Comparative Legal Reasoning in Strict Liability

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Abstract

The imposition of strict liability has long been and remains highly controversial. Legal systems rely on it to different extents and the arguments which are used to justify its imposition vary considerably within and across jurisdictions. The thesis compares the main justifications for strict liability as put forward in four legal systems, two common law (England and the United States) and two civil law (France and Italy). After explaining how strict liability is understood in the four laws and setting out the relevant contexts of strict liability, the thesis analyses comparatively the treatment that legal arguments receive across these legal systems. Some of these arguments are based on the notion of risk, while others relate to goals such as the avoidance of accidents, the protection of victims, or the redistribution of losses. By looking at how these arguments are used in each of the four legal systems, the thesis unearths a wide variety of patterns of reasoning, which reflect the different ways in which legal actors across the four laws think about strict liability. Moreover, the thesis assesses the justificatory weight of the arguments, showing that these can assume varying significance within and across the four laws and that such variations reflect different views as to the values and goals which should guide strict liability and inspire tort law more generally. Overall, the thesis seeks to improve our understanding of strict liability, to shed light on the significance and role of the justifications put forward for its imposition, and to enhance our comprehension of the different legal cultures featuring in the four legal systems studied.

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Table of Abbreviations

Akron L Rev	Akron Law Review
AJCL	American Journal of Comparative Law
Am J Legal Hist	American Journal of Legal History
Arch phil dr	Archives de philosophie du droit
Ariz St LJ	Arizona State Law Journal
Ass plén	Assemblée pléniere de la Cour de cassation
B & S	Best and Smith's Reports, Queen's Bench (ER vols 121-122)
Baylor L Rev	Baylor Law Review
BGB	Bürgerliches Gesetzbuch (Germany, 1900)
Bull AP	Bulletin des arrêts Cour de Cassation Assemblée plénière
Bull civ	Bulletin des arrêts de la Cour de cassation, Chambres civiles
CA	Cour d'appel; Court of Appeal
Cal L Rev	California Law Review
Can JL Juris	Canadian Journal of Law and Jurisprudence
Cardozo L Rev	Cardozo Law Review
Cass civ	Chambre civile de la Cour de cassation française
Cass com	Chambre commerciale de la Cour de cassation
Cass crim	Chambre criminelle de la Cour de cassation
Cass soc	Chambre sociale de la Cour de cassation
Cc	Code civil français
CC	Conseil Constitutionnel
CE	Conseil d'État
CE Ass	Conseil d'État, assemblée du contentieux
Cf/cf	Compare
CG	Corriere giuridico
Ch	Law Reports, Chancery Division (1890-)
Ch/ch	Chapter
Ch réun	Chambres réunies de la Cour de Cassation
Ch J Comp L	Chinese Journal of Comparative Law
Civ sez un	Sezioni unite della Corte di cassazione italiana
Civ (1), (2) and (3)	Première, deuxième and troisième chambre civile de la Cour de cassation française
Civ (I), (II), (III), and (VI)	Prima, seconda, terza, e sesta sezione civile della Corte di cassazione italiana
Civ (sezione lavoro)	Sezione lavoro della Corte di Cassazione italiana

CJEU	Court of Justice of the European Union
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLWR	Common Law World Review
Cmnd	command (identifier for published parliamentary papers)
Cod civ	Codice civile
Colum L Rev	Columbia Law Review
comm	commentaire
concl	conclusions
CPA 1987	Consumer Protection Act 1987
CUP	Cambridge University Press
D	Recueil Dalloz
D aff	Recueil Dalloz, Cahier droit des affaires
D Lgs	Decreto Legislativo
DC	Dalloz Chronique
DDHC	Déclaration des droits de l'homme et du citoyen
DH	Dalloz, Recueil hebdomadaire de jurisprudence (1924-1940)
Dig disc priv	Digesto delle discipline privatistiche
Dir Fam Persone	II diritto di famiglia e delle persone
Dir giur	Diritto e giurisprudenza
DP	Dalloz, Recueil périodique et critique de jurisprudence, de legislation et de doctrine (1825-1940)
DR	Danno e Responsabilità
Dr & patrim	Droit & patrimoine
ed(s)	editor(s)
edn	edition
Eg/eg	for example
Enc Dir	Enciclopedia del diritto
Enc Giur	Enciclopedia giuridica Treccani
esp	especially
et al	and others, *et alii*
EU	European Union
EWCA Civ	Decision of the Court of Appeal (Civil Division)
EWHC	Decision of the High Court
F Supp	Federal Supplement (United States)
Fasc	fascicule
Fam Dir	Famiglia e Diritto

Fla St U L Rev	Florida State University Law Review
Fordham L Rev	Fordham Law Review
Fordham L Rev Res Gestae	Fordham Law Review Res Gestae
Foro It	Il Foro Italiano
Foro Pad	Il Foro Padano
Ga L Rev	Georgia Law Review
Gaz Pal	Gazette du Palais
GC	Giustizia civile
Geo LJ	Georgetown Law Journal
Geo Wash L Rev	George Washington Law Review
GI	Giurisprudenza italiana
GM	Giurisprudenza di merito
Harv L Rev	Harvard Law Review
HL	House of Lords
HUP	Harvard University Press
ILJ	Industrial Law Journal
Indiana LJ	Indiana Law Journal
Inst	Institutiones (Institutes of Justinian)
Iowa L Rev	Iowa Law Review
J	Mr Justice
J Law Econ	Journal of Law and Economics
JCl	Juris-Classeur
JCl Admin	Juris-Classeur Administratif
JCl E	Juris-Classeur Europe
JCLI	Journal of Contemporary Legal Issues
JETL	Journal of European Tort Law
JTL	Journal of Tort Law
JCP	Juris-classeur périodique, La semaine juridique
JCP E	Juris-classeur périodique, La semaine juridique, entreprises et affaires
JCP G	Juris-classeur périodique, La semaine juridique, édition générale
JEL	Journal of Environmental Law
JPIL	Journal of Personal Injury Law
J Legal Stud	Journal of Legal Studies
KB	Law Reports, King’s Bench Division (1901-1952)
Law Comm	Law Commission

Law and Phil	Law and Philosophy
LGDJ	Librairie générale de droit et jurisprudence
LJ	Lord Justice of Appeal
Loy LA L Rev	Loyola of Los Angeles Law Review
LPA	Les petites affiches
LQR	Law Quarterly Review
LRC	La Responsabilità Civile
LR Ex	Law Reports, Exchequer Cases (1865-1875)
LR HL	Law Reports, English & Irish Appeals (1866-1875)
LR QB	Law Reports, Queen's Bench (First Series) (1865-1875)
LS	Legal Studies
LT	Law Times Reports
Ltd	Limited
Md L Rev	Maryland Law Review
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
MLR	Modern Law Review
n/nn	footnote/footnotes
NCL Rev	North Carolina Law Review
Noviss Dig It	Novissimo Digesto Italiano
NGCC	Nuova giurisprudenza civile commentata
Nottingham LJ	Nottingham Law Journal
obs	observation
OJLS	Oxford Journal of Legal Studies
Okla City U L Rev	Oklahoma City University Law Review
OUCLJ	Oxford University Commonwealth Law Journal
OUP	Oxford University Press
p/pp	page/pages
para(s)	paragraph(s)
PD	Politica del diritto
PN	Professional Negligence
Product Liability Directive	EU Directive 374/85
Products Liability Restatement	Restatement (Third) of Torts: Products Liability (1998)
Pt	Part
PUAM	Presses Universitaires d'Aix-Marseille
PUF	Presses Universitaires de France

QB	Court of Queen's Bench Law Reports, Queen's Bench Division (1891-1901, 1952-)
QBD	Queen's Bench Division of the High Court of Justice; Law Reports, Queen's Bench Division (1875-1890)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
rapp	rapport
RCA	Responsabilité civile et assurances
RCDP	Rivista critica del diritto privato
RCLJ	Revue critique de législation et jurisprudence
RCP	Responsabilità civile e previdenza
reg	regulation
Req	Chambre des requêtes de la Cour de cassation
RIDC	Revue internationale de droit comparé
Riv Dir Civ	Rivista di diritto civile
Riv Dir Comm	Rivista del diritto commerciale e del diritto generale delle obbligazioni
Riv Dir Priv	Rivista di diritto privato
RTDPC	Rivista trimestrale di diritto e procedura civile
RLDC	Revue Lamy droit civil
RRJ	Revue de la recherche juridique, Droit prospectif
RTD civ	Revue trimestrielle de droit civil
S	Recueil Sirey
SCR	Supreme Court Reports (Canada)
Second Restatement	Restatement (Second) of Torts (1977)
somm	sommaires
s(s)	section(s)
Suff U L Rev	Suffolk University Law Review
S Cal L Rev	Southern California Law Review
Tex L Rev	Texas Law Review
Third Restatement LPEH	Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010)
TGI	Tribunal de Grande Instance
TLR	Times Law Reports
TR	Term Reports, King's Bench (ER vols 99-101)
Trib	Tribunale
Tul Civ LF	Tulane Civil Law Forum
Tul L Rev	Tulane Law Review

U Chi L Rev	University of Chicago Law Review
U Mem L Rev	University of Memphis Law Review
U Pa L Rev	University of Pennsylvania Law Review
UCLA L Rev	UCLA Law Review
UKHL	Decision of the House of Lords
UKSC	Decision of the UK Supreme Court
Va L Rev	Virginia Law Review
Vand L Rev	Vanderbilt Law Review
vol(s)	volume(s)
Yale LJ	Yale Law Journal
YEL	Yearbook of European Law
YUP	Yale University Press
W Ontario L Rev	Western Ontario Law Review
WLR	Weekly Law Reports

Table of Cases

England

France

Italy

United States

European Union

Canada

Table of Legislation

1. General Introduction

1.1. Aims of the Thesis and Methodology

Strict liability in tort has long been and remains highly controversial. Legal systems rely on it to different extents and the reasons which are put forward to justify its imposition vary widely within and across jurisdictions. This study seeks to explore the roles and purposes that strict liability is seen to play in four tort systems, two common law (England and the United States) and two civil law (France and Italy), paying particular attention to the substantive arguments that different legal actors use to justify the imposition of this type of liability. By focusing on the significance of the various arguments and on their relationship within and across the four laws, this work aims to advance our understanding of strict liability in the four systems and to illuminate the different values and goals brought to bear on discussions relating to these justifications. Furthermore, as a result of this investigation, national lawyers may be encouraged to reflect on elements and features of their own legal system that at present may be either neglected or misapprehended.

Given the nature and aims of this inquiry, the thesis does not rely on the traditional methodology of comparative functionalism.[1] Indeed, by seeking to 'find rules or institutions … serving a certain social function',[2] functionalism is interested in how such rules and institutions operate and in the effects they produce across legal systems, and therefore it

[1] On functionalism, see generally Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir (tr), 3rd edn, OUP 1998) 32–47; Michele Graziadei, 'The Functionalist Heritage' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 100; Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 345.

[2] Jaakko Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 RabelsZ 419, 423.

cannot provide the methodological support needed by a work that concentrates on legal reasoning rather than on the substantive laws themselves. Instead, given its focus on legal reasoning, the thesis combines two other methods of comparative law, namely the 'jurisprudential' and the 'structural' approach.[3] The former approach aims for 'an understanding of conscious ideas at work' in legal systems, 'that is the principles, concepts, beliefs, and reasoning that underlie … legal rules and institutions'.[4] This approach is connected to one of the aims of the thesis which, by exploring the substantive justifications for strict liability, seeks precisely to advance our understanding of the ideas that lie behind strict liability and which therefore inspire its imposition across the four legal systems studied. Secondly, my emphasis on legal arguments finds support in Sacco's structural approach to comparative law. According to this approach, the reasons through which legal actors reach a certain solution constitute one of the 'legal formants' which shape the legal system and which 'have a life of their own';[5] this is so true that '[l]egal systems where the conclusion is supported by different justifications cannot be regarded as identical'.[6] Legal structuralism promises to improve our understanding of a system or framework and of its constituent elements by observing the relationship among the elements themselves.[7] If we think of the

[3] For a brief overview of these two methods of comparative law, see Mathias Siems, *Comparative Law* (CUP 2018) 123–127 (suggesting that the two overlap).

[4] William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to Rats' (1998) 46 AJCL 701, 705. See also Catherine Valcke, 'Comparative Law as Comparative Jurisprudence - The Comparability of Legal Systems' (2004) 52 AJCL 713.

[5] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 AJCL 1, 30. See also Ugo Mattei, 'The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence' in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001) 238, 251.

[6] ibid.

[7] Mattei (n 5) 251. Geoffrey Samuel, 'Can legal reasoning be demystified?' (2009) 29(2) LS 181, 194.

arguments for strict liability as an independent legal formant of the tort system, identifying and comparing them will improve our understanding of strict liability and of the tort system more generally as well as illuminating their own significance.

My focus on legal argumentation yields a further payoff. A legal system's reliance on one or more justifications for strict liability is likely to show its commitment to certain goals or values in relation to accidents. These goals and values may be seen as a reflection of the mind-set of the legal actors operating within that system or, in other words, as a reflection of an aspect of the legal culture characterising that system.[8] Therefore, by focusing on the reasoning which surrounds strict liability, our comprehension of the various legal cultures featuring in the four systems under consideration may be enhanced.

At this stage, I need to clarify that while the thesis focuses on the arguments put forward to justify strict liability and on the criticisms that these arguments attract, it does not explore arguments that justify fault-based liability, nor does it consider the reasons for adopting rules of no-liability (ie rules which leave the loss lie where it falls). It is certainly true that, at least sometimes, the reasons in favour of fault-based liability or no-liability are used to criticise arguments justifying strict liability, and that sometimes an argument which is used to justify strict liability may be used in a different way to justify fault-based liability or no-liability. Notwithstanding these overlaps, the focus of my investigation remains on strict liability and on the arguments put forward to justify it. Indeed, unlike fault liability or no-liability, strict liability is often seen as exceptional and as requiring special justifications.

[8] See generally Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 710, 711 (arguing that the notion of legal culture 'might include underlying values or principles of a legal system, as well as traditions, shared beliefs, common ways of thinking, constellations of interests or patterns of allegiances of lawyers, lawmakers, and citizens').

What is more, these justifications are very much open to debate and the object of considerable disagreement across and within different legal systems.

Secondly, in discussing the arguments for strict liability it may be tempting to assess their validity. For example, is the spreading of losses an attractive justification for strict liability? Should we decide between strict, fault-based, or no-liability regimes on the basis of considerations such as avoiding accidents or compensating victims? Is there any particular understanding of interpersonal justice which convincingly supports the imposition of strict liability? These are clearly important questions, but I will not try to answer them here, nor will I suggest a novel approach as to when and why strict liability should be imposed. Instead, I will seek to produce a picture of legal reasoning in strict liability, so that our understanding of this type of liability, of the reasoning surrounding it, and of the four tort systems more generally may be enhanced.

1.2. Scope of the Thesis

Given that this work investigates in a comparative perspective the arguments put forward to justify strict liability in tort law, it is necessary to clarify what it is meant by 'strict liability' and 'tort law'.

As concerns strict liability, the meaning of this notion will be clarified by explaining how each of the four legal systems understands it. While it is more convenient to postpone this task to Part II of the thesis, where I provide an overview of the four laws, it is necessary at this point to explain why I adopt this strategy. First of all, given that my investigation is about the reasoning justifying strict liability *in four legal systems*, it is indispensable to know what *these systems* mean by strict liability before we can understand the relevant reasoning

put forward in each. Moreover, the very term 'strict liability' is clearly not system-neutral, as it refers to a distinct form of liability recognised as such in common law systems such as the English and the American one. As will be seen, in these two legal systems strict liability is often portrayed as 'liability without fault'.[9] The same term 'liability without fault' can be also found in the two civil law systems (*responsabilité sans faute* in France and *responsabilità senza colpa* in Italy).[10] However, and very importantly, the three terms do not necessarily refer to the same phenomenon in the four laws, for 'fault' (*faute*, *colpa*) can take on different meanings across (and sometimes even within) them, therefore proving to be a highly ambiguous notion.[11] In light of this, I do not provide an abstract, system-neutral definition of strict liability and instead explain how 'strict liability' is understood in the four legal systems, including its relationship with fault. As will be seen, legal actors in all four systems are aware that it is difficult to distinguish sharply between 'fault' and 'strict liability' but, notwithstanding this difficulty, 'strict liability' is often depicted as clearly distinct from, if not opposed to, fault-based liability and it is widely used to refer to groups of situations where, at least in principle, the defendant's 'fault' (generally understood as lack of reasonable care or ordinary diligence) is seen as irrelevant to the determination of liability.

Secondly, I need to explain the meaning of 'tort law'. The term is clearly not system-neutral, as it refers to a particular body of law in England and in the United States, which

[9] See text to nn 36–38 and nn 113–117.

[10] See text to nn 184–185 and nn 249–250.

[11] For a brief discussion concerning several common law systems, see Allan Beever, *A Theory of Tort Liability* (Hart Publishing 2016) 28–33. For a discussion of the extraordinary breadth of fault (*faute*) in French law, see Simon Whittaker, 'The Law of Obligations' in John Bell et al, *Principles of French Law* (2nd edn, OUP 2008) 294, 364–381. For a discussion of the various meanings of 'fault' (*colpa*) in Italy, see Massimo Franzoni, *L'illecito. Trattato della responsabilità civile* (2nd edn, Giuffrè 2010) 175ff.

primarily governs situations where a party, independently of the existence of a contract or other, equitable duty,[12] has caused some harm to another party.[13] The bodies of law generally concerned with these types of situations in France and Italy are the laws of extra-contractual liability (*responsabilité extracontractuelle*, *responsabilità extracontrattuale*). While overlapping to a large extent, the laws of torts and the laws of extra-contractual liability are by no means coextensive legal domains. A particularly important example relates to situations where a private party brings an action not against a private entity but against the state or some public authority. In English and American law this type of dispute is generally governed by ordinary tort doctrines, though sometimes qualified or specially adapted.[14] Similarly, in Italian law the law of extra-contractual liability generally applies to cases where private entities sue public bodies alleging the infringement of their rights or other legally protected interests (*responsabilità civile della pubblica amministrazione*).[15] By contrast, in France the application of the law of extra-contractual liability to public authorities is generally excluded and their liability is instead in principle governed by a distinct and special body of principles and rules known as 'administrative liability' (*responsabilité*

[12] As to the relationship between torts and equitable wrongs, see eg Nicholas J McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson Longman 2018) 21–23; John Gardner, 'Torts and Other Wrongs' (2012) 39 Fla St U L Rev 43, 51; cf James Edelman, 'Equitable Torts' (2002) 10 Torts Law Journal 64.

[13] Some terminological clarification is in order here. I will use the terms 'harm', 'loss', or 'damage' to refer to the detrimental effects that an individual might suffer as a result of tortious conduct. These will typically include death, personal injury, pain and suffering, emotional distress, or damage to property. By contrast, I will use the term 'damages' to refer to the monetary award that the defendant is ordered to pay to the claimant in respect of those losses.

[14] For English law, see Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study* (OUP 2003) ch 2. For American law, see Michael D Green and Jonathan Cardi, 'The liability of public authorities in the United States' in Ken Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Intersentia 2016) 537, 538.

[15] Francesco Caringella, *Compendio di diritto amministrativo* (10th edn, Dike 2017) pt 5, ch 1.

administrative or *responsabilité de la puissance publique*).[16] While there is not enough space to discuss this special body of law (nor its reasoning) systematically, the thesis will refer occasionally to French public liability to show the reach of certain justifications which feature in legal reasoning concerning both public liability and the liability of private parties.[17]

Another difference between the laws of torts and the laws of extra-contractual liability may be identified at the level of the conditions of liability. While in all the four systems the courts must verify that the relevant causation and conduct elements are met, only the French and Italian laws generally require that the claimant has suffered some sort of harm.[18] Claiming that one is entitled to obtain damages because the defendant adopted a particular course of action and infringed a legally protected interest is not enough to obtain a favourable judgment; instead, the infliction of harm is necessary.[19] By contrast, the English and American laws include torts which do not depend upon the materialisation of some harm to the claimant's detriment; in these cases, the defendant's infringing conduct constitutes and completes the tort by itself and no (showing of) harm is required for a finding of liability; when a tort presents this feature, it is usually labelled as actionable *per se*.[20] It is true that

[16] TC 8.2.1873, D.1873.3.17 (*Blanco*). See generally René Chapus, *Droit administratif général*, t.1 (15th edn, Montchrestien 2001) 1227ff.

[17] See text to nn 349–352 and nn 844–848.

[18] For a general comparative discussion on this see Helmut Koziol, 'Comparative Conclusions' in Helmut Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag KG 2015) 748–750; id 'Schadenersatzrecht and the Law of Torts: Different terms and different ways of thinking' (2014) 5(3) JETL 257, 263–267. This difference between common law and civil law systems is connected to further divergences, such as the types of the remedies available for liability in tort, which however need not detain our attention here.

[19] See eg article 2043 of the Italian *Codice civile* and article 1240 of the French *Code civil*.

[20] See eg Robert E Keeton, Lewis D Sargentich, and Gregory C Keating, *Tort and Accident Law – Cases and Materials* (4th edn, Thomson West 2004) 155ff (on defamation); WE Peel and J Goudkamp, *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) [4–005] (on trespass to the person), [4–007] (on battery), [13–033] (on libel and some types of slander), [14–003] (on trespass to land).

this difference between the laws of torts and the laws of extra-contractual liability may have become one of degree rather than one of kind. Indeed, situations have emerged in the Italian and (especially) French laws where the existence of liability *per se* may be occasionally admitted.[21] But even so, liability *per se* remains exceptional in the two civil law systems and it is still unclear whether this type of liability will attract enough support to become an established or even expanding pattern of liability. For present purposes, it suffices to say that liability *per se* is not explored here, as the focus is on situations where the claimant has suffered some sort of harm. This is in part because it is here that the justifications for the imposition of strict liability are most interesting, and in part for reasons of space.

A final point is in order to delineate the scope of the thesis. Strict liability does certainly not belong only to the province of tort law, as it features in other legal domains such as, most notably, the law of contract.[22] Given that the distinction between tort and contract is much discussed and that there is considerable disagreement as to where and how the line between the two should be drawn,[23] it is important to clarify for present purposes the relationship

[21] In French law, 'acts of unfair competition give necessarily rise to … some harm, even if just of a moral nature' (Cass com 1.7.2003 n.01-13.052; Cass com 27.5.2008 n.07-14.422; Cass com 28.9.2010 n.09-69.272); the failure to provide patients with information relating to subsequent medical treatment creates in itself 'a damage [*préjudice*] that the judge cannot leave without reparation' (Civ (1) 3.6.2010 n.09-13.591, RTD civ 2010.571, note Jourdain); again, certain courses of action by the employer 'necessarily cause a prejudice' to the employee who is therefore entitled to get damages (eg Cass soc 19.1.2012 n.13-31.005, Cass soc 17.5.2011 n.10-12.852, JCP S 2011). Italian law appears more committed than French law to the principle that there cannot be any liability in tort without detrimental consequences ('*danno-conseguenza*') resulting from the defendant's infringement of the claimant's legally protected interest (see Massimo Bianca, *Diritto civile. V – La responsabilità* (2nd edn, Giuffrè 2012) vol 5, 186). Nevertheless, some uncertainty is shown in relation to liability for private nuisance: some decisions suggest that the infringing conduct may be enough to trigger damages (eg Civ (III) 9.5.2012 n.7048); other decisions (Civ (II) 2.8.2016 n.16074) limit this position to one particular type of harm ('*danno esistenziale*', consisting in some deterioration of the relational dimension of one's own life and the accompanying change in one's own living habits); still other decisions exclude altogether liability *per se* in the context of private nuisance (eg Civ (III) 27.6.2016 n.13208).

[22] Instances of strict liability can be found in further areas such as the law of trusts and company law which, however, need not be discussed here.

[23] eg PS Atiyah, *Essays on Contract* (Clarendon Press 1986) 40–42; Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1995) 51; Peter Cane, *The*

between them. According to a traditional view, contractual obligations stem from the voluntary agreement of the contracting parties, whereas tort duties are established by the law itself.[24] This approach, perhaps still useful as a starting-point,[25] does not however consider important developments in modern legal systems which suggest that reliance on voluntary agreement cannot distinguish neatly between tort and contract. First, the incidents of a contractual relationship as well as the consequences of a breach of contract are very often determined, in whole or in part, by the law itself; secondly, and conversely, the parties' agreement on occasion may give rise to tortious obligations or, at other times, may limit the scope of, or even exclude altogether, particular obligations already imposed by the law of torts.[26] In view of this, it seems more accurate to say that contractual obligations are *typically* triggered by the parties' agreement,[27] and that tort duties are *typically* triggered by the law

Anatomy of Tort Law (Hart Publishing 1997) 183–186; Gardner (n 12) 58–61; Curtis Bridgeman and John CP Goldberg, 'Do Promises Distinguish Contract from Tort?' (2012) 45 Suff U L Rev 873; Geneviève Viney, *Introduction à la responsabilité. Traité de droit civil* (LGDJ 2019) [225]ff; Franzoni (n 11) 14–16.

[24] eg Sir Percy Henry Winfield, *Province of the Law of Tort* (Cambridge: The University Press 1931) 380; Charles Sainctelette, *De la responsabilité et de la garantie: accidents de transport et de travail* (Bruylant-Christophe 1884) 1–15; Adriano De Cupis, *Il danno: teoria generale della responsabilità civile* (3rd edn, Giuffrè 1979) vol 1, 113.

[25] eg *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [79] (Jackson LJ); Simon Whittaker, 'The Relationship between Contract and Tort' in Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2019) vol 1, [1-152], [1-154].

[26] eg Whittaker (n 25) [1-154]; Peel and Goudkamp (n 20) [1–004]–[1–007]; John CP Goldberg, Anthony J Sebok, and Benjamin C Zipursky, *Tort Law – Responsibilities and Redress* (4th edn, Wolters Kluwer 2016) 37; Viney (n 23) [301], [382]; Massimo Franzoni, *Il danno risarcibile. Trattato della responsabilità civile* (2nd edn, Giuffrè 2010) 773ff.

[27] Simon Whittaker, 'Privity of Contract and the Tort of Negligence: Future Directions' (1996) 16 OJLS 191.

itself. It is on this basis that I distinguish tort from contract and that I focus my discussion on liability in tort rather than on liability in contract.

1.3. Sources of Analysis and Use of Materials

The justifications for the imposition of strict liability can be found in a wide range of sources across the four legal systems studied. The most useful ones to understand how strict liability is justified are judicial decisions and academic writings. As regards the former, judgments present remarkable differences in style across the four legal systems. The opinions of judges in common law systems are usually overt and elaborate, therefore constituting an ideal source to understand why the law is in a certain state (in our case, why strict liability is adopted in certain situations). Sometimes, as we will see, judicial opinions can contain a multitude of justifications that disclose strikingly complex and rich patterns of argumentation. By contrast, in the two civil law systems, judgments do not contain the opinions of the individual judges, but only the unitary decision of the court. This typically means that there is a less elaborate judicial reasoning, although there is a considerable difference between Italy and France. Indeed, the judgments of Italian courts still contain a good deal of reasoning, while French judgments are famous for their brevity and syllogistic nature. As a result, the work of French legal scholars becomes key to identifying the justifications for strict liability, to understand their role in the relevant legal system, and more generally to appreciate the intellectual climate in which the courts operate. What is more, the overt nature of French academic reasoning allows us to appreciate a certain self-awareness in the French legal culture about the key role of strict liability in their law. This does not mean, of course, that in the other three legal systems the role of legal scholars is less

important. On the contrary, for the purpose of understanding the functioning of a legal system, which include the reasoning taking place in it, academic reasoning is as essential as judicial reasoning and it is therefore given the utmost importance in this work.

Besides academic writings and judicial decisions, I have also used Reports of the Law Commission for England and Wales, the Report of the Pearson Commission, and the Restatements on the law of torts in the United States, for these all include extended discussions about the justifications for strict liability. Equivalent sources do not exist in France and Italy, although the thesis refers in a few instances to the Report of the Italian Ministry of Justice to the *Codice civile*,[28] and to a few proposals to reform French tort law which have been put forward in recent times.[29] Finally, while Parliamentary debates or documentation could have been useful sources, they are not considered in this work; on the one hand, it is unlikely that they would have added to the range of arguments already identified and, on the other hand, a thorough study of Parliamentary materials across the four legal systems (one of which comprises fifty-one jurisdictions) would have extended the boundaries of this research beyond a manageable limit.

A further point concerns the inclusion in the thesis itself of the sources which have been consulted. Studying the arguments put forward in four legal systems to justify strict liability required me to read a range of materials all of which could not eventually be cited

[28] 'Relazione del Ministro Guardasigilli Grandi al Codice Civile del 1942': available at <https://www.consiglionazionaleforense.it/web/cnf/collana-studi-storici-e-giuridici?largefont> (accessed 8 July 2020).

[29] Pierre Catala (ed), *Avant-projet de réforme du droit des obligations et du droit de la prescription: Rapport à Monsieur Pascal Clément Garde des Sceaux, Ministre de la Justice, 22 Septembre 2005* [Avant-projet Catala]; François Terré (ed), *Pour une réforme du droit des contrats* (Dalloz 2009); *Pour une réforme du droit de la responsabilité* (Dalloz 2011); *Pour une réforme du régime général des obligations* (Dalloz 2013) [Avant-projet Terré].

or referenced in the thesis, whether in the main text or in the footnotes. As a result, in presenting the reasoning of legal actors from the four jurisdictions, I have selected and used only part of the materials consulted, always with a view to providing a fair portrayal of the various justifications, their usage, and significance. I have listed the materials consulted in a separate section of the Bibliography for information.[30]

Finally, my discussion generally adopts the present tense to illustrate the reasoning of legal actors, even if they wrote in the 19th or 20th century. The reason for this is that in all the four systems contemporary legal actors still refer to these 'old' instances of reasoning as providing authoritative statements about the justifications for the imposition of strict liability. In a meaningful way, then, legal actors (especially scholars) who wrote several decades ago still participate actively in the conversation regarding the justifications for strict liability.

1.4. Structure of the Thesis

This study is structured in a way that reflects its aims and methodology. Following this General Introduction, Part II sets the scene for the comparative discussion of arguments taking place in Part III of the thesis, by outlining the main traits of the four substantive laws as relevant for present purposes. First, it clarifies how the four systems understand 'strict liability' and then it identifies and discusses the contexts where strict liability is imposed in each of them. Throughout the thesis, the term 'context(s) of liability' refers to a group of situations in which liability is imposed: these will normally coincide with what the English and American lawyers call 'torts' and with what French and Italian lawyers consider the

[30] See p 347ff.

heads of liability.[31] The aim of Part II is to provide some background to the subsequent discussion of arguments. Exploring the contexts of strict liability is key to understanding how and to what extent different legal systems rely on strict liability. Moreover, the various justifications for strict liability show a degree of context-dependence in each legal system, meaning that some of them may be seen as convincing in certain contexts of liability, but left aside in others. As a result, it is necessary to have a clear picture of where and how strict liability applies before being able to understand the reasoning for its imposition.

Part III, which is the core of the thesis, sets out the comparative analysis of the arguments used to justify strict liability in the four legal systems. Given that this analysis seeks to explore the usages and significance of each argument *within* and *across* the four laws studied, the most fruitful way of organising the discussion appeared to be by arguments. To help navigate the complexities of legal argumentation, Part III begins by providing the framework of analysis which I have elaborated to explore the various patterns of reasoning and the significance of the arguments in and across the four laws. The five, main sections of Part III analyse the arguments in turn: each section explores the core idea behind the argument, its internal variations, and then discusses its usages and significance in the four laws, comparing and contrasting the treatment the argument receives across them. Each section provides some concluding remarks in relation to the argument examined. Finally,

[31] In French and Italian law there is no agreed term to refer to the various heads of liability: sometimes these are referred to by simply mentioning the relevant provision included in the civil codes or in the statutes (eg articles 1240–1244 of the French *Code civil*, or articles 2043, 2049–2054 of the Italian *Codice civile*), other times by mentioning the action or activity on which the liability rule rests (eg 'liability for dangerous activities' (*responsabilità per l'esercizio di attività pericolose*) under article 2050 Cod civ). On whether French tort law may be understood as featuring separate heads of liability as opposed to overarching principles of liability, see Jean-Sébastien Borghetti and Simon Whittaker, 'Principles of Liability or a Law of Torts?' in Jean-Sébastien Borghetti and Simon Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart Publishing 2019) 455.

Part IV of the thesis offers further, more general insights on the patterns of use and on the significance of the arguments discussed in Part III, it provides critical reflections on the nature of the reasoning in strict liability across the four laws, and it reflects on the broader values and goals which influence such reasoning.

2. Strict Liability in the Four Tort Systems. An Overview

2.1. Introduction

Before discussing comparatively the arguments put forward to justify the imposition of strict liability, it is useful to explain how strict liability is understood in the four legal systems and to set out the contexts of strict liability which can be identified in each of them. To do so, this Part of the thesis presents the four substantive laws separately, so as to convey a clear sense of their own specificities vis-à-vis the role of strict liability, while also pointing out similarities and differences among them. This will provide the necessary background for the comparative discussion of legal reasoning in Part III, where the various arguments are not discussed in a vacuum, but rather in relation to the specific contexts of liability for which they typically are invoked.

2.2. Strict Liability in English Law

English tort law is comprised of a wide range of distinct torts (or 'contexts of liability'). On the list we find well-known 'entries' such as the torts of negligence, trespass (to land or the person), nuisance, the rule in *Rylands v Fletcher*, and many others.[32] As each tort has its own rules, authorities, and focus,[33] important variations exist from one tort to another, whether in

[32] According to Bernard Rudden, 'Torticles' (1991-1992) 6 Tul Civ LF 105, there are around seventy torts across common law jurisdictions.

[33] See Whittaker (n 11) 294, 360; Simon Deakin and Zoe Adams, *Markesinis and Deakin's Tort Law* (8th edn, OUP 2019) 23–25.

relation to the nature of the claimant's protected interests,[34] or to the standard of conduct expected of the defendant. In this second respect, English lawyers often distinguish between torts based on fault and torts involving strict (or stricter) liabilities. The former type of tort refers to situations where the defendant should have acted differently, either because she acted intentionally or because she failed to take reasonable care, the most important example being the tort of negligence.[35] By contrast, the latter type of torts—those of strict liability—are typically described as imposing 'liability without fault', ie regardless of whether the defendant complied with the standard of the reasonable person.[36] At a conceptual level, therefore, it appears that fault and strict liability *can* be seen as clearly distinct, if not opposed; at the same time, English lawyers also acknowledge that in practice a sharp distinction between strict liability and fault-based liability may be difficult to draw and that the degree of strictness across liability rules varies depending on the way in which the constituent elements of the various torts are set up, interpreted, and applied as well as on the available defences.[37] As a result, some scholars argue that it may be useful to imagine the different torts along a continuum which classifies them according to their degree of strictness.[38] Yet, on the basis of the conceptual distinction seen above, the term 'strict liability' is still commonly used to refer to those situations where compliance with the

[34] For example, while the main concern of the tort of negligence is to safeguard property interests and bodily integrity, the tort of private nuisance and the rule in *Rylands v Fletcher* are confined to the protection of the former only: see *Hunter v Canary Wharf Ltd*, [1997] AC 655.

[35] See eg *Nettleship v Weston*, [1971] 2 QB 691.

[36] Peter Cane, 'Fault and Strict Liability for Harm in Tort Law' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999) 171, 191.

[37] See Peel and Goudkamp (n 20) [11–044]; Jenny Steele, *Tort Law, Text, Cases, and Materials* (3rd edn, OUP 2017) 847; Christian Witting, *Street on Torts* (OUP 2017) 385.

[38] Cane (n 36) 172. See also Jane Stapleton, *Product Liability* (Butterworths 1994) 97, 130–132.

required standard of conduct (typically that of the reasonable person) does not exempt the defendant from a finding of liability. And while the tort of negligence certainly constitutes the main avenue of civil redress in English tort law, there are several torts which are widely seen as torts of strict liability and which appear to play an important role as well in English law. To these torts, or contexts of liability, we now turn.

A first context of strict liability concerns the famous rule established in *Rylands v Fletcher*.[39] In that case, the Exchequer Chamber held that a "person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape".[40] In other words, in its early days the rule in *Rylands v Fletcher* imposed strict liability for the harm caused by the escape of a dangerous thing,[41] it covered both damage to property and personal injuries,[42] and it applied regardless of whether the claimant had any interest in the land affected by the escape of the thing.[43] With the passing of time, however, the scope of application of the rule and, more

[39] [1866] LR 1 Ex 265; [1868] LR 3 HL 330.

[40] ibid 279.

[41] The rule was held to apply to a number of types of things: eg gas (*Batchellor v Turnbridge Wells Gas Co*, (1901) 84 LT 765); electricity (*National Telephone Co v Baker*, [1893] 2 Ch 186; *Hillier v Air Ministry*, [1962] CLY 2084); fumes (*West v Bristol Tramways Co*, [1908] 2 KB 14); blasting and munitions (*Miles v Forest Rock Co Ltd*, (1918) 34 TLR 500; *Rainham Chemical Works v Belvedere Fish Guano*, [1921] 2 AC 465); fire (*Jones v Festiniog Ry*, (1867-68) LR 3 QB 733); a flag pole (*Shiffman v Order of St John*, [1936] 1 All ER 557); a chair-o-plane in a fairground (*Hale v Jennings Bros*, [1938] 1 All ER 579); vibrations (*Hoare & Co v McAlpine*, [1923] 1 Ch 167).

[42] *Rylands v Fletcher* itself provides an example of the operation of the rule relating to damage to property: the claimant's mines were flooded by water which escaped from the defendant's reservoir and reached her property through some old shafts. In *Jennings Bros* (n 41), the rule was successfully invoked in connection to personal injuries. The claimant, tenant of a stand on a fair-ground, was hit and severely injured by a chair which, with its occupant, became detached from the defendant's 'chair-o-plane'.

[43] *Shiffman* (n 41).

generally, its role in English tort law have been dramatically reduced. This has occurred through judicial and academic statements suggesting that the rule in *Rylands* would be part of the tort of private nuisance.[44] In *Read v J Lyons*, Lord Macmillan observed, even if *obiter*, that the rule in *Rylands* 'derives from a conception of mutual duties of adjoining or neighbouring landowners and its congeners are trespass and nuisance', and that such rule 'is truly a case on the mutual obligations of the owners or occupiers of neighbouring closes'.[45] It followed from this, first, that *Rylands* could not apply unless the dangerous substance escaped from the defendant's land to a place outside such land, so that if the claimant suffers some harm within the defendant's property, he cannot recover under *Rylands v Fletcher*.[46] Secondly, it was no longer possible to recover damages for personal injuries, but only for damage to the claimant's property.[47] In 1993 in *Cambridge Water v Eastern Counties Leather*,[48] Lord Goff stated that *Rylands* is nothing more than an 'extension of the law of nuisance to cases of isolated escape'.[49] A decade later, the Law Lords reiterated this view in *Transco plc v Stockport MBC* by arguing that the rule in *Rylands* is a sub-species of private

[44] For a critique of the assimilation of *Rylands* into private nuisance, see Roderick Bagshaw, 'Rylands confined' (2004) 120 LQR 388; John Murphy, 'The Merits of Rylands v Fletcher' (2004) 24 OJLS 643; Donal Nolan, 'The Distinctiveness of *Rylands v Fletcher*' (2005) 121 LQR 421.

[45] [1947] AC 156, 173–174.

[46] ibid 168.

[47] ibid 173.

[48] [1994] 2 AC 264.

[49] *Cambridge Water* (n 48) 304. To achieve this result, the House of Lords relied on Lord Macmillan's *dicta* in *J Lyons* and on a 1949 journal article by FH Newark, 'The Boundaries of Nuisance' (1949) 65 LQR 480.

nuisance and that, since private nuisance is a tort against land,[50] *Rylands* itself is also best regarded as a tort against land.[51]

As a result, the rule in *Rylands* applies today only where the following requirements are met: the defendant must have brought or kept on land an exceptionally dangerous or mischievous thing;[52] the harm must have been a reasonably foreseeable consequence of the escape, regardless of whether the escape itself was foreseeable or not;[53] the defendant's use of the land from which the thing escaped must have been extraordinary and unusual;[54] the thing must have escaped into or onto the claimant's land;[55] and the escape must have damaged the claimant's land.[56] Finally, even if all these requirements are met, the defendant can still avoid liability on the basis of an act of God,[57] act of a stranger,[58] default or consent

[50] To this effect, see *Canary Wharf* (n 34) 702–707.

[51] [2004] 2 AC 1, [9], [34]–[35].

[52] For an overview of the things that have been found to be dangerous, see the case law mentioned in n 41.

[53] See *Cambridge Water* (n 48) 306. Cf *West v Bristol Tramways Co*, [1908] 2 KB 14, where *Rylands* was applied to a risk of harm which was unforeseeable.

[54] Originally, this requirement was labelled 'non-natural use' test in *Rylands v Fletcher* (1868) LR 3 HL 330, 338–340.

[55] See n 46 above.

[56] This requirement means not only that personal injuries are excluded from the scope of application of *Rylands*, but also that, to have *locus standi*, the claimant must have an interest in the land affected by the escape of the dangerous substance: see *Mckenna v British Aluminium Limited*, [2002] Env LR 30, [21].

[57] See *Nichols v Marsland*, (1876) 2 Ex D 1; *Greenock Corp v Caledonian R*, [1917] AC 556.

[58] If the escape is caused by the unforeseeable act of a third party, the defendant is not liable: see *Box v Jubb*, (1879) 4 Ex D 76; *Rickards v Lothian*, [1913] AC 263; *Perry v Kendricks Transport Ltd*, [1956] 1 WLR 85. If instead the act of the stranger was foreseeable, the defendant is not liable under the rule in *Rylands*, although he can be held liable under the tort of negligence: see *Northwestern Utilities Ltd v London Guarantee and Accident Ltd*, [1936] AC 108.

of the claimant,[59] and statutory authority.[60] This emasculation of the rule in *Rylands* means that, unlike the American and Italian tort systems,[61] English law does not contain any general and strict liability for dangerous activities. These are instead governed either by the tort of negligence or through specific pieces of legislation, with statutes imposing strict liability for harm caused by nuclear installations,[62] the underground storage of gas,[63] waste disposal,[64] burst water mains,[65] or the keeping of dangerous animals.[66] Therefore, insofar as dangerous activities and things are concerned, strict liability rules apply only occasionally (whether under *Rylands* itself or particular statutes), with the tort of negligence being the default rule.

Another context of strict liability is the tort of private nuisance. The creator of a nuisance may take all reasonable precautions in operating her activity so as to avoid interfering with the claimant's interest in the use and enjoyment of their land, and yet she may not be able to do so and be found liable. For example, despite adopting latest pollution filters, a factory may nevertheless emit noxious substances and affect detrimentally a

[59] In *Rylands v Fletcher*, Blackburn J included the claimant's default among the available defences ((1866) LR 1 Ex 265, 280), which applies only if the harm is due wholly to the claimant's act or default. As regards the defence of consent of claimant, this refers to situations where the claimant consented to the presence of the dangerous thing on the defendant's premises and the escape was not owed to the defendant's negligence: see *Gill v Edouin*, (1894) 71 LT 762; *Peters v Prince of Wales Theatre*, [1943] KB 73.

[60] The defendant may try to escape liability if she was statutorily authorised to perform the activity that eventually caused harm, but if liability can be excluded depends on the construction of the statute: see eg *Green v Chelsea Waterworks Co*, (1894) 70 LT 547.

[61] See text to nn 119–133 and nn 254–263.

[62] Nuclear Installations Act 1965, ss 7 and 12.

[63] Gas Act 1965, s 14.

[64] Environmental Protection Act 1990, s 73(6).

[65] Water Industry Act 1991, s 209.

[66] Animals Act 1971, s 2(1).

neighbour's enjoyment of her residential house. If the interference is so substantial that it would be unreasonable to expect the claimant neighbour to put up with it, the defendant factory will be liable and proof of reasonable care on their part will be immaterial.[67] It is therefore clear that, at least in this sort of case, private nuisance is a tort of strict liability, and the defendant can escape liability only if she acquired by grant or prescription the right to commit a nuisance,[68] if the nuisance was authorised by statute[69] or caused by an act of God,[70] or if the claimant consented to it.[71]

A further area where English law imposes strict liability relates to the harm caused by animals. First, a person may be strictly liable in nuisance or under the rule in *Rylands* for the harm caused by her own animals, provided that the requirements of the two torts are met.[72] Moreover, strict liability for animals is imposed through the Animals Act 1971 in four distinct categories of cases. First, under section 2(1) of the Act strict liability applies to the keepers of animals belonging to a 'dangerous species', meaning that these animals 'have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe'.[73] Typical examples include lions, tigers,

[67] For a statement on the strict nature of the tort of private nuisance, see *Transco* (n 51) [26] (Lord Hoffmann).

[68] See *Thomas v Thomas*, [1835] 2 CM & R 34; *Coventry v Lawrence*, [2014] UKSC 13, [2014] AC 822, [28]–[46].

[69] See *Allen v Gulf Oil Refining Ltd*, [1981] AC 1001.

[70] See *Sedleigh-Denfield v O'Callaghan*, [1940] AC 880, 886.

[71] *Pwllbach Colliery v Woodman*, [1915] AC 634. More controversial is the availability of contributory negligence: see Deakin and Adams (n 33) 429–430.

[72] See Peter North, *Civil liability for animals* (OUP 2012) [6.07]–[6.11].

[73] Animals Act 1971, s 6(2).

elephants, and bears.[74] The second category of cases is governed by section 2(2) of the Act, which imposes strict liability on the keeper of a non-dangerous animal if a number of conditions are met. First, it is necessary that the damage caused by the animal is either likely to be caused or likely to be severe. Secondly, it is required that such likelihood of harm or of severity of harm is due to characteristics which the animal possesses but which are not normally found in animals of the same species. Thirdly, the keeper must have known that the animal possessed such characteristics.[75] Unlike under the rule in *Rylands v Fletcher* and under the tort of private nuisance, liabilities under section 2 of the Animals Act 1971 also cover personal injuries. In terms of defences, sections 5(1)–(3) of the Act provides that strict liability does not apply if the harm is due wholly to the claimant's fault, if the claimant voluntarily exposed herself to the risk of such harm, or if the animal injured a trespasser. Furthermore, the defence of contributory negligence should apply as well.[76] By contrast, neither act of God nor act of a third party are applicable defences in relation to liability under section 2 of the Animals Act 1971,[77] therefore subjecting the keepers of dangerous (and sometimes) non-dangerous animals to a very rigorous regime. Finally, the third and fourth categories of strict liability under the Animals Act 1971 concern straying livestock causing damage to another's property and dogs injuring another's livestock, respectively.[78] In both

[74] *Wyatt v Rosherville Gardens Co*, (1886) 2 TLR 282, 283 (bears); *Filburn v People's Palace and Aquarium Co Ltd*, (1890) 25 QBD 258 (elephants); *Pearson v Coleman Bros*, [1948] 2 KB 359 (lions); *Behrens v Bertram Mills Circus Ltd*, [1957] 2 QB 1, 17–18 (tigers).

[75] Animals Act 1971, s 2(2).

[76] North (n 72) [2.160].

[77] *Marsland* (n 57) 260; *Baker v Snell*, [1908] 2 KB 825, 833, 834; Law Commission, *Civil Liability for Animals*, Law Comm No 13 (1967) [24].

[78] See Animals Act 1971, ss 4 and 3.

cases, proof of fault in the owner or keeper of the damaging or injuring animal is not required, and the defendant can have her liability reduced if the claimant was contributorily negligent,[79] or escape it altogether if the harm was due wholly to the claimant's fault.[80]

Another context in which strict liability is prominent is liability for the action of another. Today, in order to decide whether a party is vicariously liable, English courts run a two-stage test. First, they explore the nature of the relationship between the defendant and the physical author of harm and verify whether this relationship is 'one that is capable of giving rise to vicarious liability'.[81] The classic relationship is that between employer and employee, whose existence may be assessed either on the basis of the 'control test' or, more prominently in recent times, on the basis of the 'entrepreneur test'.[82] However, modern caselaw has extended the scope of vicarious liability beyond the boundaries of the traditional employment relationship, and today it applies to any relationship 'akin to that between an employer and an employee'.[83] When assessing whether a relationship is akin to employment, courts may consider whether:

> (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the

[79] Animals Act 1971, s 10.

[80] ibid s 5(1). For defences specific to the third and fourth categories of liability, see ibid s 5(5)–(6) and s 5(4), respectively.

[81] *Various Claimants v Catholic Child Welfare Society*, [2013] 2 AC 1, [21] [*CCWS*] .

[82] The 'control test' is satisfied when the employer 'can not only order or require what is to be done, but how it shall be done': see *Collins v Hertfordshire CC*, [1947] KB 598, 615. By contrast, the 'entrepreneur test' seeks to distinguish between employee and independent contractor by suggesting that 'an employee works for his employer', whereas 'an independent contractor is in business on his own account': see *JGE v English Province of Our Lady of Charity*, [2013] QB 722, [64]; and also *Barclays Bank Plc v Various Claimants*, [2020] UKSC 13, [2020] 2 WLR 960.

[83] ibid [47].

> business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer.[84]

Once a court is satisfied that, on the basis of these factors, the relationship between the defendant and the physical author of harm is capable of giving rise to vicarious liability, it will run the second stage of the test and will assess whether there is a sufficiently close connection between this relationship and the tortious conduct. In the traditional employment scenario, this test amounts to seeing whether the employee committed the tort in the ordinary course of their employment. Traditionally, this requirement was thought to be satisfied where the tortious act was expressly or impliedly authorised by the employer or if it could be considered as an unauthorised mode of doing the job that the employee was employed to do.[85] But given that some types of conduct cannot be described as modes of performing one's own job, for example where the tortfeasors sexually abuse the children that they are supposed to care for, courts have recently moved to a more flexible approach which assesses whether the tortious conduct is sufficiently connected with the relationship between the defendant and the physical author of harm.[86] This enquiry is highly fact-sensitive and it takes into account a variety of distinct considerations depending on the facts of the case being litigated.[87] In general terms, then, if a court is satisfied that the relationship between the

[84] *CCWS* (n 81) [35].

[85] See John W Salmond, *The Law of Torts* (1st edn, Stevens and Haynes 1907) 83.

[86] See *Lister v Hesley Hall Ltd*, [2002] 1 AC 215. Depending on the facts of the case, the close connection test may be specially adapted, as it happens with cases concerning the abuse of children: see eg *WM Morrison Supermarkets plc v Various Claimants*, [2020] UKSC 12, [2020] 2 WLR 941, [36].

