Questions of Liability: Essays on the Law of Tort. By DONAL NOLAN. [Oxford: Hart Publishing, 2024. xlii + 435 pp. Hardback £76.50. ISBN 978-1-50996-192-4.]

For the last few decades, it seems to have been much more fashionable for those who write about tort law to engage in theoretical work rather than traditional, doctrinal scholarship. But for well over 20 years, Donal Nolan has kept the flag flying for those who still see virtue in work of the second variety. He writes, and has always written, with exceptional clarity and enviable perspicacity as his recent collection of (for the most part) previously published work – *Questions of Liability: Essays on the Law of Tort* – amply proves. To be more precise, the book contains a total of 14 essays, only one of which is new. However, revisiting those that one has read before repays the effort. Like a classic film, one sees in them a good deal more the second time round.

Well over half the book deals with matters associated with the law of negligence. Two essays in particular are as provocative (in a good way) now as they were when first published: the ones on "Deconstructing the Duty of Care" (ch. 1) and "Varying the Standard of Care in Negligence" (ch. 6). In them, Nolan invites the reader to entertain two ideas that many would consider at least maverick, perhaps even heretical. The former puts forward a case for rejecting the "duty orthodoxy [that] is ingrained in the mindset of common lawyers … [on the basis that] the duty of care concept is now obscuring understanding of negligence law and hindering its rational development" (p. 27). The latter, which is no less bold, explores the possibility of shattering the "apparently invulnerable rock … [that is] [t]he objective standard of the reasonable person – the yardstick against which the defendant's conduct has been measured for over 150 years" (p. 157). Although it is not, in my view, difficult to marshal respectable arguments in favour of retaining both the duty and the objective standard, of care, it is impossible to deny that Nolan's arguments have very considerable force. One of the strengths of tort law is its remarkable capacity to develop over time. Bear this in mind and the notion that we should without question honour received wisdom in relation to both duty and breach rapidly dissipates. Then read these two essays. They will almost certainly compel anyone who does so to think hard about the merits (or otherwise) of the duty concept and the orthodox approach to breach. Reflection on orthodoxy – especially within the dynamic law of torts – is always, I think, a good thing even if one thinks, ultimately, that there is no cause for change.

Rylands v Fletcher liability is another topic in relation to which Nolan has advanced some fairly bold claims. In his oft-cited article, "The Distinctiveness of *Rylands v Fletcher*" (ch. 11), Nolan adverts to a series of important differences that exist between that action and the tort of private nuisance (pp. 316–20). So doing, of course, unsettles what was said about the two wrongs in *Cambridge Water Co. Ltd. v Eastern Counties Leather plc* [1994] 2 A.C. 264 and *Transco plc v Stockport MBC* [2004] 2 A.C. 1; for they both posited that *Rylands* liability is best seen as a sub-branch of the law of private nuisance. Nonetheless, since Nolan's claims are anchored firmly to decided cases that were never actually overruled in *Cambridge Water* and *Transco*, it is hard to resist the force of his arguments *in this connection*. But the essay goes further. It concludes on what is a less solid, and probably more controversial, note. In Nolan's view, because "there have been very few cases in which actions under the rule [in *Rylands v Fletcher*] have been successful", the time has come for "putting this creature down … [instead of] leaving it in the legal equivalent of a persistent vegetative state" (p. 335). It is a suggestion that I personally would seek to resist because I am unconvinced that mere numbers of cases are a measure of importance. By that yardstick we would regard speeding as a more important offence than murder. And we might even see fit to abolish the offence of treason, a crime that is scarcely ever committed. However, this is just the conclusion to the essay. Taken as a whole, I think it is by some distance one of the best essays that exist on an area of tort law that has fascinated and divided academics for over a century.

