obligation is uncertain does not mean that it does not exist. The implications of Smith’s argument within the law would be surprising. Many other duties in private law are ones that even the most law-abiding citizen may be unable clearly to determine that they are breaching in advance. Consider where B agrees to work for A, in return for reasonable remuneration. Because it will be significantly indeterminate what exactly reasonable remuneration amounts to, Smith’s position leads to the conclusion that A is under no obligation to pay. Certainly the quantification of A’s obligation may be unclear (although as with the obligation to pay damages it is undetermined not indeterminate as the law has rules for fixing upon a figure) this uncertainty does not mean the obligation does not exist. More generally, the surprising implication of Smith’s argument is that there are no moral obligations in situations of uncertainty as it is not possible to determine precisely what ought to be done.[[7]](#footnote-7)

ii. The existence of a pre-payment rule

Smith argues that pre-payment of damages prior to litigation is no defence to a claim for damages. On this basis, he argues that “[i]f there were a legal duty to pay damages…it would be a duty that could not be fulfilled”.[[8]](#footnote-8) Since the notion of an unfulfillable legal duty is unattractive, Smith concludes that the better view is that there is no such duty at all.

The authority cited for the proposition that pre-payment of damages prior to litigation is no defence to a claim for damages is *Edmunds v Lloyds Italico & l’Ancora Compagnia di Assicuranzione e Riassicuriazione S.p.a*.[[9]](#footnote-9) In this case, the defendant was liable for damages for breach of contract. A sum was offered in full settlement of the whole claim, which the claimant stated would only be accepted in settlement of the principal claim and not any claim for interest. The claimant applied for summary judgment, which the defendant sought to resist on the ground that the claim had already been settled. The trial judge gave judgment for the full amount, including interest, which the Court of Appeal upheld. Smith draws from this the proposition that the defendant can never fulfil his duty to pay damages prior to the litigation.

The narrower proposition for which this case stands, however, is that it is not possible for the defendant to have unilaterally performed his obligation to pay damages without the co-operation of the claimant. There was, as Sir John Donaldson MR explains, an offer to settle on one basis, with a counteroffer on another, neither of which was accepted.[[10]](#footnote-10) Consequently, the obligation to pay damages was not discharged. As Donaldson MR states, the plaintiff would have been obliged to make restitution of the money.

That an obligation can only be performed with the co-operation of another is a commonplace. If a plumber agrees to fix my boiler he can only do so if I give him permission to access the premises. That he requires my co-operation in order to perform does not mean that he is under no obligation to me to fix my boiler.

That the performance of an obligation to pay a sum of money requires the co-operation of the obligee is as true of claims for liquidated sums as it is for unliquidated, and Smith accepts that the former may be obligatory. If A owes B £100 the tender by A to B of that sum in cash will not, in itself, discharge this obligation. B, or his authorised agent most usually a bank, must accept the tender if it is to constitute performance. If it were possible for the obligor to perform his obligations without the co-operation of the obligee there would be no need for the defence of tender before action. The tender by the obligor would discharge his obligations and there would be no claim at all. “The essence of a defence of tender must be that claim and demand can be seen to correspond, so that the resort to proceedings is demonstrably unnecessary”.[[11]](#footnote-11) Its essence is not that an unaccepted tender of payment even for a liquidated sum is capable of discharging the obligation owed. Where a claim is unliquidated “that situation [i.e. claim and demand being seen to correspond] ceases to obtain if the court has to carry out an assessment of the damages in order to decide whether a sufficient tender has indeed been made”.[[12]](#footnote-12) The difference is not therefore that a liquidated claim is or may be based upon a pre-existing obligation, whilst an unliquidated one may not.

In short, then, it is not true that obligation to pay is impossible to fulfil, only that it requires the obligee’s co-operation. In this regard, it is not unlike other obligations.

iii. No damages on damages

Smith’s third argument is that there are no damages on damages. A refusal to pay damages until ordered to do so is never a source of a further duty to pay damages. “By contrast, if you pay me a debt late or perform another contractual obligation late, I can recover losses attributable to the lateness”.[[13]](#footnote-13) As obligations may be breached, and such breaches in law are wrongs that ordinarily sound in damages, the lack of any liability to pay damages for not paying damages indicates that there is no such duty.

