RETHINKING FAULT LIABILITY AND STRICT LIABILITY IN THE LAW OF TORTS

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I. INTRODUCTION

One of the most powerful influences on thinking regarding tort law is the distinction between fault liability and strict liability. It is virtually omnipresent in the cases and scholarship. As George Fletcher observed, "[w]e operate within the paradigm of the opposition of fault and strict liability and assume that this basic dichotomy lies at the foundation of the system".[1] One particularly prominent manifestation of the distinction is the prevalent practice of categorising torts as either being based on fault or as imposing strict liability. Thus, certain torts, particularly that of negligence, are routinely identified as being fault-based whereas others, such as the rule in *Rylands v Fletcher* and the tort of defamation, are widely classed as imposing strict liability. There is clearly a general understanding that organising individual torts by reference to the dichotomy between fault liability and strict liability casts light on them and the field more generally. Emblematic of this perception is one scholar's comment that "[t]here can surely be few more fundamental features to civil litigation than knowing whether liability for the act complained of is strict or not".[2]

This article argues that the ubiquitous practice of pigeonholing torts according to the categories of fault liability and strict liability is, at best, seriously misleading. It conceals the complexity of tort law and obscures more than it illuminates. Four arguments are made in support of this claim. The first is that many, and perhaps most, torts are amalgams of the two forms of liability. As we will see, it is common for torts to have several conduct elements[3] and for only

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1 G.P. Fletcher, "The Fault of Not Knowing" (2002) 3 Theor. Inq. Law 265 at 265–266.

2 J. Eekelaar, "Nuisance and Strict Liability" (1973) 8 Ir. Jur. 191 at 191.

3 It may be thought that the concepts of "conduct elements" and "fault elements" properly belong to the criminal law and are alien to tort law. This would be a serious error. These ideas are and have long been a firmly established part of tort law's vocabulary and are very regularly employed by the courts (including at the ultimate appellate level) and commentators in distilling a tort's ingredients. A prominent example is *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48; [2017] A.C. 142 at [58]. For further illustrations and discussion more generally, see J. Goudkamp, "Elements of Torts" in J. Goudkamp et al (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Oxford: Hart Publishing, 2022), at pp.40–42.

some of those elements to be paired with a fault requirement. Such torts make use of both fault liability and strict liability. The second and third arguments concentrate on supposedly strict liability torts. It is contended that the practice of labelling torts as ones of strict liability fails to take account of fault-based defences thereto as well as the fact that so-called strict liability torts have the potential to impose liability on defendants who were in fact at fault. The fourth argument focuses on the doctrine of vicarious liability. The simple point made is that the rules regarding vicarious liability ensure that responsibility in tort is overlain by a substantial stratum of strict liability. Each of these arguments is independent of the rest. The first takes a little longer to establish than the others, but the others are in no way contingent upon or secondary to it.

The problem that this article exposes is not simply a terminological one that is devoid of real-world significance. Because judges rightly or wrongly often view strict liability in tort law with considerable suspicion, branding a tort as one of strict liability can and often does create considerable impetus to confine or eliminate it. Recent and sometimes striking illustrations from the case law are legion.[4] By parity of reasoning, identifying a tort as being based on fault has the potential to alleviate such pressure. Needless to say, it is inappropriate for the parameters of a tort to be influenced by whether it is thought to be one of strict liability or fault liability if these labels paint a seriously misleading picture of the way in which it works.

Practical consequences aside, however, we should care whether the assumption that individual torts can be classified by reference to the divide between fault liability and strict liability is accurate. As observed above[5] and as the discussion below confirms, this understanding is widely held and profoundly affects thinking regarding individual torts and, indeed, the field more generally. Most tort textbooks are arranged, at least to some extent, by reference to the dichotomy.[6] And it is routine for judges hearing torts cases to state, often at the outset of their analysis of the ingredients of the tort in issue, whether they consider the tort to be one of strict liability or to be fault-based. If the understanding that torts can be arranged by reference to the dichotomy is

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4 Illustrations of cases in which this sentiment is apparent include *O'Shea v MGN Ltd* [2001] E.M.L.R. 40 at [28]–[48]; *Fytche v Wincanton Logistics Plc* [2003] EWCA Civ 874; [2003] I.C.R. 1582 at [30]–[38]; *Network Rail Infrastructure Limited v Morris* [2004] EWCA Civ 172; [2004] Env. L.R. 41 at [35]; *Bernard v Attorney General of Jamaica* [2004] UKPC 47; [2005] I.R.L.R. 398 at [21]; *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256; [2010] 1 W.L.R. 1441 at [52]; *Mitsui Sumitomo Insurance Co (Europe) Ltd v Mayor's Office for Policing and Crime* [2014] EWCA Civ 682; [2015] Q.B. 180 at [126]; *R. (AA (Sudan)) v Home Secretary* [2017] EWCA Civ 138; [2017] 1 W.L.R. 2894 at [44]; *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355 at [91]; *Generics UK Ltd v Warner-Lambert Co LLC* [2018] UKSC 56; [2019] Bus. L.R. 360 at [171].

5 See the text accompanying nn.1–2 above.

6 See, e.g., J.G. Fleming, *The Law of Torts*, 9th edn (Sydney: Law Book Co, 1998), ch.6 (explaining that his book had been structured by reference to the concepts of intention, negligence and strict liability); S. Deakin and A. Adams, *Markesinis and Deakin's Tort Law* (Oxford: Oxford University Press, 2019) (Part VI dealing with "Stricter Forms of Liability").

erroneous, it follows that the way in which the subject is conceptually organised needs to be fundamentally rethought.

II. NOMENCLATURE

The terms "fault liability" and "strict liability" are used in myriad ways in the literature and case law, and the dizzying diversity of meanings has caused considerable confusion. Accordingly, it is vital at the outset to isolate the principal meanings borne by the two concepts and to specify how they will be used in this article.[7] No apology is made for embarking on this exercise. It is absolutely essential in circumstances where there is very considerable (and often unappreciated) variability in how the terms "fault liability" and "strict liability" are used. The position is *a fortiori* considering the importance of the role that they play in efforts to understand tort law.

A. Strict Liability

Two definitions of strict liability can be immediately put to one side. According to the first, liability is strict when it is imposed "in the absence of fault".[8] Pursuant to the second, "strict liability for harm entails an obligation to adopt all available means necessary to avoid injuring someone".[9] These definitions both suffer from the same defect, namely, that no such liability exists in tort law. Thus, it is never a precondition of liability in tort that the claimant establish that the defendant was faultless.[10] Similarly, when tort law requires that care be taken,

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7 A third, related concept, "absolute liability", is beyond the scope of this article. The *locus classicus* on the subject is P.H. Winfield, "The Myth of Absolute Liability" (1926) 42 L.Q.R. 37. There is also considerable instability as regards the meaning of this expression. It is variously said to be liability that is "unchallengeable" (*Clerk & Lindsell on Torts*, 23rd edn (London: Sweet & Maxwell, 2020), para.1.69), liability that is imposed where it is "impossible for the defendant to prevent the harm occurring to the claimant" (N.J. McBride and R. Bagshaw, *Tort Law*, 6th edn (Harlow: Pearson, 2018), at p.454) and "simply strict liability without the defense of plaintiff fault or misconduct" (J.L. Coleman, *Markets, Morals, and the Law* (Oxford: Oxford University Press, 2002), at p.180).

8 A. Gray, *The Evolution from Strict Liability to Fault in the Law of Torts* (Oxford: Hart Publishing, 2021), at p.2.

9 A. Brudner, *The Unity of the Common Law*, 2nd edn (Oxford: Oxford University Press, 2013), at p.293. *Read v J Lyons & Co* [1947] A.C. 156 at 171 and 173; [1946] 2 All E.R. 471 at 476–477 (Lord Macmillan conceiving of strict liability as liability that imposes an "exacting standard" and which requires that a "high degree of care" be taken). For comprehensive demolition of this definition of strict liability, see J. Gardner, *Torts and Other Wrongs* (Oxford: Oxford University Press, 2019), ch.5.

10 The point is Peter Cane's: see P. Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002), at p.84.

the defendant is never obliged to exercise more care than is reasonable.[11] Of course, the amount of care that a given defendant may be expected to take on a particular occasion may be substantial.[12] But this does not change the fact that tort law, when it requires that care be taken, never demands that more than a reasonable amount of caution be exercised.

According to a third definition of strict liability, liability is strict when it is imposed regardless of whether the defendant is morally culpable. John Goldberg and Benjamin Zipursky (sometimes) use the concept of strict liability in this way. For example, they write that because the tort of negligence exposes shortcomers who are blamelessly unable to achieve the benchmark of the reasonable person to liability, "the standard of conduct built into the tort of negligence is strict".[13] Unlike the first and second definitions of strict liability, tort law undoubtedly imposes strict liability in this third sense. Thus, and staying with the example of the tort of negligence, it is irrelevant to a claim for that tort that the defendant was incapable of exercising reasonable care on account of their being, for example, dim-witted,[14] inexperienced[15] or even insane.[16] One problem for Goldberg and Zipursky, however, is that the meaning that they attribute to the concept of strict liability largely deprives it of utility. The difficulty lies in the fact that, minor exceptions aside, *all* liability in tort is independent of culpability. As Sandy Steel observes, "[i]t is almost undeniable that moral culpability is not a necessary condition of liability to compensate in English private law, as the law stands".[17] Because the absence of culpability is almost never an answer to liability in tort,[18] liability is nearly always strict in the third sense of the term.

