TORT LAW BEYOND THE REASONABLE MAN: RE-THINKING TORT LAW BEYOND THE STATE

Rónán Condon

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 07 June 2017

European University Institute
Department of Law

Tort Law Beyond the Reasonable Man: Re-Thinking Tort Law Beyond The State

Rónán Condon

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute
Examining Board
Professor Hans-Wolfgang Micklitz, European University Institute
Professor Stefan Grundmann, European University Institute
Professor Simon F Deakin, University of Cambridge
Professor (Emeritus) Karl-Heinz Ladeur, Universität Hamburg

European University Institute

DEPARTMENT OF LAW

Researcher declaration

I Rónán Robert Condon certify that I am the author of the work, 'Tort Law Beyond the Reasonable Man: Re-Thinking Tort Law Beyond The State', I have presented for examination for the PhD at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

I warrant that I have obtained all the permissions required for using any material from other copyrighted publications.

I certify that this work complies with the *Code of Ethics in Academic Research* issued by the European University Institute (IUE 332/2/10 (CA 297).

I declare that this work consists of **98, 247** words.

Signature and Date:

24 March, 2017.

Table of Contents

This thesis explores the evolution of tort law through the prism of three paradigms of modernity, namely, the society of individuals, organizations and networks. These models build on Karl-Heinz Ladeur's pioneering work. Tort law developed in a society of individuals which is considered a radical break with prior methods of social organization. While the core of private law was contract law modelled on the abstract will, tort law set outer boundaries on the will but its shape was individualistic focusing on individualized conduct. In the twentieth century, with the rise of the society of organizations, tort law was reshaped towards providing remedies fit for a society of organizations. This is evident both in terms of how tort law was adapted to the private firm and the state as service-provider. We find that the concept of vertical vicarious liability fits the way in which tort law abstracted from the reasonable man *per se*, to embrace the organizational setting in which agents conducted their activities. Our third paradigm, that of the society of networks, is emergent. It blurs lines between private and public and, additionally, the existing normative models of liability – whether individualized or organizational – are not aligned. With the breaking of the territorial frame of the nation-state coinciding with the emergence of a society of networks we investigate whether actors, which might previously be considered 'peripheral' to a tort and, therefore, outside the organizational model of liability are, from the perspective of the horizontal sociological network, once again potential normative addressees of liability. We argue that European law *de lege lata* is beginning to bring such actors within its scope of application. Making sense of these developments in an overall framework of an emerging society of networks and, additionally, arguing what the stakes are, and how they may be fitted into legal, normative argument, is the task of our final chapters.

ACKNOWLEDGEMENTS

When I decided to embark on a ph.d, I had not the foggiest idea what exactly a ph.d involves. I had enjoyed law as an undergraduate, particularly jurisprudence. At that time, I thought private law was not well-conceptualised as a distinct, theoretical enterprise. Private law was common law, case-law heavy but we did not touch on the deeper philosophies of private law or how it related to society, howsoever one understands this concept. All the interesting questions, as I saw it, were asked by public or constitutional lawyers. The landmark cases in Ireland involved the Irish superior courts interpreting the constitution dynamically in light of a changing social context. It took me a long time to realise that there was a connection between a constitutional and private law, and that in certain respects the public constitution rests on an older private one and that the latter was as much a constitution of society as a constitution for society. The initial impetus to do a ph.d was to explore the peculiar doctrine of vicarious liability – a strict liability island in a sea of fault-based recovery. This doctrine, and its parallel doctrines in civil law jurisdictions must, I thought, reflect some deeper tension in terms of the ascription of responsibility. This ph.d is an attempt to draw out these conclusions, but attempts to go beyond the frame of the nation-state. This is my debt to the EUI. This is the academic side of my ph.d experience. And I have found that by combining theory and case-law, a rich steam of insights.

However, there are other aspects to writing a ph.d that are just as rich but less recognised. No ph.d is written in isolation. In Gaelic there is an expression that, I think, captures how I feel about the past few years: *Is ar scáth a chéile a mhaireann na daoine*, which translates loosely as people live in each other's shadows or we rely on each other for shelter. I have found that the path to becoming an academic is an intensely collaborative and collective experience. Friendships formed in such an intense environment are lasting. It is difficult to imagine this truth in advance. I owe especial thanks to Mairéad, James, Benedita, Donal, Keiva, Emily, and Johann, Hanna Eklund, Rian Derrig, Klaus Rebholz, Colm Booth, Aoife Nannery, Emma, Rodrigo, Prezemek, Stavros Pantazopoulos and Stavros Makris. My friends and close colleagues Lucila, Betül, Marta, Heikki, Guido, Yane, Marija and Barend. This list is clearly incomplete and, indeed, listing itself does not do justice to my thanks. I would like to thank my

friends for the experiences we shared and their insights, which continue to cause a ripple long after we have all gone our separate ways.

The academic support I obtained at the EUI has been quite extraordinary. I found professors were always enthusiastic, willing to lend an ear, counsel and encouragement. I would like to thank Prof. Cafaggi who brought me to the EUI. Professor Mads Andenas, Angus Johnston, Oliver Gerstenberg, Gert Brüggemeier, Loïc Azoulai, Claire Kilpatrick, Miguel Maduro and Dennis Patterson, who have all commented incisively on my work or lent support at one point or another.

Additionally, through a European Research Council I was appointed a research associate at the EUI. There is no doubt that without their generous support it would have been very difficult to complete my studies, and for this I am extremely grateful. Additionally, in my role as research associate I assisted with research for a book co-authored by Stefan Grundmann, Hans Micklitz and Moritz Renner entitled *Grand Theories of Private Law*, and this has been a very enriching experience.

Finally, I would like to thank a few people in particular. For his patience, kindness and wisdom my supervisor Hans Micklitz. Hans has always been generous of mind, time and spirit. He is encouraging and inspiring, always pushing me to do better, to think more deeply, provoking me to challenge my preconceptions – as he might well put it. I would like to say that I am extremely fortunate to have had Hans as a supervisor. I want to mention Mihalis Dekastros. He has been my best friend over the past number of years. He pushes and provokes me all the time to see the world in a different way, always encouraging and steadfast in a crisis. One could not wish for a better friend.

My grandmothers, May and Nelly, will appreciate a special mention here! They have always supported me and encouraged me along my path. My siblings Shane, Claire and Robert. My partner Gréta Szabó from whose good nature, patience, humour, and kindness I learn every day. And, finally, my parents Angela and John. I dedicate this ph.d to my mother, the real hero of this story.

INTRODUCTION

A. TORT LAW BEYOND THE REASONABLE MAN

In this thesis we explore the evolution of modern tort law from its classical foundations through the twentieth-century to the challenges facing tort law today. In broad terms, the law developed in the twentieth century from a law focused on individual wrongdoing to a law premised on what might be called *vertical* vicarious liability.[1] We hope to retrace the steps of this evolution. Another term for *vertical* vicarious liability, which aims to ensure that our usage is not confused with a claim about the doctrine of vicarious liability, as such, is organizational liability.[2] While the formal language used by courts in the twentieth referred to individual conduct, it was in fact organizations that were increasingly the 'real' addressees of legal responsibility. At the dawn of the twenty first century, the frame of reference of vertical vicarious liability is no longer apt. What is required is to supplement vertical vicarious liability with a concept of *horizontal* vicarious liability. Echoing Teubner analysis, and borrowing from Ladeur's theoretical framework for understanding the 'third normative remodelling' of modern soicety, we will discuss tort law's relationship to the 'society of networks'. This is the basic orientation of this thesis. However, before addressing the impact of the society of networks on tort law squarely, we need to examine the place of tort law in Ladeur's theory in order to make our claims plausible.

We use examples from product liability law and state liability law as the means through which we construct our argument viewing product liability as an important example of legal developments within tort law. We will merge these perspectives in chapter IV.

---

1 G Teubner 'The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability' in G Teubner, L Farmer & Declan Murphy (eds) *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (Chichester, Wiley, 1994) 17. 'With 'vertical' vicarious liability in hierarchical organizations, employers are made responsible for the actions of their employees. Here the law, by imputing causation where no causal link can actually be proven, makes one individual vicariously responsible 'horizontally', for wrongs that have been committed by some other members of a group of actors.'

2 G Brüggemeier *Common Principles of Tort Law: A Prestatement of Law* (London, BIICL, 2004).

Before doing so, we will argue in chapter II that product liability is illustrative of a more general trend taking tort law from a focus on individual wrongdoing to an organizational model of liability. This organizational model applies, however, outside of these confines and, as such, the examples we draw on are considered of greater explanatory value.[3] We argue that whether in the context of the public bureaucracy (the state) or the private firm, organizational liability came gradually over the course of the twentieth century to complement individual responsibility in tort law. This is not to understate the distinction between private and public activity. Strong policy arguments mollified the development of a fully-fledged organizational liability with regard to the state.[4] Nevertheless, organizational liability as the 'frame of reference' when considering state liability pulled against these policy-based exceptions. In the English context from which we draw most of our arguments in chapters II,[5] as we will argue, the highpoint of this trend can be seen in the *Anns* decision. In that decision, it will be argued that the *agent moteur* of liability was an organizational model of liability. The Court during this period viewed the activities of subcontractors in terms of a delegation of public activities and, as such, that public authorities should be held liable either for negligence or on the doctrinal basis of breach of statutory duty. This is the public face, as it were, of organizational liability. Thus, the real addressee of liability, on an organizational model ought to be the state. Like the employer in vicarious liability or the firm in the case of product liability, the state created the risk in question and was, therefore, ultimately responsible when that risk materialised in harm. This is the underlying logic notwithstanding the introduction of a bystantine test of the circumstances in which the state should be held liable the legacy of which continues to bedevil the courts.[6] In Ladeur's terminology, organizational liability might be understood as a secondary normative remodelling of tort law that made it better equipped for a

3 In other words, quite apart from the codifications of product liability law, the development of the tort of negligence in the twentieth century can be understood in these terms. Brüggemeier (n 2).

4 Although these policy arguments gradually lost their vigour and, in the context of the EU and indeed ECHR, seem to be treated with more scrutiny see chapters III and IV.

5 Apart from being the legal system I am most familiar with, it is also a good example of a legal system which held on to the 'individualistic model' the longest, especially at a scholarly level see P Benson 'Misfeasance as an Organizing Normative Idea in Private Law' (2010) 60 *University of Toronto Law Journal* 731. For this reason, it is a good testing ground for our argument.

6 This refers to the whole debate as to the policy/operational distinction, which was supplemented *inter alia* with arguments about the statutory framework in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353, and continues to evolve.

society of (hierarchical) organizations.[7] However, while two distinct models of liability have developed, they tend to inadequately grasp the contemporary 'landscape of fact'.[8]

Today, in the context of EU law, while the hard and fast distinction between public and private is blurring, effacing even, the model of organizational liability is strained. It is strained because the organizational model of liability no longer corresponds to the societal knowledge base, which has migrated from organizations to networks. These networks, unlike in the society of organizations, cannot neatly divide into public and private spheres. Second, they have broken out of the frame of the territorial state and, it is argued, a form of liability law that takes the concept of network as its 'frame of reference' in a multilevel legal order is required. This line of reasoning will be pursued in chapters III and IV.

Thus, our main argument is that tort law cannot be separated from a more general transformation of society from a society of organizations to a society of networks. Notably, the 'network society' is also a society of risks. Both our understanding of networks and risks impact on the traditional role of tort law in establishing legal responsibility. A simple way to put the argument is that while the emergence of networks, whether private, public, or hybrids, disrupt the rules of imputation in tort law at the level of the duty of care, i.e. the protective scope of tort law, whereas risks make problematic the question of standard of care and the attribution of cause per the 'but for' test. Existing tort law, that is, twentieth century tort law is not yet adapted to deal with the emergent problems of the society of networks. Indeed, it might be argued that it should not 'overreach' in this way beyond its core of corrective justice into an overt, regulatory approach. These complex issues will be identified in chapter IV. However, before outlining this perspective we ought to contextualise our argument and present the theoretical framework which we will use to develop our argument.

In the following few pages, we intend to explain how we reached this atypical perspective before describing the content of the chapters of this thesis. Our preliminary observations can be presented in the form of a grid, which forms the entry-point to our argument:

---

[7] That is, a society of rational organization. We will develop the concept of secondary normative remodelling below in our theoretical framework section, section III.

[8] This phrase is taken from B Friel *Translations. Selected Plays* (Washington, The Catholic University of America Press, 1984) 418, 419. "But remember that words are signals, counters. They are not immortal. And it can happen - to use an image you'll understand - it can happen that a civilisation can be imprisoned in a linguistic contour which no longer matches the landscape of... fact."

Ladeur	**Tort Law**	**Model of Liability**	**Case-Law Examples**
Society of Individuals (19th century)	Individual Wrongdoing: moralistic	Individualistic, subjective fault.	*Winterbottom v Wright; Geddis v Bann Reservoir.*
Society of Organizations (20th century)	Strict Liability or stricter forms of liability (risk creation)	Organizational: objective responsibility; 'secondary liability'	*Anns v Merton LBC; Donoghue v Stevenson*
Society of Networks (21th century)	Liability for risk enhancement	Networks: 'horizontal liability'; failure to confer a benefit	*Francovich*? Private side? Liability for intermediary bodies? *PIP*

B. Contextualising Our Perspective in the General Discussion or why the Individual is not the centre of tort law?

Tort law is in many ways is a subject revitalised due to the processes of Europeanization and globalization of law. The process of Europeanization has provoked scholars of private law to once more focus on the question of legal evolution and the social embeddedness or otherwise of private law.[9] This shakes up a frankly dusty private law theory that for a long time has been in the grip of what White describes as 'neoconceptualism' – primarily, the seemingly intractable debate between legal economists and moral philosophers of tort law.[10] In the debate, stripped back to its most essential assumptions, moral philosophers build their model of tort

[9] N Jansen & R Michaels 'Private Law and the State: Comparative Perceptions and Historical Observations' in *Beyond the State: Rethinking Private Law* (Tübingen, Mohr Siebeck, 2008), 15; D Caruso 'The Missing View of the Cathedral: the Private Law Paradigm of European Integration' (1997) 3(1) *European Law Journal* 3. On embeddedness, classically, see K Polanyi *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, Beacon Press, 2001, orig. 1944).

[10] GE White *Tort Law in America: An Intellectual History* (New York, OUP, 1980).

law around the individual, his or her obligations in accordance with a theory of individual right and reciprocity, while legal economists focus on aggregative considerations largely arguing how tort law does or should correspond to economic efficiency. In this repect, they argue for tort law's function as a proxy for contract when transaction costs prevent *ex ante* exchange from taking place.[11]

In this respect, our starting point is quite distinct. To be sure, individual and aggregative concerns are germane to tort law, hence the impasse in scholarship. Our point can be summarised quickly: there is no law of torts *in abstracto*, which requires explanation. Instead, tort law is an unfolding social practice. Holmes argued:

> What has been said will explain the failure of all theories which consider the law only from its formal side; whether they attempt to deduce the corpus from *a priori* postulates, or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is, that the law always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.[12]

It is well-known that while Holmes pointed to the 'bricolage' of the common law, yet he went on to provide his own formal theory dividing tort law neatly in negligence, strict liability and intentional torts.[13] Nevertheless, he was at least cognisant of the importance of the diachronic dimension to law to furnish a good explanation of current law and its various apparent inconsistencies in objectives not to mention the 'real' social problems that legal changes were responding to. What the existing approaches in moral theory of tort law lack, it is submitted, is a focus on this practical dimension suggesting either that these questions are beyond the province of private law or that a pre-political private law has precedence over them.[14] Law and

---

[11] R Cooter & T Ulen *Law and Economics* 6th edn (Boston, Pearson, 2012).

[12] OW Holmes *The Common Law* (1881; reprint New York, Barnes & Noble, 2004), 36.

[13] White (n 10) focuses on Holmes's place in American legal scholarship as a bridge, as it were, between Langdellian formalism and legal realism. Holmes has been claimed by those who advocate naturalism, more recently, for his supposed classical realism. B Leiter 'Holmes, Nietzsche and Classical Realism' (2000) *U Texas School of Law Pub. Law Working Paper* No. 003. For 'bricolage' see N Simmonds 'Bluntness and Bricolage' in H Gross & R Harrison (eds) *Jurisprudence: Cambridge Essays* (Oxford, Clarendon Press, 1992) 1.

[14] H Dagan & A Dorfman 'The Justice of Private Law' (ssrn, 24 July 2015) make a valiant effort to incorporate such a perspective into tort law. Their argument is that the justice that tort law embodies is relational. To simplify,

economics (or economic analysis of law 'EAL'), on the other hand, offers an instrumental theory of private law suggesting it is merely a tool in a regulatory arsenal that might serve as in a complementary fashion to public regulation.[15] Whereas public regulation is one way to achieve regulatory objectives, private law is an institutional complement to these ends. In the radical form of this argument, private law, tort law in our case, is public law in disguise.[16] Yet, as the legal pluralists of tort law have shown neither theory seems to 'fit' tort law on their own terms.[17] Fit is achieved at the expense of some questionable stretching of existing doctrines[18], re-formulations that seem to ignore the actual history of their development[19], or through marginalising developments in the law[20] and, in particular, by ignoring the way courts justify their development.[21] Indeed, Lord Hoffmann describes this as a tension in tort law between

while formal equality is, often, a good proxy for substantive autonomy as self-determination (what they claim to be the normative ends of a liberal, as distinct from libertarian private law), it is not always so. As such, modification is required to ensure 'real' (material), as distinct from 'abstract' justice is done. Heavy reliance is placed on, at least implicitly, Durkheim's theory of social interdependence. While it is cited, the link between organic solidarity and private law is not explored overtly; although, it would appear that the notion of relational justice can be read as at least similar to solidarity.

15 S Shavell 'Strict Liability versus Negligence' (1985) 9(1) *The Journal of Legal Studies* 1.

16 L Green 'Tort Law as Public Law in Disguise'. (1959-60) 38 *Tex. L. Rev.* 257. Cafaggi has helpfully distinguished between 'functional equivalence' and 'functional complementarity', see F Cafaggi. 'A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities' in *The Institutional Framework of European Private Law* (OUP, 2006) 191. The radical version seems to blur into functional equivalence per his terminology. As we see it, G Teubner has described the dark side of functional equivalence when noting the problem of the over-socialization of law. See G Teubner 'After Legal Instrumentalism? Strategic Models of Post-Regulatory Law' in G Teubner (ed) *Dilemmas of Law in the Welfare State* (Berlin, de Gruyter, 1986) 299.

17 G Schwartz 'Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice' (1996-1997) 75 *Tex. L. Rev.* 1801. (1994-1995); G Schwartz 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994) 42 *UCLA L. Rev.* 377; C Robinette 'Can there be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine' (2004-2005) 43 *Brandeis L.J.* 369.

18 E Weinrib *The Idea of Private Law* (OUP, Oxford, 1995). His explanation of the doctrine of strict liability, e.g. vicarious liability, seems unconvincing. See Robinette's criticism in CJ Robinette 'Can there be a Unified Theory of Torts? A Pluaralist Suggestion from History and Doctrine' (2005) 43 *Brandies Law Journal* 369.

19 Ignoring how, for example, product liability law was theorised first in terms of loss spreading. Fleming James and how the intellectual drive here was legal realists on the progressive left who pointed to the real world inequalities that tort law reinforced. White (n 10).

20 Coleman's strategy in *Risk and Wrongs* regarding market share liability pushing it to the 'periphery' of tort law. J Coleman 'Justifiable Departures from Corrective Justice' in *Risks and Wrongs* (New York, CUP, 1992) 386-406.

21 W Lucy 'Method and Fit: Two Problems for Contemporary Philosophies of Tort Law' (2007) 52 *McGill L. J.* 605. In law and economics, the infamous 'surface froth' accusation, but Lucy is equally scathing of certain moral philosophical accounts of tort law that purport to take an 'internal point of view' but then largely ignore it or take the perspective of certain participants to the exclusion of others without a clear reason for doing so. As an addendum, it might be argued that in a practice such as tort law that has developed over time, the field is inevitably contested, such that it might be implausible to speak of a singular 'internal point of view': tort law is simply not that homogeneous or is no longer so.

individual wrongdoing and compensation as social justice that is not fully reconciled. This fits into a pluralist understanding of the tort system. It is worthy of extended quotation:[22]

> …the law of negligence attempts simultaneously to pursue two quite different objectives. The first is to attribute responsibility on the basis of moral fault and the second is to award compensation by way of redistribution of loss. Responsibility on the basis of moral fault requires that one should have regard to the actual physical and mental ability of the defendant as far as it is practically possible to do so. …But redistribution of loss is a matter of social justice which does not require any moral fault at all. It depends upon the proposition that it would be fairer for the loss to be allocated to the insurers or customers of the enterprise which caused it than to be borne by the victim alone. And since no moral fault is required, it does not matter that the defendant was doing his individual best. The question is simply whether his conduct fell below whatever standard the law prescribes for the protection of the plaintiff.[23]

That a prominent judge should point to the diverse aims of tort law is largely ignored by neoconceptualist theories of tort law favouring an approach that largely places a gloss on tort law like their scholistic antecedents. But, then, what do we propose in its stead? With a systems theory-inspired reading of tort law are we not culpable of exactly what we criticise, namely, placing yet another gloss on tort law – indeed, it might be argued one that is considerably more obscure and abstract than the valiant attempts of the systematisers? Our argument is that the 'added value', as it were, of a systems theory-informed approach is to better conceptualise the fact that tort law is a 'historical machine', which has developed layers of complexity in order to deal with changes in the knowledge base of society.[24] From this perpsective, the controversy that Lord Hoffmann touches on above is the evolutionary pressures placed on tort law by the development of the 'practical knowledge base' of society from one of individuals to one of organizations. Before examining this evolution more closely in chapters I and II, we will unpack our theoretical standpoint. The aim here, following Ladeur, is to re-locate the debate away from neoconceptualism towards a meta-theoretical approach that locates tort law in the more general evolution of society in modernity.[25] This meta-theory aims to provide a frame of

[22] G Williams 'The Aims of the Law of Tort' (1951) 4(1) *CLP* 137; today, this approach has been rendered more sophisticated by adopting the concept of pluralism.
[23] L Hoffmann 'Anthropomorphic Justice: The Reasonable Man and His Friends' (1995) 29 *Law Techr.* 127, 130.
[24] KH Ladeur 'The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law' Osgoode CLPE Research Paper 16/2011.
[25] 12.

reference through which tort law can be re-constructed and provides, it is submitted, an instructive lens through which to view contemporary tort law. The last theme will be developed in chapter IV. Thereby, we will enter upon *terra incognita*, an interpretation of tort law not primarily based on the individual.

C. Understanding Systems Theory as a 'Frame of Reference' rather than a Grand Theory

1. Ladeur's Debt to Luhmann

Thus, if the previous section hinted at what we are not doing, and stressed some of the problems with such accounts, we will in this section elaborate what we are proposing. We will situate our approach in a systems theory 'frame of reference'. Ladeur is concerned with internal differentiation and the relationship between the internal differentiation of law's and the knowledge base of society. To unpack his theoretical commitments, however, some central features of Luhmann's theory require explanation. Once explained, the theoretical commitments of this thesis should, hopefully, be clearer. At the outset, it should be noted that the systems theory approach does not offer a grand theory of society; although it is clearly a meta-theory, as it is a sociological theory about sociological theories. It is viewed as an *analytical frame of reference* rather than positing an explanation in the sense that the philosophers of tort law or EAL. We do not attempt to find 'fit' between our theory and the actual practices of a legal system as understood by participants, whether this means explaining particular doctrines as instantiations of deeper philosophical commitments (deontological or utilitarian) or drawing out the implicit philosophical foundations of the tort system.[26]

Systems theory is meant to be 'an observation of observations', second order observations of legal 'communications' rather than reconstructions of a question-begging internal point of

[26] Whether they succeed in convincing that the tort system instantiates efficiency or corrective justice remains an open question. Some of the difficulties in terms of the way these theories explain the tort system are analysed by Lucy (n 21).

view.[27] It is not an external point of view, properly speaking, but rather relies on existing legal theory but re-classifies these theories according to its second-order observation methodology. Legal theories become, in this light, self-descriptions and are relegated to the level of law's programmes, which will be explained presently.

A crucial methodological step in this approach is that the individual is re-located, no longer a sovereign will shaping laws to his ends, or a group of 'participants' within a practice; this image is gone replaced by law as a communicative system. To put this in other terms, Luhmann is not concerned with the individual or groups of individuals (including their purported 'internal point of view') but with communicative systems. As King and Thornhill state: '...Luhmann's primary unit of analysis is not the individual or groups of people but systems. And these systems consist not of people, but of communications.'[28] It should be stressed that Luhmann constructs a communicative theory that departs from methodological individualism. Instead of searching for the internal point of view of participants, systems theory examines societal communication. It is radically different to EAL or philosophy of private law in this respect. 'The individual' is not the centre of society and nor should she be the basic unit of social analysis. The individual, according to this approach is a constructed category, a fiction that can be subdivided into three distinct elements, namely, the living, psychic and social system.

> In this schema people, as we have seen, become living systems, which exist as bodies and bodily parts, and 'psychic systems', which produce meaning through consciousness. Society, on the other hand, consists of interdependent social systems which make sense of their environments through their communications. The two remain always quite separate, although dependent on and 'structurally coupled' to one another.[29]

The focus in Luhmann's theory is on how communicative systems interact with one another, which follows from his strict separation of psychic systems ('consciousness') from social

[27] Whose internal point of view is the obvious question, the judges, the legal scholar, and the problem of defining core from periphery, orthodox from heterodox.
[28] M King & C Thornhill *Nicklas Luhmann's Theory of Politics and Law* (Basingstoke, Macmillan & Palgrave, 2003) 2.
[29] 7.

communication.[30] This assumes, of course, that there are distinct systems of communication independent of 'psychic' systems. How the presence of multiple communicative systems are explained is in terms of modernity. The move from a stratificatory to a functionally differentiated society leads to the emergence of several communicative systems to solve coordination problems[31] leading to multiple interpretations of the same 'event'.[32] The emergence of societal subsystems is explained on the basis of the double contingency problem transposed from bilateral exchange to the level of societal communication. These communicative systems constitute society, as such, because society is defined in terms of communications. The communicative system defines its environment. We will return to this issue when we discuss the place of the legal system in this scheme below. Suffice it to say, functional in this context does not refer to purposive or goal-directed rationality, as it more commonly denotes, but in Luhmann's terminology it refers to the role of each differentiated communicative system, which produce meaning albeit different communicative systems produce different forms of meaning. Function obtaining to law, in this sense, denotes law's role in providing counterfactual normative expectations over time upholding these normative expectations in the face of experiential disappointment.[33] This is important for social 'learning' because normative counter-expectations help other systems 'anticipate', 'adjust' and 'plan'.[34] Radical separation of communication discourses assumes, additionally, interdependence. His examples of these various systems include law, politics, economy, art and so on. In terms of meaning, law produces normative expectations 'in the face of actions that contradict such expectations.'[35] Differentiation is explained by King and Thornhill thus:

---

[30] *ibid*. They stress that this does not downplay 'humanity' but describes how consciousness and communication are autonomous worlds of meaning. (citation omitted)

[31] The 'double contingency' problem.

[32] At this point, there is a certain echo of Weber. The various communicative systems can be thought of as structures that subsume events according to their distinct codes. These events are new information that is either subsumed into the structures, rendered 'redundant' or excluded. If they are subsumed, this subtle but disguised (act of subsumption) modifications constitute 'learning' for other social systems. See King & Thornhill (n 28) 49-50.

[33] 55-56. See, also, M Renner 'Death by Complexity: The Financial Crisis and the Crisis of Law in World Society' in P Kjaer, G Teubner & A Febbrajo (eds) *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford, OUP, 2011) 93. How the cognitivisation of law threatens law's normative role such that trust and reliance on law is no longer possible. This normative counter-expectation role for law is important for learning (coordinating systems) otherwise a crisis of normativity occurs.

[34] N Luhmann 'Operative Closure and Structural Coupling: the Differentiation of the Legal System' (1992) 13 *Cardozo L. Rev.* 1419. Note how he reconstructs the 'institution' of property in this way, and how it different meaning for legal, economic and political systems.

[35] King & Thornhill (n 28) 11.

> Systems are functional, therefore, in so far as they are able to organize communications and disseminate them in ways that they and other communicative systems may make use of them. In very general terms, function systems create order out of chaos: they give meaning to events which otherwise would be meaningless for society. Their functionality relates exclusively to communications and is in no way affected by the quality of their performance assessed on any other basis.[36]

From this account, it is clear that the function of the legal system is to provide society with normative expectations that help stabilise or 'de-complexify' society. While in common with classical legal postivists, Luhmann regards law as 'operationally closed' communication, his overall theoretical approach is different. He does not attempt to furnish an internally coherent system of rules, referrable to the will of a legislator or participants' point of view, but rather views law as 'a contingent and infintely alterable system of communication.'[37]Law does not exist in isolation from 'society' according to this view, rather it re-constructs its environment by law-internal means while maintaining its 'identity'.

> Closure is not to be confounded with impermeability to influence from outside: the system is permanently "irritated" from outside, i.e. by its natural unstructured environment or by other systems. But systems do not share a common reality - they have to and are only able to observe and operate on certain elements of reality - because their own "identity" does not have a stable objective character, they are a product of their own operations using certain distinctions and neglecting others.[38]

It is at this point that a distinction between code and programme is introduced. The code denotes the differentiation of a system from other systems into a functional system. It is akin to its 'DNA'. Programmes are more variable depending on 'contigent choices' and represent the cognitive openness of the law. 'One needs to appreciate the role of programmes for system operations and the possibility of programmes becoming highly complex in response to the

[36] 9. Although on the question of 'performance' see GP Calliess & M Renner 'From Soft Law to Hard Code: The Juridification of Global Governance' (ssrn, 20 July 2016).
[37] King & Thornhill (n 28) 38. This marks his approach out from philosophical treatises on tort law, incidentally, which argue a distinct 'justice' for private law embodied by tort law, and distinct from the concerns of public law or morality more generally.
[38] KH Ladeur 'The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law' EUI Working Paper LAW No. 99/3, 11.

growing complexity of the system's environment.'[39] Programming allows for the environment to re-enter the system but in a way that does not undermine its code.[40] The code law/non-law still determines how the environment, as constructed by the system itself, will be meaningfully understood.[41] However, programmes re-formulate information from law's environment and re-frame them to be consistent with law's binary code.[42] As King and Thornhill explain: 'Programmes exist as organizers of information which allow the application by the system of its binary code.'[43] Hence, in law if the binary code depends on the distinction between law/non-law, then, what counts as law is organized by the law's programmes which provide criteria of selectivity for law's code. Although there is no direct relationship between the legal system, in terms of input-output, and other systems, such as law and economy, the legal system 'experiences' irritation in its environment and this provokes internal reactions at the level of its programmes. Programmes relate to law's function by making the law a 'historical machine', allowing for law's binary code to be applied.[44] These programmes create 'redundancy', meaning the law can incorporate 'events' (information) into its 'structures', which allow for normative stabilization over time.[45] Luhmann locates the centre of these legal communications in courts; it is here that the programmes of legal comminications are primarily unfolded.[46]

[39] *ibid*, 25.

[40] Ladeur (n 38) 12. In his terms: 'The extreme and unstructured complexity is only accessible to the system if it develops a 'translation'-system of its own which does not correspond to its external reality.'

[41] A good example here might be the way law/non-law is applied to mental illness. The programme for dealing with mental illness is normally the insanity defence, which asks a fundamentally different question to that of health professionals focusing on legal capacity (programme) rather than on the question of treatment. Another perhaps more directly relevant distinction is the famous law v morality distinction in *Donoghue v Stevenson*, but these examples can be multiplied.

[42] Paraphrasing King & Thornhill (n 28) 59. Ladeur (n 38) 15, gives specificity: 'The system needs programmes, e.g. a legal act for its functioning which specifies its distinctions between law and non-law and allows for the generation of patterns, such as legal dogmatics.' (citation omitted)

[43] 23.

[44] Ladeur (n 38), 12. As Ladeur stresses, the law links to its own operations. It has no 'holistic view of reality.'

[45] King & Thornhill (n 28) 49. Another way to put this is that law's programmes enable the law to incorporate information but are also sufficiently open to allow for variation on the basis of new information. Standards such as reasonableness or good faith allow for this balance. However, this is not a precise or clear process.

[46] This would seem commonplace to common lawyers. However, given the tradition of codification in civil law countries, this is a novel approach.

2. Ladeur's Models of Modernity – Programmes and Paradigms

Thus, the law as a distinct communicative system with its own 'internal complexity' (internal differentiation) emerges with modernity. This is the level at which Ladeur's analysis becomes germane. The fundamental break here in modernity is the introduction of the *liberal law*, which is the law of a 'society of individuals'.[47] Liberal law, with its separation of the right and the good, is a law-internal programme that reflects the functional differentiation of society.[48] This is the case, first, because what is legally valid (law/non-law) is determined entirely by the legal system itself, rather than by appeal to an extra-legal source meaning the law, itself, is functionally differentiated from other communicative systems.[49] In other words, no *finis ultimus* outside legal communication is a source of law, rather the law simply links operation to operation.[50] Second, the liberal law's programmes (subjective right; private will) supports 'space' for heterarchical communicative systems and, in addition, relies on these systems to enrich its programmes (internal differentiation). Thus, with Luhmann the basic insight follows the claim that while modern law is operationally closed, it is cognitively open. Ladeur's paradigms of modernity attempt to explain the law's internal differentiation going beyond Luhmann's rather more limited examination of the internal dimension to law, and its relationship to its epistemic knowledge base.[51] The relationship between cognitive assumptions of normality and legal norms is close and complicated. To understand Ladeur's approach this is a key (epistemological) methodological assumption. We will expand on this distinction presently.

Within the legal system, programmes develop patterns as a result of 'events' and these programmes include what Ladeur refers to as 'legal dogmatics'. The liberal law is the law for

---

47 Ladeur (n 24) 12, citing J Appleby *The Relentless Revolution: A History of Capitalism* (New York, WW Norton & Co., 2010).

48 11: 'These rules are decoupled from substantive values, and allow for the co-ordination among agents who pursue their self-chosen goals.'

49 What Tuori refers to as 'the essential positivity of modern law'. K Tuori 'Fundamental Rights Principles: Disciplining the Instrumentalism of Policies' in AJ Menéndez & EO Eriksen (eds) *Constitutional Rights through Discourse: On Robert Alexy's Legal Theory – European and Theoretical Perspectives* Arena Report No 9/2004, 55.

50 Of course, *pace* Tuori, this does not mean that the legal system does not develop, internally, dogmatic concepts of fundamental rights. Tuori locates these at the level of deep legal culture to be contrasted with surface level law.

51 Whereas Luhmann was apt to show how law is a distinct system, he was less detailed regarding his examination of the content of law's programmes.

a heterarchical society, without a stable concept of collective order imposed from above or by tradition.[52] Instead, central 'institutions' such as the subjective right support what Ladeur refers to the relational rationality of the society of individuals in which the 'play of ideas' lead to the emergence of innovation.[53] In other words, the non-instrumental form of the subjective right which refers to 'relationships in terms of rules' buttresses decentralised cooperation by allowing for future-oriented planning of relations.[54] The subjective right provies a normative structure for decentralised cooperation because its *formal* equality allows for the forming of 'stable patterns of relationships between legal actors'.[55] It is a background 'architecture' that allows for cooperation outside the legal system understood as state law.[56] Another important but subsidiary 'institution' in this respect is 'classical' tort law, that is, tort law limited in scope by a strict distinction between misfeasance and nonfeasance.[57] There is a strong focus in classical tort law on individual active conduct; causation of harm alone will not ground legal responsibility. Tortious responsibility requires fault, at its most perpicacious in civil law as imputed to the party as an excess of the will.[58] The legal 'institution' of the subjective right and the misfeasance/nonfeasance concepts in tort law do not impose thick moralistic duties on

[52] This insight appears to be the main point of departure for his criticism of discourse ethics because the latter, Ladeur argues, attempts to construct a notion of the collective good on the basis of stable rules that can be universalized. Because liberal law assumes an 'acentric' social order, linking operations to operations rather than a concept of the good, this precludes access to objective values. As he notes at p. 14, Ladeur (n 24), 'Such a system cannot work on unstructured values or moral discriminations.'

[53] Ladeur cites Appleby (n 47), 240 for this phrase.

[54] Ladeur (n 24), 11. He borrows this terminology from M Oakeshott *On Human Conduct* (Oxford, Clarendon Press, 2003) 140 (Ladeur cites the 1975 edition, but the pagination is identical). There is an analogy here in terms of planning with I Macneil's notion of discreteness and presentiation providing for binding the future in his theory of classical contract law see I Macneil (D Campbell ed.) *The Relational Theory of Contract: Selected Works of Ian Macneil* (London, Sweet & Maxwell, 2001). With Macneil, Ladeur shares the idea that the egoistic man of the classical legal order is not an accurate representation of contracting. However, Ladeur seems to argue it is an important institution that helps solve coordination problems.

[55] Ladeur (n 24) 21.

[56] The term legal system is employed here to mean state law. In some systems theory scholarship, legal system is meant to denote what is ordinarily called the legal system and law-like patterns outside the legal system. Instead, when we use legal system we refer to state law (courts and legislature made law). For the totality of legal communications, we use 'legal communications'.

[57] The term that Ladeur (n 24), 23, actually uses is responsibility based on the harm 'in the stricter sense as opposed to negative externalities which cannot be regarded as restricting the subjective rights of third persons'. What I think he means here is the distinction between negligence for direct injury versus indirect injury as discussed by Brüggemeier (n 2). This will be treated in chapters I and II. We will defer comment until then.

[58] F Ewald *L'Etat Providence* (Paris, Grasset, 1986).

parties to care for one another.[59] But what they do is allow for horizontal cooperation without impediments based on feudal institutions or on the basis of state-reinforced customs.[60]

Ladeur, in addition, views decentralized cooperation as giving rise to 'conventions' (read, alternatively: cognitive assumptions of normality, interpersonal standards) that can, then, be incorporated into the law and normatively coded. Hence, while liberal law provides 'space' for decentralized cooperation, the latter produces social conventions that, then, can be incorporated into law in a 'feedback loop'.[61] In tort law, for example, the standard of care fulfils this function. What is normal and what is reasonable behaviour are closely linked.[62] In this light, the collective order is constructed 'bottom-up' out of 'cognitive assumptions of normality.'[63] This architecture, Ladeur argues, limits 'the centralisation of legal material' by which he means allows for the development of legal transactions outside the legal system; for example, private contracting that create complex structures of cooperation.[64] This inverts the classical account of law, whereby legal norms are deductively applied to facts.[65] In Ladeur's account, by contrast, practical knowledge informs the development of legal rules not the other way around.[66] This deductive modelling of the law, classical legal formalism, conceals the legal system's dependence on its practical, social knowledge base. In this regard, Ladeur refers to a 'reverse process of norm generation', with the construction of norms dependent on practices

[59] The focus on subjective right is a very 'continental' approach to common lawyers: G Samuel 'Le Droit Subjectif and English Law' (1987) 46(2) *CLJ* 264. However, notwithstanding the absence of a subjective right in English law, there is overlapping protection and philosophical orientation. In other words, it is plausible to refer to classical contract and tort law in liberal terminology. For contract PS Atiyah *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979); for tort law, White (n 10).

[60] P Kjaer 'Post-Hegelian Networks: Comments on the Chapter by Simon Deakin' in M Amstutz & G Teubner (eds) *Networks: Legal Issues of Multi-lateral Co-operation* (Oxford, Hart Publishing, 2009) explains well the transition from feudalism to modernity.

[61] Ladeur (n 24) 13 alternatively uses the phrase 'factual normality' to denote the dependence of the legal norm on social conventions about what is good, reasonable etc as a basis for constructing collective order. Although he is quick to caution that the relationship is one of 'oscillation' or of feedback between norms and 'fact'. For example:

'This does not mean that normal knowledge is just blindly introduced into the legal system. On the contrary, the legal system can, and has to, observe whether these practical rules are sufficient, reliable, have to be modified upon the basis of new experience, etc. Normality and normativity are closely linked, and this link is continuously observed, revised and re-modelled.' (18)

[62] B McMahon & W Binchy *The Law of Torts* 4th edn (Dublin, Bloomsbury 2013).

[63] Ladeur (n 24) 6.

[64] Indeed, it was such complex contracting out of which the modern firm developed before it gained legal personality e.g. *Salomon v Salomon & Co Ltd* [1896] UKHL 1.

[65] And this is probably more radical than M Oakeshott's more subtle account of *lex* as well in which he dismisses deductivism in favour of analogical reasoning as a process of amplifying the *meaning* of *lex*. Oakeshott (n 54) 130-41.

[66] To be precise, there is an interaction, a 'feedback loop' between norms and normality.

beyond the law rather than by means of the more classical understanding of norms applied to facts that the deductive model supplies.[67] It should be clear that this is not a simple 'input' model, however, because the law reconstructs these 'events' or data internally through its programmes consistent with law's autonomy or operative closure.[68] 'Open norms'[69] ('bridging concepts') such as reasonableness or good faith[70] assist in linking law's programmes to shared 'cognitive assumptions of normality'; in other words, the law is linked to the decentralized 'collective order of modernity'.[71] The task of chapter I is to give shape to the programmes of the liberal law, which is situated in a society of individuals. The liberal law gives rise to a particular type of attribution-imputation in tort law.

For as long as this practical knowledge can be derived from distributed 'experience', the liberal law's subjective right – the society of 'individuals' – is an adequate normative modelling of society.[72] This practical knowledge base is 'dynamic' meaning that the law, a normative stabilization of this knowledge base, will be impacted by changes in this knowledge base. However, as soon as the knowledge base fragments with the rise of the 'society of organizations', this stable framework of *rules of just* (individual) *conduct* is undermined.[73] The

---

[67] Ladeur (n 24) 5 referring to administrative law, but this is a general point.

[68] KH Ladeur 'From Universalistic Law to the Law of Uncertainty: On the Decay of the Legal Order's "Totalizing Teleology" as Treated in the Methodological Discussion and its Critique from the Left' (2011) 12(1) *German Law Journal* 525, 539: Legal norms and their 'application' in decisions is viewed somewhat like a feedback loop, whereby state law norms and the non-state practical knowledge base are 'reciprocally penetrable.' He speaks of 'order from fluctuations.'

[69] I think this phrase is in common usage. We find an instructive analysis in S Taekema 'Private Law as an Open Legal Order: Understanding Contract and Tort as Interactional Law' (2014) 43(3) *Netherlands J. of Legal Philosophy* 140. We take it that Taekema argues (or at least seems to argue) here against legal positivism building on Fuller's ideas about human interaction. This is not our task.

[70] Although there is no general doctrine of good faith in the English common law, many scholars maintain that casuistic re-working of classical law approaches this concept e.g. the concept of reasonableness, especially 'the reasonable expectations of honest men' see R Brownsword *Contract Law: Themes for the Twenty-First Century* 2nd edn (Oxford, OUP, 2006), and H Collins 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *CLP* 297; for the phrase 'reasonable expectations of honest men' see J Steyn 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *LQR* 433.

[71] Ladeur (n 24) 6.

[72] Although one cannot speak of a subjective right, strictly speaking, in the common law the systematic and deductive model came to prominence in the mid- to late- nineteenth century, on both sides of the Atlantic. The functional equivalent for the subjective right in Anglo-American law is an objective law organised around the misfeasance/nonfeasance distinction in tort law and the 'will theory' in contract. On the relationship between subjective right and English law see G Samuel (n 59); for prominent systematic approaches to law in the USA and English respectively see discussion of Langdell, and Pollock in Roseberg.

[73] FA Hayek *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Cornwall, Routledge, 1982; 1998 reprint) chs 8 & 10 esp. His normative theory for what a legal order should comprise provides a good analogy with the liberal law of the society of individuals. Oakeshott (n 54) 230-41, his account of *lex* is more precise.

society of organizations is a development in the knowledge base of society, breaking the symmetry between the liberal legal system's individualism and factual normality. In Ladeur's words a 'rupture' occurs, which he defines in these terms:

> A distinction has to be made between the continuous flow of information which emerges from the permanent variation within societal knowledge basis, and the momentary suspension of normality by the rise of new factual paradigms which induce a kind of "break of symmetry" in the inter-relationship between technical normal knowledge and the feedback loops which have to be designed within the legal network of networks.[74]

The legal system, then, receiving feedback from society experiences a 'rupture' caused by a change of paradigm in the practical knowledge base of society, develops its internal programmes. This constitutes a second normative re-modelling, in order to adjust to the new knowledge paradigm such that the legal system can continue to fulfil its function. The basic shift from the society of individuals to the society of organizations is the change in how social 'reality' or 'normality' is perceived. In the common law, at least, Holmes is an important thinker in this regard. However, as Kennedy has noted the main intellectual impetus comes from France and, as such, we will examine Duguit, Saleilles and Josserand in chapter II as illustrative. There is a move from a view of reality that is premised on the idea of chance[75], in which case the loss lies where it falls, or if a man-mediated accidents, fault is an excess of the will, to one based on accidents as statistical regularities, probabilities to be calculated and losses to be socialised, most clearly represented in the rise of insurance.[76] The injuries that occur to individuals remain a question of misfortune but are rendered statistically predictable and, therefore, the subject of prevention *ex ante* or deterrence and loss spreading *ex post*.[77] 'Society' comes to be viewed, in other words, as an aggregate and the question becomes one of risks and their fair distribution. Especially with the rise of insurance, the emphasis shifts

---

[74] Ladeur (n 24) 21.

[75] We will elaborate on this in chapter II. Suffice it to say, it bears a residuum of the Christian world view.

[76] This might, as an aside, cast doubt on Honoré's outcome responsibility relation to tort law as an adequate approach to twentieth century tort law, never mind contemporary tort law. His basic argument is that we should bear the risk of our bad luck, as well as benefit from the gains that accrue to us should our risk taking not result in harm to another. This approach seems at odds with the welfare state and an approach to tort law that aims at compensation/risk spreading. See T Honoré *Responsibility and Fault* (Oxford, Hart Publishing, 2002).

[77] F Ewald 'Philosophie Politique du Principe de Précaution' in F Ewald, C Gollier & N de Sadeleer *Le Principe de Précaution* 2nd edn (Paris, PUF, 2008).

from fault to risks, their distribution, and the justification for such a distribution. This is what Ewald means when he refers to risks as a 'mal à répartir'.[78] This impacts profoundly on tort law, because it provides a basis from which to argue beyond individuals about who the best risk avoider *is* and *why*. Different factual worlds makes for different normative conclusions regarding *is* and *why*. The emergence of risk calculation, of course, led to what Weber calls rationalization in the private sector into firms and public bureaucracy. These emerging structures became subjects of law, although not legal subjects in the earlier, liberal sense. Artifical or legal personality concealed, somewhat, the way in which risk calculations succeeded rules of just conduct with regard to organizations. Thus, it is the hierarchical organization to which decision-making is attributed in the secondary normative re-modelling. But we must remember that it is not the organization, X or Y *per se*, that is the target but the group to which the organization belongs. In legal doctrine, this is both explicitly the case (product liability) and implicitly achieved (the doctrine of vicarious liability). Both examples will be explored in chapter II. Suffice it to say, the aim was internalization of costs in industries. However, the model of organizational liability that developed was also applied, with modifications, to the state.[79] We will denote this *normative* model of liability by using the term *vertical* vicarious liability, albeit not without the possibility of some confusion.[80] In an attempt to avoid confusion, it is important to clarify that we do not mean the common law doctrine of vicarious liability but rather the tendency in the law to look beyond immediate actors to the groups, their activities, in which their acts are ensconced. To put this otherwise, the emergence of collective or corporative structures irritates the law and how normality is understood. As Ladeur states:

> The knowledge base is increasingly processed and channelled by representative groups, organisations and a homogeneous technical infrastructure beyond the open processes of self-coordination among individuals and small organisations as used to be the case in the case of the liberal order.[81]

[78] F Ewald (n 58) 24.
[79] G Brüggemeier (n 2) pp. 150-56. He makes a strong and persuasive argument to this end.
[80] G Teubner (n 1) distinguishes between vertical and horizontal vicarious liability.
[81] Ladeur (n 24) 57-58.

Linking normativity and facts is more 'proceduralized', with the legal system coordinating groups rather than individuals. There is, thus, an emphasis on 'the harmonisation of competing interests' in an interdependent society.[82] If the society of individuals developed rules of just conduct, the society of organizations developed rules of just conflict. Thus, Ladeur argues that in the society of organizations, the legal system developed 'a set of "rules of conflict" for the management and co-ordination of different types of rules (individualistic v collective) ...'[83] In his words, '[n]ew types of rules and judgments evolve which try to balance the liberal individualistic rationality against the new collective logic.'[84] The regulation of individual conduct, in other words legal communications, increasingly occurred outside the frame of the state legal system, the state remained the primary institution of 'positive integration'.[85]

In tort law terms, at the level of the law's programmes, this meant that individual litigants were understood as representatives of conflicting groups within society. This moulded the law of negligence and strict liability building on earlier models of corrective justice towards a model of what has been described as weak commutative justice.[86] Thus, stricter forms of liability emerge that decouple legal responsibility from fault in the classical sense. The language of the law may remain rooted in concepts such as fault, but fault is redefined as running an unreasonable risk as distinct from directly and unreasonably acting in the world.[87] And faulty conduct or acts is replaced by 'fault' in activities, whether production processes or in the imprudent hiring of subordinates who are not sufficiently controlled. In both cases, the internalization of costs within an organization is what matters and the task of the courts is to determine which risks are unreasonable and which are reasonable and must fall on the

---

[82] *ibid*.

[83] KH Ladeur 'The Social Epistemology of Risk Observation and Management – Modern Law and the Transformation of its Cognitive Infrastructure' in HW Micklitz & T Tridimas (eds) *Risk and EU Law* (Cheltenham, Elgar, 2015) 49, 57.

[84] *ibid*.

[85] Kjaer (n 60) Thus, for Kjaer the *apogée* of the welfare state can be referred to as Hegelian.

[86] C Schmid 'The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell' in C Joerges & T Ralli (eds) 'European Constitutionalism without Private Law, Private Law without Democracy' ARENA Report No 3/11 RECON Report No 14, 17.

[87] Although disputed, it is sufficiently established that the transition from the nineteenth to the twentieth century involved a transition from the preeminence of direct to indirect injuries. The latter led to the need for the development of the 'control mechanisms' of foreseeability and proximity in tandem, as Fleming calls them. See J Fleming *The Law of Torts* 6th edn (Sydney, The Law Book Co. Ltd, 1983); Brüggemeier (n 2), 93-115. For the idea that the move from 19th century to 20th century law involved a shift from subjective to objective fault see D Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford, OUP, 2001). It might be a question of emphasis or degree, rather than a transformation of kind.

'victim'.[88] This involves court in the complex task of determining reasonable risk taking relying on an economic and sociological (aggregative) perspective but ultimately with a view to making a normative judgment.[89] This presupposes an epistemology in which risks are calcuable, collective, and injuries can be converted into a monetary value.[90] The nub is that accidents are considered as ordinary instances of social interdependence, not acts of nature or the individual will.[91] Ewald traces this changed view back, at least in France, to the rise of factory accidents in mid-19th century France culminating in the law of 9 April 1898, which led to the internalization of ordinary costs of activities within firms.[92] As we will see, the theorists of this approach were Saleilles and Josserand, who attempted to re-fashion French law in light of the 'machine age'. This move to stricter forms of liability, meaning liability on the basis of risk creation which locates responsibility in hierarchies, such as firms, has parallels in other leading jurisdictions.[93] It is not only by means of legislation, but by means of reinterpreting judge-made law that transformations occurred to reflect this changing understanding of accidents, their causes and the best way to deal with their consequences. This transformation from the first modern tort law to the second is treated in chapters I and II respectively. Kennedy's concept of globalization of the law finds neat expression in this transformation. The change from legal formalism to the social, reflecting a different understanding of the causes of

88 As Ewald remarks in *L'Etat Providence*, the victim as a general term for those who suffer accidents only makes sense when the world is viewed as interdependent. He is the victim of the inevitable accidents of industrial society rather than an unfortunate victim of *fortuna* or the excess of individual will. Indeed, accidents has a similar situativity i.e. before they were 'wrongs', now accidents meaning a secularization of tort law.

89 Renner (n 33); on the interaction between custom and legal norm see, inter alia, Brüggemeier (n 2) 65-70.

90 F Ewald 'Insurance and Risk' in G Burchill, C Gordon & P Miller (eds) *Studies in Governmentality* (Chicago, University of Chicago Press, 1991) 197. The latter, Ewald refers to injuries as 'a capital'. Full reparation is not required by the paradigm of insurance, although it may be achieved. Interesting here, for a philosophic and economic analysis is G Calabresi 'Torts – the Law of the Mixed Society'. (1977-1978) 56 *Tex. L. Rev.* 519.

91 The concept of 'interdependence' is noted by D Kennedy 'Three Globalizations of Law and Legal Thought: 1850-2000' in D Trubek & A Santos (eds) *The New Law and Economic Development. A Critical Appraisal* (Cambridge, CUP, 2006) 63 as animating the *langue* of the social, which we argue corresponds to Ladeur's 'society of organizations'. Philosophically speaking, Durkheim's definition of his science of morals, following Comte, is a strong exposition of this tendency whereby morals are defined as observable social facts, rather than by means of an *a priori* theory.

92 F Ewald discusses the importance of this law in F Ewald (S Utz trans) 'The Return of Descartes Malicious Daemon: An Outline of the Philosophy of Precaution' in T Baker & J Simon (eds) *Embracing Risk: The Changing Culture of Insurance and Responsibility* (Chicago, Univerisity of Chicago Press, 2002) 273, 277. 'Thus, the result of the new law was to make the firm legally "responsible" not only for accidents arising from personal imprudence or negligence, but also for those arising even when the firm has taken all precautions to avoid them, and those for which the worker is the cause (absent tortious intent on the worker's part).'

93 G Brüggemeier 'Risk and Strict Liability: The distinct examples of Germany, the US and Russia' EUI Working Paper Law 2012/29. He draws parallels between Germany, the US and Russia in this respect. Similar social legislation is found in the UK.

accidents in the context of tort law, might be considered to reflect the way these changes were intellectualised by their leading proponents.[94]

However, it should be noted *pace* Ladeur that the aim is not to supplant the liberal order with a different model but to construct a functional equivalent model to that of the nineteenth century.[95] The aim remains that of facilitating decentralized coordination. To this end, the re-modelling of normative rules to the 'patterns' of the practical knowledge base is required. This pattern is now preeminently organizational and, as such, legal programmes evolve to facilitate coordination between organizations, and between organizations and 'individuals'.

That is not to say such secondary normative re-modelling was not achieved without difficulty. We might consider the central preoccupation of Luhmann's concerning the distinction between contingent programming and purposive programming in this light. The former refers to the 'if/then' structuring of legal reasoning, whereas the latter replace 'if/then' with open-ended objectives – ends to be achieved. The contingent programming of the law is historicised by Ladeur, who considers it corresponds, more or less, to liberal law. In this thesis, we follow this approch. Luhmann contends that the latter, purposive programming, can potentially undermine law's operative closure leading to 'de-differentiation' or 'cognitivisation'. With the emergence of 'world society', these tendencies are magnified.[96] While it is surely correct that once one replaces rules of conduct with end-dependent rules there is a blurring between law and non-law, it is also the case that the organizational paradigm of the twentieth century remained strongly normative. We will examine the way in which factual normality was integrated into legal reasoning in chapter II.

In chapters III and IV, we examine 'the society of networks'. There is, as yet, no law of the network society albeit certain scholars find network-like thinking in some judgments,[97] while

[94] At the level of 'legal consciousness', as it were.
[95] *ibid*. For example, it is often noted that legal realists in the USA, who can be fitted well into the social, were 'fixers', progressives who wanted to revise the law in the light of social science responding to the 'felt necessities of the time' rather than 'breakers', who want to expose the internal contradictions in the law, something that incidentally distinguishes them from later trends in American scholarship such as Critical legal theory. A possible harbinger for the later approach is R Demogue. See HW Micklitz 'The Legal Subject, Social Class and Identity-Based Rights' in L Azoulai, S Barbou des Places & E Pataut *Constructing the Person in EU Law: Rights, Roles, Identities* (Portland Oregon, Hart Publishing, 2016) 285.
[96] N Luhmann 'The World Society as a Social System' (1982) 8(3) *International Journal of General Systems* 131.
[97] J Adams & R Brownsword 'Privity and the Concept of a Network Contract' (1990) 10 *Legal Studies* 12.

others argue, normatively, that the law should be orientated towards the society of networks.[98] However, accepting that we are entering a network society corresponds to another important thesis. We have left the stable frame of the territorial state.[99] Ladeur, for example, views legal communications *today* as primarily outside the state's frame.[100] The question, as such, assuming that positive integration can no longer be achieved, how the law can continue to normatively regulate in a post-Hegelian 'state'.[101] In the European Union, Ladeur conceptualizes its multilevel structure as a 'network of networks' meaning a matrix that attempts to coordinate 'society', a social order understood in heterarchical terms. Ladeur applies this understanding *mutatis mutandis* to its legal order.[102] The role of court-based law *viz* other sources of law is radicalised in the network society, with court made law becoming peripheral to legal communication outside the state. The role of courts, then, becomes one of coordination not of groups, but of socially fragmented discourses. We concur with Kjaer that the governance networks are a paradigmatic focus for colliding discourses insofar as there is a real danger that these 'interfaces' of discourses may in the end result in the crowding out of particular discourses by others in the definition of risks or, indeed, the enforcement of putative balances between consumer welfare and market access.[103] In our perspective, we focus on secondary liability in terms of the relationship between 'secondary regulation' in the context of primary self-regulation in the so-called New Approach. The Court is charged in this perspective with interrupting 'negative' patterns in networks, unblocking their dependence on particular discourses that have 'external effects' for society. This will be explored in chapters III and IV. Its upshot is that the failure to create 'collision rules' results in the cognitivization

---

98 G Teubner 'Coincidentia Oppositorum: *Hybrid Networks Beyond Contract and Organisation*' in Amstutz & Teubner (n 60), 3.

99 G Teubner 'Breaking Frames: Economic Globalisation and the Emergence of Lex Mercatoria' (2002) 5 *European Journal of Social Theory* 199.

100 Like Teubner, Ladeur seems to hold the broken frame thesis with respect to 'postmodern' society.

101 KH Ladeur 'The State in International Law' in C Joerges & J Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Portland Or., Hart Publishing, 2010), 397.

102 *ibid*. Also, in this direction see M Amstutz 'In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning' (2005) 11(6) *European Law Journal* 766.

103 P Kjaer 'The Multiplicity of Normative Orders in World Society' in P Kjaer *Constitutionalism in the Global Realm: a Sociological Approach* (London & New York, Routledge, 2014) 41-62. He argues that Luhmann's world society thesis is under-determined. What is required is an examination of governance structures 'defined as frameworks of transfer located in between normative orders which are characterised by legal and organisational heterarchies ...' (41). It is in these interfaces between normative orders (*Sinnwelten*, we think discourses in Teubnerian terms) that analysis should be directed. The governance structures are referred to as 'autonomous Eigenstructures' or, alternatively, in terms of their 'nomos', at p. 46.

of law.[104] Cognitivization refers to the process whereby law becomes dependent on knowledge from other social systems, most notably, the economic system rather than fulfilling its traditional stablizing function of providing normative counter-expectations. This is often exemplified in rules of legal self-restraint.[105] We argue that constitutionalization of private law can offer a potential path to re-normativize private law, tort law in our case, beyond the frame of reference of the nation state. However, constitutionalization of private law understood in terms other than total constitutionalization.[106]

Notwithstanding the potential constitutionalization holds, in the emerging paradigm of the society of networks, the risk of cognitivization is a real one. An example of this process is, surely, the contemporary way in which laws are framed in terms of indeterminate objectives, such as the aim of achieving 'a high level of consumer protection' or 'a high level of environmental protection' dependent on risk determinations from other systems, without a clear linkage to law-internal normative standards such as reasonableness that are essentially backward-looking standards. By contrast, these backward-looking standards enable the law to subsume or make 'redundant' 'events' while allowing for variation depending on new factual contingencies. This allows for stable normative expectations such that the law achieves its stabilizing function. To give a concrete example, the reasonableness standard in negligence law can be 'applied' to social practices to determine their lawfulness, using legal dogmatics to attribute legal rights and duties. These legal dogmatics, law's programmes, can by applying standards such as whether a reasonable man would have done what the defendant did in the circumstances link to a developed body of law, giving rise to certainty with regard to what one can normatively expect, while being sufficiently open (cognitively) to allow for a degree of variation. In the society of organizations, one can *attribute* factual cause and *impute* legal cause to groups.

However, in the network society this stable frame of reference is unpicked. There are two main reasons why this is the case. First, particular network structures that emergence in the 'society of networks' fall somewhere between market and hierarchy. They are neither properly so

[104] *eg* Renner (n 33). Kjaer (n 102), the danger that certain discourses may become 'hegemonic' even re-defining law's programmes in its light.
[105] It need not be, of course. The main point is that an 'over-socialisation' the law, pace Teubner, occurs, see G Teubner (n 16). The normative dimension of the law is, therefore, diminished.
[106] The argument from total constitutionalization underestimates the way in which, in the EU for example, the legal order does not correspond to a federal state, and the role of the CJEU within the legal order.

called. As such, they are emergent structures that appear neither to fit the law internal individual or organizational programmes of the previous paradigms. This can be seen on both sides of the increasingly questioned public/private divide. For example, private firms organise according to a dense horizontal web of relations raising legal questions of attribution, imputation and of facilitating cooperation. Supply chains and construction contracts are considered exemplary.[107] Second, on the 'public' side it is no longer sufficient to equate public government with bureaucracy.[108]Goverance, a more encompassing term, takes account of the transformed role of public actors and, more importantly, private actors within an 'overall governance architecture' that uses private actors to achieve public interest ends.[109] For a tort lawyer, these issues raise vexing questions of attribution and imputation when these networks result in injuries, physical, property or economic, to third parties.[110] The heterarchical structure of the knowledge base in the network society renders the 'tools' of attribution and imputation difficult to apply. There is a multiplication of secondary actors, but these actors do not fit into an orthodox model of vertical vicarious liability without difficulty. Because the relationship between actors no longer fits the model of vertical vicarious liability, it does not seem fair, just or reasonable to impute responsibility on an organizational model.[111] At least not according to that framework. Thus, a concept of horizontal vicarious liability has been proposed. It remains to be seen, how this concept can take on legal shape.[112] In chapter IV, we argue that we can observe tentative signs that indicate that it may be emerging.

However, the question can be approached from a second angle. It is not simply a question of reasonable imputation meaning finding a criteria, e.g. subjective or objective fault/strict liability (adjuding between X and Y, on whose shoulders is it 'fairer' to place responsibility), on which responsibility rests. The network society raises more fundamental questions of

---

[107] Amztutz & Teubner (n 59).

[108] This is how Chalmers frames the question. D Chalmers 'The Government and Citizenship of Self-Regulation' in F Cafaggi (ed) *Reframing Self-Regulation in European Private Law* (The Netherlands, Wolter Kluwer, 2006), 161.

[109] *ibid.*

[110] Obviously, not only for tort lawyers. They vex corporate and contract lawyers equally, if not more so. And, of course, the public governance issue is usually discussed in public law terms i.e. how to control administrative actors, to what extent can administrative law be applied to private parties and so on. These questions appear both in national law and at the European level.

[111] J Stapleton 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 *LQR* 301. 'Peripheral Parties' can be considered in this light. Whereas Stapleton was concerned with the distortion of the bilateral structure of tort law, we suggest that what is really at issue is the multiplication of actors at the onset of 'overall governance architecture', which fits more adequately into a network paradigm.

[112] Teubner (n 1).

attribution. To be precise, the very notion of cause that is central in tort law, a necessary but not sufficient condition of liabiltiy, is problematized. The network society is also a 'risk society'. In the risk society determining appropriate levels of risk itself becomes uncertain. It is uncertain because the ordinary tools of cost-benefit analysis prove inadequate. This is because of our changing understanding of the epistemology of risk.[113] In Ladeur's terms, the knowledge base has 'ruptured'.

Thus, precaution replaces prevention as the central way we understand risk taking, especially in Europe. The methodology of risk management is problematized. Risk has become, in short, reflexive.[114] The way in which precaution understands risk taking is largely based on a proceduralist model of input legitimacy. Scientific knowledge, while no doubt important, has become questioned and scholarship has emerged that notes the problem of 'transscience'. This is, in essence, a recognition that scientific knowledge cannot answer questions of value in a world in which value is contested and fragmented. Schepel has noted how this new frame of reference places pressures on tort law, because absent a clear yardstick as to what constitutes reasonable risk taking, tort law's tools of analysis, reasonableness and cause especially, are inapt. In the context of governance, tort law is required to examine the degree to which public authorities or non-public bodies fulfilling (quasi-)public functions have taken into due consideration all affected parties whose lives are subjected to risk management. He urges courts to make private law public, as it were, by taking a proceduralist turn. This can be accompanied by a rights-based reorientation of EU law which affords *prima facie* rights to litigants. But its aims are far broader than simply a question of individual procedural rights, it is a question not of individuals, at least primarily, but of colliding communications.

