

**AN EXPLORATORY THEORY OF LEGAL COHERENCE IN CANENGUS AND  
BEYOND**

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**1 Introduction**

When Allan Hutchinson and Derek Morgan arrived at Newcastle Law School (NLS) for the symposium examining ‘The Canengusian Connection’<sup>1</sup>, they walked along the same corridors and visited the same rooms in which they had taught and discussed tort law and academic comment with their students in the 1980s. Although familiar with the place and some former colleagues, they saw NLS anew: the decor and equipment had changed; they were greeted by students and members of staff who were new to them. And while ‘The Canengusian Connection’ remained the same as it was in 1984, it now took on an altered significance; the doctrinal, social, and political background, against which those participating in the symposium read it, had changed.

We might say that the authors of the essay, as well as the participants in the symposium, were discovering new aspects of objects and ideas with which they were already familiar. Accident compensation law, which was the central concern of the symposium, was (as in the 1980s) identified as meaningful in multiple ways – but not quite the same ways since the relevant practices and purposes had altered (*e.g.*, corrective justice had in the intervening years become a more pressing concern for many commentators on tort). But while change was very much in the minds of those who participated in the symposium, we can identify one thing that held constant in the years between 1984 and 2009. Negligence law (like law more generally) reveals distinct meanings when placed in the horizon of altered practices and purposes.

This is a point that Hutchinson and Morgan were mindful of when they composed their essay. They introduced their readers to an imaginary compensation claim in which five fictive judges invoke various principles and policies and, in so doing, breathe life into the legal field under investigation. However, Hutchinson and Morgan do not stake out a

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<sup>1</sup> A.C. Hutchinson and D. Morgan, ‘The Canengusian Connection: The Kaleidoscope of Tort Theory’ (1984) 22 *Osgoode Hall Law Review*, 69.

‘position’ of their own (on the question as to how we should respond to accidents). Hence, we find in their essay a position on positions. They impress upon their readers the fact that the area of legal activity they examine is one in which a variety of sometimes diametrically opposed views have a place. As we read their essay, we have a keen sense of the tension that can arise in accident compensation law and the constantly changing social context in which it is embedded. This prompts a question that is the central concern of this essay: how does law, entangled in a network of often divergent and developing contextual considerations, become intelligible and coherent?

On the analysis offered below, we can unearth the beginnings of an answer to this question in ‘The Canengusian Connection’. This is because Hutchinson and Morgan throw light on legal intelligibility and legal coherence as an exploratory activity. They do this by taking their readers on a journey around the legal issues with which they are concerned and making their particular aspects explicit in the interpretations of these fictive judges. But our focus will not be exclusively on the authors of ‘The Canengusian Connection’. We will contrast their analysis with that of a prominent legal formalist and tort scholar, Ernest Weinrib. To assess his views on legal coherence critically, we will refer to the hermeneutics of Martin Heidegger and the later philosophy of Ludwig Wittgenstein. But first we must look more closely at ‘The Canengusian Connection’.

## 2 Accidents, Compensation, and Controversy in Canengus

In their essay, Hutchinson and Morgan introduce a negligence dispute following a traffic accident in the fictitious land of Canengus, where the laws are based upon a mixture of Canadian, English and American doctrine. The claim involves, *inter alia*, an action against a driver (Allan) who failed to repair one of the headlights in his car.<sup>2</sup> The claimant (Derek) identifies the defendant’s failure to maintain his vehicle as the cause of the accident. Allan also brings third-party proceedings against a witness to this event (Martin), who failed to call an ambulance, thus failing to take on the role of a rescuer and delaying the arrival of medical help to the claimant.<sup>3</sup> The five judges propose different solutions to these claims and invoke a rich variety of reasons for their respective decisions.

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<sup>2</sup> *Ibid*, 69-70.

<sup>3</sup> *Ibid*, 69-70.

Doctrin CJ proposes to resolve the case ‘in accordance with the law as it is, and not as some think it ought to be’.<sup>4</sup> She draws a sharp distinction between legal and moral statements, observing that ‘arguments of law and morality are ... mutually exclusive’.<sup>5</sup> Accordingly, in her opinion, she does not rely on any sources external to law and proposes a solution that is based solely on existing doctrine. She argues for ‘the formal and neutral application of the [existing] rules’,<sup>6</sup> for she believes that this will preserve ‘certainty and generality so as to avoid a doctrinal wilderness of single instances’.<sup>7</sup>

Mill J’s judgment is very different. He argues that ‘the law should seek to simulate an outcome that would be produced by market forces in a world which generates no transaction costs’.<sup>8</sup> According to Mill J, judicial choices should be made so as to support ‘economic efficiency’.<sup>9</sup> He thus concentrates on the economic consequences that specific decisions are likely to generate in the future. He argues that it is policy and not logic that shapes common law doctrine.<sup>10</sup> Moreover, he urges the judiciary to acknowledge that the main purpose of law is the maximisation of overall wealth.<sup>11</sup>

Mill J’s views contrast sharply with the arguments advanced by Wright J, who advocates a deontological interpretation of tort law. On Wright’s J account, Mill’s forward-looking or consequentialist approach fails to ‘take individuals seriously’.<sup>12</sup> Mill J is insensitive to the separateness of persons, summing their interests in an aggregate.<sup>13</sup> He fails to recognise that individuals are intrinsically valuable and their rights cannot be ‘overridden by appeals to general utility’.<sup>14</sup> According to Wright J, the compensation which defendants are obliged to pay to claimants stems from their status as moral persons. Moreover, he argues that ‘when one person harms another, the injured has a moral right to demand and the injurer a moral duty to pay compensation’.<sup>15</sup>

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<sup>4</sup> *Ibid*, 70-71.

<sup>5</sup> *Ibid*, 71.

<sup>6</sup> *Ibid*, 75.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid*, 80.

<sup>9</sup> *Ibid*, 81.

<sup>10</sup> *Ibid*, 77.

<sup>11</sup> *Ibid*, 80.

<sup>12</sup> *Ibid*, 87.

<sup>13</sup> See Man Chun Siu, ‘Conflict in Canengus: the Battle of Consequentialism and Deontology’ (2010) 7 *The Journal Jurisprudence*, section 3 (applying the political philosophy of John Rawls to Mill J’s thinking).

