

Damages Without Duty

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In a decade of important work, Stephen Smith has marshaled a number of arguments against what he calls ‘the duty view’ of damages awards in private law.¹ The duty view (which might more revealingly have been called ‘the existing duty view’) is the view according to which ‘damage[s] awards confirm existing legal duties to pay damages.’² Generously, I am credited with advancing ‘the most plausible’ version of the duty view, namely the ‘inchoate duty view’ according to which the court makes determinate, by its award, what was up to then an indeterminate legal duty.³ Smith and I agree, at least *arguendo*, that by its award the court fixes the amount that the defendant now has a duty to pay. I merely add: ‘and now has a duty to *have paid*’. This is the addition that Smith rejects.

Notice that, as it stands, this is purely a dispute about what the law says. About what *which* law says? About what ‘the common law’ says.⁴ Presumably the common law could be different in different times and places. But Smith and I both

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¹ The duty view is criticised by Smith in various locations. My focus will mainly be on his article ‘Duties, Liabilities, and Damages’, *Harvard Law Review* 125 (2012), 1727. Also drawn upon here are Smith, ‘Why Courts Make Orders (And What This Tells us About Damages)’, *Current Legal Problems* 64 (2011), 51 and Smith, ‘Remedies for Breach of Contract: One Principle or Two?’ in Gregory Klass, George Letsas, and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford 2014).

² Smith, ‘Duties, Liabilities, and Damages’, above note 1, 1727.

³ *Ibid*, 1728. Smith is referring to a remark of mine in ‘Torts and Other Wrongs’, *Florida State University Law Review* 39 (2011), 43: *ibid*, 1744.

⁴ *Ibid*, 1728.

argue on the footing that there is a standard or default common law position on the point, which forms part of a standard or default common law model of the law of torts and contracts.

All the following parts of the model seem to be agreed, at least *arguendo*, between us:

(a) In the law of torts and the law of contracts, there are ‘primary duties’ owed by Ds to Ps.⁵ Breaching one of these constitutes the tort or the breach of contract as the case may be.

(b) Breach of such a primary duty is a legal wrong by D against P, also known as a violation by D of P’s ‘primary rights’. Is a breach of duty analytically a wrong? Smith seems to grant that it is,⁶ but he casts doubt on that view in other writings. Elsewhere he suggests that a justified breach of duty cannot be a wrong. (Or maybe he thinks it is not a breach?)⁷

(c) P has a legal power (and a legal right?) to bring court proceedings against D on the ground that D violated P’s rights.⁸ The power is not restricted to those Ps whose primary rights actually were violated. It extends to all Ps who (following the proper process) *assert* such violations. ‘On the ground that’ means that the proceedings ought to succeed iff and because (the proper process yields the verdict that) the assertion is true.

(d) The bringing of such proceedings by P places duties on the court and in particular gives P new rights as against the court.⁹ Call them ‘remedial rights’.

(e) The remedy awarded by the court may at least sometimes take the form of an order to D to do what, according to the law, was already D’s duty before the order was made.¹⁰

⁵ Ibid, 1729.

⁶ Ibid, 1738.

⁷ Smith, ‘Remedies for Breach of Contract’, above note 1, 347.

⁸ Smith, ‘Duties, Liabilities, and Damages’, above note 1, 1734.

⁹ Ibid, 1749-50.

¹⁰ Ibid, 1750.

This is the case, for example, where the court orders specific performance of a contractual obligation.

(f) An award of damages by the court, whether it was the court's duty to make it or not, gives D a duty to pay damages to P. P's remedial rights against the court may therefore give P a further remedial right against D. This may be a right to the payment of damages, with further recourse to the court (or a right to go straight to enforcement) if they go unpaid.¹¹

So Smith and I agree on a great deal. Here is where we differ: Smith denies what I believe, namely that an award of specific performance and an award of damages are *alike* in ordering D to do what, according to the law, was already D's duty before the order was made. In other work, Smith rightly differentiates those like me who think that there is one principle incorporating both these remedies, from people like him who think that there are two principles. Thus for his purposes, therefore, the duty view can also be called 'the one principle model'.¹²

Smith officially has two arguments¹³ against the duty view, which are also arguments against my 'inchoate duty' version of it. But he ends up making at least five. Briefly, they run as follows:

1. 'Payment of damages prior to litigation is no defense to a claim for damages.'¹⁴ Thus, if there were a duty to have paid damages before the award, 'it would be a duty that could not be fulfilled.'¹⁵ Call this the *no advance payment* objection.

