



REVIEW ARTICLE

John Murphy*

FORMULARISM AND TORT LAW

I INTRODUCTION

MOST modern English texts on the law of tort follow a fairly standard pattern. They typically begin with an instrumentalist account of tort law — which looks beyond the internal structure and constituents of the subject to the goals it is intended to achieve — before proceeding to a reasonably straightforward account of the major torts and the principles governing the availability of remedies and defences. In stark contrast to this format is Peter Cane's recent, valuable and thought-provoking contribution to the literature: *The Anatomy of Tort Law*.¹ This article is a response to that book which, uniquely, defers discussion of the functions and effects of tort law until the very last chapter and, much more radically, breaks up a wide range of familiar torts into three constituent elements: protected interests, sanctioned conduct and (legal) sanctions.² This unpacking exercise is conducted to enable him, later, to reconstruct tort

* LLB, LLM; Faculty of Law, University of Manchester, England. I am grateful to Margot Brazier, Hazel Carty, Anthony Ogus and the anonymous referee for helpful comments on earlier drafts of this review article.

1 Peter Cane, *Anatomy of Tort Law* (1997).

2 Cane uses the term 'sanctioned conduct' to connote behaviour which may result in legal consequences. He deliberately eschews the use of the phrase 'tortious conduct' for the simple reason that certain forms of conduct on the plaintiff's part — for instance, contributory negligence — may equally be regarded as sanctioned conduct. Correspondingly, he uses the term 'sanctions' to refer not simply to tortious remedies but also, for example, to the apportionment of damages principle in the *Law Reform (Contributory Negligence) Act 1945* (UK).

'in a novel way which not only illuminates the inner workings of tort law but also lays the groundwork for a better understanding of the relationship between tort law and other areas of the law, such as contract'.³ For Cane, the debate about whether there is a law of tort or a law of torts is redundant.⁴ Whether tort law is seen as being underpinned by a discernible juridical coherence or whether it is viewed as 'a loose federation of causes of action'⁵ is, according to Cane, a distraction. It diverts attention from the central plank of his thesis that the formulary approach to tort 'makes it difficult to explain [the subject] as a system of ethical precepts ... and to think clearly about when tort liability ought to be imposed as contrasted with when it has been or might be imposed'.⁶ By this he means that tort law is typically presented as a series of formulae — that is, technical rules which define the preconditions for success in litigation — which emasculate its potential as a means of achieving corrective justice. As Cane puts it, 'the formulary approach to tort law limits the creative ability of the courts to the point where they may not feel able to protect people's interests even in cases where doing so would receive very wide support in society at large'.⁷ For this reason, Cane advocates the abandonment of a categorised approach to tort, whereby each category is defined in terms of complex, technical formulae.⁸

In addition to the claims that the formulary approach both confuses our understanding of the law of obligations and constrains the ability of the courts to advance and develop tort law, Cane also contends that it masks a number of important anomalies in the law (such as the fact that punitive damages are not available in negligence⁹ and the fact that there exists an unethical hierarchy of protected interests in English tort law). Were all of these allegations true, Cane would have an extremely compelling thesis. In this article, however, I shall explain why some of his contentions are significantly overstated while others appear to have little or no foundation. I shall also demonstrate that his alternative account of tort law fails to identify a number of important advantages that arise from adopting a formulary approach. In short, this article defends formularism.

3 Cane, above n 1, 1–2.

4 For an extremely accessible discussion of this issue, see Carol Harlow, *Understanding Tort Law* (1995) ch 1.

5 Peter Cane, *Tort Law and Economic Interests* (2nd ed, 1996) 447.

6 Cane, above n 1, 9.

7 Ibid 73.

8 Ibid 199.

9 His argument is that if deliberate gain-seeking conduct, such as a dangerous mode of working designed to save money, is thought to be an appropriate trigger for an award of punitive damages (as it is in defamation: see *Cassell & Co Ltd v Broome* [1972] AC 1027), then it ought not to matter that the action in question lies in negligence: see Cane, above n 1, 132–3.

II FORMULARISM, JUSTICE AND RATIONALITY

As Cane points out at some length,¹⁰ the decision of the House of Lords in *Hunter v Canary Wharf Ltd*¹¹ made clear the highly formulaic nature of a nuisance action which, at once, constrained both the class of persons entitled to sue in nuisance and the scope of the tort. As Cane rightly identifies, their Lordships reasserted the requirement of a proprietary interest in land in order to be able to sue in nuisance; they quashed tentative moves towards the establishment of a new common law tort of harassment;¹² they failed to recognise any general right to sue in respect of disrupted television viewing (despite an earlier judicial suggestion that such interferences might be actionable¹³); and they established, beyond doubt, that nuisance law would not support an action for personal injuries.¹⁴ Cane's objection to such formularism is that, in narrowly defining the scope of any one tort in this way, anomalies are spawned which are at least irrational if not also unethical.