Two further essays to which I think especial attention should be drawn are those on "Rights, Damage and Loss" (ch. 13) and "New Forms of Damage in Negligence" (ch. 7). Quite why the first of these was placed in Part III of the book (entitled "Tort in General") rather than in Part I (entitled "Negligence") is unclear to me. After all, in just the second sentence of that paper, Nolan states that "[t]he focus of the analysis [in the essay] is on the law of negligence" (p. 371). And just a few pages later he makes clear that his key argument "is that a concept of damage is a necessary component of a plausible rights-based analysis of negligence law" (p. 373). Be that as it may, however, it is hard to deny that the article – whatever its proper place in the book might be – makes a powerful case for taking seriously the underexplored questions of (1) how best to conceive the concept of damage and (2) exactly what role the damage component fulfils in the tort of negligence. Just as with the essays on duty and breach, this one is deeply thought-provoking. Is a rights-based conception of negligence law possible, or necessary? Does Nolan's insistence on the superiority of thinking in terms of "damage" rather than "loss" have repercussions for other parts of tort law? For instance, would we do well to re-think (or at least re-name) the tort of causing loss by unlawful means? Ought textbook writers to follow Nolan and reconstruct their negligence chapters in a way that gives real salience to the damage component?

It is certainly true that the question of what constitutes "damage" has in recent years received close scrutiny at the highest appellate level and on more than one occasion. But I am sure that there remains a good deal of work to be done on this topic. Happily, Nolan has done some of it for us. In the chapter dealing with "New Forms of Damage in Negligence" (ch. 7), Nolan takes his readers to several forms of damage that, for many, will not previously have shown up on the radar.

Throughout his career, Nolan has made it something of a habit to be ahead of the curve in thinking about negligence and private nuisance. A number of the essays in this collection exemplify that point. His essay on "Preventive Damages" (ch. 12) was (in this jurisdiction at least) pathbreaking. It alerts readers to some very interesting cases in other common law jurisdictions in which a claimant has been able to recover damages the purpose of which was to reimburse the claimant for "costs incurred in preventing wrongful interference with the person or property of the *claimant*" (p. 340). It is a head of damages that, before reading this essay, I had never known existed. It is doubtless only a matter of time before others begin to give some thought to this fascinating topic: Nolan's essay certainly whets the appetite.

Nolan was also ahead of many of us when he first published "The Liability of Public Authorities for Failing to Confer Benefits" (ch. 4). For here, back in 2011, he argued (among other things) that negligence cases turning on a public authority's omissions should be dealt with according to ordinary principles of private law and that no special rules should be applied merely because the defendant authority happened to be invested with some or other statutory duty or power. In the wake of *Michael v Chief Constable of South Wales Police* [2015]

UKSC 2 and *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, of course, this has become the orthodox approach.

In similar vein, some of the key arguments contained in his essay, "'A Tort Against Land': Private Nuisance as a Property Tort" (ch. 9) have since received subsequent Supreme Court endorsement in the already (in)famous case of *Fearn v Tate Gallery* [2023] UKSC 4. That said, important points of divergence do exist between Nolan's understanding of that tort and the two very different depictions of it proffered by Lord Leggatt and Lord Sales in *Fearn*. But this does not constitute a reason to side-line or skip this essay. In fact, the opposite is true. For *Fearn* will doubtless be examined closely for some years to come; and anyone who engages in that enterprise would do well to read Nolan's powerful essay, with its firmly rights-based conception of private nuisance, alongside the case. (I do however have my doubts about whether the essay – dealing as it does with just one tort – was the right place to trumpet the merits of rights analysis *generally.* Showing that a rights-based understanding of private nuisance has considerable analytical force is a slender peg on which to hang, as Nolan does (p. 282) the case for a rights-based approach to private law as a whole.)

There is not room here to comment on all the chapters in this book. It is, by anyone's standards, a hefty volume at 434 pages. But to conclude this review, I think it is worth saying something about two other inclusions: the very first chapter entitled simply, "Introduction" and the final essay, "Against Strict Product Liability" (ch. 14).

