Strict liability and the aims of Tort Law

VALORISATION ADDENDUM

1. Scientific and Societal Relevance

Strict liability regimes are ubiquitous, but problematic. They exist in almost all, if not all, contemporary legal systems, but there is a great deal of diversity between legal systems with regard to the distribution of strict liability rules relative to fault-based rules, the scope of strict liability rules, and how they are perceived by various legal actors. This research was born from the belief that this divergence of practices and justifications opens the space for a debate about the concept of strict liability, the function of strict liability rules within the law of torts, and the factual instances that ought to be regulated by strict liability rules. This is a debate which has already engaged scholars specialized in legal philosophy, comparative law, and law and economics, as well as national doctrinal scholars.

The main findings of this study on strict liability contribute to the scientific debate in the fields of comparative law and the philosophy of tort law. In both fields of study, strict liability has been difficult to account for, but for different reasons. In the field of comparative law, strict liability proved difficult to account for in European harmonization projects because of the diversity of strict liability rules and the variation in their scope were considered insurmountable challenges to the formulation of model rules or proposals for harmonization. Authors contributing to the philosophy of tort law struggled with a different problem – the justification of strict liability. Many philosophical accounts of tort law are based on assumptions about the practice of tort law and the broader practice of responsibility that are incompatible with strict liability torts (for instance, that the practice of tort law is concerned only with wrongdoing, or only with efficient deterrence, or only with the compensation of worthy victims). This research is based on an argument about the goals of tort law that makes room for strict liability torts. In this regard, we have argued that the practice of tort law is concerned with giving each person their due (distributive justice) and with righting interpersonal wrongs (corrective justice), and that the choice of strict liability over fault-based liability is a matter of distributive justice. Such a choice implies a different distribution of primary entitlements and duties (i.e. the creation of a different type of *interpersonal wrong*), but does not take away the need for corrective justice when such primary entitlements and their correlative duties are violated.

By combining comparative research with a normative inquiry into the goals of tort law as a practice, we have found two recurring characteristics of strict liability norms: first, strict liability norms are non-universal, in the sense that primary duties and entitlements take other forms than the all against all form that is characteristic to fault-based norms; and second, the link between potential tortfeasors and victims is mediated in strict liability cases, the ascription of liability typically requiring the identification of at least two connected relationships, whereas in fault-based liability the ascription of liability is direct (the

relationship between victim and tortfeasor being unmediated). Consequently, the characteristic subject of a strict liability rule is not the individual qua individual, but the individual qua member of a group or class, and the duties that make up the primary level of strict liability wrongs can be further divided into three categories: (a) duties owed by members of a group or class to all others; (b) duties owed by all persons to members of a group or a class of persons; and (c) duties owed by members of a group or class to members of another group or class. Also, as opposed to fault-based liability, which links tortfeasors and victims in a straightforward ("direct" or "un-mediated") manner, strict liability norms typically link tortfeasors and victims by way of two connected relationships held together by a nexus point. The elements of liability combine to form a narrative of two relationships: one relationship between the tortfeasor and the nexus point and a second relationship between the nexus point and the victim. The mediated structure of their primary duties and entitlements is what allows strict liability regimes to bypass judgments regarding the quality of the defendant's behaviour. The locus of the wrong or, in other words, the problem that the liability rule is trying to address, is not in the behaviour of the tortfeasor, but in the nexus point, which is always somewhat removed and independent from the tortfeasor's decision-making process. There is, therefore, a sort of "imputability distance" implied in all strict liability wrongs.

The societal impact of this research is more difficult to anticipate. The normative arguments presented have a high degree of abstraction and their operationalization would require the elaboration of further arguments (to be made in more concrete circumstances). The present research gives lawyers the tools for building arguments, judges the tools for shaping the jurisprudential evolution of the law (should they be inclined to at least a modicum of judicial activism), and legislatures the tools for shaping policy, but it does not provide any ready-made solutions. Nevertheless, in our conclusion, we have suggested that the arrow of history points towards a future with more strict liability, not less:

> *In this author's opinion, legal systems that are evolving in the same direction as the French and the English systems are going in the right direction. Our current and future liability problems seem hard, if not impossible, to address only by recognizing duties of care and setting standards of individual behaviour. Many of the problems that have arisen and will continue to arise from climate change, from the privatization of our digital space, or from the development of self-driving cars and artificial intelligence can only be addressed by collective action and community thinking. Strict liability, with its duties derived from group membership and its imputability distance, especially when coupled with insurance mechanisms, with their costs-sharing distributive effects, is better suited for the complex modern interactions characteristic to such problems. Strict liability will not solve these new problems humanity is faced with, but the re-distribution that comes with enacting new*

strict liability rules will morph our perception, reframing them as problems we face not apart, as uncoordinated individuals, but in common, as members of groups, collectives and communities.

2. Audience

This study is addressed mainly to academics, and more specifically legal academics. Many comparative tort law scholars and scholars working in the nascent field of philosophy of tort law will even find that many of the arguments presented above interact with their own work and with competing arguments that some of them have already made.

Additionally, the present work may be of interest to practising lawyers, judges and other policy-makers because it contributes to the understanding of strict liability and provides (some) normative guidance with regard to the adoption of new strict liability rules.

Lastly, the present study may be of interest to philosophers. There is interesting work being conducted by contemporary philosophers on the nature of responsibility, of rights, of duty, and especially on the existence and nature of group duties. Authors working on such problems may benefit from a better understanding of strict liability and could integrate insights from this thesis into their broader, more ambitious, arguments and theories.