Thus, constraining nuisance law by means of a narrowly-defined, formulaic action which is seen as distinct from a negligence action gives rise to the following problem. Suppose that P suffers both personal injury and interference with the enjoyment of his land because of vibrations generated by D. Nuisance law affords P no remedy in respect of his personal injuries¹⁵ but it does allow him to sue for the disturbance. Indeed, even beyond compensatory damages, an injunction would probably be granted to prevent any further such disturbances.¹⁶ No such injunction could be obtained to avert the risk of further personal injuries, for the interest in bodily integrity is protected by a different formulaic tort — negligence. For Cane, this insistence upon formularism gives rise to 'a strange inversion of moral values' whereby P's 'interest in bodily and mental health and safety is less well protected by tort law than property interests'.¹⁷ This, he contends, is both irrational and unethical.

Before we accept Cane's contention, two points should be considered. The first is that the problem does not, on reflection, inhere in the fact that tort generally, or nuisance law in

10 Ibid 81–2.

11 [1997] 2 All ER 426.

12 Cf *Khorasandjian v Bush* [1993] QB 727; *Burris v Azadani* [1995] 1 WLR 1372. Note, however, that since these decisions of the Court of Appeal, a civil law action for harassment has since been created by statute: see *Protection from Harassment Act 1997* (UK).

13 *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436, 446 (Buckley J).

14 [1997] 2 All ER 426, 438 and 442 (Lords Goff and Lloyd respectively).

15 *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426, 442 (Lord Lloyd).

16 On the granting of injunctions to prevent the continuance of nuisances see *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287; *Miller v Jackson* [1977] QB 966; *Kennaway v Thompson* [1981] QB 88.

17 Cane, above n 1, 132.

particular, is overly formulaic:¹⁸ it rests, rather, with the fact that injunctions are not currently available for negligence. The second (related) point is that there are no obvious reasons why, in appropriate circumstances, negligence actions should not allow injunctive relief. The fact that negligence almost always takes the form of an isolated breach of a duty, resulting in a fixed amount of harm, means that compensatory damages are almost always an adequate remedy for P. But the fact that an injunction would not normally be required is not to say that such relief would necessarily be misplaced in such an action. Indeed, in cases such as our example where there is a continuing breach of a duty — the unreasonable ongoing generation of vibrations — there seems no reason to refuse an injunction.¹⁹ Furthermore, there is nothing in s 37 of the *Supreme Court Act 1981* (UK), which contains the court's jurisdiction to grant such relief, that necessarily rules out injunctions in negligence cases. In short, my point is that, contrary to Cane's assertion, there is nothing inherently immoral about the formulaic nature of nuisance law: instead of overhauling the whole of the law of tort and reconstructing it in terms of protected interests, sanctioned conduct and legal sanctions, all that is required is some modification to current judicial practice within the existing law of negligence. (Yet even this minor change may be unnecessary in reality because P in our hypothetical would be likely to sue in both negligence (for personal injuries) and nuisance (for property damage)²⁰ with the result that an injunction would be granted in respect of the nuisance action, in any event.)

III FORMULARISM AND JUDICIAL LEGISLATION

Examination of the inter-relationship between, and peculiarities of, negligence and nuisance law is, by itself, insufficient either to make the case for the retention of the formulary approach or to found Cane's radical suggestion. Though such examination serves nicely to highlight one of the misplaced claims in Cane's thesis, it does not lend itself to the elaboration of any broader argument about how apposite (or otherwise) it is to retain a formulary approach to tort in preference to Cane's trinity of protected interests, sanctioned conduct and legal sanctions. In order to do this, we need next to address a much more fundamental attack on formularism, one that insists that the formulary approach makes it 'unnecessarily difficult to reform the law in ways widely agreed to be desirable'²¹ because

18 Conor Gearty, for example, has convincingly argued that physical injuries sustained in the manner described are quite properly the sole preserve of the law of negligence: see Conor Gearty, 'The Place of Private Nuisance in a Modern Law of Torts' (1989) 48 *Cambridge Law Journal* 214.

19 Cane recognises this when he states that negligence 'is not a state of mind but a failure to comply with a standard of conduct' and that '[t]here is no obvious reason why an injunction should not be available in suitable circumstances to order a person to refrain from specified conduct': Cane, above n 1, 132.