As a card-carrying "tortaholic", I was very familiar with virtually all of the material in this book even before I sat down to read it. But I realise that not everyone will have been around for as long as I have and that many will not have had the chance to read most of these essays before. I also recognise that some readers will struggle to find the time to read all of this book. For all such persons, then, the introductory chapter will come as a Godsend. It serves as a road-map *par excellence* to what lies ahead. To be more precise, it provides a helpful summary of what each chapter contains. In so doing, it will be of great assistance to those who are able only to read the various essays selectively. But it goes further still. For Nolan also offers in this chapter some reflection on the extent to which developments in the law have confirmed or contradicted his arguments. Where contradictions have occurred, he acknowledges them with admirable openness. The value of this chapter, therefore, is twofold: it allows readers to make informed choices about which chapters to read (and in what order); and it alerts them to various caveats that must now be applied to some parts of some of the articles.

In the final essay, Nolan assesses whether there genuinely is – as is often argued – any merit in having a strict liability regime for tort claims arising from defective products. He considers closely many of the arguments that have been made in support of such a regime and dismantles them all skilfully. He then concludes that the best way forward would be to repeal Part I of the Consumer Protection Act 1987. In large part, his call for repeal turns upon the Act's unworkability (which he attributes, in significant measure, to the way in which technological advances have caused the pivotal concept of a "product" to become even harder to work with than it already was (pp. 398–400)). Much of what he says *in this respect* is persuasive. (But I cannot but harbour doubts about how significant in practical terms such repeal would be. It would reduce costs associated with pleading in the alternative; but I am not sure it would make very much difference to the outcome of most cases.

Although some of the essays in this book are by no means new, it is nonetheless true that all of them address questions to which tort lawyers are *still keen* to find answers. Equally, and relatedly, although the law has clearly moved on since some of them were first published, one cannot say that any have clearly exceeded their sell-by-dates. Accordingly, because they all bear the hallmarks of first-rate scholarship, the book comes highly recommended. Indeed, because most of the topics addressed in this book centre on aspects of the law that form the backbone of most university courses on tort law, I would go so far as to call it essential reading.

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The Structural Transformation of European Private Law: A Critique of Juridical Hermeneutics. By Leone Niglia. [Oxford: Hart Publishing, 2023. xx + 184 pp. Hardback £90.00. ISBN 978-1-50992-525-4.]

Niglia's book offers a comprehensive and insightful analysis of the intricate relationship between the EU constitutional order and private ordering, illustrating three significant structural transformations over the past 60 years. Niglia's examination of the interplay between the EU constitutional order and private ordering is both comprehensive and thought-provoking. The book delves into private law areas most affected by contemporary modernisation waves, including consumer law, the internal market, lex mercatoria, digitisation, artificial intelligence, data protection, standardised contracts, finance, political economy and labour. The innovative comparative methodology provides valuable analytical tools, offering profound insights into the evolution of these disciplines.

The prologue lays a solid foundation by contextualising the three major structural transformations within the framework of European integration and, thus, it provides a detailed overview of the evolution and current condition of European integration in relation to private ordering, setting the stage for the chapters that follow. In the prologue, the author clarifies the concept of "comparative juridical hermeneutics" as an approach that goes beyond merely comparing norms, facts, ideas or functions (pp. 11–12). Instead, it involves a comparative analysis of how legal actors employ the technique of balancing in both EU law and national private laws. This means examining not only the content of the laws themselves, but also how judges, lawyers and other legal professionals interpret and apply these laws in various contexts.

In Chapter 2, the author interestingly delves into the concept of autonomy within the EU constitutional order, examining how private law areas have evolved in response to the increasing autonomy of European legal structures. This exploration includes an insightful analysis of the historical development of the case of the Court of Justice of the EU ("CJEU"). In this perspective, Niglia critically examines the impact of autonomy on these areas, highlighting both the advancements and the challenges. The book is not an easy read. It delves into various dense and complex concepts, such as, co-normativisation, mutual learning