<sup>14</sup> See n 1, above, 90.

<sup>15</sup> *Ibid*, 87.

The next judgment is that of Prudential J. He proposes an approach to the case that can be described as socio-legal. He describes tort law as a ‘litigation lottery’, in which large numbers of deserving accident victims ‘never recover anything’ and in which the administrative costs of delivering compensation are ‘astronomical’.<sup>16</sup> Instead of concentrating on tort-based liability, he proposes a no-fault, insurance-based compensation scheme allowing for the costs of accidents – which are an ‘endemic feature of modern life’ – to be borne by society as a whole.<sup>17</sup> He sees this approach as socially just since society as a whole benefits when people undertake risky but desirable activities such as driving.<sup>18</sup> He argues that judges ‘should add a touch of concern and compassion for our fellow human beings to the tort system’<sup>19</sup> and should, therefore, concentrate on the harm suffered by the victims of accidents instead of focusing their attention on the fault of the defendant.

The last judgment is delivered by Lefft J. His contribution gives expression to views associated with the Critical Legal Studies Movement. According to Lefft J, judicial decisions are ‘rationalisations of our ideological prejudices’.<sup>20</sup> Judicial activity is, on this view, informed by individual purposes and (class-based) biases, rendering law a mere tool in the hands of a skilled judge. He observes that ‘the elite in our society hold a monopoly on knowledge’.<sup>21</sup> He thus presents a Marxist analysis, according to which the ideology of a ruling class dictates the outcome of judicial decisions. Pointing to the impossibility of an objective and fair trial in a society where choices are made by a privileged and self-interested group, Lefft J dismisses all the justificatory frameworks introduced by his colleagues and observes that the ‘vast paraphernalia of legal rights and entitlements amounts to nothing more than a sugar coating on a bitter pill’.<sup>22</sup>

By introducing their readers to the spectrum of views we have surveyed, Hutchinson and Morgan demonstrate that multiple and often contradictory purposes shape tort law and that it, consequently, has the appearance of a

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<sup>16</sup> *Ibid*, 97.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid*, 95-100. See also G. C. Keating, ‘A Social Contract Conception of the Tort Law of Accident’ in G.J. Postema (ed.) *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001), where the author invokes the Kantian theory of social contract and argues for a no-fault liability scheme as the regime that most effectively accommodates burdens and benefits following from the pursuit of desirable activities by members of a community.

<sup>19</sup> See n 1, above, 96.

<sup>20</sup> *Ibid*, 105.

<sup>21</sup> *Ibid*, 108.

<sup>22</sup> *Ibid*, 105.

patchwork quilt. For this reason, their analysis contrasts sharply with that of Ernest Weinrib.

### 3 Weinrib's Formalist Account of Legal Coherence

According to Weinrib, the various doctrines that lend negligence law its distinct character give expression to a single idea, namely corrective justice.<sup>23</sup> This prompts Weinrib to argue that it is quite wrong to construe this body of private law as serving multiple purposes that (to use his term) are external to the law itself (*e.g.*, forward-looking policy goals such as accident-prevention and the ideal of distributive justice). Corrective justice is concerned with righting wrongs between the two parties to a claim, who are connected as the doer and the sufferer of the same harm.<sup>24</sup>

Because corrective justice, according to Weinrib, discloses what he terms an unmediated juridical relation between two parties, it abstracts from their social status and welfare, considering them as equal at the outset of the transaction.<sup>25</sup> Weinrib associates the equality of the parties to a negligence action with their status as moral persons. Moreover, this view of the parties to a claim conveys a Kantian, deontological, view of people which asserts that individuals are ends in themselves and their rights cannot be sacrificed for the sake of achieving external goals of the kind mentioned earlier.<sup>26</sup> A 'legal wrong' is understood as a disturbance of this equality which *must*, according to the standards of corrective justice, be restored by the party who inflicted harm, notwithstanding external circumstances.

In assuming that negligence law is exclusively concerned with corrective justice, Weinrib offers a vision of this branch of tort and legal coherence, in general, that is radically different from the one that we might draw from 'The Canegusian Connection'.<sup>27</sup> Weinrib seeks to justify his position in an

<sup>23</sup> E. J. Weinrib, 'On the Immanent Rationality of Law' (1988) 97 *The Yale Law Journal* 949.

<sup>24</sup> *Ibid*, 984.

<sup>25</sup> *Ibid*, 980.

<sup>26</sup> While, according to Weinrib, corrective justice 'represents the structure of the relationship between parties in private law', it does not provide a normative foundation justifying this relationship. Weinrib finds such a foundation in the Kantian notion of right. On Weinrib's view, both corrective justice and Kantian right are implicit in the discourse of private law 'as a coherent justificatory enterprise' providing respectively 'its unifying structure and its normative idea'. See E. J. Weinrib *The Idea of Private Law* (Cambridge, Massachusetts: Harvard University Press, 1995), 19-20.

<sup>27</sup> Hutchison and Morgan are not, themselves, proponents of coherence. See A.C. Hutchinson and D. Morgan, 'Shock Therapy: Policy, Principle and Tort' (1982) 45 *Modern LR* 693, 693 (describing tort law as a 'battleground').

essay entitled ‘Legal Formalism: on the Immanent Rationality of Law’.<sup>28</sup> He argues that perceiving law as being informed by multiple, external purposes will necessarily undermine its coherence. This leads him to seek to explain tort law by offering a formalist account of its nature. Formalism, says Weinrib, ‘embodies a profound and inescapable truth’ about law’s inner coherence.<sup>29</sup> The law is coherent and intelligible when a number of concepts that it consists of, as well as their application in judicial decisions, could be conceived as expressions of a single, unifying form. ‘One achieves a complete understanding’, Weinrib claims, ‘when the form is exhibited and the content is seen as adequate to it.’<sup>30</sup> On Weinrib’s account, the form of corrective justice shapes private law and is exhibited in all its doctrines such as duty of care, remoteness or damage, as well as in particular judgments.