In such a perspective, a tort law for the network society is meant to fulfil *a* role in managing colliding discourses, different ways to understand risk imposition.[115] The individual of classical tort law, is now a conduit, her rights and duties, a means through which a collisions discourse can be channelled. Micklitz has described the changing role of the individual in law by

113 U Beck (M Ritter, trans) *Risk Society: Towards a New Modernity* (London, Sage Publications, 1992) esp. part 1; Ewald (n 77); Ewald (n 92).
114 Beck (n 113).
115 Obviously, this collisions idea extends far beyond tort law but herein we attempt to focus on tort law specifically.

reference to Demogue, her role as *mandataire*.[116] Transferred to our problem, this means that one looks beyond the individual, not only to the organization as in chapter II, but now to the problem of managing discourses in networks. Constitutionalization of private law in EU law can be understood as an exercise in boosting individual rights, not primarily *vis-à-vis* the state or private parties *per se*, but as a means to combat the domination of one discourse over others. This is explored in chapter IV with reference to the New Approach to Technical Standards, which is increasingly raising questions of accountability and liability. According to our account, state liability per *Francovich* can be re-interpreted as a matrix through which all these questions combine. Additionally, it is one piece in a jigsaw aimed at re-conceptualizing secondary liability in a network society. We will not at this point specify our argument; that is the task of chapter IV. Suffice it to say, it complements primary liability and, in addition, can form a template for the liability of private actors fulfilling state-like functions.

In sum, the society of networks, represents a third epistemological rupture, but one that remains poorly normatively re-modelled. It is our contention that a tort law does not yet exist for this configuration. Chapter IV is devoted to imagining the shape of such a hypothetical tort law of networks focusing on the question of the emergence of governance. The problem of non-state cognitive norms becoming state law and, thereby, determining the normativity of tort law[117] is vexing.

We can now conceptualise our perspective with the assistance of a grid, which places the problem in a historical perspective:

[116] Micklitz (n 95), although I suggest that this *mandataire* goes back farther to the social. Now, in the network society it takes on an additional dimension.

[117] D Wielsch 'Relational Justice' (2013) 76(2) *Law and Contemporary Problems* 191, 209, he refers to contract and standardization. The sentence: 'Multi-firm standardization is thus able to determine the normativity of contract in whole sectors of economic transaction.' In other words, it excludes other discourses including the law in framing what is normal care.

Century-Paradigm	**Epistemological**	**Ethic**	**Juridical**
19th c. Individuals	Nature & will	Kant	Negligence, subjective fault
20th c. Organizations	Risk – exogenous, social, scientific certainty: prevention	Durkheim	Vertical vicarious liability: strict liability, 'negligence without fault'.
21st c. Networks	Risk reflexivity – precaution, manufactured risk (endogenous risk)	Beck, Ewald	Horizontal vicarious liability, risk management and its adequacy, a public law of torts?

CHAPTER I: TORT LAW AND THE SOCIETY OF INDIVIDUALS

A. INTRODUCTION

Ladeur views the French revolution as a break-even point. His most central insight is that in post-French revolutionary Europe, the modern period, the legal system developed programmes that institutionalised a private sphere of action. Private law, the core of the emerging national legal systems, placed the sovereign individual at the centre of the legal system, with the individual agent as the basic unit for the 'attribution of responsibility'.[118] The negative side of the 'society of individuals' is well documented by Horwitz who suggests in the American context that it constituted a subsidisation of industry.[119] However, it is argued that this is to miss its more immediate significance. It constituted a freeing up of individuals to pursue their projects: the delimitation of the legal system *qua* discourse with contract as pivot provided for substantial 'positive externalities'.[120] In this edification of contract law and theory, tort law was placed in a subsidiary role particularly in the common law, which is the main source we draw on in this chapter.[121] Ladeur articulates this model as:

> ...pre-suppos(ing) an acentric society the collective order of which resides in the permanent emergence of innovations that establish a "play of ideas", a pool of variety that contains an excess of possibilities over reality generated from the practices of co-operation, competition, imitation, and experimentation in society. Clearly, this process generates not only spontaneously, but also in a reflexive form of second order observations of the very rules and patterns its own infrastructure, meta-rules and stabilising institutions.[122]

---

118 Ladeur (n 24), 6. On core/periphery within law, see Kennedy (n 91).

119 The controversial 'Horwitz thesis': see M Horwitz *The Transformation of American Law 1870-1960: the Crisis of Legal Orthodoxy* (New York, OUP, 1992). Much ink has been spilt in an attempt to discredit this thesis, *eg* G Schwartz 'Tort Law and the Economy in Nineteenth Century America: A Reinterpretation' (1980) 90 *Yale L.J.* 1717. Alternatively, Marx's more profound critique, from which most other 'left critiques' seem to follow, see K Marx 'On the Jewish Question' in R Tucker (ed) *The Marx-Engels Reader* (New York, Norton & Co, 1978) 26, *ie* alienation.

120 Ladeur (n 24) puts it in these terms: 'In the economic order of the liberal society, a "culture of improvement" is enshrined, which was always open to knowledge transfer which was, to a large extent, not only accepted as being unavoidable, but also as being productive for the permanent generation of technological innovation and competition.' (12) (citation omitted)

121 In France, although 'subjection' of tort to contract is less evident, the unitary fault standard placed an emphasis on affirmative action, limiting the scope of tort law see Ewald (n 57) for a reconstruction, especially focusing on the philosophical background or embeddedness to nineteenth century tort law in France.

122 Ladeur (n 24) citing Appleby (n 47) 156.

What Ladeur expresses is a shift from hierarchy to heterarchy, as feudal privileges were replaced with formal civil equality as a 'second order observation' within the legal system.[123] Formal equality involved the establishment of basic rules which assisted coordination between individuals and supported in this way, *inter alia*, the market order.[124] As Simmonds argues, formal equality rested on a conception of justice that leaves questions of the distribution of wealth to the market; whether a particular distribution is fair or unfair depends on '...the way in which it has come about.'[125] More importantly, however, is the space this 'architecture' creates for experimentation not only in the economy, but in other media of communication such as art, health and so on, by supposing that there is no privileged knowledge, whether derived from tradition or authority.

Thus, formal legal equality was supported by what Kennedy refers to as formal law, or what Ladeur calls an architecture 'positive' law. Formal law through the subjective, individual right (or will expressed via freedom of contract in the common law[126]) supported the de-centralised, self-organization of society.[127] That is to say, the formal equality of individuals not only placed the abstract individual at the centre of the law of contract and tort but, additionally, fulfilled a structural role by delimiting the province of the law from other fields of social action or

---

123 However, as S Deakin & F Wilkinson 'The Origins of the Contract of Employment' in *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford, OUP, 2005) points out this is not the whole picture. Employment relationships maintained their vestiges of hierarchy well into the twentieth century: '...the predominant legal form of work relations in the nineteenth century was not the employment contract, but, instead, the disciplinary and hierarchical model of the master-servant relationship...' (42) This shows the hazard of over-generalisation of the move from status to contract on which my idealisation rests; nevertheless, it is submitted that it remains largely correct. Deakin at p. 43 acknowledges that his account is nuanced and the general trend was towards 'will theory' and private autonomy citing Ibbetson (n 87). In addition, it dovetails with Marshall's account of the emergence of civil rights. See TH Marshall *Citizenship and Social Class and Other Essays* (Cambridge, CUP, 1950).

124 Hayek (n 73), 31 premised on 'end-independent rules which serve the formation of a spontaneous order, in contrast to end-dependent rules of organization.' Teubner indicates that more besides the market order or the political are relevant, but this is often obscured in the scholarship, see G Teubner 'After Privatization? The Many Autonomies of Private Law' (1998) 51(1) *CLP* 393.

125 N Simmonds *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester, MUP, 1984), 27. This is of course troubling from a social justice perspective.

126 Samuel (n 59); O Kahn-Freund 'Introduction' in K Renner *Institutions of Private Law* (London, Routledge, 1949, reprint 1976) explains that in practice the common law results are the same, albeit these are reached by a different method pp. 13-14 esp. explaining the theoretical differences between systematic 'rights and duties' continental and historical-remedial common law method. Both predispose the law towards what M Weber refers to as the 'calculability of chances' (14), allowing for coordination and planning.

127 Ladeur (n 24) Positive law should not be confused with legal positivism. Ladeur elaborates his concept of positive law at p. 11: 'In a deeper sense, a law that ... rests on the assumption that "nobody is in charge of the collective order" is "positive". As a consequence, it is "non-instrumental", in the sense that it refers to a "relationship in terms of rules". These rules are decoupled from substantive values, and allow for the co-ordination among agents who pursue their self-chosen goals.' (citations omitted)

discourses. Thus, the concept of the sovereign individual at the centre of the legal system, to which rights and duties are ascribed, can be considered an institutional support for an acentric social 'order'.[128] This is, in short, the first, modern normative modelling of an acentric social order. This limits the thicker social dimensions of bilateral disputes, effectively instituting a thin procedural form of (corrective) justice *inter partes*,[129] thereby facilitating the unabridged emergence of distributed social conventions outside the legal system.[130]

This preliminary sketch of 'classical law' should not, however, be confused with a claim that the law is autonomous in a stronger sense, one that would imply hermetic closure. While it is true that the law is 'operationally closed', it remains 'cognitively open'.[131] Its cognitive openness implies that emergent social conventions are then normatively modelled by the law into its individualistic framework.[132] To be precise, while the law normatively models its distributed cognitive 'infrastructure', through the individual will, which serves to stabilize expectations and facilitate further social experimentation by providing counterfactual rules on which actors can rely in order to plan their activities; it embodies, additionally, 'open norms'

---

128 Ladeur (n 24), 11; G Jellinek (M Farrand trans.) *The Declaration of the Rights of Man of Citizens: A Contribution to Modern Constitutional History* (New York, Holt, 1901) explains that this concept of sovereign individual rights *vis-à-vis* the state developed from the Reformation first in the United States in which the individual, sovereign conscience was viewed as inalienable and natural: 'What had been held as the work of the Revolution was in reality a fruit of the Reformation.' (77) This was later generalised beyond simply religious rights to other individual rights which became a sphere of non-violability surrounding the individual. "While Locke, similar to Rousseau later, places the individual in subjection to the will of the majority of the community, upon which, however, restrictions are placed by the objects of the state, now the individual establishes the conditions under which he will enter the community, and in the state hold fast to these conditions as rights. He has accordingly rights in the state and claims upon the state which do not spring from the state.' (82) To rephrase into Ladeur's language, this institutionalization of the subjective right allowed for networks of relations to emerge not dependent on the will of the state, but those flowing from the interaction of sovereign individuals. In short, a non-hierarchical form of knowledge generation not dependent on tradition. See KH Ladeur 'The Liberal Legal Order and the Rise of Economic Organizations – Towards a Legal Theory of Proceduralization' in K.-H. Ladeur (ed), *Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations* (Baden-Baden, Nomos 1997) 169: 'The special feature of bourgeois society is not that the individual is seen without social bonds. It is more that the bonds remain indefinite and open to alteration.'

129 *Compare* Dagan & Dorfman (n 14) version of relational justice, which is contextual. For an elaboration of procedural, as distinct to substantive justice, see R Brownsword 'The Theoretical Foundations of European Private Law: A Time to Stand and Stare' in R Brownsword et al (eds) *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011) 159, 161-64.

130 Ladeur (n 24), 12 more precisely: 'This self-organisational potential comes to the fore when the legal system is challenged by the dynamic knowledge base which generates "experience" as a distributed type of knowledge which no longer accepts a central privileged point of observation of society which is either "given" by tradition or claimed to be possessed by the political sovereign power in the European absolutist states.'

131 N Luhmann (KA Ziegert trans) *Law as a Social System* (Oxford, OUP, 2004).

132 Ladeur (n 24) '...in the "society of individuals" of the 19th century both public and private law were based upon complex layers of social knowledge, conventions and professional practices, all of which were enshrined in the public order at large or in social and technical experience. Without reference to this cognitive infrastructure, neither private law nor administrative decision-making can be understood.' (20)

that serve to render the law responsive to its environment.[133] In this respect, 'reasonableness' or 'fault'[134] in negligence for example provides a means through which cognitive, distributed knowledge is translated into the law and normatively coded.[135] Fault, in effect, encodes into law knowledge emerging from 'society' as to appropriate and safe standards of care which were generalised by the law, through its 'rules of just conduct'.[136] In this sense, normality and normativity are intertwined.[137]

As we will see in the next chapter, when what constituted normality became more complex as the society of individuals transitioned to a society of organizations, and came to depend on an epistemology of risk, the function of negligence also changed from a backward-looking analysis to a policy-led and forward-looking question.[138] For now, it suffices to say that the will and fault structuring of the law rested on a vision of society permeated by the ascription of action or, more precisely, 'acts' to individuals. A view that assumed *(une) vie collective* had not yet emerged when the drafters of the *Code Civil* or the systematisers of the common law commenced their re-organisation of the classical law.[139] Rather, accidents were either ascribed to nature as 'natural' misfortune or to man as positive intervention in the world.[140] In this chapter we will proceed by sketching the emergence of a distinct law of torts within the tradition of 'legal science', examine the main bridge between law and normality, before,

---

133 There are significant parallels to be drawn with the contemporary debate between contract law formalism and contextualism. For example, Bernstein argues strongly for formal legal norms such that actors can select the apposite mix between legal and non-legal governance mechanisms. See L Bernstein 'Merchant Law for a Merchant Court: Re-thinking the Code's Search for Immanent Business Norms' (1996) 144(5) *University of Pennsylvania Law Review* 1765. The underlying view of law is 'bottom up'; it is simply one part of a more comprehensive experimental order. Too much law, in order words, stymies innovation through private ordering. Of course, not enough law has its own consequences Kjaer et al (n 33).

134 Which became synonyms eventually, as the law became more secular.

135 Brüggemeier (n 2) argument regarding how the standard of care, while drawing on custom, is ultimately a normative standard.

136 What should not be under-estimated is the role of law as a means to generalise local knowledge. In this respect, the building of the nation-state, its legal system, and the diffusion of knowledge are intertwined. Kjaer (n 60) places particular stress on this dimension to the law, namely, the role of law as a means to 'distribute' technical knowledge. KH Ladeur 'The Postmodern Condition of Law and Societal "Management of Rules": Facts and Norms Revisited' (2006) 27 *Zeitschrift für Rechtssoziologie Heft 1*, 87, 90 notes in the German context, the role of technical bodies which fulfilled an analogous, or even more important, function.

137 Ladeur (n 24), 17. Thus, strongly opposed to the concept of rational subsumption, citing A Lefebvre *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford, Stanford University Press, 2008).

138 Ewald (n 58) a notable chronicler of the transition from fault to (social) risk.

139 22.

140 25, Ewald notes that the various misfortunes that befell the eponymous hero in Voltaire's *Candide*, which aptly capture this mix of natural and man-made perils. Fault was attributed to moral, individual shortcoming at the opening of the nineteenth century, while misfortune was considered 'natural'.

finally, examining areas in law in which the individualistic model most clearly impacted the nature of the legal relation, which today would be considered in a collective dimension.

B. RE-PROGRAMMING THE LAW: THE CONTRIBUTION OF LEGAL SCIENCE TO AN ACENTRIC LEGAL ARCHITECTURE

Our introductory remarks can be re-phrased. In the modern era, the legal system departed strongly from a form of law that does not distinguish clearly between the right and the good. While the natural lawyers did not for the most part adhere to Aristotelian-Thomist metaphysics, they retained the doctrines developed by the late scholastics. By contrast, in the nineteenth-century doctrines that appeared to be justified by reference to a final end were reassigned to the will of the parties.[141] The normative model for this frame-working centred on 'legal science' as described by Kennedy with its twin emphasis on will and fault, both concepts deriving from an anthropocentric, normative modelling of the law.[142] Will was the basic institution that supported an acentric society, while fault was its outer limit defined in its light as an 'excess of the will' exemplified in the French tradition.[143]

---

141 J Gordley *The Philosophical Origins of Modern Contract Doctrine* (Oxford, OUP, 1991) distinguishing between the continued reliance by natural lawyers on the concept of virtue inherited from the late scholastics and, ultimately, Aristotle, in contradistinction to the rise of the will in nineteenth-century doctrinal scholarship. Gordley shows, convincingly, how the recasting of the law as resting on the will of the parties led to confusion and distortion.

142 This presentation of the development of the law is not free from controversy. On the will and fault side of the debate among modern authors are, notably, Kennedy (n 91), White (n 10), and Ibbetson (n 87). Where these authors see discontinuity, OW Holmes in *The Common Law* famously saw a long-standing emphasis on fault. R Kaczorowski 'The Common Law Background of Nineteenth Century Tort Law' (1990) 51 *Ohio State Law Journal* 1127 interjects on the side of Holmes in the debate tracing fault-based reasoning in the common law which was established at least by in the eighteenth century. We do not pretend to resolve this dispute; however, it suffices to say that by the nineteenth century the accent placed on fault whether by exegesis (Kaczorowski, especially his discussion of contributory negligence), or by invention had increased to the extent that it was the central organizing principle in the law of torts. By the latter half of the nineteenth century the consolidation of the law of torts into a systematic, and independent field of law centred on fault had been achieved replacing disparate torts with a law of torts. This progress was accentuated during the twentieth century.

143 Atiyah (n 59) captures this idea by his connection of the will theory of contract to the economic organization of society, for the first limb of this formula. He comments that in the early nineteenth century owing to the specialization, not to mention urbanization and the attendant breakdown of feudalistic bonds, that industrial society unleashed: 'Relationships that were formerly taking place within some kind of institutional framework were now taking place on an individualized basis through the medium of contract.' (259) This was the impetus, he argues, to 'individualism as a social mechanism'.

Legal science, as Bell remarks, '. …did not look directly at social values and consequences, but sought coherence in doctrinal legal principles.'[144] In this vein, Kennedy refers to the period stretching roughly from 1850-1914 as the era of legal formalism.[145] German 'legal science', with its emphasis on legal principles and deductive reasoning,[146] is considered its most developed and influential instantiation.[147] This type of thinking is especially prominent in the civil law with an emphasis on the 'subjective right' and reparation for fault.[148] What the legal scientists borrowed in terms of their conception of law from the natural lawyers is concisely summarised by Simmonds, who refers to the key features of 'law as a rational science':

1. Law is, or may be, capable of justification in terms of principles. These principles are extracted from cases and the cases may be justified in relation to these principles.
2. Rules of law are justifiable in terms of their content, and not simply by reference to principles requiring, for example, respect for the decisions of a court of law, or a democratically elected legislature.

144 J Bell & D Ibbetson *European Legal Development: The Case of Tort* (Cambridge University Press, 2012), 43.
145 Kennedy (n 91). It should be noted that Kennedy's divisions of what he refers to as the 'legal consciousness', or what we might call the modelling by law of its cognitive environment, are overlapping and inexact. They do not have sharp ends, with one period ending and another beginning but rather approximate the dates that Kennedy ascribes to them.
146 'Between 1850 and 1914 what globalized was Classical Legal Thought (CLT). It had no essence. But among its important traits were that it was a way of thinking about law as a system of spheres of autonomy for private and public actors, with the boundaries of spheres defined by legal reasoning understood as a scientific practice.' (20-22)
147 In this regard, 'German legal formalism' of the nineteenth century was defined as much by its catholicity as by its coherence with several divergent schools of thought. In addition, its 'reception' into Anglo-American legal thought was not straightforward. See M Reimann 'Nineteenth Century German Legal Science' (1990) 31 *B.C.L. Rev.* 837 on this point. Nevertheless, the systematization of the common law of torts owes a great deal to its influence because it was the dominant model for the science of law. For an elaboration of this see White (n 10). And yet its systematization and dependence on German sources can be described as bric-a-brac, with continental concepts and doctrine adopted for their utility and not in a systematic fashion it would appear. See D Ibbetson 'The Law of Business Rome: Foundations of the Anglo-American Tort of Negligence' (1999) 52(1) *CLP* 74, esp. p. 108.
148 Fault was the main organizing concept, especially in France. This is not to say that there were no tensions between Art 1382 and the antecedent, customary law. Many of the types of vicarious liability, i.e. liabilities for the acts of others, were based originally on an objective view of liability but fault encroached on this territory e.g. liability for the acts of children in one's care, or liability of employers. See Bell & Ibbetson (n 144) 59-62 especially. See L Josserand *De La Responsabilité du Fait des Choses Inanimées* (Rousseau, Paris, 1897) For a discussion of how isolated areas of non-fault liability, i.e. Article 1386, were later generalised and expanded. In Germany, although fault was the main organizing concept in the *BGB*, because of the relatively late unification of the country, codification arrived at the end of the 'society of individuals' and already the *BGB* appeared outdated by the time of its enactment. See HW Micklitz 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse' EUI Working Papers LAW 2012/23, especially the discussion of the defects of the *BGB* viz social law.

3. Law embodies moral values in a non-instrumental way. In other words, the positive rules must be related to the values that they serve deductively not instrumentally. That is to say, the rules must be specific applications of wider moral principles, not simply means to a desirable goal.[149]

The main difference between the classical form of 'law as a rational science', *ie* the natural lawyers, and its nineteenth-century form was a change in methodology; in this respect, its intellectual ballast derived from Kant's critique of the natural law.[150] This critique admonished the classical jurisprudence for its confusion of pure reason with experiential or empirical bases. Blackstone's *Commentaries* are indicative of this approach, which in its first chapter derives legal obligations from metaphysical claims about the nature of man.[151] Von Savigny, father of the German school, intended to create a science of positive law deriving inspiration from historical sources to explain the existing law, not chronologically, but conceptually and systematically.[152] The historical development of the law, therefore, was instrumentalised in a manner, in order to serve the search for the underlying principles which explained the law in a coherent manner.[153] Nevertheless, the overriding similarity with the natural lawyers was the emphasis on a self-sufficient private law, sustained by the conceptual coherence of rights and duties. However, it was the will as the axiom that held together this post-Aristotelian schema.[154] The common law manifestation of this formal reasoning was the elevation of the 'will theory of contract' to central place in contract law and theory.[155] Kennedy states that '[t]he will theory

149 These three points are a partial quotation/partial summary of Simmonds's description. For his argument see Simmonds (n 124), ch 2 especially pp. 19-22.

150 Highly disputed: the precise relation between Kantian liberalism and the law.

151 W Blackstone *The Commentaries of Sir William Blackstone on the Laws and Constitution of England* (Elibron Classics, 2005) who derives man's natural liberty from God. Although as Reimann (n 147) notes Kant's target was the German natural law scholar, Wolff. Bentham took aim at Blackstone more squarely. See, in addition, B Cardozo *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921) on Blackstone 'The old Blackstonian theory of pre-existing rules of law which judges found, but did not make fitted with a theory still more ancient, the theory of the law of nature.' (131) The elision of what natural law requires as of logic and legal practice is, it is submitted, apparent.

152 Reimann (n 147) 'The empirical method required attention to actual data, the systematic goal the demonstration of an order in them.' (847-848)

153 Reimann puts it that history was used not to venerate the past but to detect the law's 'innermost principles'. (854)

154 It is going far beyond this thesis to analyse German legal thought in the nineteenth century *in toto*, and we hope the reader might excuse this passing reference. A comprehensive treatment of the birth and development of German legal thought from the historical school to the Pandectists is found in Reimann (n 147).

155 On the Will Theory of contract in the common law see Ibbertson (n 86) ch12, and Atiyah (n 59). To be precise, in the common law the main organizing device was the emerging duty of care but note ch 12 of Ibbertson's book:

was an attempt to identify the rules that should follow from consensus in favour of individual self-realization.'[156] In short, private law was 'individualized'.[157] This movement was part of a greater effort to turn the whole mechanism of the state, but particularly its laws, towards this goal.[158] The common law example, on which this chapter is mainly focused, is illustrative because the transformation of the law was so stark. From the perspective of legal science, an anarchy of different forms of action were refined, and rationalised according to doctrines and, at base, general principles that eventually concretised a sharp contract-tort divide. While the common law never achieved the systematisation through codification of French or German law, it is true to say that the influence of continental scholarship melded with economic liberalism to provide a distinctively individualistic and formalist law of contract and tort.[159] This chart explains the main juridical basis of classical tort law. Both French and German law constructed tort law around a generalised concept of fault, whereas in English law more important for the eventual development of a self-standing tort law centring on negligence is the relationship between contract and tort law.[160] Nevertheless, in all major jurisdictions, while

'The equation that negligence with the actor's failure to live up to the standards reasonably to be expected of individuals in society meant that legal liability was significantly identified with personal moral shortcoming.' (181) We use centring on fault, as negligence moved to the centre of tort law in the nineteenth century. For further elaboration on the duty-based formulation of the law and its origins see N Jansen 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' (2004) 24(3) *OJLS* 443-369. Jansen traces the duty concept of tort law back to ambiguities in the thought of Grotius, but the main precursor to the 19th century view is declared to be Pufendorf. 'Civil liability, he [Pufendorf, R-C] argued, was a private sanction necessary in order to ensure compliance with duties of care that were not penalized criminally. Deterrence had become the aims of claims for damages; the old Thomistic ideas of restoring equality and ensuring fair compensation were, at best, secondary.' (458) Therefore, delictual duties were reduced to those based on individual behaviour: '...he was the first to formulate the fault principle: if liability is regarded as a private law sanction, this does indeed follow.' (458)

156 Kennedy (n 91) 26.

157 D Kennedy 'Legal Formalism' in N Smelser & P Baltes (eds)) *International Encyclopedia of the Social and Behavioral Sciences* vol 13 (New York Elsevier 2001) 8634, 8635: 'According to the critics, the mainstream saw law as having a strong internal structural coherence based on the two traits of 'individualism' and commitment to legal interpretive formalism. These traits combined in 'the will theory'. In the sociological jurists' version, the will theory was that the private law rules of the 'advanced' Western nation states were well understood as a set of rational derivations from the notion that government should help individuals realize their wills, restrained only as necessary to permit others to do the same.'

158 AV Dicey *Introduction to the Study of the Law of the Constitution* (Indianapolis, Liberty Classics, 1982, orig. 1885).

159 The precise relationship between the formalism of nineteenth century common law and economic doctrines is contested compare Gordley (n 141), Atiyah (n 59). Gordley doubts the direct impact of economic liberalism on the law, Collins refers to classical contract in terms economic terms but qualifies this as perhaps an ideal type, whereas Atiyah is more direct in connecting legal formalism and economic liberalism.

160 Ibbetson (n 87).

contract provided support for experimentation, a 'libertarian' (negative freedom) tort law drew its minimal outer limits.

Fault/duty of care[161]	**Germany**	**France**	**United Kingdom**
Source	BGB	Code Civil	Case-Law
Example	Article 831	Article 1382	Emergence of Negligence

1. The Emergence of a Distinct and Subsidiary Tort Law

It should not be inferred from the preceding discussion, however, that contract law alone embodied an individualistic model. In tort, the scholarly development of the law in line with principles of coherence and consistency led in effect to a rationalisation of the emerging field.[162] Indeed, White in his authoritative study of tort law in America expands on the role of legal science in the re-conceptualisation of tort law.[163] It is well-documented that prior to the mid-nineteenth century tort law was a procedural law premised on writs. It was a law of actions as distinct from a law premised on a single organising principle. In fact, it would be remiss to speak of a law of tort(s) at all. As White argues, the idea of a separate law of tort with a unitary standard of care is a creature of the late nineteenth century rationalisation.[164] The central

[161] Duty of care, because of the more rigorous distinction between these two concepts, namely, fault and duty in Anglo-American law. However, as Ibbetson (n 87) persuasively shows the distinction was more fluid that is generally assumed, with ideas of wrongful conduct infecting the duty of care question especially after the judges sought to take questions of legal responsibility away from juries.

[162] In France, of course, the individuation of tort law was achieved through the *Code Civil*, but particularly as Gordley stresses, its subsequent interpreters. See Gordley (n 141).

[163] White (n 10), see chs 1 and 2.

[164] White (n 10) notes that contemporary nineteenth century debates between Holmes and his critics about the original basis of tort liability were a product of conceptualism with its emphasis on comprehensive theories. These disputes assumed a single, separate field of inquiry called tort law and proposed alternative theories as to whether

insight of the 'legal science' school, most notably championed by Langdell at Harvard, was to connect disparate cases to general principles.[165] This led to, in effect, the transformation of a 'wilderness of single instances' into a coherent and principled body of law. The method of constructing general principles from cases was by means of inductive generalisation.[166] In this respect, the most important innovation was to derive from trespass on the case a general principle of negligence premised on duty and fault grouping together previously disparate actions often premised on status relations, such as the duty of an innkeeper *vis-à-vis* his guests, and re-conceptualising them as instantiations of a more general doctrine, namely, negligence.[167] Towards the end of the nineteenth century, negligence came to be conceptualised as a general duty of care owed by all to all. The fault principle simultaneously emerged as a unitary standard of care, first enunciated by Holmes in his theory of tort Law.[168] It will be

---

it rested on fault or a stricter standard. However, 'Far from assessing individual tort actions with reference to a comprehensive theory of liability, judges and juries prior to the mid-nineteenth century did not even consider tort actions a discrete substantive category of claims.' (15) Hence, the question as to the basis of tort liability, and the standard of care it required, was misplaced because there existed no single subject called tort law before it was invented according to White.

165 The emphasis on judgments is, it is argued, a distinct common law twist on 'legal science'. White (n 10), 32 explains the method 'The study of law consisted of a series of analytical examinations of the relationship between cases and principles.' By contrast Reimann (n 147) makes clear that Savigny, the father of legal science, emphasized custom, and even more prominently legal scholarship as distinct from judgments in terms of the generative dimension in his historico-systematic method when deducing law's 'innermost principles'. 'Nineteenth Century German Legal Science' 837, 854.

166 In ch 2 White (n 10) goes a long way towards explaining this conceptual, legal science approach in terms of the more general evolution of tertiary education in America in the nineteenth century, whereby there was a shift from moral and political philosophy to natural sciences, and from general to specialized, 'scientific' education. See esp. pp. 20-26. The methodology, both historical and conceptual in approach owe a considerable amount to the German formalistic approach in the nineteenth century, as argued by Kennedy (n 91).

167 'The contribution of the scientists to tort law, then, was to isolate Torts as a distinct field of study, to supply that filed with an overarching theoretical perspective (negligence, R-C.), and to transform its existing rules and maxims into doctrine consistent, where possible, with that perspective.' (38)

168 Holmes (n 12), Holmes's lead in systematizing the law of torts in this manner was followed in the United Kingdom by F Pollock *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law* (Philadelphia, Blackstone Pub. Co., 1887). As White (n 10) reminds us, this book was dedicated to Holmes. Ibbetson (n 87) explains that in the early nineteenth century negligence emerged, hinged on two bases, situations in which a prior legal relationship existed, such as bailment, and circumstances in which a prior relation did not. Bailment cases, which were in fact traditionally classified as contractual, were reclassified as tort. The latter general duty was forged out of an adaptation of the northern natural law school to the law of England. By the end of the century the latter influence was predominant. See p. 92 especially citing *Heaven v Pender* (1883) 11 QBD 503, 516. White (n 10) demonstrates that this general manner of thinking of negligence is owed to Holmes: 'Holmes's significant contribution was the isolation negligence as a comprehensive principle of tort law. ... First, it systematized an embryonic expansion in American case law of the meaning of negligence from that of neglect of a specific, predetermined duty to that of violation a more general duty potentially owed to all the world. Second, Holmes's isolation of "modern negligence" was to provide Torts with a philosophical principle: no liability for tortious conduct absent fault, with fault to be determined by reference to "motives of policy" or "the felt necessities of the times". It is argued that the latter emphasis led to the secularisation of tort law, and the entry point for its moulding in accordance with policy. This was to come in the early twentieth century and Holmes can be understood to be at the bridging point between the first and second phase outlined above. It is

illustrated below, how the individualistic flavour of tort law impacted on the substantive law. Suffice it to say, the emphasis on self-reliance and the will impacted on the extent of tort duties which will be demonstrated in relation to the doctrine of vicarious liability, and in relation to product liability. In effect, what could not fit will or fault was marginalised, such as the doctrine of vicarious liability as we will see. What could fit was moulded into this rational structure by creating meta-doctrines such as a concept of unitary negligence which explained the law in this manner.

Additionally, it is argued that this often parasitic relationship between tort law and contract is a function of the systemic dimension to legal science which sought coherence between the different, emerging fields of law. Thus, the contract-as-will and tort as its limits restructuring of the law demonstrates, therefore, that that legal concepts corresponded to a society of individuals, with the individual and the regulation of his conduct taking central place in private law. While legal formalism provided stable counterfactual rules, the individualistic focus of formal law tracked the distributed knowledge base from which the law drew its normative model of action.[169] The relationship between contract-as-will inasmuch as it delimited the role of tort law is aptly illustrated in the infamous case of *Winterbottom v Wright* to which we now turn our attention.

2. The Radiating Effect of the Will of the Parties: *Winterbottom v Wright* as a Paradigmatic Common Law Example

The emphasis on individual will meant that in the relationship between contract and tort, primacy was given to the contractual allocation of rights and duties as opposed to the re-allocation of rights by interventionist judges.[170] In other words, the tort law duty of care or the scope of interests protected by tort law was circumscribed by contract law. This preference for

important to note, pace White, that initially at least fault if it were understood as policy-based, did not socialise the law but retained its existing boundaries.

[169] Ladeur (n 24). See 'Introduction' to this thesis for an elaboration.

[170] The vocabulary was acts not risks. The risk vocabulary came later. This preference for a contractual allocation of rights was eclipsed in b2c relations in the twentieth century, but remains strong in b2b even if today the matter is discussed more openly in terms of risks see Brownsword (n 70).

contractual primacy is distinctly present in *Winterbottom v Wright*,[171] in which the Court favoured the primacy of contract outside of the scope of direct injury. The gravamen of *Winterbottom* concerned, in essence, the liability of a tortfeasor towards third parties to a contract. The defendants, were suppliers of mail-coaches, subcontractors who provided the Postmaster-General (Royal Mail) with mail-coaches and contracted to ensure that the mail-coaches were to be '... kept in a fit, proper, safe, and secure condition for the said purpose' and, in addition, the defendant undertook to repair the coaches where necessary. By a separate contract, the Postmaster-General hired Atkinson and others to convey the coaches from Hartford to Holyhead. The plaintiff, an employee of Atkinson and others, brought his action against the defendant for negligent failure to maintain the mail-coach resulting in personal injury to the plaintiff. The essential question was given the negligent failure of the defendant to maintain the mail-coach, contrary to his contract with the Postmaster-General, could this presumptive fault give rise to a tortious duty of care allowing the plaintiff to recover?

Lord Albinger's leading judgment emphasised that in the circumstances no recovery was allowed on the action. First, Lord Albinger's concern was with what has come to be referred to as 'the floodgates argument', or the spectre of 'an infinity of actions.'[172] Secondly, an attempt to construe the case as falling within the precedent of *Levy v Langridge* was rejected.[173] In that judgment the defendant sold a gun containing a latent defect to the plaintiff's father which was subsequently discharged by the plaintiff causing injury. The plaintiff argued that this case similarly involved a latent defect.[174] It was held that an element of fraud was present in *Levy* that did not exist in the present case. Hence, as a matter of moral culpability the defendant in *Winterbottom* did not reach the threshold for recovery absent direct injury.[175] Thirdly, in a

[171] (1842) 10 Meeson & Welsby 109.
[172] 113.
[173](1837) 2 Meeson & Welsby 519.
[174] The latent defect was framed as a lack of an opportunity to inspect the coach, and perhaps, was more accurately described as an attempt to rebut an argument from contributory negligence. In addition, given the lack of opportunity to inspect the plaintiffs attempted to argue that it was a case of fraud on all fours with *Levy*. In any event, the crux of the plaintiff's argument was that the *Levy* judgment was broad enough to encompass the facts of the case.
[175] In fact, Lord Albinger used contractual reasoning to state that the plaintiff was '...really and substantially the party contracting' (114) because the contract was made between the defendant and his father presumably for his benefit, the plaintiff lacking the capacity to contract, and the defendant was aware of his identity; consequently, that judgment was not truly an exception to the privity of contract rule. The last qualification in the previous sentence is our inference because Lord Albinger did not elaborate on this point.

somewhat rhetorical flourish his Lordship declared, in effect, that the law of torts should not be allowed to subvert what has come to be referred to as the 'contractual matrix'.[176]

> By permitting this action, we should be working this injustice, that after the defendant has done every thing to the satisfaction of his employer, and after all matters between them has been adjusted, and all accounts settled on the footing of their contract, we should subject them to being ripped open by this action being brought against them.[177]

In language no less clear Aderson B. stated that although the absence of recovery constituted 'hardship' for the plaintiff, 'that might have been obviated, if the plaintiff had made himself a party to the contract.'[178] In consequence, privity of contract marginalised the role of fault beyond direct injury in constructing duties of care towards third parties to a contract.[179] This subordinated the plaintiffs claim to an ethos of self-reliance, to be out-worked via contract, and constituted a powerful limitation on an expansive use of fault-based reasoning without the presence of an antecedent duty to take care: *Damnum abseque iniuria*. Thus, contract-as-will considerably limited the fashioning of new duties outside the existing grounds of recovery.[180]

Winterbottom is indicative of legal formalism by its exclusion of questions of equity or substantive justice as means to expand tortious duties outside of existing categories of recovery.[181] It indicates, additionally, how legal science influenced the development of the law:

---

176 J Fleming 'Tort in a Contractual Matrix' (1995) 33(4) *Osgoode Hall Law Journal* 661. There are several intermediate steps in his argument that we exclude, which although important for an understanding of the case, are not relevant to the argument presented here. For example, there were no precedents to support his claim.

177 *Winterbottom*, 115.

178 *ibid*.

179 J Stapleton 'Duty of Care and Economic Loss: A Wider Agenda' (1990) 107 LQR 249 noting how *caveat emptor* related to third party claims. If parties to the contract could not recover, because *caveat emptor*, then a third party should not recovery. Of course, *caveat emptor* is simply a legal presumption that stands for the proposition that parties that privileges private ordering: absent express contract allocation of risks, the law will not intervene. Per Stapleton, for tort liability to develop a re-evaluation of the presumption caveat emptor was first required for reasons of coherence, and fairness.

180 See Rolff B.'s short judgment in *Winterbottom*, p. 116. *LeLievre v Gould* [1893] 1 QB 491 is instructive in this respect. In that case, it was held that either the plaintiff had to show that the fault was parasitic on contract, or, that it fell within one of the recognised and narrowly-defined categories of fiduciary duty. In the absence of the first two bases, proof of fraud was required per Esher MR.

181 This is notwithstanding the tendency of legal formalism to abstract from individual judgments general principles of law. In the instant case, to do so would be to undermine the will and fault interrelationship. Therefore, a more general concept of fault was sacrificed in the name of a proceduralised type of law. See Kennedy (n 157)

tort could not be allowed to develop in such a manner that would undermine contract law; in other words, tort law had to fit into the overall system of private rights that favoured de-centralised experimentation, with contract as its main institutional support. Indeed, if *caveat emptor* prevailed in bilateral contract representing a policy for express contractual allocation of rights, then, the courts could not permissibly allow tort actions to outflank this doctrine, especially with respect to third parties.[182] Hence, a preference for contract was evident in the relationship between strangers with the law structured around this choice.[183] In such a perspective, tort law was a scheme of negative liberties for the protection of life, limbs, and property, a defensive posture which protected against the positive acts of others, albeit insofar as contract law did not dictate otherwise.[184] The individual as the basic subject of private law was a self-governing agent who could shape her legal relations according to her own genius. The only coercion on her freedom outside this negative scheme of interference torts was the market which provided signals and shaped her incentives.[185]

3. Secondary Re-Modelling of Distributed 'Experience' through the Tort Standard of Care

While the protective scope of tort law was determined by, and dependent on, the primacy of contract law in the common law during the period of legal formalism, the standard of care insofar as tort law was engaged was 'opened' to the distributed knowledge base of society.[186] This was achieved by tying the standard of care to a community standard of care as distinct

who argues that while legal formalism is a 'contested concept' that what binds different types of legal formalism is 'the willingness of the formalist to sacrifice substantive justice (or 'equity') in the particular case.' (8634)

182 Stapleton (n 111).

183 Of course, more extensive duties existed in tort provided a prior relationship existed. These pre-existing duty cases often were parasitic on a contractual nexus, such as the law on bailment. As Ibbetson (n 87) argues the duty of care was used to limit tort law's scope by isolating this question from that of the standard of care. Duty '[i]nstead, ... delimited with increasing precision the circumstances in which a defendant would be required to exercise care.' (91)

184 Brüggemeier (n 2) 11. This relates to the idea that fault was an abuse of the exercise of will. One is free to do as one pleases provided it does not impinge on the equal liberty of others with fault as the threshold.

185 Hayek well describes this in *Law, Liberty and Legislation*, Hayek (n 73).

186 While the duty of care was subsequently enlarged, a crucial step in modernising tort law via an objective standard of care is the purpose of this section. A limited duty of care, also, came under strain from changes in the knowledge base, particularly when new ideas about responsibility were confronted with a 'rigid' contract law formalism see B Markesinis 'An Expanding Tort Law — the Price of a Rigid Contract Law' (1987) 103 *LQR* 354

from subjective or 'internal' moral shortcoming. We have already seen in *Winterbottom* how the Court was concerned with the individualistic notions of self-reliance and fault. Absent fraud, the degree of relevant fault was insufficient, and did not fit within the existing categories of recovery. In other words, tort law's emphasis on fraud and fault meant that it was admonitory, stressing personal moral shortcoming.[187] In this sense, tort liability bore structural resemblances to criminal wrongdoing based on personal culpability.[188] However, over the course of the nineteenth century the connection to criminal liability waned. The reason for this is that similarities between the criminal and civil (tort) standard of care were effaced by the gradual adoption of an 'external' standard of care.

The main innovation in nineteenth century English, tort common law at least with regard to the standard of care was the move from variable standards of care to a single standard of reasonableness finally achieved in *Blyth v Birmingham Waterworks*, not long before the time that the notion of a general tort of negligence was gaining acceptance.[189] Prior to *Blyth*, it could be argued that there were three distinct standards of care, namely, gross negligence, ordinary negligence and slight negligence. This reflected an ambiguity: is tort law aimed at internal moral shortcomings or at submitting the defendant to a community standard of care?[190]

The *fons et origo* of the *Blyth* judgment can be traced back still farther to *Vaughan v Menlove*.[191] In *Vaughan*, the plaintiff and defendant was adjoining landowners. Owing to the defendant's want of care, which included ignoring several warnings as to the fire hazard inherent in the placement of his haystack, a haystack ignited destroying plaintiff's property. The legal issue on appeal was whether the plaintiff should be held to the standard of reasonable prudence or whether his subjective, *bona fide* judgment as to the risks involved should determine the standard of care.[192] Tindall C.J. overruled the trial judge, stating that the appropriate standard of care was '...in all cases a regard to caution such as a man of ordinary prudence would observe'. This approach was later generalised in *Blyth* as the appropriate standard of care in all

[187] White (n 10). Indeed, G Gilmore *The Death of Contract* (Ohio, Ohio State University Press, 1974) goes far in demonstrating how, eventually, Holmes successfully purged tort law of this admonitory dimension.
[188] Ibbetson (n 87) shows persuasively that fault was not a continuation of the liability of the pre-industrial age but a limitation thereof. On structural resemblance see Brüggemeier (n 2).
[189] 11 Ex Ch 781 (1856).
[190] On which John Austin and Oliver Wendell Holmes disagreed. For a discussion see Gilmore (n 187).
[191] (1837) 132 ER 490 (CP).
[192] The trial judge had held that since the case was not one that fell under contractual principles, if it were held that gross negligence was the appropriate standard of care, this involved proof of a subjective recklessness.

negligence cases, where the Court held that '[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'[193] It is argued that one should not be misled by the rejection of subjective standards of care, that the reasonableness standard was decoupled from knowledge accessible to ordinary members of a jury. The reasonableness standard was not yet a handmaiden of policy.[194] In fact quite the opposite inference should be patent. It is clear from the facts of *Menlove* that the reasonableness standard was premised on individual conduct, and was a judgment pre-eminently based on individual moral shortcoming, albeit judged in the light of community standards of reasonable conduct.

Indeed, at first at least, that community standard remained wedded to more generally embedded concepts such as *fortuna*, which failed to take into account the social dimension to accidents.[195] In the early to mid-nineteenth century, that is before the rise of social statistics, the world was viewed differently.[196] At the beginning of this period the image of the world that prevailed on tort law was one of acts and not activities, which corresponded to a 'society of individuals' as the main locus of attribution.[197] In other words, the law focused on individual acts as distinct

193 *Blyth*. This citation is extracted from Ibbetson (n 87) 169-70. I see no reason to add or to subtract from it.

194 And nor would be an adequate explanation of what occurred. The growing complexity of the knowledge base, which grew to rely more and more on calculations of risk, performed in vertically integrated firms, meant that customary knowledge became specialised. However, the reliance on society for what normality comprised of remained, and was filtered through the reasonable concept, which was its normative control mechanism. Brüggemeier (n 2) in his discussion of the hybrid nature of the reasonableness standard, part custom and part norm, explicates this later development. This development of the knowledge base made reasonableness a more forward-looking and policy-inspired determination.

195 Ewald (n 58) has explored this in relation to the fault standard in France, we think this analysis applies mutatis mutandis to the emerging classical tort law in the common law. Both regimes reflect what Ewald calls a 'liberal legal order'.

196 *ibid*.

197 Josserand (n 148) also informs us that the treatment of accidents also had deeper vestiges of a moral view of the world where *fortuna* was seen as outside the control of man. This supported the attribution of liability only in cases of fault i.e. human action. For a legal philosophical analysis of this distinction see G Keating 'The Idea of Fairness in the Law of Enterprise Liability' (1997) *M. Law Rev.* 1266: The author emphasises the distinction between acts and activities with the latter 'modern' conception of tort law, particularly evident in product liability and vicarious liability per Keating. Ewald (n 92) picks up on this theme which linked responsibility to providence in the nineteenth century, referring to it as a paradigm: 'Providence is the great virtue of the nineteenth century. It is the foundation of responsibility in the conventional sense of the term, (except in the case that it is due to the fault of another). Indeed, when the term was coined in the nineteenth century, "responsibility" did not designate, as it does today, a general principle of blaming others for mishaps, but precisely the opposite.' (276) The argument goes: If nature is governed by immutable laws beyond the knowledge of the fallible human mind, one's only recourse is to take precautions against the potential unwieldly power of happenstance, and consequently one is personally responsible for failing to take prudent precautions against such vicissitudes of life; this view of

from business or governmental activities. The focus on the paradigm of the individual obscured the emerging firm and mass accidents, at least within the province of tort law.[198] Industrialisation connotes the calculability of risks, while the individualistic lens of the law was still entrenched in a worldview that was tied to the concept of *fortuna*, which suggested that losses *naturally* lie where they fall in the absence of fault,[199] the latter implying 'affirmative negligent conduct'.[200] That is to say, a world in which large scale vertically integrated firms had not yet fully emerged.[201] The distributed knowledge base had yet to place injuries as normal and natural consequences of activities as distinct from depending on unavoidable chance, and attributable only where external force is brought to bear on another through faulty conduct.[202] In other words, in the society of individuals noone else is responsible for one's misfortunes in the absence of fault. That negligence was premised on fault underscores the fact that it 'the primary function of tort liability had been seen as one of punishing or deterring blameworthy civil conduct' as distinct from compensating injured "victims", but blameworthiness interpreted according to a community standard.'[203] In an important sense one can argue that tort law of the nineteenth century was backward-looking, focusing on the conduct of the parties to a dispute. Once their conduct breached a certain threshold tortious liability would be inferred.[204] It was only later in the century that it was redefined in terms of statistical

responsibility therefore encouraged self-reliance and could not lead to moral or legal obligations in the absence of fault, the loss therefore was meant to lie where it fell.

198 Legislative interventions can be traced back to Germany, which began experimenting with strict liability as early as the 1830s with respect to the railway. G Brüggemeier (n 93).

199 Keating (n 197) On the modern conception: 'That conception holds that the characteristic risks of the modern world are the inevitable by-products of planned activities – not the random consequences of discrete acts – and seeks to make activities – not actors – bear the costs of the accidental injuries that they occasion.' (1267) Of course, Holmes (n 12) saw clearly the policy choice involved, but preferred the allocation of risks that this implied. From my perspective, I view Holmes as an important harbinger for the social insofar as he viewed the world through a scientific lens.

200 A phrase taken from J Stapleton *Product Liability* (London, Butterworths, 1994).

201 This explanation is evident in G Viney *Introduction a la Responsabilité* (3e ed. LGDJ Paris 2008): « En effet dans un monde ou l'activité économique demeurait principalement artisanale, les relations de droit privé mettaient généralement en présence des individus et, en cas de dommage, c'était donc un litige entre individus qu'il fallait, le plus souvent, trancher. » (22)

202 Ewald (n 92) In the Social (my terminology but consistent with Ewald's argument) 'Injuries are "normal" – which does not mean inevitable.' (279). In a conflictual and prejudicial social life where business activity results in injury to another, the costs occasioned by such activities need to be distributed.

203 62.

204 Simmonds (n 125) 27: 'The doctrinal writer expounds a body of principles that assess the justice of a situation by reference to the way in which it came about. The law is regarded as containing a complex moral theory that defines and delimits the legitimate spheres of conflicting interests, fair and unfair forms of competition and co-operation.' Simmonds refers to this as resting on a '*particular type* of conception of justice' which he calls historical justice. It might also, it is argued, be referred to as corrective justice.

probabilities with Holmes.[205] That the concept of reasonableness was tied to an objective standard of care, however, smoothed the path to the imposition of a 'critical' standard of care.[206]

Both the unitary concept of reasonableness as fault, and the slow emergence of a general duty of care demonstrated the individualistic and 'scientific' tort law of the nineteenth century, which paralleled classical contract law in its formalism. When a general concept of negligence emerged, under the influence of this legal science approach, the concept of reasonableness premised on fault was held to be the appropriate standard of care.[207] One should not, however, allow the deductivism of legal formalism to obscure the connection between the legal system and the "collective knowledge' of society."[208] It is argued that an emphasis on 'the reasonable man' illuminates the connection to the knowledge base by deriving or more accurately, modelling, a normative standard on a social evaluation of prudent, individual behaviour.[209] The upshot, as it were, of the move from a standard of care reflective of internal states of mind to external or community standards of care, was that when negligence emerged as the tort action *primus inter pares*,[210] it was closely tied to the distributed and, more crucially dynamic, knowledge base of society. In other words, by tying reasonableness to ordinary judgment, the court effectively created, or generalised, a link with the distributed knowledge base.[211] Because the distributed knowledge base of society in modernity is dynamic,[212] this allowed more

---

205 Holmes (n 12).

206 Community v critical, relying on Brownsword (n 70) 135. The community standard reflects ordinary pre-critical community standards of ascription of responsibility to individuals, whereas the critical standard reflects a proceduralised form of ascription, meaning a standard not readily accessible to ordinary judgment such as an economic or 'social justice' standard.

207 White (n 10) 18 'Neglect expanded to encompass malfeasance as well as nonfeasance, and thus came to be synonymous with legal carelessness. At the same time a "fault" standard emerged as a limiting principle of tort liability. Modern negligence was born.' White, in effect, argues that the transition from specific duties, emphasising nonfeasance was replaced with a general standard to cater premised on a duty of all to all, which obtained to those cases of malfeasance outside the traditional duties of care. This process had begun in earnest in America the 1830s, although certain authors such as Ibbetson (n 87) 84, 85 trace the scholarly development further back to F Buller *Introduction to the Law of Trials at Nisi Prius* (1767). In the USA, in particular, certain state courts began '...to associate negligence with acts of misfeasance which were not limited to specific persons, offices or occupations.' (159) White suggests that first systematic general negligence standard 'in the books' in the United Kingdom can be found later, in Pollock (n 168).

208 Ladeur (n 24), 6. (Citation omitted)

209 Brüggemeier (n 2) emphasises that the standard of care is a factual-normative one and we agree with this analysis.

210 Ibbetson (n 87) refers to negligence in core/periphery terminology, *ie* negligence 'and its satellites' referring to rest of tort law as 'satellite' with negligence exerting centripetal pressure on other doctrines.

211 Generalized because the reasonableness standard already existed in relation to contractual situations, and *Menlove* extended it to torts.

212 The law is opened to 'a societal dynamic conception of the (sic) "normality". Ladeur (n 24), 16. (Citation omitted) In fact, Ladeur is referring to the reformulation of the 'police power' in the nineteenth century; however,

complex and statistical understandings of human action to enter the law via an objective reasonableness standard.[213] However, the emergence of a statistical approach to tort law was gradual, provoking a secondary re-modelling of the legal system and is the subject of our second chapter.

C. HOW INDIVIDUALISED ASCRIPTION BECAME A NORMATIVE MODEL FOR A GENERAL LAW OF TORT

It has been argued that the contractual allocation of rights was favoured, instituting a preference for a nascent civil society over a re-allocation of rights via tort law. Second, it has been demonstrated that the governing fault standard was one premised on cognitive input from the distributed, social knowledge base. What remains to be demonstrated how this fault-based and individualistic recasting of tort law impacted on the substantive law both private and public leading to a highly individualistic approach to problems that today would be considered in aggregate terms. This nineteenth century modelling of tort law gave rise to what might be referred to as *the classical model of legal responsibility*, namely, individualised legal responsibility. This model for the ascription of responsibility is evident in both the way private tort liability and public tort liability was developed from the mid-nineteenth century onwards.[214]

the point applies to private law also, especially since he explains his reformulated police power in terms of 'private law society'. Here, Ladeur is not referring to the ordoliberals at least not directly but rather the notion of acentric, self-organisation.

213 As Ladeur (n 24) argues, '. …private law can[not] be understood and practiced without the observation of social norms and cognitive assumptions of normality.' (6)

214 We should of course recognise that in the UK owing to Dicey's equality principle, there was no sharp distinction between private and public tort law. Instead, the individualistic models developed in the context of private relationships were adapted to the 'state'.

1. Private: The Doctrine of Vicarious Liability

For the purposes of our analysis we will focus on the troublesome doctrine of vicarious liability to illustrate the radiating effect of fault- and, therefore, individualistic-thinking on the doctrine of vicarious liability. In short, the doctrine of vicarious liability makes a master liable for the torts of his servant (later employer-employee) and in the common law is a form of secondary liability which exists in the absence of fault on the part of the master.[215] Hence, it is a means to impute liability to a master in the absence of personal fault. Ibbetson argues that prior to the nineteenth century, if not logical, the existence of the doctrine of vicarious liability in the common law was unproblematic.[216] It was a legal means to make a master pay for the torts of his servants, and could be obtained as a remedy in case only but not in trespass. With the rise of large scale enterprises and the attendant accidents they caused in the nineteenth century, notably in the railways industry, the doctrine of vicarious liability obtained renewed attention as a means by which to empty the deep pockets of railway companies and induce them to better monitor their employees.[217]

Ibbetson demonstrates that as individualised or personalised fault spread to dominate tort law, it gradually invaded areas of the law which had previously rested on different foundations. The uncertainty with regard to the doctrine of vicarious liability occurred at the level of theoretical debate as to its foundations.[218] In this regard, the identification theory which underpinned the doctrine of vicarious liability became problematic because its 'agency' thinking was viewed to be inconsistent with a law based on individual wrongdoing. It rested on a concept of status relations which were now thought alien to the law.[219] For the doctrine to be accommodated, it was restricted to the employment situation with the tort of an employee needed to

---

215 Although this remains in dispute, the master's tort version of the doctrine of vicarious liability in a minority view.

216 Ibbetson (n 87) 'The earlier common law had dealt with these [cases] without any apparent difficulty: so long as the common law could reflect popular ascriptions of responsibility, legal liability could straightforwardly be imposed in those cases where it was considered appropriate, and there was no need for any soul-searching analysis to justify this.' (181) Citing *Hern v Nichols* (1708) 1 Salk 289; *Jones v Hart* (1698) 2 Salk 441; *Kingston v Booth* (1685) Skinner 228.

217 Brüggemeier (n 93).

218 Ibbetson (n 87); PS Atiyah *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967).

219 Except for family law, see K Carr 'The Deconstruction and Reconstruction of Family Law through the European Legal Order' (Ph.d Thesis 2014).

activate/justify the liability of a superior defined according to a narrowly construed 'course of employment' test. The narrow construction of the doctrine of vicarious liability was a consequence of the emphasis on personalised fault which resulted in the doctrine being considered an outlier, an exception that should not undermine the general rule. By the twentieth century it was thought to rest on 'rough justice', policy and convenience, which lay outside the fault-based core of the law of torts.[220]

The result of this was to throw the justification of the doctrine of vicarious liability into a theoretical muddle that lasted the course of the twentieth century as those who viewed its foundation as pragmatic and based on policy vied with those who viewed personal fault as indispensable as a limiting factor on the expansion of the tort.[221] This debate can has been debated in the terms of masters' tort (primary liability) or servants' tort (secondary liability), and is a live scholarly dispute.[222] The latter argument was that not only the tort of an employee was required but that the moral underpinning of the law in personalised fault required the doctrine to be construed narrowly such that circumstances of imputed liability be restricted.[223] Its strict criteria also excluded a number of other grounds on which liability was thought to lie and therefore led to the development of a number of other doctrines such as non-delegable duties, and arguably *Rylands v Fletcher* to circumvent its narrow grounds.[224] All ameliorative efforts were based on an individualised conception of tort law and deviations from fault, such as *Rylands v Fletcher* were narrowly construed.

Whereas, the influence of 'fault', contributed to the otherwise pragmatic common law judges limiting the reach of 'scope of employment', the German jurists went one step further in Art. 831 *BGB* by requiring an employer to be personally at fault, in addition to the fault of his employee. This led to '...the specific structure of [Article] 831(1) *BGB* as a compound cause

220 Atiyah (n 218).
221 For a strong statement on fault see Hardiman J.'s dissent in *O'Keeffe v Hickey* [2008] lESC 72.
222 Although most favour a servant's tort conception of the doctrine of vicarious liability, the most recent contribution in favour of a 'master's tort' conception shows how this debate is far from over. R Stevens 'Vicarious Liability or Vicarious Action?' (2007) 130 *L.Q.R.* 30-34.
223 Viney (n 200). The different rationales are well illustrated by Viney: « Dans l'optique d'un système fondé sur la faute, il est en effet naturel d'exiger que, pour engager la responsabilité du commentant, l'acte du préposé ait été autorisé ou au moins toléré par l'employeur. … En revanche, dans la perspective d'un système fondé sur la corrélation entre le profit de l'activité d'autrui et le risque engendré par celui-ci, ce qui importe c'est de déterminer quels sont des risques qui doivent normalement peser sur l'entreprise. » (996, 997)
224 See D Ibbetson 'The Law of Tort in the Nineteenth Century: The Rise of the Tort of Negligence' in Ibbetson (n 86) pp. 170-187, esp. 181-184.

of action consisting of an employee's wrongful behaviour, regardless of fault, plus the principal's own fault.'[225] Brüggemeier argues that the effect of this prescription was to 'localize' liability with the employee. This personalisation of fault led to, from the beginning, problems of attributing fault to corporations, and it took many years of inventive judgments by the German judges to remedy what were even in 1900 outdated notions of personalised fault.[226]

But even in this era a too close focus on the law in the books distorted the rise of special legislation to deal with specific industrial accidents. Brüggemeier states that even in the nineteenth century the application of strict liability had emerged through legislation in respect of railroads in Germany.[227] This pointillistic manner of conceptualising strict liability, as an exception to the rule, was extended to; *inter alia*, automobiles, aircraft, and energy installations, in the twentieth century.[228] The rule/exception approach to strict liability although particular to German ways of conceptualising tort liability is not exclusive to Germany. These peripheral irritants which sought to internalize the costs of activities of large scale industries placed pressure on the personalised conception of tort law. They came into conflict with the fault paradigm and began to reverse the consequences of private law reasoning alone. An equivalent English *harbinger* of things to come is the Workmen's Compensation Acts, which viewed the firm as an organisation with responsibilities towards workers.[229] As Collins argues this peripheral legislation came to the centre in phase two and began to influence how arguments were made and how judgments were given in the courts.[230] From isolated regulations that dealt with the consequences of industry on the railroads and socially ameliorative measures for workers, the regulatory technique became dominant in the twentieth century, and was coupled with a new conceptualisation of the role of law as a corrective to social and economic problems. In the background is an organisational concept of liability which interacts with questions of insurance to shape the scope of tort liability. This muddle would have been avoided but for the

---

[225] Brüggemeier (n 2) 119.

[226] see 118-32 for Brüggemeier's extensive treatment of the jurisprudence.

[227] Brüggemeier (n 93) 'The German answer to the "age of railways" was a sort of strict civil liability (1838/1871), out of which the modern *Gefahrdungshaftung* developed.' (3)

[228] *ibid*.

[229] See D Brodie *Enterprise Liability and the Common Law* (Cambridge, CUP, 2010). Brodie details the historical influences on the emergence of enterprise liability in the common law in his introduction. On the Workmen's Compensation Act, 1897: 'The Act was a remarkable piece of social legislation and imposed a form of strict liability on employers. Compensation for industrial injuries was now seen as the responsibility of enterprise. ...' (3)

[230] H Collins 'Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalizaton' LSE Law, Society and Economy Working Paper 6/2007.

nineteenth century systematisers who equated the law of torts with personalised fault. The universalism evident in contract law theory, referred to as the placement of a procrustean bed on top of contracting practices, seems to have impacted tort law theory as well. At all events, they reflect an attempt to keep to strictly delimit the law to facilitate decentralised coordination. The eclipse of these ideas was gradual reflecting changing understandings of accidents.

2. Public: A Public Law of Tort

In this period a public law of tort emerged in France. In England by contrast the judges grappled with existing grounds for recovery. In both France and the UK in the nineteenth century tort law as argued above was premised on individual wrongdoing. If one assumes that the State should be liable, how can the State be accommodated within this personalised model of liability?

(i) France

Le roi ne peut mal faire was replaced in France by a general principle of state liability in tort. This was achieved in 'small steps' in post-revolutionary France.[231] The reasons for the reluctance of the administrative courts to allow for tortious recovery against the administration relate mainly to their slow emergence as independent administrative courts, the particular French conception of the separation of powers, and the traditional concept of sovereignty.[232] Harlow emphasises the latter as particularly important: 'At the political level, the idea of the Nation-State, whose fundamental attribute is Sovereignty, formed a serious obstacle to imposition of legal liability on the State.'[233] There was an incongruity between sovereignty and

[231] D Fairgrieve *State Liability in Tort: A Comparative Law Study* (Oxford, OUP, 2003) 9.
[232] *ibid*. Harlow notes that this traditional concept of sovereignty was challenged by L Duguit who reconceptualised the role of the State as a provider of services see C Harlow 'Administrative Liability: A Comparative Study of French and English Law' (Ph.d thesis, 1979).
[233] 12.

the imposition of 'conditions' thereon.[234] However, as Harlow equally notes this principle of unfettered sovereignty exists in tension with the notion that the State is a legal entity subject to the rule of law.[235]

The rule was first chipped away and gradually replaced in *Blanco (1873).* In *Blanco,* the case was framed as one of personal liability of an employee with vicarious liability of the State. The claimant brought the case via an argument by analogy with the *Code Civil* to extend the principles of *respondeat superior* developed in the private law context to the State. The Court rejected the principles applicable to civil liability in the *Code Civil* and '[t]he rules of administrative liability were held to be of a distinct and special character.'[236] That they were distinct and special justified the *Conseil d'Etat*'s jurisdiction. The relevant test was whether the tort was committed in the *service public*. This was intended to restrict liability by taking account of the 'need to balance the exercise of private rights with the general public interest'.[237] Hence, civil liability of the administration could be neither 'general nor absolute'. What the Court in *Blanco* did, in effect, was to allow for a special regime of administrative liability to be carved out 'for damages caused by the actions of persons which [the State] employed in the public service'.[238] Its justification was based on the separation of powers. Hence, the decision was both expansionary, developing a general principle of state liability, and restrictive, suggesting that liability would be more limited than that of private parties.[239] *Pelletier* added to this the distinction between personal acts and 'fautes de service' with the latter attracting the liability of the State. Finally, in the *Feutry* decision the *Tribunal des Conflits* 'extended the jurisdiction of the administrative courts to local authorities based on a unitary conception of the State.[240] This provided the basis of a corporate view of the State which distinguished state liability from ordinary civil liability viewed on individual conduct with a doctrine of vicarious liability to attribute liability to the 'master'. In other words, these decisions differentiated

---

234 *ibid*, citing Bodin.

235 13. Harlow cites for the origins of the rule of law argument: N Johnson 'Law as the Articulation of the State: a German Tradition seen through British Eyes' (unpublished paper). Dowdall 'The Word "State"' (1923) 39 *LQR*. 98; Borchard 'Governmental Liability in Tort' (1924-25) 34 *Yale LJ* 1, 129; GDH Cole's Introduction to Rousseau's Social Contract' Dent's ed. 1973.

236 Fairgrieve (n 231) 11.

237 *ibid*.

238 13.

239 Harlow (n 232) relates this restrictiveness to the sanction, as distinct from compensatory, rationale for state liability. It was also restrictive in this period due to the acte d'autorité doctrine which persisted until the *Tomaso-Grecco* case.