Here we make two points in response. First, this point is inconclusive because the law does not award damages for the breaches of duties to pay a judgment debt, but there is clearly a legal duty to pay that debt.[[14]](#footnote-14) So we cannot straightforwardly infer from the absence of a duty to pay damages for breach of a legal duty that there is no legal duty at all. Second, the reason one does not have a tertiary obligation to pay damages for the failure to pay damages may be to do with the way obligations are individuated. If a person suffers loss at t due to a tort, but then suffers some further loss at t+n, which is also attributable to the tort, we do not say that the tortfeasor had two distinct obligations to pay damages. The single obligation to pay damages simply swells as more (or less) loss is attributable to the tort. Loss attributable to the failure to pay damages, if causally attributable to the wrong itself, simply increases the size of the secondary obligation already in place.

iv. The argument from language

Fourthly, Smith argues that the courts themselves speak of a liability, and not a duty, to pay damages.[[15]](#footnote-15) However, this is readily explicable. If there is a duty to pay damages, wherever it is enforceable the defendant is subject to a liability. The claimant has the power to trigger the enforcement of the duty that is owed to him, and the defendant is under a corresponding liability. There is a duty and a liability. Once this power of enforcement is exercised, if the court makes an order for damages in the claimant’s favour, this creates a new duty.[[16]](#footnote-16) This new court-created duty may be enforced in different ways (through proceedings for contempt of court, seizure of assets, garnishment of earnings and so on) if not complied with. The prior duty is merged within that created by the court order, and another court order in the same terms cannot be obtained. This new right to payment is created by the court’s order, and not by the initial wrong. It is therefore unsurprising that the courts talk of a liability to pay damages, as there is both a liability and a duty.

*Positive arguments for a secondary legal duty upon commission of the wrong*

a. Distress damage feasant

If A finds B’s chattel on A’s land, and it has caused damage, A is generally entitled to distrain B’s property until B tenders an offer of adequate compensation for the damage caused.[[17]](#footnote-17) It would be odd if A were entitled to keep B’s property without B’s consent in order to obtain compensation from B, if B were under no legal duty to pay such compensation. Further the privilege to retain is not dependent upon a continuing liability to pay damages. Indeed there is no power to maintain an action for trespass so long as the distress is retained,[[18]](#footnote-18) and the expiry of limitation so that the defendant is no longer liable to an action for enforcement does not bring to an end the privilege to retain the chattel until the obligation to pay damages has been fulfilled.[[19]](#footnote-19)

It may be that this right only exists in cases where ‘adequate’ or ‘reasonable compensation’ can be readily ascertained without ‘endless conflict’ being a likely prospect.[[20]](#footnote-20) If so, Smith might reply that distress damage feasant is rather an exception to the rule that there is only a liability to pay, rather than strong evidence of the general existence of a duty. Nonetheless, at a minimum, the right to distrain damage feasant provides support for a mid-position, namely, that a wrongdoer has a duty to pay damages when the amount can be reasonably ascertained.

b. Interest

S35A of the Senior Courts Act 1981 confers a discretionary power to award simple interest in respect of the sum for which judgment is given for the period between the accrual of the cause of action and judgment.[[21]](#footnote-21) The discretion whether to award such interest is removed by S35A(2) in cases of personal injury and wrongful death: in such cases the court must award interest unless it considers that there are special reasons not to do so.

John Gardner has pointed to the awarding of interest for a period prior to an order being made as an argument in favour of the duty view.[[22]](#footnote-22) We agree. But the point is really established only by the award of interest in relation to non-pecuniary loss. An award of interest on pecuniary losses might be said simply to reflect the further loss caused by not having the use of the money between the accrual of the cause of action and the order being made.

However, this cannot be said in relation to non-pecuniary losses, where the claimant would not have had the money awarded in respect of the non-pecuniary loss at her use had the tort not occurred. If, for example, loss of amenity damages are awarded for the loss of a leg, the court will value this according to the appropriate figure at the time of trial, not the time of injury. No further revaluation of this loss between the date of injury and trial is therefore required. However interest is still awarded on this sum for the pre-trial period. The award of interest in these cases implies that the claimant ought to have had the money sum paid to him prior to the order being made.[[23]](#footnote-23)

c. Language and structuring assumptions

In addition to talking, rightly, of a liability to pay damages, the courts also talk of a duty to pay damages. Perhaps most famous is Lord Diplock’s usage of the language of secondary obligations to pay damages in *Moschi v Lepp Air Services Ltd*[[24]](#footnote-24) and *Photo Production Ltd v Securicor Transport Ltd*.[[25]](#footnote-25) Lord Diplock made clear that this secondary obligation arises ‘by implication…of law’ upon breach of a contractual primary obligation.[[26]](#footnote-26)

d. The rule of law

What do courts have the power to do? Can they impose obligations upon us from the air? Is it ok for the law to say “you are free not to do X” only for a judge to change your legal position and say “you must do X”?