20 For an example of physical injury being sued for in both torts see *Bolton v Stone* [1951] AC 850. And, more importantly, in respect of physical harm, see *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145 and *The Wagon Mound (No 1)* [1961] AC 388.

21 Cane, above n 1, 9.

the courts are constrained in changing and developing the law of tort to meet changing social conditions ... [since they] feel that they must develop the law in a way that is consistent with existing law (both judge-made and statutory) so as to maintain the common law as a reasonably coherent and consistent body of principles ... [legitimated by] ideas of rationality, consistency and continuity.²²

His suggestion here is that formalism stymies judicial legislation in a way that would not be true of his trinity-based approach. In order to substantiate this contention, Cane takes as his 'test case' the protection of privacy. I shall take precisely the same example in order to mount a defence of the formulary approach. This defence will consist of the argument that not only is formalism perfectly consistent with, and conducive to, desirable legal development, but that it also ensures that such developments occur without many of the defects I shall demonstrate to be present in Cane's approach.

Radical Judicial Legislation

As a starting point, it is important to appreciate that there are no particular institutional constraints placed on the courts when it comes to creating or developing novel rules of tort law. As Stephen Todd has observed:

It is, of course, beyond doubt that from time to time in the past the common law has recognised new duties and liabilities and that it continues to have this capacity, whether by way of decisions widening the ambit of existing torts or of decisions recognising the existence of new torts.²³

Were this observation not true, such seminal judgments as those in *Rylands v Fletcher*,²⁴ *Wilkinson v Downton*,²⁵ *Donoghue v Stevenson*²⁶ and *Hedley Byrne & Co Ltd v Heller & Partners Ltd*²⁷ would never have been delivered and would not have received such widespread acclaim. On the other hand, Cane is correct when he asserts that 'courts may sometimes be unwilling to decide tort cases in such a way as to generate a rule or principle which could be criticized as being too radical a break from or development of the existing

22 Ibid 73.

23 Stephen Todd, 'Protection of Privacy' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 174.

24 (1866) LR 1 Ex 265. In Australia, of course, the strict liability tort of *Rylands v Fletcher* was abandoned in 1994 in favour of liability based on a non-delegable duty in negligence: see *Burnie Port v General Jones Pty Ltd* (1994) 120 ALR 42.

25 [1897] 2 QB 57. Though dormant for virtually a century, new life may be being breathed into this tort: see Jo Bridgeman and Michael Jones, 'Harassing Conduct and Outrageous Acts: A Cause of Action for Intentionally Inflicted Mental Distress?' (1994) 14 *Legal Studies* 180.

26 [1932] AC 562.

27 [1964] AC 465.

body of common law'.²⁸ Before accepting that the (unconstrained) trinity-based approach is therefore preferable in this context, it is crucial to identify the reason for such judicial reticence. If it is, as Cane suggests, simply that the courts feel bound by the restrictive formulae that dominate tort law — such as the requirement of proprietary entitlement in nuisance that we saw earlier — then there is some cause for concern. But the trouble with accepting such an account is that it fails to emphasise the fact that tort law, to a significant degree, reflects core social values. So long as judicial legislation simply embodies dominant mores within society, even quite radical law making is feasible. For example, the seminal judgment of Lord Atkin in *Donoghue v Stevenson* was possible because his Lordship recognised that 'liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay'.²⁹ By contrast, where there is no such 'general public sentiment' two possibilities arise: either judicial legislation will appear uncertain and confused (reflecting the competing social values) or it will not occur at all. The experience of English tort law reveals a marked preference for the second option. When faced with competing policy objectives, rather than side with one or the other, the judges have often expressed the view that the matter would be better dealt with by parliament.³⁰

In short, my point is that the reluctance to provide judge-made law in the field of tort is determined more by the fact that this would involve taking a specific stance in respect of politically or morally contentious matters than by a perception of being fettered by formularism. Judicial conservatism and reticence in this regard is not principally a product of the fact that tort, much more than other areas of the law of obligations, is overly-formulaic. It is equally discernible in those areas. Thus, similar observations about the reluctance of the courts to legislate have been made with respect to the much less formulaic law of restitution.³¹ If it is true, as I contend, that the most important constraint on judicial legislation is the absence of a distinctive social value, it should follow that the presence of such a value would allow the judge to develop the law, even quite radically, notwithstanding the would-be shackles of formularism. And this, as we have already seen, is borne out in the preface to Lord Atkin's neighbour principle quoted earlier. Even so, occasions when there is such consensus on moral or policy matters are few and far between; and this explains the apparent paucity of examples of radical judicial legislation in tort.³²

28 Cane, above n 1, 19–20.

29 [1932] AC 562, 580.