[87] See James Goudkamp and Donal Nolan, *Winfield & Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) [21-021]–[21-037].

defendant and the physical author of harm is capable of giving rise to vicarious liability and if the tortious conduct is sufficiently connected with this relationship, a court will hold the defendant vicariously liable.[88] By contrast, the defendant will not be liable if either of these requirements is not met, or if the physical author of harm was not himself liable in tort (because, for example, he had a valid defence against the claimant); alternatively, the defendant may obtain a reduction in damages by proving that the claimant was contributorily negligent.[89] Finally, a special rule of vicarious liability applies in the context of traffic accidents. In general, these are governed by the tort of negligence,[90] but strict liability is imposed on a vehicle owner where someone else drives the car for the owner's purposes and under delegation of a task or duty.[91] All these vicarious liabilities are clearly strict, for proof of the defendant's diligent conduct is no answer to a claim for damages.

Other contexts of strict liability featuring in English law relate to the so-called liability for breach of a non-delegable duty, which applies across a variety of different situations. For example, in relation to the operation of dangerous activities, an employer is under a non-

[88] The breadth of this two-stage test has allowed the UK Supreme Court to hold liable: the Ministry of Justice for the injury that a prisoner working in the prison kitchen caused to the claimant catering manager (*Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 [*Cox*]); a private employer for the harm that one of his employees caused to a customer by way of verbal and physical assault (*Mohamud v WM Morrison Supermarkets Plc*, [2106] UKSC 11, [2016] AC 677); a local authority for the sexual abuse that a child suffered as a result of the acts of her foster parents, in whose care the child had been placed by the local authority (*Armes v Nottinghamshire County Council*, [2017] UKSC 60, [2018] AC 355 [*Armes*]).

[89] See *Imperial Chemical Industries Ltd v Shatwell*, [1965] AC 656.

[90] Roderick Bagshaw, 'The Development of Traffic Liability in England and Wales' in Wolfgang Ernst (ed), *The Development of Traffic Liability* (CUP 2010) 12, 49; Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, CUP 2018) 188.

[91] *Ormrod v Crosville Motor Services Ltd*, [1953] 1 WLR 1120; *Morgans v Launchbury*, [1973] AC 127, reversing the decision of the Court of Appeal, where Lord Denning MR extended the vicarious liability of vehicle owners 'to a case when the car is being driven by the driver for his own purposes on an occasion in which the owner has no interest and for which he has not given permission': see *Launchbury v Morgans*, [1971] 2 QB 245, 254–255 [*Launchbury*]. Cf the position in the United States, on which see text to nn 160–163.

delegable duty to ensure that her activity will not result in any damage and, therefore, she is strictly liable for the harm negligently caused by the independent contractors to whom she entrusted such activity.[92] Similarly, hospitals and schools have a non-delegable duty to ensure the physical safety of the patients and pupils put in their care, with the result that they are strictly liable for the harm caused to them by independent contractors while performing teaching or medical functions.[93] Finally, an employer is under a non-delegable duty to see that reasonable care is taken in providing her employees with competent staff, adequate material, a proper system of working, effective supervision, and a safe place of work,[94] although it is controversial whether this liability is strict or based on fault.[95]

A further context of strict liability can be identified in the English law of liability for defective products. Since *Donoghue v Stevenson*, the main avenue of civil redress for victims of accidents involving products has been the tort of negligence,[96] where the manufacturer is liable only if she negligently exposes others to an unreasonable risk of harm which then materialises in the form of personal injury or damage to property other than the product

[92] *Honeywill & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd*, [1934] 1 KB 191. In *Woodland v Swimming Teachers Association*, [2013] UKSC 66, [2014] AC 537, [6], Lord Sumption cast doubt on the basis of this type of non-delegable duty and added that in future cases the *Honeywill* decision and its progeny may be re-examined.

[93] See *Cassidy v Minister of Health*, [1951] 2KB 343 (hospitals); *Woodland* (n 92) (schools).

[94] *Wilson and Clyde Coal Co v English*, [1938] AC 57, 78; *Latimer v AEC Ltd*, [1953] AC 634.

[95] Compare Peel and Goudkamp (n 20) [9–018], [9–025] (suggesting that the non-delegable duty in question is modelled on the duty of care in the tort of negligence) with Witting (n 37) 611 (arguing that liability for breach of a non-delegable duty, including that of employers, is strict).

[96] For an account of the different phases of product liability in English law, see Simon Whittaker, 'The Development of Product Liability in England' in Simon Whittaker (ed), *The Development of Product Liability* (CUP 2010) 51ff.

itself.[97] By implementing the European Directive on liability for defective products,[98] however, the Consumer Protection Act 1987 provides claimants with an additional route to compensation for harm caused by products, although it is not entirely clear whether this liability is strict or based on fault. Under the Act, liability of manufacturers is formally divorced from any notion of fault, but it is required that the product in question be defective. This requirement has sparked a lively debate as to the nature of liability, with some legal scholars suggesting that the standard of conduct imposed on manufacturers is not substantially different to that in the tort of negligence,[99] and with others arguing instead that liability is strict because independent of any regard for the avoidability of the defect and the taking of reasonable precautions.[100] Some of the leading cases in the field suggest that, at least insofar as manufacturing defects are concerned, English courts do not give any consideration to the defendant's conduct and see product liability as strict.[101] Where, instead, the product is defective in design, courts engage in a more inclusive balancing exercise and take into account whether the defect was avoidable and at what cost, in the context of a

[97] *Donoghue v Stevenson*, [1932] AC 562 which marked the emergence of the tort of negligence as an autonomous tort, concerned itself a case of liability for defective products.

[98] EU Directive 374/85 (Product Liability Directive). On the implementation process, see Simon Whittaker, *Liability for Products* (OUP 2005) 465–475.

[99] Simon Whittaker, 'The EEC Directive on Product Liability' (1985) 5 YEL 233, 242–246; Jane Stapleton, 'Products Liability Reform—Real or Illusory?' (1986) 6 OJLS 392.

[100] Christopher Hodges, *Product Liability: European Law and Practice* (Sweet & Maxwell 1993) [3.019]; Elspeth Deards and Christian Twigg-Flesner, 'The Consumer Protection Act: Proof at last that it is protecting consumers?' (2001) 10 Nottingham LJ 1.

[101] *A v National Blood Authority*, [2001] 3 All ER 289 [*NBA*] (distinguishing between standard and non-standard products, which correspond respectively to products with design defects and products with manufacturing defects: see eg Deakin and Adams (n 33) 604, fn 195). See also Donal Nolan, 'Strict product liability for design defects' (2018) 134 LQR 176, 177 (suggesting that the distinction between design and manufacturing defects 'is rightly viewed as fundamental to the analysis of the defectiveness issue in strict product liability regimes in other jurisdictions, since a coherent approach to that question seems to be impossible without it').

broader risk-utility test.[102] It is not yet entirely clear whether this way of assessing design defects amounts to imposing strict liability or liability based on fault but, at least at the level of formal statements, English courts see liability for design defects as strict and suggest that, while there is a risk of considering the defendant's conduct when assessing the avoidability of defect, the focus should be kept on the product, not on the producer.[103] Similarly, some leading scholars argue that performing a risk-utility calculus in cases of defective design 'would not be reintroducing negligence by the back door',[104] and that liability would be strict on the grounds that the assessment of the avoidability of defect would be made in hindsight (at the time of the trial) and that its focus would not shift back from the product to the manufacturer's conduct.[105] Insofar as defences are concerned, the Consumer Protection Act 1987 follows the Product Liability Directive.[106] Among these, particularly significant is the so called development risk defence which, broadly speaking, shields manufacturers from liability if the relevant risk of harm was unforeseeable according to the scientific and technical knowledge available at the time when the product was put into circulation. While article 7(e) of the Product Liability Directive takes a rigorous approach whereby the defendant is exempted from liability if that knowledge 'was not such as to enable the

[102] *Wilkes v Depuy*, [2016] EWHC 3096, [85]. See also *Bogle v McDonald's Restaurants Ltd*, [2002] EWHC 490, [80]; *Gee v DePuy International Ltd*, [2018] EWHC 1208 [*Gee*], [141]–[143] (suggesting that 'the avoidability or impossibility of taking precautionary measures; the impracticality, difficulty or cost of taking such measures; and the benefit to society or utility of the product' may be relevant even in cases involving non-standard products).

[103] *Wilkes* (n 102) [89].

[104] Deakin and Adams (n 33) 607.

[105] Nolan (n 101) 178–179. See also *Wilkes* (n 102) [89]; *Iman Abouzaid v Mothercare (UK) Ltd*, [2000] All ER (D) 2436.

[106] CPA 1987, s 4(1); Product Liability Directive, article 7.

existence of the defect to be discovered', the Consumer Protection Act 1987 adopts a more subjective test and shields a manufacturer from liability if 'the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control'.[107] Notwithstanding the different wording, it is unclear whether the English provision will lead to different results from those that would be achieved under article 7(e) of the Directive. Indeed, in the leading case *NBA*,[108] the court referred directly to the Product Liability Directive rather than to the Consumer Protection Act 1987 and therefore adopted a rigorous approach to the defence,[109] making it very difficult for defendants to rely successfully on it. While it remains to be seen whether this stance will be confirmed in future cases or if instead English courts will prefer adopting a more lenient approach towards manufacturers, it seems clear that the development risk defence reduces the rigour of liability for defective products. In sum, as seen above,[110] while there is no settled view as to the nature of product liability under the Consumer Protection Act 1987, several legal scholars and some leading judgments suggest that liability is strict insofar as manufacturing defects are concerned and that, at least at the level of formal statements, liability may be strict even in relation to design defects.

[107] CPA 1987, s 4(1)(e). As a result of this difference, the European Commission instituted proceedings against the UK for failure to transpose correctly the Directive, but the CJEU rejected the Commission's view on the ground that it failed to identify UK caselaw interpreting the development risk defence in a way that was inconsistent with the Directive: see *Commission v United Kingdom*, Case C-300/95, [1997] All ER (EC) 481.

[108] *NBA* (n 101).

[109] ibid [74],[49].

[110] See text to 99–105.

To conclude, in a setting where the tort of negligence dominates the scene, strict liability plays nevertheless a role. On the one hand, over the 20th century English legal actors have been reluctant to admit or expand strict liability in tort: examples of this sentiment are the fall of the rule in *Rylands v Fletcher*, the introduction of strict product liability only as a result of a European directive, the watering down of the rigour of the development risk defence under article 4(1)(e) of the Consumer Protection Act 1987, as well as the fact that an important area such as traffic accidents is based, by and large, on negligence. On the other hand, both the courts and the legislature are willing to support, in a variety of settings, the imposition of strict liability, as shown in contexts such as liability for animals, liability for private nuisance, liability for products, liability for breach of certain non-delegable duties and, most importantly given its recent expansion, vicarious liability for the tort of another. In sum, although the tort of negligence constitutes the centre of gravity of the English tort system, some types of accidents escape its gravitational pull and are governed by rules of strict liability.

2.3. Strict Liability in the Law of the United States

While there are fifty-one tort regimes in the United States, one for each of the jurisdictions forming part of the Union, there is a degree of uniformity among them which makes it possible to approach tort law in the United States as if there were one body of law.[111] In this respect, the Restatements of the American Law Institute are of great assistance, as they 'restate' systematically the common law of torts on the basis of the rules adopted in the

[111] Kenneth S Abraham, *The Forms and Functions of Tort Law* (5th edn, Foundation Press 2017) 1.

majority of states and therefore they make it relatively easy to identify the tort rules which have broad acceptance across the United States.[112]

In keeping with the English approach, American tort law is organised around a collection of torts. From the perspective of the standard of conduct, torts are often distinguished on the basis of whether or not they rest on the defendant's fault. Torts based on fault involve either intentional wrongdoings or carelessly inflicted harm, with the tort of negligence clearly dominating the scene.[113] In contrast, liability rules which do not rest on a failure to act as a reasonable person should have done in the circumstances constitute instances of strict liability.[114] Therefore, in keeping with the English approach, a conceptual distinction between fault-based liability and strict liability appears to be viable.[115] At the same time, though, some legal scholars show that sharp boundaries between fault and strict liability may be difficult to draw,[116] and that different liability rules may be located along a

[112] In some cases, particularly if the state courts are split on a particular issue and it is not possible to identify a majority view, the Restatement may reflect the drafters' own preferences (this being usually made clear in the comments to the relevant section in the Restatement).

[113] On the historical importance of negligence, see G Edward White, *Tort Law in America: An Intellectual History* (OUP 2003) 12ff. As in English law, the tort of negligence is predicated upon a failure to take reasonable care: see *Brown v Kendall*, 60 Mass 292 (Mass.1850). Note that, under the American doctrine of *negligence per se*, the notion of fault may extend to the mere violation of a statutory rule independently of whether the non-compliant conduct was or was not reasonably careful, such violation constituting negligent conduct and being subsumed into the common law tort of negligence: see Goldberg, Sebok, and Zipursky (n 26) 393 ff. In English law, by contrast, the tort of breach of statutory duty is today entirely separate from the tort of negligence: see Peel and Goudkamp (n 20) [8–001]ff.

[114] See eg Keeton, Sargentich, and Keating (n 20) 805.

[115] See Steven Shavell, 'Strict Liability versus Negligence' (1980) 9 J Legal Stud 1; Robert Cooter and Thomas Ulen, *Law & Economics* (6th edn, Pearson 2012) 196–198. See also, though from an entirely different perspective, Gregory C Keating, 'Is There Really No Liability Without Fault' (2017) 85 Fordham L Rev Res Gestae 24, 29.

[116] See John CP Goldberg and Benjamin C Zipursky, 'The Strict Liability in Fault and the Fault in Strict Liability' (2016) 85 Fordham L Rev 743.

continuum on the basis of their degree of strictness.[117] Nevertheless, the term 'strict liability' is commonly seen in opposition to fault, and it is therefore used to refer to a variety of torts which do not make liability depend upon the violation of the standard of conduct of the reasonable person. As a result, and despite the prominence of the tort of negligence, strict liability takes on an important role in the United States.

To begin with, after an initially cold reception by a majority of courts,[118] the English rule in *Rylands v Fletcher* has been accepted in most states and, in sharp contrast with the English approach, it has developed into a strict liability for harm caused by abnormally dangerous activities.[119] In determining whether an activity is abnormally dangerous, courts rely on several factors. In particular, they primarily consider the likelihood and severity of harm, whether the risk of harm can be avoided by the exercise of reasonable care, and whether the activity generating such risk is in common usage.[120] The relevance of other factors such as the locational appropriateness and the social value of the defendant's activity has varied over time,[121] but they appear to be of limited importance today.[122] Examples of

[117] See the classification of liability rules put forward by Guido Calabresi and Alvin K Klevorick, 'Four Tests for Liability in Torts' (1985) 14 J Legal Stud 585.

[118] Famous examples are *Brown v Collins*, 53 NH 442 (1873); and *Losee v Buchanan*, 51 NY 4756 (1873).

[119] cf the position of courts in Texas: see *American Tobacco Co, Inc v Grinnell*, 951 S.W.2d 420 (Tex.1997) [35].

[120] See factors (a)–(d) of § 520 of the 1977 *Restatement (Second) of Torts* ('Second Restatement'), as well as § 20(b) of the 2010 *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* ('Third Restatement LPEH').

[121] Compare comment *f* to § 520 of the Second Restatement with the Reporters' Note on comment *k* to § 20 of the Third Restatement LPEH.

[122] See Reporters' Note on comment *k* to § 20 of the Third Restatement LPEH.

abnormally dangerous activities include blasting,[123] storage of explosives,[124] processing of hazardous materials,[125] transportation of flammable or explosive materials,[126] crop dusting,[127] and fireworks displays.[128] Liability for harm caused by abnormally dangerous activities is clearly strict, for the defendant is liable even if she exercised due care to avoid the harm.[129] In terms of the defences available to defendants, a variety of approaches can be identified. For example, the Second Restatement adopts an extremely rigorous approach to intervening actions and events: § 522 provides that strict liability applies even if harm is 'caused by the unexpectable (a) innocent, negligent or reckless conduct of a third person, or (b) action of an animal, or (c) operation of a force of nature'. The position in the caselaw is more mixed. While some jurisdictions adopt the Second Restatement's approach,[130] others do not and hold that external causes of harm can exempt a defendant from liability, especially if they are unforeseeable.[131] Turning to the victim's own conduct, there is again a variety of

[123] *Dyer v Maine Drilling & Blasting, Inc*, 984 A.2d 210 (Me.2009).

[124] *Exner v Sherman Power Construction*, 54 F.2d 510 (2nd Cir.1931); *Yukon Equipment v Fireman's Fund Insurance*, 585 P.2d 1206 (1978).

[125] *T & E Industries, Inc v Safety Light Corp*, 587 A.2d 1249 (N.J.1991).

[126] *Siegler v Kuhlman*, 502 P.2d 1181 (Wash.1972); *National Steel Service Center v Gibbons*, 319 N.W.2d 269 (Ia.1982).

[127] *Langan v Valicopters*, 567 P.2d 218 (Wash.1977).

[128] *Klein v Pyrodyne Corp*, 810 P.2d 917 (Wash.1991). For further examples, see Victor E Schwartz, Kathryn Kelly, and David F Partlett, *Prosser, Wade, and Schwartz's Torts – Cases and Materials* (13th edn, Foundation Press 2015) 755–756.

[129] § 519 of the Second Restatement; § 20(b)(1) of the Third Restatement LPEH.

[130] eg *Yukon* (n 124) 1211–1212 (intentional conduct by a third party not a good defence); *Old Island Fumigation v Barbee*, 604 So.2d 1246, 1248 (1992) (negligence by a third party not a good defence).

[131] eg *Golden v Amory*, 109 N.E.2d 131, 133 (Mass.1952) (considering act of God as a good defence because 'plainly beyond the capacity of anyone to anticipate').

approaches. For example, §§ 523–524(2) of the Second Restatement suggest that the defendant should be able to escape liability if the victim voluntarily assumes the risk of harm generated by the abnormally dangerous activity, but not if the victim was contributorily negligent.[132] By contrast, a radically different approach is adopted by the Third Restatement LPEH. In seeking to reflect the evolution of the caselaw intervening after the drafting of the Second Restatement, § 25 abolishes contributory negligence as a complete bar to recovery and suggests a regime of comparative responsibility, where liability is apportioned depending on the defendant's and claimant's respective conduct.[133]

Another context of strict liability in the United States regards the harm caused by animals. In this respect, in resemblance with the English approach, a distinction is drawn between trespassing (or intruding) animals, animals wild by nature, and domestic animals.[134] As regards trespassing animals, the position of most American courts is essentially that 'a possessor of livestock is liable for any harm done while upon the land … although the possessor of the livestock exercised the utmost care to prevent them from intruding'.[135] In the approach of the Third Restatement LPEH, this rule is now extended to all animals other than dogs and cats.[136] Moving to wild animals, most states impose strict liability on their

[132] eg *Bringle v Lloyd*, 537 P.2d 1060 (Wash.Ct.App.1975).

[133] A regime of comparative responsibility is today adopted in a majority of jurisdictions across the United States: see comment *c* to § 25 of the Third Restatement LPEH.

[134] Charles E Cantu, 'Distinguishing the Concept of Strict Liability in Tort from Strict Products Liability: Medusa Unveiled' (2003) 33 U Mem L Rev 823, 827, 828ff.

[135] § 504(1) of the Second Restatement.

[136] See § 21.

owners and possessors for any harm caused to third parties,[137] with the exception of public zoos, which are liable only if negligent.[138] More complicated is the position regarding domestic animals. An owner or possessor of this type of animal, whose classic example would be a dog or cat,[139] is strictly liable only if she 'knows or has reason to know' that the animal has 'dangerous tendencies abnormal for the animal's category'.[140] However, many states have enacted statutes which hold owners or possessors of dogs strictly liable regardless of any scienter requirement, therefore creating an important exception—confined to dogs—to the common law position.[141] If instead the domestic animal does not have any abnormally dangerous tendency, the negligence standard applies.[142] In terms of defences, the position is complex. As regards intervening actions by third parties or natural events, the Second Restatement suggests that, for trespassing animals, strict liability does not apply if harm is 'brought about by the unexpectable operation of a force of nature, action of another animal or intentional, reckless or negligent conduct of a third person';[143] by contrast, in relation to wild animals as well as to domestic but vicious animals, strict liability applies even if the harm occurred because of the 'unexpectable … innocent, negligent or reckless conduct of a

[137] See § 22 of the Third Restatement LPEH (see the Reporters' Note on comment *b* for a rich sample of decisions regarding wild animals).

[138] See *Kennedy v City and County of Denver*, 506 P.2d 764 (Colo.Ct.App.1972).

[139] *Sinclair v Okata*, 874 F Supp 1051 (D.Alaska 1994) (dogs); *Van Houten v Pritchard*, 870 S.W.2d 377 (Ark.1994) (cats).

[140] § 23 of the Third Restatement LPEH.

[141] eg FLA. STAT. ANN. §§ 767.01, 767.04 (West).

[142] eg *Safford Animal Hosp v Blain*, 580 P.2d 757 (Ariz.Ct.App.1978) (cows); *Williams v Tysinger*, 399 S.E.2d 108 (N.C.1991) (horses).

[143] § 504(3)(c). See *Hartford v Brady*, 114 Mass. 466, 19 Am.Rep. 377 (1874); *McGibbon v McCurry*, 43 LTR 132 (1909).

third person, or … action of another animal, or … operation of a force of nature'.[144] Adopting a different approach, the Third Restatement LPEH 'employs a unitary standard' which takes into account the foreseeability of intervening actions or events and which arguably excludes strict liability if such actions or events were not reasonably foreseeable by the defendant.[145] As to the victim's conduct, the approach of the Second Restatement and of some courts is similar to that adopted for abnormally dangerous activities, for the defendant can escape liability in cases of victim's assumption of risk,[146] but not of contributory negligence.[147] By contrast, the Third Restatement LPEH and the caselaw of many state courts adopt a regime of comparative responsibility.[148]

Another context in which strict liability is prominent is liability for the action of another. In this area, the most significant doctrine is the vicarious liability of employers for the torts committed by their employees.[149] It is widely acknowledged that an employer/employee relationship exists if the employer 'controls or has the right to control

[144] § 510. 'Authority relevant to this Section is sparse and indecisive': Reporter's Note on § 510 (also referring to relevant caselaw).

[145] See the Reporters' Note on comments *d* and *e* to § 34.

[146] See § 515(2)–(3) of the Second Restatement; *Keyser v Phillips Petroleum Co*, 287 So.2d 364 (Fla.Dist.Ct.App.1973) (wild animals).

[147] See comment *b* to § 515. See *Seim v Garavalia*, 306 N.W.2d 806 (Minn.1981); and *Johnston v Ohls*, 457 P.2d 194 (Wash.1969) (dogs).

[148] See § 25 of the Third Restatement LPEH. For some judicial examples, see *Ambort v Nowlin*, 709 S.W.2d 407 (Ark.1986) (dog bite); *Mills v Smith*, 673 P.2d 117 (Kan.Ct.App.1983) (wild animals).

[149] This type of strict liability is very important, for it is often imposed in contexts where accidents are frequent and of potentially great magnitude and where the physical author of harm is held liable only if negligent. For example, health care establishments are strictly liable for the medical malpractice or other misconduct of their staff; similarly, vehicle owners are strictly liable, under certain conditions, for the traffic accidents carelessly caused by another person driving their vehicle (see text to nn 160–163).

the manner and means of the [employee's] performance of work'.[150] Furthermore, the employer is liable only if the tort is committed by her employee 'acting within the scope of employment',[151] meaning that the employee is 'performing work assigned by the employer or engaging in a course of conduct subject to the employer's control'.[152] The 'scope of employment' requirement can be interpreted in a broad way, with the result that liability may apply if, for example, the employee disregards the employer's instructions or even if the employee's action is intentionally wrongful.[153] The defendant will not be liable if there was no employer/employee relationship between her and the material author of harm, or if the 'scope of employment' requirement was not met, or if the employee was not himself liable in tort; alternatively, the defendant can obtain a reduction in damages by proving that the claimant's negligent conduct contributed to the causation of harm.[154] While it is therefore clear that, as a general rule, an employer is not vicariously liable for the tort of an independent contractor,[155] there are important exceptions to this, most notably in relation to the breach of a non-delegable duty. Typical examples concern situations that involve operating an abnormally/inherently dangerous activity or creating a 'peculiar risk' of harm

[150] § 7.07(3)(a) of the *Restatement (Third) of Agency* ('Agency Restatement'). See *France v Southern Equip Co*, 689 S.E.2d 1 (W.Va.2010).

[151] § 7.07(1) of the Agency Restatement.

[152] § 7.07(2) of the Agency Restatement.

[153] *Patterson v Blair*, 172 S.W.3d 361 (Ky.2005) (car dealership held vicariously liable for an employee's act of firing a pistol at a vehicle's tires in effort to repossess it while the claimant, a customer, was operating it).

[154] See *Li v Yellow Cab Company of California*, 532 P.2d 1226 (Cal.1975).

[155] See § 57 of the Third Restatement LPEH.

to third parties.[156] In situations like these, courts reason that there is a duty to third-party victims that the employer cannot delegate to the independent contractor, with the result that the former will be held liable for the harm caused by the latter.[157] Here, liability is clearly strict, for proof of the employer's diligent conduct is no answer to a claim for damages.

Another form of vicarious liability relates to parental liability. While at common law the general position resembles the English approach and therefore parents are held liable for the harm caused by their children only if they have been themselves negligent in supervising or controlling their offspring,[158] most states have enacted statutes which, with variations, provide for strict parental liability in cases of intentional misconduct by the minor.[159] Furthermore, many courts adopt the so called 'family purpose' doctrine, which is instead expressly rejected in England.[160] This doctrine, which establishes a form of vicarious liability in the context of traffic accidents, provides that the family member (typically a parent) who is owner of a vehicle is strictly liable for the harm carelessly caused by another family member (typically a child) while driving, so long as the driving occurs with the owner's permission, whether express or implied.[161] Finally, in some states, statutes have extended the scope of this form of vicarious liability so as to cover traffic accidents carelessly caused

[156] For a restatement of the law governing these instances of non-delegable duty, see §§ 58 (work involving abnormally dangerous activities), 59 (activity posing a peculiar risk), and 60 (work on instrumentalities used in highly dangerous activities) of the Third Restatement LPEH.

[157] See eg *Anderson v Marathon Petroleum Company*, 801 F.2d 936 (7th Cir.1986).

[158] See *Appelhans v McFall*, 757 N.E.2d 987 (Ill.App.Ct.2001).

[159] See Lisa Gentile, 'Parental Civil Liability for the Torts of Minors' (2007) 16 JCLI 125.

[160] See n 91 and accompanying text.

[161] *McPhee v Tufty*, 623 N.W.2d 390 (N.D.2001); *Malchose v Kalfell*, 664 N.W.2d 508 (N.D.2003); *Young v Beck*, 251 P.3d 380 (Ariz.2011).

by any person, family member or not, who was driving the vehicle with the owner's permission.[162] In these cases, the defendant can benefit from any defence available to the driver.[163]

Leaving the realm of liability for the action of another, another context of strict liability is private nuisance. Here liability is at least sometimes strict because, as also discussed in relation to English law, the defendant may be found liable even though she took all reasonable precautions. The classic example is that of a factory which, despite adopting reasonably expensive measures and advanced technology, cannot bring the level of pollution below a certain threshold and cannot therefore avoid a substantial harm to the neighbour's interest in the use and enjoyment of land.[164] If a balancing of all the stakes involved suggests that the interference with this interest is unreasonable, the defendant will be found liable even though she adopted all reasonable precautions to avoid harm.

More complicated is the American law of defective products. So much has been written on it that '[t]he topic of products liability has sufficient material to support a separate law school course'.[165] For present purposes, however, it is sufficient to emphasise only a few key points. Strict product liability emerged in the United States in 1963 with *Greenman v Yuba Power Products, Inc*,[166] a decision that deeply influenced the drafting of § 402A of the

[162] See Goldberg, Sebok, and Zipursky (n 26) 566. An example is NY Vehicle and Traffic Law § 388. Apart from instances where strict liability is vicariously imposed on vehicle owners, traffic accidents are governed by the tort of negligence.

[163] Bruce Feldthusen, John CP Goldberg, Michael D Green, and Catherine M Sharkey, 'Road Traffic Accidents in North America' (World Tort Law Society, forthcoming) [41].

[164] eg *Jost v Dairyland Power Cooperative*, 172 N.W.2d 647 (Wis.1970). See also Gregory C Keating, 'Nuisance as a Strict Liability Wrong' (2012) 4:3 JTL, article 2.

[165] Schwartz, Kelly, and Partlett (n 128) 768.

[166] 377 P.2d 897 (Cal.1963).

Second Restatement which, promulgated in 1964, has represented the reference point of product liability law over the subsequent three decades. Since the 1970s American courts, with the help of legal scholars, identified three types of defect, namely manufacturing defects, design defects, and warning defects.[167] The required standard of liability has generally varied according to the type of defect affecting the product. While it is uncontroversial that manufacturing defects were and are governed by strict liability, warning and design defects have generated both a long-lasting debate on the most appropriate standard of liability and a caselaw oscillating between strict liability and liability based on negligence. In this respect, it hardly makes sense to characterise the American position as embracing a unitary view, given the variety of approaches adopted across the fifty-one jurisdictions. It can be nevertheless observed that the 1998 Products Liability Restatement recommends what is, in essence, a negligence-based regime for both design and warning defects, therefore departing from § 402A of the Second Restatement.[168] While many jurisdictions now follow this approach, others do not,[169] and there are examples from the caselaw of decisions which apply strict liability to design or warning defects.[170] It remains to be seen whether the approach of the Products Liability Restatement will eventually prevail

[167] This trifurcation of defectiveness is formally adopted by the *Restatement (Third) of Torts: Products Liability*, published in 1998 ('Products Liability Restatement'). A definition of each type of defect can be found in § 2 of this Restatement.

[168] For a very recent and critical appraisal of the approach of the Products Liability Restatement, see Gregory C Keating, 'Products Liability as Enterprise Liability' (2017) 10:1 JTL 41, 75–77.

[169] For a complete list, see John Fabian Witt, *Torts: Cases, Principles, and Institutions* (2nd edn, CALI eLangdell Press 2016) 595–596.

[170] eg *Barker v Lull*, 573 P.2d 443, 454, 457 (Cal.1978) (design defects); *Beshada v Johns-Manville Prods Corp*, 447 A.2d 539, 545–549 (N.J.1982) (warning defects).

or whether the courts will instead prefer imposing strict liability even for these defects,[171] although the approach of the Restatement seems to have gained the ascendancy in recent times. In terms of defences, some courts align with § 402A of the Second Restatement and therefore reject contributory negligence as a defence to a strict liability claim, while recognising assumption of risk[172] and misuse of product as defences barring recovery.[173] A majority of courts, however, adopt a regime of comparative responsibility and typically reduce damages if the victim was at fault.[174] Finally, the vast majority of jurisdictions recognise the 'state-of-the-art' defence (which is similar in function to the 'development risk' defence in European systems),[175] while a few of them reject it and therefore adopt a very rigorous strict liability.[176] In sum, strict liability plays an important role in the American law of defective products: it certainly applies to manufacturing defects and, in some situations and various forms, it may also apply to design and warning defects.

To conclude, over the course of the 20th century, many legal scholars and judges have devoted increasing attention to strict liability and have managed to carve out considerable space for it in American tort law. Occasional interventions of state legislatures have also supported an expansion of strict liability, especially in the context of liability for the action

[171] *Godoy ex rel. Gramling v E.I. du Pont de Nemours & Co*, 768 N.W.2d 674, 690 (Wis.2009).

[172] See *Findlay v Copeland Lumber Co*, 509 P.2d 28, 31 (Ore.1973).

[173] See *Hernandez v Barbo Machinery Co*, 957 P.2d 147 (Ore.1998).

[174] See *Daly v General Motors Corp*, 575 P.2d 1162 (Cal.1978). For a rich list of authorities, see the Reporters' Note on comment *a* and comment *d* to § 17 of the Products Liability Restatement.

[175] See *Vassallo v Baxter Healthcare Corp*, 696 N.E.2d 909 (Mass.1998); *Tucker v Wright Med Tech, Inc*, 2013 WL 1149717 (N.D.Cal. March 19, 2013); *Placencia v I-Flow Corp*, 2012 WL 5877624 (D.Ariz.2012).

[176] *Townsend v Sears, Roebuck & Co*, 879 N.E.2d 893, 898-99 (Ill.2007); *Sternhagen v Dow Co*, 935 P.2d 1139, 1144–1447 (Mont.1997).

of another. Compared to the English approach, American law places comparatively more reliance on strict liability, as shown by the development of the rule in *Rylands v Fletcher* into a general liability for abnormally dangerous activities, by the adoption of the 'family purpose' doctrine, and by the enactment of statutes imposing strict liability on parents and of statutes providing for the strict liability of dog owners. Special mention deserves to be made to liability for defective products, for this has been the major catalyst of strict liability theorists and progressive judges over the past fifty years, and it is therefore unsurprising that some state courts understand and apply the relevant law in a particularly rigorous way. In sum, despite the predominance of the tort of negligence and the attractiveness of the fault paradigm to many American legal actors, strict liability constitutes an important part of tort law in the United States.

2.4. Strict Liability in French Law

The general law of what is now called French extra-contractual liability is set out in Book III ('The Different Ways of Acquiring Ownership'), Title III ('The Sources of Obligations'), Sub-title II ('Extra-Contractual Liability') of the *Code civil*.[177] Since its enactment in 1804, the *Code* has sought to regulate all cases of extra-contractual liability by a handful of very general rules.[178] From the perspective of the required standard of conduct, these rules are

[177] The current structure of Book III is the result of the reform enacted by the '*Ordonnance* of 2016' (*Ordonnance* no 2016-131 of 10 February 2016 *portant réforme du droit des contrats, du regime general et de la preuve des obligations* as amended by *loi* no 2018-287 of 20 April 2018 *ratifiant l'ordonnance* no 2016-131 *du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*). For an overview of the changes introduced by the *Ordonnance* of 2016, see Pietro Sirena, 'The New Design of the French Law of Contract and Obligations: An Italian View' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten* (Hart Publishing 2017) 339.

[178] In 1998, however, many new provisions were added to the *Code* to implement the Product Liability Directive: see text to n 223. Moreover, in 2017 the French Ministry of Justice published a draft parliamentary bill (the *Projet de réforme*) which, if enacted, would introduce important substantive changes to this area of

sometimes presented in a binary way, with 'liability for fault' (*responsabilité pour faute*) on one side and 'liability without fault' or 'strict liability' (*responsabilité sans faute, responsabilité de plein droit*) on the other.[179] Belonging to the first group are the first two provisions in Sub-title II, articles 1240–1241 (former articles 1382–1383) Cc, which establish respectively that '[a]ny human action whatsoever which causes harm to another creates an obligation in the person by whose fault it was caused to make reparation for it', and that '[e]veryone is liable for the harm which he has caused not only by his action, but also by his failure to act or his lack of care'. Under these provisions, a defendant is liable if they failed to act as a *bon père de famille* or *personne raisonnable* (the French equivalent of the 'reasonable person'),[180] meaning that they failed to comply with 'a general norm of social conduct which requires of individuals to act with prudence and diligence'.[181]

French law (the *Projet* is available at www.justice.gouv.fr/publication/). For a comparative discussion of many of these changes, see Jean-Sébastien Borghetti and Simon Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart Publishing 2019).

[179] See Jonas Knetsch, 'The Role of Liability without Fault' in Borghetti and Whittaker (n 178) 123, 125, referring to François Terré, Phillippe Simler, Yves Lequette, and François Chénedé, *Droits civil, Les obligations* (12th edn, Dalloz 2018) [905]ff. For a similar example, see Philippe Malaurie, Laurent Aynès, and Philippe Stoffel-Munck, *Droit des obligations* (10th edn, LGDJ 2018) [47]ff. It should be noted that in French law the notion of *faute* goes beyond a defective conduct in the defendant. In keeping with the American approach, *faute* extends to the violation of statutory rules or administrative regulations, regardless of whether the defendant acted negligently: see Patrice Jourdain in Geneviève Viney, Patrice Jourdain, and Suzanne Carval, *Les conditions de la responsabilité. Traité de droit civil* (4th edn, LGDJ 2013) [448]. But French law goes even farther than this: every criminal offence is in itself a 'fault' for the purposes of civil liability (see Whittaker (n 11) 368–373); furthermore, *faute* plays the role which in common law systems is performed by the defining characteristics of individual torts, such as the duty of care in the tort of negligence, and by the general clause of 'unlawfulness of harm' (*ingiustizia del danno*) in article 2043 of the Italian *Codice civile*, all setting the scope of liability by selecting the rights or interests deemed to deserve tort protection (for a comparative overview on this, see Pier Giuseppe Monateri, *La Responsabilità Civile. Trattato di Diritto Civile* (UTET 1998) 54–64).

[180] Malaurie, Laurent Aynès, and Philippe Stoffel-Munck (n 179) [53].

[181] Jourdain (n 179) [450].

By contrast, the second group of provisions, which is often portrayed in the literature as going under the banner of *responsabilité sans faute*, is comprised of articles 1242–1244 (former articles 1384–1386) Cc as well as of other rules located outside the *Code civil*,[182] almost all of which now impose liability regardless of whether the defendant acted as a *bon père de famille*.[183] The French habit of presenting 'fault' (*responsabilité pour faute*) and 'strict liability' (*responsabilité sans faute*) as clearly distinct, if not opposed, reflects the idea that it is appealing to distinguish between the two, even if only for reasons of a clearer and neater exposition of the law.[184] At the same time, though, the positive law shows that liability rules can vary in their degree of strictness,[185] at times even substantially, therefore suggesting that, in keeping with the English and the American position, these rules may be placed along a continuum. As will be seen below, French law contains many rules of strict liability, their number and (sometimes extreme) rigour showing very well the French strong attachment to strict liability as compared to the other three legal systems studied.

As a starting-point, article 1242(1) provides that 'one is liable not only for the harm which one causes by one's own action but also for that which is caused by the action of persons for whom one is responsible, or of things which one has in one's keeping'. While at the time of enactment of the *Code* this article was arguably meant to be merely an introduction to subsequent provisions,[186] in the late 19th century it was re-interpreted as an

[182] See text to nn 233–246.

[183] cf article 1242(6),(8) Cc, establishing that teachers are liable for the harm caused by their pupils if the claimant can prove the teachers' 'fault, lack of care or failure to act'.

[184] Knetsch (n 179) 125.

[185] ibid 126–127; Whittaker (n 33) 389–408.

[186] Malaurie, Aynès, and Stoffel-Munck (n 179) [187].

independent ground of liability for the harm caused by the deeds of things in one's 'keeping' (*garde*).[187] This rule applies in principle to all physical things, with no distinction being made on the basis of the thing's dangerousness or defectiveness.[188] The person liable is the 'keeper' (*gardien*), with la *garde* being defined as the 'the use, direction, and control' of the thing.[189] To escape liability, the *gardien* must show the existence of a fortuitous event—either a force of nature, an action of a third party or an action, innocent or careless, of the victim—which is causally linked to the victim's harm and which bears the characteristics of *force majeure*: it must be 'unforeseeable' and 'irresistible'[190] as well as 'exterior to the thing'[191].[192] If the victim's conduct does not constitute *force majeure*, but she was at fault and contributed to the realisation of harm, the defendant's liability will be reduced accordingly (defence of *faute de la victime*).[193] Therefore, as absence of failures in the defendant's conduct is not a good defence, French liability for the deeds of things can be

[187] Civ 16.6.1896 (*Teffaine*), D 1897.I.433 note Saleilles.

[188] Ch réun 13.2.1930 (*Jand'heur*), DP 1930.I.57. However, article 1242 Cc does not apply to motor-vehicle accidents falling within the scope of the *loi* Badinter (see text to nn 234–238), nor to accidents caused by defective products falling within the scope of the Product Liability Directive as implemented in France in 1998 (see text to nn 223–232): Borghetti and Whittaker (n 31) 464.

[189] Ch réun 2.12.1941 (*Franck*), S 1941.I.217 note H Mazeaud.

[190] Ass plén 14.4.2006, Bull AP nos 5–6, D 2006.1577 note Jourdain, D 2006.1933 note Brun.

[191] Req 22.1.1945, S 1945.I.57. Malaurie, Aynès, and Stoffel-Munck (n 179) [195] (noting that 'exteriority to the thing' is no longer mentioned by the courts but that nevertheless it is an underlying ingredient of *force majeure* in the context of liability for the deeds of things).

[192] Jourdain (n 179) [667].

[193] Malaurie, Aynès, and Stoffel-Munck (n 179) [194]; Req 13.4.1934, D 1934.I.41 note Savatier; Civ (2) 6.4.1987, D 1988.32 note Mouly.

seen as strict, even if the intense process of elaboration, interpretation, and reinterpretation of the various elements of this liability has at times called into question its strict nature.[194]

Other strict liabilities are those for the action of animals and for ruinous buildings. Article 1243 (former article 1385) Cc imposes liability on the owner or user of an animal, and this includes any type of animal, except wildlife.[195] The fundamental condition for imposing liability is use of the animal, with liability being normally imposed on its owner, who is typically also its user.[196] The following provision, article 1244 (former article 1386) imposes liability for damage caused by a ruinous building, with the claimant having to prove that the damage was caused by a defect in the maintenance or construction of the building. As with liability for the deeds of things, under both articles 1244 and 1245 liability can be avoided in cases of *force majeure* or its extent reduced in case of *faute de la victime*.[197] Again, as proof of diligence does not excuse the defendant, liability under both provisions is strict.

Other strict liabilities featuring in French law are those imposed for harm caused by another person's action, found in article 1242 Cc. Article 1242(1) provides that a person 'is liable for the harm caused by the action of persons for whom he is responsible'.[198] This

[194] Whittaker (n 98) 52–59, 633–634 (on the notion of *garde*, causation, and defences); Jourdain (n 179) [660], [675]–[675-1] (on *la garde*); Mireille Bacache-Gibeili, *Les obligations, La responsabilité civile extracontractuelle* (3rd edn, Economica 2016) [255]ff (on *la garde*).

[195] Malaurie, Aynès, and Stoffel-Munck (n 179) [185]; Civ (2) 1.6.1972, Bull civ II no 169.

[196] However, if at the time of the accident the animal is with someone else who has its 'use, direction, and control', liability will be attributed to this person: ibid [186].

[197] Civ (1) 3.3.1964, JCP G 1964.II.13622 (ruinous buildings); Civ (2) 19.2.1992 no 90-14470 (animals).

[198] For an analysis which compares the French liability for the action of another (both in its current form and as envisaged in the *Projet de réforme*) with the relevant English and German law, see Birke Häcker, '*Fait d'autrui* in Comparative Perspective' in Borghetti and Whittaker (n 178) 143.

general statement was originally meant to provide only an introduction to the specific liabilities envisaged in the subsequent *alinéas* of the same article: liability of parents for the harm caused by their children wo live with them (article 1242(4), (7)), liability of masters and employers for the harm caused by their servants and employees (article 1242(5)), liability of teachers for the harm caused by their pupils (article 1242(6), (8)), and liability of craftsmen for the harm caused by their apprentices (article 1242(6)–(7)). More recently, however, the Cour de cassation has held that there may be additional instances of liability for another's action on the basis of 1242(1) in situations other than those encompassed by *alinéas* 4–7, although the scope and impact of this decision is not yet clear.[199] The relevant caselaw has shaped two main classes of cases: the first regards situations where the defendant has the power to organise and control the way of life of another person, for example a delinquent minor or an adult with physical or mental impairments;[200] the second concerns situations where the defendant supervises or organises the activity of another, without any need for the physical author of harm to be physically or mentally impaired.[201] Defendants in both classes of cases are subjected to strict liability,[202] as proof of diligence is no answer to a claim for damages and the defendant can escape liability by proving *force majeure* or

[199] Ass plén 29.3.1991 (*Blieck*), JCP 1991.II.21673 note Ghestin. For a detailed analysis of the significance of *Blieck*, see Geneviève Viney in Geneviève Viney, Patrice Jourdain, and Suzanne Carval, *Les conditions de la responsabilité. Traité de droit civil* (4th edn, LGDJ 2013) [789-8]–[789-27].

[200] See Viney (n 199) [789-15].

[201] Malaurie, Aynès, and Stoffel-Munck (n 179) [149]. See Civ (2) 22.5.1995, RTD civ 1995.899 note Jourdain (liability of a rugby club for the death and injuries that its own players caused to the players of the rival team); Civ (2) 12.12.2002, RTD civ 2003.305 note Jourdain (liability of a club of *majorettes* for the injuries one of the *majorettes* caused to another member by mishandling her baton).

[202] Viney (n 199) [789-21] (regarding the first type of cases) and [789-24] (regarding the second type of cases). The same solution is adopted in articles 1246–1247 *Projet de réforme*.

obtain its reduction by proving *faute de la victime*.[203] Noteworthy, the regime applied to defendants in the second class of cases may change in the future and be based on a presumption of fault, should the current reform project of the *Code civil* become law.[204]

Moving to the liability of parents (article 1242(4),(7) Cc), the *Code civil* states that parents can escape liability by proving that 'they could not avoid the harm' caused by their children. French courts long interpreted this defence as based on fault, meaning that parents could avoid liability by proving that they fulfilled their duties of upbringing and surveillance.[205] After a period of uncertainty and oscillating caselaw,[206] the Cour de cassation eventually held that parents are strictly liable for the harmful action of their children,[207] with the only available defences being *force majeure*[208] and *faute de la victime*.[209] Moreover, it was later established that it is enough for the action of the minor to be the 'direct cause of harm',[210] without any need for the latter's conduct to be at fault in any way.[211] These judicial developments have rendered parental liability extremely strict.

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[203] ibid [789-23] and [789-27]; Malaurie, Aynès, and Stoffel-Munck (n 179) [149].

[204] Article 1248 *Projet de réforme*.

[205] Civ (2) 12.10.1955, D 1956.301 note Rodière.

[206] Viney (n 199) [870] at p 1185.

[207] Civ (2) 19.2.1997 (*Bertrand*), D 1997.265 note Jourdain; Ass plén 13.12.2002, D 2003.231 note Jourdain.

[208] Civ (2) 2.12.1998, Bull civ II no 292.

[209] Civ (2) 10.11.2005, RCA January 2006, comm no 6; Civ (2) 19.10.2006, RCA 2006, comm no 370.

[210] Ass plén 9.5.1984 (*Fullenwarth*), D 1984.525 note Chabas.

[211] Civ (2) 10.5.2001 (*Levert*), D 2001.2851 note Tournafond. This position was later confirmed in Ass plén 13.12.2002, D 2003.231 note Jourdain. The current reform project, judging this development as too extreme, would remove it by requiring that the action of the physical author of harm be of a nature to engage their own liability in tort (article 1245(1) *Projet de réforme*).

Another remarkably strict liability is that of employers for the harm caused by their employees (article 1242(5) Cc).[212] There are three requirements for the imposition of this liability. First, there must be a 'relationship of subordination' (*lien de préposition*) between employer and employee, consisting in the employer's power to give orders or instructions to the employee in relation to the performance of the latter's functions. This relationship is not confined to cases of employment proper and is interpreted in a very expansive way, as shown by the caselaw.[213] Secondly, the harmful action must be of a nature to engage liability in the physical author of harm, the employee.[214] Thirdly, the harm must have been caused in the course of employment, the Cour de cassation finally holding that the employer is liable for the action of the employee unless the former 'proves that the employee acted outside the functions for which he was employed, without authorisation and for purposes alien to his attributions'.[215] Employers' vicarious liability is clearly strict because, once the claimant has shown that the three requirements above are met, the employer cannot escape liability by proving that she acted diligently or even that, from her point of view, the employee's action

[212] While article 1242 Cc refers to the notions of *commettants* and *maîtres* as liable parties and to *domestiques* and *préposés* as the physical authors of harm, for reasons of convenience I simply refer to employers and employees.

[213] Cass crim 20.5.1976, RTD civ 1976.786 obs Durry, where an election candidate was found liable for the harm that his supporters caused to those of another candidate, on the ground that he had the power to give them orders. For other examples, see also Viney (n 199) [792].

[214] Malaurie, Aynès, and Stoffel-Munck (n 179) [161]. If the employee's conduct is not of a nature to engage their own liability because, for example, a fortuitous event bearing the features of *force majeure* caused the claimant's harm, then the employer is not liable: see Civ (1) 11.12.1974, D 1975 IR 67; Civ (2) 13.11.1992, RCA 1993 comm 110.

[215] Ass plén 19.5.1988, RTD civ 1989.89 note Jourdain. This solution is also adopted in article 1249 *Projet de réforme*.

bore the features of *force majeure*.[216] If, though, the claimant's negligent conduct contributed to the causation of harm, the defendant will be able to obtain a reduction in damages.[217]

As to the liability of teachers, a series of legislative measures have been enacted, imposing strict liability on the state if the teacher whose fault harmed the pupil works in public schools or in schools having a contract (*contrat d'association*) with the state.[218] If instead the teacher works in a private school, article 1242(6),(8) Cc applies and the teacher is personally liable only if her fault is proven,[219] while the school will be strictly liable as an employer pursuant to article 1242(5).[220] Finally, as to craftsmen, while article 1242(7) Cc subjects them to the same burden of proof envisaged for parents (no liability upon proof that 'they could not avoid the harm'), it is still unclear whether this imposes strict liability[221] or liability based on a presumption of fault.[222]

Another significant area of liability is that of defective products, currently governed by articles 1245–1245-17 Cc, implementing the Product Liability Directive.[223] Despite the fact that article 1245-10 Cc formally characterises the producer's liability as strict and does not include proof of diligent conduct among the available defences, the nature of liability for

[216] Viney (n 199) [809].

[217] ibid.

[218] *Loi* 20.7.1899 and *loi* 5.4.1937.

[219] Muriel Fabre-Magnan, *Droit des obligations. 2 - Responsabilité civile et quasi-contrats* (4th edn, PUF 2019) [424]–[425].

[220] Viney (n 199) [917].

[221] ibid [893] (arguing that liability of craftsmen is, in essence, assimilated to that of parents and would therefore be strict).

[222] Malaurie, Aynès, and Stoffel-Munck (n 179) [153]. Under article 1248 *Projet de réforme*, liability of craftsmen for the action of their apprentices would be based on a presumption of fault.