A fourth definition of strict liability perceives liability as being strict when it is imposed regardless of whether the defendant was at fault in a technical legal sense. This is how Peter Cane uses the language of strict liability in his

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11 "The law only requires *reasonable care* – it does not require all possible care": P.S. Atiyah, *The Damages Lottery* (Oxford: Oxford University Press, 1995), at p.4 (emphasis in original).

12 Consider the text accompanying n.131 below.

13 J.C.P. Goldberg and B.C. Zipursky, "The Strict Liability in Fault and the Fault in Strict Liability" (2016) 75 Fordham L. Rev. 743 at 747. See also A.M. Honoré, "Responsibility and Luck: The Moral Basis of Strict Liability" (1988) 104 L.Q.R. 530 at 537 (maintaining that "the objective standard of competence imposes a form of strict liability on that minority of shortcomers who cannot attain it").

14 *Vaughan v Menlove* (1837) 3 Bing N.C. 468; 132 E.R. 490.

15 *Nettleship v Weston* [1971] 2 Q.B. 691; [1971] 3 All E.R. 581.

16 *Dunnage v Randall* [2015] EWCA Civ 673; [2016] Q.B. 639.

17 S. Steel, "Culpability and Compensation" in J. Goudkamp et al (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Oxford: Hart Publishing, 2022), at p.47.

18 Conversely, culpability is often material to remedies awarded for torts. For example, it is squarely relevant to apportioning responsibility for contributory negligence: see *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 K.B. 291 at 326; [1949] 1 All E.R. 620 at 632; *Stapley v Gypsum Mines Ltd* [1953] A.C. 663 at 682; [1953] 2 All E.R. 478 at 486. Similarly, save in uncommon situations (see the text accompanying n.146 below), punitive damages cannot be awarded absent culpability (see the authorities cited in J. Goudkamp and D. Nolan, *Winfield & Jolowicz on Tort*, 20th edn (London: Sweet & Maxwell, 2020), para.23.017).

illuminating scholarship on the subject. Thus, in *Responsibility in Law and Morality*, he writes that liability is strict when it is imposed regardless of whether the defendant was negligent "and regardless of whether the [defendant's conduct in issue] was accompanied by any particular mental state".[19] Cane observes that forms of fault recognised by tort law, in addition to negligence, include "'intention', 'recklessness', 'knowledge/belief' and 'malice'".[20] Tort law obviously makes more use of certain of these forms of fault than others.[21] But all of them feature as elements of torts to at least some extent.[22]

It is imperative to recognise (although it is often not recognised[23]) that the third and fourth conceptions of strict liability differ radically from each other.[24] The difference comes into sharp focus once it is observed that the two definitions sometimes give conflicting answers to the question whether strict liability has been imposed. Take the tort of negligence. As Goldberg and Zipursky observe,[25] that tort imposes strict liability in the third sense (i.e., liability regardless of culpability) because it is no answer for the defendant to say that they were not morally to blame. It simply does not matter that the defendant was, for example, incapable of conforming to the standard of the reasonable person or strove heroically but unsuccessfully to live up to that benchmark. However, because the tort requires proof of a failure to exercise reasonable care, it is impossible for it to impose strict liability in the fourth sense (i.e., liability regardless of legal fault).[26] Thus, and consistent with their focus on determining whether the technical legal ingredients of causes of action exist, judges insist that "the tort of negligence is not a tort of strict liability".[27]

Following Cane, this article employs the language of strict liability in the fourth sense. It does so because, for reasons that have been given above, the other definitions are either wholly inadequate as devices for understanding tort

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19 Cane, *Responsibility in Law and Morality* (2002), at p.82.

20 Cane, *Responsibility in Law and Morality* (2002), at p.78.

21 This theme is developed at length in P. Cane, "*Mens Rea* in Tort Law" (2000) 20 O.J.L.S. 533.

22 See the text accompanying nn.34–36 below.

23 e.g., it is suppressed by McBride and Bagshaw, *Tort Law* (2018), at p.31 who write that liability is strict where "the defendant was not necessarily at fault, or to blame".

24 John Gardner did more than anyone to pry these definitions apart. Writing in relation to the criminal law, he rightly condemned the "muddle" that failing to distinguish them has caused: see J. Gardner, "Wrongs and Faults" in A. Simester (ed), *Appraising Strict Liability* (Oxford: Oxford University Press, 2005), at pp.68–69. Precisely the same muddle has caused considerable confusion in relation to tort law.

25 See the text accompanying n.13 above.

26 It may be thought that the law concerning vicarious liability and non-delegable duties of care are exceptions to this claim. It is true that the doctrines of vicarious liability and non-delegable duties of care can result in the defendant being held liable for the tort of negligence regardless of fault on their part but this is so only where there is fault on the part of another person.

27 *Dunnage v Randall* [2015] EWCA Civ 673; [2016] Q.B. 639 at [129] per Vos L.J. See also *Gore v Stannard (t/a Wynvern Tyres)* [2012] EWCA Civ 1248; [2014] Q.B. 1 at [125] (Lewison L.J. emphasising that "[n]o question of strict liability" arose in the famous case of *Vaughan v Menlove* (1837) 3 Bing N.C. 468; 132 E.R. 490 despite a shortcomer being held to the objective standard of care in a claim in negligence).

law (in the case of the first and second) or are of limited usefulness in this regard (in the case of the third). Further, and importantly the fourth sense in which the term "strict liability" is used is the most dominant by far in legal discourse both inside tort law and outside it.[28] As John Gardner observed with reference to tort law, "In legal parlance, strict liability is liability regardless of fault. 'Fault' here has a technical lawyers' meaning".[29] Several other scholars, also writing as regards tort law, have reached the same conclusion.[30]

One may be tempted to respond that the fourth definition of strict liability lacks utility because all or most torts require fault in the technical sense of the word in at least some respect meaning that tort law does not make use of strict liability. This reply harbours an accumulation of errors. But the most obvious (and fatal) problem with it is that even if all torts have at least one fault element, it is categorically not the case, as we will see in considerable detail imminently, that all aspects of the wrongs recognised by tort law are governed by a fault standard. Strict liability is a real phenomenon in tort law on the fourth definition of the concept, and tort law makes extensive use of it.

B. Fault Liability

Two principal definitions of fault liability are apparent from the foregoing discussion of strict liability. Fault can refer either to moral culpability or to facts that satisfy a fault element of a cause of action in tort. This article uses the concept of fault liability in the latter sense, which correlates with the definition of strict liability that has been adopted. Proceeding in this way opens up an important issue, which is what are the forms of legal fault that tort law recognises. It is convenient to adopt Cane's catalogue in this regard, which is fairly mainstream. Reference has been made to it above.[31] Thus, a tort makes use of fault liability if and to the extent that liability for it depends on proof of negligence or one of the mental states that Cane identifies, namely, intention (whether intention as to conduct ("D intended to enter C's land") or intention

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[28] See, e.g., H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968), at p.132 (defining strict liability in the criminal law as liability "where it is no defence to prove that you did not intend to do the act forbidden, did not know that you were doing it, and indeed took every care to avoid doing it")

[29] Gardner, *Torts and Other Wrongs* (2019), at p.173. See also at pp.134–135.

[30] See, e.g., A. Beever, *A Theory of Tort Liability* (Oxford: Hart Publishing, 2018), at p.32 ("the most prevalent" meaning); W.P. Keeton et al, *Prosser & Keeton on the Law of Torts*, 5th edn (St. Paul M.N.: West Publishing Co, 1984), 534 (referring to this as how the term strict liability "is commonly used by modern courts"). c.f. J. Murphy, "The Heterogeneity of Tort Law" (2019) 39 O.J.L.S. 455 at 462 ("highly idiosyncratic" and having "few … adherents").

[31] See the text accompanying n.20 above.

as to consequences ("D intended to cause injury to C")), recklessness, knowledge, belief and malice.[32]

It is worth emphasising that Cane's position that the concept of fault in tort law extends to particular mental states is and has long been and still is entirely orthodox.[33] Thus, writing at the dawn of the twentieth century Sir John Salmond considered that tort law recognised two forms of fault, "wrongful intent" and negligence.[34] In the twenty-first century, the authors of *Clerk & Lindsell on Torts* contend that the "main categories of fault [include] intentional harm [and] intentional conduct".[35] They go on to identify as forms of fault substantially the same states of mind as does Cane.[36] The writers of other contemporary tort textbooks proceed similarly.[37]

Admittedly, some scholars who appear to use the term "fault" in a technical sense sometimes seem to treat it as being synonymous with negligence. For example, in *The Damages Lottery* Patrick Atiyah wrote that "there is nothing esoteric about the legal concept of fault — lawyers define it as a failure to take reasonable care according to all the circumstances of the case".[38] However, it is clear that this usage is an artefact of a focus on the tort of negligence (and that tort was, of course, Atiyah's overriding concern in *The Damages Lottery*). Limiting the idea of fault to negligence yields the conclusion that torts such as deceit and conspiracy, because neither of them requires proof of negligence, lack a fault element. That conclusion is jarring if not downright absurd. Unsurprisingly, it is contrary to both authority at the ultimate appellate level[39] and the opinions of textbook writers.[40]

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32 Space precludes unpacking what each of these concepts entails, most or all of which will already be familiar to readers of this article. Cane defines each of them carefully: see Cane, *Responsibility in Law and Morality* (2002), at pp.79–82.

33 It is also orthodox outside tort law including, most obviously, in connection with the criminal law: see, e.g., J. Horder, *Ashworth's Principles of Criminal Law*, 9th edn (Oxford: Oxford University Press, 2019), at p.181.