30 See, eg, *McLoughlin v O'Brian* [1983] AC 410, 430 (Lord Scarman declining to grapple with the controversial issue of extending liability for nervous shock) and *Kaye v Robertson* (1991) 18 FSR 62, 66 (Glidewell LJ refusing to recognise a tortious invasion of privacy: see below, n 39).

31 See Craig Rotherham, 'Unjust Enrichment and the Autonomy of Law: Private Law as Public Morality' (1998) 61 *Modern Law Review* 580 who identifies (at 585) 'the English legal community's tendency to distance itself from political and moral controversy'.

32 Even where a moral consensus exists, the judges may be cautious to constrain the scope of their 'legislation'. Indeed, in the very sentences that preceded the exposition of his

In arguing that radical judicial legislation is largely impeded by the formulary approach to tort law, Cane alights upon the specific example of common law protection of privacy. He begins by identifying that in recent times there has been considerable '[s]ocial demand for legal protection against invasions of privacy', and then asserts that 'the courts have found it difficult [to protect against such invasions] because of the legacy of formularism'.³³ At this point in the article, I want not only to challenge the claim that the courts have been unable to develop tort law to protect privacy, but also to demonstrate that they are able to do so in a way that would be much less beset by difficulties than would his own trinity-based approach.

On the basis of my earlier argument, if there is a significant barrier to the judicial creation of a new tort protecting privacy, it should inhere in conflicting social values rather than in the fact that tort law is formulaic. This is precisely the case. Before elaborating upon this, it is important to be clear about the sense in which the term 'invasions of privacy' is used. As Cane is himself aware, certain aspects of privacy already receive protection via the torts of trespass, nuisance, malicious falsehood and defamation. What, however, is not currently protected is the publication of facts about P's private life that do not necessarily affect P's reputation. This point was clearly made when the question arose in *Kaye v Robertson*³⁴ (around which case Cane bases his argument that formularism obstructs the development of a tort protecting invasions of privacy).

A feature of tort law found only in the United States of America and New Zealand is that, in those jurisdictions, the courts have developed a common law tort protecting privacy in the sense just outlined.³⁵ In the United States, the right not to have facts concerning P's private life made public against his will has existed since *Melvin v Reid*³⁶ was decided over sixty years ago. The parallel development in New Zealand is of much more recent vintage with its origins lying in *Tucker v News Media Ownership Ltd*³⁷ and (less equivocally) in

neighbour principle in *Donoghue v Stevenson*, Lord Atkin stated: 'The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief': *Donoghue v Stevenson* [1932] AC 562, 580 (emphasis added). Yet, such judicial caution displays more the foresight and wisdom of the judge than it does any restriction on his 'legislative' free hand. And for all that the effect of the neighbour principle was constrained at its very birth, it remains, nonetheless, a product of radical judicial legislation.

33 Cane, above n 1, 71. He also suggests (at p 73) that the courts perceive themselves to 'lack political legitimacy' when it comes to legislating in this way. We have already seen, however, that landmark cases such as *Rylands v Fletcher*, *Donoghue v Stevenson* and *Wilkinson v Downton* cast doubt on this suggestion.

34 (1991) 18 FSR 62.

35 The best account of this is to be found in Todd, above n 23.

36 (1931) 297 P 91. The issue had long been mooted before that, however: see Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

37 [1986] 2 NZLR 716.

*Bradley v Wingnut Films Ltd.*³⁸ In the New Zealand cases in particular, the judges were less concerned with the straightjacket of formularism than with the competing policy objectives of protecting P's privacy and D's freedom of speech. In *Bradley*, Gallen J's chief concern was explicitly to balance the public interest in a free press against the public interest in protecting individual privacy. A similar balancing exercise was what primarily vexed the Court of Appeal in *Kaye v Robertson* (in the same way that it has dogged the law of defamation³⁹). Put bluntly, it is not primarily formularism that prevents the English courts from developing a common law tort protecting privacy, it is that they have felt unsure about how best to do this, preferring to leave the matter to parliament.⁴⁰

Of course, while formularism may not, per se, impede the courts' ability to develop a new tort protecting privacy, it does not follow that the formulary approach necessarily lends itself ideally to the task. Nor does it negate the possibility that Cane's trinity-based approach might be better suited to the job. Furthermore, the fact that only two common law jurisdictions have forged ahead in this way, to date, tends to suggest that crafting a common law tort based on privacy is a particularly difficult task within a formulary system. On the other hand, this concession does not support the suggestion that Cane's trinity-based approach must necessarily be better. What I shall now examine, therefore, is whether an approach premised on protected interests, sanctioned conduct and legal sanctions would be any better.