2. '[I]t would normally be impossible for [wrongdoers] to satisfy such a duty (or at least impossible for them to know that they had satisfied it) because the duty's content could not be

¹¹ Ibid, 1756-7.

¹² Smith, 'Remedies for Breach of Contract', above note 1, 341.

¹³ Smith, 'Duties, Liabilities, and Damages', above note 1, 1741-3.

¹⁴ Ibid, 1741.

¹⁵ Ibid, 1742.

determined prior to a judicial decision.’¹⁶ ‘Legal duties are meant to express moral duties ... and in morality “ought” generally implies “can.” The suggestion that the law recognizes a legal duty to do something that individuals cannot reasonably be expected to do should be accepted on only the clearest evidence.’¹⁷ Call this the *indeterminacy* objection.

3. ‘Orders [e.g. to pay damages] do not inform defendants what they have ‘duties’ to do; they simply command defendants to do things. Orders are intended to be practically rather than morally authoritative. ... Legal duties are meant to reflect moral obligations.’¹⁸ If the court wanted to inform the defendant what he was already bound to be, a declaration rather than an order would be used. Call this the *orders* objection.

4. ‘Under the duty [view], the wrongfulness of the defendant’s act ceases to have significance, so far as litigation is concerned. If the only available judicial response to a civil wrong is to try and induce wrongdoers to comply with their post-infringement moral duties, the so far as litigation is concerned, civil wrongs are just another category of duty-creating events.’¹⁹ Call this the *redundancy of wrongdoing* objection.

5. ‘Imposing both duties and liabilities to pay money for the same wrong may subject wrongdoers to disproportionate hardships and award victims disproportionate gains. A choice must be made’ between the duty view and Smith’s own ‘liability view.’²⁰ Call this the *double jeopardy* objection.

An oddity of these arguments is immediately apparent. Only in connection with the *no advance payment* objection does

¹⁶ Ibid, 1743.

¹⁷ Ibid, 1744.

¹⁸ Ibid, 1747.

¹⁹ Ibid, 1752.

²⁰ Ibid, 1754.

Smith cite black-letter law. Only there are cases cited.²¹ Even so, the cases are not treated as settling the point at issue. Instead the black-letter-law is used to generate something more like a philosophical objection: if the duty were otherwise, 'it would be a duty that could not be fulfilled.' And that sets the tone for the other objections. They are all philosophical objections for which authorities such as cases are not cited and perhaps are not needed. The idea is that, if they are sound, they point to ways in which the duty view makes the law unintelligible or at least absurd. Of course absurd law is nothing new. But pointing to legal absurdity in the implications of the duty view is a relevant argumentative move for Smith to make if defenders of the duty view hold up their duty view as part of an ostensibly non-absurd account of how the law in this neighbourhood works. The law can be as absurd as you like; but the defensible law surely can't be?

So let's allow Smith his philosophical turn for the sake of argument, and consider the force of the objections one by one:

1. The black-letter premise of the *no advance payment* objection is promptly qualified by Smith himself. 'In common law jurisdictions the positive law is clear that *except in cases where payment is accepted as part of a settlement*, payment of damages before litigation does not extinguish a plaintiff's right to an award of damages.'²² The exception is not as minor as Smith makes it sound. Settlement can be in advance of litigation as well as during it. Yes, it must be accepted by P as settling P's claim. But why not? Since (on the inchoate duty view) the amount of damages that is owed may well be indeterminate until settled by a court, why not allow P to reserve his power, and his right, to have it so settled? You may reply that it would be possible for P to reserve his right to determine whether D has

²¹ Ibid, 1742.

²² Ibid, 1741.

paid enough without disallowing payments already made by D from counting towards the eventual total. But there are intelligible policy reasons for not going down this road. One is that it opens up space for argument about whether payments made by D really were in advance fulfilment of the duty to pay damages. If D sends P a sum of money without explanation is it to count or not? Another, perhaps more important, is that going down this road allows D quickly to de-incentivize P from pursuing her claim for full damages. Once D can make an effective payment towards D's eventual liability without P's having agreed to accept it as such, then P has less to gain and more to lose (in possibly wasted expenses, not to mention efforts and anxieties) from pursuing the matter further. In that system, it becomes systematically easier for Ds to pay Ps off with damages lower than the law would award at trial. Any P's power to negotiate is easily reduced from day one. In the system where P's agreement to a pay-off is required, by contrast, P and D negotiate in the knowledge that the alternative remains a lawsuit for the full amount. It is harder to for D to get away with undercompensating P.