Weinrib uses the example of a table to develop this point. He explains that the form of a table can only be plausibly conceived of by reference to its content, and, conversely, the content of a table can only be made intelligible by reference to its form. Form and content are, according to Weinrib, correlative and interpenetrating.<sup>31</sup> Because one is unimaginable without the other, ‘form ... is content and content form, with the distinction between them being notional, not ontological’.<sup>32</sup> The form of a given matter is not a new, separate attribute of a given phenomenon, but is a principle disclosing the thing’s intelligibility. This, Weinrib argues, is as true of tort as it is of a humble table.

Form determines what a given phenomenon is in two ways: positively, by highlighting its essential characteristics and negatively, by distinguishing it from all other phenomena. ‘Form’, says Weinrib, ‘is the ensemble of characteristics that constitute the matter in question as a unity identical to that of other matters of the same kind and distinguishable from matters of a different kind.’<sup>33</sup> Thus, form distinguishes the thing (be it a body of legal doctrine or a table) as something determinate; and without the form there would be ‘an indeterminate something or other that is nothing in particular’.<sup>34</sup> This means that form allows us to apprehend the thing as meaningful: it is either something that the form discloses or nothing at all. If there is no form, we are left with mere unintelligibility. When we seek to

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<sup>28</sup> See n 23, above.

<sup>29</sup> *Ibid*, 950.

<sup>30</sup> *Ibid*, 974.

<sup>31</sup> *Ibid*, 959.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*, 958.

<sup>34</sup> *Ibid*, 957.

disclose the meaning of a given thing, we are asking what the thing *is*, and, according to Weinrib, the form provides an unambiguous answer to this question.<sup>35</sup> These points lead Weinrib to declare that ‘tort law has the only purpose it can coherently have: to be tort law’.<sup>36</sup>

In making this rather gnomic sounding declaration, Weinrib is simply applying his account of ‘form’ to the area of private law concerned with wrongdoing, outside of contractual relations and the law of restitution. For Weinrib, as we have already noted, takes the view that form discloses the intelligibility of a given phenomenon. And form, on his account, distinguishes tort from all other phenomena. Moreover, he takes the view that, in order to be coherent, the phenomenon under scrutiny cannot exhibit more than one form.<sup>37</sup> To demonstrate this point, Weinrib explains why private law, once identified as exhibiting the form of corrective justice, cannot be coherently thought of as disclosing, for example, the form of distributive justice. Unlike corrective justice, which is concerned with restoring the notional antecedent equality between two parties, distributive justice is concerned with a proportionate allocation of resources among an unrestricted number of individuals.<sup>38</sup> Weinrib defines distributive justice as encompassing three elements: ‘the benefit or burden that is the subject of the distribution, the recipients among whom the benefit or burden is to be distributed, and the criterion according to which the distribution is to take place’.<sup>39</sup>

On this view of distributive justice, the amount that each party receives or the burden that s/he will be bound to bear depends on criteria that are set for each particular distribution. This means that the forms of distributive and corrective justice represent two different functions of equality: proportional (in the case of distributive justice) and quantitative (in that of corrective justice). This, in turn, imposes two separate standards of coherence. As Weinrib puts it: in the case of distributive justice, ‘coherence ... is a harmony of criterion, benefit (or burden), and beneficiaries (or

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<sup>35</sup> *Ibid*, 958.

<sup>36</sup> E.J. Weinrib ‘Understanding Tort Law’ (1989) 23 *Val.U.L.Rev* 485, 525-526. See also n 23, above, 958 and A.C. Hutchinson, ‘The Importance of Not Being Ernest’ (1988) 34 *McGill Law Journal* 234, 240.

<sup>37</sup> See T.T. Arvind ‘The tortological question and the public-private relationship in tort law’ (2010) 7 *The Journal Jurisprudence*, section 3.

<sup>38</sup> See n 23, above, 981.

<sup>39</sup> *Ibid*.

burden-bearers)', while in that of corrective justice, 'coherence ...lies in the singleness of the relationship of doing and suffering'.<sup>40</sup>

In accordance with the conception of form, described above, which holds that form unequivocally determines its content, Weinrib argues that both forms could not satisfactorily explain the same juridical relation simultaneously. 'They [corrective justice and distributive justice] constitute the most abstractly comprehensive structures of justification and thus cannot be combined into a single overarching justificatory structure. Each form is its own distinctive and self-contained unity. They both pertain to the ordering of external relations among persons, but they order these relations in different ways. Because the forms of justice represent mutually irreducible conceptions of coherence, no single relationship can coherently combine the two forms.<sup>41</sup> If a corrective element is mixed with a distributive one, each necessarily undermines the justificatory force of the other, and the relationship cannot manifest either unifying structure.<sup>42</sup>

If we accept that Weinrib's account of tort is correct, then only one of the five judgments in 'The Canengusian Connection' is defensible: that of Wright J. Like Weinrib, Wright J identifies the compensation that the defendant pays to the claimant as being required by corrective justice. Moreover, he regards this ideal of justice as underwriting the status of the parties as moral persons. To this we can imagine Weinrib adding the further observation that the other four judgments fail a test of coherence since they do not give adequate expression to corrective justice and, in some cases, seek (quite misguidedly) to meld it with distributive justice. Plainly, Weinrib's account of coherence can be put to a wide range of critical uses. But should we accept his account of coherence? Before trying to answer this question, we must examine the writings of Wittgenstein and Heidegger and the notion of 'aspect perception'.

#### **4 Wittgenstein and Heidegger on Coherence and Aspect Perception**

While Weinrib's theory of private law may seem appealing, putting a powerful critical tool in the hands of those who use it, it can hardly be reconciled with negligence law as it exists in common law jurisdictions. When deciding cases in tort, judges do not refer exclusively to the ideal of

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<sup>40</sup> *Ibid*, 983.

<sup>41</sup> While Weinrib does not talk in terms of 'uncombinability', he alerts his readers to the problem. On uncombinability, see J. Gray *Post-Liberalism. Studies in Political Thought* (London: Routledge, 1993), 301.