34 J. Salmond, *The Law of Torts* (London: Stevens & Sons, 1907), at pp.9–11.

35 *Clerk & Lindsell on Torts* (2020), para.1.58.

36 *Clerk & Lindsell on Torts* (2020), paras.1.59–1.64.

37 See, e.g., Deakin and Adams, *Markesinis and Deakin's Tort Law*, 6th edn (2019), at p.24 (commenting that "fault … assumes three forms: malice, intention (including recklessness), and negligence"), Goudkamp and Nolan, *Winfield & Jolowicz on Tort* (2020), para.3.001 (observing that "acting with a particular state of mind" is a form of fault and then discussing relevant mental states). See also R.A. Epstein, "A Theory of Strict Liability" (1973) 2 J.L.S. 151 at 152 (identifying intention and negligence as species of fault) and the *Restatement (Third) of the Law of Torts: Liability for Physical and Emotional Harm* (St. Paul M.N.: American Law Institute, 2016), ch.4, Scope Note ("liability for negligence or for intent is liability based on fault").

38 Atiyah, *The Damages Lottery*, at p.3. See also Gardner, *Torts and Other Wrongs* (2019), at p.135 (linking fault with the issue of "the care that D took"). c.f. at p.173 where Gardner treats knowledge as a form of fault.

39 See, e.g., *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48; [2017] A.C. 142 at [58] (emphasising that the tort of deceit has a fault element).

40 See, e.g., Deakin and Adams, *Markesinis and Deakin's Tort Law* (2019), at p.24 and H. Carty, *An Analysis of the Economic Torts*, 2nd edn (Oxford: Oxford University Press, 2010), at p.308; J. Murphy, *The Province and Politics of the Economic Torts* (Oxford: Hart Publishing, 2002), at p.199 (characterising the torts of deceit and conspiracy as being fault-based).

III. AMALGAMS

The complexity of most torts is such that one cannot, without seriously mischaracterising the position, say simply that they are based on fault or that they are torts of strict liability. The reality is that individual torts generally make use of both fault liability and strict liability and often do so in more or less equal measure.[41] This claim may appear to be contradictory. However, no contradiction exists because it is entirely conventional, as we will see, for torts to be constituted by several elements that are focused on the defendant's conduct and for only some of those elements to be paired with a fault requirement. It is, at best, misleading to portray such torts (as opposed to their elements) as being either based on fault or as imposing strict liability.[42]

A. Supposedly Strict Liability Torts

In *R. v Governor of Brockhill Prison*, a prisoner's sentence was retrospectively reduced by a change in the law. The result was that he had been detained for longer than he should have been. The House of Lords held that the prison's governor was liable for false imprisonment. It did not matter that he had acted reasonably and in good faith. This led Lord Slynn to remark that "false imprisonment is a tort of strict liability".[43] Lord Slynn's position is accurate in that it is irrelevant to liability for false imprisonment whether the defendant knew or should have known that he had no authority to detain the claimant. At the same time, however, it is inadequate simply to categorise false imprisonment as a tort of strict liability. That is because it is an essential ingredient of that wrong that the defendant intended to restrain the claimant. As Smith L.J. said in *Iqbal v Prison Officers Association*, the defendant must have had "an intention to deprive the claimant of his liberty".[44] It is precisely because of this requirement that the tort of false imprisonment is regularly referred to as an "intentional

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41 One is reminded in this regard of Lord Simon's remark in *Read v J Lyons & Co Ltd* [1947] A.C. 156 at 180 that "[t]here is not one principle only which is to be applied with rigid logic to all cases. To this result both the infinite complexity of human affairs and the historical development of the forms of action contribute".

42 The claims made in this section may appear to be reminiscent of those made by Goldberg and Zipursky, "The Strict Liability in Fault and the Fault in Strict Liability" (2016) 75 Fordham L. Rev. 743. In fact, the analyses diverge from each other almost completely because of the very different meanings that Goldberg and Zipursky attach to the concepts of fault liability and strict liability.

43 [2001] 2 A.C. 19 at 26; [2002] 4 All E.R. 15 at 18 See also A.C. at 28 and 32; All E.R. at 20 and 24. See further *R. (AA (Afghanistan)) v Secretary of State for the Home Department* [2013] UKSC 49; [2013] 1 W.L.R. 2224 at [41] per Lord Toulson ("liability for false imprisonment is strict"); *Clerk & Lindsell on Torts* (2020), para.14.26 ("Liability is strict").

44 [2009] EWCA Civ 1312; [2010] Q.B. 732 at [72]. See also *VS v The Home Office* [2014] EWHC 2483 (QB) at [31].

tort" by judges[45] and scholars[46] alike. However, because the tort is insensitive to fault in the respect exemplified by the decision in *Governor of Brockhill Prison*, this classification also misses an important part of the truth. Because the wrong's definition incorporates aspects of both fault liability and strict liability, neither of these labels used alone accurately describes it.

Analogous points can be made about the tort of battery.[47] In *Wamala v Tascor Services Ltd* Walker J. asserted that liability for battery "is strict" and that "[t]here is no requirement to prove fault".[48] The tort of battery indeed imposes strict liability in so far as it is irrelevant whether the defendant intended to harm the claimant.[49] The tort also imposes strict liability in that it is apparently immaterial whether the defendant reasonably thought that the claimant had consented to the contact concerned.[50] To this extent, Walker J.'s description of the tort is understandable. However, fault is most definitely required in other respects before liability for battery will arise, and consistent with this the wrong is frequently referred to as an "intentional tort".[51] Thus, in *Letang v Cooper* Lord Denning M.R. and (Danckwerts L.J. concurring) held that a claim will not lie for battery unless the defendant intended to make contact with the claimant's body.[52] Since this is no mere volition requirement, it follows that the tort of battery imposes strict liability in so far as the issues of damage and consent are concerned and fault-based liability as regards the requirement of bodily contact. The fact that the wrong is an ensemble of both strict liability and fault liability is suppressed by applying those labels at the macroscopic level of the tort. Those labels make sense only if they are applied in a more discriminating way, which requires one to descend to the atomistic domain of the tort's elements.

A prime example of a tort that is almost universally but inaccurately thought to be one of strict liability is that of defamation. It is frequently asserted without qualification that it imposes strict liability.[53] That position is, to a degree,

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45 See, e.g., *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312; [2010] Q.B. 732 at [72]; *Director of Legal Aid Casework v R. (Sisangia)* [2016] EWCA Civ 24; [2016] 1 W.L.R. 1373 at [26].

46 See, e.g., *Clerk & Lindsell on Torts* (2020), para.14.17.

47 For discussion as to whether liability for trespass to the person is based on fault liability or strict liability, see A. Beever, "The Form of Liability in the Torts of Trespass" (2011) 40 Comm. L. World Rev. 378. Beever draws attention to the fact that torts that go under the banner of trespass to the person are sometimes referred to as imposing strict liability and on other occasions as intentional torts. However, he wrongly concludes that the former characterisation is correct. In actuality, both labels are correct yet neither is. That is because the torts are medleys of both forms of liability.

48 [2017] EWHC 1461 (QB); [2017] 4 W.L.R. 155 at [247].

49 "[A]n intention to injure is not essential to an action for trespass to the person": *Wilson v Pringle* [1987] Q.B. 237 at 249; [1986] 2 All E.R. 440 at 445 per Croom-Johnson L.J.

50 *Re F* [1990] 2 A.C. 1 at 73; [1989] 2 All E.R. 545 at 564; c.f. *Restatement (Second) of the Law of Torts*, (St. Paul M.N.: American Law Institute, 1977), §§50, 892(2); McBride and Bagshaw, *Tort Law* (2018), at p.66.

51 See, e.g., *Co-Operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329; [2011] 3 W.L.R. 1272 at [33] per Aikens L.J.

52 [1965] 1 Q.B. 232 at 239–240; [1964] 2 All E.R. 929 at 932.

53 See, e.g., *Clerk & Lindsell on Torts* (2020), para.21.11 ("defamation remains a tort of strict liability"); *Gatley on Libel and Slander*, 16th edn (London: Sweet & Maxwell, 2017), para.1.4 ("defamation is a

understandable. The cause of action requires proof, among other things, that the statement in issue was defamatory and that it referred to the claimant. Neither of these requirements is governed by a fault standard. Thus, it is irrelevant whether the defendant believed, reasonably or otherwise, that the statement concerned was not defamatory.[54] Similarly, it is immaterial that the defendant neither intended for it to refer to the claimant nor was negligent regarding the risk that it would be understood as doing so.[55] Indeed, it is immaterial even that the defendant was ignorant of the claimant's existence.[56] However, the elements of the tort of defamation are nevertheless squarely concerned with fault in at least two respects. First, liability for defamation will not arise unless the defendant was at least negligent as regards the risk that the statement would reach a third party.[57] Suppose, for example, that D utters defamatory remarks regarding C which T overhears. D will not be liable if D reasonably but mistakenly believed that no one else was within earshot.[58] Similarly, if D writes a letter to C in which D makes statements that are defamatory of C and T opens and reads it, D will be liable in defamation only if D was negligent with respect to that risk.[59] Secondly, where T publishes a libellous statement in premises occupied by D, D will be liable if, upon obtaining knowledge of its existence, D fails to remove it within a reasonable period of time.[60] This rule incorporates a fault requirement on account of its concern with the defendant's knowledge and whether the defendant, upon obtaining knowledge, acted with reasonable expedition. It follows that the tort of defamation is an amalgam of fault liability and strict liability. This reality is concealed by the familiar claim that the wrong is one of strict liability.