[223] This was originally transposed in France by *loi* no 98-389 of 19 May 1998.

products is controversial. Indeed, it has been suggested that the judicial assessment of the notion of defect actually involves an evaluation of the producer's conduct,[224] and that liability would be based on fault in cases of design defect or failures in the duty to warn, with strict liability operating in cases of manufacturing defect only.[225] However, and despite these controversies, the narrative of product liability as essentially strict is widespread among French legal scholars,[226] and reinforced by the debate which has preceded and accompanied the implementation of the Product Liability Directive.[227] In particular, the implementing process has been long and difficult, for French law had already adopted a combination of contractual and extra-contractual rules resulting in a strict liability of sellers and manufacturers.[228] For this reason, French legal actors were hostile to some of the rules in the Directive, most notably that allowing the development risk defence,[229] which seemed to water down the protection already guaranteed to victims of defective products.[230] As a

[224] See Whittaker (n 98) 483–484; François Xavier Testu and Jean-Hubert Moitry, 'La responsabilité du fait des produits défectueux, Commentaire de la loi 98-389 du 19 mai 1998' D aff (16 July 1998) Suppl to No 125, 7; Terré, Simler, Lequette, and Chénedé (n 179) [1228].

[225] Jean-Sébastien Borghetti, *La Responsabilité du Fait des Produits: Etude de Droit Comparé* (LGDJ 2004) [669]. For more general remarks on the allegedly fault-based nature of product liability, see Pascal Oudot, 'L'application et le fondement de la loi du 19 mai 2008 instituant la responsabilité du fait des produits défectueux: les leçons du temps', Gaz Pal 2008, 15 November 2008, 6.

[226] Geneviève Viney in Geneviève Viney, Patrice Jourdain, and Suzanne Carval, *Les régimes spéciaux et l'assurance de responsabilité* (4th edn, LGDJ 2017) [14], [22]; Jérôme Huet, 'Responsabilité du fait des produits défectueux. Objectifs, portée et mise en œuvre de la directive 85/374' JCl E, fasc 2020 (updated 15.2.2017) [19], [60]; Jacques Flour, Jean-Luc Aubert, Eric Savaux, *Droit civil. Les obligations. 2. Le fait juridique* (14th edn, Dalloz 2011) [300].

[227] Jean-Sébastien Borghetti, 'The Development of Product Liability in France' in Simon Whittaker (ed), *The Development of Product Liability* (CUP 2010) 87.

[228] For a concise exposition, see Whittaker (n 11) 294, 403–408.

[229] Viney (n 226) [54]–[57].

[230] Patrice Jourdain, 'Commentaire de la loi no 98-389 du 19 mai 1998 sur la responsabilité du fait des produits défectueux' JCP E 1998.1204, [77]; Jean Calais-Auloy, 'Le risque de développement: une exonération contestable' in *Mélanges Michel Cabrillac* (Dalloz/Litec 1999) 81.

result, while French law has in principle adopted this defence, it has departed from it where the harm is caused 'by an element of the human body or by its products'.[231] And the scope of application of this defence may be further reduced if the current reform project of French tort law were enacted, as the defence would no longer apply wherever the harm is caused 'by any health product for human use', which is the type of situation where the defence is most often invoked these days.[232] Here again, then, all the French propensity for strict and broad liability rules is displayed.

Further areas of strict liability can be found outside the *Code*, most notably traffic accidents, nuisance (*troubles du voisinage*), and medical accidents, all regulated by special legislation.[233] Traffic accidents were long governed by liability for the deeds of things but, due to the intensification of motoring and the increase in the number of deaths and injuries caused by traffic accidents, special legislation became necessary.[234] The French legislator, under the pressure of legal scholars and the Cour de cassation, eventually enacted the *loi* no 85-677 of 5 July 1985 (*loi* Badinter).[235] The regime set up by the *loi* is extremely strict: the

[231] Article 1245-11 Cc. This exception was admitted as a reaction to a major scandal involving the safety of blood products contaminated with HIV, on which see Whittaker (n 98) 149–151, 315–319, 324, 394–401.

[232] Article 1298-1 *Projet de réforme*. See Viney (n 226) [57].

[233] The *Projet de réforme* would incorporate the statutes governing traffic accidents and *troubles du voisinage* in the *Code civil* as articles 1285–1288 and 1244, respectively. By contrast, liability for medical accidents would continue to be regulated by *loi* no 2002-303 of 4 March 2002. Other examples of strict liability outside the *Code* include liability for nuclear installations (regulated by a plethora of international conventions and domestic laws) and liability for accidents caused by airplanes (article L 141-2 of the *Code de l'aviation civile*).

[234] Geneviève Viney and Anne Guégan-Lécuyer, 'The Development of Traffic Liability in France' in Wolfgang Ernst (ed), *The Development of Traffic Liability* (CUP 2010) 50, 60–69.

[235] André Tunc, *La Sécurité Routière: Esquisse d'une Loi sur les Accidents de la Circulation* (Dalloz 1966). See also Civ (2) 21.7.1982 (*Desmares*), JCP 1982.11.19861 note Chabas, where the Cour held that the victim's fault could exclude liability only where it constituted *force majeure*. This decision pushed the legislator to take action and enact the *loi* Badinter. This statute in turn triggered a *revirement* of the Cour de cassation, which held that the victim's fault could impact on the defendant's liability even if it did not constitute *force majeure*: Civ (2) 6.4.1987 JCP 1987.II.20828 note Chabas, D 1988.32 note Mouly.

driver or keeper of the vehicle is liable on the basis of the mere 'involvement' (*implication*) of the vehicle in the accident, this amounting to a very relaxed understanding of causation;[236] furthermore, liability cannot be avoided even if the harm was caused by *force majeure*,[237] and the victim's fault can be used as a defence only if it was at once inexcusable and the exclusive cause of injury.[238] The striking rigour with which the position of drivers and keepers of motor vehicles is treated constitutes a perfect example of the attractiveness of strict liability among French lawyers.

Turning to *troubles du voisinage*, French courts have developed this liability rule since the late 19th century,[239] and for a long time based it, at least formally, on fault.[240] Today, however, it seems enough that the defendant violates the principle that 'nothing must cause an excessive inconvenience as between neighbours' (*nul ne doit causer à autrui un trouble anormal du voisinage*),[241] whether or not she was at fault.[242] Liability is, again, strict, as it can be avoided only by proof of *force majeure*.[243]

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[236] Article 1 of the *loi* Badinter. On the notion of *implication* and its relationship with causation, see eg Sabine Abravanel-Jolly, 'Art. 1382 à 1386 - Fasc. 280-10 : RÉGIMES DIVERS. – Circulation routière. – Indemnisation des victimes d'accidents de la circulation. – Droit à indemnisation' JCl Civil Code (updated 28.11.2018) [37]–[54].

[237] Article 2 of the *loi* Badinter.

[238] Article 3 of the *loi* Badinter.

[239] Civ 27.11.1844, S 1844.I.211.

[240] Civ (2) 3.12.1964, D 1965.321 note Esmein.

[241] Civ (2) 28.6.1995, Bull civ II no 222, RTD civ 1996.179 note Jourdain; Civ (3) 11.5.2000, Bull civ III no 106, D 2001, somm 2231 note Jourdain.

[242] Civ (3) 4.2.1971, JCP 1971.II.16781 note Lindon; Civ (3) 12.2.1992, RCA 1992, comm no 179.

[243] See Patrice Jourdain in Geneviève Viney, Patrice Jourdain, and Suzanne Carval, *Les régimes spéciaux et l'assurance de responsabilité* (4th edn, LGDJ 2017) [184]. See Civ (2) 5.2.2004, Bull civ II no 49, RTD civ 2004.740 note Jourdain; Civ (3) 10.12.2014, Bull civ III no 164, D 2015.362 note Dubarry and Dubois.

Finally, in relation to medical accidents, legislation was enacted in 2002 to bring order in a rather chaotic area of French civil liability.[244] This legislation provides that, except where harm is caused by a defective product (where the law on liability for products applies), professionals such as doctors, midwives, or dental surgeons as well as 'any establishment, service or bodies in which individual acts of prevention, diagnosis or care take place are liable for the harmful consequences of acts of prevention, diagnosis or care only in the case of fault'.[245] Therefore, where such acts cause harm to a patient in a hospital or clinic, this will be strictly liable to her for the careless conduct of the person performing the harmful act. Furthermore, health care establishments are also liable 'for harm resulting from hospital-acquired infections, unless they establish the existence of a *cause étrangère*' (ie *force majeure*).[246]

To conclude, it is clear that, compared to the English and American approaches, French legal actors have a distinct taste for the idea of imposing liability regardless of any failure in conduct. Since the late 19th century courts and legal scholars have relentlessly contributed to the development of strict liabilities, from the creation of liability for the deeds of things and the general liability for the action of another to a stricter interpretation of rules such as those on parental liability. The legislator too has fuelled this transformation through a series of interventions such as, most notably, that relating to traffic accidents which imposes a particularly strict liability in an area where deaths and personal injuries are an everyday

[244] *Loi* no 2002-303 of 4 March 2002, whose article 98 created Title IV of Book 1 of the legislative part of the *Code de la santé publique*. This statute does not make clear whether liability for medical accidents is contractual or extra-contractual.

[245] Article L 1142-1 al. II of the *Code de la santé publique*.

[246] ibid.

occurrence. It is therefore clear that French law has undergone a process of transformation in which the general trend has been from fault to strict liability and that today it relies heavily on (sometimes very) strict liability regimes in a very wide range of situations.

2.5. Strict Liability in Italian Law

The general law of Italian extra-contractual liability is set out in Book IV ('Of Obligations'), Title IX ('Of Unlawful Facts') of the *Codice civile*, enacted in 1942.[247] The opening provision of Title IX is article 2043, which sets out a general rule of 'liability for fault' (*responsabilità per colpa*) and provides that '[a]ny action which deliberately or negligently causes an unlawful harm to another person obliges the person who committed that action to compensate the harm'. In so providing, article 2043 imposes liability on defendants who failed to comply with the standard of diligence and prudence required of a reasonable person in like circumstances (the so-called *buon padre di famiglia*).[248] Article 2043 is followed by a panoply of provisions (article 2047 to article 2054) which govern specific contexts of liability and which are widely seen as embodying distinct criteria of imposition of liability.[249] Are these provisions instances of *responsabilità per colpa*, or do they depart from the standard of the reasonable person and therefore constitute examples of 'liability without fault' or 'strict liability' (*responsabilità senza colpa* or, more commonly today, *responsabilità oggettiva*)? Since the enactment of the *Codice civile*, the nature of most of

[247] This codification is often portrayed as a 'hybrid' of the French *Code civil* and the German BGB, with its own originality in many respects: see Sirena (n 177).

[248] Monateri (n 179) 74. Besides article 2043, a multitude of statutes and administrative regulations establish fault-based norms of conduct for a wide range of activities, whose violation constitutes *colpa* and therefore triggers liability: see Giovanna Visintini, *Fatti Illeciti* (Pacini Giuridica 2019) 106–107.

[249] See Stefano Rodotà, *Il Problema della Responsabilità Civile* (Giuffrè 1964) 127ff.

these provisions has been disputed because they allow for defences which may be interpreted (and have in fact been interpreted) in a variety of ways. In this respect, then, the key question is to establish whether a lack of *colpa*, ie whether the defendant acted as an ordinarily diligent person should have done in like circumstances, exempts her from liability. Here, therefore, we see again that, in keeping with the other three legal systems considered, the idea is that there is an 'exonerating level of diligence' which, at least in principle, allows to draw a distinction between *responsabilità per colpa* and *responsabilità oggettiva*.[250] At the same time, both the positive law and the work of some Italian scholars show that the picture may be more complicated than this and that, from the standpoint of the standard of conduct, it is possible to think of liability rules as located along a continuum of strictness.[251] Nevertheless, the term *responsabilità oggettiva* is used to refer to contexts of liability where *colpa* is seen as irrelevant and which, therefore, constitute instances of strict liability in Italian law.

A good starting-point is represented by articles 2047 and 2048 Cod civ, which govern liability of guardians for the harm caused by individuals lacking mental capacity (article 2047), and liability of parents, preceptors, or craftsmen for the harm caused by, respectively, children, pupils, or apprentices (article 2048). Both these provisions provide that the defendants are liable 'unless they prove that they could not have prevented the harmful action'. This wording has proven to be highly ambiguous, with interpretations oscillating between fault and strict liability. While courts have often argued that defendants could avoid

[250] Monateri (n 179) 76–77.

[251] Pier Giuseppe Monateri, Gino MD Arnone, and Nicolò Calcagno, *Il Dolo, la Colpa e i Risarcimenti Aggravati dalla Condotta* (Giappichelli 2014) 154–160.

liability if their obligations of monitoring or upbringing were fulfilled,[252] the rigour with which courts assess the facts and the defendant's behaviour has led numerous authors to think that these liability rules are in reality strict and proof of a diligent conduct is no answer to a claim for damages.[253]

Difficulties of interpretation have also characterised article 2050 Cod civ, which regulates liability for dangerous activities. This provision of the code does not define what amounts to a dangerous activity, with the consequence that, apart from where special legislation has been enacted, it will be for the courts to decide from case to case whether a certain activity qualifies as dangerous for the purposes of article 2050. In this respect, and contrary to the more restrictive approach of American courts vis-à-vis liability for abnormally dangerous activities,[254] Italian courts have interpreted the notion of 'dangerous activity' in a particularly generous way, thus giving article 2050 a strikingly broad scope of application. Examples of dangerous activity include the loading and unloading of things by operation of cranes or similar equipment,[255] the manufacture and distribution of gas cylinders,[256] and even fuel delivery at gas stations.[257] The general idea behind this caselaw

[252] In relation to article 2047, see Civ (III) 19.6.1997 n.5485. In relation to article 2048, see Civ (III) 6.12.2011 n.26200.

[253] In relation to article 2047, see Rodotà (n 249) 160; Marco Comporti, *Esposizione al pericolo e responsabilità civile* (Morano editore 1965) 238; Monateri (n 179) 931 (in combination with his remarks at 85–86). In relation to article 2048, see Liliana Rossi Carleo, 'La responsabilità dei genitori ex art. 2048 c.c.' Riv Dir Civ 1979.II.126; Luigi Corsaro, 'Funzione e ragioni della responsabilità del genitore per il fatto illecito del figlio minore' Giur it 1988.IV.225, 226–228; Monateri (n 179) 945.

[254] See text to nn 123–128.

[255] Civ (III) 1.7.1987 n.5764.

[256] Civ (III) 26.7.2012 n.13214.

[257] Civ (III) 29.7.2015 n.16052.

seems to be that an activity is dangerous if, by its nature and thus regardless of any culpability on the part of its operator, it possesses a 'high harmful potential', ie it gives rise to a serious risk of harm.[258] Furthermore, article 2050 imposes liability on the party who engages in a dangerous activity 'unless she proves that she took all suitable measures to avoid the harm'. While what constitutes 'all suitable measures' is determined from case to case, Italian courts have eventually clarified that article 2050 imposes strict liability,[259] for proof of ordinary diligence does not exonerate the defendant.[260] To escape liability, the defendant must either satisfy the court that she adopted 'all suitable measures to avoid the harm' or, if she did not, that a fortuitous event (*caso fortuito*), typically a natural force, an action of a third party or of the victim, was the exclusive cause of harm.[261] Apart from this last condition, the event must also be exceptional and objectively unforeseeable,[262] otherwise its causal impact will be deemed irrelevant and the defendant will be held liable. If, however, the fortuitous event consisted in a careless action of the victim and it contributed to the causation of harm, the defendant can obtain a reduction in damages pursuant to article 1227 Cod civ.[263] Clearly, then, those engaged in dangerous operations are subjected to a strict regime of liability.

[258] Civ (III) 27.7.1990 n.7571; Civ (III) 30.8.1995 n.9205; Civ (III) 7.5.2007 n.10300. See Franzoni (n 11) 412–416; Monateri (n 179) 1019.

[259] Civ (III) 4.5.2004 n.8457, [2.1]. See also Trib Mantova 5.8.2009 n.789, DR 2009.1227; Civ (III) 17.12.2009 n.26516 [3.9]; Trib Milano 11.7.2014 n.9235.

[260] Civ (III) 9.4.2015 n.7093, [1.8].

[261] Civ (III) 18.7.2011 n.15733.

[262] ibid; Civ (III) 4.5.2004 n.8457, [3.2].

[263] Civ (III) 18.7.2011 n.15733.

A particular example of liability for dangerous activities is article 2054 Cod civ, which regulates liability arising from traffic accidents.[264] The nature of each of the four liability rules contained in article 2054 has been clarified by the Corte di cassazione in a very recent decision. Paragraph 1 establishes the driver's liability for damage to property or harm to the bodily integrity of another, unless she proves that she did everything possible to avoid it; paragraph 2 provides that in cases of collision between vehicles, drivers are presumed to have caused the harm in equal shares; paragraph 3 holds the owner of the vehicle (or the usufructuary or purchaser with reservation of ownership) jointly and severally liable with the driver for accidents under paragraphs 1 and 2, unless she proves that the vehicle was being operated against her will; paragraph 4 provides that '[i]n any case, the persons indicated in the preceding paragraphs are liable for damage arising from defects in the manufacture or maintenance of the vehicle'. In a climate of controversy and uncertainty on the nature of these rules, the *Sezioni Unite* have held that the first three paragraphs of article 2054 impose liability on the basis of lack of ordinary diligence.[265] By contrast, in agreement with most legal scholars,[266] the same court views paragraph 4 as providing for a truly strict liability rule,[267] for defendants can escape liability only on the basis of a fortuitous event

[264] Civ sez un 29.4.2015 n.8620.

[265] ibid [3.1]–[3.3]. Cf Carlo Castronovo, *Responsabilità civile* (Giuffrè 2018) 754–755; Antonino Procida Mirabelli di Lauro, *La responsabilità civile: strutture e funzioni* (Giappichelli 2004) 114–118; Franzoni (n 11) 605–608, 613–613; Riccardo Mazzon, 'Il fenomeno della responsabilità oggettiva nella disciplina prevista dall'art. 2054 c.c. e concernenti la circolazione dei veicoli' in Paolo Cendon (ed), *Responsabilità civile* (UTET 2017) vol III, 4295, 4296–4298; Monateri (n 179) 1095–1096.

[266] eg Enzo Roppo, 'Sul danno causato da automobile difettose. Tutela dei danneggiati, regime di responsabilità e incidenza dell'assicurazione obbligatoria' GI 1978.12.IV.130, 132.

[267] Civ sez un 29.4.2015 n.8620, [3.3].

which breaks the causal link between the accident and the defect in the manufacture or maintenance of the vehicle.[268]

In common with the French *Code* of 1804, the *Codice civile* contains a provision dealing with liability for damage caused by things in one's keeping. Article 2051 provides that '[e]veryone is liable for the damage caused by things in her keeping, unless she proves that the damage was the result of a fortuitous event'. The scope of article 2051 is very broad, as a result of the generous interpretation given to the concepts of thing and 'guardian' (*custode*). In particular, any physical thing, movable or immovable, in solid, liquid, or gaseous state falls within the scope of article 2051.[269] Any distinction between 'dangerous' or 'innocuous' things is irrelevant, as that between defective or non-defective things: liability will be triggered in any case.[270] Furthermore, in this respect differing from the French position,[271] the thing must not have been a 'mere instrument in the hands' of the defendant, as otherwise the thing will be seen as merely occasioning the accident, not as causing it, and article 2043 (ie fault-based liability) rather than article 2051 will be applied.[272] As to the notion of *custode*, the defendant is identified as such if she was in a factual relation with the thing consisting in having physical control and power over it,[273] ie if the *custode* is in the position to 'control the thing, remove situations of danger that may have materialised, and

[268] ibid.

[269] Alessandro Farolfi, 'Il danno cagionato da cose in custodia' in Cendon (n 265) 4087.

[270] Civ (III) 20.7.2002 n.10641; Civ (II) 2.4.1964 n.712.

[271] Viney (n 199) [659].

[272] Civ (II) 25.3.1995 n.3553; Monateri (n 179) 1039–40.

[273] Civ (III) 8.2.2012 n.1769.

exclude others from coming into contact with the thing'.[274] To escape liability, the defendant must prove the occurrence of a *caso fortuito* which had 'exclusive causal efficiency in producing the harm', meaning that it was 'autonomous, exceptional, unforeseeable, and inevitable'.[275] Otherwise, if the fortuitous event consisted in a faulty action of the victim and it contributed to the causation of harm, the defendant can obtain a reduction in damages.[276] In sum, since proof of the *custode*'s diligence is no answer to a claim in damages, liability for the harm caused by things in one's keeping appears strict.[277]

The same can be safely said of liability for damage caused by animals. Article 2052 establishes that '[t]he owner of an animal, or one who makes use of it for the period of such use, is liable for damage caused by the animal, regardless of whether the animal was [at the time of the accident] in her keeping or strayed or escaped, unless she proves that the damage was the result of a fortuitous event'. As in French law, the notion of animal includes any type of animal, be it tame, tamed, or ferocious,[278] and the notion of use is understood broadly so that 'using' an animal for pure leisure is enough.[279] Furthermore, while the owner is often the person who uses the animal, at the time of the accident the animal may have been used by another person who, in this case, will be liable rather than the owner.[280] Finally, liability

[274] Civ (VI) 4.10.2013 n.22684.

[275] Civ (III) 18.9.2015 n.18317, [1.2]. See also Civ (III) 1.2.2018 n.2480.

[276] Civ (III) 6.7.2006 n.15383.

[277] cf Bianca (n 21) 722–727 (seeing the liability for the damage caused by things in one's keeping as based on a presumption of fault, on the ground that the defence of *caso fortuito* would involve an assessment of the diligence of the defendant's conduct).

[278] Franzoni (n 11) 532. Similarly to French law, wildlife is outside the scope of article 2052.

[279] Monateri (n 179) 1053.

[280] Civ (III) 22.12.2015 n.25738; Civ (III) 11.12.2012 n.22632, [6.3].

under article 2052 is seen as clearly strict, given that the defendant's conduct is irrelevant and the only available defence is, as usual and with the same rules seen above, proof of *caso fortuito*.[281]

Another significant provision is article 2053 Cod civ, which imposes liability on the owner of a building or other structure for the harm caused by its ruinous state. Contrary to the equivalent provision in the French *Code civil*, however, the claimant must only prove damage and causation, being on the defendant the onus to prove that the damage was not caused by a defect in its maintenance or construction. Furthermore, and again, the defendant can escape liability by proving a fortuitous event as the exclusive cause of damage or obtain a reduction in damages if the careless action of the victim contributed to the causation of harm.[282] Therefore, as the conduct of the building's owner is irrelevant to the determination of liability, this provision of the code constitutes a clear instance of strict liability.

Another context in which strict liability is prominent is the vicarious liability of employers, regulated in article 2049.[283] The essential requirements of liability are three. First, there must be a special relationship between the defendant and the physical author of harm, such that the former has the power to direct and monitor the activity of the latter (*rapporto di preposizione*). The typical example is that of the relationship between employer and employee, but many other types of relationship would also qualify, such as those arising in

[281] Civ (III) 4.12.1998 n.12307.

[282] Civ (III) 21.1.2010 n.1002, [2.2], [3.2]–[3.5].

[283] While for convenience I refer to employers and employees, article 2049 Cod civ refers to employers and masters on the one hand, and to employees and servants on the other.

the contracts of mandate, agency, or mere collaboration.[284] The second requirement is that the employee has committed an unlawful action or omission (*fatto illecito*). On the meaning of *fatto illecito*, however, there is disagreement, as some believe that the action of the physical author of harm should be of a nature to engage his personal liability under article 2043, while others believe that an innocent action is enough to trigger the liability of employers.[285] The third and final requirement is that the tasks entrusted to the employee are of such a nature that they determine, make it easier or make possible the occurrence of the harmful event (*nesso di occasionalità necessaria*); if this requirement is met, the employer may be held liable even in situations where the employee abused his position, went beyond the limits of the assigned tasks, acted for strictly personal purposes, or harmed the claimant intentionally.[286] Article 2049 clearly imposes a strict liability, for the employer's diligent conduct is irrelevant and, once the requirements seen above are met, the employer can only obtain a reduction in damages if the claimant's negligent conduct contributed to the causation of harm.[287]

Beyond Title IX, Book IV of the *Codice civile* there is another provision in the code that deserves attention, namely article 844 on liability for nuisance ('Immissioni'). This article, which is located in Book III ('Of Ownership'), Title II ('Of Ownership'), provides

[284] See respectively Trib Milano 3.10.2009 n.11786, Civ (III) 22.6.2007 n.14578, and Civ (III) 16.3.2010 n.6325.

[285] For an account of the various positions, see Franzoni (n 11) 769ff.

[286] eg Civ (III) 25.5.2016 n.10757, [5].

[287] Marco Comporti, *Fatti Illeciti: le responsabilità oggettive – Artt. 2049-2053. Il Codice Civile – Commentario* (Giuffrè 2009) 124, fn 100. It is instead controversial whether the defendant can escape liability by proving *caso fortuito*: ibid 92, fn 33 (arguing that the defence should, in principle, be available); and Civ (III) 20.2.2006 n.3651, 38 (categorically excluding the application of *caso fortuito* to article 2049 Cod civ).

that a landowner has remedies against nuisances only if these exceed the threshold of 'normal tolerability' and that, if the emissions come from a productive activity, the court must decide the dispute by reconciling the needs of that activity with the protection of property rights. In this case, if emissions cannot be brought below an acceptable level through the adoption of reasonably expensive precautions, they are lawful and can in principle continue but the party suffering from the nuisance is entitled to an indemnity from the other party.[288] In this case, liability can be described as strict, for the fact that the defendant adopted all reasonable precautions to remove or minimise the nuisance is irrelevant to the determination of her liability.[289]

Outside the *Codice civile*, there are other areas of strict liability governed by special legislation.[290] Among these, the most significant is liability for defective products, currently governed by articles 114–127 of the 'Consumers code' (*Codice del consumo*),[291] which implement the Product Liability Directive.[292] By and large the Italian legislator has reproduced in a faithful way the key elements of the Directive, such as the notions of producer, defect, or compensable damage.[293] Moreover, Italian law has adopted all the

[288] Monateri (n 179) 556.

[289] See Pietro Trimarchi, *Rischio e responsabilità oggettiva* (Giuffrè 1961) 348. Note, however, that the nature of liability for nuisance in Italy is controversial: see Cesare Salvi, *Le immissioni industriali. Rapporti di vicinato e tutela dell'ambiente* (Giuffrè 1979) 251; Monateri (n 179) 566–567.

[290] Examples include liability for nuclear installations (legge 1860/1962, D.P.R. 519/1975, and D.M. 20.3.1979), liability for accidents caused by airplanes (article 965 of *Codice della navigazione*), or liability for the exploitation of mines (article 31, r.d. 29.7.1927 n.1443). For a general overview of these and other special liabilities, see Franzoni (n 11) 649–676.

[291] Enacted with D Lgs 6.9.2005 n.206.

[292] The Directive was first implemented in Italy by D.P.R. 24.5.1988 n.224.

[293] Articles 115, 117, and 123 of the *Codice del consumo*. A thorough review of the implementing law and its points of departure from the Directive can be found in Roberto Pardolesi and Giulio Ponzanelli (eds), 'La responsabilità per danno da prodotti difettosi' Nuove leggi civili commentate 1989.497.

grounds of exoneration envisaged in the Directive, none of which allows the producer to escape liability on the basis of her diligent conduct.[294] This circumstance, coupled with the fact that liability is typically seen as based on the causal connection between defect and harm, without any relevance accorded to the producer's conduct,[295] leads to liability for defective products being seen as generally strict. But this conclusion is unanimously accepted only in relation to manufacturing defects for, in keeping with the other three legal systems, it is controversial whether liability arising out of design defects or failures in the duty to warn is strict or based on the producer's fault.[296] Furthermore, it is doubted whether Italian courts, especially in recent times, always interpret liability for products as strict or if instead at times they 'succumb to the charm of fault'.[297]

Finally, a few words must be said in relation to medical accidents, an area recently reformed by *legge* no 24 of 8 March 2017. Here the Italian legislator has opted for a binary regime: the relationship between health care establishments and patients is contractual in nature, with the consequence that the former are liable in contract to the latter pursuant to articles 1218 and 1228 Cod civ for, respectively, any harm caused either by their own organisational failures or by the negligent or intentional conduct of their staff (whether or not there exists a formal contract of employment between the establishment and the

[294] Article 118 of the *Codice del consumo*.

[295] Civ (III) 29.5.2013 n.13458; Civ (III) 19.2.2016 n.3258, [5.1].

[296] Giulio Ponzanelli, 'Dal biscotto alla "mountain bike": la responsabilità da prodotto difettoso in Italia' Foro It 1994.1.1.252, [3]; Pier Giuseppe Monateri, *Illecito e responsabilità civile – Tomo II*. *Trattato di diritto privato* (UTET 2002) 225ff; Bianca (n 21) 751–752. Cf Giulio Ponzanelli, 'Il produttore è responsabile del danno cagionato da difetti del suo prodotto' in Pardolesi and Ponzanelli (n 293) 506, 508–509.

[297] Alessandro Palmieri, 'Difetto e condizioni di impiego del prodotto: ritorno alla responsabilità per colpa?' Foro It 2007.I.2415, 2418.

professional who injured the patient).[298] While the nature of the liability of health care establishments for their own failures under article 1218 is not yet entirely clear, with interpretations oscillating between fault and strict liability,[299] their liability under article 1228 is clearly strict, for this provision is, in contractual matters, the equivalent of article 2049 Cod civ. By contrast, the relationship between doctors (or other health care professionals) and patients is extra-contractual and the former are personally liable to the latter on the basis of fault pursuant to article 2043 Cod civ.[300]

To conclude, strict liability plays an important role in Italian law. Besides employers' vicarious liability, which has always been treated as strict, several liability rules included in the *Codice civile* have become strict due to the gradual interpretive work of both courts and legal scholars (eg liability for dangerous activities, for the deeds of things, for the actions of animals, for ruinous buildings, and for traffic accidents at least in so far as the owner of the vehicle and the producer of a defective vehicle are concerned). But while occupying a considerable space in Italian law, strict liability is not as pervasive as it is in French law. Indeed, the nature of a number of liability rules remains controversial due to the ambiguous wording in the provisions of the code and is subjected to a variety of interpretations, oscillating between strict and fault-based liability (most notably, liability of parents for the actions of their children and that of guardians for the actions of individuals lacking mental capacity). Furthermore, in some areas where death and personal injuries are frequent

[298] Article 7, para 1 of *legge* 24/2017. For an overview of liability for medical accidents, see Rosanna Breda, 'La responsabilità—riformata?—della struttura sanitaria' in Nicola Todeschini (ed), *La Responsabilità Medica* (UTET 2019) 930.

[299] Breda (n 298) 946–947.

[300] Article 7, para 3 of *legge* 24/2017. If, however, the individual health care provider has undertaken herself a contractual obligation vis-à-vis the patient, she will be liable in contract, not in tort.

occurrences, Italian law contrasts with French law in that the fault paradigm is still attractive, the paramount example here being the role it plays in the liability of drivers for traffic accidents. In addition to this, it is difficult to find in Italian law liability rules that are as strict as those that French law has envisaged, for example, in relation to liability for traffic accidents, parental liability, or liability for defective products vis-à-vis the limitations imposed on the development risk defence. All in all, then, it is true that Italian legal actors have progressively increased their reliance on strict liability and that this type of liability is today a central and widespread feature of Italian law. However, if compared to the French position, it is clear that greater caution has been adopted in Italy towards the introduction of strict liability and that the solutions envisaged by the Italian courts and legislator have generally been less radical and more prone to the influence of the fault paradigm.

2.6. Concluding Remarks

In the four legal systems studied, strict liability is understood in loosely similar ways. On the one hand, strict liability is often presented as opposed to liability for failure to act as a reasonable and diligent person. In this way, strict liability and fault-based liability are seen as clearly distinct. On the other hand, it is recognised that it may be difficult to draw a clear-cut distinction between fault and strict liability, that certain contexts of liability may present a mixture of fault-based and strict elements, and that therefore the idea of a continuum may better represent variations among liability rules in terms of their strictness. Nevertheless, in all four systems strict liability is still a well-recognisable legal category and it is widely used to refer to several contexts of liability where, at least in principle, the defendant's 'fault' (understood as lack of reasonable care or ordinary diligence) is seen as irrelevant to the

determination of liability. This remains true even though the understandings of 'fault' may themselves differ in the four laws.

So understood, strict liability features in all the four legal systems studied, but it does so in different ways and to conspicuously differing extents across the four laws. Trying to locate the four jurisdictions along a spectrum on the basis of their relative reliance on strict liability, French law would be at one extreme point. The relentless work of French jurists and courts since the late 19th century as well as the occasional interventions of the legislator have all contributed to the adoption of strict liability in a wide range of situations, from liability for the deeds of things or the actions of animals to vicarious liability for the action of another and liability for traffic accidents. Moreover, the degree of strictness of certain rules is striking, as shown by the *loi* Badinter on traffic accidents as well as by the limitations to the development risk defence in product liability. The absence of a distinct context of liability for dangerous activities should not be taken to mean that harm caused through the operation of these activities remains without redress. Either statutes regulating the specific activity in question or the general liability for the deeds of things will make up for this absence and therefore cover accidents that Italian law and American law subject to a dedicated strict liability for (abnormally) dangerous activities. All this testifies to the heavy reliance of French law on strict liability and it gives a clear sense of the French taste for it.

English law would instead be placed at the other extreme point of the spectrum. Here, strict liability is indeed imposed in a variety of contexts (eg animals, private nuisance, defective products, breach of certain non-delegable duties), and the recent expansionistic developments in the law of vicarious liability confirm that it has a role to play in English tort law. This occurs, though, in a setting where the tort of negligence is dominant and where,

therefore, legal actors are generally very cautious before adopting or expanding rules of strict liability. A striking example of this attitude is the demise of the rule in *Rylands v Fletcher*, which went from potentially being a general rule of strict liability for dangerous activities to actually being, in the view of some scholars but especially of the highest courts, a 'sub-species' of the tort of private nuisance. Moreover, in sharp contrast with French law, a key area such as that of traffic accidents remains governed by the tort of negligence. Additionally, where English law applies strict liability, the relevant rule is sometimes less broad in its scope of application than equivalent rules in the other three legal systems, a clear example being liability for the actions of animals. In sum, if compared to the other three legal systems studied, English law shows greater attachment to fault and, therefore, fewer and less rigorous rules of strict liability.

Italy and the United States would be located somewhere in the middle of the spectrum. In Italian law, this type of liability plays a very important role. Even if the *Codice civile* sets out liability rules whose standard of conduct is not entirely clear, the interpretive work of courts and jurists has turned many of these rules into strict liabilities. Particularly striking here is the breadth of liability for dangerous activities under article 2050, with the courts interpreting the requirement of dangerousness in a very generous way. On the other hand, despite the widespread reliance of Italian law on strict liability, the notion of fault still exerts considerable attraction on Italian legal actors, with the result that interpretive uncertainty still characterises contexts such as parental liability, and that key contexts such as the liability of drivers for traffic accidents remain the province of fault. In addition to this, it is difficult to identify in Italy liability rules that possess the same extreme rigour displayed occasionally by French law. In sum, while heavily relied on and certainly featuring more prominently

than in English law, strict liability in Italy does not reach the peaks of frequency, breadth, and rigour that it instead experiences in France.

Similar conclusions can be drawn in relation to the United States. Here, unlike English law, the rule in *Rylands v Fletcher* was not restricted but rather developed into a general strict liability for abnormally dangerous activities. Moreover, again departing from the English approach, pockets of strict liability can be identified in relation to the harm caused by dogs, to the intentional misconduct of children, and to traffic accidents in situations where the 'family purpose' doctrine (or expanded statutory versions of it) apply. In addition to this, in the context of product liability some state courts apply strict liability even to design and warning defects, and do not afford manufacturers the protection of the development risk defence; this position testifies to an extremely rigorous approach which, albeit currently in retreat, is still clearly present in the United States within this specific context of liability. On the other hand, American strict liabilities are sometimes less broad than those identifiable in France and Italy. For example, the American liability for abnormally dangerous activities does not include a high number of activities which are instead covered by its Italian equivalent, its rule of liability for the actions of animals does not apply to all animals, unlike the French and Italian ones, and its liability for the action of another person does not cover the wide range of situations falling within the scope of the French law on *le fait d'autrui*. In sum, strict liabilities constitute an important part of American tort law, featuring more conspicuously here than in English law while not being as widespread, rigorous, or broad as in France or Italy.

In sum, all the four legal systems studied rely on strict liability. Certainly, there are important commonalities across the four laws, as each of them includes rules of strict liability

for harms caused by animals, by the actions of other persons, by defective products, and by certain types of unreasonable nuisances. At the same time, though, the four systems differ markedly in the way in which they rely on strict liability and in the extent to which they do so. This diversity of significance reflects contrasting views as to the desirability of strict liability and its proper place in the tort system. The next Part of the work seeks to advance our understanding of strict liability by exploring the substantive arguments put forward in the four jurisdictions to justify the imposition of this type of liability. Arguments will be discussed in relation to each legal system and comparatively by paying attention to the various contexts in which strict liability has been identified. In this way, it will be possible both to shed light on the role and purposes attributed to strict liability in each of the four legal systems studied and to bring to light the wide variety of values, ideals, and goals which are brought to bear on the imposition of such liability.

3. Legal Arguments in Strict Liability

3.1. Introduction

The imposition of strict liability across the four legal systems studied has been justified in the twentieth century by a wide variety of arguments. While some of these arguments have lost much of their strength due to social changes and developments in legal thinking, others have continued to be relied upon by scholars and courts and to inform contemporary legal reasoning.

This Part of the thesis explores the main arguments put forward across the four legal systems to justify strict liability. Some of these arguments are based on the notion of risk and will be grouped under the label of 'risk-based arguments' (which include 'risk-creation', 'abnormality of risk', 'nonreciprocity of risk', 'risk-benefit', and 'risk-profit'). Other arguments are premised on the desire to pursue goals such as the avoidance of accidents (referred to as 'accident avoidance'), the protection of victims (referred to as 'victim protection'), or the redistribution of losses. This latter goal includes the 'loss-spreading' argument (which includes 'insurance spreading', 'enterprise spreading', 'proportionality of burdens and benefits') and the 'deep-pockets' justification. All the arguments discussed in this Part of the thesis feature a 'core idea', and some of them also present internal variations which reflect different ways of handling that core idea. Identifying core ideas and distinguishing between their internal variations are the first step in exploring the complexities of legal reasoning in strict liability, for this allows us to unravel the *patterns* of reasoning with greater precision and to uncover the justificatory weight of the various arguments and of their internal variations within and across the four laws.

The thesis, however, will not cover the whole range of arguments which can be put forward to justify strict liability. In particular, while arguments concerning a reduction in litigation (or administrative) costs and the pursuit of efficient resource allocation could have formed part of the analysis, for reasons of space it has not been possible to analyse them systematically in dedicated sections. However, these arguments will be mentioned wherever they appear together with the arguments on which I focus, so as to illustrate the full range of justifications that individual legal actors put forward. Moreover, sometimes I will also refer to the pursuit of socio-economic welfare, or to the promotion of norms of interpersonal justice and individual responsibility: while these could perhaps be treated as arguments in themselves, their main role in legal reasoning is to provide a specific connotation to a variety of arguments. Therefore, although they will not be the object of separate sections, they will feature in my discussion so as to highlight the different commitments which inspire legal actors when it comes to justifying strict liability.

As said in the general introduction of this work, my aim is not to evaluate the persuasiveness or desirability of strict liability or of any of the arguments considered in the thesis, nor to put forward any novel approach to strict liability.[301] However, I have selected arguments on the basis of whether they can be treated as distinct justifications for strict liability. On this basis, I do not consider 'cost internalisation' (*internalisation des coûts, internalizzazione dei costi*) and 'enterprise liability' (*responsabilité de l'entreprise, responsabilità d'impresa*) as themselves arguments for strict liability, but rather as 'empty boxes' that can be filled with, or surrounded by, a variety of different justifications. In particular, in discussions on strict liability, 'cost internalisation' amounts to no more than

[301] See p 4.

saying that a party should be strictly liable, ie that she should internalise the costs of accidents she caused, whether or not she was at fault: this says nothing about the *reasons* for holding that party strictly liable. Where it is used, the term 'cost internalisation' is typically surrounded by ideas such as risk-profit, accident avoidance, or loss-spreading, which constitute the reasons for forcing the defendant to internalise the costs of accidents she caused. Similarly, the term 'enterprise liability' merely means that a firm should be strictly liable, but does not clarify at all the reasons why this should be so.[302] 'Enterprise liability' too is, therefore, an empty box that can be filled with all sorts of justifications. The focus of my discussion is not on these empty boxes, which do not constitute distinct reasons for imposing strict liability, but rather on the justifications which give content to them.

My comparative analysis of legal arguments for strict liability unearths a wide variety of patterns, which reflect different ways in which such arguments are used in the four legal systems studied. Sometimes strict liability may be justified by reference to a single argument, labelled here a *stand-alone* argument, while sometimes multiple arguments may be used at once. Where the latter is the case, they may either be *combined* or simply *juxtaposed* within a broader reasoning. Where arguments are combined, they constitute building blocks of the relevant reasoning and present some level of interconnectedness or integration. Often, the reasoning of which they form part would not stand up if any of them were missing, for each argument constitutes a necessary element in the reasoning; often, the justificatory value of each argument depends on its relationship with the other arguments featuring in the same reasoning. For example, a reasoning justifying strict liability may include two arguments,

[302] This term was independently coined by Albert A Ehrenzweig, *Negligence without fault: trends toward an enterprise liability for insurable loss* (University of California Press 1951) (reprinted in (1966) 54 Cal L Rev 1422), and by Charles O Gregory, 'Trespass to Negligence to Absolute Liability' (1951) 37 Va L Rev 359.

with one embodying the fundamental goal that strict liability pursues and the other constituting the means of achieving it. In this case, the two arguments are interconnected and form a combination of arguments. By contrast, where arguments are only juxtaposed, they look like a list of separate, independent elements each adding to the overall justification for strict liability. The significance of a juxtaposed argument does not depend on the other arguments in the reasoning; therefore, to understand its justificatory weight it is often helpful to take into account a variety of factors, as for example the existence of an explicit ranking of arguments provided by the relevant legal actor, the use of emphatic expressions, or the number of times an argument is repeated in the same reasoning. Finally, sometimes it may be difficult to understand whether the arguments put forward are being combined or juxtaposed, and where this is case I will merely note that they are discussed or grouped together.

Another important pattern of reasoning which can be identified in the four legal systems concerns the context-dependent use of arguments. An argument may be used to justify a specific context of strict liability but be ignored in relation to others, or its frequency of use may vary depending on the particular context or contexts of liability for which it is invoked. My analysis will pay attention to this pattern so as to appreciate correctly the overall significance of arguments in each of the four legal systems examined.

A further pattern of reasoning, which cuts across the previous ones, relates to the distinction between means and goals. At times, an argument may feature in the reasoning justifying strict liability as the goal that strict liability should pursue. Where this is the case, other arguments also considered in this work may act as means to achieve that goal. For example, strict liability may be justified on the ground that it is desirable to ensure that

victims of accidents receive compensation for their losses, and the *same* reasoning may suggest that the best way to do so is to impose liability on the defendant because of her spreading abilities; in this case, loss-spreading acts as a means to achieve the goal of victim protection. Moreover, arguments that sometimes act as means may, at other times, be themselves the goals which strict liability should accomplish. For example, accident avoidance and loss-spreading may be seen as functional (and therefore as means) to the increase in socio-economic welfare, but they may also be seen as goals worth pursuing in themselves. Relatedly, the same argument may be used by legal scholars and judges as a means to achieve different goals. For example, the deep-pockets justification may be seen as serving an increase in socio-economic welfare or, quite differently, the protection of victims. Similarly, the risk-profit argument may be seen as promoting norms of individual responsibility or, quite the opposite, as part of a strategy of increased victim protection. All these variations characterise the relevant argument and confer on it varying role and significance within and across legal systems.

Keeping track of all these patterns of reasoning and, therefore, of the different ways in which the various arguments are used will be key to understanding how legal actors in the four jurisdictions organise their thinking about strict liability.

Besides this, it is also important to assess the justificatory weight of the arguments as used across the four legal systems. In this respect, I characterise arguments depending on the weight or significance which is attributed to them, both in individual instances of reasoning and in the legal systems more widely. Where the significance of arguments is not made explicit in the materials, I will proceed on the basis of my own assessment. First, an argument may act as a 'key' reason for adopting strict liability, meaning that it is seen as a justification

of great importance, which is invariably the case where the argument stands alone but which can also be the case where the argument is either juxtaposed or combined with other justifications. In the latter two cases, the same reasoning may include one or more key arguments, all being of equal importance. Secondly, arguments may act as 'secondary' reasons for imposing strict liability: they are not as significant as key justifications but they still contribute in important ways to justifying strict liability in the view of its proponent. Like key arguments, secondary arguments may be juxtaposed or combined with other justifications, and the same reasoning may include one or more secondary arguments. Finally, arguments may be thrown in as 'extras' doing little work to support the imposition of strict liability; these have been called 'make-weight arguments',[303] as the 'true' reasons for imposing strict liability must be identified in other arguments featuring in the same reasoning, whether by way of combination or juxtaposition.

The patterns of reasoning and the characterisation of arguments presented above will provide a map and a compass to navigate through the complexity of legal reasoning in strict liability. Notwithstanding this, however, the justificatory value of arguments as well as their reciprocal relationship in the reasoning of a specific scholar or judge may remain unclear. This may be due to a lack of precision or sophistication of analysis within the materials, or to the fact that some of the arguments considered have fuzzy edges and may overlap. Furthermore, it may happen that an argument is presented as a certain argument but in reality it is a different one. I will acknowledge these kinds of difficulties while also providing, if possible, the interpretation of the argument that fits better the broader thinking of the relevant legal actor.

[303] See Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 MLR 820, 827.

A further point which needs clarification concerns the nature of the arguments discussed in this work and, more particularly, the distinction (particularly evident in academic writings) between what could be labelled 'interpretive justifications' and 'normative justifications'. The first term refers to an argument which is used to interpret (or explain) the law, in our case strict liabilities, without the relevant legal actor taking a view as to the soundness of that argument. The second term, by contrast, refers to an argument which is relied upon to show why strict liability should be adopted, meaning that the relevant legal actor agrees with the argument in question, whether or not they also see it as a correct interpretation (or explanation) of the law.[304] My comparative analysis of arguments includes both types of justification, but I generally do not distinguish between the two usages for two reasons. First, it may be difficult to understand whether legal actors (and especially legal scholars) are putting forward an interpretive or normative justification, as they often do not clarify this point and their reasoning may be open to doubts (particularly in civil law systems). Secondly, it is doubtful whether reasoning which is being presented as merely interpretive does not include any normative dimension reflecting a prescriptive project of the relevant legal actor.[305]

Finally, a few words are necessary on the organisation of the discussion that follows. This part of the thesis is organised by *arguments* and it includes five sections, one for each argument. Within each section, there are six sub-sections. The first one introduces the

[304] See Jules Coleman, *The Practice of Principle* (OUP 2001) 3 (distinguishing between justifications and explanations). Cf John Gardner, 'What is tort law for? Part 1. The place of corrective justice' (2011) 30(1) Law and Phil 1, 2–4 (criticising Coleman's distinction on the ground that all justifications are explanations and distinguishing between 'committal' and 'noncommittal' justificatory statements).

[305] See Peter Cane, 'Rights in Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 35, 41, 51 (arguing that, while presented as purely interpretive, rights-based theories of private law are prescriptive and driven by a desire to protect individual interests and autonomy).

relevant argument by explaining the core idea and its variations, while the final one provides a brief comparative conclusion on the significance of that argument across the four jurisdictions. The four sub-sections in between form the heart of the discussion, as they explore the relevant argument in each of the four legal systems. In developing my analysis across these four sub-sections, the legal systems are not ordered in the same way for every argument, but rather according to the prominence of the relevant argument in the systems. For this purpose by prominence I refer to a variety of factors, such as whether the argument is more heavily relied upon in one system than in others, whether it is still used or not, or in which system it was developed earlier from an historical standpoint. All combined, these factors suggest that a particular argument is more prominent in some legal systems than in others, and it is on this basis that I have ordered their discussion. The practical advantages of this ordering are significant: discussing first the system where an argument is more prominent allows to develop sooner rather than later a richer framework and vocabulary of analysis that will help the comparative discussion while at the same time avoiding tiring repetitions. However, I am conscious of the need to avoid bias. In this respect, careful attention will be paid to explore arguments as they are treated in each legal system, and the theoretical framework that legal actors from one jurisdiction develop in relation to a particular argument will not be superimposed on the discussion of that argument in other jurisdictions. In other words, while feeding on the richer vocabulary of the legal system(s) where the argument is more prominent, the discussion will seek to be fair to the legal systems and to their reasoning in strict liability.

3.2. Risk

3.2.1. The Risk-based Justifications of Strict Liability

As a justification for imposing strict liability, the concept of 'risk' (*risque*, *rischio*) underlies and informs a variety of approaches. The widest of these suggests that a party should be liable because she created a risk of harm to another which then materialised ('risk-creation', or 'theory of created risk'). On this view, the mere existence of a causal link between the risk created by a defendant and its materialisation (ie the harm) is sufficient to trigger liability. A key feature of the theory of created risk is that it is broad enough to apply to any situation, as any action or even omission can contribute to a risk of harm to others.[306] Perhaps for this reason, more sophisticated versions of this theory distinguish according to the nature of the risk created. For example, liability may arise only if the risk of harm was abnormal,[307] as where the defendant engages in dangerous activities such as blasting operations, nuclear installations, or toxic waste disposal ('abnormality of risk'). Or a person may be liable if she creates and imposes on another a 'nonreciprocal' risk of harm, that is a risk of harm 'greater in degree and different in order' from that created and imposed on her by the victim.[308] For example, airline companies and pilots create and impose a nonreciprocal risk of harm on homeowners by flying over their heads and are therefore liable strictly to them for the

[306] Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2004) 89.

[307] See Matthew Dyson and Sandy Steel, 'Risk and English Tort Law' in Matthew Dyson (ed), *Regulating Risk through Private Law* (Intersentia 2018) 23, 36.

[308] This theory has been proposed by George Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harv L Rev 537, 542.

damage done on crashing ('nonreciprocity of risk').[309] Compared to risk-creation, these two qualified approaches reduce considerably the scope of strict liability for created risk.

As will be seen, risk-creation and its variants focus on the nature of the risk created by the defendant. By contrast, other risk-based arguments focus on the notion of gain and argue that a person who creates a risk of harm to others for the purpose of obtaining some gain must pay for the harm so caused. In this respect, two distinct theories of risk have been put forward depending on the meaning given to the notion of gain. The first adopts a very broad understanding of gain, with the result that any benefit derived from the creation of risk is enough to trigger liability ('risk-benefit'): for example, as riding a horse for pleasure in a park is an activity which gives the rider a benefit (pleasure), the rider should be strictly liable for the injury caused to a person innocently lying in the park. The second gain-based theory adopts a narrower understanding of gain so that only an economic benefit can justify the defendant's strict liability ('risk-profit'): for example, as operating an industrial plant is an activity which generates financial gain, the prospect of that gain justifies the firm being strictly liable for any damage caused to adjacent land.