240 Here I closely follow C Harlow's characterisation of developments at pp. 27-28.

administrative liability from delictual responsibility. However, the *faute de service* was to be judged according to the standard of fault or gross fault and therefore the distinction was partial. In this sense, by tying the liability of the State to the fault of an individual servant, this was a principle of vicarious liability not dissimilar to the type of liability in Article 1384. The difference lay, apparently, in the special nature of the employment contract between a state employee and the State. This was a limiting principle. Second, the State retained the right to sue the individual tortfeasor. Third, not all tortious acts of employees were sufficient to fall under the heading '*faute de service*'. The Court took it upon itself to reconcile 'public needs with private interests'.[241]

It is submitted that despite the Court's remonstrations that State liability did not depend on the rules of the *Code Civil*, in the early days at least, it was dependent on its conceptual framework. Harlow refers to this as the 'gravitational pull' of the *Code Civil*.[242] Hence, an action could be brought against the State understood as a corporate entity only if fault of an employee could be demonstrated. This is similar to the notion of *faute d'autrui* whereby the latter must trigger the civil responsibility of the Principal. The difference in *Blanco*, at least, is that there were to further reasons to limit this type of recovery. This was, as stated, based on balancing the public interest with the private rights of the citizen.[243] If it is correct to argue that at this stage of legal development (late nineteenth century) fault remained a personalised concept, then State liability depended on a *personalised and moral* view of the tort law.[244] In the early days, it was not yet appropriate to speak of recovery for systemic failure – this would come later. Second, the rationale for recovery according to Harlow was to sanction the State, as distinct from compensate or repair the injured party. Harlow argues that because it was developed in tandem with an abuse of powers doctrine, it came to be seen as a sanction for maladministration rather than a compensatory remedy. However, state liability later developed towards compensation. There remains a tension, however, between a sanction-based view of liability and a compensatory one.

---

241 26.

242 30.

243 Per *Blanco* (legifrance.gov.fr ; 5 March 2014): « Que cette responsabilité n'est ni générale, ni absolue ; qu'elle a ses règles spéciales qui varient suivant les besoins du service et la nécessité de concilier les droits de l'Etat avec les droits privés. »

244 It is probably accurate to say that in 1873 it did, but it is evident that *Blanco* was decided on the eve of great change**.**

However, this initial emergence of a personalised fault-based state liability was not to last. In fact, the fault-based liability of the *Conseil d'Etat* coexisted alongside other forms of strict recovery against the State. These 'exceptions', because based on statute, to the general rule of no recovery in the nineteenth century were developed piecemeal and covered areas such as war damage compensation, and compensation for losses caused by public works such as road, canal, and railway construction.[245] Harlow argues that they could have been the basis for a general principle of risk or strict governmental liability but the prevailing emphasis on fault in the late nineteenth century prevented such a theorisation. However, by the early twentieth century Duguit had emerged with just such a theory. Harlow demonstrates how Duguit in the early years of the turn of the twentieth century re-conceptualised the law of state liability giving it a fresh, and stricter basis based on the concept of public service. The relevant point which derives from Duguit's theorisation is that liability of the State cannot be premised on fault because the State, as a corporate body, cannot commit a fault. In other words, it would be to submit the State to a version of the pathetic fallacy.[246] This led to the reformulation of state liability on the basis of equality before public charges deriving ultimately from the protection of private property mandated in the post-Revolutionary period. Perversely, the emphasis on the 'special' nature of state liability once the basis for restricting recovery became a motor of liability once the rationale was reformulated along the lines advocated for by Duguit. This corporate view of the State was to be important in the twentieth century as the *Conseil d'Etat* developed the doctrine. Indeed, from the very first articulation of State liability the notion of '*faute de service*' implied such a view by emphasising the individual's role in the provision of a state service, if not entirely decoupling individual wrongdoing from the equation. The shift was swift because *Blanco* was decided « *a la charnière du* » the transformation from the society of individuals to the society of organizations which impacted on the discussion as to the functions of tort law by stressing the limitations of formal justice.

[245] Harlow (n 232) outlines the various provisions.

[246] This undercurrent in scholarly debate is noted also by G Williams 'Vicarious Liability and the Master's Indemnity' (1957) 20(3) *MLR* 220 when he discusses the tendency to view the firm in a similar anthropomorphic light. This, it is argued, is symptomatic of what Ladeur refers to as the society of organizations.

(ii) England

In England by the nineteenth century it was firmly established that the Crown enjoyed immunity in tort law: 'The King can do no wrong'. This is the common historical basis from which the two jurisdictions depart. For Harlow, the subsequent differences that emerged are overstated. What Fairgrieve refers to as the 'injustice of Crown immunity' was meliorated by special legislation to deal with specific incidents of liability. 'A practice evolved whereby the Crown would stand behind the individual Crown servant and pay the damages and costs if a private employer would have been vicariously liable in similar circumstances.'[247] Therefore, if there is a difference between the two jurisdictions it is in consequence of the fact that in English private law a distinction between the personal liability of individual public servants and immunity of the State was copper-fastened, in contrast to France where a model which came to stress the corporate liability of the State.[248] The latter, as noted above, comprehends the notion of '*faute de service*' (fault in the administrative system) and, it is submitted, has an expansionary dynamic.[249] Second, although the Crown could do no wrong a distinction was made between the Crown as sovereign and the acts of public authorities. As Harlow points out, it was curtailed in *Mersey Docks and Harbour Board v. Gibbs*.[250] The judgment concerned damage caused by negligence of a harbour authority. The House of Lords deprived the shield of Crown immunity to a large number of public corporations which offered to the public ordinary commercial services.[251] Another notable judgment from this period is *Geddis v Proprietors of Bann Reservoir* which muddied the waters somewhat by indicating that public authorities may be liable for their acts or omissions where they are based on statutory duties but this was again premised on a personalised view of tort law.[252]

---

247 Fairgrieve (n 231) 10.

248 Harlow (n 232). On the deeper significance, see JWF Allison *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford, OUP, 2000). Harlow shows that the difference is overstated because the *Conseil d'Etat* deploys a number of control mechanisms, which produce similar outcomes.

249 My point here is that by diverting from the interpersonal conception of tort law, it allows questions of distributive justice more scope.

250 (1866) L.R. 1 H.L. 93.

251 As cited and explained in Harlow (n 232) 43.

252 *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430 This is at least how the judgment came to be seen retrospectively. In *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 Lord Reid accepted that statutory duties were duties owed to the Crown and not to private individuals: 'I would agree [that statutory duties are owed

Therefore, '[f]rom the middle of the nineteenth century, it became clear that public bodies could be liable for the torts of their servants.' However, whether for reasons of expedience or principle *the Public Authorities Protection Act 1893* placed limitations on this form of recovery including rules regarding costs to discourage claims.[253] It was not until *the Crown Proceedings Act 1947* that liability of the Crown returned to the fold.[254] In that Act, the Crown was equated with a private person of full age and capacity in respect of tortious liability. However, this equality principle (the common law applies without distinction to private parties and public parties) meant that the Crown was read into a private law based on individuals and their transactions rather than stressing the unique role of the Crown (read: State) in the provision of public services. This included the use of the doctrine of vicarious liability against the Crown. There was, however, no 'special' concept of Crown liability established. The State as service provider, however, by the mid-twentieth century was an increasingly plausible account in light of the previous half century of social legislation, and the new impetus for corrective legislation given impetus by the Beveridge report.

In sum, the Courts were less willing than their French counterparts to abandon a *personalised* view of tort law to meet the needs of plaintiffs in actions against the State. However, the law of torts was transforming in any event in this period as will be outlined in the next section such that the question of state liability, in the absence of a concept of the State, would re-emerge. Dicey's conceptualisation based as it was on the parity or equality principle was unsuited to the activities of the State because the legislative democratic State main torts can be described as omissions. To accommodate the omissions of the State into the framework of acts would lead ultimately to a great deal of casuistry.

to the Crown, R-C], but there is very good authority for the proposition that if a person performs a statutory duty carelessly so that he causes damage to a member of the public which would not have happened if he had performed his duty properly he may be liable.' (1031)

253 Fairgrieve (n 231) 11.

254 *ibid*, 12. Fairgrieve makes the interesting point that contrary to the common perception, statute formed the basis for this evolution in the UK, while case-law was the basis in France.

C. CONCLUSION

No sooner than the personalised or individualised model was emerging than it was breaking down. However, a personalised view of legal responsibility remained an important, distinctive means to view ascription. Indeed, when coupled with fault it provides a powerful normative model of liability, which continues to influence the law, existing in tension with what we will refer to as an organisational model of liability.[255] We have demonstrated that in the nineteenth century a type of law emerged, focused on individual self-realisation, through the will and its limit, fault. Fault, however, in this systematic law had to interact with the will theory, such that it could not undermine its basis. In addition, fault filtered normality into the law in the setting of human interactions based on defined rules of just conduct. In sum, the personalised model of tort law centred on fault dominated in this period. Thus, in combination with the will theory of contract institutionalised the market order which gave priority to the market allocation of risks, and differentiated the economy from society through the empowerment of individuals.

The law had to be equipped to this end. This was achieved in the common law by re-modelling the existing law in a procrustean manner, explaining existing law in light of overarching principles, fault-based negligence, and explaining away or minimizing areas of law which did not accord with this model, prominently the doctrine of vicarious liability. In addition, the law modelled the social, distributed knowledge base through the concept of reasonable care, a standard that was generally accessible and comprehensible to the mass of individuals.

This model, of course, ignored the rise of the vertically integrated enterprise, and indeed the 'regulatory' and welfare state, the activities of which lay behind the acts of tortfeasors. This is unsurprising because at the start of this period neither the vertically integrated firm nor the regulatory state had emerged as an institutional form, and knowledge remained distributed. Enterprise was conducted by merchants in partnerships not yet by corporations, and the state had not yet assumed wide social functions.[256] In consequence, the need for a corporate form of

[255] Its legacy is clearly visible in the career of *Rylands v Fletcher* [1868] UKHL 1 in the UK; which has wavered from quasi-strict liability, and back towards fault-based recovery over the past 150 years.

[256] A Chandler *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA, Harvard Belknap, 1977), 28 'Specialization in Finance and transportation, unlike that in distribution, led to an important institutional development: the growth of the incorporated stock company.' This corporate form was required in areas where large amounts of capital were needed such as banking, turnpikes and canals.

liability did not yet exist. When the changes in the knowledge base at the end of the nineteenth century were perceived, and found troubling, this model of personalised fault came under pressure. This was because knowledge was increasingly technical in nature, and could not be scrutinised by simply reconstructing behaviour as what a *bonus paterfamilias*, or reasonable man, would have done in the circumstances. This was the case both in terms of liability as it applied to public and private actors. The moral, personalised view of tort law was about to be changed utterly.

CHAPTER II: TORT LAW AND THE SOCIETY OF ORGANISATIONS

A. INTRODUCTION

In chapter I, we noted that the classical model of tort liability was personalised - an individualistic model that mainly focused on a community-based standard of individual conduct derived from distributed 'experience'. It is argued that no sooner it was concretised in legal doctrine, than it began to strain and bend.[257] This is in part because despite the separation of fact and norm that classical positivism assumes, and that is necessary for the operative closure of the legal system, this 'self-observation of the legal system', so to speak, drastically underestimates the embeddedness of the normative legal system in its cognitive knowledge base.[258] In this respect, there is a strong connection between 'normal' expectations and legal norms whether, to use the categories of the common law, we refer to the duty of care or the standard of care in negligence. In other words, what Ladeur refers to as 'bridging' or 'hybrid' concepts such as negligence are sufficiently cognitively open to adapt to newer understandings of normality or 'fact', which is then normatively coded in the legal system as duties of reasonable care.[259] In the previous chapter, as we adumbrated, both the generalised duty of care and the standard of care were the product of a liberal legal order that, on the one hand, provided the basic modern architecture of experimentation particularly through elevating contract-as-will while, on the other, had not been fully extricated from more atavistic notions of naturally occurring harm – albeit through the emergence of a community-based (objective) standard of care was in the process of de-coupling from pre-modern notions of subjective wrongdoing.[260]

---

[257] To put this less prosaically, Holmes followed hot on the heels of Langdell. Although Holmes developed a fully-fledged doctrine of negligence premised on fault, he also introduced a particular statistical approach to tort law.

[258] Ladeur (n 136).

[259] Ladeur (n 83) 49, 53. Although Ladeur refers to 'danger' as a bridging concept, he also remarks: '*Erfahrung*' is, by itself, a typical hybrid concept which integrates informational, practical and normative elements. Its role in public law can be compared to the rules defining 'negligence' in private law.' (Citation omitted)

[260] To be clear, regarding the common law, a general concept of negligence emerged only towards the end of the legal formalist period. Its rise corresponds to the rise of mass accidents. Its conceptual tools, fault and the concept of a *general* duty are creatures of the nineteenth century rationalisation of the law. It came to prominence as a rationalisation of due care, because trespass concerned with property damage was inadequate to a rising industrialising society. This is true at the level of the scholarship, *eg* Pollock (n 168), Holmes (n 12) – and certain judicial pronouncements such as Brett MR's in *Heaven v Pender* (general duty), *LeLievre v Gould* 'proximity'. It was not until the twentieth century that they were generalized in legal doctrine in *Donoghue v Stevenson*. Although this was certainly a gradual process, as B Hepple 'Negligence: The Search for Coherence' (1997) 50(1) *CLP* 69 avers, citing J Salmond *Salmond on Torts* 6th edn (London, 1924), (1924) who was still referring to subjective states of mind as required for negligence. To be clear, pace Brüggemeier (n 2), 66, reasonable care is a normative concept, albeit one highly dependent on cognitive definitions of normality.

In any event, the liberal private legal order gave rise to a rule-oriented, individualistic form of law that drew on distributed experience ascribing legal responsibility to individuals; it was, as such, blind to the possibility that certain individual 'acts' are better captured in terms of a social concept of 'activities'.[261]

This changed fundamentally at the turn of the twentieth century when '. …a new type of group-based knowledge (...) which relies upon rules of probability which imposed order on and allowed for recognition of patterns in phenomena which hitherto had been regarded as subject to blind chance' emerged and became integrated into the legal system.[262] This group-based knowledge assisted forward-looking planning, and the rise of *eigenstructures*,[263] chiefly public bureaucracy and its counterpart the private, vertically-integrated firm in which hierarchical decision-making occurred.[264] The emergence of group-based calculations can be described as an epistemological 'break of symmetry' or 'rupture' between the 'feedback loops' of the legal system and the knowledge base of society, in which with the rise of the 'society of organisations' a dichotomy emerged between distributed 'experience' and 'expert knowledge', resulting ultimately in a secondary normative re-modelling of the legal system through the establishment of new organisational models of liability and the legal system's internal differentiation.[265] In tort law terms, the blind chance referred to here is replaced by a notion of statistically regular *accidents*, which do not fit the anterior dichotomy between fault as affirmative action and *fortuna*.[266] The law, in addition, began to 'look' beyond individuals, their fault, to the place of the individual within representative groups, and gradually diminished the notion that injuries can be attributed to 'act of god' or *vis major* in the absence of individual fault. Accidents are the consequence of human (collective) activities rather than individual acts or the 'natural' order. Accidents, in short, are *social* phenomena.[267]

---

[261] Ewald (n 58). Although note when we say 'blind' we are speaking anachronistically, because the collective attribution of responsibility required the emergence of a concept of risk, the subject of this chapter. Ewald makes this point clearly.
[262] Ladeur (n 135) 87.
[263] Kjaer (n 102).
[264] *ibid*. Chandler (n 256) 'the firm'.
[265] H Collins *The Law of Contract* 4th edn (Cambridge, CUP, 2003) details how this occurred through internal differentiation of the legal system. The universalism of contract and tort was replaced by the emergence of *eg* distinct labour, employment, and tenancy law. For Germany see F Wieacker (T Weir trans) *A History of Private Law in Europe* (Oxford, Clarendon Press, 1995).
[266] Ewald (n 57).
[267] *ibid*.

B. THE RISE OF 'THE SOCIAL' AS THE LAW OF THE SOCIETY OF ORGANISATIONS

In this chapter, we examine how the change in the knowledge base of society, as decentralised experimentation advanced, resulted in a move from individual conduct to a social concept of responsibility that ultimately transformed the way in which the ascription of responsibility occurred. In other words, the 'cognitive' rise of the 'society of organisations' led to a secondary normative re-modelling of the legal system, as the legal system as a stabilising 'second order of observations' adjusted its programmes, its norms, to the rise of the corporative form by creating, indirectly and directly, an organisational model of liability.[268] This organisational model of liability fully embraced a 'critical' duty and standard of care, and in the process re-focused the relationship between contract and tort in the common law.[269]

It should be emphasised that it did not replace the earlier individualistic model of tort liability entirely, but rather added an organisational dimension to private law disputes formerly considered almost exclusively in bilateral terms.[270] To place this in Ladeur's terms, rules emerged that attempt 'to balance the liberal individualistic rationality against the new collective logic.'[271] Thus, '. …within individualistic rules of liability, problems of the collective attribution of responsibility re-appear; this applies to product liability'.[272] Beyond product liability, one can perceived the emergence of this organisational model in the evolution of the doctrine of vicarious liability, whether applied overtly to employers, or as deployed *mutatis mutandis* against the state, as we will see. It was, of course, these areas of law namely product liability (mass accidents, the counterpart of mass production), the doctrine of vicarious liability and state liability in which organisational liability was apt to emerge, because these areas of

---

[268] We draw here on the distinction between cognitive normality, and legal normative ordering that Ladeur develops at length in Ladeur (n 24) regarding global administrative law. See the Introduction to the thesis for a lengthy treatment of this distinction.

[269] This involved a shift from law's immanent coherence to a functional understanding of tort law as a means to achieve deterrence and compensation. See Williams (n 22) as typifying this approach. In other legal systems, *eg* Germany, contract law re-formulation was equally if not more important see Markesinis (n 185).

[270] *eg* H Collins 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53(6) *MLR* 731.

[271] Ladeur (n 2) 96.

[272] *ibid*.

law touch directly upon the firm and the state as centres of (expert) decision-making, as distinct from individual agents, in the industrialised, welfare state. In this sense, we can perceive the emergence of the organisational form both in public bureaucracy and 'private bureaucracy', *ie* the firm.[273]

The 'cognitive rupture' undergirded the rise of the society of organisations in 'the social' involved turning from the individual to the group, and from fault to risk. Teubner refers to the emergence of a concept of *vertical* vicarious liability, whereby risk management so to speak was assigned, *ex ante* but more importantly for our purposes, *ex post* to organisational addressees.[274] These organisational subjects of law were additionally objects of law in the sense that they acted as placeholders for conflicts of interests between groups in the society of organisations. Tort law, in addition to solving concrete legal disputes, became concerned with risk management by harnessing organisational expertise towards reducing risks and channelling to the appropriate group the costs of accidents.[275] In legal scholarly terms, intrepid theorists re-formulated legal doctrine in line with 'the felt necessities of the times'.[276] These 'felt necessities' were social, as distinct from individualistic. We will now examine the influence of the social, as it were, on the formulation of tort duties (England), and the replacement of fault with risk as the motor of liability (France). From a legal scholarship perspective we focus on France in agreement with Kennedy, because the logic of the social, so to speak, was most developed in French scholarship.[277]

[273] The firm as private bureaucracy, pathbreaking: Chandler (n 256):
[274] G Teubner (n 1). Although one should note that its imputation *ex post* was with a view to prospective accident reduction.
[275] G Calabresi *The Costs of Accidents*: *a Legal and Economic Analysis* (New Haven, Yale University Press, 1970).
[276] Holmes (n 12).
[277] Kennedy (n 91).

1. From 'Cognitive Rupture' to the Materialisation of Law

> Rules derived by a process of logical deduction from pre-established conceptions of contract and obligation have broken down before the slow and steady action of utility and justice.[278]

Kennedy borrows Weber's concept of materialisation of law to describe the changes to the manner in which law was conceptualised during this period.[279] The materialisation of law denotes the percolation of the social into private law proper (contract and tort) and the internal differentiation of private law into new fields of law *eg* labour, employment and tenancy law.[280] In all these areas of law, the shift was from classical contract and tort to viewing relationships in a collective perspective of social interdependence.[281] In other words, the rise of 'the social' *qua* interdependent groups as a way of conceptualising the relationship between law and society was the particular grammar or *langue* in which argument over the distribution of rights and duties was conducted.[282]

Before turning to these re-formulations of private law, it would be remiss to ignore the influence of an emerging regulatory state[283] on private law doctrine.[284] The emerging regulatory state was, in turn, embedded in a new social epistemology largely the result of innovations in social statistics.[285] With the emergence of social statistics, the basic idea was that beyond individual free will one could ascertain social laws, probabilities (risks) of

---

278 B Cardozo (n 151) 99-100.

279 See, additionally, J Habermas (W Rehg trans) *Between Facts and Norms*: *Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass., MIT Press, 1996) ch 9 for an elaboration of the concept of materialisation albeit read in light of his overall theory about the relationship between public and private autonomy.

280 Wieacker (n 265) 431-38, for the German example. See Collins (n 265) for an analysis of materialization and differentiation in the common law p. 37-39.

281 Kennedy (n 91).

282 *ibid.*

283 The regulatory state herein denotes the period up to the New Deal, before the creation of the welfare state.

284 *Compare* Wieacker (n 265), who seems to argue that nineteenth century legislative intervention supported the liberal legal order. For Wieacker, the real break with the past, and what Collins has referred to as the differentiation of the legal system into *eg* employment, labour and competition law, was the first world war. See especially pp. 432-38. On differentiation in Collins's sense see Collins (n 265).

285 Ewald (n 57) notes at length the seminal important role of Queletet in forming the new social sciences, in direct tension with earlier metaphysical views of causation.

accidents, crime, health and so on that remained reasonably constant year-on-year, which enabled preventive forward-planning and, indeed, insurance.[286] As Ewald states, prevention replaced providence as the *leitmotif*:

> Prevention (the vocabulary of which henceforth replaced that of providence) presupposes science, technical control, the idea of possible understanding, and objective measurement of risks. Thus, the problem is no longer that of compensating for practically inescapable losses but of reducing the probability of their occurrence.[287]

This change from providence to prevention is accompanied by a conceptual shift from danger to risk. As Brüggemeier outlines '*Dangers* are the natural events, which have always imperilled mankind: tempests, wild animals on land and sea, epidemics, earthquakes and tsunamis. By contrast, *risks* are man-made contingent perils, in particular in relation to industrial or technical development.'[288] Thus, the concept of prevention is tied to that of risk, and risks are considered subject to rational planning aiming to achieve optimum levels of safety and spread the inevitable costs when risks materialise as accidents.[289] Ultimately, prevention aimed to reinforce individual security.[290] Towards the end of the nineteenth century, prevention became the important guiding principle of a swathe of social legislation aimed at increasing the security of workers, minimising accidents and spreading their costs through private and social insurance. It was, thus, through positive, politicised programmes of social legislation that the turn from providence to prevention first emerged. This emerging legislation that aimed to provide security from risk of the industrial society was enlarged within the post-war welfare state to provide a minimum level of security to citizens from 'cradle to grave'.[291]

---

286 *ibid.*
287 Ewald (n 92), 282.
288 Brüggemeier (n 93).
289 Calabresi (n 90).
290 Ewald (n 92) 'The nineteenth century's dream of security is tied to a scientific utopia ever more capable of controlling risks. While one cannot eliminate risks al- together (there is never zero risk), they will have been reduced sufficiently to be able to be dealt with collectively: accidents are the by-product, necessary although always more marginalized, of scientific and technical progress. These are special or abnormal risks, the responsibility for which should be spread over the community. Our concept of assured public health and safety involves prevention, the dream of an ever more complete reduction of risk. It is not, at least not on purpose, a measure designed to take on all human misfortunes.' (282)
291 Influential see Marshall (n 123); see also D Priel 'British Politics, The Welfare State, and Tort Liability of Public Authorities' Warwick School of Law Research Paper No. 2010/14. Priel notes 'Academic lawyers writing

At all events, by the end of the nineteenth century, the perceived inadequacies of the liberal legal order led to the emergence of considerable risk-centred social legislation. Indeed, it is sometimes underlined that harbingers for the re-formulation of private law can be found in this *fin de siècle* social legislation, whereby at least at a surface level the pressure of the emerging universal male franchise and class conflict, most notably in Bismarck's attempt to pacify the rising tide of socialism[292], led to the redistributions of rights and duties from employees to employers *qua* class or group.[293] At a deeper level, in Prussia one can retreat further into the nineteenth century to find contrapuntal examples of special legislation to deal with railways,[294] which moved from fault towards stricter forms of liability of railway companies, intended to cope with the emerging industrial society and whose primary aim was to redistribute benefits and burdens, as a world of acts was replaced with a more risky world of activities.[295] In Germany, these special measures however remained outside the core of civil liability because the civil code (the *BGB*) rested on a liberal constitution which favoured freedom of contract and fault.[296] While this social legislation was most developed in Germany, throughout the

---

at the time started talking about the area of law in terms of what it 'does' (instead of what it 'is'), and increasingly this question has come to be examined within the context of its role within the welfare state.' (10) And 'The consensus years and the expansion of the welfare state were reflected not only in the creation of new public institutions such as the National Health Service and the Industrial Injuries Scheme, but also in a slow but steady expansion of tort liability against the state and employers, an expansion that effectively reoriented tort law towards becoming a mechanism of insurance concerned with the optimal allocation of risks among different groups in society.' (10)

[292] Brüggemeier (n 93), 11 argues that in respect of the German model it had two tracks '...state social insurance and 'stricter forms of civil liability (enterprise liability and *Gefahrdungshaftung*) beyond the fault principle. The first was in the Bismarck era not to be separated from the political context of the attempted state domestication of the new class of industrial workers and their organisations (socialist parties; trade unions) and their integration into the society of imperial Germany. The special legislation on no-fault liability came from politics, too.'

[293] In this respect, we note RHPflG, 1871 on enterprise liability, and the introduction of compulsory state insurance for accidents in the workplace in 1884, which as Brüggemeier informs us was the basic model for French legislation, 1898, and the Worker's Compensation Acts in the UK and America. Brüggemeier (n 93). Brüggemeier states, technical innovation which led to a proliferation of accidents was the engine of change: 'This new technical-industrial world with its industry – and transport – related accidents forced legal practitioners and legislatures to seek new regulatory strategies for dealing with these risks outside of well-trodden paths of roman-pandectist legal doctrine.' (3) The emphasis in Germany was on social insurance and no-fault statutes, whereas in the common law jurisdictions a greater role was given to compulsory enterprise private insurance as a means to transfer risk, and spread it among the relevant class, and ultimately to pass-on the cost to consumers.

[294] Prussian Railway Act, 1838, Brüggemeier (n 93) informs that this was based on the strict liability of innkeepers, nautical carriers, and stables. He notes however that although elements of a risk approach were present, the law was rooted in 'receptum' liability, which allowed for its contractual waiver. The Imperial Liability Act, 1871 expanded the Prussian approach to the rest of the newly formed Empire, with certain amendments notably a greater emphasis on technical operation and personal injuries.

[295] It is notable that Chandler (n 256) places the railway at the forefront of vertical integration; a model later adapted to other areas of the economy in the USA.

[296] Brüggemeier (n 93) 'The different heads of liability for technical risks developed before and after 1900 in the shadow of the great systematic codification of the BGB. This lay in the hands of pandectist academics and practitioners. ... Political attempts to incorporate strict liability into the BGB failed.' (11)

industrial West steps were taken to re-assign the outcomes of a contract and tort approach; for example, in France the *loi* 1898,[297] and in the UK the Workers Compensation Act, 1897, might be considered the starting-point of a distinct employment law.[298] As Cafaggi states:

> In the last part of the nineteenth century and the first part of the twentieth, the emergence of regulation, and in particular that of welfare regulation, was primarily due to significant limits of compensation. These shortcomings were associated with the *internal structure of civil liability* and the weaknesses of other branches of private law, especially contract and labour law. Worker compensation regimes for industrial accidents are only one example of an emerging body of legislation stimulated by the combined weaknesses of civil liability and labour law.[299]

Thus, the internal structure of civil liability, in our terms the individualistic model of liability, resulted in a lag between social legislation and tort law.[300] It would appear that under the influence of social legislation, a regulatory view of the law of torts, as a means to indemnify or compensate individuals for inevitable accidents, in effect, emerged.[301] No longer could tort law be conceptualised, at least not without dispute, as a distinct realm outside the regulatory ends of the welfare state.[302]

---

297 Ewald (n 57) notes, in particular, its influence on Saleilles and Josserand.

298 Brodie (n 229) makes the point that the concept of enterprise liability, what we call organisational liability, owes its origins to the Workers' Compensation Act.

299 F Cafaggi. 'A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities' in F Cafaggi (ed) *The Institutional Framework of European Private Law* (Oxford, OUP, 2006) 191, 192-93 (emphasis added, R-C). For similar movements in German, American and Russian law see G Brüggemeier (n 93).

300 Common law: Within the firm, the liability of employers towards employees was frustrated by the so-called 'Holy Trinity' of defences *ie* common employment, voluntary assumption of responsibility and contributory negligence. The latter was understood as excluding liability entirely. Outside the employment relationship, with respect of firm liability towards third parties the doctrine of vicarious liability was understood narrowly crystallised in the so-called Salmond test. For detail see White (n 10); Hepple (n 260).

301 There is certainly a clear link in Saleilles's treatment of tort law, see R Saleilles *Les Accidents du Travail et la Responsabilité Civile: (essai d'une théorie objective de la responsabilité délictuelle)* (Paris, Rousseau, 1897).

302 Again, on the deeper consilience between the new role for public law and private law see L Duguit (F & H Laski trans) *Law in the Modern State* (New York, Huebsch, 1919) 49: 'Public law has become objective just as private law is no longer based on individual right or the autonomy of a private will, but upon the idea of a social function imposed on every person. So government has in turn a social function to fulfil.' (49) See also L Greene 'Tort law Public Law in Disguise' (1959–1960) 38 Texas Law Review, 259; for contract, F Kessler 'Contracts of Adhesion-Some Thoughts About Freedom of Contract' (1943) 43 *Colum. L. Rev.* 629.

Indeed, within tort law scholarship and, eventually, the legal doctrine there was a basic change in the understanding of injury.[303] Injury was reclassified as accident. This rested on a fundamental epistemological turn highlighted by Ewald. Whereas *fortuna* had dominated the classical private law leading to the attitude that losses should lie where they fall because absent fault noone is responsible for naturally occurring events, the emerging risk paradigm premised accidents as an inevitable consequence of scientific and technical progress. In the epistemology of the social, risks were a social concept insofar as risks were a consequence of human, organised activity. What is reasonable became a question of whether activities imposed a reasonable risk on society. The role for the law was to attune its normative 'programmes' to this paradigm. This involved, in short, an organisational view of activities – as distinct from individual acts the role of law was to intermediate between 'active' and 'passive' groups within society; and secondly, the emergence of a critical standard of care distinct from a community-based standard was required to find the correct balance between liberty and restraint. Fault was redefined from a question of individual conduct to the running of an unreasonable risk.

This dual shift aimed at rendering tort law a *social* tort law, so to speak, and was first espoused in French scholarship; indeed, it is here we will find the most developed and influential re-conceptualisations of private law at the turn of the twentieth century.[304] In the vanguard of the translation of these 'social' insights into private law scholarship and doctrine were scholars such as Josserand, Saleilles, and Duguit. While Josserand presented the source of change as immanent in the *Code Civil*, Duguit argued that the change directly contradicted the system inherited from the *Code Civil* by replacing a 'metaphysical' theory of individual rights with a social and realist concept of law.[305] These disparate writers can be summarily described as

---

303 Forerunner, at least in the common law, Holmes (n 12).

304 Kennedy's distinctions between Germany, French and US scholarship as the most influential in certain historical milieu is somewhat of a simplification. For example, the French scholarship obviously owes a debt to Ihering. Nevertheless, it is certainly true that a rich and influential wellspring of French scholarship emerged in the first decades of the twentieth century, and was broadly read outside France. Wieacker offers an explanation as to why the scholarship was most developed in France: F Wieacker 'The Degenration of Positivism, and Legal Naturalism' in Wieacker (n 265) 442, 456: 'In France, Duguit, Saleilles, and Gény put forward a new theory of interpretation based on law's *fonction sociale*, the need for a new theory being felt earlier in France than in Germany or Switzerland, since the Code there was a hundred years older.'

305 L Duguit *La Transformation Générales du Droit Prive depuis le Code Napoléon* (Paris, Alcan, 1912): 'On essayait de justifier le système en torturant quelques textes du Code Napoléon, notamment les articles 1384 et suivants.' Notably critiquing Joserrand's *De la Responsabilité du fait des Choses Animées*, and Saleilles's *Les Accidents du Travail et la Responsabilité Civile*. Duguit notes that his inspiration comes from Auguste Comte's *Système de Politique Positive* (1890). Without wishing to go too deeply into Comte, we note in Duguit's account an attempt to provide a new rationalization and justification for our legal system and perhaps this explains his

social because emphasis moved from the individual to the whole.[306] At all events, whether drawing on resources immanent to the law or advocating a new, scientific recasting of the law, French scholarship made clear the link between the law and its social function in order to fashion a principle of strict liability.[307] This paved the way for a law viewed in a regulatory dimension beyond the provision of universalised 'rules of just conduct'.[308]

Important for tort law is Saleilles and Josserand's development of *La théorie du risque profit* or *théorie du risque d'activité*.[309] To be clear, the development of this theory of risk-profit meant that apart from fault, there were other reasons which justified a loss being shifted from plaintiff to defendant.[310] These other reasons rested on a social conception of responsibility

---

criticism of the torturing of the Code. See Hayek on what he perceived to be Comte's 'fatal conceit' which we liken to Duguit's methodology: FA Hayek 'The Fatal Conceit' in FA Hayek (WW Bartley III ed) *The Fatal Conceit*: *The Errors of Socialism* (London, Routledge, 1988) 66, 68: 'Confusion about justification also stems, particularly so far as the issues that mainly occupy us are concerned, from Auguste Comte, who supposed that we were capable of remaking our moral system as a whole, and replacing it by a completely constructed and justified (or as Comte himself said, 'demonstrated') body of rules.'

306 At the extreme of this thinking Duguit argues that each individual and group, including the state, has a particular social function which imports a duty to fulfil turning the individual rights-based law on its head by attaching legal consequences to the individual or group for failing to fulfil the duty in question. See Duguit (n 305) especially his discussion of property in which it is converted from a subjective right into a right to do as one wishes with one's property insofar as the property owner fulfils his social function. This analysis undermines the subjective element in the right.

307 Kennedy (n 91) 37, noted the German influence on these French scholars. In particular, he stresses Jhering's approach to law and the free law school's influence. Jhering, in addition, influenced common law scholars. In particular, Cardozo (n 151) noted Jhering's 'great contribution' namely '...a conception of the end of the law as determining the direction of the growth ... finds its organon, its instrument, in the method of sociology. Not only origin but goal is the main thing.' (102)

308 Kennedy (n 91) 'Their basic idea was that the conditions of late nineteenth-century life represented a social transformation, consisting of urbanization, industrialisation, organizational society, globalization of markets, all summarized in the idea of interdependence. Because the will theory was individualist, it ignored interdependence, and endorsed particular legal rules that permitted antisocial behavior of many kinds. The crises of the modern factory (industrial accidents, pauperization) and the urban slum, and later the crisis of the financial markets and the Great Depression, all derived from the failure of coherently individualist law to respond to the coherently social needs of modern conditions of interdependence.' (38) Although note Saleilles's attempt to balance subjective and objective law. R Saleilles *De la personnalité juridique* 2e éd (Paris, Rousseau, 1922).

309 These were the leading French scholars who formulated the risk-compensation theory on two bases. Saleilles by a redefinition of fault on the basis of risk, and Josserand by an expansive reading of the code civil, art 1384. There were other attempts however as B Cirhuza Nyamazi notes very precisely in his 'De la responsabilité sans faute de l'administration en droits compares francais, belge et congolais' « Ces deux doctrines aboutissaient en définitive, à substituer à la notion de la faute un principe de responsabilité plus large, celui du risque. Mais en réalité, il y eut plusieurs théories du risque dont le seul dénominateur commun était la recherche de solutions favorables aux victimes en dehors de toute idée de faute. » http://www.memoireonline.com/12/09/2953/De-la-responsabilite-sans-faute-de-ladministration-en-droits-compares-francais-belge-et-congol.html (18 July 2016).

310 D Jutras 'Louis and the Mechanical Beast or Josserand's Contribution to Objective Fault in France' (ssrn, August 2014). Jutras explains that Josserand's contribution was to interpret the code civil as to educe a basis of liability beyond fault regarding responsibility for things. Once fault was no longer the sole basis of liability in these circumstances, the door was open to an alternative basis for responsibility: 'Damage had to be viewed as a burden to be allocated between the plaintiff and the defendant. Either the loss was shifted to the defendant, through the imposition of liability, or it was borne by the plaintiff. The fact that the defendant had committed a fault was

tinctured by a view of the allocation of benefits and burdens of industrial society between active and passive parties.[311] Josserand's view of the justification for the expansion of *la responsabilité* gives us an insight into such thinking:

> « …il arrive tout naturellement que, dépourvus de la sécurité matérielle, nous aspirons de plus en plus à la sécurité juridique ; puisque nous courons de sérieux risques d'être accidentés, ayons, du moins, la certitude d'obtenir à l'occasion, une réparation, nous-mêmes si nous sortons vivants du fâcheux fait-divers, nos héritiers, si notre destin est scellé. »[312]

In this respect, Josserand's theory seemed to rest on a version of argument for the protection of the weaker party which was concurrently transforming contract law and contract theory.[313]

---

only one of the many reasons for placing that burden on the defendant's shoulders. In Josserand's view, there were other circumstances justifying the imposition of liability. In particular, Josserand argued that when a passive victim was harmed by a thing set in movement by another person, for that person's own profit, the active party had to pay for the loss, as a counterpart for the profit or enjoyment derived from the thing. That, in short, was the theory of risk-profit. *Ubi emolumentum, ibi onus esse debet*.' (321)

311 However, it is important to note, as Jutras does, that this activity/passivity criterion was not simply liability for being active, but for setting in motion a thing which subsequently causes damage to another party. Jutras, goes on to discuss the ambiguity in Josserand's concept of risk-profit particularly its weaknesses but it need not detain us here as we are concerned with the transformation itself, and not the strengths or weaknesses of a particular theory. See pp. 321-22.

312 L Josserand *L'Évolution de la responsabilité (conférence donnée aux Facultés de Droit de Lisbonne, de Coimbre, de Belgrade, de Bucarest, d'Orades, de Bruxelles, à l'institut français, aux centres juridiques de L'Institut des Hautes Etudes marocaines à Rabat et à Casablanca), Evolutions et Actualités Conférences de Droit Civil* (Paris, Recueil, 1936), 32. This was not, however, only a French phenomenon as Ibbetson (n 87) states: 'Legal Commentators began to stress that negligence liability depended not on a moral principle but on a social one; it was based not on something internal to the defendant but on failure to live up to an external standard, and that external standard was something that be determined by public policy.' (197)

313 There is a certain consistency here with his argument regarding abuse of rights. D Jutras (n 309) argues that this protection of the weaker party dimension meant that as a general theory of strict liability it ran into difficulty in those situations in which such differences of power did not exist. 'For Josserand, this objective liability was meant to protect the "weaker party". It did not make sense to invoke it when both parties had been creating identical risks for one another. For that reason, it could only be applied in the context of the imposition of non-reciprocal risks.' (323) G Priest 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law' (1985) 14 *Journal of Legal Studies* 461. In the context of the American twentieth century expansion of product liability makes the link between the 'myth' of freedom of contract and product liability directly. Discussing Kessler, a scholar, he states that if one assumes that unequal bargaining power means that contract is not a reliable protection of an individual's interest, then tort law has a regulatory role to correct contracts brought about by asymmetries of power 'The narrative (Kessler's) persuaded the courts that the nineteenth-century nation of independent and equal merchants had disappeared and had been replaced by a twentieth-century nation of product consumers who, because lacking in bargaining power, are uninformed, unable to influence manufacturer behavior, and thus totally dependent on courts for protection. It follows directly that nineteenth-century contract law must also be replaced with law more responsive to modern problems.' (494, 495) J Stapleton 'A New Theory of Strict Moral Enterprise Liability' in Stapleton (n 200) 185, 196 explicitly draws the parallel to consumer protection *ie* the parallel between employer liability and the Unfair Contract Terms Act, 1977: 'Although not imposing strict liability, other UK legislation, including the important Unfair Contract Terms Act 1977, has placed those who act in the course of business in a more demanding position in terms of civil liability than those who do not, and EC measures have followed this pattern.' (citations omitted)

This argument, in essence, suggests that because of changes in society wrought by industrialisation social relations have changed and law has a role in safeguarding the interests of all in these new circumstances of interdependence.[314] Josserand noted that 'l'accident devint anonyme' meaning that fault of the 'patron' or of the company cannot be established in accordance with the traditional subjective or individual fault principle.[315] This is largely because the type of injury that occurs in industrial society no longer corresponds to a direct act, what earlier was referred to as fault as affirmative action, but is an indirect consequence of industrial activity.[316] Therefore, Josserand proposed that legal responsibility should be based on 'cause' alone founding this principle on 'équité'.[317] Cause in this theory had a particular meaning. It was not individual causation as such: rather, it stood for the principle that he who creates a risk should indemnify those who suffer injury should that risk materialise: the 'théorie du risque crée'.[318] Its rationalization rested on the idea that the industrial world was a world of activities and in consequence accidents were inevitable; as such, because certain activities imposed inevitable accidents on its passive victims as a cost of social progress, it was only right and fair to impose an indemnity on those actors who generated the risks of harm when they materialised as injury.[319] Saleilles referred to this concept as 'causalité industrielle'[320] which was premised on the notion of social justice as justice *qua* risk distribution.[321] Translated into French law, it gave rise to a principle of strict liability for business activities through the expansion of articles 1384-86 of *Code Civil*. Yet, its influence can be felt beyond strict liability in the way negligence came to be interpreted. As Ehrenzweig puts it: '(e)xposing the

---

[314] Kennedy (n 91) identifies 'interdependence' as the *leitmotif* of the social.

[315] Josserand (n 148). Josserand, after examining several alternative approaches concluded that the fault principle had to be replaced: 'IL faut faire un pas de plus et s'attaquer ouvertement à l'antique notion de la faute aquilienne; il faut dégager la responsabilité de l'idée de faute qui l'enserre dans un domaine devenu trop étroit, et l'asseoir sur une plus large base.' (5, 52)

[316] Saleilles (n 301) makes this point clearly by contrasting direct and secondary cause: 'Il s'agit donc d'une cause immédiate et directe qui n'est le fait positif de l'auteur responsable, ni le fait des choses, mais qui se rattache cependant, comme cause seconde, a un fait d'imprudence de la part de l'auteur responsable.' (51)

[317] 103, 104. See also Saleilles (n 301) pp. 54 – 61 especially for Saleilles's consideration of 'participation indirecte et lointaine.' (60)

[318] *ibid* 113. Josserand attributed this theory to Saleilles, p. 105.

[319] Notably, this normative 'passive'/'active' distinction was later exploded by Coase, at least on one reading of his thesis see R Coase 'The Problem of Social Cost' (1960) 3 The Journal of Law & Economics 1.

[320] Saleilles (n 301) If the particulars of his argument differ, Saleilles is consilient with Josserand in terms of its justification. 'La vie moderne, plus que jamais, est une question des risques. ... Le point de vue pénal est hors de cause, le point de vue social est seul en jeu. ... forcément, en raison et en justice, il faut que ce soit celui qui en agissant a pris à sa charge les conséquences de son fait et son active.' (5)

[321] Fault becomes objective under this conception referred to as an *obligation légale*. It is an '...obligation imposée par la loi pure et simple de l'obligation légale, obligation imposée par la loi sur le fait du rapport de causalité industrielle, en raison seulement de la loi de justice sociale sur la répartition des risques.' (12)

community to risk, rather than causation of the individual harm has become the basis of liability in both fields (negligence and strict liability, R-C), even in countries in which fault has been called "'the mother of all enterprise liability.'"[322] This meant, in brief, that apart from the other aims to be pursued by tort law, tort law was now viewed as a form of indemnity justified by the actions of an active party *vis-à-vis* a passive victim.[323] So long as the active-passive distinction between risk creator and victim remained good, organisations that were in a better position to prevent risks should be legally responsible for their actualisation on a test of 'causation'.[324] It is crucial to note that this is at base a normative model of ascription to groups *qua* their organisational actors: first, it establishes that risks should be distributed to organisations as a normative premise; second, that this assists risk spreading. It is liability based on a materialised or social approach to accidents and, it is submitted, is a type of 'moral enterprise liability'.[325] Thus, the role of tort liability was reconceived in social terms as a means to intermediate between different social groups *qua* their organisational form *eg* manufacturers/consumers, employer/employee. Although this resulted in a secondary normative remodelling of tort law, often changing outcomes that follow from the liberal law's 'just rules of conduct', the law did not simply negate that which came before and start again from first principles.[326] In all main jurisdictions, the core private law, contract and torts, was re-fashioned in a more indirect manner.[327] It is submitted that what arose can be described as a blended approach (hybridisation) best captured in terms of the concept of *weak commutative*

---

322 AA Ehrenzweig 'Negligence without Fault' (1966) 54(4) *California Law Review* 1422.

323 In this respect the French scholars were solidaristic, most clearly expressed in Duguit's treatment of the concept of duty, whether this concerned the duties private parties owed each other or those which the state owed private parties. In the USA, on the other hand, the approach appeared to be more directly utilitarian. Although Priest avers that the approach that developed before, but more especially, after the Second Restatement aimed at the indemnifying the poor and reducing accidents it had a more important economic basis namely the Pigovian thesis about the efficiency gains of internalizing externalities. See G Priest (n 313).

324 Josserand (n 148) 88: 'De là l'idée de faute objective qui n'est plus qu'un rapport de causalité entre le dommage réalisé et une activité considérée comme constitutive de risques.'

325 Stapleton (n 200).

326 We are suspicious of arguments that see in social legislation the germ of developments in legal practice because the latter never decoupled fully from justice, and became entirely the handmaiden of policy, see Brodie (n 229). It is argued that although the enterprise became a subject of the law, it fitted into the existing quilt, and was woven into its fabric creating a more patterned quilt. However, this should not detract from the importance of social legislation as an impetus for end-dependent thinking in tort law, particularly in scholarship. G Priest 'The Modern Expansion of Tort Law: Its Sources, Its Effects, and Its Reform' (1991) *The Journal of Economic Perspectives* Vol. 5(3) 31: 'The legislative intervention in tort law, however, itself constituted a revolution. Tort law scholarship gained a novel dimension: If the worker injury component of tort law could be changed to achieve some social gain, what other part of tort law should also be changed?' (33)

327 The reformulation most explicitly departs from the individualist model in France under the influence on the public side of the theory of service public, and on the private by the concept of risk. See Duguit (n 302).

justice, whereby the duty of care (protective scope of tort law) was enlarged and the standard of care was re-framed to capture the organisation. This ultimately results, of course, in the de-centring of the individual in tort law through the emergence of a second normative model of ascription.[328] We will now expand on the concept of weak corrective justice: the impact of the social on tort law.

2. Materialised, Social Responsibility: *Donoghue v Stevenson*

'The old forms remain but they are filled with new content.'[329]

The English courts never went as far as to fully embrace strict liability, at least not overtly.[330] However, the courts did embrace a type of hybrid negligence regime in which the social dimension of activities is evident, while the standard of care is increasingly critical, namely, a standard of care that does not rely exclusively on a community standard of care, but rather imposes liability in the absence of fault as classically understood because the enterprise is a better position to reduce costs of accidents, through risk spreading and insurance.[331] The loss shifting and spreading approach as a general policy prefers enterprise liability and places burdens on enterprises not only in terms of the cost of accidents, but as a way to ensure prospective improvements to safety standards such as to avoid further liability. Liability as deterrence strong-arms industry expertise to innovate and is, as such, in systems theory terms a normative support for cognitive learning.[332] We will examine this dimension to liability

[328] KH Ladeur 'The Financial Crisis – A Case of Network Failure?' in Kjaer et al (n 33) 63, 72 in which Ladeur refers to the role of law in the society of organizations as that of '...the mediator of Exchange processes among representative 'encompassing' groups and organisations with their own internal and external stable cognitive infrastructure.' see Collins (n 270).
[329] Cardozo (n 151) 101. *Donoghue v Stevenson* [1932] AC 562.
[330] *Read v Lyons* [1947] AC 156 often considered a line in the sand, so to speak. However, at least not overtly because of the de-moralisation of the fault standard suggest the truth is more complex and contingent. See B Markesinis, S Deakin & A Johnston *Markesinis and Deakin's Tort Law* 7th edn (Oxford, OUP, 2012), for a lengthy discussion of the ambiguity and complexity of the standard of care. While reasonable care as fault is the standard, and is meant to be an objective standard, this is but a thumbnail sketch of quite a complex balancing exercise. This dovetails with Renner's account, discussed below.
[331] Ehrenzweig (n 322).
[332] Renner (n 33).

below. Before turning to this aspect, we will examine the way in which the duty of care expanded, first, and, then, second explore the standard of care, before in part II point to particular doctrinal evolutions in the USA and the UK that demonstrate the move from the classical to a heightened form of liability under the influence of a social concept of responsibility.

3. The Duty of Care and the Organisation

The expansion of the duty of care in Anglo-American tort law is paradigmatic. This is because the post-*Buick*, post-*Donoghue* 'escape out of contract law' allowed for direct actions to be brought against manufacturers, leapfrogging as it were retailers at least with regard to personal injuries.[333] This approach is consistent with the social with its emphasis on enterprise liability: it is justifiable in terms of the *moral* responsibilities of enterprises as active parties who introduce risk into society, or fail to manage risks adequately. This is the question of social fairness clearly outlined, above all, in the French scholarship. Second, it is justifiable in terms of compensation and loss spreading, because manufacturers *qua* group are in a better position to manage these *typical* (and, therefore, foreseeable) business risks, through internal risk management, insurance and passing on costs to consumers. The highpoint of risk spreading rationales for an expanding tort law was the 1960s, only to later retrench in light of insurance crises and the de-moralisation of enterprise liability, namely, the dissolution of the distinction between active and passive parties.[334] However, what the social did achieve was to re-pivotal tort law, both negligence and strict liability towards direct actions against enterprises thereby supplementing the society of individuals with a model of the ascription of responsibility germane to the society of organisations.

From the perspective of the social, the important move in twentieth century common law can be demonstrated by recourse to *Donoghue v Stevenson*. The claim advanced in this section is

[333] For 'Escape' see Markesinis, Deakin & Johnston (n 330). Leapfrogging is Stapleton's terminology. See Stapleton (n 200).

[334] One can trace this back to the impact of Coase on tort law *ie* a particular interpretation thereof. The controversial admission of a developmental risk defence in the Product Liability Directive, already suggests it is a less than strict standard notwithstanding the rhetoric about legitimate consumer expectations.

that courts, while remaining wedded the juridical reason of justice *inter partes*, began to view individuals in their social roles thus weakening the concept of individual right and tort law as reparation for its violation inherited from classical law. *Donoghue v Stevenson*, in effect, created a necessary relational link between a manufacturer and end-consumer, moving from a direct injury model to one concerned with typical business risks, from externalisation of the costs of accidents to their internalisation.[335]

The facts of *Donoghue* are so celebrated that it would add nothing but tedium to recount them in detail here. It suffices to say that the case concerned whether an end-consumer could recover against a manufacturer for injury caused to her by a latent and 'inherently dangerous' defect in a product, namely a non-alcoholic beverage. In *Donoghue*, the rule in *Winterbottom v Wright* was overturned.[336] It will be remembered that in *Winterbottom* a preference for contract as a means to deny a duty of care towards third parties outside of the privity of contract. In this way, the demarcation of duty could prevent fault being used in an open-ended manner to construct duties towards third parties.

As a matter of formal juridical reasoning, Lord Atkin stated that the existing case-law obtained to particular duties of care owed by, *inter alia*, landlords, tenants, salesmen, and so on. The learned judge stated, however, that these duties must rest on a certain more general duty: 'And yet the duty which is common to all cases where liability is established must be logically based upon some element common to the cases where it is found to exist.'[337]. Lord Atkin's, thus, arrives at the neighbour principle which is akin to a species of *culpa* in other systems, and which provides a test of reasonable foreseeability and proximity for the imposition of a duty of care.[338] This re-focused the law to questions of remote injury to individuals beyond a contractual relationship, expanding the province of tort law considerably to relationships

---

335 P Cane 'Distributive Justice and Tort Law' (2001) *NZLR* 401. See also Keating (n 197) in which he criticises the corrective justice scholars, especially Fletcher, Fried and Weinrib. In particular, he argues that the distinction between act and activities is the basis for a fairness account of enterprise liability that fixes on the concept of commutative justice.

336 *Donoghue*: Lord Atkin rather than overruling the judgment, a competence the Court did not yet possess in any event, confined it to its particular facts.

337 580, and '...in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.'

338 'The liability for negligence, whether you style it such or whether you treat it as in other systems as a species of culpa, is no doubt based on the general public sentiment of general moral wrongdoing for which the perpetrator must pay.' (580)

between strangers.[339] Thus, while Lord Atkin is arguing rather formalistically that the law rests on general axioms or principles, the approach is innovative by greatly expanding the bounds or province of tort law.[340]

While *Donoghue* can be viewed in terms of relations between individuals *qua* neighbours, this is a reductive or partial view of the judgment. It misses the organisational dimensions to the judgment. It is argued that, it is a profound reversal of the nineteenth century jurisprudence meant to circumvent 'privity of contract' and opens the door if followed to its logical conclusion to a policy-oriented and social tort law.[341] In this vein, Lord Atkin reveals in the first pages of his judgment the public health and liability-systemic context of the question before the Court.[342]In other words, from the manner in which the case was framed it is clear that the judge was looking beyond the immediate case, and examining a world of manufacturers and consumers, and the extent to which the former owed obligations towards the latter as a matter of social policy. That is, in essence, a question of distribution of rights between groups or classes for typical or systemic risks, not correction between individuals as such. This is evident when Lord Atkin's states:

> The question is whether the *manufacturer* of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or

339 See above the discussion of the different responsibility 'paradigms' in the liberal state, as distinct from the welfare state. Esp. Ewald (n 57). G Brüggemeier (n 2) 93: states that the main transformation in the twentieth century was from direct to indirect injuries. 'The actual revolution in liability law in the twentieth century took place, both nationally (Germany R-C) and internationally, in the field of indirect injuries. ... We need merely mention environmental, manufacturer, dealer and workshop liability, the entire field of 'media torts', the situations of nervous shock and interruption of public supplies and the internationally controversial set of cases on non-contractual liability for pure economic loss. The list goes on.'

340 Lord Atkin's seems to indicate that it beyond the judicial function to derive general principles from specific instances of duties, and then proceeds to do exactly that which he has reservations about: 'To seek a complete logical definition of the general principle is probably beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials.' (580)

341 M Davies 'The Road from Morocco: Polemis Through Donoghue to No-Fault' (1982) 45(5) MLR 534. Davies refers to the change from direct acts towards indirect acts as 'Kuhnian' in proportions. In the USA, Priest (n 313) refers to the influence of Kessler on the transformation of the law of torts by undermining the justification for freedom of contract. See Kessler (n 302). Although this pertains more to the post-Traynor J in *Escola v. Coca-Cola Bottling Co.*, (1944) 24 Cal.2d 453, 150 P.2d 436 policy-turn in the law, as distinct from the exception to the privity rule in *MacPherson v. Buick Motor Co.*, (1916) 217 N.Y. 382, 111 N.E. 1050, which is more akin to the *Donoghue* judgment.

342 'I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test it applies to the system under which it arises.' (579)

> *consumer* from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.[343]

This type of language in its generality, of manufacturers and consumers, reappears many times in Lord Atkin's judgment. The question of 'fairness' as between these groups which is posed is essentially a question of distributive justice shaping the cause of action. The individual litigants are understood in their materialised social roles as manufacturers and consumers.[344] The group context informs the scope of just rules of conduct, as a primarily inter-individual model is replaced by a model which looks beyond the individual to his place within a larger, encompassing group. These are relations the law must regulate to achieve justice between the parties. This has analogies with the differentiated areas of law mentioned earlier: labour, tenancy and so on that replace references to individuals with references to (materialised) group-based categories *eg* 'tenant', 'employee'.

Thus, it is argued that policy is at work beneath the neighbour principle.[345] Additionally, Lord Atkin's indicates that the needs of society favour a particular interpretation of the relevant authoritative judgments: 'I do not think so in our jurisprudence to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes

---

[343] 578-79 (emphasis added, R-C).

[344] Stapleton (n 200), 202. Her treatment of *Donoghue v Stevenson* makes clear: 'If we choose to focus on the individual's existing cause of action against an individual defendant, we can describe it in terms of securing corrective or commutative justice. If we choose to focus on who (*as individual(s) or as a class*) is enriched by the legal change as *intended* to secure the redistribution of risks, *ie* intended to secure distributional justice, and our reasons for the law must establish why it is fair to make this redistribution.'

[345] Consider P Cane 'Corrective Justice and Correlativity in Private Law' (1996) *OJLS* 471-488. On *Donoghue v Stevenson* he argues that it is not corrective justice principles per se which is at question but rather a question as to who should bear the risk: 'These are not principles of corrective justice because they are not dependent on the particular interaction between the defendant and this plaintiff – they are general principles which may apply, and which have subsequently been applied to a multitude of interactions between manufacturers and consumers. But they are consistent with the structural principle of corrective justice because they concern the relative positions of the two parties. More than that, they are, in an important sense, principles of distributive justice because they are principles about who, as between manufacturers and consumers, should have an entitlement: should the consumer have an entitlement to be free from injury or should the manufacturer have an entitlement to inflict injury?' (481) And: 'Let us assume that before that case the relevant rule of law was that a bystander could not recover against a manufacturer in respect of injuries caused by the negligence of the manufacturer in producing a product. After that case the relevant rule imposed such liability. An effect of the case was, therefore, to redistribute resources (in the form of legal rights) from one group (manufacturers) to another group (bystanders). Therefore, to say that the meaning of private law is corrective justice is to give an incomplete account of the structure of private law.' (482, 483)

upon its members as to deny a legal remedy where there is obviously a social wrong.'[346] This statement has echoes of Cardozo J.'s judgment in *MacPherson v Buick*, which also draws on the social needs.[347] In that judgment, Cardozo J. held that precedents should be interpreted with a view to contemporary social conditions, not merely as an outworking of juridical reason. Cardozo J. stated famously:

> Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be immanent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.[348]

In sum, it is argued that even if one supposes that the neighbour principle is a rule of conduct, which it is undoubtedly is, one should remain mindful of several key points. First, the question is posed as one of social welfare with respect to manufactured goods. In other words, Lord Atkins looks beyond the facts of the case, and the particular relationship between the parties, to the social consequences of allowing the manufacturer to escape liability thus depriving the plaintiff of a remedy. It should be apparent from our examination of *Winterbottom* in chapter I that this breaks new ground by recognising the need to compensate 'victims' and reverses the *damnum abseque iniuria* thinking behind that judgment.[349] The import of the judgment is to rebalance tort and contract, leading to the expansion of the scope of the former into *terra incognita*. This adjustment has the practical effect of creating new legal bonds that previously did not exist. Second, Lord Atkin's new bonds are not between individuals *qua* individuals, but between groups, consumers and manufacturers. Although by no means explicit in the judgment, tort law becomes a means to balance the interests of different groups in society.

In *Donoghue*, therefore, the protective scope of tort law is a distributive question in the last analysis. Thus, what was developed was a form of weak commutative justice out of the duty

---

[346] 583.

[347] Indeed, Lord Atkin seemed to obtain guidance from that judgment which he refers to as '...the illuminating judgment of Cardozo J. in *MacPherson v Buick Co*. . …in which he states the principles of the law as I should desire to state them.' (598)

[348] *MacPherson*, 391.

[349] Indeed, as we alluded to in chapter I, it was part of a general trend to increase the protection of consumers that was transforming contract law. See Stapleton (n 200).

of care. While courts argue analogously from case to case unfolding justice *inter partes*, the courts additionally embed this argument in concerns of social responsibility, utility and distributive fairness, particularly regarding whether the scope of tort law should be enlarged. *Donoghue* is not far from the idea of 'causalité industrielle', meaning *moral* enterprise liability.[350] The main difference in English law is that the concept of risk enterprise liability has never obtained overt acceptance, although reasonableness has become a rather elastic concept.[351]

It should be stressed that this concept of weak commutative justice contrast with Gardner's concept of localised distributive justice. Gardner's localised distributive justice stands for the analytical proposition that in the doing of corrective justice between individuals, the chief task of private law, there is an inevitable distributive justice dimension, albeit it is subsidiary.[352] This is because in the outworking of the common law, the drawing of analogies results in the redistribution of rights and duties according to the rule of law. Gardner argues that:

> Under the rule of law judges must decide cases according to law, which means (minimally) that must not separate the rules from the ruling, either by declaring what the rule is or will henceforth be while declining to apply it to the case in hand, or by denying that there is a rule. It follows that no judge may rule in favour of any plaintiff except by locating the plaintiff within a class of imaginable plaintiffs who would, according to the judge, be entitled to the same ruling. …(and to make this judgment they are confronted with the question) How do we dole out the right to proceed in tort among various candidate classes?[353]

In other words, if class A can recover, why not class B in an analogous situation. Extending recovery to class B means that in the doing of corrective justice, distributive justice occurs inevitably because how we argue from class A to class B involves question of desert by analogy. If an apt analogy exists and gives reason for an extension of recovery, then, a redistribution of rights occurs and, in this sense, a minimum of distributive justice is done. It is

[350] See J Stapleton 'A New Theory of Strict Moral Enterprise Liability' in Stapleton (n 200) 185, 191
[351] Markesinis, Deakin & Johnston (n 330). Reasonableness has increasingly been shaped by balancing interests, with the Learned Hand test fragmentarily applied, and applied in an approximate manner.
[352] *ibid.*
[353] J Gardner 'What is Tort Law For? Part 2. The Place of Distributive Justice' Oxford Legal Studies Research Paper No. 62/2013, 12.

argued that this conception of the connection between the rule of law and justice recalls Lord Diplock's the very similar incremental and intermural account of common law reasoning in *Dorset* in which if policy is to play a role at all, it is policy inherent to the law. It should be noted Lord Diplock was, in that case at least, a dissenting voice.[354] However, we argue that this underestimates the influence of the social because the very concept of responsibility between A and B, tortfeasor and plaintiff becomes dependent on their social roles *qua* consumer or manufacturer. It is not a question, in short, simply of extending recovery to consumers as a class by analogy: a general principle is laid down that reverses privity of contract. This general principle rests, in turn, on the crucial distinction between active and passive actors, tortfeasors and victims. Enterprise or organisational 'moral' responsibility assumes this distinction and aims at channelling liability to organisational addressees, which breaks with a concept of individual responsibility that unfolds by analogy. Rather, the question is one of the impact of social interdependence (materialisation) on the concept of responsibility. Therefore, the social is closer to the position of Calabresi that Gardner critiques as deflationary.[355] The social reverses the distribution of rights of A and B placing the parties within their social roles as consumer and manufacturer. Manufacturers *qua* manufacturers owe duties to consumers: once an accident occurs, the role of the court is to restore this social distribution of rights. Thus, corrective justice became entangled in the overall distribution of risks. It is corrective justice with an eye to a sociological concept of responsibility. This is clearly the case in Cardozo's pioneering work when he argues how the appropriate grounds and bounds of tort law are to be determined.[356] We do not think, respectfully, that this can be explained simply as the outworking of the liberal rule of law, but represents a new way to conceptualise responsibility in its own right.

[354] [1970] AC 1004.
[355] Gardner (n 353) 14.
[356] Cardozo (n 151).

4. The Social Standard of Care

Once it is accepted that a legally relevant relation or *vinculum iuris* exists between different groups of individuals understood in terms of their social roles, then the question of standard of care reappears. But it does so primarily in terms of the imposition of a reasonable risk rather than in terms of individual fault. Ehrenzweig refers to twentieth century negligence as bearing 'Siamese-twin functions', and we submit that this refers to the supplementation of the tort law of the society of individuals with a tort liability adjusted to a society of organisations.[357] This subtle re-emphasis from fault as conduct to fault as risk means, in effect, hybridisation: the standard of care becomes a standard all things considered, fairness between the parties (its application to the particular facts), between groups (compensation justification), custom (expertise), cost-benefit analysis particularly questions as to who is best cost avoider (economic utility).[358] In the final analysis, a normative standard of reasonable care is supplied, which is additionally a social standard of care because of its emphasis not only on individual right but, additionally, materialised justice and aggregative utility when attempting to hold the enterprise liable for typical business risks.[359] The twentieth century refinements of the fault standard, which strip it of 'much practical meaning' is, additionally, difficult to understand without the rise of enterprise liability insurance – a device '… devised for the injurer's protection, [which, R-C] has widely been adapted to secure recovery of the injured.'[360]

To be precise, the language has remained the same, namely fault or reasonable care,[361] but with the transformation of the knowledge base towards expert knowledge, reasonableness was an

---

[357] Ehrenzweig (n 322) 1422, 1445.

[358] Collins (n 230) criticising the way in which this is in effect economisation. Although the extent to which cost-benefit analysis actually occurs is disputed. It is more often than not an impressionistic justification adduced for restricting or expanding the law: usually the former in recent years.

[359] Ehrenzweig (n 322), 1423. Typical business risk is a sociological concept, strongly influenced by the availability of insurance. Also, Brüggemeier (n 93), 8 'The chance to externalise the risks of business activities on insurers made it more sensible for the courts to internalise the losses caused by these activities as costs on the risk creating enterprises.'

[360] *ibid*.