Having said that, the law in many common law jurisdictions does in fact have a system to allow D to make a down-payment towards damages. That takes the form of a payment into court or a formal offer of compromise of litigation.²³ Again, P need not take the offer. It is up to her. But she will bear a penalty in costs awarded against her (or similar) if she ends up being awarded damages less than the amount paid into court or formally offered. So the law does enable D to put pressure on P for settlement. It does however closely regulate how and when this pressure can be applied. The thought is presumably that the pressure to settle should be confined to a point at which P has

²³ In England and Wales the main system is now that of 'Part 36 Offers' under the Civil Procedure Rules Part 36. Northern Ireland, by contrast, retains the older model of a payment into court.

already upped the ante considerably, and would no longer be expected to simply roll over timidly when offered a small sum.

This shows that it is not true that a duty to pay damages in advance of the award of damages by a court would be 'a duty that could not be fulfilled'. That duty can be and is fulfilled in formal and informal settlements every day. The fact that such fulfilment by D requires the agreement of P does not show that it does not qualify as D's fulfilment of a duty. It is not a condition for one's having a duty that one is able to determine *unilaterally* what would count as performing it. I often have to ask my wife what, in her opinion, I have a moral duty to do in some complex situation. I can't work it out by myself. But clearly I don't acquire the moral duty only once my wife and I hammer out exactly what its content is. Nor is it a condition of having a duty that one is able to perform it without the cooperation of the person to whom it is owed. Suppose I promise to meet you for lunch tomorrow. I can meet you for lunch tomorrow only if you also show up. Both of us need to play a part for me to perform my duty. True, if neither of us shows up then you are not well-placed to complain about my not having shown up. But it does not mean that I performed (did not breach) my duty. I breached my duty, which required your co-operation to perform it.

2. Once one sees how much store Smith sets by unilateralism one can see why he doesn't stop to mention another interesting point of black-letter-law. In at least some common law jurisdictions interest payable on damages awards is calculated, not from the time of the award (t_2), but from the time at which the the wrong was done (t_1).²⁴ The obvious

²⁴ In the UK, more precisely from 'the date when the cause of action arose': Senior Courts Act 1981 s35A. Similarly in British Columbia: Court Order Interest Act 1996 s1. Both systems make intriguing exceptions, notably for non-pecuniary losses. *Jefford v Gee* [1970] 2 QB 130; Court Order Interest Act 1996, s2. These exceptions do not threaten the main principle.

conclusion to draw is that, in the eyes of the law, the award adds determinacy to a duty which D already had before the award was made. The award adds this determinacy retroactively. The legal duty at t1 is what the court decides at t2 that it already was. Smith's second objection, the *indeterminacy* objection, reveals that for him this proposition of law verges on the unthinkable. It only *verges* on the unthinkable because he agrees that the law might conceivably do such a thing. The problem is that in doing so it would not be able to make its usual moral claim over us. A retroactive duty would be morally unintelligible and, as he says, that would make it a very curious beast.²⁵

But would it be morally unintelligible? Nothing said by Smith in support of his objection reveals why. We may doubt whether it is true that ('generally' or otherwise) 'ought' implies 'can'.²⁶ But even if we treat that proposition as axiomatic, the retroactive duty of which I have spoken satisfies the axiom. The fact that the amount to be paid at t1 is only determined at t2 is no obstacle to D's having paid it at t1. So far as we know, he could have paid the right amount from the word go. The only obstacle was that he didn't know, and indeed couldn't know just yet, that it was the right amount to pay. That just means that there was a large element of luck in whether he managed to perform his duty when it fell to him to perform it. And we already know, from the case in which I sought my wife's advice on what I was duty-bound to do, and the case in which I promised to meet you for lunch, that a large element of luck in whether one performs one's duty is an everyday occurrence outside the law. Even if we were to concede that 'ought' implies 'can', that is still a very long way from conceding that

²⁵ It 'makes nonsense of the very idea of a duty': 'Duties, Liabilities, and Damages', above note 1, 1748

²⁶ I attack the proposition in, among other places, Gardner, 'Reasons and Abilities: Some Preliminaries', *American Journal of Jurisprudence* 58 (2013), 63.