In reconstructing tort law in terms of conduct, interests and sanctions, Cane's thesis invites an irresistible comparison between itself and the delict provisions of the German civil code contained in the *Bürgerliches Gesetzbuch* (BGB). According to the central tortious provision of this code,⁴¹ 'liability for causing injury in an unlawful and culpable manner only arises if the injury affects the victim in one of the legal interests enumerated in the text; these interests are life, body, health, freedom, ownership and any "other right"'.⁴² In common with Cane's preferred approach, the German code eschews the use of a complex system of nominate and innominate torts and instead bases liability to pay compensation on sanctioned conduct that violates listed protected interests.⁴³ To the extent that the two

38 [1993] 1 NZLR 415.

39 See, for example, *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670 and Eric Barendt, 'Libel and Freedom of Speech in English Law' [1993] *Public Law* 449.

40 In *Kaye v Robertson*, Glidewell LJ declared that '[t]he facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals': (1991) 18 FSR 62, 66.

41 BGB § 823 para I.

42 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (2nd ed, 1992) 639.

43 Markesinis' translation of the code is more informative about the kinds of conduct sanctioned than the summary supplied by Zweigert and Kötz. It states: 'A person who wilfully or negligently injures the life, body, health, freedom, property or other right of another contrary to the law is bound to compensate him for any damage arising therefrom': B S Markesinis, *The German Law of Torts* (2nd ed, 1990) 10.

approaches are similar,⁴⁴ it is instructive to explore the German experience in relation to the protection of privacy. So doing provides valuable clues as to how well Cane's system might fare in this country.

In fact, the Germans have done no better than the English when it comes to protecting privacy. In 1954, under the category of 'other rights', the German code was amended to give explicit protection to human personality.⁴⁵ The enactment of this right was in large part a compromised response to distinguished academic calls in favour of a right to privacy.⁴⁶ The problem with enacting a simple right to privacy was the familiar one that 'the right to be protected against an often irresponsible Press must be counterbalanced by the equally important need to preserve the freedom of Press'.⁴⁷ In the result, protection against invasions of privacy in Germany (by recourse to the recognition of a new protected interest) is beset by precisely the same problems as those confronting the common law judge operating within the formulary system. Moreover, the partial protection of privacy that is provided by German law bears an uncanny resemblance to that offered under the English common law.⁴⁸ This might lend itself to the suggestion that each system is equally (un)able to strike the appropriate balance between the competing interests at stake. However, I would reject this suggestion, and contend that the formulary approach is, in fact, better able to protect legitimate rights to privacy. This is the case, I believe, because formalism can accommodate not just radical judicial legislation, but also more conservative, incremental reforms.

Incremental Judicial Legislation

The recipe for a privacy action in New Zealand exemplifies perfectly the kind of formulaic tort to which Cane is so opposed. Todd has summarised succinctly the gist of such an action: 'There must be an intentional disclosure, the disclosure must be public, the facts disclosed must be private and the matter made public must be one which would be highly

44 The principal difference between Cane's approach and the BGB is that Cane insists not merely upon a list of protected interests, but that there be a hierarchical structure to this list as a means of resolving conflicts between P's protected interests and D's freedom (also a protected interest). For Cane, 'this hierarchy of interests is part of the ethical structure of tort law, because the stronger the protection [afforded to P], the greater the limitation imposed on the freedom of action of [D]': Cane, above n 1, 90.

45 Although BGB § 823 para I protects against harm to one's body, health and life, it is well established that this provision 'only protects the physical aspects of individual existence and does not offer any protection against invasions of one's honour or privacy': Zweigert and Kötz, above n 42, 727.

46 For the history, see Markesinis, above n 43, 55–7.

47 Ibid 56.

48 Interferences with P's property (akin to nuisance and trespass) are protected by § 823; actions based on the publication of incorrect facts about P (if they threaten P's credit) are also possible under § 824, while § 826 offers limited protection against intentional misstatements about another.

offensive and objectionable to a reasonable person of ordinary sensibilities'.⁴⁹ From this summary it is apparent that there are four elements to the formula: private facts, public disclosure, intentional publication and objectively identifiable gross insult.⁵⁰ But it is the very complexity of this formula that has allowed this tort to emerge and thrive. In particular, the requirement that the disclosure must be of a kind that would offend a reasonable person of ordinary sensibilities is, I believe, the key to its success. At once it limits both press freedom and the individual's right to privacy. It allows matters of no offence (but genuine public interest) to be aired publicly, and it acts as a control device on frivolous litigation born out of an overly precious view of the status of one's own privacy.⁵¹ In this way, it restricts the increase in the courts' workload, it facilitates the administering of corrective justice and it effects only an incremental expansion in the boundaries of tortious liability.