[361] Ehrenzweig (n 322) 1428: 'If this be the trend today [enterprise liability, R-C], the courts, at least in their language, have failed to concede the change, since the rules of enterprise liability are still couched in terms which imply reprehensible conduct.' Or, as Markesinis, Deakin & Johnston (n 330), 198 remark, the standard of ordinary care *ie* reasonable man or person is 'little more than an anthropomorphic conception of justice as perceived by judges or juries.' In other words, the individual is a device through which the courts deliberate over 'justice'. We argue that this is a socialised, or social justice.

increasingly exacting standard premised on technical knowledge as to what constitutes an unreasonable risk.[362] Nevertheless, the standard of care is ultimately a normative standard such that custom although highly influential is not coterminous with due care. In this vein, Ladeur argues that it fell to the judge to determine the appropriate balance between groups: '[t]he judge, in particular, should act as a mediator between conflicting interests beyond the stable orientation provided by abstract legal norms.'[363] The fact that judges engage in these balancing exercises is rarely acknowledged, albeit it is increasingly recognised in recent years.[364]

Thus, in order to effect this policy-oriented change enterprise negligence was finally shorn of its subjective or objective just rules of conduct element, which opened the door to re-shaping fault in light of higher standards of care for typical business risks.[365] The courts subtly began to re-focus the question to "'Whose risk was it that this damage might occur?' in place of ... 'Whose fault was it that this damage did occur?'".[366] The 'ill-defined objective standard of care' divorces reasonable care from ordinary notions of fault, as a species of *culpa* or of some community standard of just conduct.[367] It now depends on expert, customary practice, *eg* the professions or technical standards in production processes, supplemented by the general justificatory arguments about who is least cost avoider. It is supposed that the enterprise is in a better position to control risks, as subject and object of law.[368] Subject because particular enterprises are held liable for systemic failures to control risks,[369] object because the question

362 M Lee 'Safety, Regulation and Tort Law: Fault in Context' (2011) 74(4) *MLR* 555: the precise relationship between technical standards, custom and regulatory standards, is highly ambiguous. The courts often defer but may revise these standards as well. Medical negligence shows how what is customary by reference to medical standards while very important, is not decisive.

363 Ladeur (n 135).

364 *Smith v Eric S Bush* [1990] UKHL 1; particularly in shipping *eg Mark Rich and Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1996] AC 211. K Oliphant 'Tort Law, Risk and Technological Innovation in England' (2014) 59(4) *McGill LK* 891, points to Denning LJ's explicit recognition of balancing interests as exceptional. Judicial and scholarly debate is more explicit in the USA *eg Escola*, and the legal realists.

365 Ehrenzweig (n 322), 1457, with regard to railways but making a more general point: 'What the law wants to know is whether liability can be imposed on the railroads in those cases because the harm was typical for its activities and thus calculable and typically insurable.' This influences how concepts of proximity and due care are interpreted, p. 1458.

366 JA Jolowicz 'Liability for Accidents' (1968) *CLJ* 50-63. Jolowicz, it is argued, underestimated the extent to which the fault standard was becoming a placeholder for policy-based decision-making.

367 58, citing Ehrenzweig (n 322).

368 It is only later that a tension emerged between a moral enterprise theory and the deterrence theories, including the Posner v Calabresi dispute.

369 Once again, Brüggemeier (n 2) brings much needed clarity here which, incidentally, dovetails with Ladeur's concept of the knowledge base in the organisational society. The choice for internalisation implies: 'He, the business owner, and the judge or state agent, must decide whether, considering the (internalized) risk of damage, he should continue his business unchanged (and pay compensation), take insurance coverage and apply better preventive measures, or convert or cease activities.' (159)

is one of balancing group interests between industry and consumer safety.[370] This role is well-captured by Renner when he argues that it involves stricter liability, with cognitive expectations placed inside a framework of normative expectations (liability).

> …in order to impose strict liability for certain types of activities, the courts necessarily had, more or less scientifically, to evaluate social risks rather than indulge in the normative questions of intent and negligence. In doing so, they specifically had to pay due regard to the technical feasibility and to the costs of preventive measures. Thus, cognitive expectations with regard to the technological-scientific state of the art, industry-specific standards and economic calculus soon found their way into legal reasoning.[371]

While Renner refers to strict liability, it is not only in strict liability that these calculations were made.[372] The Learned Hand test is important here, mainly however as a heuristic. The Hand test compares the (marginal) costs of precautions with the probability or risk of harm and its gravity. B v PL in shorthand. As Learned Hand J recognised his test is not precise and cannot avoid contentious interpersonal utility comparisons:

> All these are practically not susceptible of any quantitative estimate, and the second two (seriousness of the injury, cost of precautions) are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is thought most likely to accord with commonly accepted standards, real or fancied.[373]

While Posner finds an immanent economic logic of the common law in the Learned Hand test, Brüggemeier cautions in this respect that the Learned Hand test was a sophisticated

---

[370] We imagine that the greater emphasis on the classical tort standard in the UK, albeit as Markesinis, Deakin & Johnston (n 330) demonstrates it is not unadulterated by policy arguments, reflects the idea that this balance should favour enterprises more than consumers. This is a little impressionistic, however. For comments in this direction see C Van Dam *European Tort Law* 2nd edn (Oxford, OUP, 2013).

[371] Renner (n 33) 93, 103.

[372] Indeed, with respect to strict liability one might argue that there is a distinct blurring. If we focus only on doctrine, one might suspect that strict liability is liability for causation, a much lower threshold than fault. However, if one removes the fault requirement one is left in all likelihood with causation as a more exacting 'control mechanism'. This is the French experience see C Harlow (n 232), D Fairgrieve (n 231). It might be argued that strict liability, then, is also a question of partitioning risks, but emphasises a choice of emphasis *ie* solidarity v liberty.

[373] *Conway v O'Brien* (1940) 111 F.2d, 611, 612. Reproduced in Markesinis, Deakin & Johnston (n 330), 199.

formulation of the standard of care that, in the end, rested on the assumption of measurable typical business risk and was aimed at large organisations capable of making such calculations or, indeed, their insurers.[374] The cost-benefit analysis, then, seemingly is a prospective test aimed at ensuring businesses take optimum levels of precautions. However, Brüggemeier doubts businesses have sufficient information to factor in optimum levels of cost,[375] and following Calabresi states that judges are not in a position to make marginal cost-benefit analyses and, as such, the rule is instead a justification for cost internalisation with the best risk avoider.[376] The aim is to channel liability such typical business risks to the organisation and the test is, as such, "perfectly suited to 'depersonalized' enterprise negligence liability a la *MacPherson* …'[377] In the social, what was 'normal' shifted from a distributed knowledge base to expert calculations of probabilities and harm.[378] In the background was, of course, the question of insurance which was increasing the threshold of 'reasonable' or 'fault'-based liability.[379]

It should be noted, however, that in the final analysis, '[c]ourts are not regulatory agencies that set general standards. They decide concrete cases. In such situations, they determine *'correct' behaviour, appropriate to the situation and the defendant*.'[380] Therefore, while the test may be formulated in general terms, it is applied to a particular factual nexus that involves contextual adjudication.[381] This means it retains a corrective justice dimension, even if a general policy of internalisation is being pursued. That is why the courts do not simply avoid the 'administrative costs', so to speak, of lengthy adjudication over cause and fault: the guiding principles for formulating the particular standard of care *in abstracto* may be social justice as compensation or utility, but the actual application of the test is fact sensitive. Another way to put this is that the rise of the organisational entity, the enterprise usually, meant that courts increasingly

374 Brüggemeier (n 2), 70-73. Indeed, citing Calabresi, Brüggemeier argues that judges are not in a particularly good position to make cost-benefit analyses and, as such, the question should be who is in a better position to make risk avoiding decisions, which usually is the enterprise.
375 Citing Ronald Dworkin in this respect.
376 See Schwartz (n 17).
377 Brüggemeier (n 2), 73.
378 *eg* USA, the transformation of *Rylands v Fletcher* into strict liability recovery for ultra-hazardous risks. Liability for risk creation *qua* strict liability has not been so clear cut in the UK. More generally, Ladeur (n 136).
379 See Oliphant (n 364) 891, 840. Particularly his discussion of Denning LJ's 'candour' regarding how insurability influenced 'victim' compensation in *Nettleship v Weston* [1971] 2 QB 691.
380 Brüggemeier (n 2).
381 We think this is what Markesinis, Deakin & Johnston (n 330) mean when he distinguishes between the standard of care and its application.

imposed an exacting standard of care cognisant of their social role vis-à-vis consumers, but the dispute remained a question of achieving justice *inter partes*. It is, in short, materialised private law.

Thus, it is sufficiently clear from the foregoing that while the social indicated that the duty of care should be enlarged to groups *qua* organisational actors, the standard of care owed is determined according to a critical standard, not accessible to community, distributed knowledge. While this risk-based thinking has obvious implication for industry, the rise of the welfare state as a service provider in parallel, led to an enormous expansion of the activities undertaken by the state in 'the Social'. The model of organisational liability was applied to the state by extension, quite clearly in France and in fits and bursts in England. The scholarship in France explicitly emphasised these links between private and public tort law.[382] In English law, the link is even clearer due to the equality principle.[383] We will examine the parallel application of an organisational model to private actors and public actors in part II below. What is reasonably clear is that an individualistic model of liability was overlain with an organisational model aiming at the internalisation of risk for businesses and, indeed, the state. The moral basis of liability was the distinction between active and passive parties, while the scope of negligence and vicarious liability was determined according to a test of typical business risks. Strict liability was concerned with risk creation, and the social responsibilities that followed therefrom.

C. THE ECLIPSE OF THE INDIVIDUAL: EXAMPLES OF THE TURN TO ORGANISATIONAL LIABILITY

382 G Ripert *Le Régime Démocratique et le Droit Civil Moderne* 2eme éd (Paris, Pichon, 1948). In particular, his chapter on responsibility and ch1 and ch2 explaining the influence of democracy by universal suffrage on law.

383 This golden thread is present in Josserand's view of how mechanisation changes tort law, and how Duguit discusses the change from a sovereigntist to a public service based theory of the state and its laws. See Duguit (n 302) 44-46 esp. Regarding the characterisation of the state as a relationship of interdependence, as distinct from sovereignty as a personalised concept, and the attendant need due to changing circumstances, or 'flux', to move beyond simply national defence, internal security and order, and justice as the functions which the state is required to perform. In particular: 'The profound economic and industrial change that has taken place over the world has created new governmental obligations. The clear interdependence of peoples, the circulation on all hands of intellectual ideas and scientific discoveries, impose on the state the duty of organizing such public services as will permanently assure such international communication.' (45, 46) This is but one example of interdependence fostering a need for greater governmental, regulatory involvement. Another is the Labour movement. For the gaining acceptance of the concept of flux see Cardozo (n 151) who argued for a pragmatic method in law and social justice as the dominant aim: 'Nothing is stable. Nothing absolute. All is fluid and changeable. This is an endless 'becoming'. We are back with Heraclitus.' (28)

We have explained how the basic structure of tort law was reconfigured to leapfrog the individual towards organisational addressees, and how these were placeholders for group-intermediated justice and utility. It remains to demonstrate how case-law evolved in this direction.[384] Writing in the middle of the twentieth century, Glanville Williams bemoaned the de-personalisation of tort law.[385] What he perceived was in our terms the gradual emergence of organisational liability as a perversion of the interpersonal framework of tort law. As Brüggemeier observes organisational liability has two tracks '... (i) it is vicarious liability to the extent that it involves liability for direct injury through the wrongful action of concrete employees; (ii) it is, within certain bounds strict liability to the extent anonymous production and service processes are involved.'[386] In other words, vicarious liability for employee 'fault' increasingly broadly construed and, eventually, no-fault liability for production processes.[387] As we have argued, the rise of organisational liability cannot be sensibly divorced from the rise of third party liability insurance.[388] In France, this was informed by solidaristic thinking, in other jurisdictions by a socially-determined concept of fairness.[389]

Thus, to illustrate the transformation of law to deal with the problems of the organisation we take examine Brüggemeier's characteristic examples. First, product liability and second the doctrine of vicarious liability. Both will be examined in a common law context. Both examples, however, largely mirror developments on the Continent (Germany, France) although developments occurred at different speeds and along different paths.[390] In the case of product's

---

384 Stapleton (n 200) 191 where Stapleton discusses 'causation' with regard to vicarious liability *eg* 'What I am arguing for here is that the special circumstances which may justify the imposition of vicarious liability on the employer even in the absence of uniform agreement that the employer's conduct was a 'cause' of the harm, is the profit motive of the employer in creating the opportunity for the employee to act.' This rationalization of vicarious liability could easily have been taken from Josserand or Saleilles discussed above.

385 Williams (n 246), 220. 'Man's progress has been associated with increasing emphasis upon the value of the individual, and collective punishment tends to deny this value.' (234) Williams thought this an inadequate justification of the doctrine of vicarious liability.

386 Brüggemeier (n 2) 158.

387 161.

388 Brüggemeier (n 2) 8. Additionally, Van Dam (n 370), 265, refers to insurance as 'the fuel of modern tort law'.

389 Ewald (n 92) 'Social solidarity, more generally, allocates risk by shifting it to the firm, thereby creating a new balance between rich and poor, consumers and producers.' (278) In a world of probabilities and statistical measurement, in which scientific knowledge is considered objective, the parameters of such solidarity can be determined.

390 Bell & Ibbetson (n 144) referring to product liability and medical negligence: 'Changes have not always taken identical form, since at any moment each legal system has had its own particular rules, principles, values and

liability, there is a clear systemic approach to the organisation. In the case of vicarious liability, the trend has been to stretch the doctrine to its limits in order to shift losses insofar as is possible to the organisation.

1. Product Liability *qua* Organisational Liability

Through the development of separate legal personality for firms at the end of the nineteenth-century, the corporation as distinct from the individual entered the law.[391] The firm entered a law that relied on the language of individuals, to be sure, but nevertheless re-shaped liability towards an internalising model. The particular context is, of course, the development of large, vertically integrated firms.[392] A good example of doctrinal transformation that adjusted the law towards the firm is given by Brüggemeier when he contrasts *Thomas v Winchester*[393] and *MacPherson v Buick*.[394] In *Thomas*, the defendant sought to deny liability in negligence on the basis of the privity rule. In essence, a pharmacist sold the plaintiff a poisonous substance, mistakenly assuming that the substance was benign.[395] The plaintiff suffered personal injury. The mislabelling in actual fact was occasioned by Winchester, a third party to the contract between the pharmacist and the injured party. Thus, under the privity rule in *Winterbottom* recovery would be denied. Ruggles CJ fashioned an exception to the privty rule for inherently dangerous goods. However, in order to do so he stated that the pharmacist was an 'agent', with Winchester comprising the 'principal'. By the time, *MacPherson* was decided, such a principal-agent link was overlooked. The question was simply whether a manufacturer owed a duty of care to an injured party.

---

institutional structure against the background of which changes have occurred. But these differences aside, it is possible to paint a coherent picture of convergent legal development across Europe.' (74)

391 Saleilles (n 308) on the subjective rights of firms.

392 Bell & Ibbetson (n 144) 175: By the nineteen thirties, at the latest '...the structure of the manufacturing industry was moving towards larger undertakings which had a greater capacity to absorb losses and pass them on to their customers, and liability insurance was generally available to spread losses (as it had not been in the nineteenth century), though it is impossible to find data demonstrating that this was in fact the cause of the changes in the law.'

393 (1852) 6 NY 397.

394 Brüggemeier (n 2), 133-34. The analogy with *Donoghue* should, it is submitted, be patent. Here Brüggemeier argues that it is a move from vicarious liability to direct responsibility; although we think he does not mean the 'doctrine of vicarious liability' but uses the term more loosely to include agency. *MacPherson*.

395 'The plaintiff' for convenience. The action was brought by the husband of the injured party on her behalf.

MacPherson concerned a situation that traditionally would have failed due to an absence of privity of contract. Instead of coating the judgment in terms of agency, a direct duty of care was imposed on the manufacturer to take reasonable care in manufacture. Cardozo J. extended the scope of the concept of 'inherently dangerous' beyond poisons, explosive and deadly weapons, 'things whose normal function it is to injure or destroy',[396] broadening the test as 'If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is a thing of danger.'[397] The enterprise as an organisational unit is, in principle, from this point onwards tortiously liable for the reasonably foreseeable consequences of its failure to comply with an objective standard of care.[398] It is therefore a de-personalised concept of fault, not required to rest parasitically on employee fault or requiring the fiction of an agency type relationship. It is a nascent organisational liability for production processes. The 'manufacturer' as distinct from a specific individual was held liable in fault. By providing a direct cause of action against the manufacturer "...legal policy channels liability to the 'correct' address, the enterprise owner, and at the same time to reach the 'deep pocket'."[399] The subsequent use of the doctrine of *res ipsa loquitur* in product liability cases also blurs the line with strict liability. *Res ipsa*, a rule of evidence, became a procedural means to make recovery easier for 'victims' of defective products. This was to place the burden of proof on the manufacturer once a clear inference of negligence could be made from the circumstances.[400] This was favourable from a victim's recovery perspective. Second, the standard of care was 'surreptitiously' raised, because of the relative ambiguity of concepts such as reasonableness.[401] As we argued already, the focus was increasingly placed on reasonable risk, and thus reasonableness became entangled in questions of policy i.e. deterrence and risk spreading. The subsequent twentieth-century expansion of liability, as detailed by *inter alia* Priest, demonstrates how what became important was not individual fault but determining

396 *MacPherson*, 387.
397 389.
398 This de-personalization can be traced back to *George v Skivington* (1869) LR 5 Exch. 1 per Bell and Ibbetson (n 144).
399 Brüggemeier (n 2), 135.
400 See Bell and Ibbetson (n 144) 78. Citing *Grant v Australian Knitting Mills Ltd* [1936] 1 AC 85; and S Whittaker (ed) *The Development of Product Liability* (Cambridge, CUP, 2010).
401 Stapleton (n 200), 22 although notes why warranty is preferable because strict, whereas negligence-in-fact remains difficult to prove. For an early, extended discussion of this trend see Ehrenzweig (n 322).

which risks should be placed on manufacturers and which should lie with consumers. What emerged after the war was a pro-consumer case-law. [402]

Escola v Coca Cola Bottling Co was a decisive turning point in US law and scholarship in this regard. In *Escola*, the plaintiff suffered personal injuries when a carbonated bottle exploded. Traynor J. argued that strict liability should apply, going beyond the previous negligence and *res ipsa* approach. Traynor J. introduced three main arguments in favour of strict liability for defective products. First, he relied on enterprise moral responsibility. Drawing on parallels with administrative provisions regarding safety that impose criminal responsibility for introducing defective products, he argued for an analogous heightened standard of liability. Second, the enterprise is in a better position to anticipate and reduce hazards viz the public and in a better position to spread the costs of accidents. Second, Traynor J. states that based on *McPherson* while in that decision there was manifest negligence, the principle laid down was more extensive than the facts before Cardozo J. such that implied warranty should be extended beyond parties in privity, justifying a stricter standard of care between manufacturer and consumer. Thirdly, warranty can be classified as a species of tort or contract. It is quasi-tort or quasi-contract and Traynor J. seems to locate it properly in tort law. The net result is that manufacturers are strictly liable for defective products in their ordinary use. This judgment was highly influential on the Second Restatement twenty years later, creating stricter liability for products.[403]

While the transformation of UK tort law was less dramatic, remaining wedded to 'negligence' as distinct from strict liability, the threshold of reasonableness gradually increased. In the end, the Product Liability directive drew closer the US and European approach, albeit with certain differences. Both focus on the standard of care a person is entitled to expect, the so-called consumer expectation test, taking all circumstances into account.[404] This is a flexible standard meant to mediate traditional negligence and strict liability, balancing consumer and manufacturer interests. It wavers somewhere between negligence as a 'risk-utility' test and strict liability as enterprise liability *simpliciter*. It is not so distinct in this respect of the general

[402] From the 1960s especially 'The liability of manufacturers for product-related losses was vastly increased and the obligations of consumers vastly diminished.' Per G Priest '(n 313) 461, 462.
[403] *ibid.*
[404] Product Liability Directive, art 6. This is an example of a rights-based approach coming to the fore.

evolution of fault towards a hybrid standard, although the European regime seems more weighed in favour of the consumer, as we will see in chapter III and IV.[405]

2. The slow emergence of 'enterprise risk' liability in the common law: Vicarious Liability

The doctrine of vicarious liability is a hybrid between individual fault and enterprise liability. There are two dimension to this: first, in line with our discussion of what constitutes fault above policy is at work beneath an apparently individualised concept. It may be said to capture classical fault such as glaringly negligent individual acts, but additionally what might be considered 'fault' only in an attenuated manner.[406] Second, with regard to the rules concerning what is within the scope of employment, courts have gradually relaxed the second limb of the Salmond test. The Salmond test is the traditional formulation of vicarious liability

> A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.[407]

While the first limb of the test is not vicarious liability, properly so called, the focus of twentieth century vicarious liability was on the second limb, namely, an 'unauthorised mode' of doing an act that is explicitly authorised. This influence of policy factors on the test, the concern with risk spreading and deterrence led to an interpretation of the test that at times made its application by courts difficult to justify. For example, it is difficult to reconcile judgments such as *Conway v George Wimpey & Co. Ltd* with *Rose v Plenty*. In the former case an employee of the defendant transported workmen of another firm, contrary to the defendant's instructions, to a work site. The Court of Appeal held that the defendant was not liable because the employee

405 Extensive discussion in Markesinis, Deakin & Johnston (n 330). The above comments are impressionistic. For more critical remarks, see Stapleton (n 200).
406 See Atiyah (n 218), his discussion remains instructive.
407 JW Salmond *The Law of Torts* (London, Stevens and Haynes, 1907) 83.

did not fall within the second limb of the test. In *Rose*, by contrast, a milkman, again contrary to his employer's instructions, transported a boy on his milk rounds. Notwithstanding the employer's express prohibition on this occasion the employer was held vicariously liable on the second limb of the Salmond test. Lord Scarman justified his interpretation of the Salmond test decision thusly: [T]he matter must be looked at broadly, not dissecting the servant's tasks into its component activities – such as driving, loading, sheeting and the like – by asking: what was the job on which he was engaged for his employer.[408] It would appear, then, as Deakin argues that the test is a highly fact sensitive enquiry, but it is hardly satisfactory to explain the law on the basis of fine distinctions that do not seem to be animated by a guiding principle or test. Atiyah preferred to explain the law in terms of risk distribution, and it is submitted that this is correct.[409] The precise application of the test in each circumstance seems to be a mixture of fairness between the parties within a framework of imputation of typical business risks to firms. One of the earliest formulation of the doctrine of vicarious liability in these terms is furnished by Laski who states: 'If the employer is compelled to bear the burden of his servant's torts even when he is himself personally without fault, it is because in social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained.[410]This approach was influenced, in turn, by French scholars such as Saleilles who were concerned with 'the Social' including the concept of a moral enterprise liability. Therefore, while formally a servant's tort, it appears incongruous to argue that the doctrine of vicarious liability is not concerned with group justice, as it were. This is increasingly obvious in recent decisions, which have been heavily criticised for the conflation of primary and secondary liability.

We submit that one might view the gradual expansion of the doctrine of vicarious liability as a spill-over from product liability, because at first in the Californian Supreme Court, later in the Commonwealth and Ireland, courts began to rationalise vicarious liability in deterrence and compensation terms – even when this included criminal acts by employees![411] The idea that the doctrine of vicarious liability is a question of primary liability is, of course, out of step with how it is formally rationalised.[412] It is secondary liability for the fault of an employee. However,

---

[408] *Rose v Plenty* [1976] 1 WLR 141, Scarman LJ 147-48.
[409] Atiyah (n 218)
[410] H Laski 'The Basis of Vicarious Liability' (1916-1917) 26 *Yale L.J.* 105, 112.
[411] HJ Steiner *Moral Argument and Social Vision in the Courts* (Madison, University of Wisconsin Press, 1987), regarding spill-over in terms of justification.
[412] England: *Staveley v Jones* [1956] AC 627.

developments in the law from the mid-twentieth century onwards casts doubt on this explicit basis. To explain the shift of *emphasis*, and if we use the terms of the debate for a moment, there has been a move from a 'servant's tort' conception of vicarious liability to a 'master's tort' conception. Giliker distinguishes the two bases:

> The first and most popular explanation is that it is indeed liability imposed on one person for the wrongful act of another. This is sometimes known as the 'servant's tort' theory. The second (the 'master's tort' theory) holds that the master is liable for the torts of the servant by reason of the attribution of the servant's acts to the master.[413]

This when translated into modern terminology places emphasis on the master or enterprise's role. This is Stevens's interpretation of the modern doctrine; although it jars with other authors who retain the notion that the employee's fault is important.[414] The fundamental re-conceptualisation of the doctrine of vicarious liability as being a *quid pro quo* for enterprise activity, as distinct from a rule of responsibility for the wrongful acts of another, was a long time coming in the common law. As Brodie argues it rests on an appeal to fairness: 'The appeal to fairness proclaimed by enterprise liability is predicated on the capacity of the courts to render an enterprise responsible for the risks engendered by it.'[415] This 'logic' can be observed for the first time in the jurisprudence of the Californian Supreme Court in *Hirman v Westinghouse Elec. Co.* in which the Court expressed the rationale for a broad doctrine of vicarious liability:

> They are [the losses caused by the torts of an employee] placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to, distribute

---

413 P Giliker *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge, CUP, 2010) 13. The 'confusion' between primary and secondary liability constantly appears in doctrinal scholarship post-*Lister* as a critique of the court's approach. Lister v *v Hesley Hall Ltd* [2001] UKHL 22.

414 R Stevens 'Vicarious Liability or Vicarious Action' (2007) 30 *LQR* 123. See, in addition, Williams (n 246). It is submitted that since exemplary damages can be awarded against employers based on vicarious liability, this demonstrates that the servant's fault alone is an inadequate conceptualisation see *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773.

415 Brodie (n 229) 27.

> them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.'[416]

The framing of enterprise liability as a question of where a loss should lie between a risk creator and an innocent plaintiff is a departure from corrective justice premised on individual fault and an open-door for policy arguments. The focus on risk creation rather than supervisory failure moves the centre of vicarious liability away from negligence and towards strict liability. In addition, it should be clear from the extract above that the courts treat the doctrine of vicarious liability as a social problem, and not simply a question of redress between a tortfeasor and an injured party. Nevertheless, the requirement of employee fault remains but the 'scope of employment' is greatly increased. Many activities previously thought outside of the 'scope of employment' are now integrated into the legal responsibility of the firm. According to Brodie this approach has foundered in California but its influence has spread beyond the USA. The Canadian Supreme Court has developed enterprise liability. As Brodie states: 'The concepts of enterprise risk and job-created authority were seized upon in the seminal case of *Bazley* where the Canadian Supreme Court built on the pioneering work of the Californian counterparts.'[417] There was a correlative relationship between job-created authority and the attribution of responsibility for the introduction of a risk. If the enterprise provided a framework in which power or authority could be exercised, this was a justification for the imposition of liability. The Court in *Bazley* introduced the notion of 'materially enhancing' the risk. There was extensive discussion in *Bazley* of the policy reasons behind the extension of liability that occurred by the extension of 'scope of employment', which chimed with the rationale developed by the California Supreme Court. There are adjustments, however. The emphasis in *Bazley* is less on risk distribution and more on deterrence of future harm. The greater scope for liability is meant to incentivise the firm to take precautionary measures to ensure an employer will not act negligently or criminally.[418] When this is capacious enough to include the sexual abuse of children carried out by an employee in a care home, we see how far we have come

---

[416] This section owes a large debt to Brodie (n 229) ch 3. He cites this judgment at p. 28-29. See *Herman v Westinghouse Elec. Co.* (1970) 2 Cal. 3d 956, 959-960.

[417] Brodie (n 229) 34.

[418] There is a strong economic strand running through this incentive argument. MacLachlin J. for the majority in *Bazley v Curry* [1999] 2 SCR 534 cites at AO Sykes 'The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment and Related Legal Doctrines' (1988) (1988) 101 *Harv. L. Rev.* 563.

from a notion of responsibility based on individual conduct.[419] This is exemplary of a particular risk creation type of reasoning. A number of control mechanisms which reflect countervailing policy and corrective justice considerations were devised but these can be flexibly applied. The 'close connection' test was the main one. This was adopted by the House of Lords in *Lister* but without discussion of its rationale in risk.[420] There is, as was noted earlier, a fundamental tension between vicarious liability understood as personal responsibility of an employee for activities in the scope of his employment which should be borne by his *master*, and the idea that the third party effects (their costs) of activities undertaken by *enterprises* should be borne by those enterprises. The latter takes the law back to the days of the identification theory, as noted by Stevens and Giliker. It dissolves the primary/secondary liability distinction. It is an organizational way of viewing the enterprise's activities. One is concerned with the moral basis of tort law as individual conduct (whether regarding the *master* or the *servant*), the other, the question of how to regulate organisational activity fairly and the issue of who should bear the burden of losses created by lawful but risky activity. In short, it is a move from *master* to *organisation* as the frame of reference. This type of organisational reasoning is more and more evident in the case-law subsequent to Lister. In *Bernard v Attorney General for Jamaica*, for example, it is pellucid:

> The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable. In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee.[421]

The parameters of what is constituted 'material' enhancement of a risk (*Bazley*) or 'close connection' (*Lister*) is ultimately based in equity or fairness but it is not equity between individuals but equity between individuals and firms. Therefore, an aims of tort law approach

---

[419] *Bazley*, *Lister*. But we also should stress its flexibility makes some decisions difficult to reconcile *eg Bazley* and *Jacobi v Griffiths* [1999] 2 SCR 570.

[420] *Lister* per Lord Steyn: Wherever such problems are considered in future in the common law world, these judgments [*Bazley* and *Jacobi*] will be the starting point. On the other hand, it is unnecessary to express views on the full range of policy considerations examined in those decisions.' (para 27)

[421] [2005] IRLR 398, para. 18. Cited in Giliker (n 413), 168.

is favoured that abstracts from the individual case and looks to general policy questions, and then tries to return to the case to make fact sensitive judgments.[422] This is an admixture of policy and principle typical of our times. Thus, the problem remains how to integrate enterprise liability into interpersonal law. Certainly, the expansion of vicarious liability is to be explained in this manner, as a disguised form of organisational liability (using the language of individuals and their responsibility) with the parameters of the scope of employment largely influenced by policy reasoning. But the tensions remain with the extant interpersonal law, as the doctrine of vicariously liability has not fully migrated to strict liability for simply the creation of a risk. The employee fault requirement continues to be important but it no longer the most important factor with risk context reasoning coming to the fore, especially in Canada.

In Germany and France, we witness a similar instrumentalisation of vicarious liability. In Germany, as noted above the personalisation of responsibility in tort law extended to the requirement that in addition to the employee, the employer must be personally at fault. (Art. 831, BGB). These rules were surpassed in the case-law leading to strict liability.[423] Whereas in France, via Article 1384(5), a strict form of enterprise liability based on risk was developed.[424] This elevates risk reasoning to the place as most important justification for vicarious liability. In the common law, it is a relevant justification in the mix, so to speak. Nevertheless, all these developments tended to place greater burdens on enterprises with a movement from a focus on the functions of employment towards liability where there is some connection with the employment. That is not to say that the tests are clear; they are not. They rest on an uneasy accommodation of policy and juridical reasoning, which from a traditional lawyer's perspective is a recipe for uncertainty. The driver appears to be victim compensation and policy arguments support the enterprise as the relevant risk bearer.[425]The notion of being a relevant

[422] This is the tension between the moral basis of enterprise liability and the policy basis, often today the economic justification (allocative efficiency as distinct from risk distribution *simpliciter*, although the latter can overlap with the former). I would argue that this is a problem that occurs when one grafts economic or policy arguments onto a legal system which operates according to the organizing principle of justice as an interpersonal concept. For a comprehensive moral theory of enterprise liability see Keating (n 197).

[423] Brüggemeier (n 2).

[424] This is especially the case since the 1980s. See Giliker (n 413) 181-88. 'The 1988 decision [of the *Cour de Cassation*] represents not simply a new formula, but an acceptance of the principle of vicarious liability as a means of responding to the risks arising from misconduct of employees.' (186)

[425] This is repeatedly emphasised in Giliker (n 413) see *eg* ch 6.

risk bearer is both a. a justification based on 'fairness' and b. a justification based on good economic sense.

3. Direct Action against the State via Negligence: The Rise of the State qua Organisation

Brüggemeier states that '[t]he result of enterprise liability is the consequence of the change in values undergone by society with the transition from externalisation of damages (nineteenth century) to internalization of damages (twentieth century).[426] Accompanying these trends is a certain tendency to view the state as a large organisation like any other began even to prevail upon common law judges before this tendency was reined in from the 1980s onwards, a striking parallel with the general retrenchment in negligence liability *viz* private parties.[427] In Brüggemeier's terms, governmental or state liability, or what is referred to in the common law as the liability of public authorities (*inter alia*, 'the Crown'), constitutes '[a] special case of organizational liability' comprising 'objective liability for unlawful acts'.[428] It is certainly true that governmental liability, with its focus on unlawfulness/discretionary power additionally moved away from a concept of personal fault towards a concept of breach of public duty.[429] The precise relationship between the public functions the state discharges and tort law has remained ambiguous throughout the twentieth century. What one can say with reasonable certainty is that the idea that general negligence principles should apply to the state has been substantially curtailed in the past thirty years.[430] However, in those circumstances in which the state has been held liable in negligence, the state is conceptualised as a direct tortfeasor albeit a 'special' tortfeasor given the statutory context in which the state conducts its activities.

426 Brüggemeier (n 2) 72-73.
427 *Dorset*; *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373; *Anns v Merton London Borough Council* [1978] AC 728.
428 Brüggemeier (n 2) 162.
429 *ibid*, even more so at the European level in which the 'state' or the 'EU' is held liable for breaches. However, it should be noted that in common law acting *ultra vires* is not a condition precedent for negligence.
430 The case-law is well-known. Certain important judgments: *Murphy v Brentwood District Council* [1991] 1 AC 398; Hill v Chief Constable of West Yorkshire [1988] 2 WLR 1049; *X v Bedfordshire* [1995] 2 AC 633; *Osman v United Kingdom* [1998] EHRR 101; *Stovin v Wise* [1996] 3 WLR 389.

Nevertheless, the case-law even in England evidences attempts by judges to hold the government 'vicariously liable' as the sphere of state activities expanded.[431]

We will argue that, before its retrenchment, *Dorset, Dutton* and *Anns* demonstrate this tendency through the expansion of recovery in negligence against the state. *Dutton*, indeed, is probably the highpoint in this respect by explicitly relying on the concept of control, which neatly parallels the doctrine of vicarious liability. State liability *qua* organisational liability never, of course, reached the extent it has in France, but we argue that it would be remiss to ignore attempts to view the state in this de-personalised manner and straightforwardly ascribe responsibility for its activities even in the common law![432] Today, it is true that significant retrenchment has occurred albeit it now appears to be evolving again under the influence of human rights law.[433] While we will argue that this retrenchment is at least partly a consequence of the lack of 'fit' between a concept of organisational liability and the current landscape of fact in our final chapter, chapter IV, the question of the interaction between human rights law will be examined in chapter III. For now, we will simply focus on the expansion of an organisational model of liability resting on general negligence principles.

---

[431] This is not vicarious liability but organisational liability via various means *eg* breach of statutory duty, negligence. This way of viewing state liability is, incidentally, shared by C Harlow & R Rawlings *Law and Administration* 3rd edn (Cambridge, CUP, 2009), 751 referring to crown immunity as traditionally exceptional. With the erosion of this exception via the Crown Proceedings Act, 1947, the equality principle came under pressure because of the developing organisational dimension to tort liability, particularly in negligence: 'This exception [Crown Immunity] was to assume greater importance as tort law moved from a system of "corrective justice" in which individuals sued individuals to a system where the objective was to fix vicarious liability on corporate entities able either to meet or insure against the substantial awards of damages made in personal injury actions.'

[432] Allison (n 248). One should recall Harlow (n 232) who argues that the state in France has other control mechanisms apart from duty, *ie* causation and degrees of fault, such that differences in the actual application of state liability can be overstated. In the UK, there remains an idea that governmental liability is somehow distinctive of general tort law, Markesinis, Deakin & Johnston (n 330) 313-18.

[433] Markesinis, Deakin & Johnston (n 330), 312 invokes the metaphor of a swinging pendulum to explain the post-*Anns* retrenchment up to *Stovin v Wise*, and subsequent refinement or incoherence of the law, depending on one's perspective, particularly under the influence of ECHR jurisprudence.

(i) England: From *Dorset* to *Dutton to Anns*

In the social, particularly under the influence of scholars such as Duguit analogies are apparent between state and private firm, as we will see below in relation to France. The basic insight was that insofar as the state was "a complex public service corporation" the role of the law was to provide an assurance against the consequences of its activity for those individuals who were prejudiced by its operations.[434] This accorded to the theory of enterprise liability expounded by Laski, among others.[435] This implied setting aside concerns about state sovereignty and applying a stricter form of tortious responsibility to the state. In the case of England, a similar transformation of the role of the state, as that which occurred in France, occurred since the late nineteenth century but came to florescence after the Beveridge report. In other words, one should not overlook the context for the rise of state liability, namely, the rise of the welfare state during the twentieth century which increasingly regulated many spheres of social and economic activity.

However, unlike in France, absent a positive concept of the state the relationship between negligence and the liability of public authorities was far more influenced by the Diceyan equality principle, namely, that the same standards that apply to citizens should apply to the state.[436] This poses the problem indirectly because once the concept of negligence becomes one of organisational liability, as we argued above, the question is whether it is an apposite model to apply to state activities or whether the liability of public authorities is 'special'. In other words, that a widened approach to the liability should develop appeared open as a consequence of the *Donoghue v Stevenson* decision, more particularly, the judgment of Lord Atkin's which by its soaring language acted to reignite debates about the proper bounds of tort law.[437] As it was argued above, *Donoghue* performed a type of weak commutative justice meaning that the group context now became an important matter in terms of deciding where a

[434] Duguit (n 302) 240.
[435] Indeed, Duguit explicitly makes the connection to Laski's work on vicarious liability in this respect.
[436] Allison (n 248). Of course, Harlow & Rawlings (n 431) clarify that Diceyan equality was somewhat a fiction given contemporary crown immunities.
[437] Davies (n 341) refers to this as a Kuhnian transformation.

loss should fall. The first attempt to apply *Donoghue* to public authorities appears, unsurprisingly, in Lord Atkin's dissenting judgment in *East Suffolk*.

The essential question was whether statutory powers could be converted into common law duties of care, providing the requisite proximity between the tortfeasors and the injured party. The majority in the House of Lords resisted the analogy.[438] This is, it is submitted, a particularly important case because it arrived less than a decade after *Donoghue* and coloured the approach of the courts for the next 70 years.[439] In *East Suffolk* the relevant local authority pursuant to a statutory power assisted in the reconstruction of a dyke after the plaintiff's land was flooded. It emerged that the reconstruction was carelessly undertaken and had it been properly undertaken it would have been completed at a much shorter interval, which resulted in cost and inconvenience to the plaintiff. The Court held that the damage was caused by an act of nature, not by the negligent work conducted by the Council, the latter served only to aggravate the damages suffered. The court, in effect, avoided the duty of care issue by focusing on causation. It was an out-moded approach in the sense that it attributed not to human agency but to 'nature' entirely the damage caused to the plaintiff. The Court refused to award damages for what seems to amount to failure to confer a benefit on the plaintiff although the judgment is somewhat unclear.[440] Additionally, emphasis was placed on the role of the public authority within a statutory framework which may have been inhibited by allowing liability to follow.[441] The public authority had a statutory power as distinct from a statutory duty to act and consequently there could be no duty of care. This remained good law until *Anns*, although chinks soon began to appear in the 'no liability for omissions' armour.

In his dissenting judgment, Lord Atkin's criticised the failure to distinguish between breach of statutory duty and the common law duty of care.[442] That is to say, Lord Atkin distinguishes breach of statutory duty from negligence. The former is, traditionally, a narrowly defined tort requiring the plaintiff to demonstrate that he belongs to a particular protected class for whose

[438] *East Suffolk Catchment Area v Kent* [1941] A.C. 74, H.L. (E.).
[439] It reappears in *Stovin v Wise* and, *eg*, *Gorringe v Calderdale MBC* [2004] 1 WLR 1057.
[440] The Court is unclear as to whether it was decided on the basis of causation or duty of care.
[441] The public law framework argument reappeared also on many occasions in the 1990s to deny recovery. Prominently, *X v Bedfordshire*.
[442] See especially p. 88: '...I cannot help thinking that the argument did not sufficiently distinguish between two kinds of duties: (1) A statutory duty to do or abstain from doing something (2.) A common law duty to conduct yourself with reasonable care so as not to injure persons liable to be affected by your conduct.'

benefit the statute is enacted. On the other hand, Lord Atkin states that there is an additional common law duty to conduct oneself 'with reasonable care so as not to injure someone affected by your conduct'. This duty applies whether an individual is exercising a public duty or power, or acting 'in pursuance of his ordinary rights as a citizen'.[443] Thus, it would appear to be a duty that applies to individuals with respect to their conduct. However, notwithstanding this manner of framing the duty, Lord Atkin goes on to state:

> I treat it therefore as established that a *public authority*, whether doing an act which it is its duty to do, or doing an act which it is merely empowered to do, must in doing the act do it without negligence, or, as it is put in some of the cases, must not do it carelessly or improperly. Now quite apart from a duty owed to a particular individual, which is the question in this case, I suggest that it would be difficult to lay down that *a duty upon a public authority to act without negligence* or not carelessly or improperly does not include a duty to act with reasonable diligence, by which I mean reasonable despatch.[444]

The significant slippage between the initial framing of the duty of care in individualised terms and the subsequent formulation of the principle in terms of the direct duty of a public authority, then, demonstrates that the duty is an organisational one. The public authority, in other words, is conceptualised as a unit, a subject of law and its obligations flow from its putative negligent discharge of those functions. In terms of the duty of care, Lord Atkin's approach posited the presence or absence of proximity as the decisive issue in the case,[445] albeit without invoking the concept explicitly:

> But we have to deal here with relations between the plaintiffs and the Board, which I suggest are much closer than the general relations of members of the public to a public authority. The Board were engaging themselves in repairing the plaintiffs' wall with the object of preventing the further flooding of the land of the plaintiffs …[446]

---

[443] 88.
[444] *East Suffolk*. (emphasis added)
[445] There is, of course, in this respect a strong emphasis on the concept of assumption of responsibility in the manner the duty is framed. This became an important factor in later jurisprudence *eg* implicitly *Dorset*, *Anns*, and in certain pro-plaintiff post-1980s judgments, explicitly *eg Reeve* [1998] 2 WLR 408. Although assumption of responsibility is not decisive *eg X v Bedfordshire*, *Murphy v Brentwood* and so on.
[446] *East Suffolk*.

This gives rise to a duty to conduct the work with 'reasonable despatch.'[447] As Markesinis and Deakin emphasise, in Lord Atkin's dissent: '...the central question was not whether the board was under a pre-existing statutory duty to act, but whether the relationship between the two parties was sufficiently close to give rise to a duty of care at common law.'[448] Lord Atkin's is significant for two reasons. He applied the general principles laid down in *Donoghue* to public authorities. Second, in echoes of *Donoghue* he provided a direct action against the public authority leapfrogging, so to speak, the negligent acts of individual, public servants. This approach was subsequently taken up in *Dorset* by Lord Reid.

The *Dorset* judgment occurred at the highpoint of the welfare state. – the early 1970s. The welfare state as a 'direct service provider' undertook social services through its servants, and via third parties, and it was thought that given the fact that these individuals further the aims of the state, the state should therefore be liable for their torts, either primarily or vicariously.[449] Additionally, this era marked the highpoint of the general approach towards the duty of care in negligence such that tort law was being re-fashioned in its light. A notable example is *Hedley Byrne v Heller*.[450] Thus, increasingly the tort of negligence surpassed a category-based approach. No longer was general principle a residuum to cover situations outside of the existing category-based duties, but the general duty became the relevant test:

> Over the ensuing years the courts have gradually shifted their approach from that of ascertaining a specific duty of care for each kind of situation or class of relationship, to that of starting from the position of the general duty of care as enunciated in Donoghue v. Stevenson, and in particular Lord Atkin's formula.[451]

Indeed, in *Home Office v. Dorset Yacht Co. Ltd* case reasonable foreseeability and proximity alone were considered sufficient to determine the duty of care, or if we prefer who in law is

---

[447] *ibid*.
[448] Markesinis, Deakin & Johnston (n 330) 320.
[449] Harlow & Rawlings (n 431) 338 where the authors refer to the welfare state in these terms: '...at the time the classic welfarist model of direct service provision by integrated, hierarchical, public bodies.'
[450] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Ibbetson (n 87) speaks of negligence and its 'satellites'.
[451] 150. That is, Lord Reid's judgment appeared to indicate that it was no longer necessary to fit the facts within a pre-existing duty, and the court could examine the relationship between the plaintiff and the defendant afresh, only then turning to policy reasons to restrict recovery. See Lord Diplock's sharp dissent that criticized the methodology of the majority.

one's neighbour.[452] The case concerned the escape of seven borstal boys from an island under the control and supervision of three officers, who left the island at night and boarded, cast adrift a yacht, damaging the plaintiff's nearby yacht which was moored offshore. The plaintiffs brought an action for damages against the Home Office. The basis of their claim was that the 'general principle' approach to Lord Atkin's dictum. If reasonable foreseeability and proximity and physical damage could be demonstrated, then a duty of care should be presumed. Policy counter-arguments would then be required to rebut the presumption.[453] The plaintiffs, in brief, argued that where there is a right to control a person there is a corresponding duty to take reasonable care in the exercise of such control.[454] The defendants, on appeal, attempted to argue that there was no duty independent of statute, and that the only duty recognised whereby third parties may be liable for the actions of others was that of the parent-child relationship. In addition to the fact that there was no duty, policy should, *prima facie*, militate against the imposition of a new duty.[455] In his judgment Lord Reid dismissed the defendant's category-based, analogical approach.[456] He accepted the 'steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it.'[457] This was accepted unless it was accepted that there was some valid explanation or justification for its exclusion.[458] This is to the detriment of an approach which determines the duty of care owed based on the category of the case and strict policy bars. Put more formally, it is the difference between a + *b*, *then D presumed*, *not-c*; and *a* + *b* + *c*, *then D.*[459] This rested on Lord Atkin's general principle in *Donoghue v. Stevenson*, and there is of course a clear line from Lord

[452] [1970] AC 1004. (Lord Reid, Lord Morris & Lord Pearson maj., Lord Diplock and Viscount Dilhorne dissenting).
[453] *Dorset*, 1017-1018 sketches this argument in outline.
[454] 1020.
[455] *Dorset*, 1011.
[456] The defendant had argued against the general duty of care: 'It is not sufficient to establish a duty of care, merely to consider whether he damage was foreseeable. If that were a permissible question, the duty of care would be open-ended in a way which the courts never recognised.' (1010) And 'The court must, before it applies the test of foreseeability, make a policy judgment as to whether or not it desires to create the duty in question. The proper approach is to consider whether a duty of care situation exists which the law ought to recognise and whether, in the situation, the defendant's conduct was such that he should have foreseen that damage would be inflicted on the plaintiff.' (1011)
[457] 1026: This is the learned judge's explanation of *Donoghue v. Stevenson*.
[458] It ought to apply 'unless there is some justification or valid explanation for its exclusion.' (1027).
[459] A = reasonable foreseeability, B = Proximity, C = Category of case, D = Duty.

Atkin's dissenting judgment in *East Suffolk*.[460] This, in effect, makes the test more elastic and malleable.

The supervisory system in *Dorset* was being evaluated and held to be wanting.[461] But there are, in addition, deeper similarities. In this vein, Harlow refers to *Dorset* as 'the starter motor of state liability' and sees it as the emergence of a view which places the state 'in the position of guarantor.'[462]

Secondly, given that negligence is a common law tort that applies uninterruptedly across what on the continent is referred to the public/private divide, a troublesome principle is established which Harlow saw as leading to a counter-movement, the hardening of a more continental idea of the public/private divide previously alien to the common law.[463] This approach is particularly evident in Lord Diplock's dissenting judgment, which distinguished between public and private remedies in the exercise of powers conferred by statute, a previously unmade distinction in the common law: 'For a careless exercise of his rule-making power his is responsible to Parliament alone. The only limitation on this power which courts of law have jurisdiction to enforce depends not on the civil law concept of negligence, but on the public law concept of ultra vires.'[464] Lord Diplock's approach was to make any civil action contingent on a prior holding of *ultra vires*; in other words, a civil action depended on an unreasonableness finding, a much higher threshold than general negligence as it was evolving.[465] This approach

---

460 *Dorset*, 1027.

461 The logic could be exploited by enterprising judges. It opens a door which had been previously bolted. This is not to say that such an extension would be inevitable but it would allow more room for manoeuvre. It would, in particular, have to still contend with the common law's objection to recovery for economic loss.

462 C Harlow 'Corrective Justice in the Frame' in C Harlow *State Liability*: *Tort Law and Beyond* (Oxford, OUP, 2004).

463 That is not to say that there is no such thing as public law in England but rather that there are no special rules of negligence which are engaged or special tribunals relevant to public authorities.

464 *Dorset* per Lord Diplock 1065. He continues that matters of discretionary decision-making is not well suited to adversarial procedure and rules of evidence adopted in English courts of law or of which judges and juries are suited by their training and experience to assess the probative value. This is the reason, per Lord Diplock, why '...over the past century the public law concept of ultra vires has replaced the civil law concept of negligence as the test of the legality, and consequently of the action ability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose.' (1067) *cf* C Harlow "'Public' and 'Private': Distinction with a Difference' (1980) 43(3) *MLR* 241.

465 In addition, a holding of *ultra vires* does not lead inexorably to the imposition of a duty of care per Lord Diplock see p. 1069 especially.

would tend to elide statutory powers and the common law duty of care and was a novel development, one which was regrettably followed in the next twenty years in various forms.[466]

The niceties of Lord Diplock's analysis aside, we see the emergence of the two strands of thinking in respect of the liability of public authorities in negligence; one broad and general, the other cautious, incremental and categorical. This pattern has been repeated in the intervening twenty years and the pendulum has swung in both directions; however, even Lord Diplock concedes through incremental growth a general principle may tend to emerge.

The notion of control as being an important determinant of liability was taken up in *Dutton v. Bognor Regis*. Lord Denning M.R. rejected the relevance of the power/duty distinction.[467] It had been thought since *East Suffolk* this was important because it represented the difference between a positive duty to act on the one hand, and on the other a mere statutory discretion. Non-exercise, or failure to confer a benefit from negligent exercise of the latter were thought not to give rise to a duty of care.[468] According to Lord Denning M.R.:

> This argument assumes that the functions of a local authority can be divided into two categories, powers and duties. Every function must be put into one or other category. It is either a power or a duty. This is, however, a mistake. There is a middle term. It is control.

Control, for Lord Denning M.R., was a common currency sufficient to give rise to a duty of care. This is because actual control was so extensive extending from bye-laws, the approval of planning permission, the employment of a surveyor to ensure that the construction complies with the bye-laws, and finally the eventual demolition of structures which fail to comply. As Priel argues: 'When the state was put in charge and has extensive control, it matters little whether the risk was *created* by the state, for the state was given (or has taken) control for the

[466] C Harlow 'Fault Liability in French and English Law' (1976) *MLR* 39(5) 516, 535. Harlow points out that this interpretation runs counter to the 'mainstream of English law.' (535) Its most explicit recent formulation was in *Stovin v. Wise*.

[467] This again echoes Lord Atkin's judgment in *East Suffolk*.

[468] It appeared that liability would only arise in the context of powers if the public authority had caused further damage.

sake of *reducing* risks. Having failed to do so, '... its shoulders are broad enough to bear the loss.'[469]

Although *Dorset* can plausibly be read as an assumption of responsibility case, we view the notion of control as being more important to fully understand its radical import.[470] Therefore, *Dutton* merely develops these ideas. This is, however, at odds with the traditional common law distinction between acts and omissions, and the general rule against recovery for pure economic loss. It seems to align the approach towards public authorities more with the rationale behind vicarious liability as enterprise liability, by which the enterprise (in this case the state) is held liable for the risks it has created and/or, has failed to manage. Responsibility for risks is laid at door of the state because of the position of control it assumes. This is, it is submitted, radically at odds with the act-based theory of the liberal state and its law premised on fault.[471] This was the true highpoint of the expansion away from the traditional law, although the House of Lords further developed, albeit cautiously in *Anns*, an expanded recovery against public authorities.

It is submitted that *Anns v Merton* reflected a desire to extend the law of negligence to deal with the problems of the administration the welfare state and consumer protection. The law of torts is instrumentalised in order to effectively correct bad contracts by implying a warranty of merchantable quality into buildings constructed at the behest of local authorities.[472] This, in effect, expands tort law into the domain of contract law and is a feature of the judgment that invoked the ire of the judges in the *Murphy* judgment in which *Anns* was overturned.[473] If we recall the facts of the case, it was framed as relating to damage caused to apartments because either the council failed to inspect the building work undertaken, or inspected this work negligently, and was based on the council's statutory duties under the Public Health Act, 1936. In fact, it was independent contractors who had failed to adequately inspect the property in

469 Priel (n 291).
470 Post-1990s a number of judgments interpreted *Dorset* in this light.
471 Indeed, it is at odds with the manner in which Dicey, with characteristic brio, conceptualised the responsibility of public servants, which was personalised and based on acting *ultra vires*. AV Dicey 'The Rule of Law' in Dicey (n 158) 'With us every official from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts and made in their personal capacity liable to punishment or the payment of damages for acts done in their official capacity but in excess of their lawful authority.' (178) In general, there is a tendency in English law to make the state servant, rather than the state as a corporate body, responsible.
472 This analysis accords with the learned Law Lords interpretation in *Murphy*.
473 We argue that the traditional emphasis was on personal autonomy with tort less prominent. We can argue that this move from contract to tort evident in *Donoghue v Stevenson*, now taken to more radical conclusion in *Anns*.

question. The upshot was structural damage including subsidence, cracks and other defects. Again, it was framed as if a form of primary liability of the local authority which could be described as an omission, although it resembled vicarious liability, as it was liability for the negligent acts of third parties i.e. independent contractors by an expanded reading of the statute.[474] The objection to such a use of tort law which grasps at the expanded function of the state is captured by Goodfellow Q.C who reminds us of the individualistic act-based origins of tort law:

> It is one thing to hold that there is a duty of care if a person creates a danger or induces a breach of the byelaws, another to hold there is a duty if a person fails to detect someone who has broken the byelaws. If a building inspector simply fails, negligently, to notice that the foundations are only 2 feet 6 inches deep instead of 3 feet there should be no liability.[475]

Nevertheless, the Court held the local authority liable for in effect, if not explicitly, its supervisory failure. Lord Wilberforce's approach was to lean on the reasonable foreseeability and proximity test squarely, with policy and decided cases less pressing and decisive in the name of plaintiff compensation. In consequence, Priel is correct to state: '[t]he wide reading of *Donoghue* in the context of *Dorset Yacht* and *Anns* established the idea that as far as the citizen is concerned the state is its 'neighbour' for much of what it does.'[476] Hence, by the creative development of duties of care out of statutory duties, or more accurately that statutory duties created the necessary degree of proximity to create a duty of care, the law by the early 1980s was developing, aside from personal responsibility or an invocation of the doctrine of vicarious liability, a type of state corporative responsibility. To be sure, this was oblique if

---

[474] Goodfellow Q.C. in *Anns* anticipated this distortion of the individualistic basis of tort law if a duty were to be imposed on the inspector of building works: 'The inspector is not the creator of the thing. The prime villain would not be liable and therefore someone whose fault must be less would be under a wider duty than the person primarily at fault.' (748)

[475] *Anns*, 748. It is important to note that Anns is also the beginning of an attempt to distinguish torts committed in the context of a legislative framework from those torts committed by private actors. Thus, focus was placed on a distinction between policy/operation of a statute. This meant that special rules were being developed for public authorities. Public-private divisions in tort liability remain very contentious to this day.

[476] Priel (n 291), 13. There is a debate as to the manner in which from *Anns* onwards the judges attempted to carve out a public private divide which is well rehearsed. For the purposes of this paper it will not be examined. Suffice it to say, the judges increasingly made arguments about the intention of the statutory framework to counteract negligence claims. The highpoint of this approach was in *X v Bedfordshire Co Co*.

compared to the *dans les fonctions auxquelles* test in France, which more directly superimposed primary responsibility on the state but nevertheless it was a significant adaptation of the existing legal materials to the society of organisations.[477]

The abrupt halt to this progress occurred in *Yuen* which was one of many judgments in the 1980s that brought this expansive organisational approach to an end.[478] Notwithstanding its specific context, financial services, in which courts are at all times reticent to impose a duty of care, its reasoning subsequently influenced a series of judgments that eventually led to the overturning of *Anns*. The Privy Council's denial of proximity is its most decisive blow to *Anns*. In effect, *Yuen* among other cases reversed the tendency for statutory powers to form, without difficulty, the basis of a duty of care. Therefore, this case implicitly denies the control or organisational template as a structure for recovery. Secondly, if policy-based reasoning had been behind the expansion of negligence in the first instance as outlined above, then policy was again used to retrench the law in the 1980s.[479]

The *Yuen* depositors argued that the regulator, the Commissioner of Deposit-taking Companies (the Commissioner), had failed in their duties under the relevant legislation, the Ordinance of 1976, because they, in circumstances where they knew or ought to have known about the fraudulent activities of the Bank in question, failed to revoke the authorisation of the Bank.[480] This should have been apparent before the plaintiffs made their deposits with the bank and therefore the conduct of the regulator was considered a cause of the plaintiffs losing their deposits.[481]

---

477 Fairgrieve (n 231).

478 *Yuen Kun Yeu v A.-G. of Hong Kong* [1988] 1 AC 175, others cited in *Yuen* include *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210; *Leigh and Sillavan Ltd. v Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] AC 785.

479 J Stapleton 'Tort, Insurance, and Ideology' (1995) 58 *MLR* 820 makes this point clearly. Lord Keith in *Yuen* is alive to this policy dimension: 'The issues in the appeal raise important issues of principle, having far-reaching implications as regards the potential liability in negligence of a wide variety of regulatory agencies carried on under the aegis of central or local government and also to some extent by non-governmental bodies. Such agencies are in modern times becoming an increasingly familiar feature of the financial, commercial, industrial and social scene.' (189)

480 The preamble of the Ordinance reads: 'To regulate the taking of money on deposit and to make provision for the protection of persons who deposit money and for the regulation of deposit-taking business for monetary policy purposes.'

481 The essence of the claim related to depositors who made 'substantial deposits' with a deposit taking company, American and Panama Finance Co. Ltd. These deposits were made in 1982 but by 1983 the relevant deposit taking company was in liquidation. As a result, the depositors lost their deposits in full. The plaintiffs also claimed that the company should not have been registered in the first place.

The claim was based on the statutory powers incumbent on the regulator under the Ordinance, which included the power of control and supervision.[482] In the circumstances, the plaintiffs relied on *Anns* for the proposition that the breach of statutory powers could be the basis of a duty of care, and further argued that it was fair, just and reasonable that '...when legislation is passed with the express object of conferring powers on a public body to protect depositors from loss that if such loss occurs from the negligent exercise of those powers a claim should lie.'[483] The defendants sought, *inter alia*, to confine *Anns* to the context of health and safety regulation, argue that a special relationship was required before recovery could be granted in pure economic loss, and that for policy reasons liability should be denied. The defendant had to reconcile the interests of 'multiple' parties and this would be inhibited by a negligence action.

First, Lord Keith cautiously side-stepped the approach in *Anns* stating that it 'is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.'[484] Lord Keith then focused on proximity. In this respect although it was foreseeable that the plaintiffs would be at risk of losing their deposits, this was a necessary but not sufficient condition of a duty of care. Lord Keith took the day-to-day control or narrow interpretation of *Dorset* which counselled against liability.[485] That approach confined *Dorset* to the proposition that a duty of care would lie in circumstances where a defendant exercised day-to-day control over the activities of a third party, as distinct from a general regulatory powers.[486] Therefore, no special relationship (or proximity) was created in the circumstances.[487] Secondly, the plaintiffs' claim on the basis of *Hedley Byrne* was dismissed as there was no voluntary assumption of

---

[482] The Court rehearses the plaintiffs' central argument at p. 180: 'The commissioner's failure to exercise properly his statutory powers of control and supervision led to the plaintiffs making deposits with a company which should not have received that money, and so the plaintiffs suffered loss.'

[483] The plaintiffs also noted the reliance that they place on the Commission (the regulator) owing to the latter's access to information not available to the plaintiffs. (181) In addition, it is clear from the submissions of the plaintiffs that they were sensitive to the changing tide towards policy arguments and framed their claim accordingly. They noted at p. 179 the various judgments delivered since *Anns* that could be considered a 'retrenchment' from the *Anns* position. Second, while denying that this was a case of pure economic loss, they further argued that 'If the purpose of the legislation is, and can only be, to prevent economic loss, then that is the only type of loss which can be envisaged to result and be the subject of a claim in these circumstances.' (181)

[484] 194. It was later explicitly distinguished in *Murphy v Brentwood*.

[485] 196.

[486] This is to keep distinct negligence and vicarious liability. 'In contradistinction to the position in the Dorset Yacht case, the commissioner had no power to control the day-to-day activities of those who caused the loss and damage. As has been mentioned, the commissioner had power only to stop the company carrying on business, and the decision whether or not to do so was clearly well within the discretionary sphere of his functions.' (196)

[487] 'To hark back to Lord Atkin's words in *Donoghue v Stevenson* [1932] A.C. 562, 581, there were not such close and direct relations between the commissioner and the plaintiffs as to give rise to the duty of care desiderated.' (196)

responsibility towards the plaintiffs. The regulator was not in a quasi-contractual relationship with the plaintiff in which he guaranteed the creditworthiness of the deposit-taking company. The duty on the commissioner was to supervise in the general public interest, and not in the specific interest of individual members of the public.[488]

Lord Keith stated that matters of policy were not relevant because the case could be dismissed on the application of the proximity test.[489] However, the delimitation of proximity is not a scientific exercise, but a policy decision. It became even more strained in light of *Caparo* which made the policy dimension paramount but this is a well-rehearsed debate such that it will be excluded from this chapter.[490]

Lord Keith's judgment, in effect, broke the spell that converted the state into a guarantor, a type of corporate actor which creates or enhances risks and must indemnify individuals for their consequences. Now, it might be argued that the particular facts in *Yuen* make this statement too broad. In other words, the *Yuen* facts disclose a situation in which it cannot be said an organisational context exists, the bank is simply too distant from the state to fit into the organisational model. Perhaps. And yet, when the *Murphy* case was decided a few years later, on facts on all fours with *Anns*, the *Anns* decision was overruled. Hence, in *Yuen* what we can see is a far more radical *volte face* – a rejection of the organisational or corporate model of responsibility. This was achieved by narrowing the proximity requirement, and the rise of policy first, duty second type reasoning which owes considerable debt to the *Yuen* decision.

It might be convenient to argue this use of breach of statutory duty to canalise corporative responsibility broke down with the end of the welfare state but such a causal claim should be treated with caution.[491] Nevertheless, there is a striking parallel between the evolution of the welfare state towards a regulatory state and retrenchment in the law of torts away from an expansive use of breach of statutory duty as a basis for a negligence claim. Once again, the role and function of the state was changing, and with it, the corporative model seemed outmoded and inapt. In sum, in the common law of English it is clear that the organisational model of

[488] 196. *Hill v Chief Constable of West Yorkshire* was the relevant analogy here.
[489] It is submitted that an adequate reading of Lord Keith's judgment will find his interpretation of the distinction between proximity and policy a thin one.
[490] *Caparo v Dickman* [1990] 2 AC 605.
[491] Priel (n 291) notes that the new retrenchment can be explained politically, not as influenced by neoliberalism but by the reassertion of traditional conservative values. It is difficult to tell, in truth.

state responsibility developed obliquely. No sooner had it developed than it seemed to provoke retrenchment. Applied to the state, the organisational approach in its full expansiveness had a short career. We will examine in the next chapter potential reasons why this may have been the case.

(ii) France: *Blanco* and the Emergence of State Liability

If the English courts developed a direct action against the state in bits and pieces as it were, before reconsidering the sweeping approach in the 1980s, the French expansion of liability was all the more dramatic and patently derived from an organisational model. This is important for chapter III and chapter IV, because the concept of state liability in European law owes considerable inspiration to the French model of liability.

