

**The only way to explain a law of tort that includes both fault- based and strict liabilities is to accept that "tort is what is in tort books, and the only thing holding it together is the binding' (Tony Weir, An Introduction to Tort Law (2nd edn, OUP, 2006)ix).**

### Introduction

- Tony Weir claims that (include quote from the title here).<sup>1</sup>
  - Define strict liability and fault-based liability.
  - This essay will critically examine whether Weir's position is true. It will identify what appears to distinguish tort from other forms of civil liability, and then examine whether there is any unifying principle explaining why all torts have these common features, with particular focus on explaining how fault-based and strict liability torts can coexist under the same heading.

### What Distinguishes Torts from Other Civil Causes of Action?

- Differences:
  - Torts are rights 'in rem' – unlike contract and trusts, which only governs the relationship between the two parties, tortious remedies and relationships can exist regardless of prior relationship.<sup>2</sup>

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<sup>1</sup> Tony Weir, *An Introduction to Tort Law*, (2<sup>nd</sup> ed., Oxford University Press, 2006), ix

<sup>2</sup> Nicholas Hopkins, *Modern Studies in Property Law, Volume 7*, (Bloomsbury Publishing, 2013), 342

- Tortious damages aim to put you in the position as if the tort hadn't been committed,<sup>3</sup> contract aims to put you in the position as if the contract had been fulfilled.<sup>4</sup>
- Tortious liability is founded in an act being inflicted non-consensually, contractual liability exists purely by virtue of party consent.<sup>5</sup>
- The scope of the contractual relationship is defined by the parties (unless a term is imposed by statute)<sup>6</sup>, the scope of one's duty in tort is defined by the law.<sup>7</sup>
- Vicarious liability exists with respect to tort but not contract/trust/restitution.<sup>8</sup>
- It is therefore factually possible to identify a tort by the rules that apply to it, as they all share these features, but this is not enough. Weir's claim can be extended to say that not only is the classification of something as a 'tort' arbitrary, but so is the fact that they all share these features. There needs to be a coherent principle as to why all of these causes of action share the same rules: a unifying theory of tort.

### Unifying Theory of Tort

- There are three main types of theory exist: fault-based, efficiency/economics-based, and corrective justice-based<sup>9</sup>.

<sup>3</sup> *Lim v Camden & Islington Area Health Authority* [1980] AC 174, 187

<sup>4</sup> *Addis v Gramophone* [1909] AC 488

<sup>5</sup> Hopkins, (n 2), 342

<sup>6</sup> *Shirlaw v Southern Foundries* [1939] 2 KB 206

<sup>7</sup> Vivienne Harpwood, *Modern Tort Law*, (Psychology Press, 2005), 127

<sup>8</sup> Paul Glikler, *Vicarious Liability in Tort: a Comparative Perspective*, (Cambridge University Press, 2010), 62

<sup>9</sup> Robert Stevens, *Torts and Rights*, (Oxford University Press, 2007), 306

- Fault-based theories: a person is liable to compensate someone when it is their fault that the other person suffered harm.
  - Explains fault-based liability, for obvious reasons. Does not explain strict liability torts, such as liability for escaped substances, as there is no fault.<sup>10</sup>
  - Does not explain vicarious liability: employer can be liable for employee actions without proof they did anything wrong.<sup>11</sup>
  - Therefore: no an adequate explanation for grouping strict and fault-based torts.
- Efficiency/economics-based theories: these characterise the torts as methods to incentivise inefficient conduct.<sup>12</sup>
  - Explains why some torts are strict liability: in certain cases, strict liability produces the optimal incentive to take optimally efficient precautions against behaviour which may cause harm.<sup>13</sup>
  - Does not explain why only some people owe duties to prevent harm, especially in fault-based negligence, rather than anyone who was more efficiently placed than the victim to prevent the harm.
    - ❖ E.g. it does not explain areas of torts where liability for certain bodies is unlikely or outright excluded: e.g. the difficulty of holding local authorities liable for causing economic loss to home-owners.<sup>14</sup> The authorities do not

<sup>10</sup> *Rylands v Fletcher* [1868] UKHL 1

<sup>11</sup> *Lister v Hesperley Hall Ltd* [2002] 1 AC 215

<sup>12</sup> Richard Posner, *Economic Analysis of Law*, (Aspen Publishers, 2002)

<sup>13</sup> Jules Coleman, Scott Hershovitz, Gabriel Mendlow, 'Theories of the Common Law of Torts', (*Stanford Encyclopaedia of Philosophy*, 17 December 2015), <<http://plato.stanford.edu/entries/tort-theories/#TheTorLawEcoAna>> accessed 24 September 2016

<sup>14</sup> Peter Cane, *Anatomy of Tort Law*, (Bloomsbury Publishing, 1997)

avoid liability because they have not been inefficient (they have, negligence is inefficient), but a duty of care is often found not to exist anyway because the law wants liability to fall on other entities (like builders).

- ❖ Therefore, this doesn't justify the fault-based torts as a whole: no an adequate explanation for grouping strict and fault-based torts.
- Corrective justice theories: '*Tort law repairs wrongful losses.*'<sup>15</sup>
  - Whether this provides a unifying theory depends on what constitutes a 'wrongful loss' loss. It cannot be loss inflicted with fault, due to the existence of strict liability torts.
  - Chapman argues that loss equals infringement of rights, while a rights-infringement will be 'wrongful' where it is not a permissible invasion of a right.<sup>16</sup> This can be combined with other theories: Oberdiek argues that something is 'wrongful' when it subjects someone to an impermissible risk of harm (i.e. where the defendant took an unjustifiable risk of invading the claimant's rights, and that risk subsequently manifested).<sup>17</sup>
    - ❖ Goudkamp and Murphy argue that rights-based corrective justice theories, and other types of corrective justice theories, cannot explain why, in fault-based torts, the cost of preventing the harm is relevant to whether or not the defendant breached a duty of care<sup>18</sup> (i.e. why this is relevant to whether a

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<sup>15</sup> Tony Handfield, Trevor Pisciotta, "Is the risk-liability theory compatible with negligence law?", [2005] LT 387, 387

<sup>16</sup> Bruce Chapman, *Justice, Rights, and Tort Law*, (Springer Science & Business Media, 2012), 80

<sup>17</sup> John Oberdiek, "The Moral Significance of Risking", [2012] LT 339

<sup>18</sup> *Bolton v. Stone*, [1951] A.C. 850

right has been infringed or whether the infringement of the right is permissible or not).<sup>19</sup>

❖ Nor can it explain why the claimant only apparently has a right, such as to economic sanctity, when the defendant does something, such as assume responsibility for the claimant's economic sanctity.<sup>20</sup>

- Therefore: no an adequate explanation for grouping strict and fault-based torts.

### Conclusion

- Each of the main types of unifying theories cannot explain the co-existence of fault and strict liability torts under one label.
  - Fault-based theories explain fault based torts well, but cannot explain strict liability torts' existence;
  - Efficiency/Economic theories explain strict liability torts well, but cannot explain many elements of fault-based liability;
  - Corrective justice and rights-based theories explain strict liability torts, but have problems explaining many elements of fault based liability.
- Weir's statement therefore appears to be correct.

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<sup>19</sup> James Goudkamp, John Murphy, "The failure of universal theories of tort law", [2015] LT 47

<sup>20</sup> Ibid., 63

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