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tort of strict liability"); T. Weir, *Tort Law*, 2nd edn (Oxford: Clarendon Press, 2006), at p.91 ("defamation … [is a] tort … of 'strict liability'").

54 "A person charged with libel cannot defend himself by showing that he intends in his own breast not to defame … if in fact he did …": *E Hulton & Co v Jones* [1910] A.C. 20 at 23 per Lord Loreburn L.C.; [1908–10] All E.R. Rep. 29 at 47.

55 Exemplified by *E Hulton & Co v Jones* [1910] A.C. 20. There is one exception to this rule, which concerns "look alike" cases: see *O'Shea v MGN Ltd* [2001] E.M.L.R. 40.

56 "[I]t is impossible for the person publishing a statement which, to those who know certain facts, is capable of defamatory meaning in regard to A, to defend himself by saying: 'I never heard of A and did not mean to injure him'": *Cassidy v Daily Mirror* [1929] 2 K.B. 331 at 341 per Scrutton L.J.; [1929] All E.R. Rep. 117 at 121.

57 David Rolph resists this conclusion in D. Rolph, "The Concept of Publication in Defamation Law" (2021) 27 Torts L.J. 1. He argues that the cases in issue are anomalous (at pp.7–10). The argument is a difficult one given the number of decisions and the fact that they form a line of authority that is long-standing.

58 *White v J & F Stone (Lighting and Radio) Ltd* [1939] 2 K.B. 827 at 836; [1939] 3 All E.R. 507 at 512. Consider also *McNichol v Grandy* [1931] S.C.R. 696.

59 See, e.g., *Huth v Huth* [1915] 3 K.B. 32; [1914–15] All E.R. Rep. 242 (no liability where letter unforeseeably opened by inquisitive butler); *Powell v Gelston* [1916] 2 K.B. 615; [1916–17] All E.R. Rep. 953 (no liability where letter addressed to father opened by son). Consider also the example given in *Pullman v Walter Hill & Co Ltd* [1891] 1 Q.B. 524 at 527 (Lord Esher M.R. stating that no liability would arise in defamation if a burglar stole and read D's private notes that were defamatory of C).

60 *Byrne v Deane* [1937] 1 K.B. 818; [1937] 2 All E.R. 204.

In *OBG Ltd v Allan*, Lord Hoffmann claimed that "conversion is a tort of strict liability".[61] Similarly, Sarah Green and John Randall describe conversion "as a classic tort of strict liability".[62] This is a half-truth. It is well established that it is irrelevant to liability for conversion that the defendant did not know of, and could not reasonably have discovered, the claimant's interest in the goods in issue.[63] In this regard, and as Diplock L.J. said in *Marfani & Co Ltd v Midland Bank Ltd*, the duty imposed by the tort of conversion is indeed "absolute" with the result that the defendant "acts at his peril".[64] However, the tort of conversion is nevertheless acutely concerned with fault in circumstances where the claimant must not only intend to deal with the chattel in question but must also intend to exercise dominion over it.[65] None of this is consistent with conversion being a tort of strict liability.

This brings us to what is often regarded as the "classic example"[66] of strict liability in the law of torts, namely, the rule in *Rylands v Fletcher*. The understanding that the rule imposes strict liability is essentially ubiquitous.[67] The language of strict liability is used in this setting because, as Blackburn J. put it in *Rylands v Fletcher* itself, a defendant who brings onto their land anything that is likely to do mischief if it escapes "must keep it in at his peril".[68] Thus, if the dangerous thing in question escapes from the defendant's land and causes damage to the claimant's, the defendant will be "damnified without any fault of his own".[69] However, even here the unqualified application of the label "strict liability" is seriously misleading. As cases of impeccable pedigree make clear, the elements of the rule in *Rylands v Fletcher* are sensitive to whether the defendant was at fault in at least three ways.[70]

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61 [2007] UKHL 21; [2007] 1 A.C. 1 at [95].

62 S. Green and J. Randall, *The Tort of Conversion* (Oxford: Oxford University Press, 2009), at p.67. See also P. Cane, "Causing Conversion" (2002) 118 L.Q.R. 544 at 544 ("conversion is a strict liability tort").

63 *OBG Ltd v Allan* [2007] UKHL 21; [2007] 1 A.C. 1 at [311]. There are, however, several exceptions to this rule: see *Clerk & Lindsell on Torts* (2020), paras.17.73–17.79.

64 [1968] 1 W.L.R. 956 at 971; [1968] 2 All E.R. 573 at 578.

65 "The essential elements [of the tort of conversion] … involve an intention act or dealing with goods inconsistent with or repugnant to the rights of the owner, including possession and any right to possession. Such an act or dealing will amount to such an infringement of the possessor or proprietary rights of the owner if it is an intended act of dominion or assertion of rights over the goods": *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342; (2012) 82 N.S.W.L.R. 420 at [124] per Allsop P. (cited with approval in *Clerk & Lindsell on Torts* (2020), para.16.07). Consider also *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19; [2002] 2 A.C. 883 at [39].

66 *Clerk & Lindsell on Torts* (2020), para.1.70. See also Weir, *Tort Law* (2006), at p.92 ("famous example").

67 See, e.g., *Transco Plc v Stockport MBC* [2003] UKHL 61; [2004] 2 A.C. 1 at [97] per Lord Walker ("strict liability is its essential characteristic"); *LMS International Ltd v Styrene Packaging and Insulation Ltd* [2005] EWHC 2065 (TCC); [2006] T.C.L.R. 6 at [13] per HHJ Peter Coulson Q.C. ("*Rylands v Fletcher* is a rule of strict liability").

68 *Rylands v Fletcher* (1866) L.R. 1 Ex. 265 at 279.

69 *Rylands v Fletcher* (1866) L.R. 1 Ex. 265 at 280.

70 That which follows is not an exhaustive list of the ways in which the rule in *Rylands v Fletcher* is or is arguably sensitive to the issue of fault. For example, several scholars contend that the rule is fault-

First, a defendant will incur liability under the rule in *Rylands v Fletcher* only where they intended to bring the dangerous thing in issue onto their land or otherwise took responsibility for someone else having done so. This has been clear since the rule's inception, with Lord Cairns observing in *Rylands v Fletcher* itself that the defendant will be liable only if they acted with "the purpose of introducing" the dangerous thing upon their land.[71] Thus, the defendant will not be liable under the rule in *Rylands v Fletcher* in respect of damage caused by escaping water where they faultlessly allowed it spontaneously to accumulate on their land.[72] Admittedly, the term "purpose" can be understood as referring to a person's motive rather than their intention. However, the language of "purpose" is often used as a synonym for intention,[73] and it is clear that this is how Lord Cairns was deploying it in *Rylands v Fletcher*.

Secondly, not only is fault required in that the defendant must have intentionally collected the dangerous thing concerned or assumed responsibility for someone else's having done so, but the defendant must also be at fault in that they must know that it is prone to cause injury if it escapes.[74] This, too, has been a prerequisite of liability since the birth of the rule of *Rylands v Fletcher*. As Blackburn J. observed:

> "it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, *but which he knows to be mischievous if it gets on his neighbour's*, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property".[75]

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based in so far as it is a prerequisite to liability that the damage have been reasonably foreseeable. For example, John Fleming argued that this requirement "all but stripped the remaining vestiges of strict liability from … that erstwhile pillar of no-fault liability in English law": J.G Fleming, "The Fall of a Crippled Giant" (1995) Tort L. Rev. 56 at 56. See also D. Wilkinson, "*Cambridge Water Company v Eastern Counties Leather Plc*: Diluting Liability for Continuing Escapes" (1994) 57 M.L.R. 799. c.f. D. Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 L.Q.R. 421 at 444; McBride and Bagshaw, *Tort Law* (2018), at pp.453–454.

71 *Rylands v Fletcher* (1868) L.R. 3 H.L. 330 at 339.

72 *Wilson v Waddell* (1876) 2 App. Cas. 95. See also *Giles v Walker* (1890) 24 Q.B.D. 656 (thistledown); *Pontardawe Rural DC v Moore-Gwyn* [1929] 1 Ch. 656 (rock fall); *Seligman v Docker* [1949] Ch. 53; [1948] 2 All. E.R. 887 (wild pheasants).

73 "In both philosophical and legal literature, the most widely accepted account of the 'core' of the concept of intention in relation to conduct is based on the idea of choice; and in relation to consequences, on the concepts of aim, purpose and objective": Cane, "*Mens Rea* in Tort Law" (2000) 20 O.J.L.S. 533 at 534.

74 Several leading torts textbooks are strangely silent as regards this element of the rule in *Rylands v Fletcher*. See, e.g., *Clerk & Lindsell on Torts* (2020), paras.19.44–19.69; McBride and Bagshaw, *Tort Law* (2018), at p.444.

75 (1866) L.R. 1 Ex. 265 at 280 (emphasis added). The House of Lords specifically approved this passage on appeal: (1868) L.R. 3 H.L. 330 at 339–340.

In *Transco Plc v Stockport MBC*, Lord Bingham articulated the position slightly differently. His Lordship wrote that:

> "*It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant place and time, he ought reasonably to have recognised*, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be".[76]

Lord Bingham thus considered it to be sufficient that the defendant was either subjectively aware that the thing concerned was dangerous or that the reasonable person would have been so aware.[77] In other words, and in contrast to Blackburn J., he considered that either subjective or objective fault in this connection sufficed. However, the difference between Lord Bingham and Blackburn J. (which, surprisingly, has gone unaddressed in torts textbooks) is unimportant for present purposes because on both accounts liability cannot arise under the rule in *Rylands v Fletcher* unless the defendant is at fault.