In France, that which never developed in the UK, a doctrine analogous to the doctrine of vicarious liability was developed in respect of public authorities. This was a concept of fault for public-service related activities. As Van Dam explains: 'A *faute* can be linked to public service if the public service has provided the conditions for the fault. An official's personal fault can also be a service-related fault at the same time.'[492] This *faute de service* can be traced to Duguit's treatment of state responsibility. Notably, Duguit's treatment of state responsibility is no more than a subdivision of his treatment of 'responsibility' more generally. This is clear from chapter 7 of *Law in the Modern State*.[493] He dismisses von Gierke's theory of corporate responsibility as resting on an outmoded theory of individual will. Von Gierke's theory was premised on fault and responsibility with the corporation being the directing mind with agents the body. In a manner similar to the way in which it cannot be said that the actions of the body are not independent of the mind, therefore, the acts of agents are attributable to the will of the directing mind, the corporation. Duguit rightly argued that this rested in a contortion of fault to fit the new context of large vertically integrated firms. Jellinek applied this analysis to the state, and Hauriou applied to his analysis French public law. Duguit, on the other hand, argued for

[492] Van Dam (n 370) 535-36.
[493] And, indeed, his *Les transformations générales du droit privé depuis le Code Napoléon* (Alcan, Paris 1912) Ch 5, pp. 145-47.

the abandonment of a model of corporate responsibility that rested on the paradigm of '...the existence of a conscious willing person'.[494] Instead he argued that 'The notion of fault is out of place where we deal with the interrelation of groups with groups; or groups with individuals.'[495] He cited approvingly Laski's seminal article on the doctrine of vicarious liability cited above to argue that the responsibility as fault and individual will nexus should be broken and replaced by a general principle that although '[g]roups have no wills and cannot therefore be responsible persons ...' group activity:

> ...is none the less an important aspect of social activity. The tasks it performs doubtless benefits the whole of society, but more particularly it is the members of the group who are benefited. If they so benefit, it is only fair that they should bear the risk which attaches to the contact of their acts with other individuals or groups.[496]

It is therefore clear that with sovereignty set to one side, Duguit addressed the responsibility of the state as merely a variant of corporate responsibility in the private sphere.[497] In the case of the state, responsibility is linked to the service that the state performs and should be premised on causation and not fault.[498] All individuals and groups have duties towards society, as distinct

---

494 Duguit (n 302) 'The idea of responsibility and of fault demand, as is clear, the existence of a conscious willing person. Conscious violation of a rule of law by a free will involves the responsibility of the person endowed with that will. Such is the metaphysics of the ordinary concept of responsibility. Clearly it makes the problem one of ascription.' (203)

495 205.

496 206. Interesting Duguit avoided a type of anthroporphic thinking later criticised by Williams (n 246) in relation to attempts to make found corporate responsibility on a concept of a collective will. An intermediary step in the argument above, i.e. between critiquing von Gierke and developing a benefit principle was to devalue responsibility as fault by arguing that neither the individual nor the group can be said to be independently responsible and therefore a new basis for liability is required. Especially 'The act is doubtlessly put in motion by individual wills, but the end is collective. If a fault is committed by an agent of this collectivity, it is not imputable to that agent since it is for a collective end that it has been committed. Nor is it imputable to the collectivity since the latter outside the imagination of lawyers has no personal existence. The idea of fault and imputability are thus eliminated.' (205, 206)

497 Duguit's argument can be properly said to have two movements. The first is to state that insofar as social fact indicates that sovereignty has limits, sovereignty does not exist. In other words, if it is possible to hold the state responsible, as legal practice indicates it is, then the coexistence of responsibility and sovereignty is a contradiction in terms. Second, Duguit argues that the type of responsibility that is developing cannot be captured by the individualistic concept of responsibility inherited from the 'Imperial' state which tied responsibility to authorial will. Contemporary social facts indicate organized action towards defined ends, whether in the private corporation or the nascent welfare state (my terminology, R-C) and therefore require a new form of responsibility which meets the needs of individuals who are suffer damage as a consequence of collective action. It is argued that in this manner we can see an intertwinement of private and public responsibility centred on finding ways to deal with the organizational form.

498 *ibid* 'It follows that if the organisation or management of such a service should particularly prejudice a group or an individual, the funds of that service should repair the damage so long as the relation of cause and effect between the act and damage is traceable.' (207)

from rights, and the duty varies with one's social role. The social role of the state is to provide public services, and to the extent that it fails to fulfil this duty it may be held responsible in tort. The important question was not the identity of the tortfeasor, but her form. In other words, whether the relationship involved was one between individuals and individuals, or individuals and groups. With the growing state involvement in the economy, the state as a corporate body, should be held accountable. One can therefore speak of a congruence between the private and public law regarding how they treated the rise of the organisational form.[499] Those adversely affected by corporate activity should be compensated when they find themselves 'prejudiced' by group activity. In other words, since decision-making regarding activities occurs in groups, it is these groups which should be held accountable in tort for the negative consequences of their activity. The sentence that most places this intertwinement between the rationale for private responsibility and state responsibility in relief is found in Duguit's discussion of the emergence of the *faute de service* doctrine before the *Conseil d'Etat*. It seems, for Duguit, to rest on a risk profit basis: 'It meant that the possibility of such faults involve [*sic*] a risk but that if the risk is realised the state must pay." This is no less than Josserand and Saleilles's theory applied to the state – form not identity is paramount. The form was corporate and the state "a complex public service corporation."[500] Indeed, in the distinction between personal fault and *faute de service* we find an analogue to the control test in vicarious liability with a focus on the connection between the functions performed and the act in question.

The *Conseil d'Etat* borrowed from the civil jurisprudence on tortious liability but modified these rules where the judges thought necessary. Thus, fault can vary between *faute légère* and *faute lourde* which allows the *Conseil d'Etat* to take into consideration the particular policy factors which exercise the English courts without providing *a priori* strict immunities. *Faute lourde* is, in practice, a high threshold and may make recovery very difficult. For example,

---

499 See E Picard 'The Public-Private Divide in French Law: Through the History and Destiny of French Administrative Law' in M Rüffert (ed) *The Public-Private Divide: Potential for Transformation* (London, BIICL, 2009) 17, 54. Picard clarifies that while Hauriou's theory was more accurate in terms of the existing law, Duguit's was highly influential on how the law developed. In this sense, we examine Duguit here to explain the underlying assumptions.

500 Duguit (n 302), 240. Similarly, there was a strong instrumental bent to this reasoning premised on the idea that the burden should fall in fairness on the state which can be considered to insure the citizen against these injuries: '... [The] private citizen is so to speak insured against the risks arising from each public department by claims in its special budget.' (239, 240)

faute lourde applies in respect of the liability of financial regulators.[501] There has been a trend to relax the *faute lourde* requirement, although the French courts have not taken a consistent position in this respect.[502]Nevertheless, the French courts are much closer than their English colleagues to the *Francovich* position.[503] In addition to fault-based liability, the *Conseil d'Etat* has also developed a doctrine of *égalité devant les charges publiques* which results in strict liability in circumstances where a citizen can demonstrate that he has suffered disproportionately damage by state action. This is based on solidaristic and distributive thinking, and holds the State liable for the unfavourable consequences of its actions in a manner very similar to enterprise liability.[504] Both developments, that is, fault liability and strict liability against the State represent an organisational view of the State and a principle of responsibility for its actions. The *faute lourde* requirement is, it is submitted, a way to address the reservations that English judges express at the duty of care stage towards the burden that tort liability imposes on public finances.

[501] 'Generally, gross negligence is required for damage caused by a particularly difficult or sensitive task, such as those performed by the police, the tax bodies, and supervisory or regulatory authorities.' (536)

[502] D Nolan 'The Liability of Financial Supervisory Authorities' (2013) 4(2) *JETL* 190. The author notes that whereas initially the French courts were willing to relax the *faute lourde* requirement in respect of financial regulatory authorities, the courts have reversed this initial position.

[503] Van Dam (n 370), 537. C-6/90 *Francovich v Italy* [1991] ECR I-5357.

[504] G Viney and P Jourdain *Les Conditions de la responsabilité* (3e ed. LGDJ Paris 2006) avers to the similarity between the two regimes of liability: 'On peut la rapprocher également de la responsabilité de la puissance publique pour le fait des fonctionnaires et agents publics qui relève du droit administratif mais répond à des préoccupations comparables et se trouve soumise a un régime très proche.' (976)

D. CONCLUSION

In sum, the ultimate consequence of the rise of organisational liability is the distortion of the interpersonal basis of tort law. It becomes a law of managing the negative externalities of large scale industry by making them internalise their costs and a law against large public authorities to a greater or lesser extent as we have seen. Individual moral conduct is replaced by liability for consequences of systems failure which relies, but is not entirely determined by, expert calculations of what constitutes reasonable risk imposition. The problem with this approach, as we shall see, is that it is not adapted well to a form of public or private organisation in which a vertically integrated bureaucracy or state is no longer paradigmatic. When the single unit is replaced by the network, an organisational basis of liability becomes shaky to say the least because absence singular 'control', it is not easy to manage risk, which as we shall see in any event is increasingly difficult to calculate *ex ante*. Perhaps Duguit anticipated this in his penultimate sentence in *Law in Modern State*: 'Our own system, realist, socialist, and objective represents but a moment in history; and before it is finally builded (sic) the keen observer will note its transmutation into a newer code.'[505]

[505] 245.

`

CHAPTER III: CURRENTS AND COUNTER-CURRENTS IN CONTEMPORARY LAW

A. INTRODUCTION

In chapters I and II we have argued that the society of individuals and the society of organizations have given rise to two concurrent normative models of liability. This differentiation in law's internal programmes are a response to evolutions in forms of decentralised coordination.[506] The liberal law offers normative counter expectations that stabilise society, drawing its normative models on the knowledge base of society.[507] Both the society of individuals and the society of organizations in their interaction with the legal system create irritations gradually refining normative models of tort liability. These normative liability models attempt to adjust the law to societal normality by furnishing law-internal normative models of society.[508] This bottom-up and evolutionary perspective supposes that in the society of individuals and, indeed, the society of organizations there is a close relation[509] between the legal system and normality through its law's feedback loops, with a central role played by 'briding concepts'.[510] The society of individuals connected distributed experience to 'bridging concepts' such as reasonableness as correct individual conduct, whereas the society of organizations drew on group-based expert knowledge creating a new *agent moteur* of liability, namely, vertical vicarious liability, which ties norm to risk (as distinct from fault) more closely, even if dressed in the language of the reasonable man.[511] In both cases, the architecture of the liberal law renders the law a secondary normative re-modelling of normality, which aims to

---

506 Ladeur (n 24).

507 *ibid*.

508 N Luhmann 'Operative Closure and Structural Coupling: the Differentiation of the Legal System' (1992) 13 *Cardozo L. Rev.* 1419 on the relationship between structural coupling and law as operatively closed communication.

509 F Cafaggi 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation' (2015) 36(4) *U. Pa. J. Int'l L.* 101. For a discussion of custom and its normative content. However, we are arguing that the relationship between law and 'normality' is more profound. Law is a taker not only of custom, but societal models or paradigms eg individual, organization, but also networks?

510 Ladeur (n 83). The concepts of danger in public law and negligence in private law are paradigmatic examples of bridging concepts between 'proto-normative rules of practice, knowledge rules, and societal expectations on the one hand, and normative stabilization of order on the other.' (338)

511 Brüggemeier (n 2). For a wonderful reconstruction of twentieth century strict liability in this vein M Renner (n 33) as well as pessimistic foreboding regarding contemporary shifts in risk regulation for law's normative mission. See, Hoffmann (n 23), which is essentially his point. The long-standing and apparently intractable debate concerning positive obligations, misfeasance v nonfeasance, can be understood in these terms.

stabilise society by providing normative counter-expectations.[512] What is normal and legal norm are closely linked.[513] In the society of organizations, as Ladeur argues, the law increasingly reacted to:

> '. ...the pre-structuring of society by the corporatist co-operation of the pluralistic social groups and the big firms and the "representative organisations" of both. This complex group-based infrastructure of the late modern nation state has left its traces in the legal system, which was composed of both an increasing number of laws and the regulation of more and more spheres of societal domains in the welfare state.'[514]

Whether the firm or the state an organizational model of liability matured. The law, in essence, built group balancing into its normative programmes, either explictly or surruptitiously via reasonableness, essentially clouding the collision of functional discourses in the nation state.[515] Thus, the society of organizations is construed in chapter II as a rupture or 'break in symmetry' with the society of individuals sedimenting a new model of liability, which supplements the individualistic one of the late nineteenth century.[516]

The emerging society of networks ('network society') is, by analogy, a second rupture in modernity.[517] Today we are faced with '. ...a further rise in complexity of the knowledge base of society'.[518] Ladeur remarks that the driver of change is the onset of the Information Age,[519] and it leads to: '[m]ore and more hybrid modes of organisation which blend forms of the market and organisational closure ("network contracts") spread in society, and have a repercussion on the procedures of administrative decision-making which transcend traditional borders and stable separations.'[520] Not only this, these create profound irritations for tort law, which remains wedded to individualistic and organizational models of liability. This intermediary

---

512 The relationship is, of course, a complicated one ie in some cases the law of torts defers to exogenous standards, but ultimately retains the capacity for their review in light of a normative standard. This is patent in product liability cases, and indeed in medical negligence also.
513 Renner (n 33).
514 Ladeur (n 83) 33-34 (Citations omitted).
515 Kjaer (n 60).
516 Ladeur (n 24).
517 *ibid*.
518 28.
519 M Castells *The Network Society: From Knowledge to Policy* (Washington, DC, Johns Hopkins Center for Transatlantic Relations, 2005).
520 Ladeur (n 24) 29. (citations omited)

form, located between these axes, lacks a clear legal concept or functional equivalent.[521] Existing tort law, when fashioning proximity by providing recovery on the basis of positive action or control of activities is misaligned with the network society.[522]

Secondly, a further complicating factor is that functional differentiation as the dominant form of societal organization in modernity has broken out of the frame of the nation state while tort law remains predominantly territorially delimited.[523] The central place of organizations, public or private, has been challenged by the emergence of networks whether public, private or mixed public-private hybrids. When hybrids, they involve the hierarchical state, but have transnational heterarchical dimensions.[524] The role of the state *qua* organiztion *primus inter pares* as the site of 'transfer of meaning components (*Sinnkomponente*) between different worlds' (*Sinnwelten*) is diminished by these transformations.[525] It is argued, therefore, that the emergence of transnational governance networks, *pace* Kjaer sites of meaning transfer, coincides with the breaking of territorial frame of the nation state.[526] Following Kjaer, networks are best conceived as intermediary institutions, which emerge to deal with capacity problems in circumstances in which the state is no longer in a position to resolve conflicts exclusively.[527] In other words, functional differentiation unleashed by modernity has broken free of the nation state as exclusive frame of reference, and its methods of positive integration.[528] Positive integration supposed the Hegelian state as *primus inter pares*, fulfilling a coordinating or

[521] This question has been probed deeply in relation to the rise of heterachical forms of cooperation between firms and decentralisation within firms see Amstutz and Teubner (n 60). Recall Teubner, network is not a legal concept citing RM Buxbaum, 'Is "Network" a Legal Concept?' (1993) 149 *Journal of Institutional and Theoretical Economics* 698. I share with Teubner the concern that a functional equivalent is required, but through an escape out of contract. See A Beckers 'Regulating Corporate Regulators through Contract Law? The Case of Corporate Social Responsibility Codes of Conduct' MWP 2016/12 for analogous problems regarding contract law and the growth of codes of conduct. Here there is a mis-match between the unilateral promise form of the codes of conduct and the reciprocal model of contract law.

[522] Teubner (n 99).

[523] Previously, per Kjaer (n 60) 'functionally differentiated society unfolded itself within the framework of the nation state.' (81) There have been attempts to instrumentalise tort law for use beyong the nation state, although the courts have been rather cautious in this respect ie ACTA, and have since rowed back.

[524] OMC and comitology are the usual examples. However, I think in terms of regulatory governance, the New Approach is a good fit regarding network governance.

[525] Kjaer 'Law of the Worlds: Towards an Inter-Systemic Theory' (ssrn, October 2016) 159, 173.

[526] Teubner (n 98).

[527] Kjaer (n 103).

[528] Kjaer (n 60) '...the level of functional differentiation has radicalised and territorial, and stratificatory forms of stabilisation have increasingly lost their relevance. Consequently, what is often been described as post-modern society is, in fact, only a society where the intrinsic modern logic of functional differentiation has become an even stronger characteristic of society than before.' (82) (Citation omitted)

mediating role for society through which the state forges a common interest, even if from our perspective it has traditionally exaggerated the centrality of state direction.

The 'world society', by contrast, is characterised to date by negative integration.[529] The state is no longer *primus inter pares*, but is reconceived as an actor among several in heterarchical networks, which take on numerous tasks including risk regulation.[530] In other words, functional differentiation has been radicalised, breaking free of the territorial state.[531] The state in 'radicalised modernity' enables, creates spaces, steers insofar as possible, but does not fulfil a positive integration role for society.[532] The law of the world society, by analogy, does not currently focus primarily on individual or group equities, as positive integration, but rather on a facilitative role for functional systems as a form of negative integration. However, this role coincides with a tendency to emphasise the 'market leader', so to speak, namely the economic system which through economization of other discourses defines the trade-offs between different systems of society.[533]

EU law is paradigmmatic in this respect, because it has to a large degree[534] given rise to a law of mutual recognition (*Cassis de Dijon*) rather than developing a self-standing concept of interpersonal justice.[535] That the economic system is 'market leader'[536] is well-evidenced by the New Approach to Product Standards, the object of inquiry in chapter IV. By opening markets via mutual recognition and restraining state action to *ex post* surveillance it facilitates the emergence of transnational markets. The de-regulatory effects of mutual recognition beget new governance structures, aimed at re-embedding the market, which is argued are captured by the network concept.[537] The network governance of the New Approach involves sharing

529 Luhmann (n 96).
530 PF Kjaer 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law, And The Political in the Transnational Space' (2010) *Wisconsin Law Journal* 489: 'Functional Synthesis' 'States remain a central form of ordering but only one among several. In the transnational space, a wide range of autonomous public- and private-norm producing organizations and regimes operates, which is not controlled, or only partly controlled, by states.'
531 Kjaer (n 60).
532 HW Micklitz & D Patterson 'From the Nation State to the Market: the Evolution of EU Private Law' EUI Working Papers LAW 2012/15.
533 Kjaer (n 60). Renner (n 33) – how this impacts on law ie de-normativisation.
534 A close reading of certain judgments might, however, indicate otherwise. We return to this topic in chapter IV.
535 H Collins *The European Civil Code: The Way Forward* (CUP, Cambridge, 2008) for a concise summary of negative integration, and pointillistic efforts at positive integration. Pardigmmatic also, if considered a network of networks Ladeur (n 101).
536 Kjaer (n 60).
537 *ibid* – but not reembedding in a 'lifeworld'. As Kjaer points out networks fulfil a role of ensuring compatibility between different *Sinnwelten*. The concept of 'lifeworld' suggests the unity of society, which a systems theory

risk regulatory tasks between public and private actors within what Chalmers refers to as an overall governance architecture.[538]

It is argued, however, that the shift from government to governance within EU law, and the networks thereby created, fails to take *adequate* account of other discourses beyond the economic.[539] This is not inevitably; EU law can play a role managing discourse boundaries.[540] Yet by enshring the 'market leader' economic system in its programmes, thereby minimising other functional systems, the law is cognitivised.[541] In tort law terms, risks need to be understood reflexively not simply subsumed into economic efficiency or managing systemic risks: (regulatory) 'tactic' should not dictate (normative) 'strategy'.[542] However, like political communication, which nowadays is faced with a double binary coding at an organisational level, the legal system is increasingly under the influence of economisation.[543] This is present both in domestic and EU law – the replacement of balancing of rights with economic functionalism – what might be called the 'economic semantics' of efficieny, transaction costs and market. This takes shape in law's programmes by placing economic boundaries as meta-code on legal norms. The law develops rules of self-restraint on the basis of justiciability, but it is economic argument which is decisive in setting boundaries. Highlighting this functionalisation and arguing for a greater emphasis on 'side-constraints' is the task of the present chapter.

Liability law should, notwithstanding the rupture, maintain a role of providing normative expectations, even if the law's role is not central but peripheral to highly cognitivised regulation via networks. *Quis custodiet ipsos custodes* remains a legitimate consideration for liability law even within highly cognitivised risk regulatory networks. This requires a proceduralist turn in the law, abandoning a substantive or singular vision and, instead, becoming a law of collisions.

---

approach rejects. See P Kjaer 'The Structural Tranformation of Embeddedness' in C Joerges & J Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford, Hart Publishing, 2011) 85.

538 Chalmers (n 108).

539 N Reich 'AGM-COSMET or: Who is Protected by Safety Regulation?' (2008) 33(1) *E.L. Rev.* 85 – this is not to say that EU law is bereft of the raw materials to do so, as it will be argued.

540 Kjaer (n 103).

541 *ibid*.

542 A good example here is *Paul* ie systemic risk aim excludes subjective rights under the relevant directives. For an analysis of this judgment and Three Rivers in this vein see M Andenas and D Fairgrieve 'Misfeasance in Public Office, Governmental Liability, and European Influences' in D Fairgrieve, M Andenas & J Bell (eds) *Tort Liability of Public Authorities in Comparative Perspective* (London, BIICL, 2002) 183.

543 Kjaer (n 525).

To be sure, the collision ideal does not presuppose any particular balance between discourses and is, as such, normatively thin.[544] Nevertheless, we argue that the rights-based reorientation of EU law should be emphasised to re-equip EU law with normative side-constraints that tackle out-and-out economisation. While there is no blueprint for the reconcilation of different normative spheres (*Sinnwelten*), there is a role for courts to better represent the different discourses in their normative programming. This means, in effect, giving greater weight to non-economic argument by supplying subjective rights to individuals. Yet, consistent with the concept of discourse collision, this should not be understood in terms of demarcating 'territories of the self', but in terms of the *societal* role rights play.[545] Public and private subjective rights have always been Janus-faced both architectural in the sense of chapter I and individualised in the more mainsteam definition.[546] In this chapter, we will demonstrate how EU law can be considered in terms of cognitivisation, and then what a re-normativisation might look like. This is done by examining the turn to policy in the assignment of *prima facie* subjective or individual rights. This is an invitation towards a form of meta-constitutionalism, with tort law providing remedies as secondary obligations for the breach of primary rights – *ubi ius, ibi remedium*.[547]

But rights against whom? Once laying the ground work in chapter III, we will argue that tort law requires a third normative model of liability in chapter IV – legal responsibility for a phenomenon that goes beyond individual or organizational models. The absence of a network concept or a functional equivalent means that the law oscillates between the existing individualistic and organizational models, *tertium non datur*![548] While it is agreed that in this new configuration the role of secondary actors cannot plausibly be subsumed into that of an organization exerting control nor a sovereign individual, a greater emphasis on the network remains a pressing need when developing new normative models of tort law recovery. These

---

[544] See Gerstenberg's critique of Teubner/Lescano: O Gerstenberg 'Justification (and Justifiability) of Private Law in a Polycontextural World' (2000) 9(3) *Social & Legal Studies* 419.

[545] Ladeur (n 101). For territories of the self, see G Brüggemeier (n 2) His discussion of constitutionalisation of private law, at p. 11.

[546] This tension is quite explicit in EU law – 'functional subjectivification', such that there are fewer obstacles to the task *viz* national law, which is more rooted in Enlightenment thinking ie individualism.

[547] W Van Gerven 'Of Rights, Remedies and Procedures' (2000) 37 *CMLR* 501; N Reich 'Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights' (2007) 44 *CMLR* 705.

[548] One might argue that *Sindell*-type reasoning, namely collectivising risk into a particular risk community (Teubner) might provide inspiration. However, we will argue later that such a solution is 'organizational' liability, and will not wash. It is insufficiently discriminating when placed in the context of regulation. See *Sindell v Abbott Laboratories* 26 Cal. 3d 588 (1980).

need to develop an equivalent to the concept of proximity regarding secondary actors in networks. Teritiary normative remodelling via horizontal constitutionalism[549] should be combined with horziontal liability – this is our core argument – and this is achieved by developing legal tests capable of representing the peculiar 'proximity' constellations within networks. This is particularly the case with regard to secondary tortfeasors who sit uncomfortably between the individual and organization models of liability. In our final chapter, we argue that the normative concept of 'sufficiently serious breach' in *Francovich* liability can provide a potential template for isolating those interferences with other discourses which are particularly grave from those which are not. Whereas easily invocable subjective rights open 'black boxes', 'sufficiently serious breach' may be *a* means to form the basic legal test of proximity in a network society.[550] *Ibi ius, ubi remedium* – reiterating a plea for a law of remedies in EU law.[551] It will be seen that there are certain incipient signs that the law is evolving in this direction, but absent a general law of remedies, its emergence is indirect and truncated. For now, we will dive more deeply into the currents and counter-currents in contemporary law to illustrate what is at stake.

[549] Teubner's concept is 'societal constitutionalism'. See G Teubner *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford, OUP, 2012).

[550] Opening 'black boxes'. A recurrent problem in the case law, if we look at it abstractly, is the problem of proximity, whether in the language of 'proximity' *Yuen Kun* and subsequent judgments (absence of control) or in the applied language of 'assumption of responsibility' and 'control' see ...

[551] HW Micklitz, 'The ECJ between the Individual Citizen and the Member States – A Plea for a Judge-made European Law on Remedies' in HW Micklitz & B de Witte (eds) *The European Court of Justice and the Autonomy of the Member States* (Cambridge, Intersentia, 2012) 349, Van Gerven (n 547).

B. COGNITIVISATION OR ECONOMIZATION IN EUROPEAN PRIVATE LAW?[552]

EU law, in a manner akin to developments in UK tort law post-1980s, has failed to develop tort remedies to the changing landscape of fact.[553] Indeed, on the public side there is a reduction in the role of tort law in the face of complex risk regulation, whereby the role of tort law circumscribed by the argument that it is not its proper role to second guess administrative action, whether conducted by public administration or via intermediaries which are filling gaps and fulfilling quasi-public functions (often framed in terms of a lack of privity of contract, or assumption of responsibility and reliance in tort terms).[554] The basic claim is that tort law's normativity is replaced by a functionalist approach to the law of tort at the level of law's programmes front-loading policy bars to recovery. In national law, the post-*Caparo* retrenchment is evidence of this both vis-a-vis private and public actors.[555] The retrenchment has moved the law from a market-correcting function in which tort law is viewed as a means through which in the social the law redresses *normative* imbalances between active and passive (organisational) parties towards a law of torts interwoven with policy arguments that fail to distinguish in this manner very often tying tort law to market-functioning rationales.[556] Instead, courts became less willing to impose negligence by positing *prima facie* policy bars to recovery.[557] These policy bars rest on, in particular, the distinction between first party and third party insurance. When insurance, or self-help, is easily available the courts are unwilling to extend recovery to claimants.[558] This is particularly true with respect to pure economic loss cases in which the availability of markets for insurance is supplemented by the idea that tort

552 The framing here in terms of utility and rights is taken from Collins (n 230). See for a discussion of how these trends exist not only in English law but generally throughout the Western World, see R Michaels & N Jansen 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *Am. J. of Comp. Law* 843. With particular regard to European law, see S Frerichs & T Juutilainen 'Rome Under Seven Hills? An Archeology of European Private Law' 32 Legal Studies Research Paper Series (2014 ssrn) (10 June 2015).

553 A simplification because a. Vulnerability and differentiation (*Ross v Caunters* [1980] Ch 297) b. incrementalism – it remains a living law c. Influence of ECHR jurisprudence. Nevertheless, this broad brushstroke is right.

554 P Cane 'Tort Law as Regulation' (2002) 31 *Comm. L. World Rev.* 305. Highpoint *Stovin v Wise* [1996] 3 WLR 388 (Lord Hoffmann).

555 Perhaps changing – recent case-law.

556 Collins makes similar arguments viz contract law, see Collins (n 230).

557 This applies both with respect to the liability of public authorities and private parties, with the former merely involving more developed bars to recovery.

558 Stapleton (n 111) appears a persuasive rationalisation of the case-law.

law should not subvert private ordering through the market.[559] In this way, the grounds and bounds of tort law is tied ever more closely to a market-functioning rationale, sidelining juridical reasoning.[560] In other words, whether a tortious remedy is forthcoming is a highly policy-led inquiry concerning the availability of other means of redress, (rhetorically at least or real) the spectre of indeterminate liability and, finally, wider aggregative concerns about the distribution of resources or the functioning of a market economy. [561] This retrenchment of the law coincides with the decline of the society of organisations and the rise of the society of networks, whereby the concept of vertical vicarious liability appears inapt as hierarchical control is replaced by more subtle forms of 'steering' rather than 'rowing'.[562] By placing policy before principle national law has retreated from its role of providing normative counter-expectations to regulatory processes, *mutatis mutandis* EU law which tends to radicalise this tendency due to its functionalism placing market access above other considerations when deciding whether primary or secondary law confers rights on individuals. Certain authors go as far as to state that this is a structural feature of EU law, but we demur.[563] This restraint is, in effect, a failure to review the acts and omissions of secondary actors via liability law or, in our terms, to provide normative counter-expectation via law. When we turn to examine regulatory 'black boxes' we will find that they largely remain outside the scope of application of tort law – at least until now. We will first deepen our argument by reference to case-law and theory.

---

[559] Well-illustrated in terms of theory in S Deakin & B Markesinis 'The Random Element of their Lordships' Infallible Judgment: An Economic and Comparative Analysis' (1992) 55 MLR 619. The development of negligence from *Anns* to *Murphy*; in terms of judicial exposition, the contractual matrix cases are illustrative *eg Marc Rich & Co AG v Bishop Rock Marine Co Ltd* (The "Nicholas H) (1995) 3 WLR 227.

[560] To phrase this evolution somewhat differently from a 'positive' and redistributive, interventionist state to a regulatory state focused on dealing with market failure See G Majone *Regulating Europe* (London, Routledge, 1996). This trend can be seen at the national level, but according to Majone even more so at the European level. It can be traced in the patterns of private law also see Frerichs & Juutilainen (n 552), Majone discussed at pp. 18-19. According to the authors, this 'economic functionalism' is said to challenge both juridical private law, what we refer to in chapter I above, and materialized private law, the subject-matter of chapter II, by placing market-building through law at the heart of European regulatory private law. In broad terms, we share this perspective.

[561] *ibid* 'The scope of principles and rights are narrowed or broadened, qualified and supplemented, by reference not to other legal principles but rather as justified by perceptions of the relevant policy considerations.' (9)

[562] With respect to public bodies, see *Yuen* discussed in chapter II. Regulatory discretion could not come within the concept of control developed in *Dorset*, or in other words, Lord Keith did not extend *Dorset* to fit its facts.

[563] G Davies 'Democracy and Governance in the Shadow of Purposive Competence' (2015) 21(1) *ELJ* 2. While not structural, it is certainly a tension.

1. Cognitivisation or De-Differentiation in EU Law: The Law in Suspense

Outside of human rights cases, in which the ECHR may be viewed as providing reflexive mechanisms for the reconciliation of policy-based and rights-based arguments, EU law has, thus far, performed poorly in developing normatively rich principles of liability.[564] Indeed, its design from the start has been concerned with advancing market freedoms, it critics arguing often at the expense of other social objectives[565], or in the language of systems theory at the expense of other functional discourses.[566] Like the policy arguments against recovery in English law, a priority for a certain type of market integration leads to one-sidedness in the supply of legal rights. Concepts such as legal right, liability, *etc* are refashioned in light of economic imperatives. For example, the idea that tort law recovery should be denied *tout court* because it might undermine systemic risk considerations illustrate this point.[567] In the place of legal norm, we obtain legal deference or self-restraint – law in suspense! Thus, cognitivisation denotes a de-differentiation of law and its environment such that it loses its normative content, in other words its ability to establish counter-factual normative expectations required for learning.[568] This learning is a way to integrate different subsystems of society through law and

---

564 Can be viewed, but not necessarily so: Ladeur (n 101) critiquing the way the court adjudicates from the perspective of a network or heterarchical concept of law.

565 Recently, G Davies (n 563) who argues that the very design of EU law is not germane to non-economic values because it gives priority to economic freedoms, all other social policy objectives at EU and national level viewed through this lens, citing an extensive literature of critics of EU law since the Internal Market programme. L Azoulai 'The Inoperative Community' (R Condon trans. forthcoming) bunches these scholars under the heading of the 'critical turn in European legal studies'. Of course, other scholars view the development of social dimensions in EU law more optimistically and as an incipient phenomenon see N Reich '"*System der Subjectiven öffentlieche Rechte*" in the Union: A Europe Constitution for Citizens of Bits and Pieces' (1995) vol. VI(I) *Collected Courses of the Academy of European Law* 157.

566 Functional discourses rather, *pace* A Fischer-Lescano & G Teubner 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

567 In this regard, the *Paul* decision is considered exemplary in which case the criterion of 'conferral of a right' was defeated, *inter alia*, because of the nature of the regulatory task namely prudential supervision which involved the issue of systemic contagion. Simmonds writing in an apparent hermeneutic tradition prefers Habermas to Luhmann in his diagnosis of the impact of 'monist' theories of tort law on the law but the idea is a similar one. With regard to the devaluation of causation evident in law and economics, discussed above, Simmonds remarks that such 'causal minimalism' when applied to a tort law traditionally premised on human agency is a threat that 'colonizes' the 'life-world' of tort law. Causation and its relationship to agency is '...a good illustration of the 'life-world' of background assumptions that gives content to our moral and juridical practices and that must be sustained if we are to avoid the erosion of those practices by a monastic and purely instrumental perspective.' See NE Simmonds 'Justice and Private Law in a Modern State' (2006) 25(2) *UQLJ* 229, 234.

568 M Renner (n 33).

to police their boundaries.[569] It is argued that the failure to provide a framework of normative counter-expectations means, in effect, that the law retreats from its coordinating role. While even in the classical liberal order (chapter I), traditional theory overestimated the centrality of law, it remains a second order normative model for societal integration. Long before the rise of the concept of governance, the legal system played such a strategic role, what we referred to earlier as 'flexible public intervention' in an acentric order.[570] From this perspective, Lobel's description of a contemporary 'governance' understandings of adjudication is nothing new. Lobel states:

> In the governance model, centralized law does not occupy a privileged role controlling all other subsystems. Instead, law coexists with various subsystems, ever gauging the sustainability of the different organizations. The law still dominates, however, through its capacity to coordinate among different social institutions (e.g., political, economic, legal, family, religion, education). Governance policies serve to integrate isolated efforts at the subsystem level, coordinating different scales of action. Law's coordinating function is achieved through its "competence competency," the competence to determine other actors' competencies.[571]

It is this recession of the law, 'competence competency', integrating 'different social institutions' that the concept of cognitivisation captures. By analogy with Ladeur's conceptualization of the *acte administratif* in modernity, the normative design of private (tort) law provided traditionally for a form of 'flexible public intervention' while otherwise allowing for experimentation.[572] Indeed, tort law always drew on what Ladeur refers to as social norms and cognitive assumptions of normality. In the case of negligence, this occurred both at the duty and breach stages of the inquiry. However, these assumptions were ensconced in a juridical framework such that they were placed against normative counter-expectations

[569] We do not view this as a zero-sum game between cognitivisation and normativisation. Rather we agree with Kjaer that both movements in the transnational sphere are potentially mutually constitutive. See P Kjaer 'Between Integration and Compatibility: The Reconfiguration of Cognitive and Normative Structures in Transnational Hybrid Law' in P Kjaer et al (eds) *Regulatory Hybridization in the Transnational Sphere* (Leiden, Martinus Nijhoff, 2013).

[570] Ladeur (n 24).

[571] O Lobel 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 263, 323.

[572] Ladeur (n 24), 14. We use design drawing on our analysis in chapter I of the 'institutional' role of private law, particularly the subjective right, which unleashed a 'relational' form of rationality.

required for learning and stabilization. This might be referred to as (tort) law's autonomy, which filtered policy arguments within a framework of normative arguments about duty, cause, and harmful activities. The concept of liability for creating an unreasonable risk is exemplary, because while taking account of 'reasonable risk taking' from society (*eg* economic analysis), the law ultimately requires this risk to be integrated into a concept of legal wrong or liability. In the absence of such intervention, cognitivization abstracts from a juridical framework of rights and duties denying recovery, in effect, on the basis of the operating logic of the economic system as 'market leader'.[573]

State liability in the area of financial services is exemplary. The question as to whether an individual right is conferred is collapsed into a broader question of financial risk management, effectively curtailing recovery *ex ante* on the basis of the potential effects this will have on regulatory risk management.[574] Translated into tort policy arguments, the regulator should not be held liable because this incentivizes over-precaution and undermines an adequate balancing exercise informed not only by the protection of investors, but by the trade-offs involved in proper regulation supplementing or replacing earlier arguments contra-recovery.[575] This is the basic point in judgments such as *Paul* or *Three Rivers*.[576] Because these judgments may be viewed as paradigmatic, they warrant detailed treatment.

In *Three Rivers*, the plaintiffs argued that the Bank of England had failed to adequately supervise Bank de Credit Commerciale International (*BCCI*) resulting in losses to the plaintiff. In particular, it was alleged that the Bank ignored a number of warning signs meaning that it negligently failed to respond to clear indications that *BCCI* was in a precarious financial situation. It emerged, subsequently, that *BCCI* was involved in fraud and the laundering of

---

573 Kjaer (n 60). With the rise of globalization, the 'dominant' form of cognitivisation is economic see Teubner (n 124).

574 Renner (n 33) goes further specifying how Basel I with its rules on debt-equity ratios is a process of cognitivisation because '...the concept of liability is largely replaced with the concept of risk. The scope of normative expectations, in contrast, is confined to stabilising the debt/equity ratio itself.' (102) The approach whereby banks were left to determine capital requirements on the basis of their own risk models whereby '...even the last residue of normative expectations structures on the financial markets was 'cognitivised', and liability, for the most part, left to economic calculus in the end.'

575 These arguments regarding incentives are increasingly relied on, as simultaneously, arguments concerning sovereign powers diminish. It is a new argument for a very old adage: '*Le Roi ne peut mal faire*'. In *Stovin*, for example, we find a mix of traditional juridical and policy arguments which are in agreement. One might ponder whether they are simply supporting arguments that justify old-fashioned constitutional deference to the legislature or free-standing arguments in of themselves.

576 *Peter Paul and Others v Bundesrepublik Deutschland* ([2004] ECR I-09425; *Three Rivers DC v Governor of the Bank of England* [2000] UKHL 16.

money. The basis of the claim was, first, the tort of misfeasance in public office which requires bad faith, second, negligence and thirdly a claim that the relevant directive, Directive 1977 (the First Banking Directive), implied a right to adequate supervision. The Court, in the end, held that no right had been conferred and that no remedy was availing under national law.[577]

The *Paul* case was a claim brought by Paul and others against the financial authority, the *Bundesaufsichtsamt*, because of the latter's failure to withdraw authorization from *BVH* Bank in time. *Paul* and others held deposit accounts at the bank amounting to sums in excess of the amount covered by the deposit guarantee scheme in Directive 94/17/EC. These sums were deposited in the bank between 1993 and 1995.[578] The German regulator failed to de-list the bank in time resulting in losses to the claimants. The claimants in *Paul* attempted to rely directly on Directive 94/17/EC, and on a composite of directives enacted between the late 1970s and 1990s to demonstrate that a right was conferred on them.

It seems that the basic claim underlying both cases was that the regulator was in the position of guarantor, having certain functions deriving from European law, and in this role failed to discharge its duties appropriately. In short, both the House of Lords and the ECJ dismissed their claims, apparently bringing an end to the possibility of using a tort action against financial regulatory authorities based on European law.[579] These judgments have been criticised from a doctrinal perspective, namely, their restrictive interpretation of conferral of a right, which seem to align the test for conferral of a right with a *schutznorm* theory.[580] In one sense, the elision no more than remits the issue to national law. In another, it accedes to the determination of what constitutes appropriate regulation to the economic system, what Andenas and Fairgrieve refer to as the logic of prudential supervision determines where the balance of interests lies and

---

577 Andenas & Fairgrieve (n 542). Although it did refine its doctrine of misfeasance in public office, through a kind of spill-over effect.

578 See para. 13 of the *Paul* judgment for the relevant sums and the dates on which they were deposited.

579 Although in truth, this is probably an overstatement given the contingent nature of the Court's reasoning, which emphasised the current level of harmonisation, thereby leaving the possibility of liability in the future if further integration occurs, as indeed it has.

580 As Tison states the *Paul* judgment: '... seems to depart from previous case law of the ECJ, which suggested that the first condition for *Francovich* liability should be read more flexibly: until now, the Court seemed to be satisfied with the demonstration that the EU rules are intended to protect the interests of private individuals, without it being required that the said rules confer by themselves enforceable rights.' M Tison 'Do not Attack the Watchdog! Banking Supervisor's Liability after Peter Paul' Financial Law Institute Working Paper Series 2005-02.26. N Reich 'Rights without Duties? Reflections of the State Liability Law in the Multilevel Governance System of the Community: Is There a Need for a more Coherent Approach in European Private Law' EUI Working Paper Law 2009/10, 1, 13 refers to the test as an objective *schutznorm* theory.

the boundaries of the law. In their critique of *Three Rivers* they argue that between the 1980s and the 1990s there was transformation in how the role of supervision was conceived.[581] This argument, it is submitted, also applies to *Paul*. They explain how financial regulation changed from the aim of protecting depositors to the prevention of contagion: 'Supervision should prevent contagion and systemic risk that could threaten the stability of the banking system...In this new perspective, individual bank insolvency could be acceptable.'[582] Therefore, legislation that was primarily designed to protect depositors was outpaced by changes in the function of banking supervision, which is described as a move towards 'modern methods of banking supervision'[583], and this is used in part to explain the position of the House of Lords in respect of the liability of the Bank of England. This argument applies, *a fortiori*, with respect to *Paul* in which the Court rejected the argument that the *effet utile* of the directives required the conferral of a right to the claimants.[584] In consequence, forbearance which may be viewed as negligent from the perspective of depositor protection could be viewed as prudent from the perspective of systemic contagion. This discouraged the judges from using prudential rules to construct a pro-depositor *prima facie* duty of care based on the requirements of EU law.

This approach is considered indicative of cognitivization because by accepting a certain orthodoxy without questioning its application in practice, it places an economic double binary code on legal argumentation. It failed to reveal the tension inherent in the *Paul* decision between economically rational arguments on the one hand, and on the other hand, consumer protection as an aspect of citizens' political rights.[585] The latter, consumer protection, was made entirely to serve the former, and defined in its light. The effectiveness of European law understood as achieving market integration, and not yet consumer protection, is the doctrinal

---

581 Andenas & Fairgrieve (n 542) 193.

582 186.

583 *ibid*. Heavily influenced by the Basil Committee, creating an 'internally defined normative vision' of how priorities in Banking should be ranked. Kjaer (n 569), 282. His phrase.

584 These changes in the role of the supervision were not exclusive to the approach of the UK regulator, and as Andenas and Fairgrieve (n 542) elaborate: 'The Bank of England developed this [approach, R.C.] over the years, partly in response to criticism over its handling of the different banking crises, and partly in interaction with international standard setting.' (186)

585 This accepts the idea that law can be a means to advance political objectives, or to mediate between different objectives *eg* Reich (n 565) making the analogy between Germany before unification and Europe today, but also distinguishing between different protected interests including the insights of 'reflexive law'. And, also, clearly in relation to the contract of employment and its links to political citizenship, see Deakin & Wilkinson (n 123). The authors place particular emphasis on the contract of employment as a means to ensure the coexistence of the social state and the market economy, by means of a social citizenship. See esp. p. 109.

manifestation of this perspective.[586] This resembles accepting custom understood as best practice emerging from the economic system as law without demurrer.[587] This gives far too much latitude to the regulatory authority, which may under the guise of balancing and the statutory framework, totally disregard the interests of current depositors, thereby collapsing consumer protection into the general principles relating to financial regulation. Failure to review, even at a standard akin to *faute lourde*, is tantamount to camouflaging the dependence on the economic subsystem. It speaks again the idea of constitutionalizing self-regulation.

That this approach is not isolated to financial regulation is evident if one considers *AGM-COS.MET* (Cosmet). The *Cosmet* case turned on Directive 98/37/EC which sets out health and safety requirements regarding, *inter alia*, machinery and safety components within the European Union.[588] This directive was transposed into Finnish law by Government Decision 1314/1994. The claimant in this case was an Italian importer of machinery to Finland. The case centred on the defectiveness or otherwise of a vehicle lift. In essence, the European Committee for Standardisation (CEN), a private body, defines the applicable standard for vehicle lifts in Europe. The role of CEN is to define minimum standards that apply across the European Union and relate to, *inter alia*, product safety.[589] The rationale behind uniformity in standards is to reduce technical barriers to trade which come from divergent standards across member states, and relates to the achievement of the Internal market.[590] Standardisation is supported by a

---

[586] In this vein, AG Stix-Hackl's implication in *Paul* that a deposit guarantee scheme is an alternative to liability tends to emphasise how rights are sacrificed to expediency without proceeding to a balancing of interests like a traditional legal test requires. That the claimants have means of recovering some of their losses up to a certain threshold traditionally goes to the quantification of the loss rather than the question of whether a duty of care exists.

[587] We say, here, emerging from the economic system because the assumption is usually that custom represents efficient rules. This might not be the case, of course *eg* where there is cartelization in a market, and there may be non-economic reasons why a legislator or court might want to second-guess customary standards *eg* a policy of victim compensation that might be embodied in a rule that defines safety according to the expectations of consumers rather than the industry standards.

[588] C-470/03 *A.G.M.-COS.MET Srl v Finland* [2007] ECR I-2749.

[589] These are voluntary standards, and viewed as minimum specifications which products must comply. C Joerges, H Schepel, E Vos 'The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Processes: The Case of Standardisation under the 'New Approach' EUI Working Paper LAW No. 99/9 defines the 'New Approach' as covering '...entire sectors rather than single products, and limits themselves to laying down rather general 'essential requirements' of health and safety. The task of harmonising technical specifications is now left to private European standards associations. Products manufactured according to these harmonised standards enjoy a 'presumption of conformity' with the essential requirements.' (8)

[590] As J Pelkmans put it as far back as 1987: 'The elimination of technical barriers to trade in the EC is one of the most important routes to achieve a unifed, genuinely free Internal Market in the Community.' (249) J Pelkmans 'The New Approach to Technical Harmonization and Standardization' (1987) 15(3) *Journal of Common Market Studies* 249.

strong market access case-law.[591] CEN is entrusted these tasks under the New Approach to harmonisation which can be described as a delegation of authority in rule-making from member states to the European level.[592] These standards enjoy a presumption of conformity with national health and safety requirements. The State has a market surveillance task. Once a producer certifies that she has complied with the relevant standard, according to national procedures, this is sufficient to satisfy the presumption of conformity. Presumptions of conformity, of course, do not discharge the state's post-market regulatory function.[593]

Directives such as Directive 98/37/EC establish the relevant standards as minima, and *Francovich* to the extent that it is applicable is the private enforcement side of ensuring Member States adhere to these standards. It is clear that the ability of Member States to question the relevant standard is highly circumscribed. There is a procedure whereby member state authorities may withdraw machinery from the market pursuant to Article 7(1) of the Directive in circumstances where the relevant authority determines that the machinery when used 'in accordance with their intended purpose are liable to endanger the safety of persons, and, where appropriate, domestic animals or property...'[594] In an unusual twist to the case, the Finish Ministry of Social Affairs and Health (the Ministry) did not invoke this market surveillance provision and eventually allowed the vehicle lift in question into the Finnish market. The legal controversy concerned what happened in Finland before the vehicle was approved.

The facts of the case are well-known. A Mr Lehtinen was a state official who made public statements that a vehicle lift was dangerous. These public statements went beyond the safeguard procedure provided for in article 7 of the Directive. This position was publicly expressed, first, when he was acting as in an official capacity, albeit without authorisation, and later when Mr Lehtinen was removed from the case and suspended pending investigation. In any event, the consequence of his statements was that AGM-COS.MET suffered financial losses within Finland and throughout Europe. They sued the Finnish state arguing that the Mr Lehtinen's statements could be attributed to the state.

---

591 *Procureur du Roi v Dassonville* Case 8/74 [1974] ECR 837.

592 Joerges, Schepel & Vos (n 589). Although the author takes issue with the 'delegation' categorization as potentially misleading.

593 Taken quite far in *Fra.bo*. Case C-171/11 *Fra.bo Spa v Deutsche Vereinigung des Gas- und Wasserfaches*, judgment of 31 December 2012.

594 Directive 38/97/EC. Cited at para. 8 *Cos.met*.

The *terra incognita* here was the question as to whether the acts of private parties are attributable to the state for the purposes of *Francovich* liability. Can private actions be imputed to the state? However, this is not how the question was treated. Sieburgh argues that the framing of the question as one of attribution and not imputation led the court to ignore the necessity of constructing a normative justification for making the state pay.[595] The framing was of a 'master's tort', primary liability and its scope rather than its justification. Additionally, this approach to interpretation of the facts meant that the question of freedom of expression, a defence made by the state, was not relevant for the analysis.[596] Regarding article 10 ECHR, formal criteria of competence regarding article 7(1) were favoured over a more substantive enquiry because the question was framed in terms of attribution and not imputation.[597] As Reich remarks: 'This is a somewhat reduced approach to fundamental rights in a conflict between free movement on the one hand and safety requirements on the other which should be decided on the merits, and not on matters of formal competence.'[598] It was, indeed, entirely discounted by the Court. In other words, no balancing between freedom of expression and free movement occurred.

The Court developed, in effect, a test of attribution that hinges on the perception of connection between the state and the statements of its errant official. At paragraph 56, the Court developed a test of objective attribution which depends 'on how those statements may have been perceived by the persons to whom they were addressed.'[599] The question then becomes one of whether 'the persons to whom the statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office.'[600] At paragraph 58 the Court listed a number of factors that the national court should take into account when making this assessment. If this holds, then there is an infringement of the Directive amounting to restriction on trade. Hence, the case is really one of liability for omissions. The State failed in its duty to ensure that there was no obstacle to trade. It is systemic

595 This is, of course, explainable by the no horizontal direct effect principle.
596 Based on draft by C Sieburgh (draft on file with the author). Later published with revisions as C Sieburgh 'The Attribution of Acts: Towards a Principled Assessment under EU and National Private Law' (2016) 3 *ERPL* 645.
597 This is somewhat to be expected due to the at least partially international law roots (Brasserie) of *Francovich* liability.
598 Reich (n 539) 85, 94.
599 *Cos.met*, para. 56.
600 para. 57.

liability, arguably, because it elides personal liability of the agent with that of the organization i.e. the State.

Cosmet avoids balancing of interests in favour of subsumption – attribution as distinct from imputation[601] – and in effect reduces legal protection to endorsement of the logic of a particular subsystem, that of EU law as a tool to reduce transaction costs, a widely-recognised structural weakness in the design of the New Approach confirming a pro-market bias.[602] The imperative behind the judgment was ensuring market access but by means of a type of liability that would not be accepted in a number of jurisdictions.[603] This is because it circumvents the concept of vicarious liability and recovery in economic loss without discussion. This was achieved by conferring subjective rights on individuals based on the Directive, and perhaps more tacitly, in combination with a reading of Article 28 of the Treaty. These rights were combined with a remedy against the State premised on the idea that the State has primary obligations that extend to the acts of its agents, with a test which is rigorously applied. It might be too far to suggest that this is a type of non-delegable duty imposed on the state; but if facts such as those in the instant case can be accommodated by the test of attribution, the suggestion is not too far off the mark.[604]

As distinct from the doctrinal niceties of the judgment, its narrow interpretation of article 7(1) as the only path of review, an important policy preference was articulated. Reich argues that at its core, the judgment concerned the collision of market access and consumer protection.[605] The unrelenting preference for the former, which relies largely on self-regulation, indicates that

---

601 The point here is that the test avoids the question of justifying a normative link between employee and employer. This requirement of 'control' (Salmond test) or scope of authority (company law) or 'close connection' (newer test of vicarious liability, is as Sieburgh rightly notes one of balancing rights.) Whereas, the Court in *Cosmet* ignored this normative step favouring instead a wide objective test of 'perception' going beyond a concept of, even, ostensible authority which can be avoided by public notice.

602 C Hodges *European Regulation of Consumer Product Safety* (Oxford, OUP, 2005) has pointed this out at length.

603 Whether the balance struck between market access and market surveillance was the correct one is a separate question see Reich (n 539). Later in the judgment, the Court suggested that to the extent that Finish national administrative law might not avail the claimants the national court must submit national law to an equivalence and effectiveness test, see para. 96.

604 The case was settled when it returned to the national level, leaving that question open although Reich and Sieburgh view *Cosmet* as what T Tridimas 'Vingt ans après: Winners and Losers of Francovich' (on file with author) might call an 'outcome case'. However, we respectfully disagree. We disagree because the Court clearly states that the issue is for the national court and the factors, as the AG stated, might cut both ways. In fact, the case has been settled out of court.

605 N Reich (n 539) Note Reich's criticism of the judgment, and how it perpetuates the weak consumer protection available under the New Approach.

market functioning takes precedence, and arguments based on consumer protection and freedom of expression are dismissed somewhat summarily. The failure to provide normative counter-expectations has practical consequences: 'Intervening in this complex and developing process by strict state liability rules will in the end stifle effective post-marketing surveillance and discourage critical discourse by responsible state experts.'[606] It is rather a question of favouring one objective at the expense of another on the facts before the Court.[607]

It is submitted, that this devaluation of liability law, its ensconcing in a greater framework of market integration, strips the law of its normative context. Normatively diminished, the law becomes instrumental and fails to provide for normative counter-expectations. The judgments examined in this section point towards an intensification of cognitivisation in EU law, manifested in these *Francovich* judgments. It is argued that if we contrast *Paul* and *Cosmet* we find Paul, which rejects an organizational approach on grounds more or less similar to *Yuen*. Whereas *Cosmet* follows an organizational model and identifies the errant employee with the state. There is no coherent normative approach. From our perspective, what is missing is a clear concept of network liability that can give rise to more sophisticated reasons for or against liability. In the absence of such a concept, the law turns to the economic system for guidance and, thus, the conceptual devices of the law are denuded and become simulacra, bent and contorted to achieve partial regulatory purposes. This 'monism' results in a reduced ability of tort law to monitor and respond to challenges posed by its environment; its institutional role of normatively stabilizing social processes is effaced. In other words, it submits to the logic of a particular sub-system, or *nomos*, failing to take account of the deeper conflicts at issue between different normative orders or *nomoi*. To translate this into the language of European law, the legal order has a singular *telos* and not *teloi* to reconcile. And, yet, this is but a partial picture of the incipient potential of *Francovich* state liability.[608] Before elaborating how we might re-conceptualise state liability, by its re-contextualisation, it is apt to discuss in a deeper way the tensions highlighted in this section exploring counter-currents within EU law.

606 Reich (n 539) 100.

607 AG Kolkott is less radical than the Court acknowledging a balance is to be struck. The Court, on the other hand, does not touch on the question of balancing interests preferring instead the formulation of a rigid test.

608 This is where one might be inclined to disagree with the left-criticism of EU private law, which use deterministic language to describe how the very structure of EU law, or how it is read, results in such partial trade-offs. See G Davies (n 563).

2. Constitutions and Collisions: Against 'Hegemonic Programmes'[609]

> Tort law thus developed over the course of the twentieth century from personal injury law (dominated by insurance) and liability for business activities (strict enterprise liability) into a law of judicial policies for the creation and protection of personal rights.[610]

Brüggemeier captures, accurately, the path of the law which has gradually transformed from a focus on business activities (organizational liability) towards the intrusion of rights-based reasoning into the private law. Indeed, the economisation of tort law in part I, above, can be contrasted with a counter-current towards the enhancement of the law under the shadow of basic rights protection provided via the ECHR. How far this will ultimately extend is an open question.[611] It is argued that this form of constitutionalisation, however, remains predominantly a notion of rights protection in its vertical dimension, namely the relationship between citizen and the state. From our perspective, what is important is that these rights do not simply protect individual right *viz* the state, but have profound societal dimensions.[612] It will be argued in this section that a systems theory-based re-conceptualization is required in the EU due to the changed context in which rights-based reasoning in tort law occurs shifting emphasis from the protection of individual rights from the context of a national constitutional order to the frame of 'world society'.[613]

Rights-based constitutionalization cannot be equated with classical legal thought which focuses on the demarcation of spheres of individual liberty within a comprehensive legal system, but should be conceptualized in the context of functional differentiation.[614] This functional

---

609 Kjaer (n 569) – compatibility is required.
610 Brüggemeier (n 2) 11.
611 Not to mention whether it is preferable to do so via a concept of direct horizontal effect or indirect horizontal effect see H Collins 'On the (In)compatibility of Human Rights Discourse and Private Law' LSE Law, Society and Economy Working Papers 7/2012.
612 KH Ladeur (n 101).
613 *ibid* on the role of rights protection in the ECHR regime understood as a heterarchical legal order or network; P Kjaer 'Three Dimensional Conflict of Laws in Europe' ZERP-Diskussionspapier 2/2009 (ssrn, 12 July 2016). We agree with Kjaer that the EU legal order has also vertical dimensions; albeit it has followed a proceduralist approach *ie* negative integration, rather than acting as a Supreme Court.
614 *ibid*, see Brüggemeier (n 2) introduction focusing on exactly this point. 'Developed Western societies have become too complex for their multi-layered reality to remain reducible to a comprehensive codified tort law. *A high degree of societal differentiation is incompatible with the generality and formality of private law*.' (23) See also Collins (n 611), and Collins (n 265) for similar arguments.

differentiation unfolds beyond the territorial state in the context of the EU, understood as a hybrid structure between government and governance.[615] On a vertical, government axis one finds its legal system understood in terms of direct effect and supremacy, as well as the main traditional institutions.[616] On a horizontal axis, one finds new governance including the New Approach. While the EU reduces the links between functional differentiated discourses and the nation state via a programme of negative integration, it thereby simultaneously promotes horizontal 'functionalist equivalents to corporatist structures' (the representative structures of the welfare state through which the coordination of society was obtained) in the form of network governance.[617] Therefore, the equation of constitution and the positive integration of the nation state needs re-thinking. Instead of the hierarchical concept of rights that this assumes, one needs to develop a horizontal dimension to rights – as mediating between different discourses. We have argued that this institutional dimension to rights has always been the other side of rights protection, albeit in the debate this is under-emphasised. This Janus-faced understanding of rights protection is brought into sharp relief in the EU.

EU law with its hierarchical pretensions can lay down community-wide minimum meta-norms, which can be adapted into the legal systems of the member states shaping the boundaries of the heterarchical relationship between different discourses which collide in the 'post-Hegelian state'.[618] We argue that the interaction of rights (constitutionalization) and tort law simultaneously fulfils several functions. Brüggemeier recognises this horizontal dimension to rights protection beyond the demarcation of 'territories of the self':

> Tort Law judges adjudicate the scope of the individual and business freedoms within society. They determine the private consequences of conflicting constitutional positions, such as the priority of freedom of expression and of the media over the freedom of economic activity. They also include the protection of privacy against certain forms of public presentation and journalistic investigation, as well as protection against various types of discrimination. These judicial policies imply a reassessment of the scope of protection of traditional legal rights.[619]

---

615 P Kjaer 'The Societal Function of European Integration in the Context of World Society' (2007) 13 *Soziale Systeme* 13, *Heft* 1+2, 369-380.
616 *ibid.*
617 30.
618 Kjaer (n 60), 75, at p.82 onwards especially for the transition from segmentary, territorial differentiation to functional differentiation beyond the nation-state.
619 Brüggemeier (n 2) 11.

While Brüggemeier focuses on the autonomy-enhancing approach to tort law, defining 'territories of the self' in his terms, it is obviously that he also contemplates a more encompassing societal dimension to rights.[620] This societal dimension through a systems theory lens can be understood as a question of demarcating the autonomies of different societal systems.[621] It is submitted that the contemporary constitutionalization of tort law can be read, additionally, as a normative means to counter-act what is described in the previous section as cognitivization.[622] This is required, the argument goes, if tort law is to continue to fulfil its function of providing normative counter-expectations with a view to stabilizing social processes.[623] This will not, it is assumed, lead to the degree of positive integration reached in the state. Nevertheless, it can be considered its functional equivalent, providing a form of integration between different social subsystems managing their 'differences'[624] and boundary collision via law.[625] Tort law always intervenes *ex post*, but with a view to re-ordering priorities into the future. In this case, the idea would be to compel networks to better 'internalise' different discourses where it can be demonstrated that particular interests are excluded entirely rather than weighed. Permitting this exclusion by more modest rules of self-restraint is equated with cognitivisation of the law.

---

620 That is, a societal dimension beyond demarcating individual rights according to a revised concept of human dignity. Brüggemeier points to the post-war German experience regarding the indirect horizontal effect of private law, the ECHR and the CJEU.

621 In these terms, the question of individual autonomy as well as enhancing the rights of concrete individuals bears a societal dimension. It is not unlike the idea of claimant as 'mandataire', but it takes this one step further. For *mandataire* see Micklitz (n 95). Not only is the individual claimant *mandataire* for particular 'public interests' or group rights, but rather for the purposes of regime collisions. Brüggemeier's example show how already the individual serves as both subject and object of law, but focuses on how rights can solve conflicts of interest between *groups*. Our analysis takes this point one step further, arguably, regarding how to conceptualise this move focusing instead on *discourses*. For a far more comprehensive presentation see Ladeur (n 101) discussing specifically the clash between privacy and media freedom from this societal and, indeed, multilevel perspective.

622 Hence, this leads us to view cognitivisation and normativisation as 'mutually constitutive' see Kjaer (n 569) rather than a view that greater cognitivisation elipses normativity in tort law.

623 And not simply in areas related to classical human rights protection, *ie* the first generation human rights issues that are at the interface of ECHR law and tort law e.g. *Osman* and subsequent judgments. The focus requires also an emphasis on socio-economic rights (second generation) and environmental rights (third generation rights).

624 Kennedy (n 91). Kennedy's use of the concept of managing differences is somewhat unclear. We take Kennedy to mean that in the absence of a coherent legal system, and in the absence of basic agreement regarding community values, the role for (private law) is to demarcate spheres of autonomy. But *pace* Teubner it can be understood differently.

625 Of course, this is not a panacea. Law is no *deus ex machina* that can solve all social problems. But it can, nevertheless, attempt to bring different subsystems closer together helping them to integrate into their different constitutions concern for other subsystems.

Kjaer identifies the cognitivization problem with Luhmann's concept of world society where under conditions of globalization, greater cognitivization is inevitable because functional differentiation leads to the fragmentation of society into several communicative discourses beyond the frame of the territorial state.[626] The interface of these discourses is found in incipient structures, such as, governance networks which form sectoral regimes, which aim to 'embed' or, more accurately, make compatible different discourses.[627] According to Ladeur, the emergence of these *eigenstructures* is a result of the decentralized logic of modernity, described in chapter I based on 'relational rationality'. The relational (horizontal), experimentalist liberal law unleashed decentralized cooperation giving rise to structures in the knowledge base of society, namely, the three societal paradigms that forms the theoretical framework of this thesis. The 'society of networks' is its latest iteration in which functional differentiation replaces territorial differentiation.[628] This gives rise to sectoral regimes contain their own '*eigenstructures*', namely, functional systems, organizations, networks and so on which follow the *eigenlogic* of the sector in question.[629] These structures are representative of the transition from government (*qua* bureaucracy) to governance with more diffuse and encompassing means of regulation beyond the clear public-private divide.[630] We have already seen how the notion of prudential supervision was used to deny recovery in tort in the previous section, exemplified in the *Three Rivers* and *Paul* decisions.[631] We stated that this constitutes a de-normativization of tort law replacing normative expectations with cognitive expectations coming from

626 Luhmann (n 131). Kjaer (n 103).

627 Kjaer (n 537) on 'Embeddedness': embeddedness perhaps assumes a single lifeworld, which is rejected by systems theoreticians. IJ Sand 'Changing Forms of Governance and the Role of Law – Society and its Laws' Arena Working Paper 00/14. Sand refers to these discourses as '…various knowledge-based discourses or disciplines.' These, in turn, change and destabilize the shared meanings on which the law is constructed in modernity (if we assume, with authors such as Beck we are in a period of 'radicalized modernization') by fragmenting the knowledge base of the law. This poses problems for all areas of law, including tort law.

628 Kjaer has written at length regarding how this is a move to functional differentiation as the main structuring device in modernity. This coexists with segmented and stratificatory structures but they are secondary structures. P Kjaer 'The Structural Tranformation of Embeddedness' in Joerges & Falke (n 537), 85.

629 Kjaer (n 569). He continues, clans, states and so on.

630 Footnote required. We might recall that in the welfare state these lines were blurred, although they remained territorially delimited. These newer structures have broken free of territorial limits.

631 This is considered an example of what Kjaer (n 569) implies when he states: 'If a matter related to economic reproduction is approached from an environmental law, health law, or human rights law perspective rather than from the perspective of economic law, it is likely to make a world of difference. In the absence of legal safeguards capable of ensuring a stabilization of mutual orientation and symmetric interaction between different functionally delineated dimensions, the result is likely to be cognitive closure where the governance processes become inherently one-sided and dysfunctional.' (512) (citation omitted).

rationales for non-intervention developed within the financial sector.[632] In this section, we argue that a new 'procedural' type of constitutionalization is required to facilitate the management of regime collisions as distinct from a type of constitutionalization that contrasts private law with social or individual rights.[633] In other words, constitutionalization needs to be re-thought with regard to the challenge of cognitivization by performing the role of 're-entry' for different discourses into private law, because as Sand argues:[634]

> '… different social systems represent the world in different and to some extent conflictual and irreconcilable ways', the question becomes '… how to deal with the different and colliding representations of reality within the framework of law.'[635]

However, before examining what constitutionalization implies, it is important to clarify what this does not imply, that is, *total constitutionalization*.[636] This unfortunate phrase misleads because it suggests a 'top-down' or vertical process of linking the political to the private law system. Whereas, this approach tends to legitimize law and 'tame' the political within a rule of law framework, it appears to follow the great debate of the twentieth-century confronting politicalization on one end of a spectrum with economization on the other, *tertium non datur*.[637] The point appears to be that imbalances caused by the dense 'structural coupling' between the economic system and the political can be resolved in law in terms of constitutional rights. Translated into law, it is an attempt to convert private law into 'applied constitutional law'. If this is an accurate portrayal of Kumm's position, then, we suggest such an approach that aims

---

632 It is very close to Renner (n 33), his analysis of the impact of financial regulatory standards on the standard of care in negligence and strict liability effectively precluding recovery. The 'financial sector' is, of course, a network within the economic system more broadly.