<sup>42</sup> See n 23, above, 949.



corrective justice and the associated principle of personal responsibility. On the contrary, as Lord Edmund-Davies observed in *McLaughlin v O'Brian*, judges regularly base their decisions on public policy grounds when deciding negligence law claims.<sup>43</sup> For instance, in cases concerning the liability of public bodies, even where the claimant is able to show that s/he has indeed suffered harm as a result of the defendant's careless conduct or omission, the court may nevertheless refuse to impose liability on public policy grounds.<sup>44</sup> This follows from, among other things, judicial application of the third requirement of the *Caparo* duty of care test which concerns the question of whether the imposition of liability would be just, fair, and reasonable.<sup>45</sup> This component of the *Caparo* test invites judges to consider this question in the light of the consequences that their decisions may bring about for society as a whole.

On a Weinribian view, this concern with society as a whole (rather than the parties to a claim) is a betrayal of corrective justice and a source of incoherence. Weinrib regards this approach as completely misconceived. Among other things, we might describe his critique as driven by an 'elevated' theory of private law.<sup>46</sup> He identifies an ideal central to negligence law (corrective justice) as a basis on which to explain it to us. And this ideal becomes a 'measuring rod' of legal coherence. Moreover, interpretations of negligence law that are not founded exclusively on this ideal are, according to Weinrib, incoherent and unsustainable.

While Weinrib's view offers a neat solution to the matter of the normative foundations of negligence law (and tort more generally), it seems that this area of law is more complex than he recognises. Moreover, to describe it (as Weinrib does) as informed solely by the ideal of corrective justice is to offer an unduly narrow and dogmatic account; for corrective justice is only one aspect of the vast legal field we are surveying. So, before accepting Weinrib's analysis, it is surely worth considering whether it is possible to develop an alternative view that fits better with the tort law we have, while being coherent at the same time. To this end, we will have to return to the concept of form, on which Weinrib's theory of legal coherence rests.

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<sup>43</sup> *McLaughlin v O'Brian* [1983] 1 AC 410, 424-428.

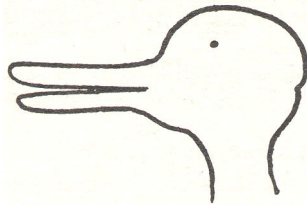
<sup>44</sup> See, for example, *Mitchell & Anr v Glasgow City Council* [2009] 1 AC 874.

<sup>45</sup> *Caparo Industries plc v Dickman* 2 AC 605, 617-618, *per* Lord Bridge.

<sup>46</sup> On 'elevated' analysis of the sort described in the text, see R. Mullender, 'Introduction: A Dance to the Music of Tort' (2010) 7 *The Journal Jurisprudence*, n 22 (on Andrew Halpin's account of 'elevated' philosophy).

As we noted earlier, Weinrib's account of form serves as an ultimate measuring rod of legal coherence that unambiguously identifies particular phenomena as distinct from all other things. However, it is questionable (for reasons explained below) whether a given phenomenon is inextricably bound to and determined by a single form. We can find support for this argument in Wittgenstein's *Philosophical Investigations* and other components of his later philosophy.<sup>47</sup> Wittgenstein demonstrates that one and the same content can intelligibly exhibit many alternative forms, which are themselves contingent and, therefore, cannot serve as ultimate bedrocks of intelligibility and coherence.

To illustrate this point Wittgenstein refers to Jastrow's duck-rabbit puzzle picture:<sup>48</sup>



By confronting readers with a paradoxical experience of seeing two objects (a rabbit or a duck) expressed in one and the same content, Wittgenstein provided an insight into the nature of our perception and the way we construct meanings in general. What we conceive to be a form allowing us to see a phenomenon as a whole, distinct from all other things (for example a rabbit), is not inextricably bound to its content, but is a conceptual scheme that we create by identifying similarities and differences between the investigated phenomenon and phenomena that we are already familiar with. To see an aspect, states Wittgenstein, is to 'bring a concept to what we see'.<sup>49</sup> If we had never seen a rabbit or a duck in our life, we would probably be unable to envisage the above figure as a picture of a rabbit or a duck. The fact that we perceive a given phenomenon as a genus of a certain kind does not exclude the possibility of conceiving it in alternative terms.<sup>50</sup> This is because form is not something inherent in phenomena. Rather, it is a concept brought by us (as interpreters).

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<sup>47</sup> L. Wittgenstein *Philosophical Investigations* (Oxford: Wiley-Blackwell, 2009), trans. G.E.M. Anscombe, P.M.S. Hacker and Joachim Schulte.

<sup>48</sup> *Ibid.*, 400.

<sup>49</sup> *Ibid.*

<sup>50</sup> In the light of this point, we have a basis to suppose that we can resist 'monologue creep' as described in P. O'Callaghan, 'Monologism and Dialogism in Private Law' (2010) 7 *The Journal Jurisprudence*, section 5 ('Monologue-Creep').

According to Wittgenstein, to see an image ‘as something’ is to perceive only one of its multiple aspects. As he puts it, to recognise Jastrow’s figure as a picture of a duck (or a rabbit), is to ‘light up an aspect’ of this image.<sup>51</sup> Wittgenstein explains his ‘aspect lighting’ theory by reference to another example.<sup>52</sup> When I look at the picture of a face I can study its expressions and features. But when I suddenly recognise it as a picture of my friend I have lit up a new aspect of the figure, seeing it as something different from what I saw before. What is peculiar to this experience is that, even though I am aware that the content of the picture has not changed, I still see it anew; and I see it anew because I have assessed it in the light of my previous experiences. And just as we can see particular aspects of a face or situation, so too may we miss them. For example, we can look at Jastrow’s duck-rabbit puzzle and continuously see a rabbit, while being unable to comprehend it as an image of a duck. When this happens, we are (to use Wittgenstein’s phrase) ‘aspect-blind’.<sup>53</sup>

Connecting these insights with Weinrib’s theory, one may suspect that in conceiving of form as determinative and bound to its content, Weinrib faces the problem of ‘aspect-blindness’. On Weinrib’s account, form determines content in accordance with the principle of *tertium non datur*: either the thing is what the form discloses, or it is something unintelligible. As Weinrib puts it, a phenomenon that does not disclose a single form is ‘an indeterminate something or other that is nothing in particular’.<sup>54</sup> Because an investigated phenomenon can, on this view, only be coherently conceived of as an expression of a single form, Weinrib identifies the form as an ultimate ‘measuring rod’ of coherence. Yet, as Wittgenstein’s analysis shows, form is contingent and may assume a variety of shapes. This means that a single form (e.g., the ideal of corrective justice) may not provide the only applicable and ultimate standard to which one may refer when assessing the intelligibility of a practice, institution, or other object under scrutiny.