By contrast, it is doubtful whether Cane's preferred approach could achieve such a workable response to the call for greater protection of privacy. While Cane identifies the fact that privacy does not fall under any of the recognised heads of protected interest he was able to distil from his survey of existing English tort law, he nonetheless suggests that it ought to be located under the banner of dignitary interests.⁵² It is not clear, however, whether he sees the infringement of dignitary interests or the interest in privacy to be the appropriate head of liability. If the general term, 'dignity', was to be treated as the appropriate interest, a number of practical problems would arise stemming from its vagueness. Even use of the narrower term 'privacy' would be more problematic than helpful. In the first place, to prevent privacy becoming an absolute right, it might be necessary to add further (countervailing) items to the menu of protected interests (such as, for example, the public interest in truth). Equally, simple recognition of a right to privacy would not remove the need for the courts to develop a body of case law identifying just which forms of sanctioned conduct would trigger liability. Would negligent invasions suffice, or would they have to be reckless or deliberate? Third, it is arguable that a general recognition of a right to privacy might have effects beyond those intended. What damage, for example, would be done to the body of case law built up around the tort of defamation, and how much of that case law would impinge upon the courts' ability to develop a law of

49 Todd, above n 23, 181.

50 It could, of course, be argued that the requirement that there be private facts is otiose and that, in reality, the formula is only tripartite. However, what is regarded as 'private' in this context is not straightforward because authority suggests that the right to privacy 'does not exist where a person has become so famous ... that he has waived his right to privacy. There can be no privacy in that which is already public': *Melvin v Reid* (1931) 297 P 91, 93 (Marks J).

51 A parallel control device exists in ss 2–4 of the *Defamation Act 1996* (UK) — the 'offer of amends' provisions — which exist to prevent vexatious litigation arising out of incidents of innocent defamation.

52 He does so by intimation. In the course of his discussion of privacy he notes that '[t]he only dignitary interests to which tort law [has historically] offered significant protection were personal liberty and reputation': Cane, above n 1, 71.

privacy (given Cane's abandonment of separate categories of torts)? Unquestionably, Cane's approach allows for novel, dynamic and responsive law reform by the courts; but the problem is that it achieves this at the cost of certainty and consistency with the existing law. The common law needs to be able develop in such a way that the solutions it provides to tomorrow's problem cases sit consistently (or at least comfortably⁵³) with its own past. Incremental reform, based on the formulary approach, helps to ensure that the court confines the effects of its 'legislation' to the sphere in which it is actually adjudicating.

Not only is incremental law reform perfectly possible within a formulary system, the very fact that certain torts are formulaic in nature helps to ensure that any developments within those torts are both incremental and self-contained. Where new torts are developed, the willingness to use complex formulae can assist the judge to avoid sweeping judicial legislation where this is unwarranted because of the absence of a non-contentious social value to which it would give expression. Privacy, as we have seen, provides a clear example of such a case. But the same is true of even the most pervasive tort, negligence. The ability of the law of negligence to delineate carefully and incrementally the acceptable parameters within which it is possible to sue for pure economic loss, psychiatric harm and negligent omissions inheres in the complex formula according to which a duty of care is established.⁵⁴

In summary, while it has been demonstrated that formularism can accommodate both radical and (sensitive) incremental judicial legislation, it is doubtful whether Cane's trinity-based approach can achieve the same (at least where broadly defined forms of protected interest found the basis of the action⁵⁵).

53 Not always are the rules developed by the courts consistent with the existing law: see Nigel Simmonds, 'Bluntness and *Bricolage*' in Hyman Gross and Ross Harrison (eds), *Jurisprudence: Cambridge Essays* (1992). On the other hand, looking to the past when shaping the future helps to ensure the absence of contradiction the law. So, for example, Blackburn J was able to ensure that the new, formulaic tort of *Rylands v Fletcher* complemented (rather than contradicted) the existing law of nuisance.

54 This duty formula in negligence comprises a three-stage test based on foreseeability, proximity and it being fair, just and reasonable to impose a duty: *Caparo Industries plc v Dickman* [1990] 2 AC 605. Note further Keith Stanton's observation on judicial legislation within these constraints that it has 'considerable attractions: it provides a technique for the courts to use when deciding whether to make an incremental step; it permits courts to take policy and fairness based considerations into account and it makes sense of a lot of the case law': Keith Stanton, 'Incremental Approaches to the Duty of Care' in Nicholas Mullany, above n 23, 51.