‘ought’ implies ‘can guarantee’ or even ‘can with certainty’. Not only is that not a logical implication; it is not a moral one either. Morality itself torments us daily with risks of error. In morality, there are no guarantees.

There is nothing morally unintelligible about retroactive duties, but there is a worry about legal ones. It is a worry borne of the ideal of the rule of law, according to which the law ought to be capable of guiding us in advance do as not to violate it. There is a rule-of-law worry about the idea that legal duties to pay damages are given their exact content only after they have already come into force. Here are two reactions to this worry.

The first is that some such retroactivity is inevitable, given the central role of authority in law. What one ought to have done in law often cannot be worked out without the intervention of a court. That is often true of one’s primary duties. What exactly was one’s contractual duty and did one’s action fall short? One goes to court to have this settled. Why not also to have it settled what, if one did indeed breach one’s contractual duty, one ought (at that very moment) to have paid in damages? Questions such as these are the bread and butter of the courts and if the rule of law forbids them, then probably it rules out having courts.

The second is that, anyway, we should not regard the law as already saying what ideally it would say. So even if we think that ideally there would be no retroactive determination at t_2 of what D was bound at t_1 to have paid, we should not assume that the law makes no such determination. We should not even insist on ‘the clearest evidence’ before concluding otherwise. Law that fails to conform to the rule of law is no surprise and no rarity,²⁷ so conceding that the duty view involves a violation of

²⁷ Compare Dworkin’s famous remark in ‘Hart’s Postscript and the Character of Political Philosophy’, *Oxford Journal of Legal Studies* 24 (2004), 1: ‘[I]t would be nonsense to suppose that though the law, properly understood, grants [P] a right to recovery, the value of legality argues against it. Or that

the rule of law does not show, or even suggest, that it is not the law. (Putting it differently: it is now time for us to withdraw the concession that we made for the sake of argument a few pages back, granting Smith his ‘philosophical turn’.)

3. The framing of Smith’s indeterminacy objection already suggests that he expects too much from the moral intelligibility constraint on legal content. The *order* objection goes even further down the same road. Possibly we should agree with Smith that the legal duty to pay damages, and any other duty, needs to be morally intelligible. It needs to be intelligible for the law to claim it as a moral duty. But it is a long way from this thesis to Smith’s thesis that ‘[l]egal duties are *meant* to reflect moral obligations.’ First, what the law claims to be doing and what is ‘meant’ to be done with or by law are two quite different things.²⁸ Second, that a legal duty is a morally intelligible does not mean it is morally sound, acceptable, binding, etc. Third, even if it is morally sound, acceptable, binding, etc., that does not mean that it is *reflecting* morality. Most legal duties constitute *mala prohibita*, not *mala in se*. They change what we morally ought to do, rather than reflecting what morality would have us do. There is no reason to think that legal duties ‘reflecting’ moral duties, i.e. *mala in se*, are more central to how law is ‘meant’ to be than are *mala prohibita*. And there are many reasons to think the opposite: in particular, that morality is extremely indeterminate and law is needed to give it more determinate content.

Is the distinction between *mala in se* and *mala prohibita* connected with Smith’s contrast between what is ‘morally authoritative’ and what is ‘practically authoritative’? I am not

though the law, properly understood, denies her a right to recovery, legality would nevertheless be served by making [D] pay.’ I have objected to this idealization of the actual (or actualization of the ideal) in various places, including in my *Law and a Leap of Faith* (Oxford 2012), ch 7.

²⁸ I discuss the difference in *ibid*, ch 5.

sure since I am not familiar with the latter distinction. What is needed to defend the duty view is only that *legal* authority is used to impose the duty to pay damages with effect from time t_1 . As already explained, it need not be moral (i.e. morally justified) authority. True, the moral intelligibility condition does affect what law can impose on us by way of duties. But that condition is a condition on the content of the duty. It does not affect which exercises of authority may be used to impose the duty, e.g. whether it is achieved by declaration or by order or by any other route.