Form (in Wittgenstein’s view) is a concept that we bring to phenomena. We should not think of it as inherent in the objects that we seek to interpret. For those who engage in the interpretation of, *inter alia*, a practice or institution, actively construct form by identifying how the object under examination relates to other phenomena. Among other things, this involves the identification of the relationships in which the object under examination

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<sup>51</sup> See n 47, 400.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, 432. See also L. Sterne, *The Life and Opinions of Tristram Shandy, Gentleman* (Oxford: Oxford University Press, 1983), 174 and 329 (on ‘hobby-horses’).

<sup>54</sup> See n 23, above, 957.

stands alongside other items in the same field and with the wider context. Wittgenstein's account of the aspects of particular objects is relevant to interpretation on the model contemplated here. He states that '[an] aspect is not a property of an object, but an internal relation between it and other objects'.<sup>55</sup> He also argues that this 'relatedness' to other objects allows us to pick out or 'light up' new aspects of the things we scrutinise.

As well as throwing light on the way in which we can pick out new aspects of an object, or practice, or institution under scrutiny, Wittgenstein is also elucidates the way in which our understanding of a particular object may remain fixed over time. He talks of 'continuous aspect perception'.<sup>56</sup> By this, he means the way in which we, as interpreters, have an immediate experience of an object as already saturated with a (comparatively stable) meaning.<sup>57</sup> When we apprehend things in this way, it reflects the extent to which we feel familiar with them. To see objects around us in this way is practically important. It is our ability to continuously recognise ourselves, other people, and objects as entities of a certain kind that constitutes our identity as free agents and allows us to operate effectively within the world. It is only because I can conceive of myself as one and the same person everyday that am I able to make decisions that I consider to be my own, stemming from my own projects, desires and experiences. Moreover, I can skilfully deal with items within the world because I expect them to exhibit similar features every day. This is because the meaning they bear emerges from the multiple relations in which they are entangled and from the context in which they are embedded. Therefore, although one can distinguish different aspects of phenomena and conceive of them in alternative terms, the ascription of significance is far from chaotic. Rather, it is organised by the way in which particular items are connected to the wider background that determines, as Wittgenstein puts it, their situatedness in 'the whole tapestry of life'.<sup>58</sup>

Wittgenstein terms the context against which we apprehend a 'form of life'. He describes a form of life as 'the given'.<sup>59</sup> By this he implies that it is the world as we find it. With the multiplicity of contingent interactions that persist within it, it serves as the only available and, hence, ultimate bedrock of coherence. It is the context (or 'the surroundings'), says Wittgenstein, that

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<sup>55</sup> See n 47, above, 212.

<sup>56</sup> *Ibid*, 201.

<sup>57</sup> S. Mulhall, *On Being in the World: Wittgenstein and Heidegger on Seeing Aspects* (London: Routledge, 1990), 124.

<sup>58</sup> See n 47, above, 279.

<sup>59</sup> *Ibid*, 468.

lends ‘importance to things’ and makes it possible to make judgments of coherence.<sup>60</sup> Moreover, ‘the given’ is the ‘inherited background against which I distinguish true and false’.<sup>61</sup> Wittgenstein also considers this background as ‘a system, a structure of taken-for-granted convictions that makes identifications and discrimination possible’.<sup>62</sup> As every validation takes place within this system, the background itself ‘belongs to the very essence of what we call an argument’.<sup>63</sup>

While the background described by Wittgenstein is ultimate, this is only in a historical, factual sense.<sup>64</sup> This is because forms of life vary across time and cultures. They are shaped by intersubjective human ways of acting (*Handlungsweise*).<sup>65</sup> Consider, for example, a bow taken by someone from Japan.<sup>66</sup> As a traditional form of behaviour, it bears distinct meanings for participants in this culture. In other parts of the world, the same physical action bears different meanings. This is because our activities are always ‘nested in the wider context of a historical culture, for the most part we are not so much unique individuals as we are participants and place-holders’.<sup>67</sup> Human actions and practices (accident compensation procedures included) are, therefore, not meaningful in themselves. Rather, they become intelligible and coherent when placed against the wider backdrop of human practices and other shared ways of acting. As Wittgenstein puts it, ‘what determines our judgement, our concepts and reactions, is not what one man is doing now, an individual action, but the whole hurly-burly of human actions, the background against which we see an action’.<sup>68</sup>

Years before Wittgenstein pursued the theme of a coherent experience of the world, the German philosopher, Martin Heidegger, dwelt on the same subject. But there are real differences between these two thinkers. Heidegger upholds the Continental philosophical tradition, while Wittgenstein’s later

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<sup>60</sup> L. Wittgenstein *On Certainty* (Oxford: Blackwell, 1975), 94-95.

<sup>61</sup> *Ibid*, 94-95.

<sup>62</sup> *Ibid*, 102.

<sup>63</sup> See n 47, ‘Aphorism’, 105.

<sup>64</sup> K.O. Apel ‘Wittgenstein and Heidegger: Language Games and Life-forms’ in C.E. Macann (ed.) *Critical Heidegger* (London: Routledge, 2004), 269.

<sup>65</sup> See n 47, above, 165, 167, and 206.

<sup>66</sup> C. Guignon ‘Philosophy after Wittgenstein and Heidegger’ (1990) 50 *Philosophy and Phenomenological Research* 649; see also H.L.A. Hart *The Concept of Law* (Oxford: Oxford University Press, 1994), 55-58 (where Hart provides the broadly similar example of a rule specifying that men must remove their hats in church (which is intelligible to the members of a particular society who accept it as their own reason for action and as having specific cultural significance for them)).

<sup>67</sup> See C. Guignon, n 66, above, 655.