An important point to note in relation to the terms 'benefit' and 'profit' is an ambiguity between the two which can make it difficult to understand whether the person using them (typically a legal scholar or judge) is referring to the theory of risk-benefit or to the theory of risk-profit. The ambiguity lies in the fact that, both in common and legal language (especially in French and Italian), the two terms 'benefit' and 'profit' can be used

[309] ibid 548.

interchangeably and each can encompass both pecuniary and non-pecuniary gains.[310] Even so, we can often see which gain-based theory of risk the scholar or judge refers to by the broader context.

Here, we shall explore how the various permutations of risk are used across the four legal systems and explain their significance as justifications for strict liability.

3.2.2. The Pervasive Nature of Risk in French Strict Liability

The influence of risk on French strict liability is remarkable and visible in relation both to the liability rules included in the *Code civil* and to the numerous special regimes of liability introduced by the legislator over the course of the 20th century. Except for nonreciprocity of risk, the theories of risk presented above have all had considerable influence on French strict liability and, although they have varying levels of importance in the legal reasoning of scholars and courts, in general they reflect a broader effort to improve the position of victims of accidents.

Historically, the concept of risk has played a central role in the development of strict liability in French law. As a reaction to the growing number of accidents caused by industrialisation in the second half of the 19th century, two prominent legal scholars, Saleilles and Josserand, spearheaded an intellectual revolution in civil liability which aimed to guarantee greater financial protection to the victims of accidents; in trying to secure this result, they called into question the 'sanctity' of fault and its adequacy to meet satisfactorily

[310] eg Florence Millet, *La notion de risque et ses fonctions en droit privé* (PUF 2001) [256], and Pietro Trimarchi, *La Responsabilità Civile: Atti Illeciti, Rischio, Danno* (Giuffrè 2017) 336, both using the term 'profit' as including non-pecuniary gains.

the new demands of social justice.[311] The value of social solidarity required the community to support those of its members who suffered some sort of harm, even if caused without fault.[312] Especially in cases of anonymous accidents in industrial contexts, a liability regime based on the fault of the defendant made it very difficult for the victim to prove the defendant's failure in conduct, with the result that the loss was systematically borne by the victim. To cure this situation and facilitate the compensation of victims, both Saleilles and Josserand appealed to the concept of risk. In 1894, Saleilles argued that justice required that a person who has the direction of an industrial activity and reaps its profits should bear the associated risk of harm and pay compensation under former article 1384(1) Cc (ie liability for the deeds of things), which he considered a crucial testing ground for his theory of risk and for ensuring greater protection to victims of accidents.[313] While at this stage he justified the imposition of strict liability on risk-profit and confined its scope of application to the industrial context,[314] in later writings Saleilles went further and argued that it was morally and socially desirable to link tort liability to the mere creation of risk on the basis of former article 1382 Cc[315], advocating a generalised application of strict liability to 'the entire range

[311] Jean-Louis Halpérin, *Histoire du droit privé français depuis 1804* (PUF 2012) 189–193; Patrice Jourdain, *Les principes de la responsabilité civile* (9th edn, Dalloz 2014) 10–14.

[312] On the importance of social solidarity in France, see eg Léon Duguit, *L'état, le droit objectif et la loi positive* (Fontemoing 1901) 69–78.

[313] Raymond Saleilles, 'Rapport', Revue bourguignonne de l'enseignement supérieur 1894.647, 659 ff. See also Saleilles, D 1897.I.433.

[314] Saleilles (n 313) 661–662.

[315] Raymond Saleilles, 'Le risque professionnel dans le code civil' La réforme sociale 1898.633, 645–647. Former article 1382 Cc founds civil liability on the defendant's fault, but Saleilles objected to this reading and argued that that provision set a 'purely objective liability, based on the idea of risks and independent of any fault'. See also id, *Les accidents de travail et la responsabilité civile* (Arthur Rousseau 1897) 74–75.

of activities of individuals'.[316] Around the same time, Josserand put forward a theory of 'created risk' (*risque-créé*) to justify liability for the deeds of things. In Josserand's view, whenever an accident occurs someone has to bear its costs. Since the victim of an accident is not only without fault but has no relationship with the thing which causes damage, the victim's loss should be borne by the person who directed the thing in her keeping for her own interest (be it pleasure or profit) and thus created a risk of harm.[317] Regardless of whether Josserand's view is best seen as referring to risk-benefit or risk-creation, there is no doubt that his work, with Saleilles's, made risk one of the conceptual cornerstones of French strict liability throughout the 20th century.[318]

Before examining the impact of the various risk-based justifications on strict liability, it must be mentioned that the theories of risk have been challenged from their very inception. Many legal scholars criticise their desirability beyond strictly-confined areas on a variety of grounds. For example, from a normative perspective it is suggested that imposing liability on grounds of risk would lead to social and moral injustices,[319] that it would cause 'senseless immobility' and therefore discourage all sorts of human activities,[320] and that it would

[316] Saleilles, 'Le risque professionnel' (n 315) 649.

[317] Louis Josserand, *De la responsabilité du fait des choses inanimées* (Arthur Rousseau 1897) 106–109, 114. See also id, D 1925.I.97, 100.

[318] See Viney (n 23) [68]–[69].

[319] Marcel Planiol, 'Études sur la responsabilité civile' RCLJ 1905.277, 278–279, 289 (on risk-creation). See also Georges Ripert, *La régle morale dans les obligations civiles* (4th edn, LGDJ 1949) [123] (arguably commenting on risk-creation, risk-benefit, and risk-profit).

[320] ibid 289. See also Georges Ripert, DP 1930.I.57, 59–60 (on risk-creation); Boris Starck, Henri Roland, and Laurent Boyer, *Obligations*, t. 1, *Responsabilité délictuelle* (5th edn, LITEC 1996) [48] (on risk-benefit and risk-creation); Terré, Simler, Lequette, and Chénedé (n 179) [908] (on risk-profit and risk-creation).

generate legal uncertainty in the administration of the law;[321] others also criticise risk-based arguments for their failure to explain in a satisfactory way a variety of contexts of liability.[322]

Notwithstanding these criticisms, risk has played a very important role in the development of French strict liability. It is widely acknowledged that the views of Saleilles and Josserand have influenced French courts, especially in the first few decades of the 20th century.[323] For example, while it is true that in the *Jand'heur* litigation the Cour de Cassation did not clarify the substantive grounds on which it was abandoning a fault-based reading of liability for the deeds of things,[324] it is most likely that the court had been profoundly influenced by the theory of risk. Indeed, in that case the *procureur général* Matter emphatically advocated a broad and strict interpretation of article 1384(1) Cc,[325] and in doing so he expressly referred to the theory of risk by quoting[326] a passage from Saleilles's note to the Cour de Cassation's decision in *Teffaine* in 1896.[327] Nevertheless, it remains true that, in relation to any of the contexts where strict liability is imposed, it is very difficult to find judicial decisions expressly referring to any of the theories of risk as justifications for such

[321] Henri Mazeaud, 'La faute dans la garde' RTD civ 1925.793, 801 (on risk-profit).

[322] See eg Starck, Roland, and Boyer (n 320) [46] (on risk-profit), [48] (on risk-benefit and risk-creation).

[323] eg Halpérin (n 311) [129]; Viney (n 23) [69].

[324] Ch réun 13.2.1930 DP 1930.I.57 note Ripert. Cf the decision in *Franck* (Ch réun 2.12.1941, S 1941.I.217 note H Mazeaud), where the Cour de Cassation defined *la garde* of the thing as the 'use, direction, and control' of it—a move widely seen as a partial return to fault.

[325] DP 1930.I.57, 64.

[326] ibid 70.

[327] Civ 16.6.1896, D 1897.I.433, 439.

imposition.[328] Therefore, it is more through the analysis of legal scholarship that the significance of risk-based justifications can be appreciated.

Starting with the theory of created risk, this argument features frequently in legal writings seeking to justify the imposition of strict liability. At least three patterns of risk-creation are identifiable, each carrying its own justificatory weight.

First, the argument occasionally acts as a stand-alone and key justification: for example, leading authors consider that it is the risk created by putting the product on the market which explains the manufacturer's liability,[329] that it is the risk created by the thing which justifies or explains the keeper's liability,[330] or that it is the risk generated by the kinetic energy of a vehicle which grounds the driver's or keeper's liability for traffic accidents.[331] This is not, though, the most frequent way in which risk-creation is used in the French context, as the argument often forms part of a more complex reasoning which seeks to ensure the achievement of some particular goal.

Secondly, sometimes the conceptual distinctiveness of risk-creation is preserved and the argument still does an important justificatory work, even if included within a broader

[328] One rare example is Trib Seine 2.4.1949, Gaz Pal 25–28 June 1949, 69, where an employee caused a traffic accident while driving the employer's vehicle. In that case, the court held the employer liable on the ground that, as owner and keeper of the vehicle, he 'assumed the risks of harm that could be caused by the vehicle in return for the profits he reaped from it'.

[329] Flour, Aubert, and Savaux (n 226) [300] (but note the lack of any elaboration on this).

[330] Lucien Charbonnier, 'Une notion-clé pour l'indemnisation des victimes d'accidents de la circulation: l'"implication" du véhicule (loi du 5 juillet 1985)' in *Rapport de la Cour de cassation 1986*, 96, 102–103; Yvon Lambert-Faivre, 'L'évolution de la responsabilité civile d'une dette de responsabilité à une créance d'indemnisation' RTD civ 1987.1, 5; Terré, Simler, Lequette, and Chénedé (n 179) [1000].

[331] Starck, Roland, and Boyer (n 320) [54], but cf [642] (arguing that the *loi* Badinter on traffic accidents 'established an objective right of reparation to the benefit of the victims, thereby enshrining the theory of guarantee').

reasoning. For example, when trying to identify the possible justifications for strict liability, Jourdain argues that (with the author's own emphasis)

> it is natural to attribute liability to the party who is at the origin of the risk, to the party who *created* that risk. It is not a matter of sanctioning the creator of a risk but of … pursuing a policy of accident avoidance which is based on the belief that the creator of a risk is in the best position to avoid its materialisation. The desire to *trace back liability to the creator of risk* features in all strict liabilities based on risk.[332]

Here, the general focus is on avoiding accidents, and yet risk-creation retains its conceptual distinctiveness and independence.[333] It seems as though the author is keeping the theory of created risk alive to perpetuate an idea which possesses the prestige of a tradition going back to Saleilles and Josserand and which, perhaps partly for this very reason, makes the imposition of strict liability more attractive and familiar.

This second pattern can be distinguished from a third one, where the creation of risk again forms part of a broader reasoning but this time it does not do any real justificatory work. For example, in relation to the vicarious liability of employers, Viney observes that while this liability is best seen 'as a means of attributing to firms the costs of the risks they create through their own activities', its 'objective … is to identify who must take out liability insurance for the protection of victims and to encourage firms to avoid accidents'.[334] Here,

[332] Jourdain (n 311) 30 (original emphasis). See also Phillippe Brun, *La responsabilité civile extracontractuelle* (5th edn, LexisNexis 2018) [675] (in relation to traffic accidents: 'it is because he participates in the creation of the risk (and he is consequently required to insure against it) that the driver or guardian of a vehicle can be ordered to pay compensation on the mere basis of an involvement [of the vehicle] in the accident' (therefore combining here risk-creation with loss-spreading)).

[333] Note that Jourdain (n 311) 29–31 provides a long list of juxtaposed arguments to justify strict liability, and he starts off by saying that 'all of them are articulated around the notion of *risk*' (original emphasis).

[334] Viney (n 199) [791-1].

and in similar cases,[335] the impression is that the creation of risk merely stands for the possibility of occurrence of some harm, losing its conceptual distinctiveness as a justification and dissolving into other arguments.[336] In sum, risk-creation in France is used in different ways and for each pattern of use it takes on a different significance.

Moving now to abnormality of risk, the argument plays a role in discussions regarding French strict liability either to support the introduction of a category of liability for dangerous activities,[337] or to explain contexts such as liability for defective products.[338] While the notion of abnormality of risk defies easy definitions[339] and may take on substantially different meanings across and within jurisdictions, French caselaw and academic writings embrace a particularly broad notion of abnormality of risk, one which encompasses ultra-hazardous activities, the abnormal position, state or behaviour of a thing,[340] as well as the putting on the market of a product that, being defective, exceeds the risk of harm that society expects and is prepared for.[341] The idea of exposing others to an abnormal risk of harm seems

[335] See Patrice Jourdain, D 1997.265, 267;Viney and Guégan-Lécuyer (n 234) 71–72; Patrice Jourdain, RTD civ 1991.541; CA Limoges 23.3.1989 (*Blieck*), RCA November 1989, comm no 361.

[336] In Viney's example, these are victim protection, loss-spreading, and accident avoidance.

[337] eg Anne Guégan-Lécuyer, 'Vers un nouveau fait générateur de responsabilité civile: les activités dangereuses (Commentaire de l'article 1362 de l'Avant-projet Catala)' in *Etudes offertes à Geneviève Viney* (LGDJ 2008) 499. The adoption of a specific liability for dangerous activities was included in two reform projects of French law: see Avant-projet Catala, article 1362; Avant-projet Terré, article 23. However, no particular urgency was felt for the adoption of this liability in light of the fact that the existing law, particularly in the form of liability for the deeds of things, is flexible and strict enough to ensure that those injured in accidents caused by dangerous things or activities receive adequate financial protection: see Avant-projet Catala, fn 40 at 159 regarding article 1362 of the *projet*; and also ibid Viney, *Exposé des motifs*, III(5), at 148.

[338] Borghetti (n 225) [616]ff.

[339] ibid [638]–[640].

[340] See Civ (2) 19.3.1980, JCP 1980.IV.216, D 1980.IR.414 note Larroumet.

[341] Borghetti (n 225) [639].

particularly apt to attract or at least to explain the imposition of strict liability.[342] Due to its conceptual breadth, abnormality of risk is used in relation to many contexts of liability and, in keeping with the other risk-based arguments,[343] it is often deployed to achieve some specific goal which, in the French context, often means the compensation of victims.[344] For example, the existence of sources of increased risk of harm pushed the French law of civil liability to move away from the fault paradigm in relation to traffic accidents, first by devising judicially a general regime of strict liability for the deeds of things,[345] and then by enacting legislatively an even stricter special liability: the 'real and violent danger' posed by motor vehicles as well as the growing number of road victims made '[t]he imperative of compensating victims … urgent',[346] a call finally met by the *loi* Badinter in 1985.[347] Finally, while the present work does not focus on public liability,[348] we should note the strict liability

[342] Note, however, that French civil courts are wary of embracing any formal distinction between dangerousness and non-dangerousness that may unduly restrict the scope of liability. The paramount example of this comes from the famous *Jand'heur* litigation in relation to liability for the deeds of things. In that case, the Chambre civile of the Cour de Cassation (Civ 21.2.1927, DP 1927.I.97 note Ripert) sought to confine the operation of former article 1384(1) Cc to things that needed to be guarded in light of their dangerousness; three years later, however, the Chambres réunies (Ch réun 13.2.1930 DP 1930.I.57 note Ripert) omitted any reference to the element of dangerousness, whit the consequence that any distinction between dangerous and non-dangerous things has been expelled from the liability for the deeds of things and not applied in later cases: see Viney (n 199) [634].

[343] See text to nn 311–318, and p 91.

[344] Geneviève Schamps, *La mise en danger: un concept fondateur d'un principe général de responsabilité* (Bruylant/LGDJ 1998) 843ff (mentioning accident avoidance as well but giving far more importance to victim protection); Guégan-Lécuyer (n 234) 501–502 (mentioning loss-spreading, victim protection, and accident avoidance); Jean-Sébastien Borghetti, 'La responsabilité de l'entreprise du fait des activités dangereuses' in *L'entreprise face aux évolutions de la responsabilité civile* (Economica 2012) 59, 60 and 68 (mentioning victim protection).

[345] André Tunc, 'Rapport sur les choses dangereuses et la responsabilité civile en droit français' in *Travaux de l'Association Henri-Capitant: Les choses dangereuses: journées néerlandaises* (Economica 1967) 50, 56.

[346] Viney and Guégan-Lécuyer (n 234) 60–61. See also Tunc (345) 56ff.

[347] On which see text to nn 234–238.

[348] See text to n 17.

of the administration for harms caused through the operation of a dangerous thing or activity.[349] This distinct category of liability recognised by the Conseil d'Etat is based on the notion of abnormality of risk and it applies to a class of things and activities that, in the judgment of the Conseil, qualify as dangerous for the purposes of public liability.[350] This strict liability is justified by the idea that, if an activity undertaken in the interest of the community creates a significant risk of harm to another which then materialises, the interests of the victim should not be sacrificed for the common good but, quite the opposite, the community (through the state) should compensate that person for the loss suffered for the greater good.[351] Although in recent times it may have lost some of its importance,[352] this category of public liability further testifies to the role that abnormality of risk plays in justifying French strict liability and in satisfying the pressing moral imperative of social solidarity.

Insofar as risk-benefit and risk-profit are concerned, the two arguments are used frequently. This may be due to the fact that in the French context both risk-profit and risk-benefit are widely seen as arguments having their roots in a simple ideal of fairness (at times expressed as *justice*, other times as *équité*), suggesting that those who gain from their risk-creating activities should pay for the harm caused. Compared to risk-creation and

[349] Fairgrieve (n 14) 138–142. This liability rule is often traced back to CE 1.8.1919, D 1920.III.1 note Appleton (*Regnault-Desroziers*) (concerning exploding munitions).

[350] François Vincent, 'Responsabilité sans faute' JCl Admin, vol 8, Fasc 824 (2015) [4]–[49]. Stéphanie Hennette-Vauchez, 'Responsabilité sans faute' in Répertoire de la responsabilité de la puissance publique (2017) [140]–[170].

[351] Fairgrieve (n 14) 138 (arguing that the argument from abnormality of risk depends on another, fundamental justification of French public liability, that is the principle of 'equality before public burdens' (*egalité devant les charges publiques*), on which see text to nn 844–848 in the context of our discussion of loss-spreading.

[352] Whittaker (n 98) 121.

abnormality of risk, risk-benefit and risk-profit are deployed selectively depending on the context of liability. In relation to liability for the deeds of things and the liability for animals, risk-benefit is certainly more prominent than risk-profit. This may well be the case because these contexts of liability are not limited to things or animals as sources of economic profit, but include also those used for non-pecuniary purposes (for example, a pet is typically a source of joy, not financial profit). Consistently with this, Savatier notes that the obligation to compensate for the harm caused by the thing or by the animal burdens the party who benefits from them;[353] similarly, more recently Jourdain argues that the benefits the keeper gets from the thing are one of the reasons why she should be designated as the liable party;[354] again, Carbonnier sees the theory of risk-benefit as the one most credited by legal scholars as explaining liability for the actions of animals.[355] By contrast, in relation to other contexts of liability, such as employers' vicarious liability, industrial nuisance, or defective products, it is the risk-profit justification that looms larger. This is because activities in these contexts involve some economic gain. Therefore, for example in relation to employers' vicarious liability, it is widely thought that as the employer makes a gain from the activity of her employees, she should also bear the risk of harm resulting from that activity.[356] The

[353] René Savatier, *Traité de la responsabilité civile* (2nd edn, LGDJ 1951) vol 1, [337]. At [274], he absorbs risk-profit and risk-benefit in the theory of *risque-créé*, which he presents as involving some benefit or profit for the liable party. Cf ibid [282], where the author emphasises the importance of insurance for the sustainability and fairness of strict liability.

[354] Jourdain (n 311) 96 (juxtaposing risk-benefit with some idea of control (*maîtrise*), accident avoidance, and insurability).

[355] Jean Carbonnier, *Droit civil. Les biens, les obligations* (2nd edn, PUF 2017) [1166] (risk-benefit standing alone) (using the term 'profit', but likely including non-pecuniary benefits).

[356] Marcel Planiol, 'Études sur la responsabilité civile' RCLJ 1909.282, 298–301 (risk-profit standing alone, and seen as 'the effect of an economic law which is both fair and reasonable'); René Demogue, *Traité des obligations en général - Tome V - Sources des obligations* (Rousseau 1925) [882] (risk-profit standing alone); Clothilde Grare, *Recherches sur la cohérence de la responsabilité délictuelle. L'influence des fondements de la responsabilité sur la reparation* (Dalloz 2005) [33]–[35] (giving credit to risk-profit), but cf [45]–[48]

distinctive importance of pecuniary gain for the liability of employers is emphasised by Viney, according to whom the element of profit may well recommend a stricter liability rule for employers than for other parties (eg parents) who are legally responsible for the harmful actions of others.[357] The same may hold true in relation to industrial nuisances and defective products, contexts where risk-profit is also sometimes relied upon as a justification for strict liability.[358]

Taking a step back, we can see that the significance in French reasoning of risk-profit and risk-benefit is ambiguous. Sometimes, whether standing alone or featuring in a broader reasoning with other arguments, risk-profit and risk-benefit act as key justifications for strict liability.[359] At other times, though, their combination or juxtaposition with other arguments suggests that they are merely secondary or even make-weight arguments. To give one example, in identifying the rationale of employers' vicarious liability, Jourdain mentions arguments such as risk-profit, accident avoidance, and deep-pockets, but then concludes that

(where she emphasises the importance of loss-spreading for strict liability); Viney (n 199) [788-11], [868] (risk-profit standing alone), but cf [791-1] (juxtaposing accident avoidance with a combination between loss-spreading and victim protection, for the purpose of justifying employers' vicarious liability).

[357] Viney (n 199) [868].

[358] Louis Josserand, *De l'esprit des droits et de leur relativité: théorie dite de l'abus des droits* (2nd edn, Dalloz 1939) [16] (seeing risk-profit as key in the context of nuisance, but also relying on an argument based on nonreciprocity of risk); Henri Mazeaud, Léon Mazeaud, and André Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (6th edn, Montchrestien 1965) [621-2] (discussing risk-profit along with enterprise spreading and victim protection). In relation to defective products, see eg Borghetti (n 225) [627]–[628] (combining risk-profit with abnormality of risk and cost internalisation).

[359] Planiol (n 356) 298–301; Demogue (n 356) [882] (both on employer's vicarious liability); Josserand (n 358) [16] (nuisance); Carbonnier (n 355) [1166] (on liability for animals); Borghetti (n 225) [627]ff (product liability); Fabre-Magnan (n 219) [397]–[400] (juxtaposing risk-profit/risk-benefit with an argument from 'authority' (*autorité*) to justify the employer's vicarious liability). See also John Bell, 'The Reform of Delict in the Civil Code and Liability in Administrative Law' in Borghetti and Whittaker (n 178) 425, 426, 428, 434, 437, 439–440 (seeing risk, and more specifically gain-based theories of risk, as foundational to strict liability in French tort law).

the fundamental point is that employers are well suited to take out liability insurance.[360] One explanation for the limited importance that risk-benefit and risk-profit sometimes show may be that other arguments are more suited to matching the socialisation of losses which has characterised the general evolution of French tort law. Nevertheless, even if of secondary or make-weight significance, gain-based theories of risk keep featuring in legal reasoning on strict liability because they carry the prestige of their original proponents, Saleilles and Josserand, and therefore make strict liability (and its expansion) more attractive and familiar by linking it to the power of tradition. In sum, in an environment where the value of social solidarity and a sentiment of compassion for the victims of accidents are prominent, the risk-benefit and risk-profit arguments are, at least sometimes, exploited to 'help' other arguments justify the imposition of strict liability in the pursuit of goals such as the protection of victims and the spreading of losses.

3.2.3. Risk in Italian Law: the Varied Importance of its Permutations

The notion of risk (*rischio*) has become central to Italian tort law thanks to the seminal work of a few distinguished legal scholars in the 1960s,[361] as well as to the role played by courts and academics in interpreting certain provisions of the *Codice civile* as imposing liability on the basis of risk. As in French law, all risk-based arguments except nonreciprocity of risk feature in Italian reasoning. It will be seen, however, that the various arguments assume in Italy a different significance than in France.

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[360] Jourdain (n 311) 105. See also Jacques Ghestin, JCP 1991.II.169, n.21673, [7], [12]; Mireille Marteau-Petit, 'La dualité des critères de mise en œuvre de la responsabilité du fait d'autrui' RRJ 2002.1.255, [20]; Grare (n 356) [33]–[35], but cf [45]–[48]; Alain Bénabent, *Droit des obligations* (17th edn, LGDJ 2018) [557].

[361] Most notably Trimarchi (n 289); Comporti (n 253).

To begin with, there is a stark difference in the patterns of use and importance of risk-creation between the two legal systems. As already seen,[362] risk-creation occasionally features as a stand-alone justification for strict liability in France and it still enjoys currency and persuasiveness among French lawyers due at least in part to the prestige of figures such as Josserand and Saleilles. This sort of 'tribute to tradition' has not taken place in Italy for the simple reason that the mere creation of risk has never attracted scholarly support as a plausible justification for strict liability in the first place. Indeed, generally risk-creation is considered too vague and therefore unworkable: the argument goes that since every human activity creates a risk of harm to others, reliance on this risk-based justification does not allow any differentiation between human activities and, consequently, it would lead to the imposition of strict liability in all cases where a loss is suffered.[363]

This scepticism does not mean, though, that the creation of risk does not feature at all in Italian reasoning. In keeping with a pattern identified in France,[364] Italian legal scholars sometimes refer to the idea of 'created risk' (*rischio creato*) to signify the mere possibility of occurrence of some harm, while relying on other arguments to justify strict liability. For example, Salvi premises liability for traffic accidents on the 'statistical significance of the risk created by putting vehicles in motion',[365] but then identifies the rationale of this liability

[362] See text to nn 329–331.

[363] Comporti (n 253) 166–168. See also Trimarchi (n 289) 92; id (n 310) 277, arguing that many human activities which create a risk of harm to others are justified by their social utility.

[364] See text to nn 334–336.

[365] Cesare Salvi, *La responsabilità civile* (2nd edn, Giuffrè 2005) 207.

in the need to ensure protection to the victims of traffic accidents.[366] In examples like this, the impression is that the creation of a risk of harm does no real justificatory work.

Other times, the creation of risk is employed as a starting-point within more complex theories seeking to justify strict liability. An important example of this may be found in the work of Trimarchi who, in 1961, put forward an interpretive and normative economic theory of strict liability which he himself presented as premised on risk.[367] According to Trimarchi's theory, a defendant should be strictly liable if her activity is driven by economic decisions or decisions involving a cost-benefit analysis, if this activity is characterised by a minimum of continuity and organisation,[368] and if the characteristic risk that such activity creates can be treated as one of its costs of operation and therefore be absorbed through loss-spreading mechanisms.[369] These conditions reflect a very specific understanding of risk, as defendants are to be liable only where the risk they create is foreseeable, calculable, and spreadable.[370] If all these conditions are satisfied, strict liability can promote both accident avoidance and an efficient allocation of resources.[371] In sum, Trimarchi restricts the type of risk which can trigger strict liability so tightly that the mere creation of a risk of harm cannot itself justify that very liability. In its heavily qualified form, Trimarchi's notion of risk is combined with

[366] ibid 210.

[367] Trimarchi (n 289) referred many times to 'created risk' (*rischio creato*) when discussing strict liability in Italian tort law: see ibid 43, 51, 52, 161, 206, 208, 214, 218, 220, 226, 227, 268, 277, 307, 315, 320, 358, 371.

[368] Trimarchi (n 310) 285.

[369] ibid 280, 359–360.

[370] Trimarchi (n 310) 357–360.

[371] On the role of accident avoidance and resource allocation in Trimarchi's theory, see text to n 590–594.

the goals of accident avoidance and efficient resource allocation, all acting as key justifications for strict liability for *rischio di impresa* ('enterprise risk').

The context where *rischio di impresa* has attracted the widest support among courts and scholars is employers' vicarious liability.[372] While the courts confine themselves to mentioning the theory of *rischio di impresa* without any meaningful elaboration on its constitutive elements or goals,[373] legal scholars often use this theory as an 'empty box' which they fill with different and more elaborate arguments. For example, some emphasise the avoidance of accidents and the availability of insurance coverage,[374] others focus on resource allocation,[375] and still others highlight the defendant's ability to treat tort liability as a cost of operation of her activity and to absorb and spread it through price adjustments and liability insurance.[376] In all these discussions, the notion of risk is bent one way and then another to serve a variety of goals, with the creation of risk as such receiving little or no emphasis. This is hardly surprising, for Trimarchi himself criticises risk-creation as unhelpful when trying to make sense of key aspects of employers' vicarious liability.[377] Overall, the idea of created risk drowns in a sea of other justifications so that what is put forward as the theory of *responsabilità per rischio* is not really based on risk-creation, but rather on a combination

[372] For a criticism of the theory of *rischio di impresa* with specific regard to employers' liability, see Renato Scognamiglio, 'Responsabilità per fatto altrui' Noviss Dig It (UTET 1968) vol XV, 691, 699–700.

[373] eg Civ (III) 27.3.1987 n.2994; Civ (III) 20.6.2001 n.8381; Civ (III) 6.3.2008 n.6033.

[374] See Monateri (n 179) 979 (perhaps adding a resource allocation argument as well).

[375] Giovanna Visintini, *Trattato breve della responsabilità civile – Fatti illeciti. Inadempimento. Danno risarcibile* (3rd edn, Cedam 2005) 753 (juxtaposing resource allocation with a combination between deep-pockets and victim protection); Mauro Sella, *La responsabilità civile nei nuovi orientamenti giurisprudenziali* (Giuffrè 2007) 1149, 1150–1151 (combining resource allocation with accident avoidance and insurability).

[376] Salvi (n 365) 192–193 (juxtaposing this argument with victim protection and risk-benefit).

[377] Trimarchi (n 289) 92. The same point is made in id (n 310) 293.

or juxtaposition of different justifications. These are accident avoidance, loss-spreading, efficient resource allocation, or victim protection, with different scholars placing emphasis on one or more of these justifications according to their own normative or interpretive views of strict liability. Paradoxically, then, what is presented as a theory of *responsabilità per rischio* puts forward justification(s) for strict liability that lie elsewhere than in risk-creation.

An interesting contrast in the status of risk-creation between the Italian and French systems therefore emerges. In France, this argument comes in three different shades. Sometimes, though not frequently, it acts as a stand-alone and key reason for imposing strict liability.[378] At other times, it is either combined or juxtaposed with other justifications within a broader reasoning,[379] but its conceptual distinctiveness from these other justifications is preserved and it remains a recognisable argument used to render the imposition of strict liability more attractive.[380] On yet other occasions, it again forms part of a broader reasoning but this time it merely stands for the possibility of occurrence of some harm, therefore dissolving into other justifications without retaining any conceptual independence and justificatory value.[381] In keeping with this last pattern, Italian legal scholars occasionally refer to the idea of created risk to signify merely that there is a possibility of some harm, in which case the creation of risk is not a justification for strict liability at all. At other times, the notion of risk is heavily qualified and combined with other justifications, with the result that again the mere creation of a risk of harm is not of itself a reason for imposing strict

[378] Text to nn 329–331.

[379] Text to nn 332–333.

[380] One of the best examples is provided by Jourdain (n 311) 30, where the emphasis on risk-creation is clear from the use of italicised words.

[381] Text to nn 334–336.

liability (as in Trimarchi's theory). This is all consistent with the widespread rejection that risk-creation faces in the Italian context, where it is heavily criticised on grounds of vagueness and unworkability.[382]

However, other risk-based arguments, such as the argument from abnormality of risk, appear more significant as justifications for strict liability in the Italian context. In contrast with the French *Code civil*, the Italian *Codice civile* expressly deals with harm caused by abnormal risks. Indeed, as already explained,[383] article 2050 Cod civ imposes liability for harm caused by the operation of dangerous activities, with dangerousness (ie abnormality of risk) being an express condition of liability. Furthermore, Italian courts consider motoring a dangerous activity and, in their view, it is this dangerousness which links the four rules contained in article 2054 Cod civ on liability for traffic accidents.[384] Besides featuring in the positive law, the notion of dangerousness has received considerable attention in Italian legal scholarship. For example, Comporti put forward in 1964 an influential theory of strict liability based on 'exposure to danger' (*esposizione al pericolo*) to explain and justify strict liability in Italian tort law.[385] For Comporti, danger means a 'considerable potential for harm' and is to be inferred from the high frequency of accidents in a given period of time as well as from the magnitude/severity of accidents regardless of the frequency factor.[386] In his view, the party who carries on dangerous activities or otherwise creates situations involving a high

[382] See text to n 363.

[383] See text to 254–263.

[384] Civ sez un 29.4.2015 n.8620, [3.1]–[3.2].

[385] Comporti (n 253).

[386] ibid 173.

probability of harm must be answerable for all losses caused to others by such activity or situation.[387]

In light of all this, it is not surprising to find abnormality of risk surfacing in Italian judicial decisions and academic writings which seek to justify or explain the imposition of strict liability especially—but not only—in relation to dangerous activities under article 2050 and traffic accidents under article 2054 Cod civ.[388] As in France,[389] the typical pattern is that abnormality of risk forms part of a broader reasoning which supports or explains strict liability in the furtherance of some particular goal. For example, Comporti argues that 'the need to protect third parties … constitutes the rationale for the rules of strict liability … : he who creates and keeps sources of danger to the community, is equally obliged to compensate losses, regardless of any fault.'[390] Similarly, Sica observes that the rationale of articles 2050–2054 Cod civ may be 'intensifying the protection of victims in light of the particular dangerousness … of the situations to which these provisions refer'.[391] These examples, to which others could be added,[392] show that, in keeping with the French attitude, there is in the Italian reasoning a strong connection between abnormality of risk as a reason for

[387] ibid 175.

[388] Comporti (n 253) 177 (on dangerous activities). On traffic accidents, see: Civ (III) 2.3.1975 n.577, GI 1975.I.1.750, 774; Salvatore Sica, *Circolazione stradale e responsabilità: l'esperienza francese e italiana* (ESI 1990) 158–159, 193; Carlo G Terranova, 'Responsabilità da circolazione di veicoli' Dig disc priv (UTET 1998) vol XVII, 89, 90, 92, 101. Abnormality of risk is also seen as a reason for imposing strict liability in relation to other contexts of liability: see Comporti (n 253); id (n 287) 302–304 (deeds of things), 355–356 (animals), 399 (ruinous buildings); Sica, ibid 162 (dangerous activities, deeds of things, animals, ruinous buildings; traffic accidents).

[389] See text to n 344.

[390] Comporti (n 253) 176 (therefore combining abnormality of risk with victim protection).

[391] Sica (n 388) 162.

[392] See the references mentioned in n 388.

imposing strict liability and the protection of victims as the ultimate goal which this liability pursues.

However, abnormality of risk can also be used to accomplish different goals, most notably efficient accident avoidance, as is the case with the theories that engage with economic analysis. For example, in relation to dangerous activities, several Italian scholars conclude that strict liability is desirable because as between the operator of a dangerous activity and its potential victim, it is the former who has the technological expertise to reduce the accidents caused by that activity;[393] others argue that, since by definition dangerous activities entail a high risk of harm, strict liability is the best option because it would induce defendants to limit the intensity of their activity and therefore reduce efficiently the number of accidents.[394] In these economic elaborations, however, the link between abnormality of risk and strict liability seems more tenuous than in reasoning pursuing victim protection. In the latter, the creation of a high risk of harm triggers liability as soon as that risk has materialised to the detriment of the victim, for the occurrence of a loss, typically a personal injury, immediately determines the need for a compensatory response. By contrast, in an economic reasoning, what is crucial is the efficient accident avoidance and an increase of socio-economic welfare, with the consequence that, in every situation—including those involving dangerous activities—strict liability may be rejected in favour of a fault-based rule

[393] Pier Giuseppe Monateri, 'Responsabilità civile' Dig Disc Priv 1998.1, 10; Robert Cooter, Ugo Mattei, Pier Giuseppe Monateri, Roberto Pardolesi, and Thomas Ulen, *Il mercato delle regole – Analisi economica del diritto civile – I. Fondamenti* (Il Mulino 2006) 218.

[394] Enrico Baffi, 'Responsabilità "aggravata". Un'analisi giuseconomica' DR 2011.4.345, text accompanying fns 32–33.

if the latter is more conducive to those goals.[395] In other words, abnormality of risk supports strict liability only if and to the extent that it aligns with the ultimate goal of efficient accident avoidance and increased socio-economic welfare, in this way losing much of its independent justificatory weight. This 'utilitarian' use of the argument of abnormality of risk puts the Italian reasoning in stark contrast with the French approach which, as earlier seen, typically links abnormality of risk to the need for victim compensation and finds its main source of inspiration in the value of social solidarity.[396]

Turning to risk-benefit and risk-profit, these are the most recurrent justifications for strict liability in Italian law among the various permutations of risk earlier identified. This may be due to their conceptual simplicity and moral attractiveness, as they are based on the view that it is inherently fair to make those who benefit from their harmful action pay for it.[397] Nevertheless, as we saw in relation to France,[398] these arguments are deployed selectively, depending on the context. First, risk-benefit and risk-profit are not invoked in relation to parental liability either in Italy or in France: as parents do not gain any benefit from the actions of their children, parental strict liability should be either rejected or based on other justifications.[399] Secondly, also similarly to the patterns of use in French law, risk-

[395] For example, in situations of bilateral accident, ie where both defendant and claimant can be expected to take precautions to avoid the accident: see Cooter, Mattei, Monateri, Pardolesi, and Ulen (n 393) 218–220.

[396] See text to nn 344–351.

[397] cf Trimarchi (n 310) 371–372 (criticising the principle *cuius commoda eius et incommoda* on the ground that it can be justified only through 'a generic reference to a shapeless and undifferentiated sentiment of fairness [*equità*]'.

[398] See pp 89–91.

[399] Enrico Carbone, 'La responsabilità aquiliana del genitore tra rischio tipico e colpe fittizie' Riv Dir Civ 2008.1.2.1, 6–7; Maria Luisa Chiarella, 'Minore danneggiante e responsabilità vicaria' DR 2009.10.973, 979–980; Guido Alpa, *La responsabilità civile - Principi* (2nd edn, Giuffrè 2018) 444.

benefit looms larger in situations where the benefit gained by the defendant can be of a non-pecuniary nature (such as in cases of vicarious liability where the defendant is not pursuing an economic interest,[400] liability for the deeds of things,[401] for the actions of animals,[402] for ruinous buildings,[403] and for traffic accidents[404]), whereas risk-profit is widely deployed in the entrepreneurial context of employers' vicarious liability for the harm caused by their employees.[405] Interestingly, though, risk-profit is only rarely mentioned in entrepreneurial contexts relating to defective products and dangerous activities, this marking a significant divergence from the French reasoning.[406] In these areas, in Italy liability is more often

[400] eg De Cupis (n 24) vol II, 162–165 (risk-benefit standing alone, which the author traces back to the value of social solidarity).

[401] eg Farolfi (n 269) 4079 (risk-benefit standing alone); Alpa (n 399) 460–461 (acknowledging the frequent reference to this argument in the caselaw); Civ (III) 19.5.2011 n.11016; Civ (III) 12.5.2017 n.11785, [4].

[402] Giuseppe Branca, 'Sulla responsabilità oggettiva per danni causati da animali' RTDPC 1950.255, 260–261; Walter Ventrella, 'Danno cagionato da animali: fondamento della responsabilità e individuazione dei soggetti responsabili' GC 1978.4.1.741, 741 and 744 (combining risk-benefit with victim protection; Valentina Cardani, 'Il danno cagionato da animali' in Cendon (n 265) 4105, 4108 (risk-benefit standing alone); Alpa (n 399) 467 (risk-benefit standing alone, and deriving from 'social needs'). See also Civ (III) 11.12.2012 n.22632; Civ (III) 9.4.2015 n.7093. Cf Trimarchi's view at n 397.

[403] Giuseppe Branca, 'Responsabilità dell'usufruttuario per rovina di edificio' Foro It 1958.I.1311, 1312–1313 (risk-benefit standing alone); Civ (III) 29.1.1981 n.693, Riv Dir Comm 1982.II.47 note Mario Bessone; Franzoni (n 11) 564 (juxtaposing risk-benefit with abnormality of risk and deep-pockets); Paolo Laghezza, 'Responsabilità per rovina di edificio e uso anomale del bene' DR 2010.10.994, text to fns 5–6, and fn 6 (combining risk-benefit with accident avoidance and resource allocation).

[404] eg Mario Griffey, *La responsabilità civile derivante da circolazione dei veicoli e dei natanti* (Giuffrè 1995) 91 (on liability under article 2054 para 3 Cod civ, combining risk-benefit with victim protection). See also the recent Civ sez un 29.4.2015 n.8620, [3.3] (on liability under article 2054 paras 3–4 Cod civ, risk-benefit standing alone).

[405] See Francesco Messineo, *Manuale di diritto civile e commerciale* (9th edn, Giuffrè 1957) vol V, 579 (juxtaposing risk-profit with deep-pockets); Franzoni (n 11) 762–763, 767–769 (discussing risk-profit with loss-spreading and resource allocation, in juxtaposition with victim protection); J Di Rosa, case note on Civ (III) 9.3.2017 n.6033, in Il Foro italiano, 2017.6.1.1986, 1987 (risk-profit standing alone).

[406] cf for dangerous activities Civ (III) 23.1.1962 n.95, FI 1962.I.213; Guido Alpa, 'Attività pericolosa e responsabilità dell'ENEL. Verso la erosione dei privilegi della Pubblica Amministrazione?' GC 1982.4.1.919, 920. For defective products, see Trib Bari 12.12.2013, DR 2014.11.1070, 1071.

justified by relying on different arguments such as accident avoidance, loss-spreading, or victim protection.

What, therefore, is the overall significance of gain-based theories of risk in relation to Italian strict liability? In discussing the French position, it was said that both risk-profit and risk-benefit act sometimes as key justifications for strict liability in a variety of contexts, and at other times as secondary or even make-weight arguments.[407] In Italy, risk-benefit undoubtedly acts as the leading justification for strict liability of owners or users of animals,[408] but in other contexts the role of the two gain-based theories of risk is more ambiguous. At times, whether standing alone or discussed with other arguments, risk-benefit and risk-profit act as key justifications in the mind of the relevant judge or scholar.[409] However, in other instances where they are either juxtaposed or combined with a variety of arguments, it is difficult to apprehend their exact significance in the reasoning put forward,[410] and they may at least sometimes look like either secondary or make-weight arguments.[411] Moreover, the fact that risk-benefit and risk-profit are often discussed together with

[407] See pp 91–92.

[408] See the references provided in n 402.

[409] eg Francesco Carnelutti, 'La responsabilità civile per gli accidenti d'automobile' Riv Dir Comm 1908.I.401, 402 (on traffic accidents); Branca (n 403) (on ruinous buildings); Civ (III) 23.1.1962 n.95, FI 1962.I.213 (on dangerous activities); De Cupis (n 24) 162–165 (on employers' vicarious liability); Trib Bari 12.12.2013 (on product liability).

[410] eg Lorena Fanelli, 'Fondo stradale dissestato per lavori ed esercizio di attività pericolosa: caratteri e limiti' DR 2001.10.925, text accompanying fns 4–7 (on dangerous activities, at first focusing on risk-benefit but then emphasising victim protection and accident avoidance); Giovanni B Ferri, 'Garanzia, rischio e responsabilità oggettiva' Riv Dir Comm 2005.10–12.I.867, 870 (on the strict liability of firms, combining risk-profit with the theory of *rischio di impresa* in such a way that it is difficult to understand fully their respective justificatory role).

[411] Salvi (n 365) 192–193 (on employers' vicarious liability, mentioning very briefly risk-benefit after emphasising the ability of defendants to spread losses); Franzoni (n 11) 762–763 and 767 (on employers' vicarious liability, mentioning risk-profit but putting more emphasis on loss-spreading, resource allocation, and victim protection).

justifications such as accident avoidance and victim protection,[412] which are abundantly relied upon in most contexts of liability,[413] suggests that the significance of these risk-based arguments is ambiguous and therefore should not be exaggerated, in keeping with the position in France.[414] Finally, a cautious approach in estimating the significance of risk-benefit and risk-profit in Italy is also warranted in light of the various criticisms levelled against the two arguments, both in general terms and with reference to specific contexts of liability.[415] In sum, while the conspicuous reliance of Italian legal actors—especially scholars—on risk-benefit and risk-profit shows their attachment to an ideal of fairness that links gains to liabilities, the way these arguments are discussed, the criticisms they attract, and the concomitant presence of competing rationales suggest that the key justifications behind Italian strict liabilities often lie elsewhere.

3.2.4. Risk in the United States: All Five Permutations at Play

In keeping with the French and Italian approaches, risk features conspicuously in American tort reasoning as an argument for the imposition of strict liability. As will be seen, American

[412] See eg Fanelli (n 410) text accompanying fns 4–7 (juxtaposing risk-benefit with victim protection and accident avoidance); Salvi (n 365) 193 (on employers' vicarious liability, juxtaposing risk-benefit with victim protection); Civ (III) 19.5.2011 n.11016 (on liability for the deeds of things, combining risk-benefit with accident avoidance); Giovanni Pugliese, 'Responsabilità per rovina di edificio in usufrutto' Temi 1957.471, 473–474 (on ruinous buildings, discussing risk-benefit with accident avoidance).

[413] See section 3.3.3. (accident avoidance) and section 3.6.3. (victim protection).

[414] See pp 91–92.

[415] In relation to parental liability, see n 399. In relation to liability of employers, see Bianca (n 21) 737 at fn 13; Civ (III) 22.5.2001 n.6970. In relation to liability for dangerous activities, see Alpa (n 399) 459–460. In relation to liability for the deeds of things, see Monateri (n 179) 1041. In relation to liability for ruinous buildings, see Vincenzo Metafora, 'Rovina di edificio per crollo di una grotta artificiale (e naturale): il problema della responsabilità del proprietario ex artt. 2053 (e 2051 c.c.)' Diritto e giurisprudenza 1988.1-4.819, 826. For a general criticism, see Comporti (n 253) 152–156; Castronovo (n 265) 28.

legal actors deploy all the permutations of risk-based arguments, from risk-creation and risk-benefit/profit to abnormality of risk and nonreciprocity of risk. Each of these variations has its own distinctive significance, with important similarities and differences as compared to the French and Italian approaches.

To begin with, risk-creation is occasionally relied on by courts and scholars to justify the imposition of strict liability. For example, in the context of abnormally dangerous activities, in a case involving death caused by the explosion of a gas tank, the Supreme Court of Oregon holds that one 'factor which enters the picture is the feeling that where one of two innocent persons must suffer, the loss should fall upon the one who created the risk causing the harm'.[416] Similarly, in relation to liability for defective products, there are cases where it has been held that one of the reasons for imposing strict liability is the creation of a risk of harm by placing defective products on the market.[417] The risk-creation argument appears in the reasoning of legal scholars too. For example, Keeton argues that '[i]t may be that most strict liabilities now recognized are illustrations of a single basis of liability—a principle that each activity is accountable for the distinctive risks it creates'.[418] In all these examples, the argument of risk-creation may either stand alone, be combined, or juxtaposed with other justifications, but it is always treated as conceptually distinct from the others and, as part of

[416] *McLane v Northwest Natural Gas*, 467 P.2d 635, 638 (Or.1970) (mentioning also abnormality of risk and nonreciprocal risk). See also *Bierman v City of New York*, 60 Misc.2d 497 (N.Y.1969) 499 (juxtaposing risk-creation with loss-spreading and accident avoidance (ibid 498–499)).

[417] *Kemp v Miller*, 453 N.W.2d 872, 879 (Wis.1990) (juxtaposing risk-creation with risk-profit and accident avoidance); *Glassey v Continental Ins Co*, 500 N.W.2d 295, 302 (Wis.1993) (combining risk-creation with loss-spreading and accident avoidance); *Green v Smith & Nephew AHP, Inc*, 629 N.W.2d 727, 750 (Wis.2001) (juxtaposing risk-creation with risk-profit, loss-spreading, and accident avoidance).

[418] Robert E Keeton, *Venturing to Do Justice: Reforming Private Law* (HUP 1969) 162.

the reasoning in which it is included, it acts as a key justification for the imposition of strict liability.

At other times, however, the creation of risk merely acts as a starting-point for more complex theories, and it is doubtful whether it works as a justification for strict liability at all. One example of this is provided by Keating's theory of enterprise liability, which suggests that firms should be strictly liable for their characteristic risks of harm.[419] In so holding, Keating often refers to the creation of risk but, similarly to Trimarchi with his *rischio di impresa* in the Italian context, he confines strict liability to conduct and activities in relation to which the relevant risk of harm can be predicted, priced into the operation of the activity, and therefore spread broadly.[420] What fuels Keating's theory is not the creation of risk as such, but the belief that it is fair to spread the costs of accidents caused by firms in a way that achieves a proportionate sharing of burdens and benefits across society.[421] In this and other similar cases, where reference to risk-creating activities merely signifies the possibility of some harm in the future, the mere creation of a risk of harm does very little if no work at all as a justification for strict liability.[422] Indeed, in keeping with patterns of

[419] Gregory C Keating, 'The Theory of Enterprise Liability and Common Law Strict Liability' (2001) 54 Vand L Rev 1285.

[420] See Gregory C Keating, 'The Idea of Fairness in the Law of Enterprise Liability' (1997) 95 Mich L Rev 1266.

[421] This result is achieved by placing the financial burdens of accidents on those who benefitted from the risk-imposing activity, namely the firm operating that activity as well as the users and consumers of the product or service provided by the firm. Insofar as the position of firms is concerned, it may be argued that Keating's theory overlaps with the risk-profit argument.

[422] Besides Keating, see eg Young B Smith, 'Frolic and Detour' (1923) 23 Colum L Rev 444, 456–460 (discussing loss-spreading) (but cf id, 'Frolic and Detour' (1923) 23 Colum L Rev 716, 725ff, where he repeatedly emphasises the creation of risk of injury in the context of *respondeat superior*); Mark Geistfeld, 'Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?' (1997) 45 UCLA L Rev 611, 658–660 (on abnormally dangerous activities, emphasising accident avoidance); Fowler V Harper, Fleming James Jr, and Oscar S Gray, *The Law of Torts* (2nd edn, Little, Brown and Company 1986)

reasoning that feature also in the French and Italian contexts,[423] the real justificatory work is done by other arguments such as loss-spreading, accident avoidance, or victim protection, with the creation of risk dissolving into them.[424] Finally, there are cases where the creation of risk is mentioned but its significance remains ambiguous because of a lack of clarity in the relevant reasoning: here too, though, justifications other than risk-creation seem to take over, so that it is difficult to understand whether risk-creation retains any conceptual distinctiveness and separate justificatory weight.[425] To all this, two further considerations should be added. First, the development in American legal thought of complex economic and moral theories has led some legal scholars to reject, either implicitly or explicitly, risk-creation on the ground of its moral indefensibility or practical unworkability.[426] Secondly, as will be seen below, the greater reliance of American scholars and courts on the qualified variants of risk-creation (nonreciprocity of risk and abnormality of risk) and on the gain-based theories of risk (risk-profit and risk-benefit) provides a strong indication that most American legal actors do not see risk-creation as a viable justification for strict liability.