633 The two main trends in constitutionalization of private law to date involve ones aimed at advancing basic human rights, including right to life (*Osman*), dignitarian rights, and freedom of expression, or aim at achieving substantive autonomy e.g. South Africa non-enforcement of property rights against slum-dwellers.

634 Ladeur (n 24).

635 Sand (n 627).

636 M Kumm 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341.

637 Teubner (n 124). With regard to politicalization v economization: 'This disagreement was only about whether private law should reflect economic efficiency or governmental policies, principles of economic autonomy or of political intervention. *Tertium non datur*.' (398) Incidentally, the success (its expansion), as it were, of vicarious liability in the twentieth-century can be understood on the basis that it can be rationalized in both economic and social justice terms.

at ‘re-writing the entire background rules of private law’ in light of constitutional norms is misplaced.[638]

Total constitutionalization is problematical because its emphasis on unity through the medium of constitutional rights is not apt in a legal order such as the EU in which there is no single state in which positive integration can unfold. The EU legal order should, instead, be conceptualised in heterarchical terms.[639] The aim should be discourse compatibility not unity.[640] Second, such a unity-hierarchy approach tends to narrow the function of private law and depreciate its role in forming the architecture for other discourses beyond the political constitution. We might recall from chapter I that the idea of private law as the constitutional structure of society precedes that of public law; in other words, private law (the subjective right, in particular) has its own wider constitutional function.[641] It is reductive to convert all disputes into a contest between political and economic discourses and, at worse, obfuscates the other discourses at issue in legal disputes.[642] While it is true that ‘the political’ and ‘the economic’ are important discourses that require reconciliation, it is equally pertinent to note that they are non-exhaustive of the conflicts that underlie legal disputes today. As a theoretical conceptualization, it is reductive in focus absorbing private law into constitutional law leaving little room for its promotion of systemic ‘private autonomies’.[643] In this vein, both Kjaer and Teubner suggest that there are other *discourses* apart from the political or economic systems, and private law’s autonomy enhancing aim can be turned to advance these separate but interdependent discourses.[644]

---

638 O Gerstenberg ‘Private Law and the New European Constitutional Settlement’ (2004) 10(6) *ELJ* 766, 767.
639 The segmentary territorial nation-state is no longer the frame of reference. Ladeur (n 101).
640 Kjaer (n 569).
641 That which developed in the classical period, perhaps idealized in FA Hayek *The Confusion of Language in Political Thought* (London, Institute of Economic Affairs, 1968) especially contrasting *nomos* and *thesis*.
642 The ‘top-down’ focus also tends to under-estimate private law’s role in creating the *iuris vinculum* of civil society see Teubner (n 124) (after privatization) argues that this is a mistaken approach for this very reason.
643 This is not dissimilar to O Gersteberg ‘Private Law and the European Constitutional Settlement’ (2004) 10(6) *ELJ* 766, 767: ‘The task of adjudication is to spell out those values (constitutional values, R-C) and thereby to encourage autonomous self-regulation. Thus, the role of courts in developing constitutional norms within private law is not one of absorbing into themselves the entire task of re-writing the entire background rules of private law. Rather, the role of courts can be seen as one of providing (as I will say) ‘deontological side-constraints’ for the autonomous self-regulation of comprehensive social spheres that carry their own internal logic and integrity.’
644 Teubner (n 124). ‘Private law’s respect of the autonomy of the market sector needs to be expanded to other autonomous spaces.’ (401); Kjaer (n 33). Describing nomoi in terms of *Sinnwelten* as distinct from Schmitt’s territorial concept of *nomos* citing RM Cover ‘Nomos and Narrative’ (1983) 97 *Harv. L. Rev.* 4. Ladeur (n 24) goes a long way to describe a ‘bottom-up’ approach to law as a (normative) secondary re-modelling of underlying structures. His analysis is broadly concordant with that of Teubner’s. On other discourses e.g. G Teubner ‘Art and Money: Constitutional Rights in the Private Sphere? (1998) 18 *OJLS* 61.

Therefore, it is our contention that private law, tort law in our case, should not align entirely with the logic of any particular functional discourse. Its role is to manage collisions through engaging a tertiary normative re-modelling of collisions that occur in networks, such as governance structures. These governance structures can be described as primary stabilizing mechanisms for colliding discourses, referred to in the literature as *eigenstructures*, whereas the law can be viewed as an external stabilizing mechanism aimed at interventions when the primary stabilizing mechanism fails to balance the colliding discourses preferring, instead, one discourse to another in what Habermas might describe as colonisation.[645]

3. From Individual Autonomy to Systems' Autonomy, and Beyond Collision towards Legal Argument

The enhancement of individual autonomy via constitutional rights (conferral of subjective rights), as we will see, can perform non-individualistic or institutional functions capably. In this perspective, the law's role becomes one of managing differences rather than imposing a totalizing view.[646] Through greater recourse to constitutional reasoning in legal disputes that flow from regulatory structures, *eigenstructures* such as that of the New Approach, the law might better reconcile the underlying discourse conflicts because constitutional reasoning allows for complicated normative balancing that provide backstops against the out-and-out 'imperialism' present in judgments such as *Paul*. Thus, this is more than simply a quibble with Kumm because it reflects an entirely different understanding of the role accorded to

[645] Again, note systems theory does not assume a single lifeworld. But the idea of colonisation or domination remains relevant. This argument is by analogy with Ladeur's (n 24) view of the role of courts viz the administration in modernity. Commenting on the interplay between administrative law and judicial oversight: 'There is a permanent interplay between these two types of internal and external stabilisation of the administrative legal process. However, it would be superficial to regard the judicial practice as the creator of the institutions of administrative law. Its stabilisation is the outcome of a co-operative process which is only moulded in statute law much later. This process can be regarded as a distributed evolutionary process which draws upon the different functions of administration and judiciary.' (18) (citations omitted).

[646] This dovetails with Kennedy (n 91), his view on the role of law in its neoformal phase: The contemporary ideal is a legal regime that is pluralist, not in the sense of CLT [Classical legal thought], which coordinates atomized individuals through universally valid abstract rules, nor in that of the Social, preoccupied with finding and supporting the "valid" "living" law of subcommunities as a path toward an idea of distributive justice. But in the sense of appropriately recognizing and managing "difference". (65)

constitutional rights in circumstances of functional differentiation not depending exclusively on individual (political) rights-protection.[647]

This approach facilitates rather than imposes resolutions, and enhances the status of discourses weakly represented in *eigenstructures* dominated by particular discourses (*nomoi*). The existence of these *nomoi* was obscured by their positive integration within the state[648] and, it is submitted, the *Total Constitutionalization* perspective tends to repeat this reduction. Instead, the different *nomoi* should be newly problematized with the breaking of that frame.[649] In European law terms, one might speak of *teloi* not *telos* leading to normative constitutional rights-balancing as distinct from merely policy balancing.[650] The aims, as distinct from the aim of a given directive or of primary community law becomes a theatre of conflict in which normative balancing might occur.[651] This balancing is, as Ladeur might argue, a *tertiary normative re-modelling* informed by processes outside the law. The courts intervene only in the most severe instances of failure attempting to address (discourse) structural problems and losses to individuals.[652]

---

647 H Schepel's insight that total constitutionalization can cut both ways, both public and private seems to support Teubner's 'mirror image' (R-C) argument regarding politicisation and economization. H Schepel 'Constitutionalising the Market, Marketising the Constitution, and to tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU law, (2012) 18(2) *ELJ* 177.

648 Kjaer (n 60) contrasting the positive integration of the state with the negative integration of global society. For an extensive conceptualization of the different phases of differentiation, as it were, see also Kjaer (n 60) 75.

649 Teubner (n 99). Describing how what we call nomoi imply '…a multiplicity of social perspectives, which then needs to be translated into the law.' (396) Teubner coins the rather ambiguous word 'polycontexturality' to describe the contemporary scene. Teubner argues that these nomoi were 'neglected' or 'instrumentalized' during the heyday of the state and risk being instrumentalized, once again, this time by the economic system because it is the leading system in the era of privatization.

650 In the *Francovich* case-law, which we will discuss below, Joined Cases C-178, 179 and 188-190/94 *Dillenkofer and Others* [1996] ECR I-4845. In general, European law, judgments such as Case C-112/00 *Schmidberger* [2003] ECR I-5659 Case C-341/05 *Laval and partners v. Svenska Byggnadsarbetareförbundet and others* [2007] ECR I- 11767, Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and another [2007] ECR I-10779. For such a conceptualization of the latter case-law see L Azoulai 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization' (2008) 45(5) *CMLR* 1335. Also, D Kennedy 'A Transnational Proportionality in Private Law' in R Brownsword, H Micklitz, L Niglia & Steve Weatherill (eds) *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011) 185. For a treatment of some steps in this direction, see K Carr 'Regulating the Periphery – Shaking the Core European Identity Building through the Lens of Contract Law' EUI Working Paper Series LAW 2015/40.

651 *Dillenkofer*; Case C-140/97 *Rechberger and Others v Austria* [1999] ECR I-3499. Both illustrate how this might be done. In addition, linking the 'aims' of the Directive or primary law to individual citizens' rights gives normative complexity. We think this is what Gerstenberg has in mind. O Gerstenberg 'Justification (and Justifiability) of Private Law in a Polycontextural World' (2000) 9(3) *Social & Legal Studies* 419.

652 This is what I draw from Carr (n 93) regarding, especially, *Aziz.*

The counterpoint, *pace* Kjaer, to the view that globalization entails de-normativization is to view cognitive and the normative expectations as mutually constitutive.[653] In other words, greater cognitivization in law exemplified by unfiltered reliance on definitions of 'normality' coming from functional systems or the closely-related, discourse 'imperialism', generates a need for normative stabilization through law. These processes, it is claimed, co-evolve. 'Neoformalist' rights-reasoning can be viewed as a means to stabilize the cognitivization processes by providing for its analysis and critique.[654] Tort law, narrowly defined as the law of economic externalities according to a Learned Hand test alone, is insufficient to the task.[655] Thus, the 're-entry' of less instrumental forms of argument into tort law is required.[656] Constitutionalization of tort law can provide this requirement by problematizing policy and legal principle searching for appropriate *de minimus* constrains on economic-based argument. Constitutionalization does not therefore, by necessity, imply the framing of the economic in a political, individual right-based discourse only. It can become the basis for a discursive process weighing and balancing rationalities, in particular, the economic, the political and the supposed *tertium non datur* missed in the second phase of legal reasoning – these include consumer, environmental, and concerns with other autonomies such as art, media and so on. Thus, to expand our argument by taking Ladeur and Teubner's assumptions about the post-modern society seriously, the role encompasses more than simply balancing rights understood as individual entitlements against collective or aggregative goods,[657] instead it involves shaping constitutional rights to discharge a particular *institutional* role.[658]

To recall, constitutions have always done more than simply protect individual rights.[659] As Hayek explained, private law understood in constitutional terms is required for the 'Open

---

653 Kjaer (n 569). 'Increased cognitivization amplifies the need for normative stabilization. Increases in the speed of social change, observational capacities, and adaptability reinforce a need for secondary stabilization of such processes through the immanent emergence of normatively defined stabilization mechanisms. In other words, cognitive and normative expectations evolve through a co-evolutionary process.' (290)

654 Ladeur (n 24), 37 'structural holes.'

655 Indeed, it can be described as a rule of thumb rather than a fully-fledged test of legal responsibility. Brüggemeier (n 2). Or when taken further as a descriptive claim, as a type of economization/cognitivisation of tort law.

656 In fact, as a purely descriptive claim this is already happening. Hence, one might argue that re-normativization is not so much required as a phenomenon that can be observed. This parallels, it would appear with H Collins's analysis of hybrid legal reasoning in contract law. See Collins (n 230).

657 A persuasive way to understand the duty of care at common law, see A Robertson 'Rights, Pluralism and the Duty of Care' in D Nolan & A Robertson (eds) *Rights and Private Law* (Oxford, Hart Publishing, 2012) 435.

658 *Particular* institutional role because constitutional law can be said to have always performed an institutional role, namely, legitimizing positive law and taming the political.

659 That is, individual rights *qua* individual rights in an ethical sense per Kant and neo-Kantian theorists.

Society'[660]; in other words, the *nomos* of private law supports the *cosmos* of the (market) spontaneous order, which in its turn constitutes the Open Society.[661] Thus, the private law fulfils a role as a central institution of an Open Society. In chapter II we argued that it developed into a law of a society of organizations, and now we claim that it needs to be fitted to a network society, a society in which group 'interests' is replaced by functional discourses as the mediatory task.[662] Managing differences via norms, to be sure, but differences of discourse not interests.

Teubner views law's function through this lens arguing for a 'fragile symmetry' between different discourses.[663] Because these systems rationalities are assumed to be autonomous, i.e. self-referential, they are apt to redefine problems according to their own lights and thus have inherent 'imperialistic tendencies'.[664] The economization of tort law above can be interpreted in this light whereby tort law is conceived as a function of private ordering (chapter I) or risk management (part I above).[665] In this respect, Teubner makes an important distinction between classical legal formalism and neoformalism when he argues that the traditional individualization of tort law is not identical with the contemporary role of fundamental rights and its *institutional* dimension. Whereas the former was heavily connected to *le droit subjectif*, aimed at protecting individuals against violations of rights by other individuals, at its most developed in the Kantian tradition, the fundamental rights discourse:

---

660 Understood in constitutional terms relates to our earlier point concerning Kumm that views private law, rather than public law, as the institutional framework of freedom. This is most developed in the idea of 'private law society' per F Böhm 'Rule of Law in a Market Economy' in A Peacock & H Willgerodt (eds) *Germany's Social Market Economy: Origin and Evolution* (London, Palgrave McMillan, 1989) 46. See, also, Hayek (n 642) p. 16: 'Public law is the law of organisation, of the superstructure of government originally erected only to ensure the enforcement of private law.'

661 Hayek (n 642). He introduces a number of neologisms to explain the differences between planned and spontaneous order. With regard to *nomos*, as rules of just conduct: 'Such rules are generally described as 'abstract' and are independent of individual ends. They lead to the formation of an equally abstract and end-independent spontaneous order or cosmos.' We see, then, clearly the way in which for a *cosmos* to exist it requires the institutional support of private law. The cosmos of the spontaneous order is, then, a necessary condition of the open society.

662 Of course, it is mainly through group or strategic litigation that these issues come before the courts. But the significance of this is a question for another day.

663 On codes and programmes see Ladeur (n 38).

664 Teubner (n 549) 207.

665 Teubner's essential claim is that the role of constitutional law in placing constraints on the political system in modernity can and should be expanded to the collision of different discourses. 'The fragmentation of society multiplies the boundary areas between autonomised comunicative media and the individual and institutional areas of autonomy.' (208)

> ...differ from 'subjective rights' in private law as they not about mutual endangerment of individuals by individuals, i.e. intersubjective relations, but rather about the dangers to the integrity of institutions, persons and individuals that are created by anonymous communicative matrices (institutions, discourses, systems).[666]

Therefore, one might view this position as a radicalization of chapter II. Whereas the society of organizations looked beyond individuals to their situation within an organizational context, tailoring an individualistic law to groups e.g. manufacturers and consumers, the role for fundamental rights envisaged is to develop the law to deal with discourse collisions – a type of conflict of laws for a world society.[667] The problem with advocating such an approach concerns its operationalization. How might one convert Teubnerian 'polycontexturality' into workable legal principles? Teubner recognizes these difficulties in terms of justiciability, which are in his terms 'enormous'.[668] In the final analysis, Teubner for various reasons, particularly the personalism of the law and the fact that there is no meta-discourse available in which balancing of discourses can occur, is circumspect about the efficacy of such an approach.[669] Human rights can, at most, remove unjust situations rather than create new just ones.[670] Its role is to constrain rather than deliver on a positive concept of justice. But Teubner offers no indication of what this means for legal reasoning.

Nevertheless, the removal of unjust situations is no small achievement. Gerstenberg attempts to specify what this might mean in terms of legal reasoning and, in particular, develops the concept of constraint to which Teubner alludes.[671] Gerstenberg argues that the constitutionalization of private law, which allows for the 're-entry' of democracy and citizenship into private law, provides such a critical and reflective form of legal reasoning. This is because Gerstenberg, rightly it is argued, points to an insufficiency in Teubner's

---

666 210.

667 Luhmann (n 96).

668 G Teubner 'Transnational Fundamental Rights: Horizontal Effects' in Teubner (n 549) 124, 146. On pages 146-49 Teubner lists the difficulty with turning human rights into a law of collisions. This is our understanding of what he means.

669 F Wieacker 'Foundations of European Legal Culture' (1989) 38 *The American Journal of Comparative Law* 1: personalism cuts deep into Western law.

670 Teubner (n 549) 149.

671 'The justice of human rights can, then, at best be formulated negatively. It is aimed at removing unjust situations, not creating just ones. It is only the counterprinciple to communicative violations of body and soul, a protest against inhumanities of communication, without it ever being possible to say positively what the conditions of 'humanly just' communication might be.' (149)

theorization. To be sure, he agrees, functional differentiation leads to multiple communicative discourses that conflict. However, simply stating that they require reconciliation does not indicate how this might occur in legal practice. For example, his approach furnishes no clear answer to the question as to who should bear the risk in tort disputes i.e. who has tort rights and who owes tort duties. In Gerstenberg's own words:

> We want, after all, not just a more or less contingent trade-off between discourses, nor simply a procedural regime of collision rules, but a principled solution to the problem of boundary drawing between discourses. There is, on the one hand, no pre-established harmony of spheres, accessible through judicial or lay intuition: the very fact that boundaries are controversial – that we debate publicly what justice requires and which risks are acceptable – shows that there is no blueprint 'out there' for a 'right' ordering of spheres.[672]

The constitutionalization of private law, therefore, provides a normative argumentative practice concerning the boundaries of discourses allowing for other, non-economic values, to enter the law's programmes.[673] This should not be confused with the idea of a 'super-discourse' regulating all other discourses, which the imagery of '*total constitutionalization*' might invoke.[674] Instead it should be conceived as a 'deontological side-constraint' plotting the boundaries of economic- or social policy-based arguments against 'individual' rights.[675] Therefore, in more practical terms rights should be relatively easily 'conferred' in a first stage to problematize practices; second, in the context of the state, at least, policy bars should be replaced by an intense scrutiny of policy argument *and* operational decision-making. The standard of care can be interpreted in the light of renewed emphasis on the importance of rights-

---

672 Gerstenberg (n 544) 424.

673 Indeed, not simply allow for these arguments to enter the law but provide 'anti-economic' (Teubner) partisanship. Gerstenberg (n 544) 'Private Law should show partisanship with those 'discourses' that are endangered when unchecked economic or technical discourses overstep their proper boundaries.' (419) He continues, to do so '...private law theory will have to admit the 're-entry' of a normative idea of democracy and citizenship.' (420)

674 That would plausibly amount to a juristocracy. In another guise, if these rights are specified by ordinary legislation the 'politicalization' of law. On a practical level this is a major cleavage between Gerstenberg and Ladeur, who hold similar but distinct views regarding human rights re-entry, and Habermas who Ladeur excoriates for his reference to meta-discourses.

675 Gerstenberg (n 544) 767: Thus, the role of courts in developing constitutional norms within private law is not one of absorbing into themselves the entire task of re-writing the entire background rules of private law. Rather, the role of courts can be seen as one of providing (as I will say) 'deontological side-constraints' for the autonomous self-regulation of comprehensive social spheres that carry their own internal logic and integrity.'

protection. This appears to accord with Ladeur's idea of constitutionalization as a means to allow 're-entry' into a heterarchical law of collisions.[676] In Ladeur's conception, the law builds on conceptions of 'public interest' or 'risk' developed in networks beyond the state (*eigenstructures*) in a process-oriented case-law and intervenes using rights to unblock harmful third party effects which includes within their purview the problem of discourse 'imperialism'.[677] These individualized rights are not, it should be remembered, simply *individual* rights but have ulterior normative purposes *pace* Teubner. In classical terms, this form of constitutionalization of tort law does not impose 'the Good', but uses social practice or normality (networks) to construct the Good in an iterative process between cognitive expectation and their 'normative secondary-remodelling'.[678] While there is no predetermined balance between the weight given to different discourses, right-based reasoning provides a structured, normative argument to allow a renewed role for law as a 'strategic public intervention' in a decentralised world society. Cognitivisation is not an inevitable by-product of the world society: this is the message. Certain judgments show the way: this is the argument.

[676] Ladeur (n 101) Focusing on the media system, as it were, but making a more general point: 'This means that the constraints set by competing rights have to be formulated by courts, instead from a heterarchical point of observation which would be focused on "re-entering" a constraint into the network for a re-modelling which bears in mind the procedural rationality which epitomises the rules and requirements of processing information under conditions of uncertainty and not to be blinded by traditional substantive rule orientation. This means that courts, instead, fulfil the role of oversight which should try to irritate the self-organisational potential of the media network in order to broaden the productive range of possibilities of reaction of the media system and not focus on a case-to-case-based substantial rationality of stable rules.' (48-49) (citations omitted)

[677] Ladeur (n 101) refers at a number of points to the problem of norm collisions and writes within the systems theory approach.

[678] Ladeur (n 101), 49-50 draws attention to the links between this process-oriented vision of constitutionalization and the traditional methodology of law in building negligence on custom and changing social norms, or, as he puts it 'the distributed knowledge base of society'.

4. Rights Balancing before the Court

The recent *Boston Scientific* judgment can assist us in our re-conceptualisation.[679] From one perspective, *Boston Scientific* can be analysed from the perspective of giving rights to vulnerable parties in line with what Kennedy terms the social.[680] However, from a systems theory perspective it is argued that what is colliding is political ('legitimate expectation of consumers'), health (the distinction between health risks and legal causation)[681] and economic discourses (market access).[682] The 'deontological side constraints' applied to the latter is filtered through the prism of constitutional rights concretised in terms of legitimate consumer expectations, which does the normative heavy lifting. The traditional legal approach requires proof of causation meaning a link between the act or activities of B and specific harm as distinct from general harm occasioned to A. This is a necessary but not sufficient way to create a 'duty of care'. Second, normally insofar as the social dictates that externalities should be internalized, this extends only to physical injuries or damage to property in product liability. Economic losses absent physical or property injury is left to contract law. The rights-based approach pursued in *Boston Scientific* upends these givens.

In *Boston Scientific*, the relevant legal question was the scope of the duties imposed on producers by the Product Liability Directive.[683] The first respondent imported and sold pacemakers and defibrillators. It transpired that these products were defective. In the case of the pacemakers, a sealant leak meant that this over time the battery might be depleted rendering the device inoperative. The relevant manufacturer, Boston Scientific, following the relevant procedures under the Safety Directive recalled the product and reimbursed the claimant the cost of a new pacemaker.[684] The claimant, then, sued for the cost of the medical procedure to fit a new pacemaker under the Product Liability Directive.[685] The defibrillators were similarly

[679] *Boston Scientific* (unreported, 5 March 2015).
[680] Kennedy (n 91), or what we refer to as the society of organizations.
[681] A vexing question in national law see the asbestos case law in Markesinis, Deakin & Johnston (n 330).
[682] We might call these horizontal or heterarchical collisions. It is also an instance of the CJEU dissolving boundaries between contract and tort, which interferes with national law and its coherence. In this respect, it shares some affinities with Joined Cases C-65/09 and C-78/09 *Gebr Weber GmbH v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH*, Judgment of the Court of Justice (First Chamber) of 16 June 2011.
[683] Directive 374/85/EC.
[684] Directive 94/42/EC.
[685] To be more accurate, the insurance company sued by subrogation.

defective, and the claim was largely consistent with the pacemaker claim, namely, the claimants sought relief for the costs of the replacement medical procedure. The reference was pursuant to three questions of the German Federal court, the most pertinent of which involved the interpretation of articles 6(1) and 9(1) of the Product Liability Directive, 85/374. According to the Directive, a producer is liable for a defect product if the claimant can prove damage, defect, and a causal link between damage and the defect. In the circumstances, all that the claimants could demonstrate was a general increased risk of harm as distinct from the specific causation of harm. Indeed, it such circumstances it is unclear whether harm was occasioned at all!

What is interesting is how AG Bot and the Court divided the aims of the Directive by giving these aims a normative *and* constitutional significance. The Court separated the completion of the Internal Market from consumer protection. Both aims were placed within a constitutional framework. This is particularly patent in the Opinion of AG Bot, but also appears in the reasoning of the Court. For example, at paragraph 35 A-G Bot states that although an objective of the Directive is undistorted competition, another main objective of the Directive is consumer protection. Although this paragraph might be considered merely a supporting argument, it reveals the deeper balancing at issue.[686] It is not simply a question of balancing costs and benefits (harmonized standards justified in relation to transaction costs), rather the deeper commitment is to balance the values or principles that undergird the EU legal order.[687] These, in turn, reflect 'legitimate consumer expectations' colliding with market access, which in our language is the collision of the discourses of politics (*qua* citizenship), health and the economy. The task of the Court, then, is to develop side-constraints on an internal market as an economic constitutional only.[688]

[686] This might be an attempt at providing a 'corrective' to the perceived pro-market bias in previous product liability judgments see Reich (n 539), Hodges (n 602) on the imbalance in the New Approach. In Reich's analysis, however, one should be careful to note that *AGM-COS.MET* was a case of state liability.

[687] This relates to Kennedy (n 651), his analysis of 'neoformalism' and EU law.

[688] In other words, if we interpret the underlying regulatory framework as a question of market access mainly or only, the rights given to EU citizens are diminished, and the balance between law's internal reconstruction of the political discourse, traditionally the role of consumer law (and, indeed, labour law) is dominated by market-based economic reasoning. Hence, the scope of protection offered by European consumer law bears on these broader issues. Herein, we think 'the social' in its legal manifestation represents a question of defining a type of social citizenship. See, for the seminal text on this question. Marshall (n 123); for a reconstruction of labour law in these terms see Deakin & Wilkinson (n 123).

This is, then, a justification for placing the burden of the costs of replacement on the producers. At paragraph 38, A-G Bot states that to make safety subject to the occurrence of specific damage undermines the consumer protection regime because it saps the preventative function of the Directive and the risk creation-injury cost bearing rationale of the Directive.[689] Furthermore, A-G Bot links his reasoning to article 35 of the Charter and article 168(1) TFEU which aims to guarantee a high level of human health protection in the definition and implementation of all Union activities and policies, and states that this should be a guide to interpretation regarding the Directive, especially with regard to the concept of defect. This argument was not repeated at court; yet, although it was not repeated, the judgment tracks his argument at paragraph 35.

The CJEU's judgment was not as emphatically pro-consumer. Nevertheless, a number of common strands between the A-G's opinion and the Court exist. The method of interpretation is largely purposive, examining the articles of the Directive considering its recitals.[690] Unlike the A-G's opinion, the vulnerability of the parties is stressed more overtly. Given their vulnerability, '…the safety requirements for those devices which such patients are entitled to expect are particularly high.'[691] At paragraph 40, the Court more clearly follows A-G Bot by stressing the abnormal nature of the risk as pertinacious to the definition of what safety requires on the facts before the Court. In other words, the greater the vulnerability of the claimants, the higher and more abnormal (serious) the risk, the more exacting the standard of care, or to put it otherwise, the more broadly the provisions of the Directive will be interpreted. This abnormal potential for damage justified the relaxation of the causal requirement. In circumstances where products of the same group/series are defective '…it is possible to classify as defective all the products in that group or series, without there being any need to show that the product in question is defective.'[692] The Court, then, at paragraph 42 invoked squarely the balancing this required. Thus, by examining the second and seventh recitals of the Directive the Court stated that the objective pursued was '…a fair apportionment of the risks inherent in modern technological production between the injured person and the producer.' Given this objective, there is no requirement to show that a particular pacemaker was defective for the purposes of

[689] At this point, A-G Bot rehearses the social's reason for enterprise liability, namely, where X creates a risk she is in a better position to minimize the risk and prevent damage at the lowest cost.
[690] The first, second, sixth and ninth recitals to the preamble were considered relevant.
[691] para. 39.
[692] para. 41.

article 6(1) of the Directive. On the second question, the Court followed A-G Bot's reasoning such that this broad interpretation of the Directive required the cost of surgical operation to be compensated, certainly in the case of pacemakers, and perhaps in the case of defibrillators the latter left open to the German Federal Court.

It was not simply that a teleological reading of the Directive provided for recovery but that the particularly vulnerable claimants, given their constitutional rights to safety required this prima face *contra legem* interpretation. Constitutional arguments were used, in additional to textual ones, to buttress the claimants' right to recovery for additional expenses beyond the cost of removal of pacemakers. This is important because it suggests that passing on costs to the producer is not a global aim but required by the particular facts of the case given the balance of rights at question. The precedential value of this judgment is circumscribed by such a methodology. It is submitted, that such an approach draws outer boundaries or 'deontological side-constraints' on purely instrumental arguments embedding them in a constitutional discourse. This does not mean that the balance achieved can be extrapolated to all claims, but the Court decided that the circumstances at issue required this result. It can be interpreted as a form of situational or contextual reasoning aiming to delimit spheres of freedom, but also of discourses (balancing economic argument, political and health) in the concrete case.

In Teubnernian terms, this judgment falls primarily into his third category regarding the function of fundamental rights; that is: 'Human rights as negative bounds on societal communication where the integrity of individuals' body and mind is endangered by a communicative matrix that crosses boundaries.'[693] In other words, had the Court failed to grant compensation to the claimants (the individual) the balance between market access and safety would have been tendentious (societal dimension).[694] The Court is drawing boundaries on economic discourse (internal market) to ensure that the health and political discourses are taken more seriously by the *eigensturcture* of the New Approach by placing greater *ex post* regulatory limits on the predominantly *ex ante* approach. As a matter of legal reasoning, the Court used rights to buttress certain policy goals *viz* others in the instant case. Legitimate consumer expectation, in short, is interpreted in terms of balancing norms.

693 Teubner (n 549) 124, 145.
694 A well-rehearsed criticism of the New Approach see Reich (n 539).

Like the Social, this approach balances policy and doctrinal arguments, but as distinct from the social, the Court finds their underlying normative attributes and attempts to justify them according to more fundamental commitments. In circumstances where market access clashes with other normative commitments, balancing of norms, as distinct from policies, occur. Additionally, there is no clear priority between competing norms. Indeed, Kennedy remarks that in the social that several ends of the law are recognised and 'it is clear that they may conflict. But the conflict is resolved not by compromise but by the choice of a dominant end.'[695] Kennedy distinguishes the social from neo-formalism because now rights are balanced but not according to a scalar or hierarchical approach. Instead, norms are balanced in a language of rights. Rights-balancing, in effect, balances the underlying values or norms of the legal system in a highly contextualized manner rather than subsuming the law into an overall (totalizing) perspective.[696] The upshot of all this is that recovery for pure economic loss is expanded beyond its national limits into the field of what is ordinarily dealt with by contract, by creating normative counter-expectations to purely economic forms of reasoning that appear in the guise of policy arguments against recovery. This type of reasoning is an important part of the picture because it suggests divergent discourses can be channelled into the medium of rights, with the latter producing a backstop against the domination of one over the other. In this case, this favours precautionary reasoning *viz* risk channelled through the medium of rights. However, we remain within the field of primary liability where the standard of care is strict liability. A suite of other problems is thrown up when we come to think of secondary liability. While rights may help us in this regard, for example by developing positive obligations of state or quasi-state actors, it does not help us clearly view the network dimension to the problem, especially how this throws up problems for cause and imputation.

695 Kennedy (n 651). He refers to von Ihering but his argument is indicative of the social.
696 Brüggemeier (n 2) views this as indicative of modern legal reasoning.

C. CONCLUSION

In the post-state centred constellation, the law of tort has receded under the influence of economization understood as a cognitivisation of the law. However, Boston Scientific demonstrates that the law can be re-normativised via rights. Rights are understood, however, not merely in terms of vertical entitlements vis-à-vis the state. Instead, they are understood as mediating discourse collisions. This no more than makes explicit what is implicit in a private law or 'bottom up' understanding of rights. They are architectural in addition to defining 'territories of the self'. This architectural role for rights protection regains vigour after the state loses its central role in coordination society. However, if *Boston Scientific* stands for enhanced liability *vis-à-vis* private parties, *ubi ius, ibi remedium*, this does not provide remedies against other regulatory actors in a heterarchical society. We turn, now, to examine how the new *eigenstructures* are causing problems for tort law in terms of its rules of causation and attribution and how a rights-based approach might assist in the resolution of these problems. Before turning directly to this question, we will briefly outline the New Approach.

CHAPTER IV: HETERARCHICAL NETWORKS, HETERARCHICAL RIGHTS, AND REMEDIES?

A. INTRODUCTION

In this chapter, we build on our analysis in chapter III. The basic contention is that once functional differentiation breaks out of the frame of the nation state, a new concept of constitutionalization is required that is alive to the collision of discourses that occurs in legal disputes. *Boston Scientific* by drawing the connection between legitimate expectation and fundamental rights protection points the way to a re-formulation of tort remedies.[697] The law's role in providing normative counter-expectations is buttressed by providing a new discursive practice, which ties torts to rights more closely. This normative re-modelling occurs by reorienting legal categories to the problem of discourse collisions interposing market integration with consumer protection. Legal argument is placed in a constitutional framework – it provides a form of argumentation in which collisions of discourses *qua* collisions of non-scalar norms can be reconciled.[698] By understanding competing 'objectives' in terms of balancing of norms, rather than policies, the Court has significant scope to intervene to counteract the problem of policy argument as *ex ante* bar to recovery. This argument addresses the need to counteract 'de-differentiation' or 'cognitivisation' of law, which a more complex form of legal reasoning. Additionally, this 'discursive practice' is not dispositive as in the social – the balancing to be achieved is highly situative, but importantly unfolds in a normative framework.[699]

Buttressing the autonomy of legal argument is, of course, only one dimension to the problem. A second concerns the proper addressee(s) of liability. We take the New Approach to technical standards to illustrate how the move from government to governance has created a governance network. In the network society, networks create their own externalities. Following Kjaer, we

---

[697] Exclusive reference to policies against recovery may be understood in Teubner's terms as over-socialization of the law, or in our terms as cognitivisation.

[698] Kennedy (n 651). Reconciliation should not be understood as a 'for all time' answer to these problems. *Pace* Ladeur and N Luhmann 'Legal Argumentation' in Luhmann (n 130), 305, law is understood as a historical machine designed to ensure stable normative expectations as well as flexibility. Over-socialization can be understood as favouring the latter at the expense of the former, constitutionalization can be understood as disruptive of this problem. See Ladeur (n 24), who views constitutionalization as a tool to revise the network of rule/exception in the law.

[699] It should ideally avoid the possibility of 'over-socialization' *pace* Teubner (n 16).

argue that networks are 'interfaces' between different functional discourses. If the law is to have a role with regard to these networks, it is one of proceduralist oversight attempting to guard against 'discourse domination'. However, as Teubner has remarked – network is not a legal category.[700] In the circumstances, then, we argue that instead of creating a type of network liability (which in any case confuses networks and organisation, as a form of unity), we require the upgrading of existing categories of recovery. In the society of organizations, the organisational model of liability was developed in a similar fashion by adjusting or stretching existing legal doctrines to provide for recovery against group actors. Today, it is argued that in conjunction with liability against the *primary* tortfeasor, an expansion of secondary liability is required *viz* the EU, the state and, potentially, private parties fulfilling state like functions. At a more abstract level, if we follow the logic of this argument, this model of liability can be described in Teubnerian terms as a move from a model of *vertical* vicarious liability towards a model of *horizontal* vicarious liability.[701] However, insofar as a sociological network is construed, it requires normative 'strategic public intervention' not simply 'total responsibility'.[702]

Because the emerging governance networks are European, it is argued that a European law solution is ultimately required to provide a framework of minimum normative counter-expectations in a tertiary remodelling of tort law towards a network society. We distinguish our problem along a vertical and horizontal axis. Along the vertical axis, what is most pressing is the emergence of a multilevel legal order. Because multilevel, the role of a harmonised standard of liability is not to determine the outcome of concrete cases, it is rather to provide a baseline or an irritant that can be integrated into national legal orders.[703] By comparison, the horizontal axis denotes the primary unit or 'intermediary institution' that requires legal regulation, at least from our perspective, is not the individual nor the organisation but, to take an illustrative example, the New Approach *qua* network. It is not simply a question of organisational liability for producers, but involves an 'overall governance architecture' in which the role of tort law is to provide normative counter-expectations that, while discriminating between primary and secondary actors, does not subsume these actors into an

[700] Teubner (n 98).
[701] Teubner (n 1).
[702] For these reasons, we oppose what we regard as *ad hoc* solutions such as *Sindell*, especially with regard to network goverance.
[703] This minimum standard can, then, set the boundary without determining outcomes see Ladeur (n 101).

organisational model of liability.[704] The existing strict liability approach for producers, requires supplementation with a view of EU or state liability and the liability of 'private' certification bodies as forming part of a governance network with accompanying legal duties. Of course, this requires an analogous standard of care and, it is submitted, that on both counts *Francovich* liability can be viewed as paradigmatic.

B. THE NEW APPROACH

The New Approach radically alters the anterior division of labour between public and private parties. In the New Approach, the state's role is consigned to post-market surveillance under strict conditions, whereas, *ex ante* manufacturers are required to ensure that their products reach appropriate product standards, meeting at the very least the essential requirements specified by directives which refer to CEN requirements. Manufacturers are obliged to enter contracts with notification bodies, who are charged with the inspection of products to ensure compliance with those requirements. This is, in effect, a European passport that enables manufacturers to export their products within the Union but is not equivalent to a guarantee of safety. Thus, greater responsibility is given to manufacturers, certification bodies, and a more restricted role is afforded to national supervisors in the overall architecture of the New Approach, which aims at product safety and undistorted competition. We will briefly sketch the history of the New Approach before turning to relevant case-law in the field of product liability.

1. A History of the New Approach

The New Approach developed first in the 1980s aiming to open markets by harmonising standards.[705] Before the New Approach was adopted, the Community made several attempts in

[704] Stapleton (n 111) – much of the argument contra-liability for secondary actors can, it is submitted, be diffused by changing this frame from organization to network.

[705] As it is well-known, standards can be a way to disguise mercantilist policies. For example, high standards can be conceived of as an indirect means to create a barrier to entry to a market in circumstances in which they negate the comparative advantage of products which, although presumptively safe, do not adhere to particularistic

vain at specifying product requirements in secondary legislation. The problems with this approach according to Schepel is twofold: first, the practical difficulty in obtaining agreement at a European level over technical specifications ('Decisional supranationalism') and, second, by the time consensus is reached the standards are often outdated.[706] The latter occurs because of rapid developments regarding the state of the art. Before the New Approach was introduced in 1985, '…the creation of a harmonized system of legislation had slowed to a halt, as Directives had needed to be encumbered with detailed technical specifications.'[707] The New Approach followed the *Cassis de Dijon* approach combining market access ('mutual recognition') with proportionate measures in the name of health and safety.[708]

This led the Commission to propose a radical new departure, whereby only 'essential requirements' were to be established at a European level.[709] Once these were complied with, they constituted a passport for manufacturers within the Union. A new regulatory framework was established, which Hodges describes succinctly:

> The New Approach system does not involve pre-marketing assessment of a product by a competent authority or the grant of a marketing authorization. Instead, the onus of ensuring and declaring that a product conforms to the legal essential requirements is placed on the manufacturer himself, although in many instances this is subject to approval by an independent technical organization (known as a notified body).[710]

The regulatory system that was established to facilitate the New Approach had an impact on the traditional public-private divide, and the division of responsibility this implies. The determination of product standards was assigned to private standardisation bodies and,[711] especially after the introduction of the Global Approach in the early 1990s, *ex ante* compliance

---

standards in the importing state. The way in which states may use standards as a disguised barrier to entry is discussed in M Egan *Constructing the Market: Standards, Regulation and Governance* (Oxford, OUP, 2001).

[706] H Schepel *The Constitution of Private Governance Product Standards in the Regulation of Integrating Markets* (Oxford, Hart Publishing, 2005), ch 2: '...to overcome the inertia of decisional supranationalism.' (63) Of course, this phrase harks back to J Weiler 'The Transformation of Europe' (1991) 100(8) *Yale LJ* 2403.

[707] Hodges (n 602) 53.

[708] Schepel (n 720).

[709] The template for the New Approach can be traced back to the Low Voltage Directive, Council Directive 73/23 EEC. Egan (n 719), ch 6 especially.

[710] Hodges (n 602) [citation omitted]

[711] *De facto*, this is largely the case. Producers are free to show compliance with essential requirements via other means, but in practice this is an expensive alternative.

and monitoring was assigned to mostly private notification bodies in accordance with a notification procedure.[712] The notification procedure meant that member states were obliged to list certain competent bodies, and notify the Commission who incorporate these bodies into the relevant directive. Producers can then utilise any notification body on this list such that such a notification body may be based in another member state.[713] The member state should have an accreditation body in place that is charged with ensuring the notified bodies are competent.[714] In essence, '…the point is that the Community entrusts the task of ensuring free movement of the products covered by the Directive to private transnationalism.'[715] This is certainly true with respect to the establishment of standards. Second, the role of controlling or monitoring conformity with standards is 'delegated' to private bodies, namely, notification bodies at the pre-market stage. The New Approach is a deliberate governance design, which re-organized the balance between governmental regulation and the use of private actors to advance public goods, namely, safety and reduced transaction costs. This was apt to blur the line between private and public because of the manner in which it integrated private actors into the governance design in relation to product standards. To be sure, this has liability consequences which remain under-developed but which we propose to investigate.

At all events, these minimum standards constitute the requirements that allow for market access subject to certification of compliance with those standards. A whole regulatory framework has emerged to enforce product safety in the Union.[716] The state in effect 'delegates' 'upwards' to the EU to create the overall framework, and within this settlement 'downwards' to notified bodies and manufacturers. This framework involves self-regulation *ex ante*, with manufacturers obliged to ensure compliance with the relevant minimum standards, certification

712 This is the case with regard to high risk products *ie* medical devices. Self-certification is permitted for certain less risky products. For a more detailed analysis, as well as the compromises this institutional design reflects see Egan (n 719) ch 6.

713 For a very clear analysis of the technical procedure see JP Gallard 'Legitimacy, Credibility and Responsibility of the (big) European Third Party Certifiers' Working Paper, SASE Conference Chicago 2014, pp. 3-4 esp.

714 Regulation (EC) of the European Parliament and Council setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Council Regulation (CE) No. 339/93, July 9, 2008, 765/2008.

715 Schepel (n 720), 67.

716 Schepel (n 720) treats this issue at ch 10 arguing for a greater role for a revised tort law. In sum: 'As regulatory law increasingly relies on voluntary standards, courts will cease deferring to regulatory decisions and take it upon themselves to scrutinise standards and the procedures that leads to their establishment. In this sense, tort law takes over the function of administrative law in the supervision of regulatory decision-making. And what courts look for in these instances cannot be very different from what the Restatement (Third) of Torts looks for in the determination of whether to have public law pre-empt tort actions: 'a deliberative process which is full, fair and thorough and reflected substantial expertise.' (400)

requirements whereby private actors certify that a product is compliant (a monitoring function), and a restricted *ex post* market supervision role for public authorities (monitoring and public enforcement). The public authorities may withdraw a product from the market but only in accordance with a strict procedure which requires that national authorities notify the Commission. Therefore, what Hodges refers to as the hybrid role of notification bodies emerges: '…a hybrid position of private commercial entities that are granted limited regulatory functions (for so long as they satisfy criteria) subject to scrutiny by competent authorities.'[717]The question become whether these notification bodies can be considered to be performing a delegated public function in the general interest or whether they are considered to be exercising a purely private service and even in the latter case whether private law should provide a remedy because their actions have clear third party impacts. A formal approach that focuses on the private nature of the contract between a producer and a notification body is apt to mislead when the private status of the contract is itself at issue. In addition, a question arises regarding how we conceptualise state liability due to the state's secondary position aimed at ensuring compliance with safety requirements. These issues can be problematized through the lens of the *PIP* case, which will be discussed in the section 3 below. Before turning to this question, we will attempt to frame the issue in tort law terms.

2. Tort Law Implications

How does this all relate to the bigger questions pursued in the first part of this chapter? The question involves the development of *eigenstructures*, and their regulation at the crossroads of colliding discourses. At the one side, we have the market oriented approach that suggests the role for European tort law is minimal. In effect, the parties have little protection beyond that afforded to them in national law. On the other side, the potential to use European tort law as a prism through which to develop side-constraints on markets beyond the state and its underlying economic system discourse. To be blunt: access, yes, but without countervailing consumer rights? Without developing a tort law regime? Another way to put this: with the move from

[717] Hodges (n 602) 219.

minimum to maximum harmonisation, from negative to positive integration, should principles of European tort law be developed or not?

For a long time, indeed, the pertinent criticism of the New Approach was the inadequate coordination of *ex ante* regulation and *ex post* liability.[718]It appears obvious that this criticism views tort law in a regulatory light as a functional equivalent or complement to *ex ante* regulation.[719] However, the multiplication of regulatory actors this entails, 'private' and 'public', in an overall regulatory architecture poses problems for tort law's models of liability. If we are to conceptualise legal responsibility in the context of such an architecture, it is necessary to develop a conceptualisation that goes beyond our existing individualistic or organizational models because it does not appear to follow either the individualistic or the principal-agent model of twentieth-century tort law in the sense that *respondeat superior* appears an inadequate paradigm for the form of public-private governance entailed.

In the New Approach, the producer/manufacturer is the primary tortfeasor and the Product liability directive can deal effectively with their liability, as the *Boston Scientific* judgment evidences.[720] On the other hand, while the New Approach implies that both state authorities and notification bodies are secondary actors, the model is mainly one of self-regulation or 'enforced self-regulation' to be exact. Thus: what exactly does state supervision imply? What is the role of certification bodies, can their activities result in legal responsibility?

While each actor, manufacturer, certifier, supervisor, plays an important role in the regulatory structure, they do so without a clear hierarchy of responsibility such that the actions of one cannot be easily imputed to another. The focus, then, inexorably shifts to primary liability but without a new liability paradigm runs into the problems of justifying imputation.[721] A new normative reason for liability is required to allow for a more comprehensive system of

[718] Cafaggi (n 299). The point has been stressed recently by SM Singh. 'What is the Best Way to Supervise the Quality of Medical Devices? Searching for a Balance Between ex-ante and ex-post Regulation' (2013) 4 *EJRR* 465.

[719] Functional complement if the structure of tort law, its form, is viewed as different to regulation; functional equivalent if tort law is considered as no different from regulation in terms of what it can achieve. On the difference between these concepts see Cafaggi (n 16). *Boston Scientific* with its departure from the ordinary rules of causation tends to suggest equivalence rather than complementarity.

[720] In other words, it fits the organizational model. However, the precise way the Product Liability Directive is interpreted by courts, obviously, is another question.

[721] C Sieburgh (n 596) makes this point clearly, although it is argued thinking from within the paradigm of personalist tort law.

liability.[722] All actors, state, 'private' regulatory bodies, and manufacturers are ensconced in a larger regulatory framework. This is conceptualized as a network which alters the role and function of tort law and its distribution of rights and responsibilities. This argument will be pursued later, for the moment suffice it to draw an analogy with Chalmers's conceptualization of this new departure.

In this new framework, Chalmers's conception of private governance regimes, or self-regulatory regimes (SSRs), as venues for the creation of local conceptions of the Good illustrates the role for (tort) law.[723] In our terminology, what Chalmers's discusses would be termed *eigenstructures* pace Kjaer. In any event, Chalmers perceives that SSRs '…distinguish themselves from cartels or other forms of private association through their concern to secure public goods.'[724] Speaking in relation to product safety but making a more general point, Chalmers is concerned with: '…[the] danger here is not so much that industry will seek to lower standards, but, more invidiously, that a particular, relatively non-pluralistic worldview dominates ideas of consumer and environmental safety.'[725] This is a form of 'capture' that does not relate to interest group domination, but rather is a question of how *eigenstructures* are prone to be dominated by particular discourses in their construction of normality, paralleling our discussion of *Boston Scientific*. It demands of law an approach that combats such domination rather than rubber stamping it. Rubber stamping from an EU law perspective consists of accepting trade-offs between market and safety without review. In formalistic terms, this type of argument accepts the market access rationale has priority and, as such, countervailing claims based on consumer rights are not considered as giving rise to subjective rights.[726] Renner might refer to this phenomenon as 'cognitivisation' of the law if these local conceptions of the Good replace normative legal categories deciding whether risk assessments are 'normal', and therefore acceptable, or not.[727] This might occur at the stage of the establishment of standards and, if it does, then a more public law of torts is required.[728] It may,

[722] With regard to the difficulties of using an individualistic or even organizational model see G Spindler 'Market Processes, Standardisation and Tort Law' (1998) 4(3) *ELJ* 316.
[723] Chalmers's focus is not tort law but the descriptive aspect of his argument can lead to a prescriptive argument concerning tort law, see Chalmers (n 108).
[724] *ibid*.
[725] *ibid*.
[726] In effect, Reich's criticism of *AGM.COS.MET*. Reich (n 539).
[727] Ladeur (n 24) 'The "normal" is not dangerous.' (17) citing KH Ladeur 'Coping With Uncertainty: Ecological Risks and the Proceduralisation of Environmental Law' in Teubner et al (n 1) 299.
[728] Schepel (n 720).

also, occur with respect the provision of recovery in tort against intermediary bodies or public authorities charged with *ex ante* or *ex post* regulatory tasks. Recalling *Paul* and *Cosmet*, it can be expressed either as a policy bar on a duty of care arising (conferral of a right) or influence the shaping of what constitutes due care (standard of care). In either case, failure to supply potential recovery reinforces, in effect, the pro-market architecture of the New Approach insofar as consumer protection, while advanced on an equal footing in its original conception, lacks teeth. It is no good that the New Approach announces a framework for balancing of policies if, in practice, when there is a multifaceted regulatory failure noone is held legally responsible. In other words, the balance of rights between market access and consumer protection according to this view is dead letter. They are policies without enforcement via tort law. An architecture of accountability without legal responsibility.[729] These problems are highlighted by the *PIP* imbroglio.

3. The *PIP* Imbroglio: Tort Law in the Spotlight

The *PIP* imbroglio relates to a large number of claims that have been litigated or are pending before the courts of a number of jurisdictions.[730] The claimants are women who obtained breast implants. The primary tortfeasor is *Poly Implant Prothèse* ('*PIP*'), a French manufacturer of silicone products. In 2000, following investigations of the Food and Drugs Administration ('FDA') in the United States, it emerged that these implants were defective because the industrial silicone gel used in their production was 'sub-standard'. Subsequently, the silicone gel found to be defective was banned within the EU. *PIP* did not comply with the ban, instead '...developed an elaborate scheme of deceit and continued to use sub-standard industrial

[729] Gallard (n 727) citing D Levi Faur & S Starobin 'Transnational Politics and Policy: From Two-Way to Three-Way Interactions' (2014) Jerusalem Papers in Regulation and Governance Working Paper No. 62. Whether these obligations give rise to tortious duties is, of course, the live question. http://www.nytimes.com/2012/09/13/world/asia/hundreds-die-in-factory-fires-in-pakistan.html?_r=0 (Accessed on 21 March 2016).

[730] In France, while recovery was initially allowed it has since been overturned on appeal. See http://www.dw.com/en/french-court-determines-germanys-t%C3%BCv-not-at-fault-for-faulty-breast-implants/a-18557471 (accessed 20 July 2016).

silicone gel.'[731] Once a putative link was suggested between the defective silicone gel used and the harm caused to certain women due to silicone leakage, many women brought claims in respect of the cost of removing these implants. As a matter of causation, it was unclear the extent to which the defectiveness of the implants resulted in bursting of the implants causing physical harm. In other words, although the product in question fell below the appropriate quality standard, the manufacturing process made unclear the extent and degree to which the relevant defective gel could be found in the products manufactured by *PIP*. Secondly, there is considerable scientific uncertainty as to the health risks posed by sub-standard breast implants. While it is true that the use of sub-standard silicone gel increases the change of rupture, it is unclear whether this poses a long-term health risk to individuals. The main costs sought relate to the cost of removal, the cost of the fitting of new implants, and psychological injuries suffered because of the health scare involved.

The New Approach appears to make market surveillance the 'task of the supervisory agencies'.[732] As a matter of fact, it was 2009 before the supervisory agency in France acted and 2010 before *PIP* products were taken off the market.[733] The manufacturer went into liquidation at this point, meaning that if the claimants were to recover at all,[734] recovery would have to be based on a claim against a so-called secondary tortfeasor.[735] We will place the potential liability of the supervisory authority to one side for the moment, because the relevant legal actions were taken against the notification body. In this respect, circumstances are further complicated by the role and function of notification bodies whose task involves ensuring that appropriate standards as to quality are applied in practice. In the main, although not entirely, notification

731 B Van Leeuwen 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 3 *EJRR* 1.
732 Van Leeuwen (n 745) 2.
733 *ibid.*
734 One should recall that several parties were criminally prosecuted. The highest profile prosecution was that of its CEO, a Mr Jean-Claude Mas. See http://news.sky.com/story/pip-breast-implant-boss-jean-claude-mas-jailed-10425136. (20 July 2016)
735 Accessing the funds of secondary tortfeasor's insurer, to be precise. An alternative claim could have been brought against the insurer with the aid of some ingenuity HW Micklitz, N Reich & L Boucon 'L'Action de la Victime Contra L'Assureur du Producteur' (2015) *Revue Internationale de Droit Économique* 37. We do not deal with the question of insurer liability in place of the producer because we suggest this does not relate to the question of attribution but of subrogation. However, in reality this is a fine distinction since insurers invariably pay. However, from an attribution perspective it is important who is primarily fixed with liability and why. This also indicates who bears the burden of insurance, who the relevant risk pool is. Although this can form part of legal reasoning, namely, who the relevant risk pool should be (the loss spreading argument), it is not the critical factor.

bodies are private bodies charged with an *ex ante* regulatory function which, in this case,[736] involved 'checking the quality management system and design dossier of the product – their certification is necessary to be able to place the products on the markets.'[737] Once a product is certified in this manner, the task of supervision falls primarily to the relevant public supervisory agency in the member state in question in conjunction with the Commission.[738] Secondly, once certification is approved by the relevant body, the product in question is approved for distribution throughout the EU. However, what complicates matters is that the responsibility of the notification body does not end here, because the notification body is under a duty to ensure continued compliance with the quality standard in question. The notification body would appear, therefore, to perform certain functions analogous to a public supervisory body. It is worth recalling that the relevant legal framework is the Medical Devices Directive (Directive 93/42/EEC), which aims to ensure market access while balancing this requirement against health and safety concerns: 'It combines the goal to safeguard the freedom of trade and goods with the aim to ensure public health and safety of the products.'[739] The Medical Devices Directive falls under the chapeau of the New Approach directives and, as such, combines *ex ante* self-regulation and *ex post* market surveillance by the relevant state authorities. Additionally, as it has already been stated, pre-market certification by notified bodies forms an important part of the regulatory process and there is a requirement at paragraph 5.4 of Annex II for periodic post-market surveillance. Apart from the general aims of the Directive, namely guaranteeing market access and a high level of protection of health and safety contained in the recitals, notified bodies are entrusted with certain specific tasks. Their tasks are pursuant to guidelines regarded as 'soft law' in the sense that they do not, ordinarily, give rise to legal obligations.[740] These tasks are specified in the Annex II of the Directive, particularly at section 3.3 which states:

---

[736] There are several options regarding certification. This is the so-called 'full quality assurance' approach. It involves a management system review not requiring an inspection of the products themselves. But, as Gallard (n 727) notes it requires at least one member with past experience on the review team. This was not the case on the facts. Although unannounced inspections were not compulsory, they would have per the Toulon court have uncovered the problem.

[737] *ibid*, 3.

[738] Article 10 of the Medical Devices Directive, Directive 93/42/EEC.

[739] Singh (n 732).

[740] 467.

> The notified body must audit the quality system to determine whether it meets the requirements referred to in Section 3.2. It must presume that quality systems which implement the relevant harmonized standards conform to these requirements.
>
> The assessment team must include *at least one number with past experience of assessments of the technology concerned*. The assessment procedure *must include an inspection on the manufacturer's premises* and, in duly substantiated cases, on the premises of the manufacturer's suppliers and/or subcontractors to inspect the manufacturing processes. (emphasis added)

Additionally, sections 5.3 and 5.4 provide for post-market surveillance tasks:

> The notified body *must* periodically carry out appropriate inspections and assessments to make sure that the manufacturer applies the approved quality system and must supply the manufacturer with an assessment report.

Finally, the notified body *may* pay unannounced visits to the manufacturer. At the time of such visits, the notified body may, where necessary, carry out or ask for tests in order to check that the quality system is working properly. It must provide the manufacturer with an inspection report and, if a test has been carried out, with a test report. However, in practice and within their discretion, the relevant notified body *TÜV Rheinland* made announced visits, and the compliance exercise was fulfilled by ensuring that certain paper work was filled in. The real question, therefore, was whether this was insufficient supervision and if it was, whether it should give rise to a legal duty which corresponded to a legal right of the claimant to seek compensation.[741]

It goes without saying, the primary tortfeasor is the manufacturer on traditional tort principles because it is the manufacturer who acted improperly.[742] *TÜV Rheinland* alleged that the manufacturer had 'deceived' their inspectors.[743] Indeed, the lower Court defined the obligations of *TÜV Rheinland* narrowly under Annex II of the Medical Devices Directive. It was essentially

[741] This is, of course, not the only avenue which claimants might use to seek compensation as Van Leeuwen points out. However, for our purposes it is the theoretically important one.
[742] And, of course, this approach was crystallised in the Product Liability Directive.
[743] Van Leeuwen (n 745).

a box-ticking exercise – nothing more, nothing less. *TÜV* was not obliged to carry out on-site inspections. Second, the Court focused on the private nature of the contract between *TÜV* and *PIP*. This rather formal approach to the contract meant that third parties could not derive rights from the relationship, because the claim could not be fitted within contracts having third party effects or article 823(2) *BGB*. Additionally, as a matter of law, the German lower Court failed to hold *TÜV* liable because the claimant could not demonstrate that she had suffered any recognised specific harm. All the claimant could demonstrate was that there was an increased risk of rupture and this was insufficient to establish liability.[744]

However, the French lower court reached a contrary conclusion focusing on the fact that *TÜV Rheinland* were exercising 'delegated public powers'. The exercise of these powers breached their obligations under the Medical Services Directive, and failure to carry out a more extensive (and unannounced) inspection despite being on notice since 2000 of the defective silicone gel, constituted a failure of control, surveillance and vigilance. Having established that *TÜV* could be held liable under the Directive, the Toulon Court more expansively interpreted the duties owing under the Directive. The Toulon court used section 3.3 to establish a breach of duty towards the claimants as well as drawing on their post-market tasks detailed at section 5.3 and 5.4. The Court focused, first, on the rather technical fact that the Directive requires inspection to be carried out by a team consisting of at least one member with past experience which did not occur and, secondly, although it is not compulsory under the Directive, had *TÜV* conducted an unannounced inspection they would have uncovered the fraud. The Court, in other words, found that the balance between precautions taken and the nature of the risk involved was insufficient or unreasonable. That breach was found was enabled, of course, because the French courts viewed *TÜV Rheinland* as exercising a delegated public power, which incidentally, seems to leave open the possibility of superior responsibility of the state.[745] In other words, 'soft law' was turned into hard legal obligation against the notified body.[746] Ordinarily such guidelines are not binding on private parties and, as such, the first instance judgment in Toulon created uncertainty. Singh clarifies: 'These guidelines are, however, not legally binding on

[744] This traditional approach to causation of harm is somewhat at odds post-*Boston Scientific*, which focuses more expansively on the concept of legitimate consumer expectation regarding product defects.
[745] Gallard (n 727) especially since the relevant state, here Germany, is meant to guarantee the competence of notified bodies. The potential liability of the French state is another question, which would focus on the ten year gap between the action of the FDA and the implementation of a ban on *PIP* products. Again, see Micklitz, Reich & Boucon (n 749) innovative solution here.
[746] The consequences of this, in itself, are obviously intriguing beyond the context of the European Union.

those parties as the principle of sincere cooperation is not binding on private parties, only on Member States.'[747] This judgment was, however, overturned on appeal.[748]

The German lower Court's approach demonstrates the limits of existing tort law in two respects. First, by reading the contract between *PIP* and *TÜV* as a private agreement without third party effects, the Court effectively shuts the gate before the horse bolts. Whereas, as Gallard argues, the French court opens the 'black box' of private certification shining a light on their practices and,[749] by extension, their place in an overall regulatory architecture, the German court's approach firmly dismisses this possibility.[750] Second, in more technical terms the German court reinforces the orthodox approach that exposure to risk cannot equate to harm on existing principles. This is coupled with scientific uncertainty as to the link between the, *arguendo*, regulatory failure and the degree to which this contributed to the risk of harm if it did indeed materialise. There is no liability for exposure to a greater risk *simpliciter*, harm is required. In the end, the case was appealed to the German Federal Court of Appeal (*Bundesgerichtshof*), which requested a preliminary reference. The referring Court in effect asked whether the scope of national law (contracts having third party effects or the case-law arising from BGB article 823(2)) ought to be reconsidered in light of EU law. This is the backdrop to the *PIP* judgment.

---

747 Singh (n 732) 473.

748 http://www.lemonde.fr/societe/article/2015/07/02/protheses-pip-le-certificateur-n-a-pas-commis-de-faute-selon-la-justice_4667137_3224.html. For a discussion of the first instance judgment see B Van Leeuwen 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 3 *EJRR* 1.

749 We agree with Gallard (n 727): 'In opening up the black box of certification involved in the CE marking framework, the French judges found a big third-party certifier guilty of day to-day practices inconsistent with its legal obligations. On the other hand, it may be argued that the notified body in question *was not the only actor responsible*, both in this regrettable case but also within the framework of *a rather complex and lax regulatory system*.' (15) (emphasis added, R-C)

750 D Caruso 'Private Law and State-Making in the Age of Globalization' Working Paper Series, Public Law & Legal Theory, Working Paper No. 06/09 (ssrn, 21 July 2016) the idea that the neutrality of private law, in our terms its self-contained or autonomous discourse, can be a useful device to conceal political issues. Here the question of responsibility, whether legal or otherwise.

4. *PIP* before the CJEU

AG Sharpston in her opinion examines the role of notification bodies, which has developed within the framework of Directive 94/42/EC.[751] She notes that within that context the Directive aims not only to provide market access, but also a high level of protection for health but also safety.[752] Breast implants are categorised as class III products meaning that they attract the most onerous compliance and surveillance obligations.[753] The AG appears early on to have dismissed a horizontal application argument,[754] but this does not dispose the claim because following *Marleasing*, the Court may provide guidance as to how national law is to be construed considering EU law.[755] While Directive 85/374 imposes strict liability on producers, this does not preclude other forms of liability.[756] The core question to answer was whether a notified body owing to 'a culpable failure to comply with its obligations' may give rise to 'direct and unrestricted liability towards the patients concerned.'[757] Importantly in this respect, AG Sharpston notes at paragraph 33 that primary manufacturer responsibility does not preclude member state or notified body liability stating: 'Plainly, however, that directive does not limit the obligations as to product safety to the manufacturer alone. It also 'imposes a number of duties on Member States', which she lists. Whereas the Directive is 'silent' regarding notified bodies, because there is an express requirement of liability insurance *viz* notified bodies, liability in some form must have been contemplated.[758] While liability is contemplated, it is for national courts to determine its contours subject to equivalence and effectiveness of EU law.[759] Crucial is paragraph 39:

> Given the crucial role played by notified bodies ... and bearing in mind, in particular, the high level of protection to patients and users that that directive aims to provide and the risks associated with the devices in relation to which they are required to carry out their examination, it seems to me entirely appropriate that those bodies should in

[751] Advocate General's Opinion in Case C-219/15.
[752] Para. 26.
[753] Directive 2003/12/EC.
[754] Para. 27, not the state nor an emanation of the state. But this is a formal rather than functional approach.
[755] C-106/89, *Marleasing* EU:C:1990:395.
[756] Para 32.
[757] Para. 28.
[758] Para 35: 'The directive is silent as regards the imposition of liability on notified bodies, although the requirement under section 6 of Annex XI that they take out civil liability insurance makes it clear that liability for something is contemplated.'
[759] Para 39.

> principle be capable of bearing liability under national law to those patients and users for a culpable failure to fulfil their obligations thereunder, provided always that the principles of equivalence and effectiveness are respected. That will be a matter for the national court to determine.