Thirdly, liability under the rule in *Rylands v Fletcher* is contingent upon the defendant's having put their land to a "non-natural" use, and that concept has been defined so as to engraft a fault requirement onto the cause of action. Thus, in *Transco* Lord Bingham said that the test for non-natural use was "whether the defendant has done something *which he recognises, or ought to recognise*, as being quite out of the ordinary in the place and at the time when he does it".[78] This test explicitly establishes alternative fault requirements. It is essential that the defendant be either subjectively ("recognise") or objectively at fault ("ought to recognise"). It is true that the use of the land itself does not need to have been unreasonable in order for it to be a non-natural one.[79] Consistent with this Lord Bingham in *Transco* remarked that "little help is gained (and unnecessary confusion perhaps caused) by considering whether the use is proper for the general benefit of the community".[80] However, this is irrelevant for present purposes. That is because it does not change the fact that it is a prerequisite to the imposition of liability that the defendant have known or ought to have known that the use to which the land was being put was a non-natural one.

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76 [2003] UKHL 61; [2004] 2 A.C. 1 at [10] (emphasis added).

77 See also *Gore v Stannard (t/a Wyvern Tyres)* [2012] EWCA Civ 1248; [2014] Q.B. 1 at [22].

78 [2003] UKHL 61; [2004] 2 A.C. 1 at [11] (emphasis added).

79 The point is carefully discussed in Nolan "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 L.Q.R. 421 at 442–444.

80 [2003] UKHL 61; [2004] 2 A.C. 1 at [11].

B. Supposedly Fault-Based Torts

Not only are torts that are collages of fault liability and strict liability frequently misleadingly labelled as torts of strict liability but such torts have also been regularly mischaracterised as fault-based torts. Consider, for example, the tort of causing loss by unlawful means. In *OBG*, Lord Hoffmann asserted that "[t]he tort is not one of strict liability".[81] Although it is true that the tort requires proof of fault in that the defendant must have intended to injure the claimant,[82] certain of the tort's elements are governed by a strict liability standard. For example, the requirement that the defendant use unlawful means against a third party is not governed by a fault standard. Accordingly, it is simply irrelevant whether the defendant knew or ought reasonably to have known that the means in issue were unlawful. As the authors of *Clerk & Lindsell on Torts* observe, "there is no authority suggesting that the defendant must have identified the means as being unlawful".[83] To at least this extent, the tort imposes strict liability.

Several other supposed exemplars of fault-based torts also make use of strict liability. Take the tort of deceit. Although opinion is divided as to the exact ingredients of this wrong,[84] a conventional list is that offered by Viscount Maugham in *Bradford Third Equitable Benefit Building Society v Borders*:

> "First, there must be a representation of fact made by words or, it may be, by conduct … Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true. Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him. … Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing".[85]

At first glance, the tort may appear to be squarely based on fault[86] given that the defendant must have made the representation of fact in issue "(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false",[87] and bearing in mind that the defendant must have done so intending

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81 [2007] UKHL 21; [2007] 1 A.C. 1 at [141].

82 "Intention is an essential ingredient": *OBG Ltd v Allan* [2007] UKHL 21; [2007] 1 A.C. 1 at [141] per Lord Hoffmann.

83 See *Clerk & Lindsell on Torts* (2020), para.23.121 n.588.

84 This theme is developed in P. MacDonald Eggers, *Deceit: The Lie of the Law* (London: Routledge, 2009). See especially at para.1.79.

85 [1941] 2 All E.R. 205 at 211 (footnotes omitted). More recently, see *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48; [2017] A.C. 142 at [18].

86 See n.39 above.

87 *Derry v Peek* (1889) 14 App. Cas. 337 at 374 per Lord Herschell.

for the claimant to rely on it. The tort, however, contains a significant strand of strict liability in connection with the element of damage.[88] Thus, while the defendant must intend for the claimant to rely on the false representation, the claimant does not need to prove that the defendant intended to cause them loss as a result[89] or was negligent with respect to the risk that loss would be suffered.[90] As Cane astutely observes, the elements of the tort of deceit are "an amalgam of knowledge, belief, intention, recklessness and cause-based (strict) liability".[91]

IV. DEFENCES

Whenever it is asserted (as it often is) that a given tort imposes strict liability, the focus appears to be exclusively on the elements of the tort concerned as opposed to defences thereto.[92] For example, the rule in *Rylands v Fletcher* is said to be a strict liability tort in view only of the fact that the claimant is not required to establish that the defendant was at fault in connection with the escape of the dangerous thing in issue.[93] However, the bald statement that a given tort is one of strict liability usually mischaracterises the position since torts that allegedly impose strict liability are typically subject to a cluster of fault-based defences. The existence of such defences means that, contrary to the impression created by the language of strict liability, it remains open to defendants, to the extent that the defences concerned permit them to do so,[94] to agitate the issue of fault.

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88 Damage is conventionally understood as an element of the tort of deceit: see, e.g., *Clerk & Lindsell on Torts* (2020), para. 17.41. However, it is debatable whether damage is an element of the tort of deceit or (if different) a condition of the tort's being actionable. Consider *Briess v Woolley* [1954] A.C. 333 at 353; [1954] 1 All E.R. 909 at 918; *Diamond v The Bank of London and Montreal* [1979] Q.B. 333 at 349; [1979] 1 All E.R. 561 at 567; J. Neyers, "Form and Substance in the Tort of Deceit" in A. Robertson and J. Goudkamp (eds), *Form and Substance in the Law of Obligations* (Oxford: Hart Publishing, 2019); J. Murphy, "Misleading Appearances in the Tort of Deceit" (2016) 75 C.L.J. 301 at 323. Space precludes consideration of this issue but there is cause for significant skepticism regarding the notion that some torts have actionability conditions that are separate from their elements.

89 Thus, it is irrelevant to lability for deceit that defendant intended to benefit the claimant by the deception: *Smith v Chadwick* (1884) 9 App. Cas. 187 at 201.

90 "[I]t does not lie in the mouth of the fraudulent person to say that [the damage] could not reasonably have been foreseen": *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158 at 167 per Lord Denning M.R; [1969] 2 All E.R. 119 at 122.

91 Cane, *Responsibility in Law and Morality* (2002), at p.89 (footnote omitted). See also Cane, "Causing Conversion" (2002) 118 L.Q.R. 544 at 546 ("Deceit can … be called a fault-based tort so far as conduct is concerned, but a strict liability tort so far as consequences are concerned").

92 The term "defence" is notoriously ambiguous: see J. Goudkamp, *Tort Law Defences* (Oxford: Hart Publishing, 2013), at pp.1–5. In this article, the word is used to refer to rules that, when applicable, prevent liability from arising even though all of the elements of the claimant's cause of action are present.

93 See the text accompanying nn.68–69 above.

94 For discussion regarding this qualification, see J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007), at pp.147–148. Gardner was

Consider the tort of battery. That tort is widely said to impose strict liability[95] on account of its being immaterial to liability for it whether the defendant intended to harm the claimant[96] and because it is no answer for the defendant to say that they reasonably believed that the claimant consented to the contact.[97] However, this description is perplexing given the existence of numerous fault-based defences. Three illustrations will suffice. Take, first, self-defence. This defence is centrally concerned with fault since it is available only if the force applied by the defendant was less than or equal to that which a reasonable person would have used.[98] Further, in the event that the defendant mistakenly believed that the claimant was an aggressor, the defence will be withheld unless the mistake was reasonable.[99] Analogous rules apply to the closely related pleas of defence of others[100] and defence of property.[101] Consider, secondly, the defence of arrest. It too is fault-based since it will be available only where the person affecting the arrest used no more force than was reasonable.[102] Take, finally, the defence of necessity. It is also attuned to fault. A defendant will, for example, be permitted to provide a claimant who lacks capacity to consent with medical treatment if and only if the defendant takes reasonable steps to confirm that the claimant lacks capacity and the defendant reasonably believes that providing the treatment is in the claimant's best interests.[103] Given these and other defences which bring the issue of the defendant's fault into focus, the simple assertion that the tort of battery imposes strict liability is simply untrue. Indeed, it is an inversion of the truth.

Equivalent observations can be made in connection with the rule in *Rylands v Fletcher*. As discussed above,[104] this tort is widely regarded as a (or the) paradigmatic example of a tort that imposes strict liability on account of its being irrelevant, in enquiring if the elements of the cause of action are satisfied, whether the defendant was at fault in connection with the escape of the dangerous thing.[105] However, the bare statement that the rule imposes strict liability is false in view of the defences that are available several of which are

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concerned with the criminal law context in this contribution but his analysis is equally applicable to the tort setting.

95 See the text accompanying nn.48–50 above.

96 See the text accompanying n.49 above.

97 See the text accompanying n.50 above.

98 *Lane v Holloway* [1968] 1 Q.B. 379; [1967] 3 All E.R. 129.

99 *Ashley v Chief Constable of Sussex* [2008] UKHL 25; [2008] 1 A.C. 962.

100 '[T]he criteria are essentially the same for both defences': *Glover v Fell* [1999] BCJ No. 1333 at [37].

101 *Attorney-General's Reference (No.2 of 1983)* [1984] Q.B. 456; [1984] 1 All E.R. 988.

102 The principles in this regard track those that apply to the defence of self-defence. Thus, in *R. v Clegg* [1995] 1 A.C. 482 at 496; [1995] 1 All E.R. 334 at 343 Lord Lloyd said that "[t]he degree of permissible force should be the same in both cases".