<sup>68</sup> L. Wittgenstein *Zettel*, (Oxford: Basil Blackwell, 1967), (trans. G.A.M. Anscombe), 98.

writings make plain the very considerable influence that Anglo-Saxon analytic philosophy continued to have on him as he developed the arguments that appear in *Philosophical Investigations* and associated works. However, a ‘surprising affinity’ exists between these two thinkers.<sup>69</sup> Like Wittgenstein, Heidegger takes as his starting point the fact that our experience of phenomena in the world is organised into an intelligible whole, rather than existing as ‘a blooming, buzzing confusion’.<sup>70</sup> And, like Wittgenstein, Heidegger connects this fact to the holistic nature of human understanding. According to Heidegger, ‘something is encountered as something in a pragmatically relational totality’.<sup>71</sup> On his view, our understanding of phenomena presupposes a form of Being-in-the-World.<sup>72</sup> By ‘Being-in-the-world’, Heidegger indicates that phenomena are only meaningful to us if we know what place they occupy in our world, what purposes they serve, and what relationships they have with us and with other phenomena.

Heidegger explains this approach to human understanding in his much discussed workshop example. In this example, he introduces a distinction between things ‘present-at-hand’ and things ‘ready-to-hand’.<sup>73</sup> A hammer achieves its significance not ‘as’ a hammer from within, but from the place it occupies within the entire field in which it is involved. It becomes meaningful only if we are able to answer the question ‘what is it for?’ Only when we are able to answer this question, can we begin to use a hammer. Among other things, we might use a hammer in order to drive nails into a board. We might do this when building a house. Thus, a hammer becomes meaningful as ‘ready-to-hand’: *i.e.*, as a tool that we are able to handle skilfully and that is entangled in the ‘equipmental context of means/ends relations by our projects’.<sup>74</sup> In other words, it is only intelligible ‘within-the-world’ of which it is a part.<sup>75</sup> As Heidegger puts it, ‘the ready-to-hand is always understood in terms of a totality of involvements’.<sup>76</sup> When detached

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<sup>69</sup> See n 64, above, 241.

<sup>70</sup> See n 57, above, 126.

<sup>71</sup> See n 64, above, 250.

<sup>72</sup> M. Heidegger, *Being and Time* (Oxford: Blackwell, 2005), 79: ‘What is meant by “Being-in”? Our proximal reaction is to round out this expression to “Being-in ‘in the world’”, and we are inclined to understand this Being-in as ‘Being in something’ This latter term designates the kind of Being which an entity has when it is ‘in’ another one, as the water is ‘in’ the glass, or the garment is ‘in’ the cupboard. By this ‘in’ we mean the relationship of Being which two entities extended ‘in’ space have to each other with regard to their location in that space.’

<sup>73</sup> *Ibid.*, 98.

<sup>74</sup> See C. Guignon, n 66, above, 654.

<sup>75</sup> See n 72, above, 122.

<sup>76</sup> *Ibid.*, 118.

from this context, it becomes ‘de-worlded’ – an unintelligible object that is merely ‘present-to-hand’ and that cannot be ‘seen as something’.<sup>77</sup> We can only ‘stare’ at it, but ‘when we ... stare at something [that lacks a place in ‘a totality of involvements’], our just-having-it-before-us lies before us as a failure to understand it any more’.<sup>78</sup>

‘Seeing as’, which is only possible in a holistic field of involvements, is identified by Heidegger as a constitutive state of understanding. According to Heidegger, [t]he “as” makes up the structure of the explicitness of something that is understood. It constitutes the interpretation. In dealing with what is environmentally ready-to-hand and interpreting it with reference to its context, we “see” it as a table, a door, a carriage, or a bridge’.<sup>79</sup> Therefore, every understanding is an interpretation and every interpretation is circumspective.<sup>80</sup> This means that interpretation cannot abstract from the circumstances in which it takes place, *i.e.*, from the entire field of its involvements.

As there are multiple circumstances or involvements in which a given thing is entangled, it is possible to interpret it in a variety of ways and to envisage its multiple aspects – a hammer is meaningful as a tool that could be used to drive nails into boards, as a tool that could be used to build a house, and so on. Engaging in interpretation, we make a thing stand out from the field of its involvements as an ‘aphopatic as’: *i.e.*, we only bring one of its aspects to light. This does not mean that we can freely throw any ‘signification’<sup>81</sup> over the interpreted phenomenon; ‘the thing in question already has an involvement which is disclosed in our understanding of the world, and this involvement is one, which gets laid down by the interpretation’.<sup>82</sup> Understanding, for Heidegger (as for Wittgenstein), already takes place within a system. Heidegger terms this system a ‘fore-structure’ or a ‘background’.<sup>83</sup> Moreover, he explains that it is everything that we have, see, and grasp in advance.<sup>84</sup> It is the world as we find it, in which every

<sup>77</sup> *Ibid.*, 79. See also S. Fish on ‘interpretative communities’ in S. Fish, *Is There A Text in This Class*, (Harvard: Harvard University Press, 1980), 147–174.

<sup>78</sup> See n 72, above, 190.

<sup>79</sup> *Ibid.*, 190.

<sup>80</sup> *Ibid.*, 191 and 200.

<sup>81</sup> *Ibid.*, 190.

<sup>82</sup> *Ibid.*, 190-191.

<sup>83</sup> *Ibid.*, 192-195.

<sup>84</sup> *Ibid.*, 191. The three elements of the fore-structure are fore-having, fore-sight and fore-conception,

understanding is grounded and which allows us to approach things as coherent.<sup>85</sup>

Having now looked in some detail at both Heidegger and Wittgenstein, it is abundantly clear that their respective approaches to coherence are radically different from Weinrib's 'measuring rod' approach. On Weinrib's view, we can only identify something (*e.g.*, an institution or a practice) as coherent by embracing the form that shapes it and that invests it with significance. Wittgenstein and Heidegger take quite a different view. They tell us that when we seek to assess the coherence of something, we are engaged in an exploratory process within the entire field of involvements. They also stake out the position that form is not enclosed within a particular object under examination. Instead, a particular object is rendered intelligible by the life-world of which it is a part. This point has an important corollary. It is, as Apel observes, the very life-world that, with Heidegger and Wittgenstein, 'assumes the role of the ultimate bedrock'.<sup>86</sup>