However, AG Sharpston makes significant inroads into national discretion because she proceeds to lay down a test. While noting that notified bodies are not to be equated with the state and that their powers are often discretionary, this does not mean the relationship between the notified body and manufacturer is purely 'cooperative'.[760] Notified bodies have teeth and these include surveillance powers. While there is 'no general obligation to inspect devices, examine the manufacturer's business records or carry out unannounced inspections' per the Directive, this does not mean that the notified body is without responsibility by simply adhering to the 'paper' method of compliance. At paragraph 54, AG Sharpston states:

> '... as part of its general duty of diligence, a notified body is under *a duty to be alert* to the fact that either of those possibilities may arise in any given case. If, therefore, it is put on notice, whether as a result of information arising out of its own inspections and assessments or otherwise, it will be under a duty to act'. (R-C, emphasis added)

And at paragraph 57:

> 'The question will be: what would a notified body acting with all due care and diligence have done in the circumstances in question? The same applies to the question whether the notified body should have carried out unannounced inspections.'

Thus, notified bodies can be placed on notice or 'alert', and in those circumstances they may be held liable where there is a lack of due care and diligence in carrying out their duties, which is a question that turns on the facts. It is notable, in particular, that what apparently a discretionary power to inspect per the Directive may become a positive obligation when on notice. It is submitted that this is strong guidance as to outcome because it would be difficult

760 Para 51.

given the facts to argue that *TÜV* were not on notice, namely, because of the actions of the FDA and the French authorities.

The Court largely follows AG Sharpston's opinion.[761] The Court accepts that the purpose of Directive 92/43 is both to harmonise law on patient safety and health, and to provide medical devices with a 'high level of protection'.[762] The Court then reviews the Directive provisions noting that the Directive provides Member States and notified bodies with surveillance powers. These powers are meant to ensure that the manufacturer complies with safety requirements.[763] However, certain of these powers are discretionary. For example, we recall that annex II section 5.4 provides that inspections *may* be unannounced and that during these inspections the notified body 'may where necessary, carry out or ask for tests in order to check that the quality system is working properly.' The argument of Ms Schmitt is essentially that had the notified body gone beyond a mere 'paper' inspection they would have uncovered the fraud by an inspection of delivery notes and invoices. From paragraph 38 onwards the Court reasons that there is no general obligation on notified bodies to conduct unannounced inspections, to examine devices or to examine the manufacturer's business records, because the Directive envisages that discretion is conferred on notified bodies in the discharge of compliance duties. And yet:

> However, the obligations laid down in Article 16(6) of the directive and those set out in paragraph 41 above *would be a dead letter if the degree of discretion knew no limits*. The notified body would not be able to fulfil its function under the procedure relating to the EC declaration of conformity if it were free not to take any steps *in the face of evidence* indicating that a medical device might not comply with the requirements laid down in Directive 93/42.[764]

Thus, while there is no general obligation to go beyond a paper review, there is a general obligation to discharge their surveillance powers with due care and diligence.[765] The notified body 'in the face of evidence' of malpractice cannot simply attest to their discretionary

[761] They avoid discussion of the extraordinary *ex tunc* aspect.
[762] Paras 4-5 respectively.
[763] Annex II section 5(1): 'The aim of surveillance is to ensure that the manufacturer duly fulfils the obligations imposed by the approved quality system.'
[764] Para 44. (RC emphasis added)
[765] Para 46.

powers.[766] Rehearsing AG Sharpston's terms, they must be 'alert'.[767] Whether the failure to exercise this discretionary power amounts to an absence of due care or diligence is, obviously, a question of fact.

The Court turns then to examine whether the Directive confers a subjective right on individuals. Unlike AG Sharpston the Court does not note the horizontal nature of the dispute squarely, but reaches the same substantive conclusion. The Court notes that the Directive aims not only to protect health '*stricto sensu*', but '…also the safety of persons and that it does not concern only patients and users of medical devices but, more generally, 'third parties' or 'other persons'[768] Thus, the Directive's 'actual aim' 'is to protect the end users of medical devices.'[769] By this move, the Court is placing tort law firmly in the mix. The Court then identifies that while the primary responsible party for ensuring compliance under the Directive is the manufacturer, this does not exclude the responsibility of Member States or notified bodies.[770] However, re-tracing *Paul*, simply because a directive imposes surveillance obligations on certain bodies does not mean it is intended to confer rights on them.[771] And following *Paul*, because there is no 'express rule granting such a right' on the face of the Directive, then, '…it cannot be maintained that the purpose of the directive is to govern the conditions under which the end users of medical devices may be able to obtain compensation for culpable failure by those bodies to fulfil their obligations.'[772] Following AG Sharpston's reasoning, then, the issue is remitted to national courts for determination in accordance with the doctrines of equivalence and effectiveness.[773] It is argued that while the Court does not confer rights on individuals, this approach is highly suggestive that national law should do so.[774] The narrow approach to *Paul* is, however, to be regretted given the overall logic of the judgment. Nevertheless, the Court's solution in the end

[766] Para 45.
[767] Para 47: '...the Advocate General observed in point 54 of her Opinion, that a notified body is under a duty to be alert, with the result that, in the face of evidence indicating that a medical device may not comply with the requirements laid down in Directive 93/42, that body must take all steps necessary to ensure that it fulfils its obligations under Article 16(6) of the directive, as well as those set out in paragraph 41 above.'
[768] Para 50.
[769] *ibid*.
[770] Para 51. See paras 52-53 for demarcation of member states and notified bodies responsibilities.
[771] Para 55, citing *Paul*.
[772] Para 56.
[773] Para 59.
[774] It would have been helpful here to follow Reich's approach whereby he distinguishes Paul in his article on horizontal liability, see Reich (n 547).

will result in hybridization of remedies by the manner in which it remitted the case to national courts.

5. The Road Not Taken

It is clear from the CJEU analysis in *PIP* that *TÜV* is more than simply a private contractor operating on the market for compliance services. *TÜV* performs an important *ex ante* regulatory compliance and, indeed, *ex post* monitoring role. It is a 'regulatory intermediary' and, thus, a powerful actor for ensuring that market access should be accompanied by a 'high level of consumer protection'. In the absence of certification, the manufacturer's product cannot be affixed with a 'CE' certification, her 'European passport', and this certification includes an obligation of continued monitoring once a product is placed on the market. Notified bodies, therefore, exercise considerable regulatory power in the current framework, which raises the question as to why it should be treated differently for the purposes of liability as a matter of EU law from public bodies.[775] The CJEU sidestepped this question by using the *Marleasing* route inferring that national courts must impose liability on private parties for a culpable excess of discretion to conform with EU law. The CJEU did consider the question of whether a right is conferred, but following the *Paul* decision noted that where surveillance obligations are imposed on parties a right it is not necessarily conferred especially where a directive does not expressly grant such a right.[776] Had there been an express grant of a right, the next question would be whether the right conferred was capable of application *viz* a private party. By contrast with *Paul* in which the financial regulator is an 'emanation of the state', conferring a right *viz TÜV* as regulatory intermediary amounts to *terra incognita* in EU law. AG Sharpston seems more committed to an orthodox *Dori*[777] interpretation whereby directives cannot give rise to horizontal obligations *simpliciter*.[778] In substance, both solutions result in the matter being remitted to national tort law (in Germany, possibly contract law) for a solution in accordance

[775] Van Leeuwen (n 745) noting the centrality of this question, and its relation to the question of horizontal direct effect, the circumstances in which it might apply, and its justification.
[776] Para 55-56.
[777] *Dori*. See also Opinion of A-G Van Gerven in Case C-128/92 Banks I [1994] ECR I-1209.
[778] Para 27. 'It follows that there can be no question of the terms of that directive being directly enforceable against TÜV Rheinland, since the relationship between that body and Ms Schmitt is "horizontal" and not "vertical".'

with the principle of national procedural autonomy.[779] Several points should be noted. First, the legal test developed is rather similar to *Francovich* liability. In that context, as we will see, the Court has developed a case-law based on a number of conditions of liability, most decisively the notion of 'sufficiently serious breach', which is otherwise termed as a 'manifest and grave' breach of discretion. This implies culpability for excess of discretion – albeit it is not clearly aligned with fault or negligence.[780] Thus, while the Court consistent with its earlier jurisprudence does not imply rights from a directive *viz* horizontal situations, national courts must apply a remarkably similar test. The CJEU appears to urge national courts to create the necessary *iuris vinculum* and even goes as far as to suggest the relevant standard. Second, it is obvious that by following the orthodox approach the Court ends up with a hybridization of remedies. This is inevitable because by using the *Marleasing* approach and, thereby, attempting to embed the remedy into national law divergences will emerge throughout Europe. We have found, for instance, that even within the context of the largely more defined *Francovich* liability national courts tend to read the remedy considering their national categories; one would suspect *mutatis mutandis* the *PIP* solution.[781] Third, neither the AG's opinion nor the Court's judgment make any connection between the Charter, *eg* article 35(2), and the Directive explicit. Instead they resolve the questions referred on a formal and textual interpretative approach. It is submitted that both have more than a touch of 'hidden constitutionalization', because in effect the result is to buttress the *ex post* remedies based on a high level of consumer protection.[782] AG Sharpston and the Court are clearly balancing norms, but without an clarifying their over-arching normative framework. The *effet utile* of EU law appears to be doing the heavy work, but it is not particularly transparent in the judgment how this is the case, save insofar as both AG Sharpston and the Court indicate that the remedy in national law should be effective. Taking these factors into account, it is argued that this in the long-run such an under-theorisation fails to provide a sufficiently clear bedrock for the expansion of rights-remedies whereas if we consider *Boston Scientific*, by contrast, the Court creates a more developed and sophisticated understanding of the links between legitimate consumer

779 See N Reich 'Product Liability and Beyond: An Exercise in 'Gap-Filling'' (2016) 3 *European Review of Private Law* 619. Regarding what national law categories might be employed.
780 *Brasserie* – it is an autonomous condition.
781 R Condon & B Van Leeuwen 'Bottom Up or Rock Bottom Harmonization? *Francovich* State Liability in National Courts.' (2016) 35 *Yearbook of European Law* 1.
782 G Comandé 'The Fifth Freedom: Aggregating Citizenship….around Private Law' in HW Micklitz (ed) *The Constitutionalization of European Private Law* (Oxford, OUP, 2014) 61.

expectation in the context of fundamental rights, and how this should be balanced against the competing norm of market access.[783] And, of course, from our perspective this has deeper horizontal constitutional dimensions as chartering the boundaries of discourses.[784]

But given the orthodox restrictions was there an alternative feasibly open to the Court? The road not taken here would be to formulate an expanded approach based on the *Fra.bo* decision.[785] It is argued that this is a persuasive approach particularly given the thin line the Court is already threading in *PIP* between the primacy of EU law and procedural autonomy. *Fra.bo* is the latest instance of a case-law that allows for the application of the Treaty provisions to private (regulatory) bodies.[786] The basic idea is that if these bodies are exercising public power in an equivalent way to the state, then, they should be subjected to European primary and secondary law. In this line, the *Fra.bo* judgment has clarified private standardization bodies can in principle come within the scope of European law. Micklitz and Van Gestel frame the question before the Court in *Fra.bo* suggestively:

> '...should such organizations be seen as quasi-statutory or hybrid institutions to which the economic freedoms of the TFEU are applicable, because otherwise the Member States could bypass the obligations following from the economic freedoms by simply "delegating" certain technical rules or certification procedures to private institutions?'[787]

The Court in *Fra.bo* applied article 34 to a private standardization body focusing on its market regulatory power: the AG focused on its collective entity; the CJEU on its quasi-statutory function. According to Micklitz and Van Gestel such an approach while answering the precise question before the Court avoided the more general one, namely:

---

783 Indeed, Reich notes this parallel, see Reich (n 539).
784 *Sinnwelten* and integration – not horizontal rights in EU law.
785 Case C-171/11 *Fra.bo Spa v Deutsche Vereinigung des Gas- und Wasserfaches*, judgment of 31 December 2012.
786 C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.
787 HW Micklitz & R Van Gestel 'European Integration through Standardization: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies' (2013) 50 *CMLR* 145, 146.

> . …the difficult decision of whether and to what extent private parties as such may become addressees of Treaty obligations ("horizontal public obligations" or "constitutionalization of private law") and are allowed to justify barriers to trade which result from their standard setting.[788]

However, this case was in the context of the claimant-manufacturer arguing that their right to free movement of goods was abridged.[789] Whereas for the *PIP* claimants their claim rests on positive rights afforded to them, divined *ex hypothesis* from EU law as consumers. Thus, it requires the CJEU to find that the Treaty confers directly effective rights on the claimants *viz TÜV* drawing on the relevant directive, the Medical Services Directive, positive rights to be regulated effectively or non-negligently. It is recalled that was rejected by AG Sharpston and the CJEU on well-established principles. Nevertheless, we should not lose track of the context in which this widening of 'state' liability is proposed. As Reich states:

> This state of legal concepts creates a paradox: the liberal deregulation and privatisation movement as undertaken by the EU has been quite successful in reducing state functions and in opening public services, traditionally provided by state institutions, to private competition. It has, however, not been able to transfer with similar success the obligations flowing out of these services to private actors.[790]

Although notification procedures are not the outcome of privatization of services as such, they are a consequence of the liberalisation of markets. Without the regulatory architecture devised by the New Approach there would be no such expanded role for notified bodies. Without the possibility of liability by analogy with state liability, there is a gap in the tort law regime whereby part of the regulatory architecture remains immune from liability.[791] The Court's

---

[788] 160.

[789] It was, in other words, decided based on market access rather than the more nuanced balance between market access and other important interests we suggest. For an argument against the *Fra.bo* judgment on the basis that it creates legal uncertainty see H Schepel 'The New Approach to the New Approach: the Juridification of Harmonized Standards in EU Law'. http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_04_0521.pdf (accessed on 23 August 2015).

[790] Reich (n 580).

[791] By analogy approach see Cases C-295-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619; Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-06297.

approach in *PIP* only goes some of the way to resolve this problem by remitting the definition of a precise legal remedy to national courts.

The more radical approach would be to expand the *Foster* case-law with *TÜV* coming within the functional definition of the state in European law, because of their important regulatory function.[792] *Fra.bo* allows in principle for a private certification body to be treated *as if* the state for the purposes of EU law, although where a restriction of EU primary law, namely free movement of goods, is at issue. While the analogy between the *PIP* claimants and the Italian manufacturer in *Fra.bo* is inexact, it does provide an avenue at least through which the Court to extend its case-law.[793] Ultimately, were the CJEU to have, counter-factually, taken such an approach they would focus on the clarity and precision of the provisions of the Directive in question, and divine the presence of individual right or otherwise. This is not an insurmountable hurdle.[794] It is our argument pursued above that in the context of a Europe-wide framework that opens markets what is required is a liability framework that protects individual and 'institutional' interests apart from market access.

However, for the time being the Court in *PIP* remits this issue to the national courts. This is a hybridization of remedies through which national law is prioritised subject to equivalence and effectiveness.[795] Therefore, insofar as the state liability jurisprudence has a role in formulating a '*jus commune Europeum*' it will be the indirect one of informing national courts of the extent of liability *viz* the state from which analogies can be drawn for 'private' parties which discharge analogous functions.[796] From our perspective, the conditions of liability in *Francovich* are considered as baseline standards. Before we examine how state liability may be reformulated in a more exacting way, we will examine where these developments have taken tort law.

---

[792] 'compliance and surveillance.' As the Court put it, emphasis mine.
[793] B Van Leeuwen 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 3 *EJRR* 1, 4.

[794] *Compare* P Craig & G De Búrca *EU Law: Texts, Cases and Materials* 5th edn (Oxford, OUP, 2011) 198: 'The reality is the Foster test embodies an unusual inverse principle of state or vicarious responsibility, whereby a body that might be regarded in some as connected with the state is held responsible for a failing of the state itself, even though it had no control over the relevant event.' The emphasis pace Fra.bo should be moved to function rather than control.
[795] Reich (n 547), 124.

[796] Condon & Van Leeuwen (n 795). This is evident regarding *Francovich* liability, partly at least it is argued because the court has yet to clearly define the conditions of liability especially the first and third condition i.e. conferral of a right and causation.

6. Taking Stock: a Cupola Revealed?

Yet even though the 'tactical' approach in *PIP* is orthodox from an EU law perspective, the 'strategic' consequences of *PIP* are far reaching. The Court in effect has brought notification bodies within the scope of EU (tort) law. Second, it impels us to re-think *Francovich* liability from a doctrine that has largely applied to non-implementation cases towards a more encompassing role with respect to misapplication case-law. Both AG Sharpston and the CJEU envisage state liability in *PIP*. And the same type of argument, presumably, can be extended by analogy to the EU itself albeit not without greater difficulty.[797] At all events, the CJEU, albeit imperfectly, is bringing *sociological* network actors within an overall *liability* regime. This is putting in place, in essence, a Teubnerian cupola of responsibility.[798] The CJEU in effect took the step that the lower German courts were unwilling to take, namely, to recognise the public functions of private actors.[799] However, unlike the French lower Court, this does not rest on a 'delegation' of public powers.[800] Rather it rests on outlining an incipient regime of secondary liability for secondary tortfeasors. While *Boston Scientific* stands for strict-to-absolute primary liability, *PIP* stands for culpability as an excess of discretion thereby aligning the liability of notified bodies with the test for *Francovich* liability and the EU itself as secondary tortfeasors. To a certain degree, one can argue that this is an instance of disguised state liability in the sense that the test is quite close to that in *Francovich* liability.

In our perspective, the rise of rights in legal reasoning, as 'deontological side-constraints' while accepting that there is no such thing as zero-risk, requires compensation where a risk exposure has occurred that threatens important constitutionally protected interests.[801] These protected

[797] Albeit with difficulty, because here the question would focus on the failure to put in place an adequate regulatory framework. There is certain case-law going in this direction in ECHR law, but not in EU law.
[798] Teubner (n 1).
[799] Chalmers (n 108). This gives so-called SSRs their due place within 'public' regulation. The former exclusion of SSRs from liability rested on what Chalmers refers to as a too-narrow definition of the state or public power.
[800] The Toulon Court emphasised delegation as the key trigger for liability, whereas the CJEU does not focus on this aspect. Their approach is more aligned to the functional exercise of powers of sanction an surveillance.
[801] This seems the implicit message in the 'asbestos case-law' even if constitutional rights are never directly invoked (for obvious reasons).

interests or simply rights stand as placeholders for more complex balancing of different discourses.[802] It is a pity that CJEU did not follow this train of thought from *Boston Scientific* to *PIP* in a more overt manner.[803] We argue that this rights-based re-ordering of *prima facie* rights reflects a deeper transformation. First, in *Boston Scientific* the idea that there are certain 'goods', such as human life or the environment on which a 'price' should not be placed and, as such, the concept of reasonable risk-taking is challenged by the idea that *potential* harms should be compensated.[804] It is argued that running an unreasonable risk, meaning a utilitarian calculus often formalised based on the Learned Hand test is insufficient from this precautionary and rights-based perspective. If risk is thought of purely in cost-benefit terms, we might consider this a cognitivization of the law ('economization') by the economic system. However, by treating risk as a question of balancing norms via rights, cognitivization is offset by its encasing in an overall normative framework that aims to develop counter-norms to out-and-out economic reasoning.[805] This 'reflexive' attitude towards risk, meaning a questioning of the concept of prevention, dovetails with our problem of discourse collisions.[806]

Second, it would appear from *PIP* that responsibility for risk is not individualized (individual or organization) but rather a collective phenomenon. Thus, while in *Boston Scientific* legitimate consumer expectations as rights underwrite the precautionary principle, the use in *PIP* of a 'high level of consumer protection' to ground secondary liability this reflects a more general shift towards a risk *society*.[807] Society is emphasised because risk is viewed not in individualized terms, but rather as a collective problem requiring management. Teubner refers to this in terms of a 'cupola' or 'risk networks'; that is, the collective setting in which individual acts take place:

---

[802] In a very similar vein, see Micklitz (n 95).
[803] Reich (n 793) makes this parallel.
[804] *Boston Scientific*, *Urgenda*: www.urgenda.nl/ documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf and http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RB DHA:2015:7196, (10 July 2016) Decommodification but through legal reasoning, rather than the more traditional route of 'command' by prohibition see Calabresi (n 90).
[805] Not without its critics: K Barker & J Steele 'Drifting towards Proportionate Liability: Ethics and Pragmatics' (2015) 74(1) *CLJ* 49 (n 793). Indeed, Markesinis, Deakin & Johnston (n 330) is critical of such an approach also.
[806] This is how Ewald frames the emerging 'precautionary paradigm'. See Ewald (n 92).
[807] Beck (113).

> Individual actors are made responsible for deeds which other actors may have committed. Their responsibility is no longer exclusively connected to actions of their own that caused the damage, but is mediated by the overarching cupola that covers them and other actors. They become part of one and the same risk creating community. …[808]

Teubner argues that all actors should be *prima facie* liable because of they belong to a common risk community. Risk communities are defined by their ability to use techniques of risk management to reduce the possibility of noisome consequences for third parties. However, once a risk community is *sociologically* constructed, *legal* responsibility between the parties to the community requires demarcation. While risk is collective, a normative concept of liability is individualized as distinct from individualistic. Certain parties are primary tortfeasors, others fulfil more peripheral but, nevertheless, important roles. In other words, it is rather unproblematic that producers who place a defective product on the market should be liable for the injuries such products occasion. This is illustrated by the *Boston Scientific* judgment. Far more problematic is the liability of secondary actors not primarily responsible for injury in sense of the normative concept of risk creation.[809] These actors are denoted by Stapleton as peripheral parties to the tort. Stapleton, notably, has provided convincing arguments as to why this approach is misguided.[810] In other words, it is misleading to think of state regulators, or, notification bodies as *respondeat superior* to producers or certification bodies on any variant of a control test.[811] It makes neither economic sense nor is it fair to search for a deep pocket.[812] Yet, while in governance networks the state or notified bodies cannot be considered a secondary actor able to *control* private parties, producers or manufacturers this is not a sufficiently strong argument contra-liability *per se*. In a network, no organization is really behind the tortfeasor – it is a collective failure of regulation.

---

[808] Teubner (n 1). Speaking in the context of environmental liability, but the point is more generalisable.

[809] Outside the sphere of vertical integration or agency (subordination) it is a very attenuated conceptualization to say that the state or certification bodies are vertically vicariously liable for the acts of producers. Although Gallard (n 727) moots this possibility due to their duties under the relevant directive.

[810] Stapleton (n 111). This is how we (re-)interpret her argument. While Stapleton focuses on the individualistic and moral dimension to tort law, we suggest that what her analysis points to is an attempt to make the state liable on an organizational type conceptualisation.

[811] The French courts reached this conclusion by a delegation theory. That is, regarding the certification body, the private body is exercising a delegated public function. This logic, however, is strained and will be increasingly strained the more functional differentiation is embedded.

[812] The latter could, of course, be disputed. Although unless one views the state as insurer of all activities, with all the moral hazard implications, then it is not fair to impose such a burden on a secondary actor.

Yet, nor is it sufficient to simply impose a rule of proportionate liability once a risk community is identified. It fails, likewise, to sufficiently *normatively* distinguish between primary and secondary actors, merging them into one overall organizational structure.[813] Although it is submitted that proportionate liability *tout court* should be avoided, this alone should not blind us to the existence of a governance 'cupola' of which the New Approach is indicative. Indeed, *PIP* strongly indicates that primary liability does not exclude secondary liability. *PIP* outlines a normative concept of secondary responsibility as distinct from favour the more *ad hoc* proportionate share solution.[814] In short, merging private actors and public regulators into a single corporate entity whether based on an organizational model of liability or as an *ad hoc* solution is misplaced and misleading.[815] But *PIP* avoids such a merger by providing for an independent tortious basis of recovery outside of a concept of delegation or control.[816] What emerges is a type of horizontal vicarious liability.[817] This concept of horizontal vicarious liability is useful insofar as it emphasises the secondary position of the purported tortfeasors.[818] In this vein, Teubner distinguishes the two types of vicarious liability:

> What we find in these constellations is an asymmetric collective responsibility, a kind of 'horizontal' vicarious liability. With 'vertical' vicarious liability in hierarchical organizations, employers are made responsible for the actions of their employees. Here the law, by imputing causation where no causal link can actually be proven, makes on [*sic*] individual vicariously responsible 'horizontally', for wrongs that have been committed by some other members of a group of actors.[819]

---

813 This is our understanding of the controversial *Sindell* 'market share' liability.
814 *ibid*. See Coleman (n 20) ch 19.
815 We end up focusing on the wrong questions; for example, whether the state or the private actor is the right addressee of liability B Van Leeuwen 'An Illusion of Protection and an Assumption of Responsibility: The Possibility of Swedish State liability after *Laval*.' (2012) 14 *Cambridge Yearbook of European Legal Studies* 453. Focuses on the question as to whether the state is *really* behind a private regulatory regime and the consequence, according to that argument, that the state should be liable where it is. However, per our argument this is an organizational perspective on liability looking for the 'firm' or 'state' which is ultimately responsible not adapted to the network context.
816 The one hint at a type of proportional liability approach is the unusual *pro tunc* element in AG Sharpston's Opinion, which was not accepted by the CJEU.
817 His terminology is unfortunate because the doctrine of vicarious liability, at least the common law, is predominantly conceptualised as a servant's tort. In other words, it is a question of imputing the acts of others to a 'superior' demarcating the boundaries of organizational responsibility.
818 Teubner (n 1).
819 *ibid*.

To be sure, in our *PIP problématique* the primary responsible actor for harms caused by product failures is the manufacturer. However, according to our network argument the state or bodies that fulfil regulatory functions in their secondary role bear certain responsibility by their contribution to the harm suffered in circumstances where its inaction or negligent action enhances a risk of harm. There are two torts – that of the primary tortfeasor and that of the secondary tortfeasor, independent but linked because of our conceptualization of the problem as one of belonging to a risk management network. This of course focuses attention not on causation, as such, but rather on demarcating the scope of the 'the duty of care', and the relevant standard.[820] This means a greater emphasis on positive duties to regulate analogous to positive obligations on states in ECHR law.[821] Once these positive obligations are accepted in principle, the question turns to developing a control test capable of reviewing the exercise of regulatory discretion considering the conflicting rights in question.

Of course, from a private law perspective, this 'publicization' of tort law can be viewed as liability for failure to confer a benefit. Indeed, the distinction between misfeasance/nonfeasance is already straining under the influence of human rights law.[822] Culpable inaction in *PIP* perhaps signals the future for a hybrid public tort of negligence and it parallels the idea of 'sufficiently serious breach' as a 'manifest and grave' excess of discretion. This in turn shifts emphasis from the conferral of a right, which is easily found, to the circumstances in which its breach is determined. This may also be the future *vis-à-vis* state liability where manifest and grave appears quite close to the *PIP* test.

From a private law perspective, it should be noted that this effectively downplays the role of causation. *Boston Scientific* dramatically show how in certain circumstances the requirement to prove specific harm is vitiated. In *PIP* there were doubts expressed by the German lower court on the same question. The influence of Charter rights-based reasoning, the normative idea of a high level of consumer protection or consumer expectations, abstract in the end from the individual of classical tort law – she is *mandataire*. This is to be expected, it is submitted,

820 See L Hoffmann 'Causation' (2005) 121 *LQR* 592. But not in line with who should pay but problematizing inaction if based on partial discourses.
821 See *O'Keeffe v Ireland*, [2014] ECHR 96.
822 *ibid*.

once the shift is to the issue of discourse collision as the reflexivity of risks. Now, as Ewald correctly notes, in what we refer to as the 'society of organizations' risk replaced fault as the main reason for attributing responsibility. However, until relatively recently the classical notion of cause remained important. Once a duty of care was admitted, the question turned to duty and standard of care, the latter determined according to running an unreasonable risk that *caused* harm to another.[823] The idea was that it is she (read: 'it', the organization) who 'causes' harm by setting in train an unreasonably risky activity that should be liable when that activity results in harm to an individual. While this approach, certainly, looked beyond individual conduct towards enterprise activities, the necessity of demonstrating cause and actual harm remained. In other words, liability for business risks still rested on a concept of moral responsibility even if it stretches the concept of agency beyond individuals to organizations.[824] However, today the evolution of causation, indeed, reflects a change in paradigm towards imposing liability for *enhancing a risk* alone.[825] Such an approach which makes the enhancement of a risk the 'gist of negligence', as distinct from causing a harm, by necessary implication greatly expands the number of potential tortfeasors.[826] In this respect, *Boston Scientific* is indicative whereby liability was imposed for economic losses where specific harm was not proven. This is probabilistic causation, forming part of a general shift towards liability without proof of specific harm. The harm in question is, in effect, the exposure (meaning enhancement) to a risk resulting in (economic or physical) losses. If enhancing a risk can justify the imposition of liability, then, it applies potentially to multiple tortfeasors. The 'asbestos case-law' in the UK demonstrates how liability was imposed based on increasing a risk of harm to multiple tortfeasors.[827] A strict application of the doctrine of causation is set aside in favour of balancing the rights of claimants against respondents, where this is sufficiently pressing, with those of the claimant coming out on top. Thus, instead of focusing on the question of

---

823 This is a simplification, often questions such as duty, cause in law or in fact, and standard of care become entangled.

824 And, thus, simultaneous achieved collective goals see Micklitz (n 95) on the dual nature of the legal subject in 'the social'.

825 Teubner (n 1).

826 *ibid*, Teubner pinpoints the practical effects: '...whenever the law loosens legal requirements for causation-in-law it is necessarily creating constellations of collective liability. Individual actors are made responsible for deeds which other actors may have committed. Their responsibility is no longer exclusively connected to actions of their own that caused the damage, but is mediated by the overarching cupola that covers them and other actors. They become part of and the same risk creating community. ...'

827 The obvious difference was that the injured party died of cancer in the asbestos case-law. However, the approach towards causation is quite similar.

reasonable foreseeable harm the courts instead invoke directly a balancing of rights, which in the circumstances allow for a relaxation of causal rules. Duties of care are imposed based on right-based reasoning that pins liability as turning on questions of risk enhancement. In other words, it is, controversially, the risk itself which forms the basis of liability rather than the harm caused in both cases.[828] The limits of liability are developed by clearly demarcating the duty of care – defining the proper addresses of rights.

B. REINVENTING *FRANCOVICH*: TOWARDS A NEW PARADIGM OF SECONDARY LEGAL RESPONSIBILITY

The basic claim is that given the impetus judgments such as *PIP* provide towards heightened secondary liability in EU law, but taking account of the existing limits of liability of non-state supervision in this hybrid context, state liability case-law can offer guidance to national courts in delimiting grounds and bounds of liability. In this way, state liability case-law can be used as a template to experiment and develop a liability law that can cross-pollinate the national jurisprudence. This requires a rights-based re-orientation in *Francovich* liability cases. This table might assist in summarizing our argument to this point going from twentieth- to twenty-first century tort law:

[828] Barker & Steele (n 820).

Different Dimensions	**Twentieth-century**	**Twenty First-Century**
Risk	Risk Creation	Risk Contribution (enhancement)
(Eigen)structure/Knowledge Base	Organizational	Network
Cognitive/Normative	Balancing 'groups' equities.	Balancing rationalities/discourses.
The Addressee of Liability	Individual tortfeasor as part of an organization	Individual or organizational tortfeasor as part of a Network
Duty of Care	Victim v Organization: the social (aggregative efficiency and social justice)	Right-holder as placeholder: balancing normative orders
Standard of Care	Strict	Bifurcation: strict v sufficiently serious breach/ 'manifest and grave breach'.

In brief, radicalization of risk leading to a move from a concept of risk creation to that of risk contribution or enhancement, the change of knowledge base from an organizational to a network frame for liability and, third, internal to the law rights-based reasoning supplementing policy arguments but also the framework in which balances is achieved.[829] It is our claim that

[829] We have in mind a process-based concept of law. H Collins describes this 'sociological' way of thinking about law clearly in his 'The Voice of the Community in Private Law Discourse' (1997) 3(4) *ELJ* 407, 410: 'It is reflexive in the sense that the law seeks to support transactions, associations, and other economic activity by understanding the functions and needs of such activities and then producing regulation that channels those activities. It is recursive in that legal regulation responds to alterations in social practices, and social practices in turn respond to developments in legal regulation. Out of this picture of private law emerges a conception of private law which emphasises processes rather than the application of entitlements, the dynamic evolution of legal doctrine rather than its fixity, and its close interaction with social practice rather than its autonomous doctrinal logic.' Citing G Teubner 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review*

Francovich liability ought to be re-positioned within the context of these three evolutions affecting the (tort) law, and that a new tort law may quite well be emerging – a tertiary re-modelling based on these irritations. It was argued that rights-based reasoning is a response to cognitivization, one that places limits on end-dependent arguments by counter-posing other interests non-reducible to a single, scalar approach.[830] This re-normativizes the law by placing backstops on dominating discourses by placing such cognitivizing discourses in a normative framework, which according to Gerstenberg leads to an experimental and discursive case-law approach aimed at unblocking 'partisan' tendencies in the post-state context.[831] From our perspective, the mix of arguments in *Boston Scientific* can be viewed through this lens. The greater openness of EU law in recent years towards balancing fundamental freedoms and fundamental rights is indicative of such an approach. The economic freedoms are re-interpreted or complemented by a social, political and environmental interpretation of EU law.[832] Second, in the previous section we examined how the organizational model of liability of the twentieth-century can be supplemented by a network approach to understanding liability law captured by Teubner in the metaphor of the cupola. Arguments based on dismissing 'secondary tortfeasors' as too causally remote from, or not sufficiently proximate to, an injury underestimate the degree to which secondary actors form part of an overall regulatory architecture. This overall regulatory architecture means that it is plausible to consider these actors as forming party of a risk management community. The relevant question is what principle of liability can take cognisance of their precise secondary role rather than merely discounting liability outright.

Third, the evolution of how we perceive risk is intertwined with that of the society of networks. As well as problems of calculability, risk creation is replaced by risk contribution or enhancement in the tort law of the society of networks. Risk contribution abstracts from causation as causing a specific harm whether by direct or indirect means (strict liability as liability for creating a risk) as traditionally understood. It is sufficient that a defendant contributed to a harm, real or potential, leading to adverse physical or economic consequences for the purposes of liability. This is not only a regulatory turn in tort law, but one linked to

239. In the language of systems theory, this means cognitive openness of the law, without its reduction to other discourses.

830 Most clearly argued for by Kennedy (n 651).

831 This is very close to Brüggemeier (n 2) see his general introduction. Gerstenberg (n 544) this is a process-based view of the law.

832 Comandé (n 796), Reich (n 580). Recently, Carr (n 651) provides an interesting argument in this direction.

constitutionalization in the sense that tort law is re-oriented to take into account certain basic rights that cannot be priced according to an economic calculus.[833] This means that long-term effects can be treated by tort law because it is sufficient that a risk is enhanced as distinct from proving a specific causal link.[834] This does not mean that this entails an automatic right to compensation, this depends rather on the rights engaged and the importance of their protection as *Boston Scientific* illustrates.[835] Therefore, the question goes back to the existence of a *prima facie* duty of care. However, that rights-based thinking leads to a looser risk-enhancement underlying justification for liability (failure to manage risk leading to its enhancement, in other words) is patent. It should be re-emphasised at this point that whereas Teubner states the concept of a common risk community, the concept of risk enhancement is meant to justify horizontal secondary liability; it is not meant to indicate that secondary actors are 'peripheral' in a sociological sense – rather, they are secondary actors in a normative or legal sense. In other words, the law should still differentiate between primary risk bearers and other actors who while sociologically form part of a risk community, when translated into legal discourse require a different treatment from primary tortfeasors. In legal terms, the opposite of 'organized irresponsibility' is not necessarily total legal responsibility: for the law to maintain its autonomy as a coherent and justifiable normative enterprise, it is argued that these differences should be stressed.[836] Without this normative dimension liability is imposed *ad hoc*, which cannot withstand scrutiny. In the context of heterarchical risk regulation with significant self-regulation, the possibility of liability should be a real one for secondary regulators such as certifiers and the state but should consider, that from a normative perspective, their failure is that of failing to confer a benefit on individuals rather than liability for a positive act. It should be confronted openly by greatly expanding the law of affirmative liability. In this respect, rights-based reasoning disrupts the ordinary course of tort law re-shaping who should bear risks

[833] On complementarity regarding *ex ante* and *ex post* regulation see Shavell (n 15), Cafaggi (n 16). However, the extent of recovery evidenced in judgments such as *Boston Scientific* go beyond simply a question of internalization and indicate what might be called 'de-commodification'.

[834] Clearly illustrated in the asbestos case-law in the UK although often critiqued. See, *inter alia*, Markesinis, Deakin & Johnston (n 330)

[835] And this is increasingly filtered through precautionary principle-type thinking. *Boston Scientific*, and more dramatically: *Urgenda*.

[836] Beck – concept of organized irresponsibility seems applicable in governance networks where a large network of actors has emerged, without clear legal duties. See U Beck *Ecological Politics in an Age of Risk* (Cambridge, Polity Press, 1995).

re-allocating risks or rights largely on the basis of imposing affirmative duties.[837] In short, causation and duty of care is interpreted in the light of fundamental rights. In this way, rights-based reasoning underlies the move from risk creation to risk enhancement by providing stronger recovery against secondary actors. However, this rights-based reasoning by too close a focus on its language of individuals obscures the fact that rights-based reasoning it is re-engineering tort law to a society of networks because in a network society loser rules of causation mean that a cupola or umbrella of liability is created. Stronger individual rights mean greater accountability of networks and the balancing of discourses comes to be an important function of the law. State liability can be seen as a matrix through which the various controversies pass. Its expansion in recent years represents what might be referred to change of understanding in the relative role of the state in an overall regulatory architecture. *Francovich* might be re-contextualized in this way, greater emphasis given to its right-based justification as a motor for its expansion to deal with cases such as *PIP* in which the state (or even potentially a 'private' party) has failed, *arguendo*, to adequately supervise a market enhancing a risk. To date, it is largely limited to a role regarding non-implementation of EU law rather than its misapplication. This fits with its conceptualisation as a residual remedy. But its potential, it is submitted, extends far beyond such a role.[838] Indeed, it can serve as an irritant with regard to national law, realigning rights and duties.[839] In the EU legal order, this takes on a multilevel dimension in which particularistic national tort law and EU law, with its 'unblocking' tendency, interrelate. Because the EU is a multilevel order, a fully-fledge and, most importantly, conceptually coherent European tort law architecture is required since the emerging *eigenstructures* such as the New Approach are trans-European. Therefore, a European tort law is required that can set minimum standards of liability that serve to 'irritate' national tort law. National tort law alone cannot create rules for the whole union. Suffice it to say, our vision of *Francovich* liability is that of an irritant provoking national courts to re-evaluate the scope of protected interests (duties of care) and the standard of care applied. Rules of secondary liability are required additionally for 'regulatory intermediaries' namely bodies

[837] These, risks and rights, are of course conceptually distinct but what is acceptable risk increasingly influences the distribution of rights i.e. through ambiguous standards such as legitimate expectations regarding safety see *Boston Scientific*. In this regard, a dramatic recent example is *O'Keeffe v Ireland* where the ECHR held that art 3 positive obligations meant that the Irish state failed in duty to put in place an adequate regulatory framework for reporting sexual abuse against primary school students given the nature of the risk involved.
[838] Reich (n 594) was first to identify this potential.
[839] And, of course, to date to limited effect: Condon & Van Leeuwen (n 795).

such as notified bodies who fulfil mostly pre-market regulatory functions, but sometimes are involved in post-market surveillance. For those actors once rights and duties are realigned according to a broadened, rights-based interpretation of EU law, *Francovich* liability can set the relevant conditions of liability by analogy with the conditions of liability for the state. From our perspective it can serve as a template for state and quasi-state function liability. State liability can be viewed as a way to create a regime of liability for peripheral parties in a network, mediating via rights-based reasoning the collision of discourses encountered in such cases, as well as doing individualised justice, by means of a 'publicization' of the law of torts. It is to this subject we now turn our attention.

1. Francovich: General Context

It might be considered, thus, from the foregoing analysis that European law embodies a constitutional, regulatory, and private law dimension. While private law is encased and instrumentalized for the purposes of the Internal Market, we submit that its distinctive characteristics suggest that the private law is not entirely submerged (sufficiently serious breach as an analogue to fault, for example). Thus, we imagine *Francovich* as at the cross-roads of these dimensions to European law. Its interaction with national private tort law, means that in the ideal it forces national courts to re-evaluate trade-offs between competing policies more exactingly, taking more seriously individual rights in their internal and external dimensions.[840] This public law of torts has the potential to review national legislative and, more importantly, administrative actions, and it will be argued analogous action by non-state but nevertheless private regulatory actors. Schepel has argued that the greater the extent of deregulation the greater the need for tort law to be oriented to questions formerly the purview of public law, going beyond simply the protection of negative liberty; *Francovich* offers a potential route to this end.[841] However, it is relatively under-utilised in this respect and

[840] Internal dimensions – the traditional role of individual rights in vertical situations. External, their role in maintaining fragile symmetries.
[841] H Schepel (n 720).

represents what Reich and Micklitz have called, a 'sleeping beauty' in European law.[842] In other words, in light of the growing influence of rights-based reasoning on European law and, indeed, on tort law, it is argued that *Francovich* should be read in light of these fundamental rights found in both primary and, increasingly, secondary law in a similar way to which free movement law has been enhanced by virtue of a Charter rights.[843] That is to say, the rights at stake should lead to greater scrutiny of their protection by states and this will manifest itself at the three stages of the *Francovich* test. This means that whether a right is conferred, whether a breach is sufficiently serious and whether a causal link is demonstrated needs to be ensconced in the context of the important rights at issue. By stressing the underlying rationale of *Francovich* liability, as found in the Opinions of AGs Mischo & Tesauro in *Brasserie* it is argued that, already, we find incipient arguments that can justify such an approach. This might lead to a Europeanized law of torts, per Van Gerven, capable of approaching the complexity of the problems raised in a society of networks, problems evident in liability outlined above under the New Approach.[844] The tendency to re-formalise tort law, by anchoring it in a concept of the rule of law, while it remains instrumental, the particular rule of law in issue is the rule of European regulatory private law, is present in *Francovich* jurisprudence, indeed it can be traced back to its very conceptualisation by AG Tesauro, and will become increasingly important in the coming years. We will examine the conditions of liability in turn.

[842] It might be argued that its original intent was simply to sanction an errant state and the purposes that we imagine for *Francovich* liability go beyond its original purposes in a fanciful way. However, paraphrasing a wise old jurist, rules find different justifications in different (historical) contexts. Thus, it might be considered that given the accelerating process of de-regulation/re-regulation and its impact on the role of the state and private actors, it is timely to re-imagine a newer role for *Francovich* in the best Holmesian tradition. OW Holmes (n 12) 3,4. This holds especially in a polity with an evolving legal system such as the European Union.

[843] This is discussed in Craig & De Búrca (n 808).

[844] Van Gerven's unaccomplished vision, found in several articles and in his *Banks*'s: Opinion of 27 October 1993 in C-128/92 Banks [1994] ECR I-1212; W Van Gerven 'Private Law in a Federal Perspective' in R Brownsword et al (eds) *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011) 337. Notwithstanding its 'minimum rules of liability' conceptualization, this is minimum to achieve the *effet utile* and, as such, such an open-ended doctrine provides substantial scope for its development, all things being equal.

2. Conferral of a Right: Redistributing *Prima Facie* Rights and Duties

Francovich liability does not rest on a *schutznorm* theory.[845] The Court looks beyond the individual as such, to the overall aims of the Internal Market when determining whether a right is conferred. The individual is at least in part a placeholder: whether a right is conferred is not *primarily* a question of whether the individual belongs to a protected class, but whether the effectiveness of EU law requires the grant of an individual right. The individual is a functionally subjectifed to serve the ends of EU law.[846] This concept of effectiveness has been interpreted narrowly, because *Francovich* has been viewed, to date, as a residual remedy. It is a residual remedy aimed at embedding the 'new legal order' when primary methods of decentralized supervision fail, namely, where there is an absence of direct effect usually due to late implementation of directives.[847] Hence, it is a way to ensure EU law is implemented and the individual is a conduit to this end.[848] In most cases, then, state liability in damages is based on effectiveness of EU law as a tool to ensure EU law is implemented by member states through their courts in accordance with the requirement of judicial cooperation.[849] The Court has rarely thread into cases of misapplication of EU law.[850] In recent years, as has been noted, it is accompanied by more rights-based reasoning, which has largely focused on the idea that individuals *qua* individuals require 'effective judicial protection'.[851] The effectiveness justification meant that in circumstances in which the claimants could not avail of the direct effect of EU law they were not left unprotected.[852] This individualistic patina means that an

845 S Prechal *Directives in EU Law* 2nd edn (Oxford, OUP, 2005).

846 M Rüffert, 'Rights and Remedies in European Community Law: a Comparative View' (1997) 34 *CMLR* 307.
847 This is combined with C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585.
848 Prechal (n 1007) succinctly describes this perspective without endorsing it: 'Where the ECJ says that rights are created for the benefit of the individual, it is not so much concerned with the protection of the interests of the individual as such, but rather uses or mobilizes the individuals for the enforcement of Community law.' (180) Of course, as Prechal notes this can be turned, then, to diverse purposes N Reich (n 594).
849 Joined Cases C-6/90 and C- 9/90 *Francovich and Others* [1991] ECR I-5357.
850 eg Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* (Haim II) [2000] ECR I- 5123.
851 The precise relationship between effectiveness and rights-protection is complex. A good attempt at giving this question analytical precision is Comandé (n 796). T Eilsmanberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *CMLR* 1199 notes a tension that runs through EU law in terms of the use of effectiveness. We might pose it in our context thus: is it effectiveness of the legal order (and hence, for example, the link in *Francovich* to judicial cooperation) or the effectiveness of rights-protection. Hence, the attempt to frame EU law in terms of the rule of law e.g. AG Tesauro in *Brasserie*. Comandé might argue that these are distinct tributaries flowing into the main river of EU law and its development.
852 This was made explicit in *Brasserie* at para. 20 'The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is

argument can be made to equate conferral of a right with the notion of protected interests as a subjective *schutznorm* theory.[853] However, we argue that the objective *schutznorm* approach is more productive in terms of our concept of horizontal rights protection, because it abstracts from the individual to the overall aims of EU law in such a way that the deeper tensions between discourses can be problematized with individual rights constituting 'strategic public interventions'.

Indeed, up to now, conferral of a right has been treated capaciously.[854] It is capacious because, in general, classical EU law has been more concerned with the question of 'invocability' (supremacy and direct effect) than with the question of the protection of individual rights.[855] The latter has been conceptualised as incidental to the main aim of the Court, namely ensuring that 'objective' Community law can be relied on in national courts.[856] The content and meaning of individual rights in EU law has remained under-determined.[857] For example, in *Francovich*

---

not sufficient in itself to ensure the full and complete implementation of the Treaty. ...As appears from paragraph 33 of the judgment in *Francovich*, the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.' This gives rise to the impression that the conditions of liability are less stringent than those for direct effect, but see S Prechal 'Member State Liability and Direct Effect: What's the Difference after All?' (2006) 17 *EBLR* 299, and that they are subsidiary. However, as regards to the subsidiary claim we know that doctrines once 'announced' can take on a life of their own. W Van Gerven 'Of Rights, Remedies and Procedures' (2000) 37(3) *CMLR* 501 'views the state liability conditions of liability as generalizable for all breaches of EU law, a means to give life to the principle of '*ubi ius, ibi remedium*'.

853 Prechal (n 1007).

854 Because it is not a clear test, it allows significant scope for judges to develop the law. See S Prechal (n 1007) For good *précis* of the general point made also by Prechal see M Tison (n 580), 21: 'Traditionally, the case law of the European Court of Justice witnessed a quite flexible approach as to this requirement: while directly applicable EU rules will per se satisfy the conferring rights-test, the opposite does not necessarily hold true: the EU rule concerned can be considered to confer clearly identifiable rights to private individuals, and hence trigger *Francovich*-liability, even if it does not satisfy the conditions of direct applicability, i.e. worded in a precise and unconditional way such as to allow private individuals to invoke them directly before the courts.' (citation omitted)

855 Although as Micklitz notes, there is a strand concerned with protecting individual rights, understood as fundamental rights going back as far as *Internationale*. HW Micklitz 'The ECJ Between the Individual Citizen and the Member States: a Plea for a Judge-Made European Law on Remedies' EUI Working Papers LAW 2011/15.

856 Eilsmanberger (n 1013) refers to what we call 'classical EU law' as 'first generation' EU law. With regard to first generation case-law, prominently *Van Gend en Loos*, *Costa v ENEL*, Case 11/70 *Internationale Handelsgesellschaft GmbH* [1970] ECR I-125, Case 106/77 *Simmenthal SpA (No 2)* [1978] ECR 629, Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd* ('Factortame I') ECR 1990, Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, and even, Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, [1995] ECR 14599 and Joined Cases C-430 & 431/93 *Van Schinjdel & van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR 1-4705. Eilsmanberger notes: '. ...these cases clearly further increased the effectiveness of (directly applicable) EC law and strengthened the principle of supremacy. They removed yet another hurdle for the application of Community law and the setting aside of incompatible domestic law by national judges. *While these cases also enhanced individual rights protection, this, again, appears to have been a more incidental effect*.' (1212) (citations omitted, emphasis added)

857 Eilsmanberger (n 1013).

the Court's test resembles that for direct effect. In *Brasserie*, the Court uses the expression 'conferral of a right on an individual' but does not give much precision to what this implies, noting merely that it must be interpreted broadly.[858] These uncertainties might be considered a boon because given the doctrinal uncertainty concerning rights-protection it might prove more plastic to 'the felt necessities of the time'. In our time, this is the requirement of recasting law in terms of explicit rights-based reasoning and treating the vexing problems outlined in the previous sections by these lights. The lack of precision regarding what 'conferral of a right' means is borne out in the case-law concerning this condition. Indeed, *Brasserie* seems to explain the circumstances in which a right is 'intended' to be conferred on individuals based on its unconditional and precise nature. This is, in effect, to rely on the 'objective' law as distinct from a theory of subjective rights in public law.[859] In other words, the question of protective scope of a provision is at most a secondary concern. What is important, rather, is the effectiveness of EU law.[860] Additionally, when applied to competition law cases it is treated particularly broadly.[861] Such flexibility is attractive when we consider the non-individualistic horizontal rights protection as 'strategic public intervention'. Thus, the 'creation' of rights concerns the primacy of European law as opposed to the primacy of the individual, which might

858 Later made consistent with EC liability in Case C-352/98 *Bergaderm* [2000] ECR I-5291

859 Reich (n 594) notably, contrasts the approach in EU law to Jellinek's conception of the circumstances in which legislation gives rise to subjective rights. Reich argues, along with Prechal, that EU is going in a similar direction but this claim remains disputable. While Tison (n 580) is correct when he argues that *Paul* should be treated more than simply an '*incident de parcours*', we submit that the Prechal-Reich argument overstates *Paul*'s significance. In particular, although we object to its reasoning even in the area of financial services, it might be argued that it is confined to its subject-matter given the policy difficulties involved in the liability of public authorities in this area *eg* moral hazard, or, the idea that the market economy requires risk and, as such, providing a remedy undermines at least to some degree this logic. Indeed, the latter argument could be extended to all tort actions regarding financial loss. See Deakin & Markesinis (n 523). For such an argument, P Giliker, 'English Tort Law and the Challenge of *Francovich* Liability: Twenty Years on' (2012) *LQR* 541.

860 Eilsmanberger (n 1013) draws out this conclusion: 'This reasoning is remarkable and revealing (*Brasserie*, R-C). It should be remembered that in the case law referred to by the Court, the capacity of the cited two internal market provisions to create individual rights was derived solely from their sufficiently clear, precise and unconditional wording, and their resulting aptitude to be directly applied. The conclusion that rights created in this manner also satisfy the condition that the rule must be "intended" to confer rights does, in my view, prove beyond doubt that the rights protected under the State liability doctrine are not to be determined by the concrete legislative purpose or protective scope (*Schutzzweck*) of the Community rule in question. The legislative intent to safeguard the interests of the injured party or to prevent the damage at issue from occurring is therefore neither a *legal foundation* of this type of liability nor a means to somehow *restrict the scope* of this remedy. This omission is surprising, as the protective scope of the infringed provision is taken into account in determining Community liability under Article 288 EC. The disregard of the protective scope of the injured provision also explains why no directions are given to determine legislative intent. It may also explain why the Court did not deem it necessary to specify that the rule in question conferred a right to the claimant in question but contented itself with concluding that it conferred rights to individuals in general.' (1225-1226) (emphasis added, but not italics)

861 *Courage*, *Manfredi*. That 'any individual' may be the subject of rights.

be considered a tension running through EU law.[862] It is a tied to the question of primacy rather than individual rights as *droit subjectif*.[863]

However, in recent years the individual has been elevated somewhat to the point of keystone in the Union's legal architecture by tying rights protection to the rule of law.[864] This renewed emphasis on the individual re-focuses our enquiry to the question of the scope of her rights and how they might be divined.[865] The answer, in short, supposes her rights are divined through the purposive interpretation of EU law. Effectiveness has been transformed into a principle of 'real and effective judicial protection.'[866] Additionally, it is clear that this stresses the horizontal dimensions to collisions as much as the idea of individual right protection. It has even been argued that the economic freedoms contain a hidden citizenship dimension, and hidden or otherwise, it is increasingly common for the Court to refer to explicit fundamental rights or citizenship-based justifications as aids of interpretation, as it were, leading to the conferral of rights on individuals in EU law.[867] Combined with a more intensive review of a member states' procedural competence, these tend to re-distribute rights and duties disguisedly or overtly depending on whether the rights-based reasoning is overt or concealed.[868] Reich argues that viewed in terms of generations of law, the CJEU has progressively been strengthening social and citizenship-based case-law and, no doubt, this is set to continue.[869] This provides, it is submitted, the potential for a Gerstenbergian discursive space to problematise the aims of directives more openly, while embedding them in a rights-based normative framework. Rights, as we argued already, are Janus-faced.

---

862 There is considerable ambiguity surrounding the issue of rights creation in EU law which will be discussed below in relation to *Paul*. For a detailed analysis see Prechal (n 991) ch 6.

863 Samuel (n 59) defines *le droit subjectif* in contrast to *le droit objectif* before pointing out that the former is alien to the British tradition. Extensively discussed in the European context by M Rüffert, 'Rights and Remedies in European Community Law: a Comparative View' (1997) 34 *CMLR* 307.

864 Lengthy discussion, T Tridimas *The General Principles of EU Law* 2nd edn (Oxford, OUP, 2006) ch 1.

865 Or as Prechal (n 991) puts it, 'The key question in Community law is, in my opinion, not so much whether there should be a protective scope doctrine. It is rather how strict that protective scope should be.' (180) (citation omitted) We think Prechal's claim that there is 'developing' a *schutznorm* theory is largely a response to Eilmansberger's provocative article in which he identified its total absence from EU law. Prechal attempts to give a greater certainty to EU law.

866 See Craig & De Búrca (n 808).

867 Comandé (n 796) discusses both the implicit and explicit dimensions to fundamental rights protection in EU law tracing their *fons et origo* to *Internationale*. For a similar reconstructive exercise with regard to remedies see Micklitz (n 992).

868 *ibid*. Comandé, citing Caruso (n 764), notes the apparently neutral language of private law (here, he means the economic freedoms) re-distributing rights and duties, as a means to avoid contentious political disputes over which there is considerable disagreement in Europe.

869 Reich (n 594).

Through this reading of *Francovich* liability, it allows for a re-allocation of *prima facie* rights and duties in EU law unsettling national patterns that are more restrictive in terms of conferring rights or protected interests on individuals. There are in national law, at least, thought to be strong policy arguments against wide-ranging rights against the state which legitimate *prima facie* policy bars to recovery.[870] In this sense, it is similar to the *Osman*-jurisprudence of the ECHR by allowing for removing policy bars to recovery while not determining the outcome of a case. The rule of law conceptualisation is buttressed by drawing on the role of rights protection within the legal architecture of the EU.

Dillenkofer is illustrative of this effects and right-based reasoning whereby rights were implied from the aims of a directive.[871] It is apt to convert aggregative into distributive principles.[872] In brief, the case concerned holiday-makers who were burdened with costs associated with the bankruptcy of a travel agent. These included the underlying principal in those cases in which the holiday-makers did not depart on their holiday and for those holiday-makers who did, the cost of return flights. In *Dillenkofer* the Court held that the Directive 90/314/EEC ('Package Holidays') provided for a reallocation of risks between consumers and sellers through a purposive reading of its recitals and its Article 7. Failure to enact legislation in a timely manner frustrated an aim of the Directive. Both the Opinion of AG Tesauro and the Court in their interpretation of the Directive divided-out, as it were, the aims of the Internal Market and that of consumer protection.[873] The fact that the legal basis of the Directive is the completion of the Internal Market, article 100a, does not mean that a second aim cannot be consumer protection understood as a distinct aim of the Directive conferring rights on individuals.[874] The relevant question is whether the purpose of the provision in question, Article 7 of the Directive, aims to protect consumers against the risk of travel agent insolvency.[875] An underlying purpose of the

---

870 Of course, this is more pronounced in certain traditions than in others e.g. UK, Ireland, and Germany. Whereas, in France, for example, the standard of care tends to be used more often as a control mechanism or indeed causation.

871 *Dillenkofer* might be read in light of Reich (n 594) who argues that the social, among other interests, is given a progressively greater role in European law.

872 C Harlow, 'Francovich and the Problem of the Disobedient State' (1996) 2 *ELJ* 199.

873 Opinion of AG Tesuaro (28 November 1995) paras 11-13 esp.

874 AG Tesauro. para 13 '...that the fact that the rules laid down in the directive are intended to protect other interests as well, in this case the freedom to provide services in the sector in question, does not of itself preclude their being rules adopted for the protection of individuals.' See also para. 39 *Dillenkofer* judgment.

875 art 7: 'The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the reparation of the consumer in the event of insolvency.' This information duty, fits the 'market paradigm' of the informed consumer but is clearly redistributive in terms of rights and duties from the anterior regime in which no such duty existed – *caveat emptor*.

Directive is to reallocate who should bear the risk of insolvency and this informs the interpretation of article 7. This is brought out clearly by the Court:

> The purpose of Article 7 is accordingly to protect consumers, who thus have the right to be reimbursed or repatriated in the event of the insolvency of the organizer from whom they purchased the package travel. Any other interpretation would be illogical, since the purpose of the security which organizers must offer under Article 7 of the Directive is to enable consumers to obtain a refund of money paid over or to be repatriated.[876]

Consumers, therefore, are conferred rights under the Directive. This purposive interpretation of the Directive, means that conferral of a right for the purposes of *Francovich* goes beyond a *schutznorm* approach allowing for easier redistribution of tort rights and duties than in national law based on the distribution of risks involved. In other words, there is no obligation on claimants to show that they belong to a particular protected class; it is sufficient that they are consumers. The Court's interpretation of the Directive is assisted, however, by the relatively clear wording of Article 7, which is evidently aimed at protecting the consumer. It remains to be seen how far this type of approach can be extended. Nevertheless, it allows for the discovery, as it were, of a right in circumstances in which it is less than clear what the exact content of that right implies because it was unclear what particular measures should be put in place to effectuate consumer protection.[877] It was an obligation of result, leaving the means to achieve the result to the Member States. This does not excuse member state inaction or render the right less certain, however, according to the Court. Second, it relies on a particular methodology that distinguishes aims of a directive in a way that might be propitious towards the development of a case-law more attuned to rights-based arguments re-balancing rights and duties in EU law. Harlow argues that these rights represent the conversion of aggregative into distributive principles with tort liability as the means by which this occurs.[878] This 'gets around' a

[876] para 36.
[877] In this sense, it was very similar to the facts in *Francovich*, a point which the Court noted.
[878] Harlow (n 1034). Harlow borrows these concepts from B Barry *Political Argument* (London, Routledge 1965), ch 3. According to Harlow 'Barry distinguishes 'distributive' from 'aggregative' political principles according to whether *collective* or *individual* interests are involved. Aggregative principles are those relating to the collective consumption of goods enjoyed by and benefiting the community or a substantial section of the community. Distributive principles, on the other hand, refer to that share of the collective goods that individuals have for themselves.' (4) Harlow also analogizes that this roughly traces the division between public and private law. Harlow continues that public law involves balancing of interests over the allocation of collective goods which 'is an inherent feature involving the state and public bodies.' (4) Tort law, Harlow considers, is now performing a

traditional problem in tort law, namely, its inadequate protection of public goods.[879] That is to say, collective principles about the public good, for example, environmental or consumer protection standards are converted into rights which can be invoked by individuals before courts.[880] Harlow views this as a feature of the developed consumer society in which individuals expect the state to fully protect them against risks.[881] This involves a form of responsibility for the management of risks which is transfer from the individual to the state. Harlow considers that the use of tort law to these ends which has occurred at national level and now occurs at the transnational level is exacerbated by the use of rights, and is inappropriate and distorts its corrective justice basis.[882] That argument is potent as an explanation for what is occurring not just in national law but before the Court of Justice. However, it is also true that the demands of corrective justice require re-thinking considering multiple responsible parties. Secondary liability via *Francovich* with its onerous conditions allows for this.

But if it is a first step in this direction, it is a tentative one. Most *Francovich* cases to date have concerned direct breaches of Community law i.e. non-implementation. In misapplication cases, indirect breaches in Eilmansberger terms, the Court has not found individual rights but per *Paul* follows a subjective *schutznorm* theory. As Tison argues there is no reason, in principle, as to why recovery in mis-application cases should be precluded. As he argues, *Schmidberger* demonstrates how it is not simply the breach of a norm but can be related to factual situations akin to negligence.[883] Yet, *Paul* goes in the opposite direction to *Dillenkofer* and, indeed,

'gap-filling' function due to the decline of the welfare state and increasingly concerned with questions of distributive justice.

[879] Spindler (n 736) although, as one might imply from our chapter II above, this case is often overstated. Indeed, Harlow's anxiety concerning the distortion of corrective justice and the abounding nature of tort law can be traced to the mid-twentieth century. We argue that she uses an incorrect analytical frame, namely, the tort law of the 'society of individuals' to dismiss 'organizational liability' as aberrant. With Teubner (n 1), we argue that this fails to identify the 'invisible cupola', as it were.

[880] *eg* Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-06221; *Urgenda*.

[881] Harlow (n 462) 'A risk-adverse society was, I argued, being shaped, in which a state of 'generalized reliance' on regulatory action by government and on state programmes was developing into a demand for a risk-free environment. Failure of regulation seemed then to point irrevocably to state responsibility, carrying correlative entitlements to compensation for individuals. This marked a transition to a belief in a form of distributive justice that was capable of embracing tort law as a distributive principle.' (125, 126)

[882] An argument perhaps more appropriate to English tort law than, for example, French in which the concept of solidarity has a role since Duguit. Harlow (n 462) charts the development of this ideology from the welfare state to the post-welfare state, with tort law especially through when conjoined with rights by international courts being used as a way to fill the gaps left by the retreating state.

[883] Tison (n 580) Notwithstanding the case was not made out, Tison continues: 'However, the judgment illustrates that individual decisions (or omissions) of a public authority, even if that authority enjoys a wide discretion, are not by their nature immune for Member State liability.' (fn 59, p. 20)

Brasserie in the field of financial services. To be sure, in terms of the purposive interpretation of EU law, the claimants found it difficult to find a particular provision such as Article 7 in *Dillenkofer* that was sufficiently precise to form a basis for recovery.[884] The most favourable provisions were to be found in the recitals to the relevant directives. Nevertheless, the court eschewed the 'aims approach' found in *Dillenkofer* stating that the existing degree of harmonisation precluded such a harmonised remedy for misapplication of law.[885] It is difficult to determine whether it was the relative imprecision of the purported right to be conferred that meant that no *prima facie* right was held to exist, or, whether it was a question of policy whereby when the state (financial regulator) has several aims to achieve such substantial discretion should foreclose judicial review.[886] It might be argued that the fact that the state had to balance the interests of several groups goes to the question of ascertainability.[887] Nevertheless, it is clear that insofar as the directive(s) in question aimed to balance several interests, those of the claimants counted among them and this should not, of itself, lead to a holding that that the beneficiaries of the right were too imprecisely defined.[888] To be sure, the latter might be relevant at the second stage of the test. This is, in essence, Tison's argument to the extent that he argues that while the Court was unduly narrow of its interpretation of the conferral of a right, the relevant weighting of interests might militate against a holding that there was a sufficiently serious breach of the directive(s).[889] Indeed, placing these policy arguments that, at least indirectly, point out that banking supervision is in the general interest,

---

884 Although even Prechal (n 1007) admits that while the conditions for direct effect and *Francovich* liability overlap, they are conceptually distinct.

885 The reasoning of the Court 'comes close' to that of the House of Lords in *Three Rivers* see S Prechal 'The Protection of Rights: How Far? In S Prechal & B van Roermund (eds) *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford, OUP, 2008) 155, 167: 'The reasoning of the ECJ in Peter Paul comes close to that of the House of Lords in the Three Rivers case. The directive at issue in that case was 'a first step in a process of harmonization,' and as such was concerned with 'the removal of barriers' to the fundamental freedoms guaranteed by the EC Treaty, not with the creation of rights for individuals.' (citation omitted)

886 Tison (n 580) rehearses the various bases on which the claim was rejected noting more than a suspicion that the policy arguments against recovery were to the forefront of the Court's analysis.

887 Prechal (n 1007). Discussing the places where direct effect and conferral of a right for the purposes of state liability 'overlap'. However, as she rightly maintains they remain conceptually different and do not *a priori* equate.

888 By analogy with *Dillenkofer*, it might be argued that this is a variation on the 'aims approach'. While a directive may have several distinct purposes, this does not mean *inclusio unius est exclusio alterius*, at least insofar as these separate aims can be clearly evidenced. The question of balancing these aims, in areas in which there is significant Member State discretion, should go *de lege lata* to the question as to whether a breach was 'sufficiently serious'. Although we appreciate that *de lege lata* in this area is disputed.