3. Innovation

As mentioned above, the justifications of strict liability regimes and the relationship between strict liability and justice have been problematic topics for both comparatists and normative legal theorists. By presenting a novel pluralistic account of strict liability, this thesis contributes to the international academic discourse on tort law, while also offering lawyers, judges and legislatures a toolbox to make better informed decisions on whether, and in what circumstances, new strict liability regimes ought to be created.

The account of strict liability from this research relies on pre-existing work and interacts with arguments already made by other scholars. Nevertheless, it does bring significant innovations to the doctrinal, comparative and normative discourse on strict liability.

The doctrinal exposition of strict liability regimes was built not only from primary sources, but also from the doctrinal accounts of French and English scholars who have already worked on identifying strict liability regimes and describing their requirements (or elements). That said, the author of this thesis had to make choices between differing opinions and interpretations, and the accounts presented in Chapters II and III differ in construction, presentation, and detail from any preexisting accounts. The most important innovation in this stage of the research lies in the identification and cataloguing of strict liability regimes

in France and England. In England in particular, this exercise had not, to this author's knowledge, yet been attempted in as systematic a manner. In fact, many English legal scholars assume that strict liability exists in such small pockets that it does not merit detailed exposition. Through our research, we show that despite some strict liability rules in England having narrowed in scope over the course of time, both the number of strict liability rules and their overall scope has increased. In France, similar doctrinal accounts of strict liability can be found, but only in the French language. Our exposition relies heavily on French doctrinal work, but has the added value of providing a doctrinal account of strict liability that is up to date and presented in the English language.

In the comparative parts of this research, a more traditional formal-conceptual classification of strict liability rules was supplemented with a problem-oriented version of comparative law functionalism, with the aim of identifying normative similarities and differences between strict liability rules and fault-based liability rules. The findings of this comparative exercise are original and bring new insight into the reasons for the obvious divergence between the French legal system and the English legal system with regard to the adoption of strict liability rules. Our main findings were that: first, strict liability norms are non-universal, in the sense that primary duties and entitlements take other forms than the all against all form that is characteristic to fault-based norms; second, the link between potential tortfeasors and victims is mediated, the ascription of liability typically requiring the identification of at least two connected relationships. Thus the choice to maintain a fault-based rule over strict liability is a choice to preserve, at least prima facie, a universal and individualistic solution that focuses on regulating interpersonal behaviour; in other words, it is a choice to see the interpersonal "wrong" as an individual's failure to behave in the right way. By contrast, in choosing strict liability over fault-based liability a legal system looks for a non-universal but also non-individualistic solution that focuses on something other than the defendant's behaviour (the standard of safety of a product, or the relationship with another); most often, this means that the interpersonal "wrong" is seen as a collective or group failure.

Additionally, there are innovations also in some of the details of the comparisons made. We found, for instance, that even when France and England define strict liability wrongs in a similar manner, some of the details of these definitions still diverge in important ways. France and England define primary duties and their correlative entitlements very similarly in the areas of product liability, liability for nuclear accidents, vicarious liability of employers for the acts of their employees, nuisance, and trespass to land. Yet: in the area of product liability, there are differences with regard to what counts as damage, how causation may be proved, and the relationship between product liability and other liability regimes; in the area of liability for nuclear accidents there are differences with regard to the recoverability of pure economic loss; in the area of vicarious liability of employers for the acts of their employees there is an important divergence with

regard to the definitions of the underlying civil wrongs committed by employees, and with regard to the liability exposure of employers when their employers are held vicariously liable; in the area of private nuisance there are subtle differences regarding the definition of the term "neighbour" and the treatment of uncertain risks; and lastly, with regard to acts of interference with the possession of land, there are conceptual and procedural differences between the English tort of trespass to land and the French *référé possessoire*. Conversely, in some areas where the definitions of civil wrongs fundamentally differ—one jurisdiction opting for strict liability and the other for (mainly) fault-based liability—we nevertheless found a number of subtle points of convergence. We have seen, for instance, that: the law of vicarious liability in England has been expanding and now partly overlaps with the French general principle of liability for others; although in France liability is strict and in England the tort of negligence dominates the area of liability for road traffic accidents, drivers are nevertheless held to a higher standard of care in England; petitory actions, which are not even conceived as remedies for wrongs in France, seem to protect possessory interests in a similar manner to the torts of conversion and trespass to goods; and, in France, the applicability of fault-based liability (articles 1240-1241 of the French Civil Code) in defamation cases has been restricted jurisprudentially to such an extent that fault-based liability has become almost inconsequential, making French law just about as strict as English law in this field.

Lastly, the present study brings a novel argument to the debate on the aims of tort law. By arguing that the practice of tort law has two constitutive aims, being built to achieve both distributive and corrective justice, we added a new voice and new arguments in favour of a pluralist account of tort law (and against those who argue for corrective justice alone, or distributive justice alone, as *the aim* of tort law). Our argument is that tort law reflects an ordered pluralism, distributive and corrective justice being ordered in a serial (or lexicographical) manner: in a first stage, by defining primary entitlements and duties, tort law specifies the requirements of distributive justice; then, in a second stage, after a primary entitlement is violated and its correlative duty breached, tort law specifies the requirements of corrective justice; and the occurrence of a "civil wrong" marks the conceptual boundary between the two stages.

4. Implementation

The findings of this study will be disseminated by submitting this manuscript for commercial publication, through presentations at conferences and symposia, and by further developing some aspects which were not central to this thesis in future academic articles. In the immediate term the author of this study intends to contribute also to the new edition of the Elgar Encyclopedia of Comparative Law with a chapter on strict liability that will refer back to the research conducted during the PhD programme, but will also, of course, go beyond it.