Overall, therefore, it appears that the theory of created risk has limited significance in American legal reasoning. It is true that some scholars and courts treat this argument as a

vol 5, 20–21 (emphasising accident avoidance, victim protection and loss-spreading, in the context of employers' vicarious liability).

[423] See text to nn 334–336 (France) and text following n 381 (Italy).

[424] See n 422.

[425] See Jed Handelsman Shugerman, 'The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age' (2000) 110 Yale LJ 333, 374 (combining risk-creation with accident avoidance and perhaps some notion of individual responsibility; this cluster of justifications is in turn juxtaposed with abnormality of risk, deep-pockets, and again accident avoidance (ibid)).

[426] eg Ernest J Weinrib, 'Right and Advantage in Private Law' (1989) 10 Cardozo L Rev 1283, 1305; Stephen Perry, 'The Impossibility of General Strict Liability' (1988) 1 Can JL Juris 147, 154–158.

key justification for the imposition of strict liability. In this, the American position resembles the French one, with some scholars (and in United States judges) seeing the mere creation of risk as a plausible justification for strict liability. But compared to the French system, this is extremely rare given the enormous volume of existing academic writing and caselaw in the United States. The result is that the argument's impact is much weaker in the American context. Furthermore, as in Italy, in the United States risk-creation does not enjoy the prestige which surrounds the argument in France from the time of Saleilles and Josserand. And indeed, in keeping with the Italian approach, in many examples of American reasoning the creation of risk dissolves into other arguments and loses any distinctiveness as a justification for strict liability. Relatedly, again resembling the Italian position,[427] risk-creation attracts fierce criticisms and its plausibility is doubted on grounds of immorality and unworkability. For all these reasons, the argument is of modest significance in the American context, especially when compared to France (and to England, as will be seen below).

In contrast with the theory of created risk, other risk-based arguments have gained greater acceptance in the United States.

Insofar as nonreciprocity of risk is concerned, this argument was elaborated in detail by George Fletcher in 1970. According to Fletcher, 'a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks'.[428] In Fletcher's view, which is rooted in concerns of individual and corrective justice,

[427] See text to 363.

[428] Fletcher (n 308) 542.

the need to ensure everyone's right to security from harm requires strict liability whenever the defendant imposes on the claimant a nonreciprocal risk of harm,[429] as is typically the case with abnormally dangerous activities, wild animals, ground damage caused by crashing airplanes, and certain types of nuisance.[430] Fletcher's theory has proved influential in American legal reasoning and it often surfaces in discussions seeking to justify the adoption of strict liability in a variety of contexts. For example, in relation to liability for abnormally dangerous activities, courts and especially legal scholars see the defendant's imposition of a nonreciprocal risk of harm on the claimant as a justification for strict liability, and typically juxtapose or combine it with arguments such as risk-creation, abnormality of risk, risk-profit/benefit, accident avoidance, or loss-spreading.[431] Similarly, in the context of liability for harm caused by wild animals, the Third Restatement LPEH considers nonreciprocity of risk as an argument supporting strict liability, and juxtaposes it to abnormality of risk and accident avoidance.[432] Again, in the context of liability for defective products, nonreciprocity of risk is occasionally mentioned as a possible justification for the imposition of strict liability.[433] In sum, in striking contrast with the French and Italian systems where

[429] ibid 569, 550–551.

[430] ibid 544, 547–548.

[431] *McLane* (n 416) 638 (combining nonreciprocal risk with abnormality of risk, in turn juxtaposed with risk-creation); Second Restatement, § 522 comment *a* (combining nonreciprocal risk with risk-benefit); Virginia Nolan and Edmund Ursin, 'The Revitalization of Hazardous Activity Strict Liability' (1986-1987) 65 NCL Rev 257, 290–293 (grouping nonreciprocity of risk with risk-profit under a fairness umbrella and then juxtaposing them with accident avoidance and loss-spreading); Goldberg and Zipursky (n 116) 763 (combining nonreciprocity of risk with risk-benefit and abnormality of risk, on grounds of fairness in the distribution of losses).

[432] Third Restatement LPEH, § 22 comment *d* and the Reporters' Note to that comment (expressly referring to Fletcher's work).

[433] Dan B Dobbs, Paul T Hayden, and Ellen M Bublick, *Torts and Compensation – Personal Accountability and Social Responsibility for Injury* (8th edn, West Academic Publishing 2017) 748.

nonreciprocity of risk does not attract any meaningful attention, Fletcher's theory has had considerable influence in the United States. This does not mean, of course, that the argument has not been criticised and on a number of grounds, for example that it would be premised on morally shaky foundations, that it would lead to economic inefficiencies, or that it would be theoretically inconclusive or practically unworkable.[434] Although these criticisms may have eroded the credibility of nonreciprocity of risk as a justification for strict liability, the argument still enjoys considerable currency in American legal reasoning and it is often used, at least in relation to liability for abnormally dangerous activities and liability for wild animals, as a key justification for their imposition.

Turning now to abnormality of risk, this argument recurs in a variety of contexts of strict liability and shows remarkable flexibility as a justification for strict liability, being employed to serve several different purposes. Unsurprisingly, the context where abnormality of risk has gained wider currency is liability for abnormally dangerous activities, for it constitutes a formal requirement for the application of the doctrine.[435] In this context, many courts and legal scholars see the abnormal character of the risk of harm created by the defendant's activity as a reason for imposing strict liability. As in France and even more in Italy,[436] abnormality of risk is typically either combined or juxtaposed with other arguments and used for the achievement of a variety of goals. For example, in their famous treatise, Harper and James argue that the harm caused by certain activities (eg blasting) 'is of such a

[434] eg Richard A Posner, 'Strict Liability: a Comment' (1973) 2 J Legal Stud 205, 215–217; Jules L Coleman, 'Justice and Reciprocity in Tort Theory' (1975) 14 W Ontario L Rev 105; Stephen R Perry, 'The Moral Foundations of Tort Law' (1992) 77 Iowa L Rev 449, 469–472 (cf id (n 431) 114–115).

[435] See Second Restatement § 520 and Third Restatement LPEH § 20.

[436] Text to nn 344–351 (France) and nn 390–396 (Italy).

serious nature that sound social policy demands that the actor assume the risk',[437] here that 'sound social policy' being loss-spreading.[438] Another example can be found in *Cities Service Co v State*, where the District Court of Appeal of Florida observes that, given the 'still many hazardous activities' in society, 'it is too much to ask an innocent neighbor to bear the burden thrust upon him as a consequence of an abnormal use of the land next door',[439] thus showing a concern for victim protection. These instances of reasoning, to which many more could be added,[440] show that the argument of abnormality of risk is intended to support goals such as the spreading of losses and the compensation of victims. The strong connection between abnormality of risk and victim protection or loss-spreading characterises the French and Italian contexts too, highlighting a common trait among these three jurisdictions.[441] As in Italy, however, abnormality of risk can feature in reasoning seeking to promote primarily other goals, such as the avoidance of accidents or the increase of socio-economic welfare.[442] For example, Shavell notes that strict liability is more advantageous than negligence in relation to high-risk activities because the former 'will tend

[437] Fowler V Harper and Fleming James Jr, *The Law of Torts* (Little, Brown and Company 1956) vol 2, 814.

[438] ibid 794–795 (drawing on Fleming James Jr, 'Accident Liability: Some Wartime Developments' (1946) 55 Yale LJ 365).

[439] 312 So.2d 799, 801 (Fla.App.1975).

[440] eg *Chavez v Southern Pacific Transportation*, 413 F Supp 1203, 1211 (E.D.Cal.1976) (combining abnormality of risk with loss-spreading, which is the key rationale of strict liability and which in turn is combined with other arguments); *Yukon* (n 124) 1212 (juxtaposing abnormality of risk with risk-profit). See also Jon G Anderson, 'The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?' (1978) Ariz St LJ 99, 135 (combining abnormality of risk with risk-profit and risk-benefit, with a view to compensating victims) (note the author's scepticism about the use of loss-spreading in judicial reasoning, ibid fn 147).

[441] See text to nn 344–351 (France) and nn 390–392 (Italy).

[442] To be sure, there are also instances of reasoning that aim at both accident avoidance and victim protection (the latter typically through loss-spreading): see *Dyer* (n 123) [20], [31].

to reduce in a desirable way participation in these activities' and therefore reduce the risk of accidents.[443] To this, Posner adds that strict liability may be preferable in cases of abnormal risk of harm because of potentially lower litigation costs.[444] Therefore, in keeping with the Italian approach, American legal economists emphasise goals such as accident avoidance and socio-economic welfare as reasons for imposing strict liability in cases of abnormal risk of harm. As already noted for Italy,[445] the move from abnormality of risk to the imposition of strict liability is immediate to a reasoning aiming at victim protection, for the materialisation of that abnormal risk demands compensation without further ado. By contrast, whenever the goal is socio-economic welfare or efficient accident avoidance, strict liability is constantly compared to negligence in terms of their respective costs to society and therefore rejected if it proves less efficient,[446] whether or not an abnormal risk of harm is involved. In other words, in economic reasoning abnormality of risk loses some of its justificatory force because it leads to the imposition of strict liability only if such imposition is more conducive to efficient results than competing standards of liability.

Finally, besides liability for abnormally dangerous activities, abnormality of risk features in discussions concerning other contexts as well. For example, in relation to liability for harm caused by wild animals, the high risk of harm involved in owning or possessing

[443] Steven Shavell, *Economic Analysis of Accident Law* (HUP 1987) 31. See also id, 'The Mistaken Restriction of Strict Liability to Uncommon Activities' (2018) 10 Journal of Legal Analysis 1, 3 (arguing that the 'risk-reducing virtues of strict liability furnish a justification for the dangerousness requirement that courts apply').

[444] Richard A Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 207–208 (while casting doubt on the compensatory function of tort law and, therefore, on any victim protection argument in favour of strict liability (ibid 208–209)).

[445] See text preceding and following n 395.

[446] Shavell (n 115); Posner (n 444) 205–210.

them is often put forward as one of the key reasons for imposing strict liability.[447] The argument is also used occasionally in the context of liability for defective products by pointing to the extraordinary risks of harm involved in such products,[448] although in this area other arguments are far more significant.[449]

Overall, abnormality of risk constitutes an important justification for the imposition of strict liability, particularly in the area of abnormally dangerous activities, where it is typically subservient to a variety of goals such as, most notably, victim protection, loss-spreading, or accident avoidance.

As regards gain-based theories of risk, they attract prominent support among judges and legal scholars in the United States. Certainly, some criticisms have been levelled at both risk-benefit and risk-profit, for example because they may sound somewhat primitive justifications or because they may be practically unworkable or morally problematic.[450] Nevertheless, the view that imposing a risk of harm on others for one's own gains should trigger liability upon materialisation of that risk is alive and well in the United States. Undoubtedly, the American approach differs from what was observed in relation to France and Italy. In the two civil law systems, strict liability rules apply both to situations where a defendant earns a monetary gain from their conducts or activities and where the defendant's

[447] *Isaacs v Powell*, 267 So.2d 864, 865–866 (Ha.Dist.Ct.App.1972). See also Anderson (n 440) 113; Cantu (n 134) 837–839; Third Restatement LPEH, § 22 comment *d* (juxtaposing abnormality of risk with nonreciprocity of risk and accident avoidance).

[448] James A Henderson Jr, 'Coping with the Time Dimension in Products Liability' (1981) 69 Cal L Rev 919, fn 72.

[449] See section 3.3.2. (accident avoidance) and section 3.5.3. (loss-spreading).

[450] Guido Calabresi, *The Costs of Accidents* (YUP 1970) 5 ('phrases such as "distribute the risk" and "let the party who benefits from a cost bear it" can no longer be accepted as sufficing to determine who ought to bear accident costs'); Perry (n 434) 464–465 and (n 426) 154–158.

conducts or activities entail benefits of non-pecuniary nature (eg liability for the deeds of things, for the actions of animals, or for traffic accidents).[451] Risk-profit is typically used to justify strict liabilities of the first type, and risk-benefit those of the second type.[452] Since in the United States most strict liabilities relate to economic activities and therefore to situations where the defendant is going to reap a monetary benefit from her potentially harmful activities, it is not surprising that risk-profit looms larger than risk-benefit in American reasoning. Indeed, while the latter is only occasionally mentioned, whether in general[453] or in relation to specific contexts such as liability for abnormally dangerous activities,[454] liability for animals,[455] and liability for private nuisance,[456] the former is heavily relied on by judges and scholars alike to justify several strict liabilities. The fairness of requiring defendants who profit from their harmful activities to compensate claimants for the losses suffered is invoked in the context of liability for abnormally dangerous activities,[457] liability

[451] See section 2.2.4. (France) and section 2.2.5. (Italy).

[452] See text to nn 353–358 (France) and nn 399–406 (Italy).

[453] eg Richard A Epstein, *Modern Products Liability Law* (Quorum Books 1980) 27; Gregory C Keating, 'Strict Liability Wrongs' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014) 292, 303, 306.

[454] Anderson (n 440) 135 (combining risk-benefit with risk-profit and abnormality of risk, with a view to compensating victims); Charles Cantu, 'Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet' (2001) 35 Akron L Rev 31, 35–36 (combining risk-benefit with abnormality of risk); Goldberg and Zipursky (n 116) 763 (combining risk-benefit with abnormality of risk and nonreciprocity of risk, on grounds of fairness in the distribution of losses). See also comment *a* to § 522 of the Second Restatement.

[455] Anderson (n 440).

[456] Keating (n 164).

[457] eg *Smith v Lockheed Propulsion Co*, 247 Cal.App.2d 774, 785 (1967) (combining risk-profit with loss-spreading, with a view to compensating victims); *Langan* (n 127) 223 (mentioning the argument in the context of 'an equitable balancing of social interests'); *Yukon* (n 124) 1112 (juxtaposing risk-profit with abnormality of risk and accident avoidance). See also Anderson (n 440) 135 (combining risk-profit with risk-benefit and abnormality of risk, with a view to compensating victims); Nolan and Ursin (n 431) 290–293.

for defective products,[458] employers' vicarious liability,[459] and—albeit more rarely—in the contexts of liability for animals[460] and of liability for nuisance.[461]

While at times risk-profit and risk-benefit stand alone to justify the imposition of strict liability, the most recurrent pattern is for these arguments to be either juxtaposed or combined with other justifications.[462] Sometimes, whether standing alone or being discussed with other arguments, they are key in justifying strict liability.[463] At other times, typically when they are discussed with other justifications by way of juxtaposition or combination, risk-benefit and risk-profit are clearly given some relevance in the context of the particular reasoning, but it is difficult to appreciate their exact justificatory weight.[464] Moreover, in keeping with the French and Italian positions,[465] the fact that both risk-benefit and risk-profit

[458] eg *Suvada v White Motor Co*, 210 N.E.2d 182, 186 (Ill.1965) (juxtaposing risk-profit with accident avoidance and with an argument based on consumers' expectations); *Brooks v Beech Aircraft Corporation*, 902 P.2d 54, 59 (N.M.1995) (juxtaposing risk-profit with loss-spreading, victim protection), 63 (risk-profit stands alone to justify hindsight strict liability). See also Henderson Jr (n 448) fn 72 (though burying risk-profit in a footnote together with abnormality of risk); Dobbs, Hayden, and Bublick (n 433).

[459] eg *Hinman v Westinghouse Electric Company*, 471 P.2d 988 (Cal.1970) (combining risk-profit with victim protection, in juxtaposition with loss-spreading; quoting Prosser, below in this footnote); *Becker v Interstate Properties*, 569 F.2d 1203, 1210–1212 (3rd Cir.1977) (juxtaposing risk-profit with loss-spreading, victim protection, and accident avoidance); Harper and James (n 437) 1373 at fn 12 (juxtaposing risk-profit with loss-spreading among those who benefit from the enterprise, accident avoidance, and victim protection); William L Prosser, *Handbook of the Law of Torts* (3rd edn, West Publishing Co 1964) 471 (combining risk-profit with victim protection, in juxtaposition with loss-spreading and accident avoidance, with the latter being expressly defined a 'makeweight argument').

[460] eg *Isaacs* (n 447) 865–866 (combining risk-profit with abnormality of risk).

[461] See n 456.

[462] See nn 453–460.

[463] Prosser (n 459) 471; Epstein (n 453) 27; *Kemp* (n 417) 879; *Green* (n 417) 750; *Hinman* (n 459) 990; Keating (n 453) 303, 306.

[464] eg Fleming James Jr, 'Products Liability' (1955) 34 Tex L Rev 192, 196, 227; *Luth v Rogers & Babler Constr Co*, 507 P.2d 761, 764 (Ak.1973); *Gossett v Simonson*, 411 P.2d 277, 279 (Or.1966).

[465] See text following n 359 (France) and text to nn 410–414 (Italy).

are often discussed with other and more widespread justifications—most notably, loss-spreading, victim protection, and accident avoidance—suggests that, at least in some cases, the two gain-based theories of risk may well be thrown in the discussion as argumentative 'extras' and therefore represent only make-weight arguments or arguments of secondary importance. In sum, in the American context risk-profit (and to a lesser extent risk-benefit) certainly attract the support of many scholars and courts to justify strict liability in numerous areas. At the same time, however, the overall significance of these arguments is difficult to pinpoint because it is hard to establish the extent to which at least some of the scholars and judges employing them are committed to their underlying logic. Finally, the importance of gain-based theories of risk should not be exaggerated also because, as will be seen in subsequent sections, other justifications for strict liability hold sway over the thinking of courts and especially scholars in the United States.

3.2.5. Risk in English Law: Controversy and Context-Dependence

As in the other three legal systems studied, the notion of risk has played a key role in the development of strict liability in England. Except for nonreciprocity of risk, which has attracted little attention and even less support, all the other permutations of risk feature visibly in the English legal reasoning. As will be seen, the patterns of use and the significance of the various risk-based justifications vary, with interesting points of contact and contrasts to be drawn between England and the other jurisdictions.

First, in the English context, risk-creation has gained increased importance as a justification for strict liability, but its significance remains ambiguous. Occasionally, risk-

creation surfaces in academic writing and judicial opinions relating to defective products,[466] breach of a non-delegable duty,[467] and the rule in *Rylands v Fletcher*,[468] either as a stand-alone justification (though very rarely) or together with other arguments. However, its use in these contexts is very limited and other justifications dominate. In contrast, in the context of vicarious liability the argument attracts considerable support and, in several decisions of the highest courts, the creation of a risk of harm which is inherent in the nature of the defendant's activity is seen both as one of the rationales of vicarious liability,[469] and as one of the conditions for its application.[470] As a rationale, risk-creation does not stand alone and it is either juxtaposed or (more often) combined with other justifications, most notably risk-benefit, deep-pockets, loss-spreading, or victim protection.[471] However, even if included

[466] Law Commission, *Liability for Defective Products*, Law Comm No 82 (1977) [23] (juxtaposing risk-creation with accident avoidance, loss-spreading, and litigation costs); Cane (n 23) 47–49 (risk-creation here stands alone to explain the liability of distributors as well as the rule in *Rylands*).

[467] John Murphy, 'Juridical foundations of common law non-delegable duties' in Jason W Neyers, Erika Chamberlain and Stephen GA Pitel, *Emerging issues in Tort Law* (Hart Publishing 2007) 369, 381–382.

[468] Cane (n 23) 49; Jenny Steele and Rob Merkin, 'Insurance Between Neighbours: *Stannard v Gore* and Common Law Liability for Fire' (2013) 25 JEL 305, 306.

[469] See *Dubai Aluminium Co Ltd v Salaam and Others*, [2003] 2 AC 366, [21]–[22] (Lord Nicholls); *Majrowski v Guy's and St Thomas's NHS Trust*, [2006] UKHL 34, [9] (Lord Nicholls); *CCWS* (n 81) [35], [73], [86] (Lord Phillips); *Cox* (n 88) [22]–[24]; *Armes* (n 88) [57]–[58], [61]–[63]. More doubtful is the role of risk-creation in *Lister* (n 86) [65] (Lord Millett) (rejecting risk-profit because too narrow a justification, but arguably seeing in risk-benefit, not risk-creation, the rationale of vicarious liability along with loss-spreading).

[470] *CCWS* (n 81); *Cox* (n 88); *Armes* (n 88).

[471] See *Dubai Aluminium* (n 469) [21]–[22] (Lord Nicholls) (arguably combining risk-creation with deep-pockets); *Majrowski* (n 469) [9] (Lord Nicholls) (combining risk-creation with victim protection, deep-pockets, and loss-spreading, arguably in juxtaposition with accident avoidance); *CCWS* (n 81) [35] (Lord Phillips) (combining risk-creation with deep-pockets, loss-spreading, and other arguments relating to the delegation of task from employer to employee and the degree of control of the former on the latter); *Cox* (n 88) [22]–[24] (first discussing and then combining risk-creation with risk-benefit); *Armes* (n 88) [57]–[58], [61]–[63] (combining risk-creation with risk-benefit, loss-spreading, deep-pockets, and victim protection).

within a broader reasoning, the emphasis placed on it by judges stresses its conceptual distinctiveness and suggests that the argument does some justificatory work.[472]

This judicial approach also finds support in the work of a few legal scholars. For example, in considering the caselaw on vicarious liability, Brodie suggests that 'vicarious liability is … seen as the corollary of the creation of risks by an enterprise',[473] and that '*Lister* is utterly consistent with the ultimate justification for the imposition of vicarious liability being the creation of enterprise risk'.[474] Similarly, Steele sees risk-creation (and risk-benefit) as 'respectable justice arguments' which support vicarious liability on moral grounds, together with other justifications such as accident avoidance, victim protection, deep-pockets, and loss-spreading.[475] In sum, as all these examples of judicial and academic reasoning show, the risk-creation rationale is typically put forward together with other justifications, including other risk-based arguments.[476] While this pattern of use may suggest that risk-creation is not seen as a sufficient justification for the imposition of vicarious liability, it does not deny the increased attention and importance that the argument has gained in recent times.

Despite this, risk-creation has been the target of numerous criticisms, with leading scholars casting doubts on its desirability or on its ability to explain the law. Some argue that imposing liability on grounds of pure risk-creation would sacrifice too much in terms of

[472] See references in n 471.

[473] Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27 OJLS 493, 495.

[474] ibid 496.

[475] Steele (n 37) 578–579.

[476] See text to, and references in, nn 471–475.

individual freedom of action.[477] Others reject risk-creation for its practical unworkability, as it would lead to irresolvable problems of causal indeterminacy.[478] Still others find the argument 'puzzling' on the ground that, if risk-creation were 'a *sufficient* justification for strict liability', English law would now feature a far greater number of strict liability torts.[479] Finally, similar criticisms sometimes target risk-creation in specific contexts of liability, such as product liability,[480] and vicarious liability.[481] Furthermore, as will be seen and in keeping with the American approach,[482] the greater reliance of English scholars and courts on abnormality of risk and on the gain-based theories of risk (risk-profit and risk-benefit) casts some doubt on the extent to which English legal actors are truly committed to risk-creation as a persuasive justification for the imposition of strict liability.

Overall, then, the significance of risk-creation in the English context is somewhat ambiguous. Compared to the French system, the argument certainly does not possess the prestige of a tradition going back to Saleilles and Josserand, but it still carries some weight.

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[477] Robert Stevens, *Torts and Rights* (OUP 2007) 99–100.

[478] Cane and Goudkamp (n 90) 400.

[479] Dyson and Steel (n 307) 23, 36 (original emphasis).

[480] Stapleton (n 99) 394 (doubting the appropriateness of risk-creation on grounds of causal indeterminacy); Peel and Goudkamp (n 20) fn 103 at [11–015] (noting that the risk-creation rationale cannot be reconciled with the requirement of defectiveness).

[481] Some argue that risk-creation cannot explain key features of the law of vicarious liability: see Stevens (n 477) 271–272; Paula Giliker, *Vicarious Liability in Tort – A Comparative Perspective* (CUP 2010) 240; John Bell, 'The Basis of Vicarious Liability' (2013) 72 CLJ 17, 20. See also Phillip Morgan, 'Recasting vicarious liability' (2012) 71 CLJ 615, 634; James Goudkamp and James Plunkett, 'Vicarious liability in Australia: on the move?' (2017) 17 OUCLJ 162, 169. Others note that too generous an interpretation of risk-creation may lead to an excessive expansion of vicarious liability: see eg James Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556, 560–561; Paula Giliker, 'A revolution in vicarious liability: Lister, the Catholic Child Welfare Society case and beyond' in Sarah Worthington, Graham Virgo, and Andrew Robertson (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2018) 121, 134ff.

[482] Text following n 426.

Where deployed, whether with other justifications or alone, the argument retains its distinctiveness and it does some work in justifying the imposition of strict liability. Especially in the field of vicarious liability, the reasoning of courts and some scholars has recently put particular emphasises on the creation of a risk of harm as one of the rationales of vicarious liability. At the same time, though, reliance on risk-creation is modest outside that field. Furthermore, in keeping with the other three jurisdictions, risk-creation is harshly criticised because seen as practically unworkable and morally problematic. Finally, as will be seen below, other and narrower risk-based arguments are certainly more prominent in the English context.

Moving now to the qualified variants of risk-creation, nonreciprocity of risk has gained very little support in the English context. A rare example of support comes from McBride and Bagshaw, who draw directly on Fletcher's theory of nonreciprocity of risk and see it as one of the convincing justifications for product liability under the Consumer Protection Act 1987.[483] But apart from this, the argument struggles to attract acceptance and indeed it is the target of various criticisms which have certainly weakened its appeal.[484] Therefore, in keeping with the French and Italian approaches, nonreciprocity of risk has failed to establish itself as a reason for imposing strict liability in the English context, this marking a striking contrast with the United States.

Far more important is instead abnormality of risk, even though it has had a troubled life in the English system. To begin with, the argument acts as a key justification for strict

[483] McBride and Bagshaw (n 12) 376–378 (juxtaposing nonreciprocity of risk with victim protection, loss-spreading, accident avoidance, and resource allocation).

[484] See Peter Cane, 'Justice and Justifications for Tort Liability' (1982) 2 OJLS 30, 45–46; Nolan (n 44) 448–449 (rejecting nonreciprocity of risk); Adam Slavny, 'Nonreciprocity and the Moral Basis of Liability to Compensate' (2014) 34 OJLS 417.

liability in a variety of contexts. For instance, it has always been a condition of application of the rule in *Rylands v Fletcher*,[485] and consistently put forward as one of its key justifications.[486] Other examples can be identified in relation to liability for dangerous animals,[487] to liability prescribed in statutes regulating certain dangerous activities,[488] and, rarely, even in relation to liability for nuisance.[489] Furthermore, insofar as activities of a dangerous character are involved, the *Honeywill* decision established that an employer is under a non-delegable duty to ensure that the dangerous activity will not result in any damage, meaning that she is strictly liable for the harm negligently caused by the independent contractors to whom she entrusted such activity.[490] Here, it is precisely the abnormal character of the risk involved which justifies the imposition of strict liability.[491]

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[485] See *Rylands* (n 39) LR 1 Ex 265, 279–280; *Gore v Stannard*, [2014] QB 1, [22].

[486] *Rylands* (n 39) LR 1 Ex 265, 279–280. See *Festiniog Railway Co* (n 41) 736, 738 (abnormality of risk standing alone); *Powell v Fall*, (1880) 5 QBD 597 (combining abnormality of risk with resource allocation); Pollock, 'Duty of Insuring Safety: The Rule in Rylands v Fletcher' (1886) 2 LQR 52 (combining abnormality of risk with victim protection); *Transco* (n 51) [10]–[11] (Lord Bingham), [55]–[57], [60], [64] (Lord Hobhouse), [103]–[106] (Lord Walker); Murphy (n 44) 659ff (combining abnormality of risk with risk-profit and deep-pockets, then juxtaposing this group of arguments with loss-spreading, accident avoidance, and resource allocation); *Stannard* (n 485) [156] (combining abnormality of risk with risk-benefit).

[487] *Filburn* (n 74) 260 (combining abnormality of risk with accident avoidance); *Baker v Snell*, [1908] 2 KB 825, 838 (abnormality of risk standing alone); Law Comm No 13 (n 77) [14], [16]–[18], [20], [24] (juxtaposing abnormality of risk with loss-spreading, accident avoidance, and litigation costs (the last insofar as cattle trespass is concerned, at [63])); John G Fleming, *The Law of Torts* (9th edn, LBC Information Services 1998) 399–400 (abnormality of risk standing alone); *Mirvahedy v Henley*, [2003] 2 AC 491, [7], [13], [34] (Lord Nicholls) (abnormality of risk standing alone); Cane and Goudkamp (n 90) 84 (abnormality of risk standing alone).

[488] Examples include: Nuclear Installations Act 1965, ss 7 and 12; Gas Act 1965, s 14; Environmental Protection Act 1990, s 73(6); Water Industry Act 1991, s 209.

[489] *Midwood v Manchester Corporation*, [1905] 2KB 597, 610–611 (discussing abnormality of risk with risk-profit and, arguably, victim protection); Maria Lee, 'What is Private Nuisance' (2003) 119 LQR 298, 323–325.

[490] *Honeywill* (n 92).

[491] ibid 199 (arguably adding, by way of combination, accident avoidance to abnormality of risk). See also Murphy (n 467) 386–391.

Abstracted from any specific context of liability, abnormality of risk has proved influential in the elaboration of theoretical approaches to strict liability and to proposals for reform. In particular, Honoré's famous theory of outcome-responsibility identifies the 'extra element' needed to justify a shift from fault-based to strict liability in the 'special risk of harm' involved in the defendant's activity.[492] In more recent times, Dyson and Steel argue that 'the *exceptional* or *abnormal* nature of the risk-imposition' can provide a justification for strict liability which is reconcilable 'with accepting negligence liability within its current limits'.[493] Finally, in terms of reform proposals, in its report on civil liability and compensation for personal injury, the Pearson Commission recommends the introduction of strict liability for exceptional risk,[494] seeking to implement by legislation the 'valuable principle … of strict liability for personal injury caused by dangerous things or activities'.[495] These examples suggest that in the last 150 years many English scholars and judges have seen abnormality of risk as an important justification for strict liability.

As to its patterns of use, sometimes abnormality of risk stands alone and therefore acts as the fundamental justification for strict liability. In this type of reasoning, the relevant judge or scholar does not provide much elucidation on the nature of the argument, and one is therefore left to wonder whether abnormality of risk is really thought to be the end of the matter in justificatory terms or if instead it 'hides' a commitment to some ideal of fairness

[492] Tony Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 LQR 530, 531, 542.

[493] Dyson and Steel (n 307) 36 (original emphasis).

[494] Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, Cmnd 7054-I (1978) ch 31.

[495] ibid [1642]. The Pearson Commission's proposal combines abnormality of risk with loss-spreading and victim protection.

or to the achievement of some specific goal.[496] By contrast, at other times abnormality of risk forms part of a broader reasoning and it is either juxtaposed or combined with all sorts of justifications.[497] In these instances, the justificatory role of abnormality of risk is generally that of a means promoting broader goals. As in France and Italy, albeit less frequently, abnormality of risk is sometimes deployed for the purpose of compensating the victims of accidents.[498] At other times, as in Italy and the United States, the argument is used to promote the avoidance of accidents (though not from a perspective of economic efficiency as is often the case in the other two legal systems).[499] Finally, in Honoré's theory of outcome-responsibility, abnormality of risk is used to justify strict liability in accordance with moral norms of individual responsibility,[500] giving rise to a pattern of reasoning which could not be found in any of the other systems.

But despite all this, the argument from abnormality of risk has been harshly criticised and, as a result of this, its force has reduced over time. According to a frequent criticism, it is very difficult to identify a satisfying criterion to distinguish between dangerous and non-dangerous activities, and consequently to apply different liability regimes on that basis. To begin with, at a time when the rule in *Rylands v Fletcher* could have developed into something similar to the Italian or American liabilities for dangerous activities, the decision

[496] See examples of the argument standing alone in nn 486–487.

[497] See nn 486–491. These include risk-benefit/profit, the deep-pockets argument, loss-spreading, victim protection, accident avoidance, and resource allocation.

[498] See eg Pearson Commission (n 494) [1641]–[1642], [1645], [1650], [1660], [1668]. See also *Midwood* (n 489) 610–611 (relating to nuisance and discussing abnormality of risk with risk-profit and victim protection). See also ATD Denning, *What Next in the Law* (Butterworths 1982) 128 (combining abnormality of risk with victim protection). Cf *J Lyons* (n 45) 173.

[499] See eg Law Comm No 13 (n 77) [20].

[500] Honoré (n 492).

of the House of Lords in *Read v J Lyons* halted the expansion of the rule by, among other things, rejecting any sharp distinction between dangerous and non-dangerous activities/things on the grounds that, since '[e]very activity in which man engages is fraught with some possible element of danger to others', it would be practically very difficult to decide which activities are dangerous and which are not.[501] A similar criticism is put forward by the Law Commission in its report on civil liability for dangerous things and activities,[502] by the Pearson Commission in its report on civil liability and compensation for personal injury,[503] and by the UK Supreme Court (then House of Lords) in *Cambridge Water*.[504] All these criticisms suggest that, in order to avoid uncertainties and practical difficulties, strict liability for dangerous activities should be introduced through statutory law.[505] The result of all this is that the rule in *Rylands* is now treated as a sub-species of the tort of nuisance,[506] that there is no distinct category of liability for dangerous activities in English tort law, and that it is for the legislator to decide whether any particular activity or thing involves such a high degree of risk of harm that the adoption of a strict liability rule would be appropriate. Again, in the context of liability for breach of a non-delegable duty, in *Biffa Waste Services*, the Court of Appeal criticised the *Honeywill* decision for imposing strict liability on grounds

[501] *J Lyons* (n 45) 172–173 (Lord Macmillan).

[502] Law Commission, *Civil Liability for Dangerous Things and Activities*, Law Comm No 32 (1970) (Law Comm No 32) [12]–[14].

[503] Pearson Commission (n 494) [1647].

[504] *Cambridge Water* (n 48) 305 (Lord Goff).

[505] Law Comm No 32 (n 502) [17]; Pearson Commission (n 494) [1649]–[1651]; *Cambridge Water* (n 48) 305. See also *Transco* (n 51) [7] (Lord Bingham).

[506] *Transco* (n 51) [9] (Lord Bingham).

of dangerousness,[507] and in *Woodland* the UK Supreme Court cast doubts on the future of *Honeywill* and similar decisions which, the court argued, 'may be ripe for re-examination' in the future.[508] Finally, the same type of criticism is popular among legal scholars. Key figures such as Cane, Goudkamp, Stevens, Nolan, and Stanton all believe that the distinction between dangerous and non-dangerous activities or things is very problematic, an approach which clearly undermines the credibility of abnormality of risk as a justification for imposing strict liability.[509] Here the difference with the other three legal systems is striking. Italian and American law both include a general liability for dangerous activities whose development is in the hands of the courts; in France, even if the *Code civil* does not (yet) include a strict liability for dangerous activities, its introduction has been proposed twice.[510] This shows that legal actors from these three jurisdictions believe that the distinction between dangerous and non-dangerous activities is a workable and meaningful one. In this respect, a further contrast emerges between English and American law. In both common law systems the degree of risk of harm is a relevant factor when conducting the negligence calculus in the tort of negligence, but American courts believe that there are substantive reasons to make room for a distinct and strict liability for activities involving an especially high risk of harm. This suggests that English courts reject this type of liability not only because they see the distinction between

[507] *Biffa Waste Services v Maschinenfabrik Ernst Hese GmbH*, [2008] EWCA Civ 1257, [69]–[78].

[508] *Woodland* (n 92) [6] (Lord Sumption).

[509] Cane (n 23) 50 and (n 36) 187; Stevens (n 477) 112–113; Cane and Goudkamp (n 90) 92–93; Keith M Stanton, 'The Legacy of Rylands v Fletcher' in Nicholas J Mullany and Allen M Linden (eds), *Tort Tomorrow, a Tribute to John Fleming* (LBC Information Services 1998) 84, 90–91; Nolan (n 44) 448.

[510] see Avant-projet Catala, article 1362; Avant-projet Terré, article 23.

dangerous and non-dangerous activities as unworkable, but also because they think it is undesirable to expand strict liability to activities involving a substantial risk of harm.[511]

Overall, then, the significance of abnormality of risk in English legal reasoning is ambiguous. On the one hand, the argument features visibly as a justification for the imposition of strict liability in a variety of contexts. On the other hand, especially in more recent times courts and scholars entertain a sceptical view about the argument's conceptual foundation, ie the distinction between what is dangerous and what is not, therefore removing a potent justification for strict liability.

Moving now to gain-based theories of risk, the significance of both risk-benefit and risk-profit in English legal reasoning would be limited if it was not for the lively discussions taking place in relation to vicarious liability. To be sure, risk-benefit and risk-profit feature in a variety of contexts. For example, they have been occasionally used to justify the rule in *Rylands v Fletcher*,[512] liability for nuisance,[513] liability for animals,[514] and liability for defective products.[515] Furthermore, they also feature as normatively attractive arguments in the reasoning of a few scholars who seek to justify strict liability on grounds of individual

[511] See *J Lyons* (n 45) 173.

[512] *Rylands* (n 39) 279–280 (combining risk-benefit with abnormality of risk); *Stannard* (n 485) [156] (combining risk-benefit with abnormality of risk). See also JR Spencer, 'Motor-cars and the rule in *Rylands v Fletcher*: a chapter of accidents in the history of law and motoring' (1983) CLJ 65, 76 (interpreting *Powell v Fall* as based on a combination of risk-profit and abnormality of risk); Murphy (n 44) 663.

[513] *Midwood* (n 489) 610–611 (discussing risk-profit with abnormality of risk, for purposes of victim protection); *Allen v Gulf Oil Refining Ltd*, [1980] QB 156, 169 (combining risk-profit with victim protection).

[514] PS Atiyah, *Accidents, Compensation and the Law* (3rd edn, Weidenfeld & Nicholson 1980) 544 (combining risk-benefit with abnormality of risk). Kumaralingam Amirthalingam, 'Animal Liability: Equine, Canine and Asinine' (2003) 119 LQR 563, 563–564 (juxtaposing risk-benefit/profit with insurability); Deakin and Adams (n 33) 510 (combining risk-benefit with abnormality of risk).

[515] Stapleton (n 38) 186–187 (combining risk-profit with Honoré's theory of outcome-responsibility). Murphy (n 44) 659 (combining risk-profit with deep-pockets and abnormality of risk in relation to defective products, vicarious liability, and the liability of any other commercial industrial enterprise).

responsibility.[516] Whether combined or juxtaposed with other arguments, in all these instances risk-benefit and risk-profit are key justifications in the reasoning put forward by the relevant judge or scholar, but the fact remains that their use in these contexts of liability is relatively rare. In this respect, there is a marked contrast with the French, Italian, and American approaches, where risk-benefit and risk-profit are used more frequently but not always as key arguments.[517]

The situation is however different in relation to vicarious liability, where risk-profit and especially risk-benefit are particularly significant in the English context. Here, despite some criticisms,[518] these two arguments are widely relied on and their justificatory significance is great. Insofar as risk-profit is concerned, several scholars deploy this argument to justify vicarious liability,[519] and some judicial opinions as well emphasise it.[520]

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[516] See Stapleton (n 38) 186ff (providing a 'moral enterprise liability' theory which is based on risk-profit and which is grounded in notions of individual responsibility); Tony Honoré, 'The Morality of Tort Law—Questions and Answers' in Owen (n 23) 73, 83–90 (combining risk-benefit, which provides the basis of outcome-responsibility, with loss-spreading); Cane (n 23) 50 (rejecting risk-benefit because it would yield a generalised rule of strict liability, and seeing risk-profit as normatively attractive though descriptively inaccurate as to the current state of English tort law). See also Slavny (n 484), who identifies the moral basis of liability to compensate in two principles, namely the 'avoidability principle' and the 'benefit principle'. On the former, see text to n 648. The latter posits that '[w]henever A harms B, there is a stronger reason to let the cost fall on the party that benefits more from the risk-creating activity'. While this principle clearly overlaps with risk-benefit, Slavny's focus is on cases where the main beneficiary of the risk-imposing activity is someone other than the defendant/risk-imposer, ie he focuses on cases other than those where risk-benefit is implicated.

[517] See pp 89–92 (France), pp 100–103 (Italy), and pp 112–115 (United States).

[518] See PS Atiyah, 'Personal Injuries in the Twenty-First Century: Thinking the Unthinkable' in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press 1996) 1, 16; Stevens (n 477) 258–259; Goudkamp and Plunkett (n 481) 169; Dyson and Steel (n 307) 40.

[519] eg Fleming (n 487) 410–411 (discussing risk-profit with deep-pockets, loss-spreading, accident avoidance, and resource allocation); Stapleton (n 38) 190–193; Honoré (n 516) 85, 89 (combining risk-profit with his theory of outcome-responsibility, and then with loss-spreading); Murphy (n 44) 659 (combining risk-profit with the deep-pockets argument and abnormality of risk).

[520] *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, [2006] QB 510, [55] (Rix LJ) (discussing risk-profit with loss-spreading and accident avoidance); *Weddall v Barchester Healthcare Ltd*, [2012] EWCA Civ 25, [63] (juxtaposing risk-profit with deep-pockets and loss-spreading).

The idea that someone who avails herself of another's actions for her own profit should pay compensation if the latter harms a third party is seen as a morally attractive justification for imposing vicarious liability. Even where discussed with other reasons such as deep-pockets, loss-spreading, or accident avoidance, risk-profit appears to be particularly relevant in the reasoning put forward, especially in the academic literature.[521] Over time, however, English courts have started to see risk-profit as inadequate to justify vicarious liability, because too narrow, and to place increasing reliance on risk-benefit for justificatory purposes. While in older cases the focus was on the traditional profit-seeking defendant employers, in recent times the doctrine of vicarious liability has been invoked in relation to entities that do not pursue economic interests.[522] English courts have therefore shifted the emphasis from risk-profit to risk-benefit so as to make sure that entities not pursuing financial profit could be caught in the net of vicarious liability and that victims, especially if suffering from very serious misconduct such as sexual abuses or racist assaults, were adequately compensated. As a result, in leading cases such as *Lister*, *Cox*, and *Armes*, risk-benefit features very prominently. To be sure, the argument does not stand alone in these and other judgments and is instead discussed with justifications such as risk-creation, deep-pockets, loss-spreading, and victim protection. But as was seen for risk-creation itself, this does not reduce the importance of the argument. Indeed, not only is risk-benefit recognised as 'the most influential idea in modern times'[523] for the purpose of justifying vicarious liability, but its importance has grown at the expense of risk-profit. As Lord Reed observes:

[521] See nn 519–520.

[522] See *CCWS* (n 81); *Armes* (n 88); *Lister* (n 86).

[523] *Armes* (n 88) [67] (Lord Reed).

> The defendant need not be carrying on activities of a commercial nature … . It need not therefore be a business or enterprise in any ordinary sense. Nor need the benefit which it derives from the tortfeasor's activities take the form of a profit. It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests. The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit.[524]

Therefore, despite some criticisms,[525] risk-benefit is very prominent in recent judicial attempts to justify vicarious liability,[526] and its importance cannot be exaggerated in light of the fact that the argument contributes to defining the boundaries of the doctrine by including in its scope of application entities not pursuing financial profit.[527]

In sum, the significance of gain-based theories of risk in the English context is mixed. On the one hand, compared to the other three systems studied, generally they are less heavily relied on across the spectrum of the strict liabilities recognised in the law of torts. On the other hand, when they *are* used, and even if combined or juxtaposed with other justifications, both risk-benefit and risk-profit constitute key reasons for the imposition of strict liability in England, whereas in the other three jurisdictions—but especially in France and Italy—they appear in some cases at least to act as secondary or even make-weight arguments. Furthermore, while in all four legal systems risk-benefit and risk-profit appeal to an ideal of fairness, in the English context and especially in the academic literature this connection

[524] *Cox* (n 88) [30] (Lord Reed). For similar remarks, see *Lister* (n 86) [65] (Lord Millett).

[525] Stapleton (n 38) 190 (arguing that risk-profit is descriptively superior to risk-benefit).

[526] Very few scholars support this approach: see Steele (n 37) 578–579. See also Bell (n 481) 20 (preferring risk-benefit over risk-creation, though it is not entirely clear whether his position is only interpretive or also normative).

[527] This expansion of the boundaries of vicarious liability is one of the reasons why several legal scholars reject the descriptive accuracy of risk-profit as a justification for the doctrine: see eg Stevens (n 477) 258–259; Morgan (n 481) 618; McBride and Bagshaw (n 12) 854–855.

emerges with particular force, with several legal scholars putting forward moral theories of individual responsibility which emphasise the fairness of making strictly liable gain-seeking parties. In sum, in English legal reasoning the link between gain-based theories of risk and individual responsibility is particularly strong, a pattern not at all evident in the other three jurisdictions.

3.2.6. Concluding Remarks

This section has shown that risk represents a widespread and significant argument in legal reasoning seeking to justify the imposition of strict liability in the four legal systems studied. Compared to other arguments which will be analysed in the following sections, risk has a particular feature: it cannot be described as a unitary argument because it consists of several different permutations (risk-creation, nonreciprocity of risk, abnormality of risk, risk-benefit, and risk-profit). Each permutation possesses its own conceptual distinctiveness, which is reflected in the way strict liability is justified, and follows its own patterns of use. As a result, the significance of risk as a justification for strict liability is better assessed if its permutations are evaluated one by one.

Starting with risk-creation, the idea that a party should be liable because she created a risk of harm which then materialised is treated in markedly different ways across the four jurisdictions. In all of them, the argument is criticised on various grounds, most notably because seen as morally unpersuasive or as practically unworkable. Consistently with this, risk-creation is flatly rejected in the Italian context and, where mentioned, the creation of risk is generally deployed as the starting-point of a broader reasoning that seeks to justify

strict liability on entirely different grounds.[528] Therefore, the creation of risk loses its conceptual distinctiveness as a justification and, as will be seen in subsequent sections, the real reasons for strict liability in the Italian context lie elsewhere. Similarly, in the United States, it is true that some scholars and courts rely on risk-creation as a key reason to justify strict liability, but again in many instances the creation of risk loses any justificatory value and strict liability is justified on the basis of other arguments. In yet other cases, it is very difficult to pinpoint the significance of the argument because of a lack of clarity in the relevant reasoning. As a result, the overall significance of risk-creation in the United States is modest.[529] The situation looks different in France and in England, where the theory of created risk has gained comparatively more acceptance. In France, from the time of Saleilles and Josserand risk-creation has enjoyed a prestige which, perhaps, renders strict liability more acceptable and familiar in the French context. This does not mean, though, that French legal actors think that risk-creation does much justificatory work when it comes to supporting the imposition of strict liability. While occasionally standing alone and therefore acting as a key justification, the creation of risk is in many cases discussed with other arguments which, as will be seen in subsequent sections, dominate the scene and explain better the heavy reliance on strict liability in France.[530] Finally, in England, risk-creation has gained increasing acceptance in recent times, essentially because of the justificatory role it has taken on in the context of vicarious liability.[531] However, because of the criticisms

[528] See pp 93–97.

[529] See text to nn 416–426.

[530] See text to nn 329–333.

[531] See text to nn 469–476.

received, of its modest use outside the law of vicarious liability, and of the greater prominence of abnormality of risk and risk-benefit/profit, the significance of risk-creation must be assessed cautiously in the English context.[532]

Insofar as nonreciprocity of risk is concerned, the different significance of this argument across the four legal systems is striking. In the United States, the argument has proved influential among courts and scholars, with numerous contexts of strict liability often justified on this basis (even if in combination or juxtaposition with other arguments).[533] By contrast, in the other three legal systems nonreciprocity of risk cannot be found, except for very few mentions in England.[534] Different reasons may be at play across the three jurisdictions to explain this absence. The theory of nonreciprocity of risk is based on an interpersonal and bilateral understanding of tort law, with an avowed rejection of collective goals as acceptable bases for imposing liability in tort. In light of this, it is not surprising that the argument has not attracted support in France and Italy, where tort law is widely perceived as a system geared towards the achievement of broader goals, whether victim protection, loss-spreading, or accident avoidance. Furthermore, it is doubtful that the theory of nonreciprocity of risk would accommodate contexts of strict liability such as strict liability for the deeds of things or for non-dangerous animals, whose core elements would be hardly reconcilable with the postulates of Fletcher's approach. As to England, by contrast, the little support gained by nonreciprocity of risk is harder to explain. Infused as it is with notions of morality, responsibility, and bilateral justice, nonreciprocity of risk would be attuned to the

[532] See text to nn 477–482.

[533] See text to nn 428–433.

[534] See text to nn 483–484.

way in which English tort law is often portrayed by its own legal actors (especially legal scholars).

In relation to abnormality of risk, this argument features prominently in the Italian and American systems, which both include a distinct category of liability for dangerous activities (albeit with robust differences in terms of their formal requirements and respective scope of application). In both jurisdictions, the creation of an abnormal risk of harm is perceived as an important justification for the imposition of strict liability, and in many instances this argument is deployed as a means to broader ends, most notably victim protection and accident avoidance.[535] The French approach contrasts, at least in part, with the Italian and American ones. In France, there is no distinct legal category of liability for dangerous activities but, despite this, abnormality of risk is alive and well. On the one hand, the argument is mentioned in proposals to introduce a specific and very strict liability rule for dangerous activities so as to ensure even greater protection to the victims of accidents. On the other hand, the notion of abnormality of risk is understood very broadly and, as such, as capable of justifying, in combination with other arguments, a variety of existing strict liabilities, from liability for the deeds of things to liability for traffic accidents and liability for defective products.[536] In the English system the argument from abnormality of risk occupies a peculiar position. On the one hand, it is seen as a prominent justification in a variety of contexts, where it can be used either as a stand-alone justification for strict liability[537] or in combination/juxtaposition with other arguments. In the latter case,

[535] For Italy, see text to nn 390–396; for the United States, see text to nn 436–446.

[536] See text to nn 344–352.