103 Mental Capacity Act 2005, s. 4. See also *In Re F* [1990] 2 A.C. 1 at 74.

104 See the text accompanying nn.66–67 above.

105 See the text accompanying nn.68–69 above.

centrally concerned with whether the defendant was at fault.[106] Thus, the defendant can avoid incurring liability under the rule in *Rylands v Fletcher* if the escape was due to the act of a third party but only if the intervention of the third party was not something against which the defendant could reasonably have been expected to guard.[107] As Parker L.J. put it in *Perry v Kendricks Transport Ltd*, once the defendant proves "that the escape was caused by the act of a stranger …, they escape liability, *unless the plaintiff can go on to show that the act which caused the escape was an act of the kind which the occupier could reasonably have anticipated and guarded against*".[108] By virtue of its concern with what reasonably could have been expected of the defendant, the defence is fault-based.

Likewise, liability arising under the rule in *Rylands v Fletcher* is also defeasible upon proof that the escape was caused by an act of God, but that defence will be withheld if the defendant could reasonably have prevented the escape but failed to do so. Thus, as Cockburn C.J. explained in *Nugent v Smith*, whether an event constitutes an act of God "must depend on [the defendant's] ability to avert the effects of the vis major, and the degree of diligence which he is bound to apply to that end".[109] In the same case, James L.J. remarked that the expression "act of God" is "a mere short way of expressing" the proposition that liability will not arise "for any accident as to which [the defendant] can shew that it is due to natural causes directly and exclusively, without human intervention, *and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him*".[110] This language is really only consistent with the defence being sensitive to fault on the defendant's part.

In these circumstances, it is unsurprising that the majority of the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd*, after comprehensively surveying the relevant English cases, concluded that "the various defences of an occupier of premises against *Rylands v. Fletcher* 'strict liability' closely correspond

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[106] It was precisely because of the defences to liability arising under the rule in *Rylands v Fletcher* that Winfield considered that it was unhelpful to refer to it as imposing absolute liability. He wrote that "the description of the rule in *Rylands* v. *Fletcher* as an example of absolute liability in tort is unhappy in view of some half dozen exceptions which are admitted as qualifications of it. 'Strict liability' seems to be a better term": Winfield, "The Myth of Absolute Liability" (1926) 42 L.Q.R. 37 at 51. The language of "absolute liability", perhaps as a consequence of Winfield's famous article, has since substantially vanished from tort law's lexicon. However, the term "strict liability" is no more apt since it too misleadingly suggests that liability arises under the rule in *Rylands v Fletcher* regardless of fault.

[107] The plea of act of third party comes in various guises including act of trespasser and act of stranger.

[108] [1956] 1 W.L.R. 85 at 93; [1956] 1 All E.R. 154 at 161 (emphasis added). See also W.L.R. at 91; All E.R. at 160.

[109] (1876) 1 C.P.D. 423 at 435.

[110] (1876) 1 C.P.D. 423 at 444 (emphasis added). See also *Nichols v Marsland* (1876) 2 Ex. D. 1 at 6 (Mellish L.J. defining the act of God defence by reference to whether the event concerned "could not reasonably have been anticipated"); *Transco Plc v Stockport MBC* [2003] UKHL 61; [2004] 2 A.C. 1 at [110] (Lord Walker suggesting that the act of God defence simply casts the burden of disproving negligence onto the defendant).

with grounds of denial of fault liability under the law of negligence".[111] Likewise, John Fleming observed that the "aggregate effect of [the defences] makes it doubtful whether there is much left of the rationale of strict liability as originally contemplated in 1866".[112] Numerous other scholars similarly contend that the defences of act of third party[113] and act of God[114] are fault sensitive.

Donal Nolan takes a different view. He argues that, properly understood, the pleas of act of third party and act of God are concerned with *causa* rather than with *culpa*. Thus, he asserts that the idea that these rules are sensitive to the issue of fault is "flawed" and that they in fact "go to causation".[115] This reduces the pleas from the status of defences *stricto sensu* to mere denials of a causation ingredient of causes of action to which the pleas are available. Nolan holds this minority view on the basis that "leading authorities" regarding the pleads "are suffused with causation reasoning".[116] In evaluating Nolan's claim, it is important to observe that it consists of two propositions, namely, that the pleas in issue are: (1) concerned with *causa*; and (2) unconcerned with *culpa*. In support of these propositions, Nolan cites four cases.[117] It is debatable whether his reading of all of these cases is right.[118] But there are undoubtedly decisions that

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111 (1994) 179 C.L.R. 520 at 545 per Mason C.J., Deane, Dawson, Toohey and Gaudron JJ. c.f. at 590 per McHugh J.

112 Fleming, *The Law of Torts*, 9th edn (1998), at p.385 (footnote omitted). To like effect, see M. Fordham, "The Demise of the Rule in Rylands v Fletcher?" [1995] S.J.L.S. 1 at 7–8 and E. Reid, "Liability for Dangerous Activities: A Comparative Analysis" (1999) 48 I.C.L.Q. 731 at 738. Ernest Weinrib goes further and contends that the rule in *Rylands v Fletcher*, partly because of the network of fault-based defences to which liability arising under it is subject, does not in fact impose strict liability at all. Thus, he writes that the rule in *Rylands v Fletcher* "is an extension, not a denial, of the fault principle": E.J. Weinrib, *The Idea of Private Law* (Cambridge M.A.: Harvard University Press, 1995), at p.188.

113 See, e.g., *Clerk & Lindsell on Torts* (2020), para. 19.98 (contending that the defence of act of third party reduces the duty that defendants owe under the rule in *Rylands v Fletcher* to a duty to take reasonable care); C. Witting, *Street on Torts*, 16th edn (Oxford: Oxford University Press, 2021) (arguing that the defence of act of third party centres "upon the question whether there was a failure to control the unforeseeable harmful acts of third parties (negligence)").

114 See, e.g., *Clerk & Lindsell on Torts* (2020), para. 3.172 (suggesting that the plea of act of God is "tantamount to saying 'no fault'"); C.G. Hall, "An Unsearchable Providence: The Lawyer's Concept of Act of God" (1993) 13 O.J.L.S. 227 at 247 (summarising the authorities as laying down the rule that "[a] finding that a party has been negligent precludes the defence"); J. Murphy, *The Law of Nuisance* (Oxford: Oxford University Press, 2010), at p.111('the basis for the defence appears to be the absence of negligence on the part of the defendant'); M. Katsivela, "Canadian Contract and Tort Law: The Concept of Force Majeure in Quebec and its Common Law Equivalent" (2011) Can. B. Rev. 69 at 94–95 ("An act of God negates … the presence of negligence not only because of its irresistibility element but also because it requires absence of human contribution").

115 Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 L.Q.R. 421 at 444–445.

116 Nolan, "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 L.Q.R. 421 at 445 n.164.

117 *Carstairs v Taylor* (1871) L.R. 6 Ex. 217 at 221; *Nichols v Marsland* (1876) 2 Ex. D. 1 at 6; *Box v Jubb* (1879) 4 Ex. D. 76 at 78–79; *Perry v Kendricks Transport Co Ltd* [1956] 1 W.L.R. 85 at 90.

118 e.g., Nolan cites *Carstairs v Taylor* but in this case it was critical that the defendant had taken reasonable care to check for and prevent holes of the kind that a rat had created and through which water flowed. Thus, Bramwell B remarked that 'the defendant can only be liable if he was guilty of negligence' ((1871) L.R. 6 Ex. 217 at 222). Further, and significantly, three of the four judges made

show that the pleas concerned can prevent the requirement of causation from being satisfied.[119] Accordingly, Nolan's first proposition is correct.

The same is not true of Nolan's second proposition. For one thing, the passages of high authority that have been quoted above[120] put it beyond serious argument that the doctrines of act of third party and act of God are concerned with whether the defendant was at fault. Nolan adverts to none of the remarks in issue. Furthermore, there is a misstep in Nolan's logic. His claim that the rules regarding act of third party and act of God are unconcerned with fault because they have sometimes prevented the requirement of causation from being satisfied is a *non sequitur*. That is because it is common for a particular contention to function as a denial of fault in one case and as a denial of causation in another or, indeed, as a denial of both fault and causation simultaneously.[121] In tort law, facts often do not relate only to a single hermetically sealed issue but engage several elements of the cause of action (or an element of a cause of action and a defence to liability arising thereunder) concerned simultaneously. For these reasons, Nolan has not established and cannot establish his second proposition.

The foregoing analysis has focused on the tort of battery and the rule in *Rylands v Fletcher*. It has done so because these are two torts that are regularly (but misleadingly) said to be torts of strict liability. It could be extended to several other causes of action in tort that are also routinely described as being based on strict liability despite being subject to numerous fault-based defences, such as that for which the Consumer Protection Act 1987 provides,[122] defamation[123] and trespass to land.[124] It is, however, unnecessary to roll the argument out to additional causes of action since the illustrations given above establish that torts that are generally said to impose strict liability are at least sometimes centrally concerned with issues of fault at the defences stage of the analysis.

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it clear that the case was not even about the pleas of act of third party and act of God but the defence of claimant consent (at 222 per Bramwell B., at 222 per Pigott B. and at 223 per Martin B.).

119 See the authorities cited in Goudkamp, *Tort Law Defences* (2013), at pp.58–59.

120 See the text accompanying nn.108–110 above.

121 See Goudkamp, *Tort Law Defences* (2013), at p.74. An excellent example is *Vellino v Chief Constable of Greater Manchester Police* [2001] EWCA Civ 1249; [2002] 1 W.L.R. 218 at [35] in which Schiemann L.J. held that the claimant's illegal conduct undermined, *inter alia*, the requirements of fault and causation.