Not only is there no moral intelligibility problem, there is not even a hint of incongruity about imposing or modifying a duty by order. That is because every order is a duty-imposing act. It is an act of requiring an action to be done, and the requirement is categorical (i.e. does not bend to the changing goals of the person ordered). That is all there is to a duty. When the sergeant-major says 'right turn' he imposes a duty on the soldiers - a duty according to military norms - to turn to the right. When he adds 'at the double' he modifies the duty. He may do so retroactively, while the right turn is already in course of execution. He might do that, e.g., for his own amusement at seeing the squaddies trip up and fall into disarray. That would be morally objectionable but it would not be conceptually awkward and in particular it would not fail the moral intelligibility condition, which sets a very weak constraint.²⁹

4. It is not clear to me what is the problem with saying that 'civil wrongs are just another category of duty-creating events', as the *redundancy of wrongdoing* objection has it. I suppose the challenge is to be found in the word 'just'. The suggestion is that the duty view underestimates the specialness of wrongdoing

²⁹ I introduced the constraint in 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honore* (Oxford 2001). So perhaps I am to blame for its inflation.

as the cause for duties of repair to come into existence. That is because according to the duty view, or maybe it is just according to my version of the duty view, the reasons for the remedial duty to come into existence are the same reasons that were not conformed to when the primary duty went unperformed. That is called ‘the continuity thesis’.³⁰ In that sense, thinks Smith, the wrong doesn’t really effect much of a change.

But the duty going unperformed *is* the wrong. So on my view it is exactly what effects the change of duty, i.e. the replacement of the primary duty with the remedial duty. What larger change than that were we expecting?³¹

Smith may reply: that is the very change we were expecting, but the wrong did not *ground* it. It was only a necessary and sufficient condition for it. A ground is more: it has to be a reason too. And on the ‘continuity thesis’ view the wrong is not the reason for the remedial duty to come into existence. The only reasons for the remedial duty to come into existence are the reasons that went unconformed to when the duty went unperformed. I am not sure that there is a real difference here. ‘Why do you have that new duty?’ we ask. ‘Because I didn’t perform the original duty,’ is a correct reply, even according to the continuity thesis. The reason for the new duty is the reason given by the continuity thesis itself, viz. that the original duty

³⁰ See Gardner, ‘What is Tort Law For? Part 1: The Place of Corrective Justice’, *Law and Philosophy* 30 (2011), 1

³¹ Smith makes us expect a larger change in ‘Duties, Liabilities, and Damages’ at 1743, by introducing the following thought. He follows Milson in distinguishing ‘*praecipe* situations in which the defendant can put matters right by a definite render’ with ‘most *ostensurus quare* [trespass] situations [in which the defendant] has done an irreparable wrong for which compensation must be assessed.’ The reference to irreparability here is a red herring. In cases of irreparable wrong the continuity thesis does not apply. Other principles of compensation must be relied upon. I explore some of these in my monograph *From Personal Life to Private Law* (Oxford 2018), ch 4.

went unperformed. The wrong was indeed the ground of the remedial duty.

‘Grounds’ talk is arguably a bit inflationary here. Grounding does play a role in the structure of private law. As we already noted, the claim of wrongdoing by P grounds the right and power to litigate against D. ‘On the ground that’ means that the proceedings ought to succeed iff and because (the proper process yields the verdict that) the assertion is true. The claim of wrongdoing grounds the power and right to litigate. Should we say also that the wrongdoing itself grounds the remedial duty? Since truth is not in doubt in that latter proposition, it is not clear that talk of grounding is apt. Grounding is a relationship in which the question of the truth of a propositional condition is raised.

5. Arguably the *double jeopardy* objection is not freestanding. It depends on the *no advance payment* objection. It is the objection that, if D had a duty at t1 and performed it, that would count as an advance payment, which according to the *no advance payment* objection, would not prevent D from being held liable to pay the same amount at t2. Hence he would pay twice.

We might nevertheless think that we have to choose between a duty view and a liability view. We cannot have both. But in that thought there lies an elementary misunderstanding exposed a hundred years ago by W.N. Hohfeld.³² Strictly there is no such thing as a liability to pay damages. That is an elliptical expression. It is a liability to be required to pay (a specified sum in) damages. The requirement mentioned here is the duty of the duty view. A decision under the liability rule is what gives rise to the duty to pay the specified sum. As already explained, in the common law

³² Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, *Yale Law Journal* 23 (1913), 16 at 53.

tradition it does so retroactively, i.e. on the basis that the duty to pay the specified sum has been that very duty from the very moment the wrong was done, a.k.a. from t1, even though at t1 one could only have been aware of the duty to pay an *as yet unspecified* sum, since one's liability was yet to be settled.