[537] See nn 486–487.

abnormality of risk is either deployed to serve goals such as the compensation of victims and the avoidance of accidents (similarly to the other three legal systems) or to support and promote notions of individual responsibility (a pattern of use which is specific to English law).[538] On the other hand, its prominence in English reasoning is greatly diminished in light of judicial and academic criticisms which consider unconvincing the distinction between dangerous and non-dangerous activities/things. Given that this scepticism directly undermines the conceptual foundation of the argument, it has contributed to the demise of the rule in *Rylands* and promises to do the same in relation to the *Honeywill* doctrine, therefore making the future of abnormality of risk in England uncertain.[539]

Finally, as regards risk-benefit and risk-profit, the idea that it is fair or otherwise desirable to link gains to liabilities attracts support in all four legal systems. In France, Italy, and the United States the two gain-based theories of risk are used conspicuously to justify a wide range of strict liabilities. Their overall significance, however, is ambiguous: sometimes they are seen as key justifications, while at other times their justificatory weight is unclear and they behave more like either secondary or make-weight arguments.[540] The English approach is different in so far as the two gain-based arguments are used less frequently but, where relied on, they act as key justifications in most instances of reasoning[541] (such as in the law of vicarious liability).[542]

[538] See text to nn 497–500.

[539] See text to nn 501–511.

[540] For France, see pp 91–92; for Italy, see pp 102–103; for the United States, see pp 114–115.

[541] See text to nn 512–517.

[542] See text to nn 519–527.

The section, therefore, provides a picture of complexity in which risk-based arguments are patterned in all sorts of different ways and in which their role varies within and across the four legal systems. What is clear is the degree of flexibility that the various permutations of risk reveal across the four jurisdictions. Sometimes, they retain their full distinctiveness and constitute in themselves fundamental reasons for the imposition of strict liability. At other times, they can be put to serve a range of distinct goals, such as meeting the demands of social justice by ensuring compensation and the spreading of losses, promoting some understanding of morality and individual responsibility, or pursuing the avoidance of accidents and the achievement of greater socio-economic welfare.

3.3. Accident Avoidance

3.3.1. Accident Avoidance as a Justification for Strict Liability

It is widely accepted that avoiding (or preventing) accidents is better than having to deal with their tragic consequences. Can the law of tort contribute to the avoidance of death, personal injury or damage to property? This question often receives an affirmative answer, and it is not difficult to find legal actors who, across the four legal systems studied, invoke accident avoidance as a justification for the imposition of liability in tort. In particular, it is argued that the threat of a legal sanction, typically the payment of damages, provides people with incentives to modify their behaviour and thereby reduce the risk of harm. The potential of tort for reducing such risk is often invoked in relation to intentional or negligent conduct, but an argument based on the avoidance of accidents is also deployed to justify strict liability. In broad terms, this argument suggests that losses should be borne by the party who is best suited to avoid or reduce the number or severity of accidents (‘accident avoidance’). So understood, accident avoidance can support the imposition of strict liability in a variety of ways, which are best explained by considering how strict liability may be better than fault at reducing the risk of accidents.

First, strict liability can more effectively stimulate an improvement in the safety of potentially harmful activities. Fault keeps defendants merely to the standard of the reasonable person, but strict liability puts more pressure on them to change the way they organise and run their activities. Furthermore, while in the fault model consideration is often given only to the precautions adopted very near or at the time of the accident (‘situational safety’), strict liability ignores the level of precautions adopted in any particular situation; rather, it leaves it to the defendant to find a way to avoid accidents or reduce their likelihood

by, for example, investing in research and development or by making (even structural or organisational) changes that can render the relevant activity safer ('background-safety'[543]).

Another way in which strict liability may promote the avoidance of accidents more effectively than fault is by preventing or reducing the operation of harmful activities or by inducing a shift to other, safer activities. The idea is that, faced with the costs of liability for the accidents caused (even if non-negligently), the party carrying on a particular activity will decide either to reduce the intensity of that activity, ie to engage less in it, or to shift to safer activities. For example, if driving a certain number of kilometres per month causes a certain number of accidents *even if without negligence*, the hope is that the adoption of strict liability will induce a reduction in the number of kilometres driven and, consequently, in the number of non-negligently caused accidents; or, if shipping goods by truck causes *even if without negligence* more accidents than shipping goods by air, the adoption of strict liability should induce the shipper to shift to the latter activity and reduce the number of accidents.[544] As this strategy to avoid accidents impacts on the intensity, or level, of the potentially harmful activity, I will call it 'activity-modification'.

Background-safety and activity-modification can overlap, though. On a broad understanding of the former, reducing the intensity of an activity (eg the number of kilometres driven) may well be seen as part of a background-safety strategy insofar as such reduction of intensity can be described as a structural or organisational change in the way

[543] I owe this term to Lewis Sargentich, who used it in the Tort course at the Harvard Law School during the autumn of 2013.

[544] Abraham (n 111) 201–202.

activities are carried on. Given this overlap, in the following discussion I do not distinguish sharply between these two ways of avoiding accidents.

As I will show, the significance of accident avoidance as a justification for strict liability and the way in which this argument is used vary considerably across the four legal systems studied.

3.3.2. The Pervasive Nature of Accident Avoidance in the United States

Among the four legal systems studied, the common law of the United States is where accident avoidance looms largest as a justification for the imposition of strict liability. The ability to prevent accidents forms one of the primary criteria for evaluating the desirability of different tort rules, with the result that accident avoidance features conspicuously in discussions regarding strict liability. The importance of accident avoidance is due partly to the prominence of the economic analysis of law, which has profoundly influenced American legal thought since the 1960s, and partly to the belief that, irrespective of any commitment to economic analysis, preventing accidents is a commendable goal as it removes the need to compensate the losses they cause. As a result, accident avoidance thrives as a justification for strict liability in a wide variety of contexts of strict liability in American tort law.

Since the second half of the 20th century, several legal scholars have put forward economic analyses of tort law in the belief that the ultimate goal of this area of law is the promotion of socio-economic welfare. In the context of accident avoidance, this means that potential defendants and claimants should be induced to adopt cost-justified precautions to the point where additional avoidance measures would cost more than the costs of accidents they would avoid (‘efficient accident avoidance’). Which type of liability rule, strict or fault-

based, achieves this goal more effectively is an issue that has sparked a lively debate among legal economists, receiving strikingly different answers. As will be seen, the economic theories put forward disagree as to the ability of strict liability to reduce accidents efficiently and therefore accord to it a different role in tort law.

To begin with, Calabresi's famous 'cheapest cost avoider' theory suggests that liability should be imposed on the party who is in the better position 'to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made'.[545] A key element in Calabresi's theory is that the search for the cheapest cost avoider is guided by what he terms 'market' or 'general' deterrence.[546] According to this approach, whose theoretical basis can be found in the 'resource allocation' theory studied in welfare economics,[547] it is key that all activities internalise their full social costs, these including the costs of accidents they cause to third parties (with or without negligence). If the costs of accidents of (say) car driving were not included in the 'price' of this activity so that people would ignore its true cost, there would be too much car driving in society at the expense of safer substitutes available on the market (eg trains or buses), or drivers would not adopt precautions that they would instead take if they knew (and had to pay for) the true cost of driving. In sum, by forcing an activity to reflect all its costs, Calabresi's approach provides people with incentives either to move to a safer activity or to make their own activity safer,

[545] Calabresi (n 450) 135ff; Guido Calabresi and Jon T Hirschoff, 'Toward a Test for Strict Liability in Torts' (1971) 81 Yale LJ 1055, 1060; Guido Calabresi, 'Optimal Deterrence and Accidents' (1974) 84 Yale LJ 656, 666; Calabresi and Klevorick (n 117) 588, 591.

[546] Calabresi (n 450) 69.

[547] ibid.

for example by adopting further precautions or investing in research and development.[548] This approach, then, proposes a general regime which rejects entirely fault as a criterion for determining liability on the ground that it would be wholly inadequate to achieve efficient accident avoidance.[549]

A very different approach is put forward by Posner. For him, while negligence is generally superior to strict liability, there are specific situations where pursuing efficient accident avoidance requires a decrease in the level of the defendant's activity.[550] For example, having a pet tiger is sooner or later likely to cause grave injury to others, given the nature of tigers and given that 'there is only so much the owner can do, in the way of being careful, to keep the tiger under control' (situational and background safety); therefore, '[t]he most promising precaution may simply be not to have a tiger—an activity-level change' (activity-modification).[551] Besides wild animals, other contexts of liability which Posner considers as appropriately subjected to strict liability and justified by efficient accident avoidance are employers' vicarious liability,[552] liability for abnormally dangerous

[548] ibid 70–71, 74–75.

[549] Calabresi (n 450) 237–273; id (n 545) 657–664. The paramount goal of Calabresi's approach is to minimise the sum of three types of costs: 'primary costs', which include direct accident costs (ie the loss itself) and the costs of reducing the number and severity of accidents causing losses; 'secondary costs', which include the social costs of leaving victims of accidents uncompensated; and 'tertiary costs', which include the costs of administering a system that seeks to reduce primary and secondary costs (Calabresi (n 450) 26–28). Therefore, in Calabresi's theory accident avoidance is combined with loss-spreading and deep-pockets (as means to reduce secondary costs), as well as with litigation costs (which form part of the tertiary costs entailed by the reduction of primary and secondary costs).

[550] William M Landes and Richard A Posner, 'The Positive Economic Theory of Tort Law' (1980) 15 Ga L Rev 851, 904. See also Shavell (n 115) 24.

[551] Posner (n 444) 207. See also *GJ Leasing Co, Inc v Union Elec Co*, 54 F.3d 379, 386–387 (7th Cir.1995) (Circuit Judge Posner) (treating the keeping of a tiger in one's backyard as an abnormally dangerous activity).

[552] ibid 218–219; Landes and Posner (n 550) 914–915 (mentioning background-safety measures in addition to activity-modification adjustments).

activities,[553] and product liability for manufacturing defects.[554] Clearly, in Posner's view, efficient accident avoidance leads to the imposition of strict liability only in specific contexts.

A still different approach to efficient accident avoidance, featuring in the work of scholars such as Shavell, Cooter, and Ulen, focuses on whether accidents are unilateral or bilateral as well as on the adoption of safety-enhancement precautions and changes in activity levels.[555] In unilateral accidents, only the injurer's behaviour can reduce the probability or gravity of losses, whereas in bilateral accidents the conduct of both injurers and victims are relevant for the purposes of accident avoidance.[556] As a result, the choice of the most appropriate rule will depend on whether the type of accident is unilateral or bilateral and on what the parties (or the injurer if the accident is unilateral) can do to take precautions or modify the level of their activity. On this basis, if the focus is on taking precautions to reduce accidents, strict liability is desirable in cases of unilateral accidents;[557] by contrast, in cases of bilateral accidents, fault and strict liability would be equally efficient because both parties are in a position to take precautions.[558] If, instead, efficient accident avoidance requires a change in the level of activity, strict liability will be desirable in cases of unilateral

[553] Posner (n 444) 207–208. See also id, 'A Theory of Negligence' (1972) 1 J Legal Stud 29, 76.

[554] Posner (n 444) 210–211; William M Landes and Richard A Posner, 'A Positive Economic Analysis of Products Liability' (1985) 14 J Legal Stud 535.

[555] Shavell (n 115); id (n 443) 5–31; Cooter and Ulen (n 115) 199–213.

[556] Shavell (n 115) 1, 6.

[557] Cooter and Ulen (n 115) 201–204. See also Richard A Posner, *Economic Analysis of Law* **(**2nd edn, Little, Brown 1977) 140–141.

[558] Cooter and Ulen (n 115) 205–211.

accidents,[559] whereas in cases of bilateral accidents it will be desirable only where it is more important to reduce the level of the injurer's activity than the level of the victim's activity.[560] On this approach, then, efficient accident avoidance justifies the imposition of strict liability in a variety of contexts, such as abnormally dangerous activities,[561] wild animals,[562] defective products,[563] or employers' vicarious liability.[564]

All these economic approaches share the view that avoiding accidents is key to promoting socio-economic welfare. However, they differ in important respects, for they disagree as to strict liability's potential in reducing accidents efficiently and therefore they expand or shrink its role in tort law accordingly.[565] In this sense, then, accident avoidance is a two-edged sword that can either promote or undermine strict liability: sometimes, the prevention of accidents is used an argument that supports a wide reliance on strict liability, other times it is an argument that marginalises strict liability and favours negligence-based rules.

While the impact of economic analysis on American legal reasoning cannot be exaggerated and has produced an enormous volume of literature in the field, the importance

[559] Shavell (n 443) 24–25.

[560] ibid 29. Cooter and Ulen (n 115) 211–213.

[561] Shavell, 'Mistaken Restriction' (n 443).

[562] Shavell (n 443) 31.

[563] Cooter and Ulen (n 115) 251–253.

[564] Shavell (n 443) 172–173.

[565] The approaches considered in the text differ in other respects. For example, while they all give relevance to litigation costs, they attribute a very different role to distributional concerns (including the deep-pockets and loss-spreading arguments): Calabresi (n 450) 39–67, Louis Kaplow and Steven Shavell, *Fairness v Welfare* (HUP 2006) 28ff, 86ff, clearly recognise their importance in assessing legal rules, whereas Posner attributes only a marginal role to them (see eg Richard A Posner, 'Wealth Maximization and Tort Law: A Philosophical Inquiry' in Owen (n 23) 99, 99–100). See also section 3.4.4. (deep-pockets) and section 3.5.3. (loss-spreading).

of accident avoidance is not confined to theories based on law and economics. In relation to most contexts of strict liability, there are many examples of judges and scholars who, while possibly influenced by the views of legal economists, rely on accident avoidance without showing any strong commitment to economic efficiency. For example, in the context of liability for abnormally dangerous activities, the Supreme Court of Iowa observes that operators of dangerous activities should be found strictly liable because, compared to potential victims, they are 'in a superior position to develop safety technology to prevent … accidents';[566] similarly, among legal scholars, the avoidance of accidents is seen either as a good reason for imposing strict liability for hazardous activities or as the rationale that fits best all the requirements set out in § 520 of the Second Restatement.[567] In the context of product liability, references to accident avoidance are even more frequent, not least because this is the area where the most intense and lively discussions on the justifications for the imposition of liability take place. As early as 1944, in his landmark concurring opinion in *Escola v Coca Cola Bottling Co of Fresno*, Justice Traynor observes that 'public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market', and that '[i]t is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others,

[566] *Gibbons* (n 126) 272–273 (quoting at length Posner) (juxtaposing accident avoidance with loss-spreading). See also *Bierman* (n 416) 498–499 (citing Calabresi) (juxtaposing accident avoidance with loss-spreading and fairness (likely based on risk-creation and/or abnormality of risk)); *Dyer* (n 123) 216, 219 (juxtaposing accident avoidance with loss-spreading and with a cluster comprised of abnormality of risk and risk-profit).

[567] See, respectively, Nolan and Ursin (n 431) 292 (citing Posner as well as Calabresi and Hirschoff) 290–293 (juxtaposing accident avoidance with loss-spreading and fairness (which consists of nonreciprocity of risk and of risk-profit)), and Geistfeld (n 422) 652–658. See also Joseph H King Jr, 'A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities' (1996) 48 Baylor L Rev 341, 352–356 (recognising that accident avoidance is a goal of strict liability—with several references to Calabresi's work—but giving it only secondary importance).

as the public cannot'.[568] In more recent times, a plethora of courts and scholars have similarly stressed the importance of avoiding accidents and shared the view that strict liability would induce manufacturers to reduce the risk of accidents.[569] Another context where accident avoidance features prominently is employers' vicarious liability. Scholars and courts argue that a regime of strict liability would induce employers to take a variety of actions to reduce the risk of accidents, such as by monitoring more intensely their employees' conduct, assigning simpler tasks to accident-prone employees, or rethinking the way of performing their activities.[570] Finally, a concern to prevent accidents is also visible in relation to other

[568] 150 P.2d 436, 440–441 (Cal.1944) (juxtaposing accident avoidance with loss-spreading, victim protection, and litigation cost reduction).

[569] eg *Francioni v Gibsonia Truck Corp*, 372 A.2d 736, 739–40 (Pa.1977) (juxtaposing accident avoidance with victim protection and loss-spreading); *Leichtamer v Am Motors Corp*, 424 N.E.2d 568, 575 (Oh.1981) (accident avoidance standing alone); *Queen City Terminals, Inc v Gen Am Transp Corp*, 653 N.E.2d 661, 671–672 (Oh.1995) (juxtaposing accident avoidance with loss-spreading and litigation costs); *Carlin v Superior Court*, 920 P.2d 1347, 1369 (Cal.1996) (juxtaposing accident avoidance with loss-spreading and victim protection); *Gantes v Kason Corp*, 679 A.2d 106, 111–112 (N.J. 1996) (accident avoidance standing alone). As to legal scholars, see eg William L Prosser, 'The Fall of the Citadel' (1966) 50 Minn L Rev 791, 799–800, 816 (juxtaposing accident avoidance with victim protection, with an argument based on consumers' expectations, and with litigation costs); Abraham (n 111) 226–227 (on manufacturing defects) (juxtaposing accident avoidance with litigation costs, loss-spreading, and the possible reduction of errors in fact-finding that strict liability may achieve). See also Keating (n 168) 46ff (juxtaposing accident avoidance with loss-spreading as proportionality of burdens and benefits, although attributing to the former limited significance).

[570] See *Gossett* (n 464) 280 (juxtaposing accident avoidance with risk-profit and an unspecified risk-distribution argument); *Mary M v City of Los Angeles*, 814 P.2d 1341, 1347–1349 (Cal.1991) (juxtaposing accident avoidance with victim protection and loss-spreading); *Lisa M v Henry Mayo Newhall Mem Hosp*, 907 P.2d 358, 366–367 (Cal.1995) (juxtaposing accident avoidance with victim protection and loss-spreading); *Becker* (n 459) 1210–1212 (juxtaposing accident avoidance with loss-spreading, victim protection, and risk-profit); Harper, James, and Gray (n 422) 21 (juxtaposing accident avoidance with victim protection and loss-spreading); Gary T Schwartz, 'The Hidden and Fundamental Issue of Employer Vicarious Liability' (1996) 69 S Cal L Rev 1739, 1763–1764 (juxtaposing accident avoidance with administrative costs), 1756, fn 91 (combining accident avoidance with deep-pockets); Abraham (n 111) 213 (juxtaposing accident avoidance with administrative costs and loss-spreading).

contexts such as liability for the harm caused by animals,[571] statutory strict parental liability,[572] and liability for traffic accidents.[573]

In sum, American courts and scholars make widespread use of accident avoidance in their attempt to justify the imposition of strict liability in a variety of contexts, regardless of whether they adhere to economic approaches to the law. What is the *significance* of the accident avoidance argument in the American reasoning? Occasionally, accident avoidance stands alone as an argument for imposing strict liability and is therefore seen as the fundamental reason for such imposition,[574] but this is rare, for in most cases the argument is either combined or (far more often) juxtaposed with other justifications and can therefore assume varying significance.[575] In legal reasoning committed to economic analysis, accident avoidance is typically discussed together with arguments such as loss-spreading (and/or deep-pockets) and litigation costs, all acting as a means to the greater end of increasing socio-economic welfare. Here, depending on the view of the single scholar or judge, the concern to avoid accidents may be equally if not more important than other arguments,[576] but its

[571] Comment *d* to § 22 of the Third Restatement LPEH and the Reporters' Note to that comment (juxtaposing accident avoidance with abnormality of risk and nonreciprocity of risk).

[572] See *Curry v Superior Court*, 24 Cal.Rptr.2d 495, 500 (1993); Pamela K Graham, 'Parental Responsibility Laws: Let the Punishment Fit the Crime' (2000) 33 Loy LA L Rev 1719, 1727 (juxtaposing accident avoidance with victim protection).

[573] See Kenneth S Abraham and Robert L Rabin, 'Automated Vehicles and Manufacturer Liability for Accidents: A New Legal Regime for New Era' (2019) 105 Va L Rev 127 (juxtaposing accident avoidance with victim protection, though showing some attraction for the resource allocation (or 'market deterrence') approach to accident avoidance as well (at 154)).

[574] eg *Gantes* (n 569); *Leichtamer* (n 569).

[575] See nn 566–573.

[576] Compare the approaches of Calabresi (n 450) (seeing the reduction in secondary and tertiary costs no less important than a reduction in primary costs), Kaplow and Shavell (n 565) (similarly recognising an important role to distributional concerns and administrative costs in addition to the avoidance of accidents), with that of

pivotal role is completely clear. To have a sense of this, the words of Calabresi are particularly illuminating when he warns legal scholars (including himself) that they 'fail at times to keep in mind that it is minimization of total accident costs, not minimization of accidents, which is the goal'.[577] In other words, accident avoidance is so central in economic analysis that legal economists sometimes treat it as if it were the ultimate goal, forgetting that instead it is only a means to the further goal of socio-economic welfare. This discussion provides two important insights. On the one hand, accident avoidance is central to economic analysis and constitutes an essential reason for imposing strict liability (or, for that matter, any type of liability). On the other hand, the importance of this argument lies in its role in increasing socio-economic welfare; here, it is a means to an end, not an end in itself.

Where, instead, it is discussed by scholars and judges who do not profess any adherence to economic analysis, the avoidance of accidents represents an end in itself which can be pursued regardless of economic theories. As Schwartz once pointed out, '[t]here is no reason why all analysts who care about deterrence as an important social goal should be classified as economists or required to accept the complete methodology of an economic analysis, and all the arguably artificial assumptions tied to that analysis'.[578] Outside economic reasoning, accident avoidance is typically juxtaposed with a variety of other arguments and in this way it can assume different justificatory weight. In some cases, the prevention of accidents acts as a key justification for the imposition of strict liability. For

Posner (n 444) (focusing on accident avoidance and a reduction in administrative costs while largely ignoring distributive concerns).

[577] Guido Calabresi, 'Fault, Accidents and the Wonderful World of Blum and Kalven' (1965) 75 Yale LJ 216, 218 at fn 7.

[578] Schwartz (n 570) 1764.

example, a court may describe accident avoidance as the 'first and foremost objective of strict liability', with other arguments such as loss-spreading and victim protection being of secondary importance.[579] In other cases, the reverse happens, with accident avoidance being of secondary importance and other arguments acting as key justifications. In *Green*, for example, the prevention of accidents is given some consideration, but the 'primary rationale underlying the imposition of strict [products] liability' was seen as lying in creating a risk of harm by manufacturing a product and profiting from it.[580] In still other cases, accident avoidance acts as a make-weight argument. For instance, at one point in his discussion of product liability as an example of enterprise liability, Keating seems to suggest that one of the reasons for imposing strict liability is accident avoidance,[581] but elsewhere he either omits any reference to this rationale[582] or openly criticises it.[583] The impression is that in the context of product liability he is using accident avoidance to make his overall reasoning look more attractive, even though the argument adds very little to it. Finally, in many cases where the relevant reasoning does not allow us to pinpoint the exact justificatory weight of accident avoidance compared to other, juxtaposed rationales, the impression is that it is still recognised as a respectable justification for the imposition of strict liability.[584] In sum, even outside the realm of economic reasoning, accident avoidance features conspicuously as a

[579] eg *Queen City Terminals* (n 569) 671–672.

[580] eg *Green* (n 417) 750. See also King Jr (n 567) 350, 353.

[581] Keating (n 168) 96–97.

[582] ibid 56–57.

[583] ibid 62. See also Keating (n 420) 1373–1374.

[584] eg *Mary M* (n 570) 1347–1349; *Lisa M* (n 570) 366–367; Harper, James, and Gray (n 422) 21.

justification for the imposition of strict liability. However, in contrast with what happens in economic reasoning, the avoidance of accidents is not treated as a means to wider ends, but as an end in itself that is worth pursuing regardless of other objectives.

All this makes clear that accident avoidance is an argument that permeates American legal reasoning in strict liability. This does not mean, of course, that it has remained unchallenged. To begin with, accident avoidance is rejected by those who think that tort liability can be justified only by considerations pertaining to the bilateral interaction between claimant and defendant. In this framework of analysis, accident avoidance is unacceptable, as it embodies a collective goal that disregards both the relationship between claimant and defendant and the doing of interpersonal justice between them.[585] Secondly, sometimes accident avoidance is criticised even by those who do not rule out justifications pursuing societal goals. For example, Keating vigorously argues for the recognition of a broad theory of enterprise liability in American tort law and, in rooting his theory in the fairness of spreading losses among all those who benefit from the harmful activity, he underlines the 'enterprise liability doctrine's relative indifference to optimal precaution', this signalling the author's scepticism towards accident avoidance as a persuasive reason for imposing strict liability.[586] Thirdly, some legal scholars argue that, while tort liability can achieve some level of accident prevention, it does not do so to the extent suggested by many legal economists.[587]

[585] See eg Ernest J Weinrib, 'The Special Morality of Tort Law' (1989) 34 McGill LJ 403, 408; Fletcher (n 308) 537–543.

[586] Keating (n 420) 1276, 1277, 1378. See also ibid 1373–1374. Note that, in Keating's theory, the beneficiaries of a harmful activity who, as such, must bear some share in the cost of accidents include not only the defendant (typically the firm gaining monetary profits from the harmful activity), but also third parties who nonetheless benefitted from it (such as the firm's customers and the users of the product or service provided).

[587] Gary T Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter' (1994) 42 UCLA L Rev 377.

Finally, it must be remembered that, as already seen when discussing accident avoidance in economic reasoning,[588] the goal of preventing accidents may militate not only in favour but also against the adoption of strict liability.

Notwithstanding these criticisms, in the United States the presence of accident avoidance as a reason for imposing liability in tort is pervasive. Insofar as strict liability is concerned, accident avoidance attracts the attention of many courts and legal scholars and it features conspicuously in discussions seeking to justify this type of liability. The argument is either used in the context of economic reasoning as a means to wider ends, or considered as a goal worth pursuing in itself. Either way, it plays an essential role in American legal reasoning and it certainly constitutes a key justification for the imposition of strict liability.

3.3.3. Accident Avoidance in Italy: a Key Justification

In several respects, the significance of accident avoidance as a justification for the imposition of strict liability in the Italian context resembles the American position and contrasts sharply with the way in which accident avoidance is seen in the English and French contexts. The idea that strict liability can lead to a reduction in the number or severity of accidents features prominently in many Italian scholarly works and, strikingly, also in judicial decisions to support or explain strict liability.

The prominence of accident avoidance as a justification for strict liability in Italy is in large part due to the role played by the economic analysis of law in Italian legal scholarship. This approach to the study of tort law first appeared in Trimarchi's work *Rischio e*

[588] See pp 137–141.

responsabilità oggettiva,[589] and then grew in importance under the influence of American legal economists, such as Calabresi, Posner, and Shavell. Therefore, while accident avoidance is also used as an argument by scholars not committed to an economic analysis, it assumes major importance in the efforts of those working from the perspective of law and economics. Moreover, Italian courts are influenced by this academic insistence on accident avoidance, their reasoning often showing a marked—though by no means exclusive—concern for accident avoidance in numerous contexts of liability. As this judicial attitude is the result of academic debates, I will first consider the work of legal scholars and then its reception in judicial reasoning.

Since the 1960s, justifications of strict liability based on accident avoidance have featured constantly in Italian legal scholarship reflecting the fact that Italian scholars started to develop a keen interest in law and economics around that time. To begin with, in the work of Trimarchi tort liability is seen as providing incentives to adopt cost-justified precautions so as to prevent accidents and promote the efficient allocation of resources.[590] In Trimarchi's view, strict liability can induce either background-safety measures, such as the adoption of further precautions or changes in productive methods, or activity-modification strategies, such as shutting down one's own activity in whole or in part.[591] Importantly, Trimarchi subjects the imposition of strict liability to the condition that the defendant's activity presents

[589] Trimarchi (n 289).

[590] ibid 34–36; id (n 310) 278. Note that Trimarchi's theory contemplates victim protection as another goal of tort liability: (n 310) 3–4, 276.

[591] Trimarchi (n 310) 278 and 283 (on strict liability in general), 296 (on employers' vicarious liability), 374 (on liability for the deeds of things and for the actions of animals).

a minimum of continuity and organisation,[592] and that the risk of harm created can be calculated and therefore be absorbed through loss-spreading mechanisms.[593] Otherwise, he argues, strict liability would not be an effective economic pressure but only a blow which would undermine the defendant's finances while not advancing the goal of efficient accident avoidance.[594] Nevertheless, he expressly notes that distributing losses (eg through insurance or self-insurance) and compensating victims must be considered a secondary goal and justification of liability as compared to that of preventing accidents.[595]

A second approach followed by Italian law and economics scholars shares Trimarchi's view that the essential objective of tort liability is the achievement of efficient accident avoidance, but prioritises different aspects of economic reasoning. For example, Monateri embraces the view that fault-based liability should be adopted in situations where both parties are in a position to take precautions to avoid accidents (bilateral accidents), while strict liability, even with no defence based on the victim's fault, should be adopted in situations where only the defendant can do something to avoid the accident (unilateral accidents).[596] A straightforward application of this approach is in the context of dangerous activities, for it is only the operator of such activities and not the victim that has the technological expertise to prevent accidents; therefore, strict liability should apply.[597] A

[592] ibid 285.

[593] ibid 280, 359–360.

[594] ibid 352, 359–360, 280. Cf the position of Tunc in France, at n 687.

[595] Trimarchi (n 310) 8, 279–280. See also id (n 289) 31–34.

[596] Monateri (n 393) 6–10; See also Cooter, Mattei, Monateri, Pardolesi, and Ulen (n 393) 210–218.

[597] Monateri (n 596) 9–10; id 'Responsabilità del produttore di sigarette per danni da fumo attivo' DR 2005.12.1210, text to fns 11–12.

further example is provided by product liability. In many cases the manufacturer is the only party who can act so as to minimise the number of accidents or their magnitude. But there are situations where the consumer is also in a position to take precautions, for example by not using a lawn mower to trim hedges.[598] Given this, the goal of efficient accident avoidance suggests that producers should be subjected to a regime of strict liability unless the victim negligently misused the product or voluntarily exposed herself to the risk of harm.[599] This approach takes into account not only what precautions the parties can adopt to improve situational or background safety, but also the intensity of the defendant's and claimant's respective activities. Indeed, if the intensity of the defendant's activity impacts on the number or magnitude of accidents more than the intensity of the claimant's activity, strict liability should apply so as to induce the defendant to reduce that intensity and therefore cause fewer accidents.[600] Fundamentally, therefore, the desirability of strict liability depends on the nature, bilateral or unilateral, of accidents and on how the intensity of activity influences such accidents; and, unlike in Trimarchi's approach, the availability of loss-spreading mechanisms is largely ignored and distributive concerns are more generally treated with caution because seen as potentially hindering efficient accident avoidance.[601]

Different again but equally influential is Castronovo's view, which sees strict liability as pursuing, first and foremost, the avoidance of accidents and considers distributive

[598] Robert Cooter, Ugo Mattei, Pier Giuseppe Monateri, Roberto Pardolesi, and Thomas Ulen, *Il mercato delle regole – Analisi economica del diritto civile – II. Applicazioni* (Il Mulino 2006) 204.

[599] ibid.

[600] Cooter, Mattei, Monateri, Pardolesi, and Ulen (n 393) 220–222. See also Monateri (n 179) 979 (on employers' vicarious liability); Enrico Baffi and Dario Nardi, 'La responsabilità da custodia della P.A.: prospettive di analisi economica del diritto' DR 2016.4.337 (on liability for the deeds of things).

[601] Cooter, Mattei, Monateri, Pardolesi, and Ulen (n 393) 222–223.

concerns less essential because only applicable to situations where firms, as opposed to physical individuals, cause harm to others.[602] In the pursuit of accident avoidance, strict liability induces those involved in potentially harmful activities either to abstain from engaging in those very activities or to adopt safety measures suitable to prevent accidents.[603] Directly influenced by Calabresi,[604] Castronovo embraces the 'cheapest cost avoider' approach, arguing that

> The person who is made answerable for a certain harm must bear liability because she was found, before its occurrence, in the most adequate position to evaluate the opportunity to avoid it and the way to avoid it in the most convenient way, so that the occurrence of the harm descends by an option for it, taken as an alternative to the contrary decision; and because each of these [decisions] has a cost, bearing the cost of the harm means paying for the choice made.[605]

In treating the 'cheapest cost avoider' approach as based on an element of choice, Castronovo does not see it as belonging exclusively to economic reasoning but instead as 'rooted in a human dimension' which, together with its considerable precision, makes it superior to any other previous attempt to justify or explain strict liability;[606] furthermore, unlike Trimarchi's approach based on *rischio di impresa* and Monateri's approach focusing on the bilateral/unilateral nature of accidents, the 'cheapest cost avoider' approach is 'universal', in the sense that it could replace altogether the fault paradigm and be the sole criterion for the attribution of liability in respect of all accidents.[607]

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[602] Castronovo (n 265) 23–24.

[603] ibid 24–26.

[604] ibid 496.

[605] ibid 492–493. For an application of this approach to product liability, see Carlo Castronovo, *Problema e sistema nel danno da prodotti* (Giuffrè 1979) 595ff.

[606] Castronovo (n 265) 493–494.

[607] ibid 493.

In sum, and in keeping with the United States, there is a spectrum of economic approaches which emphasise the importance of accident avoidance as a key factor in assessing the appropriateness of liability rules. Inevitably, different economic theories yield different results in terms of the desirability of strict liability. As was seen in relation to the United States,[608] economic analysis deploys accident avoidance as a means to socio-economic welfare and therefore the argument constitutes a two-edged sword that can either support or weaken the case for strict liability, depending on the economic theory which the scholar (or judge) adopts. The same holds true in the Italian context, with Trimarchi, Castronovo, and Monateri each providing strikingly different recipes for choosing between strict liability and fault.

The adoption of an economic perspective by leading Italian scholars has had a remarkable impact on the reasoning of many academics and, albeit to a lesser extent, on that of courts. Examples from the academic literature can be found with reference to numerous contexts of liability. For instance, in relation to the employers' vicarious liability, Sella argues that this liability is based on Trimarchi's *rischio di impresa* and, after focusing on the goal of efficient resource allocation, he suggests that strict liability constitutes an incentive for employers not to underestimate the risks of harm (citing Monateri).[609] Similarly, in the context of product liability, Pardolesi has very recently argued that a regime of strict liability with a defence of contributory negligence constitutes the best approach because it would minimise the costs of accidents by giving both producers and consumers incentives to take

[608] See pp 137–141, and text to (and following) n 577.

[609] Sella (n 375) 1150–1151 (combining accident avoidance with resource allocation and insurability). See also Monateri (n 179) 979 (perhaps adding a resource allocation argument too); Federico Gustavo Pizzetti, 'Responsabilità civile del datore di lavoro, occasionalità necessaria e stato soggettivo del danneggiato' DR 1999.4.430, text to fns 15–19; Franzoni (n 11) 762–763.

efficient precautions.[610] Comparable reasoning can be found in many other contexts, such as liability for dangerous activities,[611] liability for the deeds of things,[612] liability for the actions of animals,[613] liability for ruinous buildings,[614] and liability for nuisance.[615] All these examples show that, in keeping with American legal economists, many Italian scholars value the tools of economic analysis and consider accident avoidance a persuasive argument for the imposition of strict liability insofar as it plays a key role in the pursuit of greater socio-economic welfare.

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[610] Paolo Pardolesi, 'Riflessioni sulla responsabilità da prodotto difettoso in chiave di analisi economica del diritto' Riv Dir Priv 2017.2.87. For other examples in this context, see Guido Alpa, 'Prodotti difettosi, danno ingiusto, responsabilità del fabbricante' GM 1971.I.297, 299, 303 (combining accident avoidance with loss-spreading); Ugo Carnevali, *La responsabilità del produttore* (Giuffrè 1974) 47–49 (combining accident avoidance with loss-spreading/deep-pockets and administrative/litigation costs, clearly inspired by Calabresi); Annalisa Bitetto, 'Responsabilità da prodotto difettoso: strict liability o negligence rule?' DR 2006.3.259 (combining accident avoidance with resource allocation); Antonio Davola and Roberto Pardolesi, 'In viaggio col robot: verso nuovi orizzonti della r.c. auto ("driverless")?' DR 2017.5.616, text following fn 47 (juxtaposing accident avoidance with victim protection).

[611] Monateri (n 179) 1011 (agreeing with Trimarchi's approach), 1031 (seeing efficient accident avoidance as the goal of article 2050 Cod civ); id (n 596) 9–10; Dario Covucci, 'Attività pericolosa e responsabilità oggettiva del produttore di sigarette' NGCC.2010.667 (arguably combining accident avoidance with loss-spreading/deep-pockets and administrative/litigation costs, in juxtaposition with victim protection).

[612] Monateri (n 179) 1050–1051 (seeing Italian caselaw as perfectly consistent with economic analysis and the goal of avoiding accidents), including fn 9; Paolo Laghezza, 'La responsabilità della P.A. per omessa manutenzione delle strade' DR 2002.12.1201 (combining accident avoidance with resource allocation); Enrico Baffi and Dario Nardi, 'Analisi economica del diritto e danno cagionato da cose in custodia' DR 2018.3.327 (combining accident avoidance withresource allocation); Enzo Vincenti, 'La dottrina in dialogo con la giurisprudenza: il pensiero di Piero Trimarchi in taluni orientamenti della Cassazione civile' RCP 2018.4.1396 (arguing that some decisions of the Corte di Cassazione are aligned with Trimarchi's emphasis on accident avoidance).

[613] Annalisa Bitetto, 'Danni provocati da animali selvatici: chi ne risponde e perchè?' DR 2003.3.275, text to fns 26–28, and to fns 31–32 (discussing accident avoidance with loss-spreading and deep-pockets, with a view to minimising the social costs of accidents); Trimarchi (n 310) 369–376 (combining accident avoidance with resource allocation, while rejecting risk-benefit and risk-profit).

[614] Monateri (n 179) 1079 (accident avoidance standing alone). See also Enrico Baffi, 'La responsabilità del proprietario per danni da rovina di edificio come forma di responsabilità vicaria: analisi giuseconomica' DR 2017.6.657.

[615] Roberto Pardolesi, 'Azione reale e azione di danni nell'art. 844 c.c. – Logica economica e logica giuridica nella composizione del conflitto tra usi incompatibili delle proprietà vicine' Foro It 1977.I.1144, 1150–1153 (combining accident avoidance with resource allocation in relation to private nuisance).

Though less common, it is also possible to find judicial decisions engaging with accident avoidance from the perspective of law and economics. The most interesting examples concern liability for dangerous activities and liability for the deeds of things.[616] As regards the former, in 2005 and 2009 two first-instance judges relied on the difference between unilateral and bilateral accidents to deny the application of article 2050 Cod civ to the production of cigarettes. As the smokers involved were aware of the health risk connected with tobacco consumption and voluntarily decided to smoke and run that risk instead of quitting altogether or reducing the number of cigarettes per day, their injuries constituted a bilateral accident and therefore strict liability could not apply.[617] In 2009, however, the Corte di Cassazione rejected this line of argument and applied article 2050 to a manufacturer of tobacco products.[618] First, the court considered the 'cheapest cost avoider' approach by doing a 'copy and paste' operation from Castronovo's work.[619] Secondly, the court rejected the view that strict liability should apply only in cases of unilateral accidents on the ground, first, that there are cases of unilateral accidents where the legislator opted for a fault-based liability rule,[620] and secondly, that article 1227 Cod civ provides for a general duty on potential victims to avoid or minimise the risk of harm, irrespective of whether the

[616] Examples may arguably be found also in relation to employers' vicarious liability, where on several occasions the Corte di Cassazione stated that the rationale of this liability is *rischio di impresa*: Civ (III) 20.6.2001 n. 8381; Civ (III) 6.3.2008 n.6033; Civ (sezione lavoro) 11.1.2010 n.215.

[617] Trib Brescia 10.8.2005; Trib Roma 28.1.2009 n.1828.

[618] Civ (III) 17.12.2009 n.26516.

[619] ibid [3.10].

[620] eg car passengers cannot do anything to avoid accidents and yet, under article 2054 Cod civ, the driver is liable only if at fault.

standard of liability chosen by the legislator is strict or fault-based.[621] The fact that one or both parties can avoid or reduce the risk of harm cannot therefore determine which liability rule applies.[622] Again in the context of tobacco litigation, a lower court has recently relied on Calabresi's 'cheapest cost avoider' approach to identify the rationale of article 2050.[623] Finally, in cases concerning liability for the deeds of things, the Corte di Cassazione again picks the 'cheapest cost avoider' theory to justify strict liability,[624] and a decision from a lower court provides a surprisingly sophisticated economic analysis based on the incentives to be given to the keeper of the thing for purposes of efficient accident avoidance.[625] In sum, similarly to the United States but in striking contrast with what will be seen for England and France, efficient accident avoidance features very prominently in the work of Italian legal scholars and, through them, it has spilled into the reasoning of the courts.

As was seen in relation to the United States, though, economic analysis does not exhaust the significance of accident avoidance as a justification for strict liability in the Italian system. Indeed, while Italian reasoning reveals a strong connection between economic analysis and accident avoidance, judicial decisions or scholarly work that refer to accident avoidance without linking this to broader theories of economic efficiency are not unusual. As regards the courts, there are many examples of rulings that treat accident avoidance as important without resorting to economic analysis. In particular, in relation to

[621] Civ (III) 17.12.2009 n.26516, [3.14].

[622] Civ (III) 17.12.2009 n.26516, [3.13]–[3.14].

[623] Trib Milano 11.7.2014 n.9235, LRC 2015.2.579, 580. Cf Civ (III) 10.10.2014 n.21426 (identifying the rationale of article 2050 in *rischio di impresa*).

[624] eg Civ (III) 6.7.2006 n.15383, [5.6]; Civ (III) 19.2.2008 n.4279, [4.2].

[625] Trib Monza I sez civ 22.10.2001.

article 2051 Cod civ, the Corte di Cassazione on several occasions stated that 'the function of [strict liability for the deeds of things] is to attribute liability to the party who is in the position to control the risks stemming from the thing',[626] and that the notion of *custodia* refers to the 'power of governing' the thing, which consists of 'the power to control the thing, to remove situations of danger that may have materialised, and to exclude others from coming into contact with the thing'.[627] The expressions 'to control the risks' and 'to remove situations of danger' resonate strongly with a commitment to avoiding accidents.[628] Decisions where preventing accidents is seen as key are also found outside the context of liability for the deeds of things, although less frequently. To give an example in relation to the liability of parents, on a few occasions the Corte di Cassazione suggested that imposing strict parental liability is desirable because it provides parents with an incentive to raise their children in a way that minimises the risk of dangerous conduct on their part.[629] In sum, the reasoning of these courts clearly suggests that preventing accidents constitutes a key justification for strict liability.

In so far as scholarly works not committed to an economic analysis are concerned, the typical pattern is that accident avoidance is referred to in a generic way as a reason for adopting strict liability, without any further elaboration. In these cases, it is difficult to say

[626] Civ sez un 11.11.1991 n.12019, [2.b]; Civ (III) 13.1.2015 n.295; Civ (III) 29.9.2017 n.22839, [1.2].

[627] Civ (III) 12.7.2006 n.15779, [2.2]; Civ (VI) 4.10.2013 n.22684, [4.1]; Civ (III) 29.9.2017 n.22839, [1.2]; Civ (III) 14.3.2018 n.6141.

[628] Trimarchi himself argues that liability for the deeds of things should be attributed to the party who could 'intervene on the general conditions of risk' stemming from the thing, primarily because in this way it would be possible to promote a reduction in the risk of accidents: see Trimarchi (n 310) 374–375.

[629] Civ (III) 20.3.2012 n.4395, [2.4] (accident avoidance standing alone); Civ (III) 19.2.2014 n.3964, [4.4] (accident avoidance standing alone).

how relevant accident avoidance is, but it looks as though it acts at times as either a secondary or make-weight argument, while at other times as a key justification. An example of the first attitude is provided by Comporti who, in expounding his theory based on exposition to danger, considers the protection of victims as paramount and strict liability as fundamentally geared towards that goal;[630] he devotes very little attention to the circumstance that the defendant may be able to control or avoid the created dangers,[631] this suggesting that preventing losses is not a particularly significant factor in his reasoning justifying strict liability. In cases like this, then, the key reason for strict liability lies elsewhere than in accident avoidance, often in a willingness to see victims compensated for their losses.[632] By contrast, at other times accident avoidance looks more significant. For example, in relation to liability for the harm caused by construction defects in motor vehicles, Roppo argues that strict liability should be imposed not on the owners of defective vehicles but on their manufacturers, for they are best suited to avoid or correct the defects which can cause harm—and also for being those who profit most from the car industry.[633] In this case, accident avoidance plays a key role on the face of the reasoning considered or, at least, it

[630] Comporti (n 253) 24–25, 27, 174–76, 255ff.

[631] Comporti (n 253) 175.

[632] See Giovanni Facci, 'L'illecito del figlio minore, la prova liberatoria dei genitori e la responsabilità oggettiva' LRC 2005.2.162, text to fns 18–20 (interpreting the rigorous attitude of the courts vis-à-vis parental liability as based on the desire to ensure compensation to victims).

[633] Roppo (n 266) 136, 140 (juxtaposing accident avoidance with risk-profit, and also adding victim protection, resource allocation and, arguably, litigation costs).

does not look less important than other considerations (such as risk-profit, in the present example).[634]

Overall, then, the emerging picture suggests that, in keeping with the approach in the United States, avoiding accidents is a key reason for imposing strict liability in the Italian context. In discussions based on economic efficiency, accident avoidance constitutes the focal point of analysis and the single most important objective to be accomplished in view of greater socio-economic welfare. In discussions not engaging with economic analysis, many judges and scholars similarly consider accident avoidance to be an important reason for imposing strict liability.

Of course, all this does not mean that accident avoidance has never been challenged. Some Italian scholars seem to consider it axiomatic that strict liability focuses only on compensatory goals and that the fault paradigm would more naturally and effectively pursue the goal of preventing accidents on the ground that, unlike strict liability, it scrutinises the defendant's conduct.[635] Similarly, in discussions regarding product liability, in the 1970s some academics cast doubt on the ability of strict liability to pursue accident avoidance on the ground that, for many firms, the potential costs of liability are insignificant compared to the profits they make and therefore that the imposition of strict liability would have no effect on their choices or methods of production.[636] It is possible that, to some extent, these

[634] For similar examples, all providing interpretive views on liability for the deeds of things, see Salvi (n 365) 167, 172 (juxtaposing accident avoidance with victim protection); Paolo Garraffa, 'La responsabilità del gestore di un impianto di calcio "saponato"' NGCC 2018.7-8.1052, 1059 (accident avoidance standing alone).

[635] Salvatore Patti, *Famiglia e responsabilità civile* (Giuffrè 1984) 275, 292; Corsaro (n 253); and Carbone (n 399) 14–16 (on parental liability).

[636] Mario Bessone, 'Prodotti dannosi e responsabilità dell'impresa' RTDPC 1971.97; id, 'Progresso tecnologico, prodotti dannosi e controlli sull'impresa' PD 1972.203. Cf id, 'Profili della responsabilità del produttore nell'esperienza italiana' in Guido Alpa and Mario Bessone (eds), *Danno da prodotti e responsabilità*

criticisms attenuated the influence of accident avoidance as a reason for adopting strict liability, but they did not undermine its attractiveness in the eyes of many scholars and courts. Indeed, an analysis of the Italian reasoning suggests that the vitality of this argument has remained largely intact and that it is seen as a key justification today. Most likely because of the growing influence exercised by approaches based on an economic analysis of law, the idea that strict liability may contribute to preventing losses has thrived and become one of the most frequently rehearsed arguments for imposing strict liability in the Italian context.

3.3.4. An Argument Struggling to Become Key in English Law?

Compared to the American and Italian approaches, accident avoidance has less appeal as a justification for strict liability in England. To be sure, the argument appears in the reasoning of many English legal actors who see the avoidance of accidents as a plausible reason for imposing strict liability. However, it is also met with broad scepticism and lacks the theoretical support that economic analysis provides to it in the United States and Italy. As a result, it seems fair to say that accident avoidance struggles to establish itself as a key justification for the imposition of strict liability in the English context.

The idea that imposing strict liability may be justified by appealing to the desirability of avoiding accidents features in the reasoning of several English legal actors. For example, in relation to the rule in *Rylands v Fletcher*, Salmond argues that an occupier of land is strictly liable 'not merely for causing the escape of deleterious things from his land into that

dell'impresa – Diritto italiano ed esperienze straniere (Giuffrè 1980) 11, 27 (seemingly changing his view and considering strict liability as desirable for its loss-spreading potential in situations where firms are involved).

of his neighbours, but also for failing to prevent such an escape'.[637] In *Transco*, Lord Hobhouse repeatedly observes that the rule in *Rylands* stems from the failure to control and confine the risk created by the dangerous use of land.[638] Similar statements can be found in relation to liability for the harm caused by dangerous animals, where since the famous *Filburn* case several judges have emphasised that the person who keeps a dangerous animal is strictly liable if she fails to prevent it from doing harm.[639] Similarly, the Law Commission's report on civil liability for animals, on which the Animals Act 1971 is based, observes that one of the reasons for imposing strict liability for a dangerous activity (which includes keeping dangerous animals) is that the person carrying it on is in the best position to avoid accidents.[640] Consistently with this, recent cases such as *Mirvahedy* and *Welsh* show that accident avoidance is in the mind of judges when interpreting some provisions of the Animals Act 1971: arguing that the keeper of animals can decide whether 'to run the unavoidable risks involved in keeping [them]' means inducing her to make a cost-benefit analysis and decide whether it makes more sense to stop engaging in that activity or to continue it and pay compensation, this embodying an activity-modification argument.[641]

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[637] Salmond (n 85) 191.

[638] *Transco* (n 51) [55]-[57], [64] (therefore combining accident avoidance with abnormality of risk) (mentioned with approval by Stelios Tofaris, 'Rylands v Fletcher Restricted Further' (2013) 72 CLJ 11, 13). See also *Kendricks Transport Ltd* (n 58) 90 (again combining accident avoidance with abnormality of risk); Murphy (n 44) 659ff (juxtaposing accident avoidance with loss-spreading, resource allocation, and with a combination of arguments which includes abnormality of risk, risk-profit, and deep-pockets).

[639] See eg *Filburn* (n 74) 260; *J Lyons* (n 45) 171; *Behrens* (n 74) 13–14 (all combining accident avoidance with abnormality of risk).

[640] Law Comm No 13 (n 77) [20], [24] (juxtaposing accident avoidance with loss-spreading, abnormality of risk, and litigation costs (the last insofar as cattle trespass is concerned, at [63])).

[641] *Mirvahedy* (n 487) [157] (Lord Walker); *Welsh v Stokes*, [2007] EWCA Civ 796, [47] (both discussing accident avoidance and loss-spreading). See also David Howarth, 'The House of Lords and the Animals Act: closing the stable door' (2003) 62 CLJ 548, 548–549.