122 Several of the defences in s.4 of the Consumer Protection Act 1987 are transparently fault-based. For example, as regards the development risks defence in s.4(1)(e) Jane Stapleton writes that "… the only workable and reasonable interpretation of it is … that … in practice [the Act] does not impose strict liability on producers": J. Stapleton, "Products Liability in the United Kingdom: The Myths of Reform" (1999) 34 Tex. Int'l. L.J. 45 at 53.

123 The fault-based nature of many defences to defamation is explored in detail in Gray, *The Evolution from Strict Liability to Fault in the Law of Torts* (2021), ch.8.

124 The tort of trespass to land is heavily qualified by fault-based defences The situation prompted David Ibbetson to observe that "[i]t would … be a bad mistake to exaggerate the contrast between this regime of strict liability (qualified by justificatory defences) and a regime of fault liability. Essentially the same issues of the ascription of responsibility arise in each method of analysis …": D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 2001), at p.59.

The argument in this section is buttressed if one subscribes to the view that defences are nothing more than negative elements of torts.[125] On this understanding, if a given tort is subject to fault-based defences, its elements are necessarily attuned to fault. To identify such a tort as one of strict liability is, accordingly, a misnomer. However, even if it is thought that defences are not simply negative elements of torts but concepts that are external to a tort's definition,[126] the fact remains that the issue of fault is generally in play on account of fault-based defences even when the claimant sues in the context of a tort the elements of which make use of strict liability. Accordingly, no matter which view of defences is embraced, it is a mistake to speak of torts that admit of fault-based defences as imposing strict liability.

V. OVERLAP

Because strict liability is not liability without fault but liability regardless of fault,[127] scope exists for persons held strictly liable to have been at fault. The point can be illustrated by reference to conversion, which is commonly classed as a strict liability tort.[128] As we have seen above,[129] it is irrelevant to liability in that tort whether the defendant reasonably believed that they were entitled to deal with the chattel in question. To this extent (but only to this extent), conversion imposes strict liability. However, it does not follow that any given defendant who is held liable for conversion will not have been at fault in connection with this element of the wrong. Because the tort of conversion is insensitive to whether the defendant justifiably believed that they were entitled to deal with the chattel concerned, persons who dishonestly convert a chattel to their own use and persons who reasonably but incorrectly believe that the property is theirs to deal with are equally exposed to liability. As Lord Nicholls pithily put it in *Kuwait Airways Corp v Iraq Airways Co*, "[t]he defendant may be a thief, or he may have acted wholly innocently. Both are strictly liable".[130] Because some defendants who are held strictly liable may be at fault, simply identifying particular torts as ones of strict liability without qualification fails fairly to describe the position.

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[125] Glanville Williams famously took this position in relation to the criminal law: see G. Williams, "The Logic of Exceptions" (1988) 47 C.L.J. 261 at 277; G. Williams, "Offences and Defences" (1982) 2 L.S. 233. It enjoys significant support in the tort context: see, e.g., *Condon v Basi* [1985] 1 W.L.R. 866 at 868; [1985] 2 All E.R. 453 at 454; *Vellino v Chief Constable of the Greater Manchester Police* [2001] EWCA Civ 1249; [2002] 1 W.L.R. 218 at [35] and [62]. Consider also L.D. d'Almeida "Defining 'Defences'" in A. Dyson et al (eds), *Defences in Tort* (Oxford: Hart Publishing, 2015).

[126] For discussion, see Goudkamp, *Tort Law Defences* (2013), at pp.41–44.

[127] See the text accompanying n.10 above.

[128] See the text accompanying nn.61–62 above.

[129] See the text accompanying nn.63–64 above.

[130] [2002] 2 A.C. 883 at [103].

The claim that has just been made is that strict liability has the potential to impose liability on defendants who were at fault. A closely related proposition is that defendants who are held strictly liable are, as a matter of fact, often at fault.[131] If this further claim, which unlike the first is empirical in nature, is true, it would provide additional support for this article's thesis. However, in the absence of relevant data, no attempt is made to substantiate it. But it is plausible to think that it may be true. It formed an important part of Oliver Wendell Holmes's defence of strict liability.[132] Since his time, numerous other scholars have contended that strict liability is imposed precisely because the defendants concerned will usually be at fault.[133]

Consider the rule in *Rylands v Fletcher*. It imposes strict liability in the sense (but only in the sense) that its elements are insensitive to whether or not the defendant was at fault in connection with the escape of the dangerous thing.[134] However, it is plausible to think that defendants who are held liable pursuant to the rule will not infrequently have been at fault in this respect.[135] That is because the very fact that a dangerous thing has escaped from the defendant's land and damaged the claimant's will generally not happen in the absence of fault. This is especially so when it is borne in mind that, for the purposes of the tort of negligence, an exceptionally stringent (and hence easily breached) duty is imposed on persons who deal with dangerous things.[136]

Equivalent observations can be made as regards private nuisance. That tort makes use of strict liability in that if the claimant's use and enjoyment of their land is unreasonably interfered with as a consequence of an activity for which the defendant is responsible, it will not matter that the defendant took reasonable care to guard against the risk of interference.[137] In other words, it is

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[131] The analysis in this paragraph has been influenced by Cane, "*Mens Rea* in Tort Law" (2000) 20 O.J.L.S. 533 at 536–537.

[132] For extensive discussion, see D. Rosenberg, *The Hidden Holmes: His Theory of Torts in History* (Cambridge, M.A.: Harvard University Press, 2014), ch.5 esp at p.126.

[133] See, in particular, Weinrib, *The Idea of Private Law* (1995), ch.7, especially at pp.187–189. Consider also Fleming's remark that "[i]n one sense, strict liability is but another aspect of negligence, both being based on responsibility for the creation of an abnormal risk": Fleming, *The Law of Torts* (1998), at p.369 (footnote omitted). A slightly different contention is that proof of fault is dispensed with where it likely exists but is expensive or otherwise difficult to establish. Consider the discussion in S. Shavell, *Economic Analysis of Accident Law* (Cambridge, M.A.: Harvard University Press, 1987), ch.11 esp at p.264.

[134] See the text accompanying nn.68–69 above.

[135] Consistent with this, there are a good number of cases in which defendants have been held liable for the tort of negligence and under the rule in *Rylands v Fletcher* in respect of the same damage. See, e.g., *Mulholland & Tedd Ltd v Baker* [1939] 3 All E.R. 253 (explosion); *A Prosser & Son Ltd v Levy* [1955] 1 W.L.R. 1224; [1955] 3 All E.R. 577 (water).

[136] "Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life": *Glasgow Corp v Muir* [1943] A.C. 448 at 456; [1943] 2 All E.R. 44 at 48 per Lord Macmillan.

[137] "[I]f I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say that I have taken all reasonable care to prevent it" (*Rapier v London Tramways Co* [1893] 2 Ch. 588 at 600 per Lindley L.J.); "negligence is not an essential element in determining liability for nuisance … An occupier may incur liability for the emission of noxious fumes or noise although he has used the

the unreasonableness of the interference rather than the unreasonableness of the defendant's conduct that led to the interference that is relevant. Again, however, there is reason to suppose that many nuisances are unlikely to be caused non-negligently.[138] In *The Wagon Mound (No.2)*,[139] Lord Reid embraced this view. Although he made it clear that negligence is not an ingredient of the tort,[140] he noted that "fault of some kind is *almost always* necessary"[141] in order for liability to arise. In a similar vein, Nolan observes that where an unreasonable interference with the claimant's use and enjoyment of his or her land is established, that "may suggest unreasonableness on the part of the defendant".[142] Consistent with this, there is no shortage of cases in which defendants have been held liable for an unreasonable interference with the claimant's use and enjoyment of their land in both the tort of private nuisance and the tort of negligence.[143]

It may be queried how, given that strict liability is liability regardless of fault, we could ever be sure that any given defendant who has been held liable under a strict liability rule was in fact at fault. Accordingly, it may be doubted whether the empirical argument presently under consideration could ever be established. However, it will sometimes be clear that defendants who are held strictly liable are at fault. For one thing, and as has just been observed,[144] if a defendant incurs liability under a strict liability rule, they may also have been held liable in respect of the same conduct for a tort that cannot be committed absent fault.[145] Furthermore, even where a defendant who has been held strictly liable is not found to have been at fault in the context of a claim in respect of another tort, they may sometimes be found to be at fault for other purposes, such as in connection with deciding the remedy to be awarded. For example, since it will be very rare for a faultless defendant to incur liability for punitive damages,[146]

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utmost care in building and using his premises" (*Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 A.C. 617 at 639; [1966] 2 All E.R. 709 at 716 per Lord Reid).

138 Consider the remarks in Harry Street, "The Twentieth Century Function and Development of the Law of Tort in England" (1965) 14 I.C.L.Q. 862 at 870.

139 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 A.C. 617.

140 See n.137 above.

141 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 A.C. 617 at 639 (emphasis added).

142 D. Nolan, "Torts and Equitable Wrongs" in A. Burrows (ed), *The Law of Obligations*, 3rd edn (Oxford: Oxford University Press, 2013), para. 17.252.