In three senses court orders can and do change the obligations of the party subject to them. First, as we have seen, although the content of a court order may identically replicate the duty that the defendant was already under (“pay B £1m”) the sanction for non-performance is now potentially more onerous: contempt of court. It is a new duty into which the old has been merged. Second the order may create new obligations to seek to ensure compliance with obligations that the law has already imposed. One example are freezing orders, what used to be called *Mareva* injunctions. Here the court orders that a defendant may not use his assets in a way that he was previously free to do, in order to ensure that he complies with other legal obligations. Third the court may decide the case incorrectly, and order obligations to be performed that ought not as a matter of law exist. Until successfully appealed, however, the rights created by a mistaken order are valid.

Outside of the law of damages, we would not accept that courts should have a freebooting power to impose obligations that did not seek to reflect or enforce prior obligations arising as a matter of law. Courts do not, for example, have the power to grant an injunction restraining conduct that does not threaten the violation of any right. Why does the claimant have standing to sue in private law if his claim is not based upon some pre-existing right that he has? This standing to claim for damages cannot be based upon the earlier primary right that he had as this may well have been lost, as where the chair he owns is completely destroyed.

*Corrective justice and the liability view*

Even if contrary to the arguments we have just made, the *liability* view is correct, this is still consistent with the claim that a secondary moral duty of repair is what the law considers to justify the legal liability to pay damages; and further, not only this, but that the secondary moral duty may be a *necessary* component in the explanation.

A legal liability to pay damages is being subject to a court’s normative power to impose a legal obligation to pay damages. Consider, first, how a moral duty of repair could enter into the justification of a court’s normative power to impose a legal obligation to pay damages. The justification of a court’s normative power to impose this obligation could simply be that the court’s having this power is likely to improve the defendant’s conformity with their moral obligation of repair compared to the situation where the defendant attempts to comply with the obligation himself. How so? Here a corrective justice theorist may herself marshal Smith’s arguments. One’s moral duty of corrective justice is often to some extent unclear in content. If I negligently run you over, it is not going to be immediately clear how much compensation I owe you, particularly in relation to consequential losses; it will require some factual investigation in order to come up with a reasonable assessment. This is not to say that I am not under a moral duty at all, just that its content is unclear.

Now the law could choose to follow the moral position by deciding to impose a legal *duty* of compensation immediately upon the wrong – as we have argued it does – and stipulate the content of that duty by setting out rules for determining its content. This would significantly reduce the uncertainty in the content of people’s moral obligations. It could also, as we have argued it does, impose a liability to be placed under a court-ordered duty immediately upon breach; a duty into which the defendant’s initial secondary legal obligation merges. But it could coherently decide only to impose a legal liability, such that one has no legal duty at all until the court orders one to pay the compensation. The absence of an immediate duty could be justified in recognition of the difficulty for a wrongdoer to determine – even with the assistance of legal rules – the content of any secondary obligation to pay damages.

In short, then, it does not seem to be a major problem for a corrective justice theorist to explain why the law might *delay* the imposition of a legal duty of compensation until judgment. The basic reason is that the law would be imposing legal duties that are difficult to comply with given the epistemic uncertainty that’s likely to exist; in this way, it would be compounding the problem the defendant already faces with her moral obligations: it would be adding an uncertain legal obligation to an uncertain moral obligation. Although this is the current position, it might be thought undesirable in precisely this respect.

*Conclusion*

It is important to know what it is the law is telling us we *ought* to do. Once we have wronged another, is the law telling us that we are free to forget about the obligation we have breached, unless and until a court tells us something different, or is there something we ought to do in the interim. This would matter acutely in a world where civil recourse was completely abolished, and it matters in our world where its availability is restricted seemingly by the day.

It is true that the obligation on the wrongdoer to pay damages is not one that he can unilaterally fulfill, he needs the co-operation of the wronged party. But this is entirely right and proper. The control of the right vests in the rightholder, not the duty bearer, and if he chooses not to accept a payment as performance of the obligation owed to him that is his choice. That the performance of the obligation is dependent upon the co-operation of the wronged party does not disprove the existence of the duty.