Again, in the field of nuisance, *Rapier v London Tramways Company* reveals a willingness to take into account accident avoidance, again in the form of activity-modification:[642] if the defendants 'cannot have 200 horses together, even when they take proper precautions, without committing a nuisance, all [the judge] can say is, they cannot have so many horses together'.[643] Further references to accident avoidance can be identified in the context of product liability. In the 1970s, both the Law Commission and the Pearson Commission argue that strict liability may encourage manufacturers to 'ensure the highest possible standards of safety',[644] and therefore 'reduce the risk of further accidents'.[645] In more recent times, several English legal actors have interpreted the Product Liability Directive as based on a variety of justifications, including the manufacturer's ability to avoid accidents.[646] Finally, in the field of vicarious liability, accident avoidance features in the reasoning of some courts and of several legal scholars, typically on the ground that the employer is in a position to control her employees and take a variety of steps that can help reduce the risk of accidents.[647]

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[642] [1893] 2 Ch 588.

[643] ibid 602. See also Gerry Cross, 'Does only the careless polluter pay? A fresh examination of the nature of private nuisance' (1995) 111 LQR 445, 473–474 (juxtaposing accident avoidance with risk-benefit).

[644] Pearson Commission (n 494) [1234]–[1235] (juxtaposing accident avoidance with several other arguments, including loss-spreading and victim protection).

[645] Law Comm No 82 (n 466) [38], [23] (juxtaposing accident avoidance with risk-creation, loss-spreading, and litigation costs).

[646] Department of Trade and Industry, *Implementation of European community directive on product liability: an explanatory and consultative note* (1985) [37], [39] (juxtaposing accident avoidance with victim protection). Dyson and Steel (n 307) 42 (juxtaposing accident avoidance with loss-spreading); *Gee* (n 102) [167] (arguably juxtaposing accident avoidance with loss-spreading); McBride and Bagshaw (n 12) 376–378 (juxtaposing accident avoidance with nonreciprocity of risk, victim protection, loss-spreading, and resource allocation).

[647] *Majrowski* (n 469) [9] (Lord Nicholls) (juxtaposing accident avoidance with a combination of arguments which include risk-creation, victim protection, deep-pockets, and loss-spreading); *Viasystems* (n 520) [55] (Rix LJ) (discussing accident avoidance with risk-profit and loss-spreading); Malcom A Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century* (OUP 2005) 310; Peel and Goudkamp (n 20) [21-006] (juxtaposing accident avoidance with risk-profit, deep-pockets, and loss-spreading); Jonathan Morgan, 'Vicarious Liability For Independent Contractors' (2016) 31 PN 235, 249–251 (arguing that accident avoidance

In addition to all this, accident avoidance features in the work of some legal scholars discussing liability regardless of any specific tort, with varying degrees of prominence. For example, Slavny identifies the 'moral basis of liability to compensate', which encompasses both fault-based and strict liability, in two principles, one of which is the 'avoidability principle': '[w]henever A harms B, there is a stronger reason to let the cost fall on the party who had a better opportunity to avoid the risk'.[648] Another example is Gardner's approach, which justifies tort law by reference to the role it plays in securing conformity to a moral norm of corrective justice, and yet it sees the avoidance of accidents as part of what tort law is for.[649] Again, Stapleton recognises as legitimate 'the interest in deterring certain conduct by requiring injurers to pay the full social costs of the injuries they cause'.[650] Finally, in its first formulation, Honoré's theory of outcome-responsibility seemingly links the argument from abnormality of risk to a 'consequentialist argument for avoiding serious harm'.[651]

The emerging picture may suggest that accident avoidance is a key justification for the imposition of strict liability in England: it features in a wide variety of contexts of liability and, in many of the examples seen above, it is accorded considerable justificatory weight,

justifies 'the core feature of vicarious liability - ie making one (typically solvent) person strictly liable for the torts of another (typically impecunious) party, when he has some degree of authority and control over that other'); Steele (n 37) 578–579 (discussing accident avoidance with risk-benefit, risk-creation, victim protection, deep-pockets, and loss-spreading); Christian Witting, 'Modelling organisational vicarious liability' (2019) 39(4) LS 694 (juxtaposing accident avoidance with victim protection, and devoting most of his article to discussing the potential of vicarious liability for reducing accidents).See also Fleming (n 487) 410; Brodie (n 473) 495, both seeing accident avoidance as a secondary justification.

[648] Slavny (n 484) 425–428. The other principle, juxtaposed with accident avoidance, is the 'benefit principle', on which see n 516.

[649] Gardner (n 304) 25.

[650] Stapleton (n 303) 843.

[651] Honoré (n 492) 542.

even where it is combined or juxtaposed with other justifications. However, this is only part of the picture, and there are several reasons to be cautious when assessing the argument's overall significance in England.

First, in none of the contexts of liability where it appears accident avoidance stands out as the dominant justification and, in contexts such as vicarious liability or the rule in *Rylands v Fletcher*, it is clearly less prominent than arguments such as loss-spreading or risk.[652] Secondly, accident avoidance is the target of numerous criticisms, both with reference to specific contexts of liability and in general. For example, in relation to product liability, leading scholars such as Stapleton criticise efficient accident avoidance on the grounds that the argument would be normatively undesirable,[653] and that it would be unworkable, for it would be extremely difficult to identify the cheapest cost avoider and determine the range of compensable losses.[654] Similarly, several scholars criticise accident avoidance as a plausible justification for vicarious liability on the grounds that it cannot explain some key features of the law,[655] that strict liability is unlikely to deter,[656] or, quite the opposite, that it would end up causing over-deterrence![657] Most importantly, in this field of English law the role of accident avoidance has been sidelined by the UK Supreme Court.

[652] See section 3.2.5. (risk) and section 3.5.5. (loss-spreading).

[653] Stapleton (n 38) 157–162.

[654] Stapleton (n 99) 397–399. See also JA Jolowicz, 'The Protection of the Consumer and Purchaser of Goods under English Law' (1969) 32 MLR 1, 1–2, 9 (admitting his scepticism about the law's ability to contribute effectively to the avoidance of accidents, and suggesting that preventing accidents 'is the business of the criminal law').

[655] Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20 MLR 437, 442.

[656] Giliker, *Vicarious Liability in Tort* (n 481) 242–243; Murphy (n 467) 373–374.

[657] Donal Nolan, Review of 'Douglas Brodie, *Enterprise Liability and the Common Law* (CUP 2010)' (2012) 41(3) ILJ 370, 371–372; Goudkamp and Plunkett (n 481) 68–169.

In *Armes*, Lord Reed criticises a decision of the Canadian Supreme Court[658] where liability of a local authority for the abuse of children by foster parents was denied on the ground that 'the imposition of vicarious liability would not result in the deterrence of such abuse'.[659] After noting that the Canadian decision 'reflects the view taken in that jurisdiction that the deterrence of tortious behaviour is one of the principal justifications for the imposition of vicarious liability', Lord Reed observes that 'a number of justifications for the imposition of vicarious liability have been advanced in the British case law, but deterrence has not been prominent among them', being 'not mentioned in either the *Christian Brothers* case or *Cox*'s case'.[660] In the view of the UK Supreme Court, then, the argument from accident avoidance has little or no significance as a justification for vicarious liability, which is instead dominated by risk-based arguments and, perhaps to a lesser extent, by arguments based on loss-spreading.[661]

Regardless of any specific context of liability, several English legal scholars question the ability of tort law to reduce meaningfully the number or severity of accidents. For example, entertaining a radical position about tort law's deterrent function, Jolowicz maintains that 'prevention, in so far as it is the business of the law, is the business of the criminal law', while the civil law should mainly 'decide who shall bear the financial

[658] *KLB v British Columbia*, 2003 SCC 51, [2003] 2 SCR 403.

[659] *Armes* (n 88) [66].

[660] ibid [67]. Afterwards, Lord Reed consecrates risk-benefit as the 'most influential idea' grounding vicarious liability.

[661] See section 3.2.5. (risk) and section 3.5.5. (loss-spreading).

consequences when things have gone wrong'.[662] Less drastic is Atiyah, who argues that tort liability may be effective 'in preventing a surgeon [from] operating on a patient without his consent', or 'in deterring newspapers from publishing much which could be defamatory',[663] but then adds that '[t]he effectiveness of tort actions … as a deterrent in the field of accidents … is much more dubious'.[664] In sum, many English legal scholars doubt the ability of tort law to induce a reduction in the number or severity of accidents, and at most they concede that tort law may have some deterrent potential in relation to intentional or seriously negligent conduct. Therefore, it is not surprising that these scholars give little or no credit to accident avoidance as a possible justification for the imposition of strict liability.

This tendency to link accident avoidance to fault-based liability leads some scholar to discuss the argument only from the perspective of what can be expected of the reasonable person, forgetting that accident avoidance measures can go beyond ordinary care. An example of this can be identified in Stevens's refutation of accident avoidance as a justification for the imposition of vicarious liability:

> it is commonly said that holding an employer liable for the torts of his employees will encourage the employer to be careful. The employer has control and is in a position to reduce the harm caused by employees by the selection, supervision, and organization of staff. However, this argument fails to explain why the employer is liable even where he has taken due care in these matters. When the employer has done all that he can, what further encouragement is there in imposing liability in any event?[665]

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[662] JA Jolowicz (n 654) 1–2, 9. See also Stevens (n 477) 321–323 (showing considerable scepticism as to the ability of tort law to regulate human conduct).

[663] Atiyah (n 514) 557.

[664] ibid 558. See also Glanville Williams, 'The Aims of the Law of Tort' (1951) 4 CLP 137, 172; Cane and Goudkamp (n 90) 405–420.

[665] Stevens (n 477) 258.

Here, Stevens links tightly accident avoidance to careless conduct and does not seem to consider the possibility that strict liability may put an additional economic pressure on employers to find ways of reducing accidents. In other words, the strategies which strict liability can deploy to avoid accidents, namely background-safety and activity-modification, are not explored.

A further reason why accident avoidance struggles to establish itself as a prominent justification for strict liability (and tort liability more generally) relates to the English scepticism about the economic analysis of law. It was seen that both in the United States and in Italy the ascendancy of law and economics provided a formidable framework where accident avoidance could flourish in the reasoning of legal scholars (and of judges, to a lesser extent). In sharp contrast with this approach, in England efficiency-based reasoning has received very little support, with the result that accident avoidance lacks an important theoretical basis. An early notable exception to this is Baron Bramwell, whose judicial opinions in the second half of the 19th century make use of welfare economics to justify the imposition of strict liability for nuisance and under the rule in *Rylands v Fletcher*. In Bramwell's view, either the defendant's activity is profitable enough to pay compensation for the harm caused and still survive, or it cannot, in which case it is in the public interest that she should discontinue her activity.[666] This position is reminiscent of the approaches of Trimarchi in Italy and Calabresi in the United States.[667] Once a firm is forced to internalise the full social costs of its activity, which include compensation for the harm caused to third

[666] In relation to nuisance, see *Hammersmith and City Railway Co v Brand*, (1866-67) LR 2 QB 223, 231 (for similar remarks, see also *Bamford v Turnley*, (1862) 3 B & S 66, 84–85. In relation to the rule in *Rylands v Fletcher*, see *Powell* (n 486) 601.

[667] See text to nn 367–371 (Trimarchi) and nn 545–549 (Calabresi).

parties (even if without fault), the firm may try to find a way of reducing accidents, for example by lowering the level of its activity or by making it safer. If the firm decides not to do this, it will have to raise the price of its product or service, with the result that consumers/users will buy less of that product or service (preferring safer alternatives); as a result, the firm's product or service will be used less and the overall number of accidents it causes will diminish. To make all this work, though, it is necessary that the 'price' of the firm's activity reflects its true social cost, meaning that as far as tort liability is concerned, the firm should be strictly liable. A possible outcome of this approach, and the one envisaged by Baron Bramwell, is that if the social wealth a firm creates is less than what it costs to society, and if the firm does not find a solution to this, then it should be driven out of the market because its existence does more harm than good to society.

This way of thinking, though, has never gained acceptance in England and those scholars who have engaged with economic analysis (mostly in its Calabresian version), have shown a good deal of scepticism about the workability and desirability of this approach. For example, in discussing Calabresi's theory of general (or market) deterrence, Atiyah argues that 'there is undoubtedly an attraction in the use of the market mechanism in certain situations',[668] but adds that this approach has important limitations and 'the details of the argument seem to depend too much on forms of "fine tuning" which are inappropriate to the circumstances'.[669] In *Transco*, Lord Hoffmann comments on Baron Bramwell's interpretation of the rule in *Rylands* and rejects it. In doing so, he observes that while '[i]t is tempting to see, beneath the surface of the rule, a policy of requiring the costs of a

[668] Atiyah (n 514) 579–580.

[669] ibid 609–610. See also id (n 518) 27–30; Cane and Goudkamp (n 90) 420–433.

commercial enterprise to be internalised', the fear of imposing too much liability on firms has brought the law in another direction, that of a negligence-dominated tort law.[670]

Finally, in keeping with the position of part of American legal scholarship, some English legal scholars reject accident avoidance, especially in its efficiency-based version, on the ground that it embodies an instrumentalist approach which, by seeing tort rules purely as a function of broader social goals, conflicts with the vision of tort law as a system of interpersonal justice. For example, Cane argues that both Posner's and Calabresi's approaches (to negligence and strict liability, respectively) do not fit tort law because they are at odds with the backward-looking nature of the latter and because, where applied to a bilateral relationship as that between claimant and defendant, economic analysis undermines its own logic by subjecting itself to the constraints of the tort system.[671] Perhaps even more fundamentally, though, accident avoidance and economic efficiency conflict with Cane's understanding of tort law as a 'system of ethical rules and principles of personal responsibility'.[672]

In sum, an assessment of the overall significance of accident avoidance suggests that the argument struggles to establish itself as a key justification for the imposition of strict liability. To be sure, it receives the support of many English legal actors across a wide spectrum of contexts of liability, and from time to time legal scholars put renewed effort in endorsing it as a viable justification for tort liability (whether fault-based, strict, or both). On

[670] *Transco* (n 51) [29].

[671] Cane (n 484) 42–45, 48.

[672] Cane (n 23) 27 and 217–225; id, 'Tort Law as Regulation' (2002) 31 CLWR 305. See also Stevens (n 477) 320–340; Donal Nolan, 'Causation and the Goals of Tort Law' in Andrew Robertson and Hang Wu Tang, *The Goals of Private Law* (Hart Publishing 2009) 165, 189.

the other hand, accident avoidance is not the leading argument in any of the contexts of liability where it appears, it is usually discussed in relation to intentional or negligent conduct, and it is widely criticised, especially in its version based on economic efficiency, which has never attracted particular sympathies among English judges and, especially, legal scholars.

3.3.5. Avoiding Accidents: (Not) a Concern of French Strict Liability?

The concern to prevent accidents features conspicuously in the French context, with leading authors identifying accident avoidance as one of the goals pursued by French tort law.[673] While more emphasis is put on the deterrent potential of tort law in respect of intentional or negligent conduct, accident avoidance is also discussed in relation to strict liability. However, in striking contrast with the American and Italian approaches, this argument has modest significance in the French context as a justification for strict liability, with other arguments dominating the scene. In this respect, the situation in France bears some resemblance to that in England where, as discussed, accident avoidance struggles to become a key justification for the imposition of strict liability. As for many other arguments in the French context, we must look at academic writings rather than judicial decisions to appreciate the role of accident avoidance in the French reasoning in strict liability.

On the premise that 'prevention is better than cure', several French legal scholars acknowledge the role of strict liability in avoiding accidents and maintain that this goal must

[673] eg André Tunc, 'Responsabilité civile et dissuasion des comportements antisociaux' in *Aspects nouveaux de la pensée juridique: recueil d'études en hommage à Marc Ancel* (Pedone 1975) vol 1, 407. See also Brun (n 332) [156]. Cf Viney (n 23) [53]–[54] (critically assessing tort law's potential for accident avoidance) and Bacache-Gibeili (n 194) [47] (arguably seeing the protection of victims as the primary goal of tort law and accident avoidance as a secondary goal).

not be left to fault-based liability. In particular, it is emphasised that *prévention* should not be seen as coterminous with *dissuasion*.[674] While the latter only targets intentional or negligent behaviour, *prévention* also includes the avoidance of accidents caused without negligence. On this basis, accident avoidance features in legal reasoning relating to a variety of contexts of liability. For example, in relation to liability for the deeds of things, Malaurie, Aynès, and Stoffel-Munck argue that 'the modern foundation of this liability is the idea to impose on everyone the risks of the thing she uses', and that 'generally it is the person who makes use of the thing [*exploitant*] who is best able to prevent and calculate the risks and therefore to insure against them'.[675] Similarly, in relation to employers' vicarious liability, Viney argues that its goal is 'to identify who must take out liability insurance for the protection of victims and to encourage firms to avoid accidents'.[676] In relation to liability for traffic accidents, Viney and Guégan-Lécuyer argue that, in identifying the keeper and the driver of the vehicle as the potentially liable parties, the *loi* Badinter designates 'the persons who are best placed and able to *master the potentially damage-creating activity*, and consequently the better able to obtain insurance to cover the risks to which their activity gives rise'.[677] Again, in the context of product liability, Calais-Auloy criticises the development risk defence on several grounds, including that such defence would dissuade

[674] Millet (n 310) [512].

[675] Malaurie, Aynès, and Stoffel-Munck (n 179) [179]. See also Jourdain (n 311) 96; Noël Dejean de La Bâtie, *Aubry et Rau, Droit civil français, t. VI-2, Responsabilité delictuelle* (8th edn, Litec 1989) 273ff. French courts too have occasionally mentioned the power to avoid accidents in setting out the conditions of liability for the deeds of things: see eg Civ (2) 5.1.1956 (*Oxygène liquid* case); Civ (1) 9.6.1993 JCP G 1994.II.22202 note Viney; Civ (2) 20.11.2003 D 2003, 2902 (on the notion of *garde de la structure*). Indeed, today the notion of *garde* is defined as the 'use, direction, and control' of the thing, on which see also text to n 692.

[676] Viney (n 199) [791-1], [813]. See also Jourdain (n 311) 30, 105; Terré, Simler, Lequette, and Chénedé (n 179) [1069].

[677] Viney and Guégan-Lécuyer (n 234) 71 (emphasis added).

manufacturers from engaging seriously in their research and development efforts or, even worse, it would encourage them to keep the results of their research secret.[678] Finally, and perhaps most strikingly, in relation to parental liability Radé supports the *Bertrand* decision by relying heavily on accident avoidance and by suggesting that, faced with the prospect of such a rigorous regime of liability,[679] parents will be encouraged to put in place a 'global prevention policy' which is wider and more effective than what it would be under a regime of liability based on fault. The basic idea in these examples is that the ability of keepers, employers, parents, drivers, and producers to avoid accidents is a reason for holding them strictly liable.

In addition to this, accident avoidance features in the work of some legal scholars discussing liability regardless of any specific context of liability. For example, Tunc argues that strict liability encourages firms to improve the behaviour of their employees, the equipment used in their plants, the quality of their products, and their organisation more generally.[680] Others such as Millet observe that strict liability provides incentives to invest in research and new technologies and that, if the firm is insured, insurers will play an important role in reducing the risk of accidents by advising and monitoring the choices and

[678] Calais-Auloy (n 230) 81, 85. See also Christian Gollier, 'Le risque de développement est-il assurable?' Risques, 1993, no 14, 49, 50–51 (supporting a regime of strict liability, but with a development risk defence available to defendants, on grounds of accident avoidance and efficient allocation of resources).

[679] Cristophe Radé, 'Le renouveau de la responsabilité du fait d'autrui (apologie de l'arrét Bertrand)' D 1997.279 (juxtaposing accident avoidance with victim protection at [14], but generally giving much more prominence to the former). See also Pierre-Dominique Ollier, *La responsabilité civile des père et mère* (LGDJ 1961) [232] and [236] (juxtaposing accident avoidance and deep-pockets (the latter for purposes of victim protection)); Geneviève Viney, JCP 2002.I.124, [20]–[21] (arguing that the *Levert* decision seeks to promote greater authority and responsibility of parents, 'the only effective barrier against a growing juvenile violence'; but note the author's concern for the availability of insurance and the sustainability of the insurance market in the text following fn 57); Jourdain (n 311) 112 (juxtaposing accident avoidance with a combination between deep-pockets, loss-spreading, and victim protection).

[680] Tunc (n 673) 414; id, *La responsabilité civile* (2nd edn, Economica 1989) [165].

behaviour of the firm.[681] In applying these strategies of accident avoidance to firms, the proposed reasoning applies across recognised contexts of liability and typically encompasses rules such as liability for products or the vicarious liability of employers for the harm caused by their employees.

The picture emerging from all this may suggest that accident avoidance constitutes a prominent reason for imposing strict liability in the French context, but this impression would be misleading. Indeed, a variety of reasons suggest that accidence avoidance has limited significance among French legal actors.

First, the argument is treated as a key justification only occasionally.[682] In most examples of reasoning seeking to justify strict liability, accident avoidance is omitted and, where mentioned, it is either juxtaposed or combined with justifications which are given far more prominence in French reasoning.[683] Moreover, contrary to the approach in the other three legal systems, accident avoidance is often discussed without any elaboration or clarification as to the measures which could be taken to avoid accidents and, in particular,

[681] Millet (n 310) [531]–[537].

[682] See references in n 679.

[683] On liability for the deeds of things, see Jourdain (n 311) 96 (juxtaposing accident avoidance with risk-benefit, loss-spreading, and some idea of control (*maîtrise*)); Malaurie, Aynès, and Stoffel-Munck (n 179) [179] (discussing accident avoidance with loss-spreading). On employers' vicarious liability, see Viney (n 199) [791-1], [813] (juxtaposing accident avoidance with a combination between loss-spreading and victim protection); Jourdain (n 311) 29–31 (combining accident avoidance with risk-creation, in juxtaposition with risk-profit, an argument based on authority/control, insurability, victim protection, and deep-pockets), 105 (combining accident avoidance with authority/control, in juxtaposition with risk-profit, deep-pockets, and insurability). On traffic accidents, see Viney and Guégan-Lécuyer (n 234) 71 (combining accident avoidance with loss-spreading). On product liability, see Calais-Auloy (n 230) 84–85 (juxtaposing accident avoidance with risk-profit, victim protection, and loss-spreading, for the purpose of justifying product liability for development risks).

the activity-modification strategy is largely neglected.[684] The vast majority of authors either refer to the adoption of background safety measures[685] or generically mention the goal of preventing accidents without fuller explanation.[686] Even the comparatively more developed discussions—such as those of Tunc and Radé—do not compare with the sophistication of analysis featuring in the other three legal systems, particularly where accident avoidance is seen through the lenses of economic analysis (mostly in the United States and in Italy).

Secondly, preventing accidents as a justification for strict liability is often either seen as acceptable only as long as spreading mechanisms mitigate the effects of strict liability on defendants, or is deployed merely as a make-weight argument. For example, Tunc himself thinks that strict liability should operate to avoid accidents only in relation to those classes of defendants who are expected to be insured, or who are subjected to a regime of compulsory insurance, or again who can spread the costs of liability in other ways (eg by passing them on to consumers); otherwise, strict liability would be too 'harsh'.[687] Other scholars acknowledge that strict liability contributes to accident avoidance while promoting the protection of victims,[688] but then suggest that 'what should be promoted is a system which makes liable those who, because of the control they have on the harmful activity, are

[684] cf Flour, Aubert, and Savaux (n 226) [70] (explaining the theory of risk by reference to fairness as well as to the idea that 'the threat of a more extended liability will prevent or reduce the operation of dangerous activities').

[685] Millet (n 310) [531]–[532]; Tunc (n 673) 414; Calais-Auloy (n 230) 85; Anne Guégan-Lécuyer, *Dommages de masse et responsabilité civile* (LGDJ 2006) [206] (discussing accident avoidance in the context of mass losses).

[686] See eg Jourdain (n 311) 105; Viney (n 199) [791-1]; Malaurie, Aynès, and Stoffel-Munck (n 179) [179]. A striking exception is Radé (n 679) (discussing parental liability).

[687] Tunc (n 673) 414.

[688] Chantal Russo, *De l'assurance de responsabilité à l'assurance directe: contribution à l'étude d'une mutation de la couverture des risques* (Dalloz 2001) [742].

able to resort to liability insurance, whether or not they are in a position to avoid accidents'.[689] Overall, the impression is that preventing accidents is a concern that strict liability may seek to address, but only to the extent that pursuing this goal conforms to the spreading of losses and the protection of victims.

Arguments from accident avoidance and loss-spreading can even conflict, reflecting a contrast between fault-based and strict liability. This typically happens when accident avoidance is taken to refer only to situational safety, that is to precautions that could be adopted at the time of the accident rather than safety measures to be taken in the background. Indeed, in relation to liability for the deeds of things or the action of animals, Jourdain observes that:

> If one sees [this] liability … as completely divorced from the idea of fault and as linked to insurance, one will naturally designate as the party liable, ie as *gardien*, the person placed in the best position to take out insurance, that is, in the vast majority of cases, the owner of the thing or animal, without worrying too much about the powers he exercised when the harm materialised or about whether he had at that time any chance to avoid the occurrence of that harm. By contrast, if one tries to put liability for the deeds of things in the context of liability for fault, then one is pushed to attribute the capacity of *gardien* to the person who actually had, when the harmful event occurred, the chance to avoid it, notably by controlling the thing or the animal better.[690]

Here, therefore, Jourdain suggests a close relationship between, on the one hand, strict liability and loss-spreading and, on the other hand, fault and accident avoidance. The result

[689] ibid [756]. See also Samuel Rétif, 'Un critère unique de la garde de la chose: la faculté de prévenir le préjudice qu'elle peut causer?' RCA November 2004, 7, [6]; Viney and Guégan-Lécuyer (n 234) 71–72 (mentioning accident avoidance but clearly seeing insurance spreading and victim protection as the key justifications behind liability for traffic accidents); Jourdain (n 311) 105 (including accident avoidance among the justifications for employers' vicarious liability but concluding that the key reason is insurability).

[690] Jourdain (n 179) [675]. The reference to 'powers' refers to the classic definition of *gardien*, on which see text to n 189.

of this is that, in keeping with the approach of some Italian and English scholars,[691] the goal of preventing accidents is seen as being more naturally achieved through fault-based liability than through strict liability.

The intimate relationship between fault and accident avoidance should be by no means surprising. Indeed, a further reason to be cautious when assessing the importance of accident avoidance as a justification for strict liability in French law relates to its perceived effect on the strictness of liability. As seen above, it is true that many authors see the goal of preventing accidents as consistent with strict liability and believe that no-fault liabilities will encourage the adoption of background measures that can enhance the safety of their activities and hence reduce the likelihood or severity of accidents. However, other scholars tend to associate accident avoidance with fault and, as a result, consider it as a factor that reduces the degree of strictness of liability rules. The best examples of this are again provided by discussions relating to the notion of *la garde* in the liability for the deeds of things, judicially defined as the 'use, direction, and control' of the thing at the time of the accident.[692] In discussing this condition of liability, Carbonnier first equates *la garde* with the power to avoid damage,[693] and then adds that, by identifying the keeper by reference to such power, French law operates a 'shift towards fault' in the liability rule.[694] Again, in an effort to assess the importance of accident avoidance in relation to this context of liability, Rétif observes that, while accident

[691] See text to n 635 (Italy), and text accompanying and following nn 663–665 (England).

[692] eg Ch réun 2.12.1941, DC 1942.25 note Ripert (*Franck*).

[693] Carbonnier (n 355) [1173].

[694] ibid [1176].

avoidance is only rarely a concern for the courts,[695] the consideration they give to it confirms that this liability rule is not as strict as it is often thought to be.[696] Put another way, preventing harm is a goal that relates to what the defendant could and should have done at the time of the accident and, therefore, it is seen as naturally relevant to liability for fault rather than strict liability.

A final reason suggesting that accident avoidance is not a prominent justification in the French reasoning on strict liability relates to the very marginal role that economic theory plays in French legal scholarship. As seen in relation to the American and Italian contexts, the economic analysis of tort law is widespread and avoiding accidents is a key element from the perspective of economic efficiency. By contrast, and in keeping with the English approach, French academics are reluctant to engage with economic analysis, though for (partly) different reasons. In England, economic analysis is criticised mainly on the grounds that it would be practically unworkable as well as incompatible with a vision of tort law as a system of interpersonal justice;[697] in France, besides its problems of practical workability, economic analysis is criticised on the ground that it would be at odds with the value of social solidarity.[698] As a result, a key intellectual underpinning of the accident avoidance argument is missing from the French context, and it is therefore not surprising to see that, in keeping with the English approach, this argument plays a far less significant role in French reasoning than in the American and Italian ones. Relatedly, as the discussion of accident avoidance in

[695] Rétif (n 689) [6].

[696] ibid [22].

[697] See text to nn 668–672.

[698] Fabre-Magnan (n 219) [40] at pp 57–58.

the United States and Italy has made clear, the view of some legal economists is that there are situations where fault (or even a rule of no liability) may achieve efficient accident avoidance better than strict liability.[699] This view would reduce the room for strict liability, with a consequent diminution in the degree of protection afforded to the victims of accidents, an outcome that French lawyers do not seem prepared to accept.

To conclude, accident avoidance is clearly part of French legal reasoning, as demonstrated by those few scholars who take seriously the ability of strict liability to reduce the risks of accidents. However, this is a rare pattern of reasoning and, in stark contrast with the American and Italian approaches, the overall significance of accident avoidance as a justification for strict liability is modest. This relates to the prominence of other justifications in the French context as well as to the fact that, as also seen in relation to England, accident avoidance lacks the theoretical support provided by the economic analysis of law. In sum, it is ironic if not surprising that while French law is the 'home' of strict liability, avoiding accidents through it is really not one of its main concerns.

3.3.6. Concluding Remarks

Overall, the patterns of use and the significance of accident avoidance as a justification for strict liability vary substantially across the four legal systems. These variations relate to the way in which tort law and its functions are perceived, as well as to the role that the economic analysis of law plays in the four legal systems.

[699] For example, where the intensity of the potential victim's activity impacts on the accident rate more than the intensity of the potential injurer's activity: see eg Cooter and Ulen (n 115) 204, 212–213; Posner (n 444) 207.

In both the United States and Italy, accident avoidance constitutes a very prominent justification for the imposition of strict liability. In both jurisdictions, several prominent scholars (and some courts) use accident avoidance to justify strict liability in a wide variety of contexts, such as dangerous activities, defective products, traffic accidents, animals, and the harmful actions of employees or children.[700] The ascendancy of accident avoidance as a justification for strict liability is largely due to the emergence of law and economics as one of the main approaches to legal studies. Since 1960s, the economic analysis of law has reshaped the intellectual foundations of tort law in the two systems (but especially in the United States), and has made the avoidance of accidents an important consideration in tort theory. Legal scholars adhering to this approach have attributed increasing importance to tort law as a way of regulating conduct and of providing potential defendants and victims with incentives to take efficient avoidance measures. While distributive arguments such as deep-pockets and loss-spreading may or may not feature in the reasoning of legal economists, the goal of avoiding accidents efficiently is a constant element of analysis, as it provides the main criterion for assessing the desirability of legal rules.[701] In this respect, accident avoidance justifies strict liability whenever it is thought that strict liability is better than fault at reducing efficiently the number or severity of accidents. Relatedly, it is important to note that accident avoidance is, for legal economists, a means to a achieve a more fundamental end, which is the promotion of socio-economic welfare.[702] Accident

[700] For the United States, see text to nn 549, 552–554, 562–563, 566–573. For Italy, see n 368 as well as text to nn 597–598, 607–626.

[701] For the United States, see text to 545–575, text to and following n 577. For Italy, see text to nn 591–605.

[702] For the United States, see text following n 563, and text to and following n 577. For Italy, see text following nn 607 and 615.

avoidance cannot, however, be reduced merely to accident avoidance as a matter of economic efficiency in either legal system. Again in a wide variety of contexts of liability, many American and Italian legal actors use this argument without adhering to economic analysis: they are content to acknowledge that avoiding accidents is an important social goal in itself and that strict liability can usefully contribute to it.[703] Where used without a commitment to economic analysis, accident avoidance is placed under fewer theoretical constraints and therefore it is sometimes discussed with justifications which seldom feature in economic analysis, as for example victim protection or the various risk-based arguments.[704]

This picture contrasts sharply with the approaches of English and French law. In both jurisdictions, some legal actors use accident avoidance as a justification for the imposition of strict liability in many contexts of liability. For example, in England the argument is sometimes used in contexts such as the rule in *Rylands*, liability for nuisance, for dangerous animals, for defective products, and vicarious liability.[705] Similarly, in France the argument is deployed in contexts such as liability for the deeds of things, liability for products, parental liability, and liability for traffic accidents.[706] Importantly, this takes place without the support of economic analysis, which is frowned upon in both legal systems, and this is reflected in the patterns of use of the argument: in keeping with those American and Italian courts and scholars who do not engage with economic efficiency, accident avoidance is often either

[703] For the United States, see nn 566–573 (and accompanying text). For Italy, see nn 626–634 (and accompanying text).

[704] For the United States, see nn 566–573. For Italy, see text to nn 630–634.

[705] See text to nn 637–647.

[706] See text to nn 675–681.

combined or juxtaposed with justifications which are not very popular in economic reasoning, such as victim protection, loss-spreading, or the various permutations of risk.[707] However, despite the fact that accident avoidance is put forward as a key justification by some legal scholars (and, in England, judges), it has limited significance in both legal systems. In part, this is due to perceived 'intrinsic' limits of the argument. In both systems, it is often thought that accident avoidance is more naturally achieved through fault-based liability, on the grounds that only intentional or negligent conduct is receptive to the threat of civil liability; as a result, the goal of avoiding accidents is typically associated with fault-based liability.[708] Furthermore, in England accident avoidance is seen as opposed to the promotion of interpersonal justice,[709] while in France the potential clash is perceived to be with goals such as the spreading of losses or the protection of victims.[710] A further, essential reason why accident avoidance has failed to develop into a key justification for the imposition of strict liability (or, for that matter, of tort liability more generally) in England and France relates to the antipathy that legal actors have for the economic analysis of law.[711] Whether this is because law and economics is thought to entail a fine-tuning which is too abstract and divorced from reality,[712] or because it may clash with the principles of individual

[707] For England, see nn 638–641, 643–648 . For France, see text to nn 675–678, as well as nn 679 and 683.

[708] For England, see text to nn 663–665. For France, see text to nn 690–696.

[709] See n 672 and accompanying text.

[710] See text to nn 687–690.

[711] For England, see text to nn 668–672. For France, see text to nn 698–699.

[712] See text to nn 669 and 698.

responsibility (in England)[713] or with the value of social solidarity (in France),[714] the end result is that in both legal systems accident avoidance lacks the intellectual support which has instead allowed the argument to thrive in the United States and Italy.

[713] See text to 671–672.

[714] See text to 698.

3.4. Deep-Pockets

3.4.1. The Deep-Pockets Justification of Strict Liability

One of the most traditional justifications put forward to support the imposition of strict liability is the so-called 'deep-pockets' argument, according to which the costs of an accident should be placed on those who, because of their wealth, are better able to shoulder them. This argument can proceed on either economic or moral grounds. From an economic point of view, it is thought that, in general and subject to certain caveats, a sum of money taken from a wealthier person causes less economic dislocation than the same amount taken from a poorer person (theory of diminishing marginal utility).[715] From a moral point of view, it is seen as inherently fairer to ask a sacrifice to those who, having greater financial means, are likely to suffer less from bearing the costs of an accident.[716]

The deep-pockets justification can certainly apply to cases where both claimant and defendant are individuals, but the most common situation, almost a cliché, to which the argument is associated is where the claimant is an individual and the defendant a large firm with very extensive financial resources. Paradoxically, though, it is precisely where a firm is involved that the deep-pockets argument tends to lose its distinctiveness and be absorbed (at least to some extent) in spreading mechanisms, because no matter how deep pocketed the firm is, it will typically spread the costs of liability in a variety of ways.[717] Nevertheless, the deep-pockets justification deserves a separate treatment from loss-spreading, for two

[715] Calabresi (n 450) 41.

[716] Borghetti (n 225) [620].

[717] See section 3.5.1.

reasons. First, it is conceptually distinct from it: a party may be found liable on the ground that she has deep pockets, regardless of whether she is able to spread losses; or, quite the opposite, she may be found liable because she can spread losses (eg because insured against the risk of her own liability), even if she has empty pockets. Secondly, distinguishing the deep-pockets argument from loss-spreading will provide an interesting perspective on the evolution of legal reasoning in strict liability across the four legal systems.

3.4.2. Deep-Pockets in France: On the Way Towards the Socialisation of Losses

In France, the concern to ensure that victims of accidents could find someone with deep pockets to sue and receive compensation from was considered a valuable justification for strict liability especially in the first half of the 20th century. As Esmein (a leading tort jurist of the time) notes when describing the attitude of French law, and of courts in particular:

> We like to satisfy the claim of the victim of an accident and, by putting the compensation of the damage on the shoulders of the person able to pay, involved in any way in the [harmful] event, we take a first step towards the socialisation of risk, the ideal of solidarity.[718]

This thinking reflects a shift of paradigm in the way tort law should deal with accidents that occurred in France in the last quarter of the 19th century. Accidents were no longer seen as a matter of individual responsibility but rather as a *social* problem: their widespread occurrence was linked to life in modern society and, as a result, society had to start *socialising* their costs through policies of redistribution.[719] In France, this way of thinking has been always intertwined with a pro-victim stance that, in many cases, has resulted from

[718] Paul Esmein, 'Prendre l'argent là où il est' Gaz Pal 1958, 2, doctrine, 46.

[719] François Ewald, *L'État providence* (Bernard Grasset 1986).

a combination of left-wing politics with the Christian commitment to protecting the poor and the unlucky.[720] From this perspective, it may be seen as perfectly fine to shift losses onto wealthy defendants, as their pockets would not be affected too much by the imposition of liability and the victims of accidents would be duly compensated. This is seen as an attractive approach in the French context in a variety of situations, especially in older academic writing. For example, in relation to employers' vicarious liability, Rodière argues that 'often the employee … does not have the financial resources to stand the magnitude of harm which he can cause to others while doing his job', and, as a result, 'fairness [*équité*] leads to provide the victim with the assets of the employer as a general guarantee'.[721] Similarly, in relation to the liability of parents, Ollier argues that strict liability is justified on the ground that it is desirable to give victims a solvent defendant.[722] More recently, references to the deep-pockets justification can be found occasionally in academic works and even in judicial decisions. For example, leading authors as well as the criminal chamber of the Cour de cassation explain employers' vicarious liability by reference to the law's willingness to help victims by giving them a target (the employer) that is more solvent than the employee;[723]

[720] See Jean-Sébastien Borghetti, 'The Culture of Tort Law in France' (2012) 3 JETL 158, 173–174, including fn 51.

[721] René Rodière, *La responsabilité civile* (Rousseau 1952) [1472] (combining deep-pockets with victim protection, the two providing content to 'social interest' and 'fairness' (*utilité sociale* and *équité*), and adding risk-based arguments as well as an 'attribution' theory as possible justifications).

[722] Ollier (n 679) [232] and [235] (juxtaposing deep-pockets (combined with victim protection) and accident avoidance).

[723] Malaurie, Aynès, and Stoffel-Munck (n 179) [158] (combining deep-pockets with victim protection, in juxtaposition with various risk-based arguments); Bénabent (n 360) [569] (juxtaposing deep-pockets (with a view to victim protection) with risk-creation, loss-spreading, as well as an 'attribution' theory and a presumption of fault in the employer's supervision of, and instructions to, her employee). Cass crim 29.6.2011 no 10-80163 JCP G 2012.530 no 5 obs Bloch: 'the sole purpose of the civil liability of employers is to protect third parties against the insolvency of the author of the crime and not to relieve the latter of any liability' (see equally Cass crim 11.7.1978 no 78-90340).

others mention the deep-pockets argument when explaining certain judicial decisions in the context of liability for defective products.[724]

Nevertheless, while the deep-pockets argument has played an important role in the past in supporting some of the strict liability rules recognised in French law,[725] this argument has not carried the day as a key justification for strict liability. Imposing liability on the ground that the defendant has extensive financial resources is today widely seen either as an out of date approach or as a half-way house towards a broader socialisation of the costs of accidents that finds its most significant expression in insurance-based mechanisms of distribution of losses.[726] These propositions find direct support in the reasoning of some of the most influential French legal scholars, where the deep-pockets justification is critically assessed and replaced with more sophisticated arguments for the imposition of liability, most notably loss-spreading. For example, in discussing the justifications of employers' vicarious liability, Viney argues that the idea of offering a solvent defendant to the victim is no longer adequate to meet contemporary social needs, and that it should be replaced by the idea of charging firms for the losses they cause so that they can take out liability insurance and try to avoid accidents.[727] Similarly, while speaking of the justifications of liability for the action of another in general, Jourdain observes that 'the guarantee of solvency allows the victim to bring an action against someone who is more solvent than the physical author of harm (employers for the torts of their employees, parents for the harmful action of their children,

[724] Borghetti (n 225) [646].

[725] Viney (n 199) [791-1].

[726] See section 3.5.2.

[727] Viney (n 199) [791-1].

artisans for the torts of their apprentices)', but '[t]his justification is to be linked to the aptitude for insurance which gives it all its meaning'; so, Jourdain continues, 'the recent evolution of the structure of liabilities for the action of another leads to the abandonment of this idea of guarantee [of solvency]'.[728] Here, the deep-pockets argument loses all its distinctiveness and dissolves into the socialisation of risk, ie into a broad spreading of the costs of accidents. What is key, therefore, is not so much the depth of the pocket of the party designated as liable, but the circumstance that this party is in a suitable position to dilute the costs of liability via insurance or other spreading mechanisms,[729] while achieving the goal of compensating victims.

In sum, even if historically important and still occasionally relied upon to support or explain strict liability, the deep-pockets argument has lost much of its significance either because it appears as in itself outdated, or because it is made redundant by the availability of spreading mechanisms.

3.4.3. Deep-Pockets in Italy: a Justification Belonging to the Past?

As in France, the deep-pockets justification for strict liability surfaces in the Italian reasoning. Occasionally used in the past, especially in the course of the 1960s and 1970s, this argument is today of limited significance and, even in the contexts where it is more frequently used, its status appears controversial. To grasp the significance of this argument in the Italian context, one needs to turn to the work of academics, for judicial reasoning almost ignores it.

[728] Jourdain (n 311) 30–31.

[729] See section 3.5.2.

In the early second part of the 20th century, Italian academics occasionally included the deep-pockets argument in their explanations of a variety of strict liabilities. For example, in discussing the liability of guardians for the harm caused by individuals lacking mental capacity and the employers' vicarious liability, Messineo argues that the rationale of these liabilities lies in the circumstance that guardians and employers are normally better equipped than the physical author of harm to pay compensation.[730] Similarly, Majello identifies the rationale of parental liability in the need to obviate the predictable condition of insolvency of the child.[731] Again, in relation to traffic accidents, Forchielli thinks that the liability of owners for the harm caused by their motor vehicles was explained by the legislator's fear that their driver could be insolvent or uninsured;[732] as insurance became compulsory only in the late 1960s, imposing liability on vehicle owners was seen as the best solution to ensure the compensation of victims, for owners were usually thought to be relatively wealthy.[733]

More recently, we can still find occasional reference to the deep-pockets argument in legal scholarship, particularly with respect to the liability of parents for the harmful action of their children. In this context, academics explain the very rigorous approach with which some Italian courts in effect impose strict liability on parents by noting that parents would typically have the deeper pocket and would therefore guarantee compensation to

[730] Messineo (n 405) 579 (juxtaposing deep-pockets with risk-profit in relation to employers' vicarious liability).

[731] Ugo Majello, 'Responsabilità dei genitori per il fatto illeciti del figlio minore e valutazione del comportamento del danneggiato ai fini della determinazione del contenuto della prova liberatoria' Dir giur 1960.43, 45–46 (combining deep-pockets with victim protection).

[732] Paolo Forchielli, *Responsabilità civile* (CEDAM 1969) 59–60.

[733] Gianguido Scalfi, 'Responsabilità per vizi e per difetti dell'autoveicolo' RCP 1974.323, 339.

claimants.[734] At times, the same argument is also used to explain employers' vicarious liability[735] or the liability of owners of ruinous buildings.[736] In all these cases, the idea is that strict liability is imposed because the party designated as liable is presumed solvent and can therefore ensure that the claimant will be compensated for the loss suffered. Hence, rather as in France, the deep-pockets argument is a means towards the goal of compensating the victims of accidents and, as a result, it is almost always either combined or juxtaposed with the victim protection argument. Finally, in very few cases the deep-pockets argument is grounded in economic reasoning and seen as consistent with economic efficiency: for example, in supporting the imposition of strict liability on the public administration for harm caused by wildlife to third parties, it is suggested that 'burdening the deeper pocket [ie the administration] with the costs of liability is efficient whenever one or more individuals come into contact with a richer, stronger, more informed, and more organised party'.[737]

Despite this occasional reliance on the deep-pockets argument in academic discussions, its current significance as a justification for strict liability is limited. To begin with, it almost never features in judicial reasoning and, when it does, it is criticised. In a number of recent decisions, the Corte di Cassazione seeks to explain the rationale of strict liability and, in doing so, it considers a variety of academic theories; when referring to 'deep pocket[s]' in common law systems and '*richesse oblige*' in the French tradition, the court

[734] eg Patti (n 635) 258 (combining deep-pockets with victim protection). See also Carbone (n 399) 12–13 (combining deep-pockets with victim protection); Chiarella (n 399) 986.

[735] Visintini (n 375) 753 (combining deep-pockets with victim protection).

[736] Franzoni (n 11) 564 (arguably juxtaposing deep-pockets with risk-benefit and abnormality of risk).

[737] Bitetto (n 613) text to fns 26–32 (seeing liability of deep-pockets as a spreading method, and discussing it with accident avoidance and loss-spreading, with a view to minimising the social costs of accidents).

appears to suggest that this rationale belongs to the past and that other, more refined theoretical elaborations deserve greater attention.[738] As far as legal scholarship is concerned, the idea of basing liability on the financial capabilities of defendants is subjected to criticisms such as that of Trimarchi, who argues that imposing liability on the deeper pocket would constitute a haphazard and irrational system of compulsory charity that shifts wealth from the richer to the poorer.[739]

The limited significance of the deep-pockets arguments in Italy also emerges if one moves to specific contexts of liability, where it is clear that the argument recurs far less frequently than other justifications. Particularly in contexts of liability where the defendant is typically a firm, as in employers' vicarious liability, liability for dangerous activities, and liability for products, it is difficult to find any reliance on the deep-pockets argument. This is not surprising, for distributive concerns are usually (and better) resolved through spreading mechanisms, with the result that, in terms of legal reasoning, the deep-pockets justification gives way to loss-spreading.[740] This may appear to resonate with what was observed in relation to the French system, where it was noted that historically the deep-pockets argument has acted as a half-way house towards the socialisation of risk,[741] but this similarity should not be overemphasised, given the broader picture in both systems. As will be seen in the next section, while in France the loss-spreading justification is very prominent in relation to most contexts of liability, in Italy it is largely confined to situations where firms are involved.

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[738] eg Civ (III) 6.7.2006 n.15383 and Civ (III) 6.7.2006 n.15384, [5.6] (deeds of things); Civ (III) 19.2.2008 n.4279, [4.2] (deeds of things); Civ (III) 17.12.2009 n.26516, [3.11] (dangerous activities).

[739] Trimarchi (n 289) 29–30.

[740] See section 3.5.4.

[741] See section 3.4.2.

In Italy, the status of the deep-pockets argument also looks similarly weakened in contexts where physical individuals are designated as the liable parties. For instance, as regards traffic accidents, the argument lost its force when vehicles became subjected to compulsory insurance in the 1960s. Today, therefore, compensation is paid by insurers and the depth of the vehicle owner's pockets has become immaterial.[742] Again, in relation to parental liability, many authors criticise the idea that parents should be liable because they may be assumed to have the resources to pay compensation: this assumption may well not be right;[743] moreover, if the objective is to protect victims of accidents while not crushing parents financially, then either strict liability should be combined with compulsory insurance[744] or courts should apply a fault-based standard of liability.[745]

Rather paradoxically, the deep-pockets argument may have slowed down the development of strict liability precisely in the context where it is most frequently used, that is liability of parents. To illustrate this point, a comparison with the French system is particularly useful. In France, parental liability is strict and this strictness is today justified not on grounds of deep-pockets but typically on grounds of insurability;[746] unsurprisingly, the use of household insurance, which covers liability for harms caused by children, is

[742] See n 733.

[743] Patti (n 635) 269.

[744] Gianluca Romagnoli and Silvia Taccini, 'Il sistema della responsabilità civile dei genitori: tra profili di protezione e di garanzia' DR 2008.1.5, text to fn 34; Silvia Monti, 'Responsabilità dei genitori: alcune riflessioni' DR 2014.11.1054, text to fns 29–32.

[745] See Patti (n 635) 329–331; and Chiarella (n 399) 986, who seems to prefer fault over strict liability and discusses the drawbacks of a system of compulsory insurance for parental liability.

[746] See text to n 818.

widespread.[747] The result is that, in most cases where a child causes harm to someone, the victim gets compensation and the parents, thanks to their insurance coverage, are not crushed by the costs of liability. In Italy, by contrast, insurability is not used as a justification to support the adoption of parental liability and, unsurprisingly, liability insurance against the harm caused by children is much less used,[748] with the consequence that the distributive result seen above for France cannot be attained in the Italian context; significantly, the very nature of parental liability is still controversial, with views oscillating between strict liability and fault-based liability.[749] In this picture, the deep-pockets argument may play a role in explaining why some scholars and courts are not prepared to accept the adoption of strict parental liability. While offering an explanation for that portion of the caselaw that reads the liability of parents as strict, the deep-pockets argument does not help parental liability to become a full-blown strict liability because of the potentially haphazard allocation of losses it could generate on a large scale. Indeed, imposing strict liability on parents on the ground that they are (assumed to be) solvent may be undesirable, both because it may be very difficult to ascertain whether they really have deep pockets[750] and because, in the absence of insurance cover, the loss would be left concentrated on their shoulders. Unsurprisingly, then, some courts are reluctant to see parental liability as strict and prefer to base it on fault,[751]

[747] See Borghetti (n 720) 166–167. See also text to 819–820.

[748] While in France the household insurance is widespread, in Italy it is relatively uncommon (as of 2016, only 24,6% of the Italian families benefitted from that type of insurance policy). See Luisa Anderloni, Alessandra Tanda, and Daniela Vandone, *Vulnerabilità e benessere delle famiglie italiane*, available at http://www.forumaniaconsumatori.it/images/pdf/rapporto_vulnerabilit_unimi_2016.pdf at 23.

[749] For an overview of this clash, see Franzoni (n 11) 722–737.

[750] See n 743.