889 Tison (n 580). Tison indicates, also, that a possible confusion in the reasoning of the court relates to the distinction between enforceable rights and mere interests. Conferral of a right does not entitle depositors to specific measures or actions undertaken by supervisors but rather that their interests are considered: '…not necessarily have a legally enforceable right to claim certain measures from the supervisory authority, but the lack of adequately taking into account the depositors' interests could *post factum* open a right to compensation.' (27)

to the forefront of analysis suggests recourse to a *schutznorm* theory not germane to *Francovich* liability.[890] If it is merely a question of ascertainability, however, then too much significance should not be read into *Paul* given the fact that financial regulation has now far outpaced the stage it reached in the mid-90s. The alternative possibility, that the judgment was based on policy factors in what Andenas refers to as the logic of prudential supervision, seems to run contrary to a rights-based approach, and seems to invert the analysis in *Francovich* placing questions of the use of discretion (on policy grounds) before the question as to whether the rights of the claimants were engaged. The foregoing analysis might be made more precise: in essence, the Court failed to adequately distinguish conceptually between the first and second condition of liability.

At all events, we should not allow *Paul* to blunt the more general argument that by using rights-based reasoning, disguised in the language of effectiveness or more overtly, the court can imply *prima facie* duties that then require the state to be submitted to a more exacting review of its use of discretionary powers, in a context in which it is a secondary actor in a risk management network. *Francovich* is clearly one way in which a new tort law appropriate to the twenty-first century can be forged. It can be dressed in the language of the requirements of the *effet utile* of EU law implying *prima facie* rights to recovery. More explicitly, the Charter as an aid to interpretation can empower the court to be more explicit that what is at issue is a balance of rights, economic and fundamental rights, and this is evident from *Boston Scientific*.[891] This would encourage a wider interpretation of the first condition of liability going beyond the restrictive approach in *Paul*, for example. This is a more overt constitutionalizaiton, even, than the approach in *Dillenkofer*. Both *Boston Scientific* and *Sky Ostereich*, for example, show how these rights are protective of individual rights (qua individual) and general interests (public health, or, the media freedom).[892] Thus, it can be a path through which individual autonomy and the maintenance of fragile symmetry can we worked out on a case-by-case basis following Gerstenberg. The point, in short, is that matters of interpretation can occur in the shadow of fundamental rights and, secondly, our conception of fundamental rights can be coloured (in a

[890] Although, it might be argued that if *Francovich* is to function as a primary remedy for breach of EU law a certain type of *schutznorm* restriction is required.

[891] What Comandé (n 796) might refer to as 'explicit' citizenship rhetoric 'We can thereby note the Court's escalating tendency to relate rules and principles to the text of the Charter of the Fundamental Rights and additionally, its will to clearly express that when legislation makes explicit reference to the rights in the Charter, the validity of that legislation 'must be assessed in the light of those provisions'. Citing *Test-Achat*.

[892] Redolent of Teubner (n 669).

secondary shadow process) by our ideas about the need to maintain fragile symmetries between discourses. The rights reallocation follows the aims of the legal order, which can be several.[893] We argue that as the legal order becomes increasingly concerned with achieving a better balance between market access and other aims, such as consumer or environmental protection, the idea of maintaining a fragile symmetry between different discourses, as well as providing a *prima facie* right to recover for claimants harmed by state action or inaction can be pursued by these means.[894] The argument can be made simply: by a broad approach to conferral of a right *prima facie* risks are reallocated, *prima face* rights and responsibility re-distributed. This relates back to the need to provide for normative counter-expectations rather than endorsing a system-specific rationality via law. Of course, the conferral of a right is merely the first step in a complex test. We now turn to examine sufficiently serious breach. Once a liberal test is developed for conferral of a right, the real question of reviewing state action or inaction, can be achieved through this section condition of liability.

3. Sufficiently Serious Breach

While the New Approach may balance rationalities internally, there is a role for law to oversee the precise balance achieved. Where it is apparent that no balancing has, in fact, occurred the *Francovich* test can be applied to intervene in the most manifest failures. Sufficiently serious breach can be developed as the decisive legal test once prima facie rights are re-allocated. The reallocation of risks, via rights, on this view should be supplemented by a vigorous review of state use of discretion. The logic of the approach can be stated briefly: where there is a discrepancy between the seriousness of the risk involved and the measures taken to protect the right in question, then, liability follows.[895] Taking into account the state's particular role in the

[893] Reich (n 594), progressively realised or otherwise.

[894] Ladeur (n 24) would express this as the use of the court to create links in a 'network of networks' approach. Classical tort law aimed at negative liberty was inapt to this task. The emphasis in ECHR law and CJEU law on 'positive obligations' readdresses this deficit.

[895] Of course, there is no exact measure in this respect to determine the 'discrepancy', much as there is none to determine the reach of positive obligations in ECHR law. Suffice it to say, economic rights are less pressing than

EU law context, it is not sovereign discretion but administrative discretion that is at issue, the Court can fashion a test that forces the state (whichever branch) to justify its acts or omissions in a rationalizing process.[896] Thus, the sufficiently serious breach condition, interpreted as a process of rationalization, can allow the Court to confront market opening and functioning rationales against other interests, usually consumer protection rationales aimed at safety, issues with a collective and societal dimension that lurk behind 'individual' rights. This 'proceduralization' of law allows the Court to balance different interests, in the form of 'rights' clashing with policies in the general interest, but in a highly contextualised approach. It is the balance struck in the instant case that matters.

The tendency in the current case-law to defer to traditional arguments about legislative or administrative discretion is inapt. Hilson notes that since *Bergaderm*, in which the Court stated that Community liability and state liability principles were on all fours, there has been a divergence between the law on institutional liability and state liability.[897] Briefly put, the question of discretion is no longer central in state liability judgments. Hilson shows that in cases of non-implementation the *Brasserie-Bergaderm* statement that this constitutes a sufficiently serious breach *per se* appear no longer to be good law. *Haim* is the relevant authority.[898] More important is the question of the degree of 'fault', or redolent of *PIP*, 'culpability' involved. The Court, of course, was keen in *Brasserie* to distinguish fault at national level from the test for state liability. The Court, in brief, does not rely on any given national concept of fault but fault 'subjective or objective' can be a relevant factor.[899] This blurry account of the role of fault suggests, it is submitted, that while the test is analogous to a fault standard it cannot be equated to a given national understanding.[900] In any event, 'fault' is established based on the *Brasserie* guidelines. In this respect, a multi-factorial test was

rights that protect human life, bodily integrity (and, increasingly, the environment). Therefore, review can be variable.

[896] On legislative v administrative function of the state in the context of EU state liability see Opinion of AG Mischo in *Francovich*.

[897] C Hilson 'The Role of Discretion in EC Law on Non-Contractual Liability' (2005) 42 CMLR 677.

[898] *ibid*.

[899] Nor does the test rely on misfeasance in public office.

[900] Contra, it would appear, P Craig 'Once more unto the Breach: The Community, the State and Damages Liability' (1997) 113 *LQR* 67. Craig makes the point that the various policy arguments in English law that exclude the liability of public authorities influence the question of whether a right is conferred in *Francovich*. This certainly seems true with regard to *Paul*. However, a better understanding of the 'logic' of the judgment, Brasserie and *Bergaderm*, is that these are really questions that go to sufficiently serious breach. A second factor is that we are dealing with administrative rather than legislative discretion herein, and their weight ought, therefore, to be judged differently.

enunciated which points to a number of factors a court should take into account before making a decision seemingly in the round. This combines an emphasis on the clarity and precision of the rule breached, the discretion left to member states and the excusability or otherwise of the actions of the member states.[901] The test is meant to be non-exhaustive. It is submitted, that this merely reflects the re-balancing logic in AG Tesauro's *Francovich* opinion insofar as the balance to be struck now depends on the facts of the case and the degree of the seriousness of the infringement. The question is whether the state has trespassed a baseline of protection of individual rights by disregarding them or advancing policies to the detriment of their European rights. In paragraph 43 of the *Brasserie* decisions, the Court elaborated the considerations that guide Community liability. The Court takes account of, *inter alia*, 'the complexity of the situation to regulation, difficulties in the application or interpretation of texts and, more particularly, the margin of discretion left to member states particularly in cases of liability for legislative measures.'[902] The Court, further, takes particular account of the wide margin of Community discretion in questions relating to economic policy.[903] The Court made clear in *Bergaderm* that it has in mind not simply legislative but executive/administrative discretion also.[904] It was noted that while that judgment shifted emphasis from the legislative or administrative nature of the action at issue to the question of discretion, more recent judgments such as *Haim* indicate that discretion goes to fault, rather than constituting the relevant criterion of liability. It is submitted that this is logical because a wide discretion does not determine the question of liability but goes to questions such as the excusability of the state's action or omission.

It is probably correct that more recent case-law diverges from EC liability law, which is more concerned with legislative discretion. *Francovich*, 'fault' should not be based on discretion alone, but is rather a test of culpable inaction. Discretion is a factor going to fault, and the criteria listed can better be understood as guidelines that help evaluate whether fault is

---

[901] The test in full is set out at paragraph 56: 'The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.'

[902] para 43.

[903] para 44.

[904] Case C-352/98 *Bergaderm* [2000] ECR I-5291. See Craig (n 1065) His criticism of any formal distinction based on the legislative or administrative nature of the act in question.

established. In a similar vein, while administrative discretion affords considerable policy options to public authorities at a national level, the reason as to why the policy/operational distinction crystallised in English law, for example, is because the policies pursued reflected legislative choices. In the different context of EU law, the policies of national administrations do not reflect an analogous concept of (parliamentary) sovereignty. Once it is conceded that the relevant authority is required to balance interests, i.e. that a protected interested is engaged, this balance can be reviewed by the Court.[905] The question of rights conferral determines that general interests and rights require balancing. Sufficiently serious breach obtains to the circumstances in which this leads to liability. The earliest and, it is submitted, clearest conceptualization of this point is given by AG Mischo in his opinion in *Francovich* rejecting member state arguments concerning the immunity of public authorities:

> Indeed, the context we are dealing with here is completely different from that in which the theory of the immunity of the State in its capacity as a legislator was developed in certain Member States. …In my view it is not excessive to say that in relation to the transposition of directives the legislature is in a situation close to that of the administration responsible for the implementation of the law.[906]

Therefore, broadly conceived arguments based on, for example, policy choices of the legislature are misconceived because the nature of the discretion is different. Put simply, it is administrative discretion as to the means to achieve certain goals, rather than a justification of discretion that rests on a theory of sovereign power *per se*.[907] This means in areas of limited or no discretion the member state has an obligation of result, where defaulting on this obligation leads directly to liability for non-implementation.[908] On the other hand, in circumstances where there is significant discretion as to how certain rights are to be protected, assuming a right exists i.e. that the Court holds that the intention of the relevant directive is to confer a right, the question of discretion goes to 'fault'. In other words, the question of discretion goes to the question as to whether a breach was sufficiently serious, all things considered. Those breaches

905 This is, of course, no straightforward process see P Cane 'Tort Law as Regulation' (2002) 31 *Comm. L. World Rev.* 305.
906 AG Mischo para. 47.
907 And, of course, this goes to the nature of the 'new legal order' itself i.e. as developed in *Van Gend en Loss*, rationalized more expansively by P Pescatore *The Law of Integration* (Leiden, AW Sijthoff, 1974).
908 *Compare Brinkmann* and *Haim* which muddy the water.

that reach the relevant threshold are characterised as 'manifest and grave' breaches. Therefore, it appears that the test is equivalent to a *faute lourde* standard, although this varies as to the nature of the right at issue. As Tilson notes, the application of legal norms to factual situations can give rise to liability. *Schmidberger* illustrates this point whereby the Court, examined the facts of the case comparing them to *Commission v France* in detail to determine whether there was a breach of the Treaty provisions on free movement of goods. In the premises, the Court found that the measures taken by Austria were legitimately justified. However, had they not been justified, this would be a matter that would have gone to the sufficiently serious nature of the breach and the court is willing to go quite far on occasion to examine its existence in factual terms.[909] This is not, of course, a straightforward exercise because the balancing of rights against policies or, for example, the balancing of the rights of one group against the rights of others gives significant scope for legitimate choices. However, the mere fact that rights require balancing is no good reason to exclude potential liability *tout court*. In this respect, EU law differs from, for example, English law. The latter has traditionally followed an approach of 'front-loading' the question of balancing to the question as to whether a right exists in the first place.[910] Given the different context in which European state liability is conceived, this approach is misconceived outside of the national law context. The fact that the state authority must balance different interests certainly goes to fault in those cases that go beyond simply non-transposition and obtain to misapplication of legal norms or misapplication of law to factual circumstances contra *Paul*.[911] This can be used to adjudge the proper scope of liability of actors who enhance a risk as distinct from actors primarily responsible for the act in question. *Schmidberger* is already illustrative of such reasoning. There is no reason, in principle, as to why *Francovich* liability cannot develop in a similar direction.

Indeed, the imperative of fundamental rights protection supports such an argument against 'front-loading', and towards a more rigorous review forcing the member state to rationalize

---

909 *eg* Case C-5/94, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd* (1996) ECR I-2553. See, generally, Tridimas (n 1006).

910 *Three Rivers* largely follows the approach developed in *Yuen Kun Yeu*, in which the fact that the Court was required to balance rights gave rise to considerable discretion excluding liability, and in the area of the liability of public authorities more generally of excluding liability on the basis of anxiety about the frustration of the sovereign will of parliament – this is how we read judgments such as *X v Bedfordshire*, in particular the argument that statutory frameworks should not be undermined by tort actions.

911 *Schmidberger*.

their actions.[912] This much is clear from ECHR law. It is also clear from state liability law. Rationalization, De Witte argues, is a very important dimension of European law.[913] The idea owes its origins to Joerges who argues that the teleological orientation of EU law, both primary and secondary law, '. …exposes national legal systems to the constraints of explanation and justification.'[914] According to Joerges, this flows in the opposite direction also as the Community must strike a balance between market integration concerns and the traditional regulatory concerns of member states. This deeper question, related to legitimate regulatory choices is masked by the question of discretion but is the background in which the court must strike out in favour of rights.[915] What is required is a discourse before the court, which develops a jurisprudence of responsibility that feeds back into national conceptions of responsibility, irritating these conceptions and adjusting them to a new context: horizontal liability in a network society. The gradual flow of preliminary references leads to the construction of contours of the relevant principles and rules governing governmental (secondary) liability. In our context, within a network of actors *prima facie* responsible when there is a network or systemic failure. There is, to be sure, no clear way to determine these balances except by means of a process-oriented case-law.[916] In this respect, it does not have to be considered problematic that the concept of fault in the sufficiently serious breach test, because broad, allows a certain margin for national courts to place the stress in different places, stricter or more traditional notion. It is meant to be a baseline rather than peremptory, consistent with the problem of creating harmonised remedies in a multilevel legal order.[917]

It is sufficient, rather, to view this as a means to develop case-law that balances the seriousness of the rights violation in question against the discretion of the state, and allows for a rationalization process whereby the state must justify its actions. This allows for biases to be uncovered, if they exist, if the state prefers market access 'economic arguments' to consumer protection ones for example. If *Paul* was to follow such a path the relevant exercise would have been to scrutinize the policy arguments against liability, in their specific context, more

912 Hilson (n 1059).
913 F De Witte 'Emancipation Through Law' in Azoulai, Barbou de Places & Pataut (n 95), 15.
914 C Joerges 'The Europeanisation of Private Law as a Rationalization Process and as a Contest of Disciplines – An Analysis of the Directive on Unfair Terms in Consumer Contracts' (1995) 3 *European Review of Private Law* 175, 180.
915 Caruso (n 764).
916 Gerstenberg (n 544). Managing difference/politics through law see Kennedy (n 651).
917 Ladeur (n 101).

exactingly. These 'policy arguments' are the 'surface froth' under which clashes of discourses occur when, for example, establishing acceptable levels of risk and appropriate levels of intervention by supervisors to advance risk management.

As Van Dam correctly argues, negligence in national law is not a self-evident deductive exercise but more a structural device aimed at framing an enquiry as to whether the defendant is at fault.[918] Sufficiently serious breach *can* perform a similar structural role. Following Gerstenberg, we envisage this as a means to create a *discursive space* in which fundamental rights and policies can be opposed such that the latter can be reviewed. This allows the review of state action or inaction ensconced in a rights-based framework sensitive to the state's secondary role in a network of regulatory actors. The right conceded, the review involves the steps taken to protect the right. A breach has occurred, the question now is whether the state's actions or inactions were manifest and grave.

4. 'Direct' Causation

> As the law stands at the moment, the community harmonisation that has been attained on the culpability standard is undermined by the application of the diverse national rules on matters of causation.[919]

A test of causation has not been clearly stated by the Court. Indeed, the Court has prevaricated between a test requiring 'direct' causation and one requiring simply 'causation' although the former appears to be the preferred formulation.[920] The Court has stated, however, that doctrines such as mitigation of damages are permissible, which although conceptually distinct from the question of causation meliorate a high threshold in this respect.[921] We know that the Court countenances state responsibility for the acts of others in *Francovich* liability cases. *Cosmet* attests to this fact, although this can be theorised within the idea of state responsibility that was

[918] Van Dam (n 370).
[919] G Anagnostaras 'Not as Problematic as You Might Think: The Establishment of Causation in Governmental Liability Actions' (2002) *EL Rev.* 663, 676.
[920] *Brasserie*. Although it is unclear what exactly hinges on this formulation.
[921] Conceptually distinct but nevertheless failure to mitigate can be conflated with causation by courts, as well as more properly going to quantum of damages.

first announced in *Brasserie* as a justification of liability, *respondeat superior* for the acts of state employees rather than obtaining to the question of a doctrine similar to *novus actus interveniens*. In other words, the individual in question was subsumed into the state per a vicarious liability-type test found at paragraph 53 of the judgment. In those circumstances, the acts of a subordinate were imputable, in principle, to the state on an organizational model of liability. The scope of imputation was large, to be sure, but on the other hand, it would be difficult to subsume private actors, wholly distinct from the state unlike a former state official, on similar principles. For private actors, in other words, their acts may still constitute a break in the chain of causation. *Cosmet* is, in other words, of limited relevance to the question of causation.

The main judgments that deal with causation in any detail are *Brinkmann* and *Rechberger*. Neither really address our problem of horizontal vicarious liability for risk contribution or enhancement. Of course, they are not expected to because this is not the focus of the Court. They relate to, first, a case in which the actions of the administrative branch of government negated the supposed tort of the legislative branch in failure to implement a directive – a question going to damage, in truth, rather than causation – and second, the non-implementation of a directive in the *Rechberger* case. The Court in *Rechberger* does state, however, that misconduct by private actors does not break the causal link in circumstances in which state non-implementation of a directive deprived an individual of the exercise of her rights. Once again, it is difficult to extrapolate from *Rechsberger* to formulate more general principles of causation. This is particularly the case because as the Court stated, the obligation in the relevant Directive was an obligation of result: 'Such a guarantee is specifically aimed at arming consumers against the consequences of bankruptcy, whatever the causes may be. In those circumstances, the Member State's liability for breach of Article 7 of the Directive cannot be precluded by improper conduct on the part of the travel organiser or by the occurrence of exceptional and unforeseeable circumstances.'[922] Suffice it to say, it distinguishes between state duties *per se* and private misconduct. It is no excuse to say that the primary tortfeasor causes the tort where the state owes a duty to an individual and it is breached. This is an important point of principle should it be borne out.

[922] *Rechberger*, para. 74.

That it will be borne out is, to put it mildly, less than clear. As such, Anagnostaras argues that greater guidance as to the causation condition is required at the CJEU level.[923] Anagnostaras argues that the law is less than clear with regard to situations in which the tort in question is that of a private party, the relevant failure of the state being a failure to take positive steps to uphold Treaty rights. Of course, there is some case-law that indicates that in circumstances in which private actions create obstacles to the free movement of goods, the state may be held liable.[924] However, there is scant discussion of causation beyond the question-at-hand. Thus, it would be difficult to infer from this judgment to a factual scenario such as *PIP*. The approach towards causation remains a patchwork:

> The problem in such and similar circumstances is that the original source of the damage continues to be the illegal activity of private parties. It is not thus at all clear whether the breach committed by the domestic authorities can be considered direct enough to establish the necessary causal link for the payment of compensation from the national treasury.[925]

In other words, more precision is required as to what level of 'directness' is needed and with regard to how it relates to the question of effective protection of individual rights. However, given the fact that what *Francovich* creates is, in effect, state positive duties equating 'direct' causal link with a proximate cause (remoteness) requirement appears inapt, at least with regard to how these concepts are traditionally understood in national law. The use of the word 'direct' causation, invoking an idea of immediacy, is apt to confuse national courts on this point.[926] The ECHR avoids problem squarely by treating the question as one of the scope of state positive obligations. *A fortiori*, it cannot be that rights conferred on individuals, judged to be a sufficiently serious breach of EU law, can then be defeated by deference to rules of causation at the national level. This would restrict the *ubi ius, ibi remedium* principle by too narrow rules of attribution. However, outside the narrow field of obligations of result there is no clear case-law on causation that demonstrates clearly that the state is to be held liable notwithstanding the misconduct of third parties. This is unfortunate because member state courts may, it is

[923] Anagnostaras (n 919).
[924] Case C-265/95 *Commission v France* [1997] ECR I-6959.
[925] Anagnostaras (n 919) 669.
[926] *ibid*. Anagnostaras refers to direct causation and proximity interchangeably. We find this inappropriate.

submitted, fail to perceive the cupola, its role in the achievement of effective rights protection in EU law, and continue to treat state liability according to an organizational model of liability looking for positive conduct or control.

The argument, *a contrario*, can be stated briefly. If a *prima facie* re-allocation of rights and duties is made out and, the breach is considered sufficiently serious, a high threshold no doubt, then the question of causation ought to be developed on the basis of statistical increase of a risk rather than causation of specific harm. Did the acts or inactions of the state materially increase or contribute to the risk of harm to the plaintiff's rights such that it amounts to increased likelihood of harm. Alternatively, this can be dealt with under the chapeau of sufficiently serious breach, which would be less radical, and the test reformulated i.e. once there is a sufficiently serious breach, then, there is, for example, a rebuttable presumption of causation.[927] These (casuistic) devices weigh in favour of the effectiveness of rights protection, the underlying logic. At the very least, failure to pronounce on the question of causation leaves matters vague and uncertain.[928]

Otherwise, it is difficult to see how the state might be held responsible in mis-application cases, where a factual error contributed to damage to the claimant. It is all too easy for national courts to manipulate this condition of liability to deny recovery on the basis that the act of the primary tortfeasor was a break in the chain of causation. The effectiveness of rights-protection, considered paramount, would be comprised otherwise. This reasoning is, somewhat, similar to the approach taken by the ECHR in its positive obligations case-law. A recent judgment that goes in this direction is *O'Keeffe v Ireland*. In that case, it was held that the seriousness of the right in question, the lack of state action (here, there was an inadequate protective framework for the individual's right) meant that there was a failure of a positive obligation. It did not matter that in Ireland, primary responsibility for education lay in the hands of the Catholic Church or that the teacher in question, the perpetrator, was not employed by the state and had committed a criminal act. What mattered was that the state had positive obligations to protect certain rights and, in the circumstances, it failed to give adequate priority to the right in question through its legislative framework. To say that inadequate steps were taken given the gravity of

927 Reich (n 793) – similar argument, but he prefers the more traditional reverse the onus of proof approach.
928 Anagnostaras (n 919) '. …it could be submitted that the state of legal uncertainty created by the absence of clear case law with regard to the causality factor may be possibly interpreted as a violation of the twin principles of effectiveness and effective judicial protection that the doctrine of governmental liability is based upon.' (676).

the risk is simply another way to say that inaction enhanced, or significantly contributed to, a risk. We might quibble as to the scope of these positive obligations, yet this is better a question for sufficiently serious breach rather than causation. Rules regarding quantum can still reflect the secondary position of the tortfeasor, although whether proportionate liability or rules concerning joint and several liability are preferred is a controversy better solved at national level subject to the provisos of effectiveness and equivalence. Given the difficulties in this area in English asbestos case-law, this should be given a wide deference.

5. Summary

The basic argument pursued, herein, is that given the changed context in which the state operates, the fact that the state no longer acts *primus inter pares* as in the welfare state but 'delegates' substantial public functions down to private parties and up to the EU ends up creating a multilevel, public-private network governance architecture. This cupola leads to trade-offs between different normative discourses. However, the law currently does not possess a clear mechanism for 'strategic public interventions' into the balances achieved. In fact, EU law to a great extent is configured to give prominence to economic arguments negativing potential recovery. We view this double binary coding as cognitivisation of the law. Yet, recent case-law under the influence of fundamental rights (re-normativisation) appears for the first time to be re-setting this imbalance and providing the possibility of secondary liability beyond the concept of vertical control. However, judgments such as *PIP* because restrained by traditional doctrines of no horizontal direct effect of directives do not go far enough in demarcating how the national courts might balance discourses. In this vein, by developing *Francovich* liability along the lines envisioned above, it may act as a template provoking a new approach to state liability and, by extension, the liability of parties fulfilling state-like regulatory functions within the cupola. The EU itself is part of the cupola insofar as failure to put in place an adequate legislative framework may be a basis for a claim, but while hinted at, this falls outside the scope of our argument.

SUMMARY OF CONCLUSIONS

In this thesis, it has been argued that tort law in the national context has evolved two primary normative models of liability namely individual responsibility and organizational liability. Whereas the former rests on subjective fault, albeit objectively defined (community standard of conduct) the latter rests on liability for typical and, therefore, foreseeable risks. Both forms of liability developed within the nation state and apply with modifications to both private parties and the state. Both forms of liability additionally are second-order normative models of liability in an acentric society. A 'top down' public law understanding of the law overestimates this significantly. By contrast, private law with its emphasis on private ordering and how the law tracks rather than determines 'the reasonable expectations of honest men' better reflects the relationship between legal system and society as a plurality of normative orders. In the society of individuals, will and fault reflect this acentricity and constitute its legal buttress. They are tied to the knowledge base of society via bridging concepts such as reasonableness. However, when the knowledge base of the society of individuals ruptured caused by the rise of organizations, the law was reshaped in light of these organizational forms taking advantage of their capacity for planning and collective action. Reconciling groups, as placeholders for different functional discourses, was in the heyday of the nation state the role of the state. In systems theory terminology, the state's role is that of mediator between different functional systems or different normative orders. The law was an important means of ensuring the positive integration society by mediating these different normative orders. In tort law terms, reasonableness turned from conduct to liability for typical risks whether this meant internalisation within the firm or liability for the harmful effects of typical activities of the state. This involved the mediation of discourses primarily the political and economic systems. The organizational model of liability was considered both economically efficient and socially just. Beyond foreseeable harm, however, the law did not readily venture. At all events, it should be stressed that both models of liability, individual and organizational, exist concurrently and in tension in national law – as Lord Hoffmann states, the law of negligence attempts simultaneously to pursue different objectives.

With the breaking of the frame of the nation state, however, this legal dichotomy is disrupted. The centrality of the organizational form is replaced by the network. When in the form of

governance networks, they arise because territorial differentiation has been replaced by functional differentiation and necessitating transnational institutional configurations. Governance networks represent an attempt to re-embed the economy into societal discourses or normative orders within, but importantly, beyond the stable frame of the state. They harness private actors, the state and transnational 'avant-garde' configurations such as the EU to this end. The New Approach may be considered as a paradigmatic example. First, the New Approach transforms the state's regulatory role, which has become more peripheral. Regulation is now achieved, first by private actors themselves, second by regulatory intermediaries, third by the state and finally by the EU in an overall regulatory architecture in which regulation is a shared endeavour. This re-organization of regulatory power up to the EU level, 'down' to the private level reflects he decoupling of territorial differentiation and functional differentiation and, secondly, exposes the way in which the state is ever more peripheral to transnational private ordering. While the state always depended on its knowledge base, the breaking of the territorial frame deprives the state of its capacity for positive integration. Thinking of these trends in terms of delegation is misleading because it assumes that the state had at some point an exclusive capacity in law-making, rather than a role in terms of strategic intervention. The historical 'bottom up' perspective has emerged most transparently at an EU level, where the pretence of exclusive state regulation is quite obviously mythical. The New Approach illustrates how the state's role is but one of several regulatory actors in network governance. What distinguishes the post-nation state era from the state-centred one is that the state can no longer sit aloft society as the organization *primus inter pares* ensuring the compatibility of different normative orders, because these normative orders have globalised in world society.

The changing role of the state in a society of networks gives rise to several consequences. It is no longer Hegelian in the sense of the primary unit of positive integration, but is now one institution (organization) among several that pursue the public good. This means in effect that actors formerly considered 'private' are fulfilling public roles. It also means that the role of the state is being redefined. The liberal state/society distinction, then, is no longer a plausible understanding of 'society', because the role of the state as the sole coordinator of society has been replaced by a more complex, de-territorialised institutional configuration.

The legal system has also broken the frame of the nation state, but appears unable alone to fill the gap left by the decline of the state. The pre-eminence of the economic constitution in EU

law can be understood in these terms. The economic system emerges as 'market leader'. The richer normative programming of the society of organizations in which the law pursued several aims simultaneously has been hollowed out. The vision tends to be primarily economic and the availability of rights are defined in its light. By redefining through double binary coding (otherwise, cognitivisation) other discourses in its light, the economic system tends to dominate society.

In legal terms, law's autonomy is threatened. The rather light touch approach in terms of the duties incumbent on the state and notification bodies within the New Approach framework is indicative. Reich's analysis of *Cosmet* detailed in chapter III stands for a broader point: the preference for market access over other concerns such as consumer protection is reflected in the regulatory culture of the New Approach. The same argument goes for financial services per *Paul*. But who watches the watchdog? The economization of law, EU and national, means that insufficient policing occurs. This is what we outlined in part I of chapter III, which emphasised how the law has developed rules of self-restraint based on economic argument. Yet, it is an incomplete picture because the increased role of fundamental rights as shaping fundamental freedoms provides a point of 're-entry' for normative legal side-constraints into the law. This is well-illustrated in the legal reasoning of the Court in *Boston Scientific*.

Yet Boston Scientific while constructing a better balance between market access and consumer protection understood capaciously as not only protecting individuals but achieving a balance between normative orders – economic risk v precautionary reasoning – within a framework of rights only goes part of the way to providing a regime of liability for a network society. The argument is that given that the existing models rest on either individual or organizational liability (*Boston Scientific*), they lack a convincing justification for providing liability for other actors in networks. This is because, normatively speaking, simply extending organizational liability to other actors in networks is unconvincing. Networks lack the hierarchical character of the firm or the welfare state. In English law, this is represented as a move from *Anns* to *Yuen*. And, applied by analogy to EU law, is represented in judgments such as *Three Rivers* and *Paul* where in the absence of close control of activities of primary tortfeasors means that liability is rejected. This is supplemented by the economic arguments averred to above.

The point of chapter IV was to emphasise that the EU may develop a normative concept of secondary liability absent organizational control. This is primary liability – a type of non-

delegable duty of care towards third parties, which recognises that simply because the primary actor is at fault, this does not exclude liability against other regulatory actors. Indeed, in *PIP*, the Court underlined this point clearly. While network is not a legal concept and, as such, a sociological category this does not imply it cannot have legal consequences. We perceive *Boston Scientific* and *PIP* in these terms. These judgments are not simply a question of providing redress to the particular individuals harmed, but from our perspective are considered strategic public interventions to better balance economic functionalism and other under-represented interests in networks. Second, by providing for a nascent regime of primary and secondary liability EU law is providing a blueprint for how liability ought to be distributed in a network. Sociological collective risks are converted into normative categories of primary and secondary responsibility. Here we think that while the approach of the CJEU is orthodox – there is no general liability for notified bodies – because of the closeness between culpable excess of discretion (*PIP*) and sufficiently serious breach in *Francovich* liability, by developing the latter, the Court can guide the development of the former – albeit, from our perspective, the solution is suboptimal. To be fully developed, as Reich argues a break with orthodoxy is ultimately required and a general principle of liability or horizontal liability is reuired. But the equation of rights and remedies advances 'in bits and pieces' and the prospect of *Francovich* as a general principle of liability in horizontal situations seems remote. Therefore, *Francovich* can guide national law subject to the principle of effectiveness promoting the hybridization of remedies in a heterarchical legal order. In a broader perspective, we see these developments in terms of EU law providing a means to police the guardians or gatekeepers of private transnationalism ensuring that they remain on guard or 'alert' to the consequences of inaction for third parties, but also, at a deeper level, allowing providing a baseline against discourse domination by a narrow and economic interpretation of acceptable levels of risk, which sidelines other discourses. Legitimate consumer protection as grounded in rights plays, then, an important role of ensuring not only in providing a remedy to particular individuals, but in the maintenance of fragile symmetries in society between different concepts of acceptable conduct. To be fully developed, this requires a greater appreciation of what is at stake. Under the influence of the concept of precaution, tort law is being remoulded. Therefore – and this is the argument – there is a role for rights understood horizontally to re-normativise the law so that it maintains its distance from the economic system and is capable of setting boundaries on our market leader, the economic system. This is important if it is to continue to fulfil the role

of providing normative counter-expectations and intermediating, in a secondary manner, between different discourses. And rights require remedies or otherwise they are ‘dead letter’.

BIBLIOGRAPHY

CASE-LAW

C-470/03 *A.G.M.-COS.MET Srl v Finland* [2007] ECR I-2749.

Anns v Merton London Borough Council [1978] AC 728.

Bazley v Curry [1999] 2 SCR 534.

Bernard v Attorney General for Jamaica [2005] IRLR 398.

Blyth v Birmingham Waterworks 11 Ex Ch 781 (1856).

Conway v O'Brien (1940) 111 F.2d, 611.

C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

C-178, 179 and 188-190/94 *Dillenkofer and Others* [1996] ECR I-4845.

Dutton v Bognor Regis Urban District Council [1972] 1 QB 373.

East Suffolk Catchment Area v Kent [1941] A.C. 74, H.L. (E.).

Escola v. Coca-Cola Bottling Co., (1944) 24 Cal.2d 453, 150 P.2d 436.

Joined Cases C-6/90 and C- 9/90 *Francovich and Others [1991]* ECR I-5357.

Geddis v Proprietors of Bann Reservoir (1878) 3 App Cas 430.

George v Skivington (1869) LR 5 Exch. 1.

Gorringe v Calderdale MBC [2004] 1 WLR 1057.

Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210.

Grant v Australian Knitting Mills Ltd [1936] 1 AC 85.

Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* (Haim II) [2000] ECR I-5123.

Hern v Nichols (1708) 1 Salk 289.

Heaven v Pender (1883) 11 QBD 503.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465.

Herman v Westinghouse Elec. Co. (1970) 2 Cal. 3d 956.

Hill v Chief Constable of West Yorkshire [1988] 2 WLR 1049.

Home Office v Dorset Yacht Co Ltd [1970] AC 1004.

C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and another [2007] ECR I-10779.

Jacobi v Griffiths [1999] 2 SCR 570.

Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-06221.

Jones v Hart (1698) 2 Salk 441.

Kingston v Booth (1685) Skinner 228.

C-341/05 *Laval and partners v. Svenska Byggnadsarbetareförbundet and others* [2007] ECR I- 11767.

Leigh and Sillavan Ltd. v Aliakmon Shipping Co. Ltd. (The Aliakmon) [1986] AC 785.

LeLievre v Gould [1893] 1 QB 491.

Lister v Hesley Hall Ltd [2001] UKHL 22.

MacPherson v. Buick Motor Co., (1916) 217 N.Y. 382, 111 N.E. 1050.

Mark Rich and Co AG v Bishop Rock Marine Co Ltd, The Nicholas H [1996] AC 211.

Mersey Docks and Harbour Board v Gibbs (1866) L.R. 1 H.L. 93.

Murphy v Brentwood District Council [1991] 1 AC 398.

Nettleship v Weston [1971] 2 QB 691.

O'Keeffe v Hickey [2008] lESC 72.

Peter Paul and Others v Bundesrepublik Deutschland ([2004] ECR I-09425.

Procureur du Roi v Dassonville Case 8/74 [1974] ECR 837.

C-65/09 and C-78/09 *Gebr Weber GmbH v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH.*

Read v Lyons [1947] AC 156.

C-140/97 *Rechberger and Others v Austria* [1999] ECR I-3499.

Reeve [1998] 2 WLR 408.

Rose v Plenty [1976] 1 WLR 141.

Rowlands v Chief Constable of Merseyside Police [2006] EWCA Civ 1773.

Rylands v Fletcher [1868] UKHL 1.

Salomon v Salomon & Co Ltd [1896] UKHL 1.

C-112/00 *Schmidberger* [2003] ECR I-5659.

Sindell v Abbott Laboratories, (1980) 26 Cal. 3d 588.

Smith v Eric S Bush [1990] UKHL 1.

Staveley v Jones [1956] AC 627.

Stovin v Wise [1996] 3 WLR 389.

Thomas v Winchester (1852) 6 NY 397.

Three Rivers DC v Governor of the Bank of England [2000] UKHL 16.

Winterbottom v Wright (1842) 10 Meeson & Welsby 109.

X and others (minors) v Bedfordshire County Council [1995] 3 All ER 353.

Yuen Kun Yeu v A.-G. of Hong Kong [1988] 1 AC 175.

ACADEMIC LITERATURE

M Amstutz 'In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning' (2005) 11(6) *European Law Journal* 766.

M Amstutz & G Teubner (eds) *Networks: Legal Issues of Multi-lateral Co-operation* (Oxford, Hart Publishing, 2009).

M Andenas, D Fairgrieve & J Bell (eds) *Tort Liability of Public Authorities in Comparative Perspective* (London BIICL 2003).

G Anagnostaras 'Not as Problematic as You Might Think: The Establishment of Causation in Governmental Liability Actions' (2002) *EL Rev.* 663.

J Appleby *The Relentless Revolution: A History of Capitalism* (New York, WW Norton & Co., 2010).

PS Atiyah *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967).

PS Atiyah *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979).

L Azoulai 'The Inoperative Community' (R Condon trans. forthcoming).

L Azoulai 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization' (2008) 45(5) *CMLR* 1335.

K Barker & J Steele 'Drifting towards Proportionate Liability: Ethics and Pragmatics' (2015) 74(1) *CLJ* 49.

B Barry *Political Argument* (London, Routledge 1965).

U Beck (M Ritter, trans) *Risk Society: Towards a New Modernity* (London, Sage Publications, 1992).

U Beck *Ecological Politics in an Age of Risk* (Cambridge, Polity Press, 1995).

A Beckers ‘Regulating Corporate Regulators through Contract Law? The Case of Corporate Social Responsibility Codes of Conduct’ MWP 2016/12.

J Bell & D Ibbetson *European Legal Development: The Case of Tort* (Cambridge University Press, 2012).

P Benson ‘Misfeasance as an Organizing Normative Idea in Private Law’ (2010) 60 *University of Toronto Law Journal* 731.

L Bernstein ‘Merchant Law for a Merchant Court: Re-thinking the Code’s Search for Immanent Business Norms’ (1996) 144(5) *University of Pennsylvania Law Review* 1765.

W Blackstone *The Commentaries of Sir William Blackstone on the Laws and Constitution of England* (Elibron Classics, 2005).

F Böhm ‘Rule of Law in a Market Economy’ in A Peacock & H Willgerodt (eds) *Germany’s Social Market Economy: Origin and Evolution* (London, Palgrave McMillan, 1989) 46.

D Brodie *Enterprise Liability and the Common Law* (Cambridge, CUP, 2010).

R Brownsword *Contract Law: Themes for the Twenty-First Century* 2nd edn (Oxford, OUP, 2006).

R Brownsword ‘The Theoretical Foundations of European Private Law: A Time to Stand and Stare’ in R Brownsword et al (eds) *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011) 159.

G Brüggemeier *Common Principles of Tort Law: A Prestatement of Law* (London, BIICL, 2004).

G Brüggemeier ‘Risk and Strict Liability: The distinct examples of Germany, the US and Russia’ EUI Working Paper Law 2012/29.

F Cafaggi. ‘A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities’ in *The Institutional Framework of European Private Law* (OUP, 2006) 191.

F Cafaggi ‘The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation’ (2015) 36(4) *U. Pa. J. Int’l L.* 101.

G Calabresi ‘Torts – the Law of the Mixed Society’. (1977-1978) 56 *Tex. L. Rev.* 519.

GP Calliess & M Renner ‘From Soft Law to Hard Code: The Juridification of Global Governance’ (ssrn, 20 July 2016).

P Cane ‘Corrective Justice and Correlativity in Private Law’ (1996) O.J.L.S 471-488.

P Cane ‘Distributive Justice and Tort Law’ (2001) *NZLR* 401.

P Cane ‘Tort Law as Regulation’ (2002) 31 *Comm. L. World Rev.* 305.

B Cardozo *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921).

K Carr ‘The Deconstruction and Reconstruction of Family Law through the European Legal Order’ (Ph.d Thesis 2014).

K Carr ‘Regulating the Periphery – Shaking the Core European Identity Building through the Lens of Contract Law’ EUI Working Paper Series LAW 2015/40.

D Caruso ‘The Missing View of the Cathedral: the Private Law Paradigm of European Integration’ (1997) 3(1) *European Law Journal* 3.

D Caruso ‘Private Law And State-Making in the Age of Globalization’ Working Paper Series, Public Law & Legal Theory, Working Paper No. 06/09 (ssrn, 21 July 2016).

D Chalmers ‘The Government and Citizenship of Self-Regulation’ in F Cafaggi (ed) *Reframing Self-Regulation in European Private Law* (The Netherlands, Wolter Kluwer, 2006), 161.

A Chandler *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA, Harvard Belknap, 1977).

J Coleman *Risks and Wrongs* (New York, CUP, 1992).

H Collins ‘The Voice of the Community in Private Law Discourse’ (1997) 3(4) *ELJ* 407.

H Collins ‘Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalizaton’ LSE Law, Society and Economy Working Paper 6/2007.

H Collins *The European Civil Code: The Way Forward* (CUP, Cambridge, 2008).

H Collins ‘On the (In)compatibility of Human Rights Discourse and Private Law’ LSE Law, Society and Economy Working Papers 7/2012.

H Collins ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 *CLP* 297.

R Condon & B Van Leeuwen ‘Bottom Up or Rock Bottom Harmonization? *Francovich* State Liability in National Courts.’ (2016) 35 *Yearbook of European Law* 1.

R Cooter & T Ulen *Law and Economics* 6th edn (Boston, Pearson, 2012).

RM Cover ‘Nomos and Narrative’ (1983) 97 *Harv. L. Rev.* 4.

P Craig ‘Once more unto the Breach: the Community, the State and Damages Liability’ (1997) 113 *LQR* 67.

P Craig & G De Búrca *EU Law: Texts, Cases and Materials* 5th edn (Oxford, OUP, 2011).

H Dagan & A Dorfman ‘The Justice of Private Law’ (ssrn, 24 July 2015).

G Davies ‘Democracy and Governance in the Shadow of Purposive Competence’ (2015) 21(1) *ELJ* 2.

M Davies ‘The Road from *Morocco*: *Polemis* Through *Donoghue* to No-Fault’ (1982) 45(5) MLR 534.

S Deakin & F Wilkinson ‘The Origins of the Contract of Employment’ in *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford, OUP, 2005).

AV Dicey *Introduction to the Study of the Law of the Constitution* (Indianapolis, Liberty Classics, 1982, orig. 1885).

L Duguit *Les transformations générales du droit privé depuis le Code Napoléon* (Alcan, Paris 1912).

L Duguit (F & H Laski trans) *Law in the Modern State* (New York, Huebsch, 1919).

M Egan *Constructing the Market: Standards, Regulation and Governance* (Oxford, OUP, 2001).

AA Ehrenzweig 'Negligence without Fault' (1966) 54(4) *California Law Review* 1422.

T Eilsmanberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *CMLR* 1199

F Ewald *L'Etat Providence* (Paris, Grasset, 1986).

F Ewald 'Insurance and Risk' in G Burchill, C Gordon & P Miller (eds) *Studies in Governmentality* (Chicago, University of Chicago Press, 1991) 197.

F Ewald (S Utz trans) 'The Return of Descartes Malicious Daemon: An Outline of the Philosophy of Precaution' in T Baker & J Simon (eds) *Embracing Risk: The Changing Culture of Insurance and Responsibility* (Chicago, Univerisity of Chicago Press, 2002) 273.

F Ewald 'Philosophie Politique du Principe de Précaution' in F Ewald, C Gollier & N de Sadeleer *Le Principe de Précaution* 2nd edn (Paris, PUF, 2008).

D Fairgrieve *State Liability in Tort: A Comparative Law Study* (Oxford, OUP, 2003) 9.

A Fischer-Lescano & G Teubner 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

J Fleming *The Law of Torts* 6th edn (Sydney, The Law Book Co. Ltd, 1983).

J Fleming 'Tort in a Contractual Matrix' (1995) 33(4) *Osgoode Hall Law Journal* 661.

S Frerichs & T Juutilainen 'Rome Under Seven Hills? An Archeology of European Private Law' 32 Legal Studies Research Paper Series (2014 ssrn).

JP Gallard 'Legitimacy, Credibility and Responsibility of the (big) European Third Party Certifiers' Working Paper, SASE Conference Chicago 2014

J Gardner 'What is Tort Law For? Part 2. The Place of Distributive Justice' Oxford Legal Studies Research Paper No. 62/2013.

O Gerstenberg ‘Justification (and Justifiability) of Private Law in a Polycontextural World’ (2000) 9(3) *Social & Legal Studies* 419.

O Gerstenberg ‘Private Law and the New European Constitutional Settlement’ (2004) 10(6) *ELJ* 766.

P Giliker *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge, CUP, 2010).

P Giliker, ‘English Tort Law and the Challenge of *Francovich* Liability: Twenty Years on’ (2012) *LQR* 541.

G Gilmore *The Death of Contract* (Ohio, Ohio State University Press, 1974).

J Gordley *The Philosophical Origins of Modern Contract Doctrine* (Oxford, OUP, 1991).

L Green ‘Tort Law as Public Law in Disguise’. (1959-60) 38 *Tex. L. Rev.* 257.

C Harlow ‘Administrative Liability: A Comparative Study of French and English Law’ (Ph.d thesis, 1979).

C Harlow ‘Fault Liability in French and English Law’ (1976) *MLR* 39(5) 516.

C Harlow “‘Public’ and ‘Private’: Distinction with a Difference’ (1980) 43(3) *MLR* 241.

C Harlow *State Liability*: *Tort Law and Beyond* (Oxford, OUP, 2004).

C Harlow & R Rawlings *Law and Administration* 3rd edn (Cambridge, CUP, 2009).

FA Hayek *The Confusion of Language in Political Thought* (London, Institute of Economic Affairs, 1968).

FA Hayek (WW Bartley III ed) *The Fatal Conceit*: *The Errors of Socialism* (London, Routledge, 1988).

FA Hayek *Law, Legislation and Liberty: a New Statement of the Liberal Principles of Justice and Political Economy* (Cornwall, Routledge, 1982; 1998 reprint).

B Hepple ‘Negligence: The Search for Coherence’ (1997) 50(1) *CLP* 69.

C Hilson ‘The Role of Discretion in EC Law on Non-Contractual Liability’ (2005) 42 CMLR 677.

C Hodges *European Regulation of Consumer Product Safety* (Oxford, OUP, 2005).

L Hoffmann ‘Anthropomorphic Justice: The Reasonable Man and His Friends’ (1995) 29 *Law Techr.* 127, 130.

L Hoffmann ‘Causation’ (2005) 121 *LQR* 592.

OW Holmes *The Common Law* (1881; reprint New York, Barnes & Noble, 2004), 36.

T Honoré *Responsibility and Fault* (Oxford, Hart Publishing, 2002).

M Horwitz *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York, OUP, 1992).

D Ibbetson ‘The Law of Business Rome: Foundations of the Anglo-American Tort of Negligence’ (1999) 52(1) *CLP* 74.

D Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford, OUP, 2001).

N Jansen ‘Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability’ (2004) 24(3) *OJLS* 443-369.

N Jansen & R Michaels ‘Private Law and the State: Comparative Perceptions and Historical Observations’ in *Beyond the State: Rethinking Private Law* (Tübingen, Mohr Siebeck, 2008), 15.

C Joerges ‘The Europeanisation of Private Law as a Rationalization Process and as a Contest of Disciplines – An Analysis of the Directive on Unfair Terms in Consumer Contracts’ (1995) 3 *European Review of Private Law* 175.

C Joerges, H Schepel, E Vos ‘The Law’s Problems with the Involvement of Non-Governmental Actors in Europe’s Legislative Processes: The Case of Standardisation under the ‘New Approach’ EUI Working Paper LAW No. 99/9.

R Michaels & N Jansen ‘Private Law Beyond the State? Europeanization, Globalization, Privatization’ (2006) 54 *Am. J. of Comp. Law* 843.

G Jellinek (M Farrand trans.) *The Declaration of the Rights of Man of Citizens: A Contribution to Modern Constitutional History* (New York, Holt, 1901).

JA Jolowicz 'Liability for Accidents' (1968) *CLJ* 50-63.

L Josserand *De La Responsabilité du Fait des Choses Inanimées* (Rousseau, Paris, 1897).

L Josserand *L'Évolution de la responsabilité (conférence donnée aux Facultés de Droit de Lisbonne, de Coimbre, de Belgrade, de Bucarest, d'Orades, de Bruxelles, a l'institut français, aux centres juridiques de L'Institut des Hautes Etudes marocaines à Rabat et à Casablanca), Evolutions et Actualités Conférences de Droit Civil* (Paris, Recueil, 1936).

D Jutras 'Louis and the Mechanical Beast or Josserand's Contribution to Objective Fault in France (ssrn, August 2014).

R Kaczorowski 'The Common Law Background of Nineteenth Century Tort Law' (1990) 51 *Ohio State Law Journal* 1127.

G Keating 'The Idea of Fairness in the Law of Enterprise Liability' (1997) *M. Law Rev.* 1266.

D Kennedy 'Legal Formalism' in N Smelser & P Baltes (eds)) *Encyclopedia of the Social and Behavioral Sciences* vol 13 (New York Elsevier 2001) 8634.

D Kennedy 'Three Globalizations of Law and Legal Thought: 1850-2000' in D Trubek & A Santos (eds) *The New Law and Economic Development. A Critical Appraisal* (Cambridge, CUP, 2006).

D Kennedy 'A Transnational Proportionality in Private Law' in R Brownsword, H Micklitz, L Niglia & Steve Weatherill (eds) *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011) 185.

F Kessler 'Contracts of Adhesion-Some Thoughts About Freedom of Contract' (1943) 43 *Colum. L. Rev.* 629.

M King & C Thornhill *Nicklas Luhmann's Theory of Politics and Law* (Basingstoke, Macmillan & Palsgrave, 2003).

P Kjaer ‘The Societal Function of European Integration in the Context of World Society’ (2007) 13 *Soziale Systeme* 13, *Heft* 1+2, 369.

P Kjaer ‘Post-Hegelian Networks: Comments on the Chapter by Simon Deakin’ in M Amstutz & G Teubner (eds) *Networks: Legal Issues of Multi-lateral Co-operation* (Oxford, Hart Publishing, 2009).

P Kjaer et al (eds) *Regulatory Hybridization in the Transnational Sphere* (Leiden, Martinus Nijhoff, 2013).

P Kjaer *Constitutionalism in the Global Realm* (London & New York, Routledge, 2014).

P Kjaer ‘Three Dimensional Conflict of Laws in Europe’ ZERP-Diskussionspapier 2/2009 (ssrn, 12 July 2016).

M Kumm ‘Who’s Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 *German Law Journal* 341.

KH Ladeur ‘The Liberal Legal Order and the Rise of Economic Organizations – Towards a Legal Theory of Proceduralization’ in K.-H. Ladeur (ed), *Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations* (Baden-Baden, Nomos 1997) 169.

KH Ladeur ‘The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law’ EUI Working Paper LAW No. 99/3.

KH Ladeur ‘The Postmodern Condition of Law and Societal “Management of Rules”: Facts and Norms Revisited’ (2006) 27 *Zeitschrift für Rechtssoziologie Heft 1,* 87.

KH Ladeur ‘The State in International Law’ in C Joerges & J Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Portland Or., Hart Publishing, 2010), 397.

KH Ladeur ‘From Universalistic Law to the Law of Uncertainty: On the Decay of the Legal Order's “Totalizing Teleology” as Treated in the Methodological Discussion and its Critique from the Left’ (2011) 12(1) *German Law Journal* 525.

KH Ladeur ‘The Financial Crisis – A Case of Network Failure?’ in P Kjaer, G Teubner & A Febbrajo (eds) *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford, OUP, 2011) 93.

KH Ladeur ‘The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law’ Osgoode CLPE Research Paper 16/2011.

KH Ladeur ‘The Social Epistemology of Risk Observation and Management – Modern Law and the Transformation of its Cognitive Infrastructure’ in HW Micklitz & T Tridimas (eds) *Risk and EU Law* (Cheltenham, Elgar, 2015) 49.

H Laski ‘The Basis of Vicarious Liability’ (1916-1917) 26 *Yale L.J.* 105, 112.

M Lee ‘Safety, Regulation and Tort Law: Fault in Context’ (2011) 74(4) *MLR* 555.

A Lefebvre *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford, Stanford University Press, 2008).

B Leiter ‘Holmes, Nietszche and Classical Realism’ (2000) *U Texas School of Law Pub. Law Working Paper* No. 003.

D Levi Faur & S Starobin ‘Transnational Politics and Policy: From Two-Way to Three-Way Interactions’ (2014) Jerusalem Papers in Regulation and Governance Working Paper No. 62.

O Lobel ‘The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’ (2004) 89 *Minnesota Law Review* 263.

W Lucy ‘Method and Fit: Two Problems for Contemporary Philosophies of Tort Law’ (2007) 52 *McGill L. J.* 605.

N Luhmann (KA Ziegert trans) *Law as a Social System* (Oxford, OUP, 2004).

I Macneil (D Campbell ed.) *The Relational Theory of Contract: Selected Works of Ian Macneil* (London, Sweet & Maxwell, 2001).

G Majone *Regulating Europe* (London, Routledge, 1996).

B Markesinis ‘An Expanding Tort Law — the Price of a Rigid Contract Law’ (1987) 103 *LQR* 354.

B Markesinis, S Deakin & A Johnston *Markesinis and Deakin's Tort Law* 7th edn (Oxford, OUP, 2012).

TH Marshall *Citizenship and Social Class and Other Essays* (Cambridge, CUP, 1950).

K Marx 'On the Jewish Question' in R Tucker (ed) *The Marx-Engels Reader* (New York, Norton & Co, 1978) 26.

B McMahon & W Binchy *The Law of Torts* 4th edn (Dublin, Bloomsbury 2013).

HW Micklitz, 'The ECJ between the Individual Citizen and the Member States – A Plea for a Judge-made European Law on Remedies' in HW Micklitz & B de Witte (eds) *The European Court of Justice and the Autonomy of the Member States* (Cambridge, Intersentia, 2012) 349.

HW Micklitz 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse' EUI Working Papers LAW 2012/23.

HW Micklitz & R Van Gestel 'European Integration through Standardization: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies' (2013) 50 *CMLR* 145.

HW Micklitz, N Reich & L Boucon 'L'Action de la Victime Contra L'Assureur du Producteur' (2015) *Revue Internationale de Droit Économique* 37.

HW Micklitz 'The ECJ Between the Individual Citizen and the Member States: a Plea for a Judge-Made European Law on Remedies' EUI Working Papers LAW 2011/15.

HW Micklitz 'The Legal Subject, Social Class and Identity-Based Rights' in L Azoulai, S Barbou des Places & E Pataut *Constructing the Person in EU Law: Rights, Roles, Identities* (Portland Oregon, Hart Publishing, 2016) 285.

D Nolan 'The Liability of Financial Supervisory Authorities' (2013) 4(2) JETL 190.

M Oakeshott *On Human Conduct* (Oxford, Clarendon Press, 2003).

K Oliphant 'Tort Law, Risk and Technological Innovation in England' (2014) 59(4) *McGill LK* 891.

J Pelkmans ‘The New Approach to Technical Harmonization and Standardization’ (1987) 15(3) *Journal of Common Market Studies* 249.

E Picard ‘The Public-Private Divide in French Law: Through the History and Destiny of French Administrative Law’ in M Rüffert (ed.) *The Public-Private Divide: Potential for Transformation* (London, BIICL, 2009) 17.

K Polanyi *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, Beacon Press, 2001, orig. 1944).

F Pollock *The Law of Torts: a Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law* (Philadelphia, Blackstone Pub. Co., 1887).

S Prechal *Directives in EU Law* 2nd edn (Oxford, OUP, 2005).

S Prechal ‘Member State Liability and Direct Effect: What’s the Difference after All?’ (2006) 17 *EBLR* 299.

S Prechal ‘The Protection of Rights: How Far? In S Prechal & B van Roermund (eds) *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford, OUP, 2008) 155.

D Priel ‘British Politics, The Welfare State, and Tort Liability of Public Authorities’ Warwick School of Law Research Paper No. 2010/14.

G Priest ‘The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law’ (1985) 14 *Journal of Legal Studies* 461.

G Priest ‘The Modern Expansion of Tort Law: Its Sources, Its Effects, and Its Reform’ (1991) *The Journal of Economic Perspectives* Vol. 5(3) 31.

N Reich ‘“*System der Subjectiven öffentlieche Rechte*” in the Union: A Europe Constitution for Citizens of Bits and Pieces’ (1995) vol. VI(I) *Collected Courses of the Academy of European Law* 157.

N Reich ‘Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights’ (2007) 44 *CMLR* 705.

N Reich ‘AGM-COSMET or: Who is Protected by Safety Regulation?’ (2008) 33(1) *E.L. Rev.* 85, 94.

N Reich ‘Rights without Duties? Reflections of the State Liability Law in the Multilevel Governance System of the Community: Is There a Need for a more Coherent Approach in European Private Law’ EUI Working Paper Law 2009/10.

M Reimann ‘Nineteenth Century German Legal Science’ (1990) 31 *B.C.L. Rev.* 837.

K Renner *Institutions of Private Law* (London, Routledge, 1949, reprint 1976).

M Renner ‘Death by Complexity: The Financial Crisis and the Crisis of Law in World Society’ in P Kjaer, G Teubner & A Febbrajo (eds) *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford, OUP, 2011) 93.

G Ripert *Le Régime Démocratique et le Droit Civil Moderne* 2eme éd (Paris, Pichon, 1948).

C Robinette ‘Can there be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine’ (2004-2005) 43 *Brandeis L.J.* 369.

M Rüffert, ‘Rights and Remedies in European Community Law: a Comparative View’ (1997) 34 *CMLR* 307.

R Saleilles *Les Accidents du Travail et la Responsabilité Civile: (essai d'une théorie objective de la responsabilité délictuelle)* (Paris, Rousseau, 1897).

R Saleilles *De la personnalité juridique* 2e éd (Paris, Rousseau, 1922).

JW Salmond *The Law of Torts* (London, Stevens and Haynes, 1907) 83.

J Salmond *Salmond on Torts* 6th edn (London, 1924).

G Samuel ‘Le Droit Subjectif and English Law’ (1987) 46(2) *CLJ* 264.

IJ Sand ‘Changing Forms of Governance and the Role of Law – Society and its Laws’ Arena Working Paper 00/14.

H Schepel *The Constitution of Private Governance Product Standards in the Regulation of Integrating Markets* (Oxford, Hart Publishing, 2005).

H Schepel ‘Constitutionalising the Market, Marketising the Constitution, and to tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU law, (2012) 18(2) *ELJ* 177.

H Schepel ‘The New Approach to the New Approach: the Juridification of Harmonized Standards in EU Law’. http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_04_0521.pdf (accessed on 23 August 2015).

C Schmid ‘The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell’ in C Joerges & T Ralli (eds) ‘European Constitutionalism without Private Law, Private Law without Democracy’ ARENA Report No 3/11 RECON Report No 14, 17.

G Schwartz ‘Tort Law and the Economy in Nineteenth Century America: A Reinterpretation’ (1980) 90 *Yale L.J.* 1717.

G Schwartz ‘Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice’ (1996-1997) 75 *Tex. L. Rev.* 1801. (1994-1995);

G Schwartz ‘Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?’ (1994) 42 *UCLA L. Rev.* 377;

S Shavell ‘Strict Liability versus Negligence’ (1985) 9(1) *The Journal of Legal Studies* 1.

C Sieburgh ‘The Attribution of Acts: Towards a Principled Assessment under EU and National Private Law’ (2016) 3 *ERPL* 645.

N Simmonds *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester, MUP, 1984).

N Simmonds ‘Bluntness and Bricolage’ in H Gross & R Harrison (eds) *Jurisprudence: Cambridge Essays* (Oxford, Clarendon Press, 1992) 1.

NE Simmonds ‘Justice and Private Law in a Modern State’ (2006) 25(2) *UQLJ* 229.

SM Singh. ‘What is the Best Way to Supervise the Quality of Medical Devices? Searching for a Balance Between ex-ante and ex-post Regulation’ (2013) 4 *EJRR* 465.

G Spindler ‘Market Processes, Standardisation and Tort Law’ (1998) 4(3) *ELJ* 316.

J Stapleton ‘Duty of Care and Economic Loss: A Wider Agenda’ (1990) 107 LQR 249.

J Stapleton *Product Liability* (London, Butterworths, 1994).

J Stapleton ‘Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence’ (1995) 111 *LQR* 301.

J Stapleton ‘Tort, Insurance, and Ideology’ (1995) 58 *MLR* 820.

HJ Steiner *Moral Argument and Social Vision in the Courts* (Madison, University of Wisconsin Press, 1987).

R Stevens ‘Vicarious Liability or Vicarious Action?’ (2007) 130 *L.Q.E.* 30-34.

J Steyn ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 *LQR* 433.

AO Sykes ‘The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment and Related Legal Doctrines’ (1988) (1988) 101 *Harv. L. Rev.* 563.

S Taekema ‘Private Law as an Open Legal Order: Understanding Contract and Tort as Interactional Law’ (2014) 43(3) *Netherlands J. of Legal Philosophy* 140.

G Teubner ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Review* 239

G Teubner ‘After Legal Instrumentalism: Strategic Models of Post-Regulatory Law’ in G Teubner (ed) *Dilemmas of Law in the Welfare State* (New York, De Gruyter, 1986).

G Teubner ‘The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability’ in G Teubner, L Farmer & Declan Murphy (eds) *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (Chichester, Wiley, 1994).

G Teubner ‘Art and Money: Constitutional Rights in the Private Sphere? (1998) 18 *OJLS* 61.

G Teubner ‘After Privatization? The Many Autonomies of Private Law’ (1998) 51(1) *CLP* 393.

G Teubner ‘Breaking Frames: Economic Globalisation and the Emergence of Lex Mercatoria’ (2002) 5 *European Journal of Social Theory* 199.

G Teubner ‘Coincidentia Oppositorum: *Hybrid Networks Beyond Contract and Organisation*’ in M Amstutz & G Teubner (eds) *Networks: Legal Issues of Multi-lateral Co-operation* (Oxford, Hart Publishing, 2009).

G Teubner *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford, OUP, 2012).

M Tison ‘Do not Attack the Watchdog! Banking Supervisor’s Liability after Peter Paul’ Financial Law Institute Working Paper Series 2005-02.26.

T Tridimas *The General Principles of EU Law* 2nd edn (Oxford, OUP, 2006).

K Tuori ‘Fundamental Rights Principles: Disciplining the Instrumentalism of Policies’ in AJ Menéndez & EO Eriksen (eds) *Constitutional Rights through Discourse: On Robert Alexy’s Legal Theory – European and Theoretical Perspectives* Arena Report No 9/2004, 55.

C Van Dam *European Tort Law* 2nd edn (Oxford, OUP, 2013).

W Van Gerven ‘Of Rights, Remedies and Procedures’ (2000) 37(3) *CMLR* 501.

B Van Leeuwen ‘An Illusion of Protection and an Assumption of Responsibility: the Possibility of Swedish State Liability after *Laval*.’ (2012) 14 *Cambridge Yearbook of European Legal Studies* 453.

B Van Leeuwen ‘PIP Breast Implants, the EU’s New Approach for Goods and Market Surveillance by Notified Bodies’ (2014) 3 *EJRR* 1.

G Viney and P Jourdain *Les Conditions de la responsabilité* (3^{e} ed. LGDJ Paris 2006)

G Viney *Introduction a la Responsabilité* (3e ed. LGDJ Paris 2008).

J Weiler ‘The Transformation of Europe’. (1991) 100(8) *Yale LJ* 2403.

E Weinrib *The Idea of Private Law* (OUP, Oxford, 1995).

GE White *Tort Law in America: An Intellectual History* (New York, OUP, 1980).

S Whittaker (ed) *The Development of Product Liability* (Cambridge, CUP, 2010).

F Wieacker 'Foundations of European Legal Culture' (1989) 38 *The American Journal of Comparative Law* 1.

F Wieacker (T Weir trans) *A History of Private Law in Europe* (Oxford, Clarendon Press, 1995).

D Wielsch 'Relational Justice' (2013) 76(2) Law and Contemporary Problems 191.

G Williams 'The Aims of the Law of Tort' (1951) 4(1) *CLP* 137.

G Williams 'Vicarious Liability: Tort of the Master or the Servant?' (1956) *LQR* 72.