55 Contrast Cane's very general description of a beneficiary's interest under a will as a 'non-contractual expectancy' which attracts protection (Cane, above n 1, 87–8) with the House of Lords' highly circumscribed protection of such interests in *White v Jones* [1995] 1 All ER 691. See also John Murphy, 'Expectation Losses, Negligent Omissions and the Tortious Duty of Care' (1996) 55 *Cambridge Law Journal* 43.

IV THE HIDDEN ANOMALIES OF FORMULARISM

So far in this article, I have argued that the formulary approach to tort law undermines neither its capacity for justice and rationality, nor its capacity to accommodate judicial legislation in either its radical or conservative forms. Indeed, I have gone so far as to assert that, if anything, the contrary is true. But the case for the retention of the formulary approach needs also to address Cane's final criticism that it masks important anomalies in the law including, at times, a hierarchy of interests that is morally unsupportable. In this section of the article, I seek to explore these claims in greater depth and assess whether the anomalies to which Cane points are best removed by the reconstruction of tort law that he proposes.

As we observed at the outset,⁵⁶ Cane's analysis reveals that, in tort law, deliberate conduct which causes loss or harm to P is often *but not always* seen to be a suitable trigger for an award of punitive damages. To highlight this inconsistency, Cane adverts to the example of negligence, which does not allow for punitive damages under English law,⁵⁷ but which often takes the form of *deliberate* gain-seeking conduct. He then argues that if deliberate gain-seeking conduct *is* a suitable basis on which to award punitive damages 'it should make no difference under what head of tort liability the plaintiff seeks a remedy'.⁵⁸ His contention is not without considerable force, but his premise is apt to mislead. For Cane, such an anomaly is not only the product of a formulary approach to tort, it is also masked by it.⁵⁹ But neither of these allegations would appear to be true. Without adopting Cane's analytical model, the UK Law Commission (amongst others) was perfectly able to identify this particular anomaly⁶⁰ and, moreover, propose reforms that did not require the wholesale abandonment of the formulary approach.

On a different note, and based on the formulaic nature of nuisance law, we have already seen that Cane's argument that bodily health is less well protected than proprietary interests is more illusory than real. What we have not yet explored — apart from some passing observations made in relation to our discussion of privacy — is whether Cane's approach lends itself to the construction of a more ethical hierarchy of protected interests. I shall take the tort of passing off to suggest that it does not (although other torts such as intimidation, conspiracy and injurious falsehood would have served just as well).

In simple terms, passing off occurs where D misrepresents, innocently or otherwise, that his goods are those of P. So doing can cause P to suffer a loss of market share, a loss of

56 Above n 9.

57 In Australia, of course, no such restriction on the availability of exemplary damages in negligence exists: see, eg, *Coloca v BP Australia Ltd* [1992] 2 VR 441.

58 Cane, above n 1, 133.

59 Dividing the law into individual torts is perceived to 'conceal important organizing categories in the law' of which deliberate gain-seeking conduct would be one: *ibid* 9.

60 Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Consultation Paper No 132 (1993).

reputation (where D's goods are inferior to P's, but consumers believe the inferior goods to have been produced by P), and a loss of 'contractual expectancies'.⁶¹ At this point it is worth noting that, according to Cane's scheme, a legal sanction (or remedy) should be determined by reference to both the nature of D's conduct and the nature of the interest protected. As he puts it, 'sanctions look in two directions at once ... to the interest being protected and the conduct being sanctioned'.⁶² For present purposes, let us keep D's conduct constant; let us assume that he deliberately commits the tort of passing off. How, given this factor, do we then assess P's remedy? Ought we to do it by reference to the infringement of P's dignitary interest, or should his financial loss or contractual expectancies hold sway? On Cane's account, if the hierarchy of interests is to stand for anything, the best available remedy would be determined (given a constant of deliberate conduct) by reference to the most highly rated of the interests infringed. But is it so easy to identify which of P's business reputation, his goodwill and his loss of profits is the most valuable? I would contend that it is not.