The picture of interpretation that emerges from the analyses of Wittgenstein and Heidegger is one in which those seeking to make sense of an object, or a practice, or an institution do not make perfunctory use of a measuring rod but engage instead in an exploratory activity. They identify and dwell on the objects within the field they scrutinize and seek to bring them into a relationship in which they hang together as elements in a harmonious whole.<sup>87</sup> This Wittgensteinian-Heideggerian view is similar to that of a prominent legal philosopher who argues that the pursuit of coherence is an activity that involves the 'attempt to make things "hang together"'.<sup>88</sup>

The pursuit of coherence, on the Wittgensteinian-Heideggerian view contemplated here, is a very different undertaking from discovering a single and ever-valid form bound to a phenomenon. It is analogous to a journey. We (so to speak) walk around the object, or practice, or institution under scrutiny with the aim of describing its different features or aspects. Moreover, we seek to grasp the ways in which it relates to other things. In this latter regard, our aim is to pinpoint the relations between the object we are examining and the relations of mutual interdependence in which it stands

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<sup>85</sup> On the 'pre-interpretive' stage of interpretation in R. Dworkin, *Law's Empire* (London: Fontana Press, 1986), 65.

<sup>86</sup> See n 64, above, 257.

<sup>87</sup> Just as Wittgenstein and Heidegger are relevant to the view of coherence offered here, so too is N. Simmonds, *The Decline of Juridical Reason* (Manchester: Manchester University Press, 1984), 7.

<sup>88</sup> *Ibid.*



in the wider context. Thus, we come to see the object we are surveying as part of a ‘pragmatically relational totality’ (to use Heidegger’s phrase).

This approach to the pursuit of coherence is clearly a more complex undertaking than that described by Weinrib. And we must add a further consideration to this already complex activity. Based on the concepts that we bring to the field we are scrutinising, we each make sense of it in a variety of ways – each of which we have grounds for describing as coherent (rather than as chaotic or as an indeterminate mess). Therefore, the process of understanding unfolds in a fashion characterised by Heidegger as circular.<sup>89</sup> In our efforts to make sense of the objects, *etc.*, that we scrutinise, ‘we are going [*wandern*] in a hermeneutic circle’.<sup>90</sup> Although the German expression ‘*wandern*’ used in this passage of Heidegger’s work is usually translated as ‘going’, the word ‘*wandern*’ could also be (and perhaps more accurately) translated as ‘walking’. ‘wandering’ or ‘rambling’. In the German language, the expression ‘*wandern*’ describes, among other things, embarking on a long trip (in the mountains or a forest, for example). Those who set out on such a journey seek to make sense of a whole that is (because it is composed of a multiplicity of parts) complex. Such an undertaking is broadly similar to that with which we are concerned, namely, making sense of a body of law that is composed of a multiplicity of parts that stand in a variety of relations with the wider society of which tort and law more generally are parts.

Heidegger throws further light on interpretative processes of the sort we are concerned with when he observes that ‘when something is understood but is still veiled, it becomes unveiled by an act of appropriation, and this is always done under the guidance of a point of view, which fixes that with regard to which what is understood is to be interpreted.’<sup>91</sup> The meanings of a phenomenon become unveiled by the observer from different perspectives, against different backgrounds. To put the same point another way, we walk around the object we are investigating and, with each step, we develop a deeper, more complex understanding of it and the field within which it is situated.

If we adopt the approach outlined here, then we have a realistic prospect of ‘com[ing] into [the object under scrutiny] in the right way’ (to use Heidegger’s phrase).<sup>92</sup> Moreover, we will not – unlike those who apply a (Weinribian-style) measuring rod – ‘de-world’ it. In light of these points, we

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<sup>89</sup> See n 72, above, 92 and 362-363.

<sup>90</sup> *Ibid*, 27.

<sup>91</sup> *Ibid*, 191.

<sup>92</sup> *Ibid*, 195.

should view the process of walking in circles as an enabling condition of interpretative adequacy and, ultimately, coherence.<sup>93</sup> If we wish to see things accurately, there is simply no way of avoiding all the hard work that this entails. For we cannot detach the objects we scrutinise from the fields in which they are situated and in which they form components of our practices and projects. Moreover, interpretative activity of the sort we are contemplating has no obvious endpoint. For, as Guignon has observed, ‘there is no final explanation for our forms of life that would put an end to inquiry and consequently ... attempts to understand ourselves and our world are an open-ended, ongoing project’.<sup>94</sup>

Having looked in some detail at Wittgenstein and Heidegger, we must now consider the ways in which their thinking illuminates the process of pursuing coherence in the law of tort.

### **5 Using Wittgenstein and Heidegger to Pursue Coherence in Tort**

The heads of tort liability concerned with accident compensation (most obviously negligence law) are (like accident compensation law, more generally) informed by multiple purposes. To make sense of negligence law, for example, is a tough task. And to establish coherence in this branch of tort is an even tougher one. Indeed, it is an undertaking that requires just the sort of time-consuming, complicated, exploratory effort that Wittgenstein and Heidegger help us to understand. This might prompt the objection that judges and lawyers, more generally, are not really capable of this sort of thing. After all, few of them pore over the pages of Wittgenstein and Heidegger.

While this may be true, passages of Lord Steyn’s speech in *McFarlane v Tayside Health Board* suggest that judges and lawyers are quite capable of rising to the sort of interpretative challenge that we have been contemplating.<sup>95</sup> In *McFarlane*, the pursuers (a married couple with four children) sued for the costs of raising a fifth child (which was born after the defendant had negligently performed a sterilisation procedure on the husband). Following the operation, the couple had been told by the defendant that they did not need to use contraceptive measures since the husband’s sperm count was negative.<sup>96</sup>

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<sup>93</sup> See C Guignon, n 66, above, 669.

<sup>94</sup> *Ibid*, 669.

<sup>95</sup> *McFarlane v Tayside Health Board* [2000] 2 AC 59, 76-84.