1. The focus is on wrongful harms; it is not assumed that all wrongs involve harm. [↑](#footnote-ref-1)
2. Unfortunate because it wrongly suggests these theories are *only* concerned with (compensatory) remedies. [↑](#footnote-ref-2)
3. Smith, ‘Duties, Liabilities, and Damages’, 1741: ‘a major objection’. [↑](#footnote-ref-3)
4. Smith, ‘A Duty to Make Restitution’, 162; “Liabilities are different from duties. To say that an individual is liable to X is to say that X may be done to or imposed upon that individual if another person (or institution) exercises a power”: ibid. [↑](#footnote-ref-4)
5. “Thus understood, the liability model supposes that restitutionary orders are structurally similar to punitive orders: insofar as it makes sense to speak of a legal duty to do what the order stipulates, the duty is created, not confirmed, by the award.”: S. Smith, ‘A Duty to Make Restitution?’ [↑](#footnote-ref-5)
6. S. Smith, ‘Duties, Liabilities, and Damages’, 1743. [↑](#footnote-ref-6)
7. You might think it is unfair to Smith to transpose his point to moral obligations. Isn’t his argument restricted to *legal* obligations? Perhaps *legal* obligations should meet higher standards of certainty than moral ones. Perhaps they should – this may be a requirement of the rule of law: but, if so, this is just a good feature of a legal norm, not a condition of its existence. [↑](#footnote-ref-7)
8. S. Smith, “Duties, Liabilities, and Damages”, 1742; “Why Courts Make Orders (and What This Tells us About Damages)”, 24. [↑](#footnote-ref-8)
9. [1986] 1 W.L.R. 492. [↑](#footnote-ref-9)
10. [1986] 1 W.L.R. 492, 495. [↑](#footnote-ref-10)
11. *Ayton v RSM Bentley Jennison* [2015] EWCA Civ 1120; [2016] 1 W.L.R. 1281, [23] *per* Underhill LJ. [↑](#footnote-ref-11)
12. *Ayton v RSM Bentley Jennison* [2015] EWCA Civ 1120; [2016] 1 W.L.R. 1281. [↑](#footnote-ref-12)
13. [↑](#footnote-ref-13)
14. *President of India* v *Lips Maritime Corp*, *The Lips* [1988] AC 395. [↑](#footnote-ref-14)
15. S. Smith, ‘Why Courts Make Orders (and What This Tells us About Damages)’ (2011) 64 Current Legal Problems 51, 72-73. See for example *H West & Son Ltd v Shephard* [1964] AC 326 (HL) 364 (Lord Pearce); Sale of Goods Act, 1979 s 52. [↑](#footnote-ref-15)
16. “[T]he original debt is gone, *transit in rem judicatum*, a fresh debt is created with different consequences”: *Re European Central Railway Co* (1876) 4 Ch D 33, at pp. 37–38. [↑](#footnote-ref-16)
17. For recognition that the right continues to exist: *Arthur v Anker* [1997] QB 564, 573-576 (Bingham LJ). The right was abrogated in relation to animals by s.7(1) Animals Act 1971. [↑](#footnote-ref-17)
18. *Boden v Roscoe* [1894] 1 QB 608. [↑](#footnote-ref-18)
19. Limitation Act 1980, s.2. [↑](#footnote-ref-19)
20. *Arthur v Anker* [1997] at 576, where Bingham LJ gave this reason for rejecting the exercise of the right as a defence to a claim for trespass to goods where A had clamped B’s car in a private car park: “But in cases such as the present the calculation of a reasonable sum would be subject to such variations and would give rise to such endless dispute as to make the operation of an orderly clamping regime on this legal basis wholly impracticable”. This limitation does not seem to be recognised in other cases, but it would be consistent with limitations applied elsewhere on self-help rights (e.g. rights to abate a nuisance). [↑](#footnote-ref-20)
21. The power was initially contained in s.3(1) Law Reform (Miscellaneous Provisions) Act 1934. [↑](#footnote-ref-21)
22. J. Gardner, ‘Torts and Other Wrongs’ (2011) 38 Florida State Law Review 43, 58 n 56. [↑](#footnote-ref-22)
23. Note, however, the refusal to award simple interest on non-pecuniary loss in the tort of deceit in *Saunders v Edwards* [1997] 1 WLR 1116. The general rule still holds. [↑](#footnote-ref-23)
24. [1972] 2 WLR 1175 (HL) 1185. [↑](#footnote-ref-24)
25. [1980] AC 827, 848–50. [↑](#footnote-ref-25)
26. [1980] AC 827, 849. [↑](#footnote-ref-26)