Let us suppose further in our example that P produces many different kinds of product. Let us also assume that it is only product X that D's product resembles. In this case, the loss of profits associated with a diminished share of the market may be a good deal lower in value than the losses associated with the diminution in sales of P's other goods (because of lost business reputation). In P's eyes, the most valuable of his protected interests would be his business reputation. Where, however, P only produces one type of product it may be that P considers his lost profit to be more significant than his loss of reputation. This would occur where the product concerned was capable of generating only a very limited amount of business reputation (which might, for example, be true of a disposable razor, but not a type of car). The point is simply this: it is not possible to construct a *fixed* hierarchy of protected interests that will ensure that the most important loss attracts the most valuable remedy. Of course, it should be added that this is only the case so long as we assume that the hierarchy of interests is construed on a subjective, rather than objective, basis. But if we were to adopt an objective construction, the hierarchy thus conceived may lack a logical or moral foundation, depending on the facts of any particular case.

A final anomalous feature of the current law, which Cane attributes to formularism, is that it obscures the *true* divisions within the law of obligations. It is certainly correct that, in recent years, tort law has begun to adopt a lexicon more familiar to contract lawyers. Cases such as *Henderson v Merrett Syndicates Ltd*⁶³ and *White v Jones*⁶⁴ are replete with phrases such as 'assumption of responsibility' and 'relationship akin to contract'. To this extent, Cane has a valid point. But it remains questionable whether his trinity-based

61 Cane uses the term 'contractual expectancies' to describe 'opportunities to make advantageous contracts in the future': Cane, above n 1, 86. They are, therefore, distinct from expectation losses in contract.

62 Ibid 15.

63 [1995] 2 AC 145.

64 [1995] 1 All ER 691.

approach provides, as he claims, any 'better understanding of the relationship between tort law and other areas of law'.⁶⁵ Take first his conclusion on the difference between contract and tort:

[T]he main distinguishing feature of the law of contract, compared with the law of tort, is a greater willingness to impose strict and negligence-based liability for non-feasance. In other words, contract provides a technique for creating legally enforceable obligations of positive action.⁶⁶

This, with due respect, is hardly a novel proposition. The same might be said of the chief distinction he draws between tort and equity, based on the fact that tort is the 'main source of legal protection for common law (as opposed to equitable) property interests'.⁶⁷ Furthermore, his is not an original observation that, where a case might sound in either contract or tort, '[d]ifferent rules concerning matters such as limitation of actions and remoteness of damage may apply'.⁶⁸ On the other hand, adopting his approach would certainly remove the two anomalies highlighted in this last remark. Could they, however, be removed within the formulary system?

As regards the limitation of actions problem, a solution is assuredly at hand without abandoning the formulary approach to tort law. All that is required is suitable amendment to the *Limitation Act 1980* (UK) which, rather than formularism, per se, is the source of this problem. The insertion of a simple provision that specifies the application of a single limitation period in cases where there is a contract–tort overlap — such as contracts for professional services — is all that would be required. As regards the remoteness of damage problem, the courts could remove the anomaly. As long ago as 1978, Lord Denning proposed the application of a single remoteness test where physical damage arose in a case actionable both in contract and tort.⁶⁹ Furthermore, a commitment to formularism would allow such cases to be treated as a special class of negligence⁷⁰ in which it would be appropriate to apply the contract test for remoteness.⁷¹ Tort law already accommodates different remoteness tests: the *Wagon Mound*⁷² test of foreseeable harm, for example, is inapplicable in the tort of deceit.⁷³

65 Cane, above n 1, 1–2.

66 Ibid 185–6.

67 Ibid 197.

68 Ibid 200.

69 *Parsons Ltd v Uttley Ingham & Co Ltd* [1978] QB 791.

70 Particular classes of negligence — principally economic loss, nervous shock and omissions cases — have already emerged with their own particular formulae.

71 Where the parties are in a contractual nexus, why abandon the test based on the foresight of the parties in favour of a test based on the foresight of a stranger (the reasonable person)?

72 *The Wagon Mound (No 1)* [1961] AC 388.

73 See *Doyle v Olby Ltd* [1969] 2 QB 158 where remoteness was assessed in terms of the direct consequences of D's tortious act.

V CONCLUSION

The Anatomy of Tort Law presents a novel but, on balance, unconvincing thesis in favour of overhauling the way in which we understand and apply the law of tort to the disposition of real cases. Essentially, it argues for the adoption of an approach to tort law akin to that found in the German BGB. It has been the purpose of this article to contest systematically the value of so doing. I have challenged his thesis by attempting to apply it to particular, real-life problem cases. At the same time, I endeavoured to substantiate the case in favour of the retention of formularism. In respect of this latter enterprise, I have adopted precisely the same methodology: I have tested the formulary approach against the self-same problems. In so doing I have demonstrated that formularism does not inevitably give rise to irrationality and injustice; that it does allow politically acceptable judicial legislation and that it is just as likely as Cane's approach to reveal, and provide solutions to, extant anomalies within the law of obligations generally, and tort law in particular.