<sup>96</sup> For detailed discussion of the case, see J. Steele, *Tort Law: Text Cases, and Materials* (2<sup>nd</sup> edn, Oxford: Oxford University Press, 2010), 456-460. See also D. Morgan and B. White,

By a majority, the House of Lords held that the mother could recover compensation for pain, suffering, and the inconvenience of pregnancy and childbirth. The majority of their Lordships also identified medical and other expenses and loss of earnings associated with the birth as recoverable. However, the House unanimously decided that the costs of raising the ‘unwanted’ child were irrecoverable.<sup>97</sup>

As well as wrestling with the facts of this particular claim, Lord Steyn reflected on the relevance of corrective justice and distributive justice to the law of negligence. Thus, we find him identifying tort law as ‘a mosaic in which the principles of corrective justice and distributive justice are interwoven’.<sup>98</sup> Moreover, he notes that ‘in situations of difficulty and uncertainty a choice sometimes has to be made between the two [ideals]’.<sup>99</sup> He concludes that *McFarlane* is such a case. He finds support for this conclusion in the views of ‘the traveller on the underground’ or ordinary person).<sup>100</sup> For such a person ‘would consider that the law of tort has no business to provide legal remedies consequent on the birth of a healthy child, which all of us regard as a valuable or good thing’ (rather than a burden within a distributive justice scheme).<sup>101</sup>

Lord Steyn finds support for his distributive justice-based analysis not just in the views of ordinary people, but also in other cases in which judges have made recourse to the ideal of distributive justice.<sup>102</sup> Moreover (and significantly for the purposes of this discussion), he advances ‘an argument of coherence’.<sup>103</sup> He notes that ‘[t]here is no support in Scotland or England for a claim by a disadvantaged child for damage to him arising from his birth’.<sup>104</sup> He adds that ‘[c]oherence and rationality demand that the claim by

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‘Everyday Life And The Edges Of Existence: Wrongs With No Name Or The Wromg Name’ (2006) 29 UNSWLJ 239, section II.

<sup>97</sup> *McFarlane v Tayside Health Board*, n 95, above, 113-114.

<sup>98</sup> *Ibid*, 83.

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid*, 82.

<sup>101</sup> *Ibid*. Cf *Cattanach v Melchior* [2003] HCA 38 (where the High Court of Australia responded to a claim much like that in *McFarlane* by applying a ‘corrective justice approach, without recourse to subjective judicial notions of community conscience’ (D. Morgan and B. White, n 96, above, section II)). In *Cattanach*, the plaintiff sought compensation for the costs of bringing up a healthy child. By a majority, the Australian High Court held that she could recover. See J. Steele, n 96, above, 459.

<sup>102</sup> *McFarlane v Tayside Health Board*, n 95, above, 83 (finding support for his decision in *Frost v Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509).

<sup>103</sup> *Ibid*, 83.

<sup>104</sup> *Ibid*, 83 (finding support for his ‘argument of coherence’ in *McKay v Essex Area Health Authority* [1982] 1 QB 1166).

the parents [in *McFarlane*] should [like the claims brought by disadvantaged children] be rejected'.<sup>105</sup>

The features of Lord Steyn's speech that we have noted make it most apparent that he is not making use of the sort of measuring rod that, according to Weinrib, judges should employ when deciding negligence claims. It seems more accurate to state that Lord Steyn surveys a field in which, *inter alia*, relevant case law, corrective justice, and distributive justice (along with the views of ordinary people) each have a place. We can explain the significance he attaches to corrective justice by reference to Wittgenstein's account of 'continuous aspect perception'.<sup>106</sup> For this ideal of justice occupies a central place in the law of negligence and demands attention from all those who reflect on this branch of private law. However, Lord Steyn, as we have noted, treats distributive justice as the controlling consideration in this case. For this reason, we can (drawing on Wittgenstein once again) describe him as 'lighting up' an aspect of the field he surveys on which judges and lawyers usually place much less attention.<sup>107</sup>

Lord Steyn includes these considerations as he (so to speak) walks around the law. We might see, in this procedure, a commitment on his Lordship's part to avoiding the problem of aspect blindness. Moreover, he seeks to pursue coherence by placing emphasis on, *inter alia*, existing case law and the views of 'the traveller on the underground'. Here, his Lordship treats the law of negligence as being situated within what Wittgenstein has termed 'the whole tapestry of life' of a particular society.<sup>108</sup>

When we reflect on these features of Lord Steyn's approach to the claim in *McFarlane*, it is clearly not the neat procedure described by Weinrib. But it is an approach that faces up to the demands of a case that gives rise to 'difficulty and uncertainty'.<sup>109</sup>

## 6 Conclusions

The Wittgensteinian-Heideggerian account of interpretation and the pursuit of coherence enables us to understand why 'The Canengusian Connection' is

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<sup>105</sup> *Ibid*, 83.

<sup>106</sup> See ns 56-57, above, and associated text.

<sup>107</sup> See n 51, above, and associated text.

<sup>108</sup> On the Wittgensteinian notion of situatedness in 'the whole tapestry of life.' see n, 58, above and associated text. (We might also describe negligence law as being placed by Lord Steyn within what Heidegger calls a 'totality of involvements'. See n. 76, above and associated text.)

<sup>109</sup> See n 99, above, and associated text.

such an influential essay. Hutchinson and Morgan take us on a tour of accident compensation law. We survey this field from five distinct standpoints and, while doing so, build up an illuminating picture of the whole. The assemblage of institutions and practices on which we gaze is far from harmonious. On occasion, we have to make tough choices. And this is true not just of accident compensation law as a whole, but also of negligence law. We can see this in *McFarlane*. Lord Steyn recognises that corrective justice and distributive justice are relevant to his decision and that, while each is a part of the ‘mosaic’ he is examining, he has to make a choice between them. This leads him to consider not just these ideals of justice but also other aspects of the law – including the influence that the views of ordinary people have over its development, and claims by disadvantaged children arising from their entry into the world. Thus, having walked around this branch of tort, Lord Steyn makes an all-things-considered judgment. Moreover, he is determined to ensure that the judgment he makes fits into the existing body of negligence doctrine. Hence, we find him advancing ‘an argument of coherence’.

‘Coherence’, as Lord Steyn understands that term, does not mean the application of a measuring rod (on the model described by Ernest Weinrib). Instead, it involves a journey around negligence law. Likewise, it involves a tough choice; a decision that makes recourse to distributive justice rather than corrective justice. Wittgenstein and Heidegger clarify this process and, for that reason, those who want to make sense of tort law should pay close attention to their writings.