143 See, e.g., *Spicer v Smee* [1946] 1 All E.R. 489; *British Celanese Ltd v AH Hunt (Capacitors) Ltd* [1969] 1 W.L.R. 959; [1969] 2 All E.R. 1252; *Miller v Jackson* [1977] Q.B. 966; [1977] 3 All E.R. 338; *LMS International Ltd v Styrene Packaging and Insulation Ltd* [2005] EWHC 2065 (TCC); [2006] T.C.L.R. 6.

144 See the text accompanying n.143 above.

145 See also the illustrations given in *Clerk & Lindsell on Torts* (2020), para.7.01.

146 The only situation (itself apparently very unusual) in which punitive damages can be awarded absent fault concerns defendants whose liability is merely vicarious. As regards the permissibility of awarding punitive damages against a vicariously liable defendant, see *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773; [2007] 1 W.L.R. 1065 at [47]–[48]; P. Morgan, "Vicarious Punishment: Vicarious Liability for Exemplary Damages?" in E. Bant et al (eds), *Punishment and Private Law* (Oxford: Hart Publishing, 2020).

an award of such damages will almost always dictate that the defendant is at fault.

In summary, because strict liability is liability regardless of fault rather than liability without fault, persons held strictly liable may be at fault. This theoretical claim demonstrates that there cannot be any neat division between strict liability and fault liability in tort law. These concepts are nested rather than mutually exclusive. There is also an empirical variation on this line of reasoning, which is that many defendants who are held strictly liable are as a matter of fact at fault. It is plausible to think that this further claim, which scholars have often advanced, is true. It is probably the case that when the law imposes strict liability it does so precisely because fault will normally exist. But it is unnecessary to demonstrate as much, let alone that the imposition of strict liability can be justified on this basis, since the theoretical version of the argument suffices given this article's thesis.

VI. VICARIOUS LIABILITY

A defendant will incur liability for a tort committed by a third party where: (1) the defendant and the third party stand in a relationship that attracts vicarious liability; and (2) the third party committed the tort in the course of that relationship.[147] Despite some valiant attempts to explain vicarious liability cases as instances where the defendant is being held liable for their own tort,[148] the courts have decisively rejected this analysis and held that, when a defendant is found to be vicariously liable, they are having liability imposed on them for the third party's wrong.[149] Such liability is strict[150] since it arises regardless of whether the defendant was at fault. Thus, where it is alleged that the defendant is vicariously liable it is immaterial that they took reasonable (or the utmost) care in, for example, selecting and training the tortfeasor.

The significance of the doctrine of vicarious liability for present purposes is obvious and can be stated within a short compass. The essential point is that it exposes defendants to strict liability even where the underlying tort committed

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147 *Barclays Bank Plc v Various Claimants* [2020] UKSC 13; [2020] A.C. 973 at [1].

148 See, in particular, G. Williams, "Vicarious Liability; Tort of the Master or Tort of the Servant" (1956) 72 L.Q.R. 522; Weinrib, *The Idea of Private Law* (1995), at pp.185–187; R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), ch.11.

149 *Staveley Iron & Chemical Co v Jones* [1956] A.C. 627 at 639, 643 and 646–647; [1956] 1 All E.R. 403 at 406, 409 and 412–413; *Imperial Chemical Industries Ltd v Shatwell* [1965] A.C. 656 at 686; [1964] 2 All E.R. 999 at 1012; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366 at [155]; *Majrowski v Guy's & St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 A.C. 224 at [7], [15] and [68]; *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] A.C. 537 at [3].

150 "Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer" (*Bernard v The Attorney General of Jamaica* [2004] UKPC 47; [2005] I.R.L.R. 398 at [21] per Lord Steyn); "[v]icarious liability is strict liability" (*Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355 at [91] per Lord Hughes).

makes use of fault liability. Although the doctrine of vicarious liability is not itself a tort, it nevertheless imposes strict liability in tort and sometimes does so on top of fault liability. John Murphy neatly encapsulated the position when he wrote that "vicarious liability ensures a significant strict liability overlay in relation to all torts, including those based on fault".[151] It follows that simply identifying a given tort as being based on fault fails to take account of the institution of vicarious liability. The omission is significant given that vicarious liability is a "vitally important part of the common law of tort".[152]

VII. CONCLUSION

Much of the literature regarding fault liability and strict liability in the law of torts is confused and confusing because of a routine failure to specify with sufficient precision the meaning that those concepts bear. This article began by identifying the proliferation of ways in which the language of strict liability and fault liability are used and sought to clear a path through this terminological minefield. It then explained that strict liability, for the purposes of this article, denotes liability imposed regardless of fault where fault is understood in a technical legal sense, that is to say, as meaning negligence or a relevant state of mind. Fault liability is liability that requires proof of fault so defined.

This article then offered four reasons, each independent of the others, why the widespread practice of classifying torts as ones of strict liability or fault liability is seriously misleading. The first is that many, and perhaps most, torts that supposedly impose strict liability are in fact constituted by elements that are governed by a fault standard, and that torts that are allegedly based on fault actually make use of strict liability in important respects. The second reason is that torts that are generally thought to impose strict liability are typically subject to an array of fault-based defences. The third reason is that so-called strict liability torts have the potential to hold liable defendants who were in fact at fault. Fourthly, and finally, it was observed that there is an ever-present overlay of strict liability in the form of vicarious liability. Strict liability is thereby often imposed on top of liability for torts that makes use of fault liability.

This article has not, however, gone so far as to contend that the concepts of fault liability and strict liability should be abandoned or that the dichotomy is a false one. Rather, it objects to the application of those labels at the level of torts.

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[151] Murphy, "The Heterogeneity of Tort Law" (2019) 39 O.J.L.S. 455 at 459. See also *Restatement (Third) of the Law of Torts: Liability for Physical and Emotional Harm* (2016), ch.4, Scope Note (observing that vicarious liability "is in truth a mix of negligence liability and strict liability. The plaintiff generally needs to prove some negligence in the conduct of the employee, but the employee's negligence is then imputed to the employer in a strict-liability fashion").

[152] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1 at [34] per Lord Phillips.

If the ideas of fault liability and strict liability are to facilitate understanding regarding tort law, they must be handled in a manner that is sufficiently sensitive to tort law's complexity, and this requires one to descend to the atomistic domain of the elements of torts. Discrete ingredients of torts, unlike torts themselves, can meaningfully be identified as being governed by a fault standard or as imposing strict liability.

It may be queried whether it matters whether the tradition of placing torts into the categories of fault liability and strict liability is misleading. This point was tackled head-on at the outset of this article.[153] Attention was drawn there to the fact that the way in which a tort is categorised can and does affect its fortunes given that judges, rightly or wrongly, often look askance at the use of strict liability. Identifying a tort as one of strict liability can and sometimes does result in the courts limiting its sphere of operation. Judicial remarks evidencing as much are surprisingly common.[154] In other words, the way in which a tort is branded is of practical importance.[155]

But the tradition of grouping torts according to the divide between fault liability and strict liability is also significant for more fundamental reasons. Most tort textbooks are structured, at least to some degree, by reference to the dichotomy.[156] And it is common for judges hearing torts cases to state, often at the outset of their consideration of the ingredients of the tort in issue, whether they regard the tort to be one of strict liability or to be fault-based. In these circumstances, it is scarcely deniable that the classificatory practice concerned is widely thought to illuminate not only the operation of individual torts but the subject as a whole. If, however, torts are generally incapable of being shoehorned into the categories of fault liability and strict liability as this article has argued, this attempt to cast light on the field in fact shrouds it in darkness.

Finally, it is worth reflecting on the significance of the foregoing for debates regarding the justifiability of strict liability. It is regularly claimed that strict liability is, or has the potential to be, unjust.[157] Conversely, extensive efforts have long been made to demonstrate that strict liability is, or is sometimes, morally

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153 See the text accompanying n.4 above.

154 See the cases cited in n.4 above.

155 Writers sometimes attach practical consequences to the strict liability/fault liability divide in error. For example, Arthur Ripstein claims that torts that have a fault element require proof of damage whereas strict liability torts are actionable per se: see A. Ripstein, *Private Wrongs* (Cambridge, M.A.: Harvard University Press, 2016), at p.123. Ripstein position, for which he cites no authority, is obviously incorrect. For example, he holds out the rule in *Rylands v Fletcher* as exemplifying strict liability, yet damage is a prerequisite to liability arising under it. To take another illustration, battery has a fault element (see the text accompanying n.52 above) but is actionable per se.

156 See n.6 above.

157 See, e.g., H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford: Oxford University Press, 1994), at p.166 ("the notion of 'strict liability' in morals comes as near to being a contradiction in terms as anything in this sphere"); T. Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979), at p.31 ("strict liability … may have its legal uses but seems irrational as a moral position"); Weinrib, *The Idea of Private Law* (1995), ch.7.

defensible.[158] The analysis in this article suggests that concerns about the fairness of strict liability in tort law may be overstated, and that the exertions that have been made to justify it may have been dealing with a largely imaginary problem. This is because tort law almost never makes use of unqualified strict liability. Rather, when tort law makes use of strict liability it generally does so in conjunction with fault liability. This is not to deny, of course, that when strict liability is imposed in these circumstances its use still needs to be justified. Rather, the point is that its potential to inflict unfairness is diminished, often drastically, by reason of the fact that it is often necessary for the defendant to be at fault in certain and sometimes significant respects in order to be held liable.

[158] See, e.g., Cane, *Responsibility in Law and Morality* (2002), at pp.105–109; Honoré, "Responsibility and Luck: The Moral Basis of Strict Liability" (1988) 104 L.Q.R. 530; Coleman, *Markets, Morals, and the Law* (2002), ch.7; Gardner, *Torts and Other Wrongs* (2019), ch.6.