[751] On the former view, n 252. On the latter view, see eg Civ (III) 1.6.1994 n.5306; Civ (III) 9.10.1997 n.9815.

while many scholars propose the introduction of strict parental liability coupled with a regime of compulsory insurance.[752] In other words, to be socially sustainable the strict liability in parents needs to be combined with spreading mechanisms and, if parents are to be held strictly liable in a consistent way, the deep-pockets argument will need to be abandoned in favour of justifications based on loss-spreading. This is, of course, what happened in France.

To conclude, while used in the past in a variety contexts of liability, today the deep-pockets argument appears only very occasionally in Italian legal reasoning. Furthermore, in the context where it still retains some significance, that is parental liability, its role is ambiguous and, ironically, its usage may have contributed to hindering the development of strict liability in the area. With the passing of time, the deep-pockets argument has lost much of its force, partly because of the criticisms levelled at it, partly because of the emergence of spreading mechanisms.

3.4.4. The Minor Significance of the Deep-Pockets Argument in the United States

Compared to the other justifications for strict liability discussed in this work, the deep-pockets argument has the least appeal in the United States. While it occasionally surfaces in the caselaw and academic writing, the argument has very limited significance today, as it is much criticised and often seen as redundant given the availability of more convincing justifications. In keeping with the French and Italian approach, the status of the deep-pockets argument in the United States looks only minor.[753]

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[752] See n 744.

[753] The same conclusion holds true for the English context: see section 3.4.5.

The availability of deep pockets is sometimes put forward as a justification for strict liability in contexts such as liability for abnormally dangerous activities and employers' vicarious liability. For example, Shugerman argues that the judicial reception of *Rylands v Fletcher* from the 1890s across the United States stemmed from a variety of reasons, primarily the ability to 'control … the hazardous activity and the choice to reduce or move it', but also the 'deeper pockets' of industrialists who were responsible for the activity.[754] It is however in the context of employers' vicarious liability that the deep-pockets argument recurs more often as a justification for strict liability,[755] and here the argument can be deployed to accomplish a variety of goals, including victim protection or accident avoidance. For example, the Supreme Court of Minnesota observes that

> [p]robably the most popular reason [for vicarious liability] is to provide the injured person with a "deep pocket." In other words, vicarious liability is attached to the master-servant relationship, providing the injured person with a defendant who in all likelihood can respond in damages if he establishes a right thereto.[756]

In this passage the deep pockets of the employer act a means to pursue what is perceived to be the ultimate goal of tort law, that is the protection of victims of accidents, but this combination is not the only pattern of use of this argument. Indeed, in contrast with the approach of French and most Italian scholars, the idea of making the wealthier pay is not necessarily always tied to the protection of victims and may be used for entirely different

[754] Shugerman (n 425) 374.

[755] Bryant Smith, 'Cumulative Reasons and Legal Method' (1949) 27 Tex L Rev 454, 458–459; *Riviello v Waldron*, 391 N.E.2d 1278, 1281 (N.Y.1979) (juxtaposing deep-pockets with insurance spreading); John L Hanks, 'Franchisor Liability for the Torts of Its Franchisees: The Case for Substituting Liability as a Guarantor for the Current Vicarious Liability' (1999) 24 Okla City U L Rev 1, 17, fn 24. Cf William L Prosser, *Handbook of the Law of Torts* (2nd edn, West Publishing Co 1955) 351 (seeing deep-pockets as a 'scarcely convincing reason').

[756] *Weber v Stokely-Van Camp, Inc*, 144 N.W.2d 540, 542 (Minn.1966).

purposes. For instance, Schwartz observes that 'the employer's "deep pockets" come in as a factor favo[u]ring liability because "deep pockets" are conducive to deterrence—not because the "deep pocket" employer can conveniently serve as a source of compensation for accident victims'.[757] Here, therefore, the deep-pockets argument is instrumental to the avoidance of accidents. Similarly, this time from the standpoint of economic analysis and with a view to increasing socio-economic welfare, Shavell argues that the liability of employers can better advance the avoidance of accidents 'the higher the [employer's] assets are'.[758]

The proposition that losses may be placed on someone on the basis of her ability to pay has also received attention regardless of any specific context of liability, especially in the work of legal economists. For example, in his pioneering analysis on the costs of accidents, Calabresi considers the imposition of liability on the deeper pockets as a viable means to reduce the social costs of leaving losses concentrated on victims (Calabresi's 'secondary costs').[759] Similarly, Kaplow and Shavell acknowledge that the distribution of income is an important factor in evaluating the desirability of different liability rules and that their distributive effects should be taken into account as much as their effects on the reduction of accident costs.[760] Therefore, on the assumption that the same loss is heavier on the poor than on the rich, strict liability may be superior to negligence because it would minimise the adverse effects of accidents on the formers' well-being.[761]

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[757] Schwartz (n 570) 1756, fn 91.

[758] Shavell (n 443) 172.

[759] Calabresi (n 450) 39ff.

[760] Kaplow and Shavell (n 565) 28ff, 86ff.

[761] ibid 119.

Although the deep-pockets justification is occasionally used both in academic and judicial reasoning, its overall significance in the United States should not be exaggerated. To begin with, the deep-pockets argument is rejected by those who consider tort law purely as a system of interpersonal justice and therefore see any argument rooted in the pursuit of broader social goals as inadequate to justify the imposition of liability. From this perspective, the deep-pockets argument is unacceptable because it does not focus on the doing of interpersonal justice between defendant and claimant, but rather on a collective concern that losses should be shifted to more affluent parties as better able to bear them.[762]

Secondly, a particular strand in economic thinking, whose main proponent is Posner, does not give serious consideration to the deep-pockets argument for strict liability. In contrast with the views of Shavell, Kaplow, and Calabresi,[763] Posner's focus is almost exclusively on providing appropriate incentives for an efficient avoidance of accidents, with distributive concerns and associated notions such as deep-pockets (or loss-spreading) being largely ignored or rejected.[764] To give one example, Landes and Posner consider the deep-pockets argument (with a view to protect victims) 'an unsatisfactory explanation' for the liability of employers and instead find accident avoidance as its convincing justification.[765]

Thirdly and finally, even if strict liability is deemed desirable on distributional grounds, whether for 'moral' or 'economic' reasons, loss-spreading looms much larger than

[762] See eg Ernest J Weinrib, 'The Insurance Justification and Private Law' (1985) 14 J Legal Stud 681, 683–684; id (n 585); Jules L Coleman, 'The Structure of Tort Law' (1988) 97 Yale LJ 1233, 1248.

[763] See nn 759–761.

[764] eg Richard A Posner, 'Book Review (reviewing Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970))' (1970) 37 U Chi L Rev 636, 638–639, 646 (showing scepticism for the proposition that tort law should be worried with the consequences of leaving losses concentrated on victims).

[765] Landes and Posner (n 550) 914–915.

the deep-pockets argument in American legal reasoning.[766] Quite tellingly, it is even possible to find judicial and academic statements which, in considering both the deep-pockets and loss-spreading justifications, dismiss the former while approving of the latter.[767] In keeping with the French and Italian approaches,[768] it appears that American courts and scholars believe that distributive concerns are better dealt with through spreading mechanisms than by imposing liability on the wealthier.

Because of all this, attempts to justify strict liability on the basis of a deep-pockets argument are not a common feature in American legal reasoning. Even so, some judges and perhaps even more some juries may from time to time covertly consider the defendants' financial means (and perhaps their ability to spread losses) when deciding tort disputes. Strikingly, a former justice and chief justice of the West Virginia Supreme Court of Appeals admits:

> As a state court judge, much of my time is devoted to designing elaborate new ways to make business pay for everyone else's bad luck. I may not always congratulate myself at the end of the day on the brilliance of my legal reasoning, but when I do such things as allow a paraplegic to collect a few hundred thousand dollars from the Michelin Tire—thanks to a one-car crash of unexplainable cause—I at least sleep well at night. Michelin will somehow survive (and if they don't, only the French will care), but my disabled constituent won't make it the rest of her life without Michelin's money.[769]

Failure to include explicitly the deep-pockets argument in their reasoning suggests that judges may not see it as a good 'official' justification and may think that it is better not to

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[766] See section 3.5.3.

[767] *Hinman* (n 459) 990 (quoting William L Prosser (n 459) 471) (on the liability of employers); *Bowling v Heil Co*, 511 N.E.2d 373, 379 (Ohio 1987) (on liability for defective products); Smith (n 422) 460.

[768] See text to nn 726–729 (France) and to n 740 (Italy).

[769] Richard Neely, *The Product Liability Mess. How Business Can Be Rescued From the Politics of State Courts* (Free Press 1988) 1.

refer to it in their opinions. Rare as they may be, in such cases deep-pockets works as a 'crypto-justification' and suggests that judges may be more attracted by this argument than their reasoning shows. It is no easy task to estimate the exact impact of this phenomenon, given that a crypto-justification typically remains hidden and that it may be at work no less in the tort of negligence or other fault-based liability rules than in contexts of strict liability. On the other hand, given that courts (and scholars) often entertain views in direct opposition to the idea of imposing liability on the basis of the defendant's wealth,[770] it seems very unlikely that the deep-pockets argument works as a crypto-justification on a large scale.

In sum, in the United States the significance of the deep-pockets argument is limited. It is occasionally relied on in both judicial and academic reasoning to serve a variety of goals, most notably victim protection and, to a lesser degree, accident avoidance and socio-economic welfare. However, the vast majority of courts and scholars either ignore this argument or criticise it, and other justifications are seen as more convincing rationales for the imposition of strict liability.

3.4.5. Deep-Pockets in England: a Justification of Modest Significance, with an Exception

As in the other three legal systems studied, the significance of the deep-pockets argument as a justification for strict liability is very limited in the English context, where legal actors largely ignore this argument in most contexts of liability. The only, though significant exception is vicarious liability, and here there is a clash of views as to its proper role.

[770] An example is provided by the pervasive nature of accident avoidance in the United States, as seen in section 3.3.2.

One rare example of the deep-pockets argument being used outside the context of vicarious liability is in Murphy's 2004 article on 'the merits of Rylands v Fletcher', where he argues that

> the factory owner with deep pockets who stands to profit from his industrial enterprise should also be strictly liable for any mishaps occasioned by the escape of any dangerous element stored there. And while this argument can be applied with ease to a commercial industrial enterprise—just as it applies, *mutatis mutandis*, to commercial producers of defective consumer products—it does not lend itself at all well to a private house-dwelling neighbour: a very common defendant in nuisance cases.[771]

Here, the deep-pockets justification is combined with risk-profit and abnormality of risk to justify the imposition of strict liability on any firm pursuing commercial gains. It is however difficult to pinpoint the exact significance of the argument, for it is discussed with several other justifications,[772] and in a later work Murphy himself rejects it (at least in the context of vicarious liability and liability for breach of a non-delegable duty).[773]

The paucity of references to deep-pockets in most areas of English tort law contrasts with the pattern identified in the law of vicarious liability, which many scholars and judges justify on the basis of a deep-pockets argument. For example, both Baty and Williams think that this argument provides a sound explanation for the existence of vicarious liability. In his book on vicarious liability published in 1916, Baty identifies nine different policy bases for it, concluding that 'in hard fact, the real reason for employers' liability is [that] the damages are taken from a deep pocket'.[774] Similarly, forty years later Williams argues that vicarious

[771] Murphy (n 44) 659 (combining deep-pockets with risk-profit and abnormality of risk).

[772] A few pages after the indented quotation, Murphy refers to risk-benefit, loss-spreading, accident avoidance, and arguably even resource allocation: ibid 663, 665–667.

[773] Murphy (n 467) 372–374.

[774] T Baty, *Vicarious Liability* (Clarendon Press 1916) 154 (deep-pockets standing alone).

liability would have not developed but for the scarce financial resources of employees,[775] and adds that '[h]owever distasteful the theory may be, we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant'.[776] Other scholars go beyond mere explanation and appear to support the deep-pockets argument. For example, today Steele argues that vicarious liability is justified by a cumulation of reasons, which include the employer's deep pockets.[777]

Courts have also invoked this argument on several occasions, again together with other ones. For example, in *CCWS* Lord Phillips argues that one of the 'policy reasons' and 'criteria' which 'make it fair, just and reasonable to impose vicarious liability' is that 'the employer is more likely to have the means to compensate the victim than the employee'.[778] The defendant's ability to pay an award of damages is one of the reasons that in the *Armes* case pushes the UK Supreme Court to impose vicarious liability on the defendant local authority for the sexual abuse that a child suffered as a result of the acts of her foster parents, in whose care the child had been placed by the local authority. In particular, the court observes that '[m]ost foster parents have insufficient means to be able to meet a substantial

[775] Glanville Williams, 'Liability for Independent Contractors' (1956) CLJ 180, 195.

[776] Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20 MLR 220, 232.

[777] Steele (n 37) 578–579 (combining deep-pockets with loss-spreading and victim protection, and discussing them with risk-creation, risk-benefit, and accident avoidance).

[778] *CCWS* (n 81) [35] (combining deep-pockets with loss-spreading, risk-creation, and other arguments relating to the delegation of task from employer to employee and the degree of control of the former on the latter). Other examples include *Dubai Aluminium* (n 469) [21]–[22] (Lord Nicholls) (arguably combining deep-pockets with risk-creation); *Majrowski* (n 469) [9] (Lord Nicholls) (combining deep-pockets with risk-creation, victim protection, and loss-spreading, arguably in juxtaposition with accident avoidance).

award of damages', while 'local authorities which engage them can more easily compensate the victims of injuries which are often serious and long-lasting'.[779]

All these examples from English reasoning show that the typical pattern for the deep-pockets argument is to be either combined or juxtaposed with many other justifications, most notably loss-spreading, victim protection, and the risk-based arguments. Given the great emphasis placed on these other arguments both within and outside the law of vicarious liability, it is most likely that the deep-pockets argument, where used, is not seen as a sufficient reason for imposing strict liability especially in more recent times. Furthermore, in keeping with the other three legal systems studied, the deep-pockets argument is typically used as a means to ensure that victims of accidents are adequately compensated.[780] On the other hand, it is difficult to identify examples where the argument is deployed on the basis of economic reasoning, this marking a clear difference with the American approach.[781] In other words, English legal actors see the aim of the deep-pockets argument as the pursuit of victim protection rather than the achievement of greater socio-economic welfare. This may be partly due to the fact that when English scholars discuss American theories of economic analysis they tend to focus on accident avoidance only and they ignore what legal economists say about tort law's role in reducing the social costs of accidents through distributive mechanisms.

[779] *Armes* (n 88) [63]. See ibid [60]–[63] (combining deep-pockets with risk-benefit, risk-creation, victim protection, and loss-spreading).

[780] See eg Giliker, *Vicarious Liability in Tort* (n 481) 230.

[781] See text to nn 758–761.

In the context of vicarious liability, where it is mostly used, the deep-pockets argument has also attracted much criticism,[782] with many legal scholars and, on one occasion, the UK Supreme Court casting serious doubt on it. For example, Atiyah believes that the deep-pockets argument is hardly satisfying in terms of fairness and that, at any rate, it is unreliable because it simply assumes that potential defendants such as company shareholders are wealthier than victims.[783] Similarly, Cane argues that the 'fairness of vicarious liability depends on who [the employers] are and what they have done, not on what they can afford'.[784] Moreover, several scholars suggest that the deep-pockets argument does not fit important features of the law of vicarious liability and that it ought to be rejected. Stevens, for instance, maintains that the argument 'fails to explain why this particular employer, rather than another body with an equally deep or deeper pocket, should compensate the claimant', and that, '[i]f taken seriously, this rationale collapses into an argument that in order to ensure compensation, liability for losses should be imposed upon the deepest pocket of all: the state'.[785] McBride and Bagshaw are also very critical of the deep-pockets argument, arguing that '[t]his theory does not work: there is nothing "fair, just and reasonable" about giving effect to a principle of "can pay, will pay"'.[786] And in the *Cox* case the Supreme Court considers all the five policy rationales that Lord Phillips put forward in

[782] cf Stapleton (n 38) 187 (rejecting the deep-pockets argument as a justification for product liability).

[783] Atiyah (n 518) 25–26.

[784] Peter Cane, 'Vicarious Liability for Sexual Abuse' (2000) 116 LQR 21.

[785] Stevens (n 477) 258. Other scholars who seem sceptical about the deep-pockets justification include: Bell (n 481) 19; Cane (n 36) 187–188; Murphy (n 467) 372–374; Morgan (n 647) 247–248; Goudkamp and Plunkett (n 481) 168.

[786] McBride and Bagshaw (n 12) 852–853.

CCWS, suggesting that the deep-pockets (as well as the loss-spreading) argument is not 'a principled justification for imposing vicarious liability' and that '[t]he mere possession of wealth is not in itself any ground for imposing liability'.[787] This judicial about-turn on the relevance of the deep-pockets argument has been welcomed by scholars such as Plunkett, who defines it as 'refreshing'.[788]

The message all these criticisms convey is that making defendants pay on the ground that they are wealthier than claimants is morally unpalatable.[789] In a way, it seems as though many English legal actors see the deep-pockets argument as somewhat 'primitive' in that it penalises the wealthy without providing a good reason for doing so. Relatedly, and in keeping with the approach of the other three legal systems studied,[790] loss-spreading is seen as more acceptable than the deep-pockets argument because it ignores the depth of the parties' pockets and because, by relying on a variety of spreading mechanisms, it shelters everyone from heavy financial burdens. For Jolowicz, '[i]f it were really the case that a person held liable to pay damages actually paid them out of his own pocket', then sticking to the fault paradigm 'would not be an unreasonable position to adopt', but the widespread availability of 'channels of distribution' changes everything.[791] Similarly, in reflecting on vicarious liability Steele argues that 'introducing insurance into the equation makes [the

[787] *Cox* (n 88) [20] (Lord Reed).

[788] Plunkett (n 481) 559.

[789] See JA Jolowicz, 'Liability for Accidents' (1968) 26 CLJ 50, 57–58 (implicitly rejecting the deep-pockets argument).

[790] See nn 726–729 (France), n 740 (Italy), and nn 766–768 (United States).

[791] Jolowicz (n 789) 57–58.

deep-pockets justification] into a more modern argument',[792] and Giliker recognises that '[i]t is the development of insurance … which arguably rendered vicarious liability both workable and acceptable to employers'.[793] In sum, it is not surprising that, similar to the position in France, Italy, and the United States, loss-spreading is more attractive than the deep-pockets argument and that it therefore looms much larger than the former in English legal reasoning.[794]

Overall, then, the significance of the deep-pockets argument in the English context is very limited. First, in most contexts of liability the argument is simply not used. Furthermore, while it is true that it is occasionally relied on in the context of vicarious liability, its position looks very unstable because of the contrasting views that members of the UK Supreme Court have expressed in recent times and because of the plethora of criticisms that legal scholars have levelled at it. Finally, the status of the argument is further weakened by the loss-spreading justification, which provides a more modern and acceptable solution than merely taking money from a deep pocket.

3.4.6. Concluding Remarks

Overall, therefore, while the deep-pockets justification possesses its own particular features across the four legal systems studied, it ultimately has a modest significance in all of them.

First, its use in all four jurisdictions is very limited, with other justifications dominating the legal reasoning around strict liability. In the four systems the argument is used in relation

[792] Steele (n 37) 580.

[793] Giliker, *Vicarious Liability in Tort* (n 481) 235.

[794] See section 3.5.5.

to employers' vicarious liability, which constitutes the only significant context in England;[795] by contrast, in the other three legal systems the argument features in further contexts such as, for example, liability for abnormally dangerous activities in the United States,[796] liability for products in France,[797] parental liability and liability for ruinous buildings in Italy.[798] Nevertheless, it must be remembered that reliance on the deep-pockets argument is scant. Moreover, in all four legal systems the argument almost never stands alone to justify the imposition of strict liability, being either combined or juxtaposed with other justifications. What emerges is that the deep-pockets argument is typically used as a means towards broader ends and that, in this respect, it can serve two goals. First, it can be used to ensure that victims of accidents get compensation, especially if doing so would save a person of modest financial means from ruin while demanding only a relatively small sacrifice from a wealthy corporation. Pursuing victim protection by resorting to the deep-pockets argument is a common and widespread pattern in all four jurisdictions, and in the French and English systems stands out as the only way in which the argument is used. By contrast, in the United States and in Italy, though only very rarely in the latter,[799] the deep-pockets argument is sometimes grounded in economic reasoning and invoked either to avoid accidents or to reduce the socio-economic dislocation caused by leaving losses concentrated

[795] See text to nn 774–779.

[796] See text to n 754.

[797] See text to n 724.

[798] See text to nn 734 and 736.

[799] See text to n 737.

on victims.[800] But even if the deep-pockets argument can stem from a more utilitarian kind of reasoning, its most natural and frequent collocation is in the context of a desire to ensure adequate relief to the victims of accidents, even in the United States.

Finally, and especially in modern times, the deep-pockets argument has fallen into disfavour in all four jurisdictions. This is due in part to its perceived inherent unfairness or to the economic problems that its application may determine. In part, however, its demise is also due to the availability of another justification which, based on the availability of spreading mechanisms, can achieve distributive goals without all the (moral and economic) difficulties implicated in the idea of determining liability purely on grounds of wealth. This justification, which is the focus of my next section, is widely thought to be an evolution of the deep-pockets argument and to be capable of rendering the imposition of strict liability more acceptable and convenient. Spreading the cost is better than imposing the burden on a single person, even if they can bear it.

[800] See text to nn 757–761.

3.5. Loss-Spreading

3.5.1. The Loss-Spreading Justification of Strict Liability

Losses hurt less if their burden is spread rather than being concentrated on any particular individual. This proposition can be couched either in terms of economic cost or social solidarity. From an economic perspective, 'taking a large sum of money from one person is more likely to result in economic dislocation … than taking a series of small sums from many people'.[801] From a perspective of social solidarity, the provision of collective sources of compensation shelters the victims of accidents from their sufferings so as to reduce the adverse impact on their lives.[802] Losses may be spread through different channels of distribution, some involving potential defendants (as with third-party insurance) and others involving potential claimants (as with first-party insurance). As the present work analyses arguments for strict liability as opposed to arguments favouring fault or no-liability,[803] the focus of this section is on spreading losses via defendants rather than via claimants.[804]

Regardless of whether we see it through the lenses of economics or solidarity, the 'loss-spreading' justification for strict liability can be supported in various ways. According to a first approach, strict liability should be imposed on defendants because they can spread its costs through insurance. This spreading mechanism, which is here labelled 'insurance

[801] Calabresi (n 450) 39. See also Richard Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 J Legal Stud 187, fn 3.

[802] André Tunc, Foreword to Geneviève Viney, *Le déclin de la responsabilité individuelle* (LGDJ 1965) ii; id, 'Les causes d'exonération de la responsabilité de plein droit de l'art. 1384, al. 1er du Code civil' DC 1975.83, 85.

[803] See pp 3–4.

[804] A discussion of the second type would involve consideration of a range of further and different types of arguments which cannot be entered here.

spreading', applies to firms or individuals, as they can both take out liability insurance for the risk of harm they impose on others. Within insurance spreading a further subdivision of approaches is in order: if, as between two parties in tort litigation, the defendant carries insurance coverage while the claimant does not, liability should be imposed on the former because she is better able to spread the costs of accidents as a matter of fact ('actual insurance coverage'); or, liability should be placed on the defendant if, regardless of actual insurance coverage, she is well positioned to spread the costs of accidents by taking out liability insurance ('insurability').

According to a second approach, liability should be placed on firms because they are able to pass the loss on to consumers or to factor in the relevant costs in other ways such as by decreasing wages or shares of profits. This type of spreading, more limited in its scope of application as it refers only to firms, is here called 'enterprise spreading'. Where firms are involved, in practice there is often a synergy between enterprise and insurance spreading. Firms often take out liability insurance to protect themselves against the costs of potential tort liability. In this case, the direct costs of liability are paid by the insurer; what the firm pays are the insurance premiums and the increases in those premiums, typically through price adjustments and/or a reduction in wages and/or in the shares of profit accruing to the shareholders. These two aspects of loss-spreading overlap, but nonetheless they should be kept distinct because they refer to different methods of spreading losses and they allow us to identify important differences across the four laws in terms of the justifications for the imposition of strict liability.

A further approach to loss-spreading seeks to promote a proportional sharing of burdens and benefits deriving from harmful activities. Unlike the other approaches seen

above, which focus on the particular methods of bringing about spreading (eg insurance, price adjustments), loss-spreading as proportionality of burdens and benefits is concerned with selecting the persons over whom such costs should be spread, and these are all those who benefit from the harmful activity, regardless of whether the distribution of loss occurs through insurance, enterprise spreading, or other means (eg taxes). For example, in the case of losses caused by the tortious action of an employee or by a defective product, the defendant firm should be liable because she can spread the loss among all those who benefit from her activity, ie the firm herself (comprised of the shareholders, the employees etc.) as well as all the users and consumers of the service or activity provided. In sum, the ultimate bearers of the loss will be all those who gained some benefit from the existence of the harmful activity or action. It is clear, therefore, that this approach to loss-spreading cuts across the others in that it focuses on making the 'right' people pay via spreading, no matter what mechanisms are used to distribute the burden.

As will be seen below, there are substantial variations across the four laws in the way all these approaches to loss-spreading are used and in the significance they have in each legal system studied.

3.5.2. Loss-Spreading in France: a Panacea?

Among the four systems under consideration, French law is where loss-spreading looms largest as a justification for the imposition of strict liability, with insurance spreading dominating the scene. While it is difficult, though not impossible,[805] to find judicial statements expressly couched in spreading terms, it is the academic literature that shows

[805] cf Viney (n 23) [25].

fully the extent to which insurance spreading acts as a key justification for strict liability in France.

French law has undergone a profound transformation from a system of individual liability to a system based on the socialisation (or collectivisation) of losses.[806] With industrialisation and the scientific and technological progress there was a steep increase in the number of accidents in the second half of the 19th century. These were not seen as fatalities that had to be accepted, but rather as misfortunes that required compassion and cure in a spirit of social solidarity. The fundamental function of tort law became the protection of the victims of accidents and the fault paradigm was seen as unfit for the job.[807] To make the objective of compensation attainable it was necessary to realise a collectivisation of liability, for particular individuals could not bear the full costs of liability for accidents.[808] Therefore, despite some isolated criticism,[809] the availability of liability insurance has long been seen as the answer, a panacea capable of justifying the imposition of strict liability in a wide variety of contexts.

To begin with, insurance spreading surfaces in the liability for the deeds of things. As early as 1897, Josserand identifies the rationale of this type of liability in the theory of risk, which he sees as allowing for the compensation of all who suffered due to the deeds of others' things.[810] Crucially, when challenged by the counter-argument that his theory of risk

[806] Most notably, see Viney (n 802); Lambert-Faivre (n 330).

[807] Halpérin (n 311) 189–193; Jourdain (n 311) 10–14.

[808] Geneviève Viney, 'De la responsabilité personnelle à la répartition des risques' Arch phil dr 1977.5, 11.

[809] eg Borghetti (n 227) 102–103 (suggesting that loss-spreading 'should not by itself be sufficient to justify the imposition of liability').

[810] Josserand (n 317) 106.

would detrimentally affect the economy by imposing too great a cost on firms, Josserand replies that this potential drawback can be easily neutralised through liability insurance.[811] Similarly, Savatier relies on risk to explain the liability for the deeds of things,[812] but he regards insurance spreading as what really drives the judicial expansion of strict liability (for the deeds of things and beyond) and as the element which makes strict liability 'bearable'.[813] Again, in an article discussing liability for the deeds of things at a time when motor accidents were not yet dealt with by special legislation, Tunc argues that the cost of compensation should not be borne by an individual but by a collective source,[814] and suggests that a good liability system should, when deciding how to distribute losses, take into account insurability, actual insurance coverage, and whether either party is under compulsory insurance arrangements.[815] Finally, today insurance spreading is sometimes relied upon to justify the presumption of guardianship in the owner of the thing, for the owner is seen as the party best placed to take out insurance against the risks of accidents which may be caused by the thing.[816]

Besides liability for the deeds of things, insurance spreading is very important in numerous other areas of French tort law. In the context of liability for the action of another,

[811] Josserand (n 317) 115–116 (therefore combining insurability with his theory of *risque-crée* and with victim protection, while it is unclear what relevance Josserand attributed to enterprise spreading).

[812] Savatier (n 353) [337].

[813] ibid [282].

[814] Tunc, 'Les causes d'exonération' (n 802) 85.

[815] ibid 85–86 (combining insurance spreading with victim protection). See also Jourdain (n 311) 96 (juxtaposing insurability with risk-benefit, control (*maîtrise*), and accident avoidance); Malaurie, Aynès, and Stoffel-Munck (n 179) [179] (discussing insurability with accident avoidance).

[816] See eg Jourdain (n 179) [701]; id (n 311) 92 (combining insurability with the goal of victim protection, in juxtaposition with accident avoidance).

insurability is indicated as one of the key reasons for the imposition of strict liability.[817] For example, in the case of parental liability, Viney describes parents as 'guarantors' for the damage caused by the fact of their offspring and as the 'most naturally designated' party to bear the relevant costs and the best able to spread them through liability insurance.[818] The increase in rigour of strict parental liability that the Cour de cassation brought about with the *Levert* decision,[819] which held parents liable even if there was no failure in the harmful conduct of their child, is explained in the literature as a consequence of the widespread use of household insurance in France.[820] As to the employers' vicarious liability for the tort of their employees, again insurance spreading is often identified as a leading justification.[821] For example, after listing multiple rationales for this type of liability, Jourdain concludes that ultimately employers are held vicariously liable because they are, in most cases, very well positioned to take out liability insurance;[822] others, while putting forward different justifications, most notably risk-based arguments, do not reject the idea that the courts may consider the insurance status of the parties as a decisive factor in allocating the costs of

[817] eg Jourdain (n 311) 29–31 (discussing liability for the action of another in general and juxtaposing insurability with risk-profit, accident avoidance (combined with risk-creation), an argument based on authority/control, victim protection, and deep-pockets).

[818] Viney (n 199) [877] (a view she extends to liability for the deeds of things), [870] at 1186 (seeing parental liability as pursuing the goal of victim protection). See also André Tunc, 'L'enfant et la balle' JCP 1966.I.1983 (combining insurance spreading with victim protection).

[819] Civ (2) 10.5.2001, D 2002.1315 note Denis Mazeaud.

[820] Borghetti (n 720) 166–167.

[821] While for convenience I refer to employers and employees, article 1242 of the *Code civil* refers to the wider notions of *commettants* and *préposés*.

[822] Jourdain (n 311) 105 (juxtaposing insurability with risk-profit, accident avoidance (combined with an argument based on authority/control), and deep-pockets). See also Geneviève Viney, JCP 2000.I.241, 1244, [19] (insurability arguably standing alone, but note the author's attention to victim protection); Viney (n 199) [813], [791-1] (combining insurability with victim protection, in juxtaposition with accident avoidance).

accidents.[823] A significant indication of the French approach is also embodied in the rule laid down by the Cour de cassation in a 2007 decision, where it was established that the employee's general immunity from liability does not apply if the employee himself is insured against liability, with the consequence that the employee's insurer is exposed to a recourse action from either the employer or the employer's insurer.[824] This rule suggests that the courts pay particular attention to insurance spreading, even in its actual insurance coverage form, in devising the functioning mechanisms of tort rules.

Again in the context of liability for the action of another, the French courts have on occasion considered the actual insurance coverage of the defendant as a justification for the imposition of strict liability. In the *Blieck* case, the Court of Appeal of Limoges held liable a private centre for occupational therapy for the damage caused by a mentally disabled person to the property of the claimant. After holding that every risk-generating activity must pay for the losses caused on the ground that the 'compensation of victims is a principle embedded in [French] political and social morality', the court mentions the actual insurance coverage enjoyed by the centre as a relevant factor supporting a finding of liability.[825] Similarly, a number of legal scholars mention insurance spreading, whether in the form of insurability or of actual insurance coverage, as one of the main rationales for the imposition of strict liability in this type of situation.[826]

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[823] eg Savatier (n 353) [282].

[824] Civ (1) 12.7.2007, JCP 2007.II.10162. The immunity does not apply also where the employee acted intentionally, even if with the assent or under the instructions of his employer (Ass plén 14.12.2001, RTD civ 2002.109).

[825] CA Limoges 23.3.1989, RCA November 1989, comm n.361.

[826] Ghestin (n 360) [7] (combining insurability with enterprise spreading, risk-creation, and risk-profit), [12]; Jourdain (n 335) 544 (combining insurability with victim protection and risk-creation); Marteau-Petit (n 360) [20] (juxtaposing insurance spreading with risk-profit); Jourdain (n 201) 901 (juxtaposing insurance spreading with an argument based either on risk-creation or abnormality of risk); id, D 1997.496, 497 (juxtaposing

Further examples of legal reasoning including insurance spreading can be found in relation to liability for defective products and liability for traffic accidents. In the context of product liability, academic writings appearing both before and after the implementation of the Product Liability Directive justify the imposition of strict liability on the ground that, by relying on liability insurance, the manufacturer is in a position to spread the costs of accidents caused by her defective products.[827] As regards traffic accidents, both before and after the enactment of the *loi* Badinter,[828] there are abundant references to the importance of insurance spreading as an argument supporting the imposition of strict liability. In the *Desmares* case,[829] the Avocat général Charbonnier argued that the availability of insurance is a formidable means to ensure the complete protection of victims without exposing the responsible party to burdensome liabilities and that therefore both the values of social solidarity and individual well-being can be served at the same time.[830] Enacted in 1985 as a reaction to the Cour de cassation's activism in *Desmares*, the *loi* Badinter constitutes a 'law for the compensation of victims by means of insurance'[831] and it is typically justified by reference to insurance spreading.[832]

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insurability with an argument based on authority and victim protection (supported by risk-creation)); Olivier Gout, 'Le droit français positif et prospectif de la responsabilité du fait d'autrui' in *Le droit français de la responsabilité civile confronté aux projets européens d'harmonisation* (IRJS Éditions 2012) 291, 294 (combining actual insurance coverage with victim protection).

[827] eg Jean-Francis Overstake, 'La responsabilité du fabricant de produits dangereux' RTD civ 1972.485, [80] (combining insurability with enterprise spreading); Ghestin (n 360) [7] (combining insurability with enterprise spreading as rationales of Product Liability Directive).

[828] See text to nn 235–238.

[829] See n 235.

[830] Civ (2) 21.7.1982, D 1982.449 note Larroumet, concl Charbonnier, 450.

[831] Tunc (n 680) 166.

[832] Viney and Guégan-Lécuyer (n 234) 71–72 (combining insurance spreading with enterprise spreading (while discussing the liability of SCNF, which is the French National Railway Company), accident avoidance, and

The emerging picture suggests that insurance spreading is a pervasive justification for strict liability in France. Indeed, even if discussed with other arguments, the frequency with which insurance spreading is used as well as the emphasis put on it suggests that it is an essential justification for the imposition of strict liability.[833] Importantly, insurance spreading and victim protection appear together very often in French reasoning,[834] and the relationship between the two is important to understand the significance of the former. As shown throughout this section, insurance spreading is frequently used as a means to the end of victim protection. By being imposed on the party who is insured or who can more conveniently insure, strict liability provides victims of accidents with the target that is most likely to meet their claim, given the presence of an insurance company behind the defendant. In other words, insurance spreading attracts widespread consensus among French legal actors because it is conducive to the realisation of the fundamental objective of compensating the victims of accidents.

A further point which emerges from French discussions concerns the relationship between loss-spreading and risk-based arguments. As seen in a variety of examples set out

victim protection); Bacache-Gibeili (n 194) [673] (combining insurance spreading with victim protection); Terré, Simler, Lequette, and Chénedé (n 179) [1165] (combining insurance spreading with risk-creation and victim protection).

[833] See eg Tunc (n 673) 414 (suggesting that accident avoidance is an acceptable justification for strict liability only if the effects of this liability on defendants are mitigated through spreading mechanisms); Russo (n 688) [742] (mentioning accident avoidance as an argument for strict liability), but cf [756] (emphasising the importance of insurance spreading, even at the expense of accident avoidance); Grare (n 356) [33]–[35] (giving credit to risk-profit), but cf [45]–[48] (where she emphasises the importance of insurance spreading for strict liability); Borghetti (n 720) 166–167 (explaining strict parental liability on the basis of insurance spreading); Jourdain (n 311) 105 (seeing insurability as the single most important justification for employers' vicarious liability).

[834] See the patterns of use indicated in nn 815–832.

in this section,[835] some legal scholars (and even courts in at least one case) justify strict lability on the basis of risk and then add an insurance spreading argument. The impression one gets is that while arguments such as risk-creation or risk-benefit/profit can *theoretically* support strict liability, it is the possibility for defendants to resort to spreading mechanisms such as insurance which makes strict liability acceptable and which, therefore, provides considerable support for its imposition. As a result, it seems that the emergence and continuing vitality of risk-based justifications is made possible, at least in part, by the availability of spreading mechanisms and that, therefore, besides being an independent argument, loss-spreading is also deployed to buttress other arguments, reinforcing their appeal. At the same time, as seen in our discussion of risk, risk-based justifications may sometimes be 'exploited' in light of their prestige to help arguments such as loss-spreading support the imposition of strict liability and make the latter more attractive and familiar.[836] In sum, it appears that, at least to some extent, risk and loss-spreading are mutually reinforcing justifications of strict liability in France.

Finally, but very importantly, insurance spreading marks the boundaries of the French willingness to impose strict liability. As is now very clear, from a French perspective the great merit of combining strict liability with liability insurance is that the costs of accidents will be spread widely rather than left concentrated on any one person, whether the claimant, the defendant, or a third party. By contrast, without spreading mechanisms cushioning its impact on defendants, strict liability would be too harsh for them and therefore much less attractive to the French legal system. In this respect, then, insurance spreading works as a

[835] See text to nn 810–813 and nn 825–826.

[836] See p 92.

'safety valve' against excessive reliance on strict liability, for the latter remains attractive so long as its full costs are removed from the defendant and spread via liability insurance. Excellent examples are provided in the context of liability for traffic accidents. In 1951, when these accidents were still governed by liability for the deeds of things, Savatier argued that

> The courts could never have said in fairness that every motorist is answerable for the harm caused by his car, even without his fault, if all conscientious motorists had not been insured. It is only insurance that makes such liability bearable, without unfairly substituting, in the person of the motorist not at fault, one victime to another.[837]

Similarly, today some leading scholars argue that what makes the extreme rigour of the *loi* Badinter morally acceptable is compulsory insurance: 'to apply the strict regime of compensation envisaged in the statute to individuals not covered by insurance, for example pedestrians or cyclists, would have led to grave injustices'.[838] In sum, insurance spreading is an attractive argument in France because it ensures, through the imposition of strict liability, the compensation of victims while at the same time avoiding that anyone in society is financially crushed by that very imposition. In this way, the value of social solidarity represents a safeguard ensuring that the interests of both victims and defendants are adequately protected.

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[837] Savatier (n 353) [282].

[838] Jourdain (n 243) [123]. See also Josserand (n 317) 115–116; Charbonnier (n 830) 450. Cf Starck, Roland, and Boyer (n 320) [84]–[85], [89] (arguing that what makes it fair to shift the loss from an innocent claimant to an innocent defendant is the availability of liability insurance, but then adding that strict liability should apply regardless of insurance for the purpose of 'guaranteeing' compensation to anyone who suffered from personal injuries or damage to property). On the 'guarantee theory', see Boris Starck, *Essai d'une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée* (L Rodstein 1947).

Given the considerable reliance on insurance spreading in French discussions concerning strict liability, it is surprising not to see enterprise spreading featuring equally prominently whenever firms are involved. To be sure, the argument sporadically appears in contexts such as liability for defective products,[839] liability for nuisance,[840] or in relation to professional activities,[841] but if compared to insurance spreading its frequency, and therefore significance, is infinitely smaller. The marginal role of enterprise spreading is striking, given that from a loss-spreading perspective it would be natural to argue that firms should be liable because they can pass the costs of liability on to consumers or factor in such costs in other ways, regardless of whether they have insurance coverage or not. The fact that firms can take out liability insurance and thus bring about an even broader spreading of losses is certainly significant, and yet of somewhat secondary importance when compared to enterprise spreading, which may well be alone sufficient to accomplish a meaningful dispersion of losses where the defendant is a firm. Why, then, are French legal actors so reluctant to rely on enterprise spreading? One explanation for this may be that, while well aware of and sympathetic with the practical operation of enterprise spreading mechanisms, they do not want to inject into the legal debate, dominated as it is by a rhetoric of social solidarity, ideas resonating with the economic analysis of law.[842] Indeed, as it will be seen while discussing

[839] Overstake (n 827) [80] (combining insurability with enterprise spreading); Ghestin (n 360) [7] (combining insurability with enterprise spreading); Calais-Auloy (n 230) 84–85 (mentioning the manufacturer's ability to resort to enterprise spreading as one of the reasons to forbid the development risk defence, together with risk-profit, accident avoidance, and victim protection).

[840] Tunc (n 358) [621-2] (discussing enterprise spreading along with risk-profit and victim protection).

[841] Viney (n 802) 267ff.

[842] While recently there has been some interest in law and economics, eg Grégory Maître, *La responsabilité civile à l'épreuve de l'analyse économique du droit* (LGDJ 2005), it seems fair to say that French legal actors are still reluctant to give credit to the insights of economics. See Fabre-Magnan (n 219) [40].

the American and Italian approaches to loss-spreading, enterprise spreading is often put forward in the context of theories based on economic analysis.

Finally, while the present work does not focus on public liability,[843] we should note that the strict liability of the French administration finds one of its strongest justifications in the well-established principle of 'equality before public burdens' (*égalité devant les charges publiques*),[844] which constitutes an example of loss-spreading as proportionality of burdens and benefits. According to this principle, no one should bear a disproportionate burden compared to that shouldered by the other members of the public as a result of an activity performed for the common good. Therefore, where a public action, for example a legislative act,[845] an international treaty,[846] or a lawful administrative act,[847] causes without any fault substantial harm to a specific member of the public, the unlucky individual may be entitled to obtain compensation from the benefited community (via the state or other public entity having standing as defendant).[848] The cost of liability is ultimately borne by French taxpayers, each contributing a tiny fraction of the total loss. Rooted in the value of social solidarity, the principle of 'equality before public burdens' ensures that members of the

[843] See text to n 17.

[844] See Fairgrieve (n 14) 137–138, 144–150; John Bell, 'Administrative Law' in Bell et al (n 11) 168, 188–189, 193–195; id (n 359) 426ff.

[845] CE 14.1.1938, *La Fleurette* [1938] Rec 25. Multiple and stringent conditions make it difficult for an individual to obtain compensation for the harm caused by a legislative act: see eg Olivier Gohin, 'La Responsabilite de l'Etat en tant que Legislateur' (1998) RIDC 595; Fairgrieve (n 14) 145, 148–150.

[846] CE 30.3.1966, *Compagnie Générale d'Energie Radio-Electrique* [1966] Rec 257. Note, however, that only a very small number of such claims have been allowed: see Roger Errera, 'The Scope and Meaning of No-Fault Liability in French Administrative Law' (1986) 39 CLP 157, 162.

[847] CE 30.11.1923, *Couitéas* [1923] Rec 789 (involving the failure to enforce court orders).

[848] The exact scope of the principle of 'equality before public burdens' is controversial, with some French scholars arguing that it may constitute the basis of all French public liability: for a discussion of this issue, see Errera (n 846) 171–173; Fairgrieve (n 14) 144, and fn 71; Bell (n 844) 195.

public equally share in the benefits and burdens generated by the public action, and it confirms once again the extent to which the idea of widely distributing losses permeates French law.

In conclusion, the importance (both theoretical and practical) of loss-spreading in France cannot be exaggerated. In many cases, the spreading of losses is readily identified as an essential reason for imposing strict liability. At other times, it may not receive particular emphasis or be presented as a central justification, as where the relevant theory is founded on risk-based arguments or on the desire to 'guarantee' victims; but even in these instances, the idea that the costs of accidents will be distributed widely through spreading mechanisms rather than left concentrated on a particular person plays an important role and it is often seen as what renders strict liability an attractive and acceptable solution.[849] The key significance of loss-spreading reflects the paramount importance of social solidarity,[850] a value which imbues the French reasoning on strict liability and which constitutes a safeguard for the interests of all.

3.5.3. Loss-Spreading in the United States: a Key and Flexible Justification

In the United States loss-spreading is a prominent justification for the imposition of strict liability even though, in comparison with France, it features in a less pervasive way and it is handled very differently. As the following discussion will make clear, this argument is exposed to a variety of approaches which show its great flexibility, but also to several criticisms which have weakened its status even if only slightly. Moreover, in striking contrast

[849] Lambert-Faivre (n 330) 19.

[850] See Fabre-Magnan (n 219) [45].

with the French approach, there is no imbalance in significance between insurance spreading and enterprise spreading, with both featuring conspicuously in American reasoning.

To begin with, unlike the French position, the actual insurance coverage of the defendant is generally not seen in the United States as an attractive justification for the imposition of strict liability. For example, in a case of liability for abnormally dangerous activities, the Supreme Court of Iowa maintains that the choice of the party that is going to bear the loss must not be made 'on the basis of the parties' relative abilities to spread the risk of loss *in a particular case*'.[851] Similarly, leading scholars from the law and economics movement point out that liability rules must be chosen having in mind *categories* of defendants and claimants, and not the *particular* defendant and claimant to the case being litigated, with the consequence that 'there should [not] be one liability rule for insured persons and another for the uninsured'.[852] Again, those who see tort law as a system of interpersonal justice refuse to accord any relevance whatsoever to the 'actual insurance coverage' argument, for this is seen as wholly incompatible with any notion of individual responsibility.[853] Having said this, it is however possible that judges or juries occasionally and covertly take into account the insurance realities of the case being litigated; but even so, it seems unlikely that this phenomenon would occur on a large scale, for American reasoning regards highly goals and values (eg accident avoidance, individual responsibility) which are at odds with the idea of finding liability on the basis of actual insurance coverage. Moreover,

[851] *Gibbons* (n 126) 272 (emphasis added).

[852] See also Calabresi and Hirschoff (n 545) 1070, fn 54.

[853] See eg Weinrib (n 762) 683. As will be seen below, the same criticism is levelled at insurability and enterprise spreading: see text to nn 883–885.

the insurance status of the parties may be taken into account in decisions as to the imposition of liability for fault as much as strict liability.

The rejection of actual insurance coverage contrasts with the prominent role that insurability and enterprise spreading play in the United States. These two arguments feature frequently in the caselaw and academic writings as justifications for strict liability in contexts such as product liability, liability for abnormally dangerous activities, and employers' vicarious liability.[854] In this respect, insurability and enterprise spreading are both seen as means to achieve a wide distribution of losses, particularly where firms are involved: firms can take out liability insurance, and they can also absorb the costs of liability by passing them on to consumers through price adjustments. Therefore, both arguments contribute significantly to shaping the loss-spreading justification for strict liability in the American context and, in striking contrast with the French approach, insurability does not loom larger than enterprise spreading.

In the United States, the spreading of losses has been a fundamental theme in tort theory throughout the 20th century, it has come into contact with a variety of approaches, and it has been used in different ways and for different purposes. To begin with, loss-spreading was strongly connected to victim protection in the work of numerous tort scholars from the 1920s to the 1950s which, in conjunction with Justice Traynor's famous concurring opinion in *Escola v Coca Cola Bottling Co*,[855] paved the way towards an increased significance of

[854] In relation to product liability, see eg *Escola* (n 568) 440; *Codling v Paglia*, 298 N.E.2d 622, 628 (N.Y.1973); *Blankenship v Gen Motors Corp*, 406 S.E.2d 781, 784 (W.Va.1991); Second Restatement, §402A, comment *c*. In relation to employers' vicarious liability, see eg *Johnston v Long*, 181 P.2d 645, 651 (Cal.1947); *Hinman* (n 459) 990; *Fruit v Schreiner*, 502 P.2d 133, 141 (Alaska 1972). In relation to liability for abnormally dangerous activities, see eg *Lubin v Iowa City*, 131 N.W.2d 765, 770 (Iowa 1964); *Chavez* (n 440) 1208–1209; *Hutchinson v Capeletti Brothers, Inc*., 297 So.2d 952, 953–954 (Fla.App.1981).

[855] *Escola* (n 568) 440.

strict liability in American tort law.[856] For example, in a well-known article published in 1948, James criticises a bilateral and fault-based conception of tort law for its failure to decrease 'the toll of life, limb, and property' typical of the 'machine age'.[857] In James' view, it is the 'principal job of tort law … to deal with these losses' and '[t]he best and most efficient way to do this is to assure accident victims of compensation, and to distribute the losses involved over society as a whole or some very large segment of it'.[858] Seen in this light, loss-spreading constitutes the central justification fuelling strict liability in many contexts. For example, in *Escola*, a case concerned with product liability, Justice Traynor argues that

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.[859]

Similarly, in *Lubin*, a case involving liability for abnormally dangerous activities, the Supreme Court of Iowa observes that

> [N]atural justice would seem to demand that the enterprise, or what really is the same thing, the whole community benefitted by the enterprise, should stand the loss rather than the individual. It is too heavy a burden upon one. The trend of

[856] See Leon Green, 'The Duty Problem in Negligence Cases' (1928) 28 Colum L Rev 1014 and (1929) 29 Colum L Rev 255; Lester W Feezer, 'Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases' (1930) 78 U Pa L Rev 805 and (1931) 79 U Pa L Rev 742; Fleming James Jr, 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1948) 57 Yale LJ 549; Harper and James (n 437) ch XIII. For an account of these developments, see generally Virginia E Nolan and Edmund Ursin, *Understanding Enterprise Liability – Rethinking Tort Reform for the Twenty-first Century* (Temple University Press 1995) 21–124; Edmund Ursin, 'Judicial Creativity and Tort Law' (1981) 49 Geo Wash L Rev 229.

[857] James (n 856) 549.

[858] ibid 550. See Guido Calabresi, 'Professor Fleming James Jr' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing 2019) 259, 264–265 (noting that, for James, 'spreading ... meant meeting the, broadly defined, *needs* of victims') (original emphasis).

[859] *Escola* (n 568) 441 (juxtaposing this argument with accident avoidance and litigation costs).

> modern legislation is to relieve the individual from the mischance of business or industry without regard to its being caused by negligence.[860]

In this type of reasoning, courts and scholars are committed to ensuring that the victims of accidents receive compensation and they acknowledge that the spreading of losses achieves this result with the great advantage of avoiding any disruption to the life or business of anyone.[861] Here, then, besides being a goal worth pursuing in itself, loss-spreading is used as a means to support strict liability and, through it, greater victim protection. This way of looking at loss-spreading and combining it with victim protection is reminiscent of the French approach which, as seen above,[862] puts particular emphasis on loss-spreading as a way of supporting strict liability for purposes of victim protection.

In contrast to France, though, in the United States the loss-spreading argument can often be found in reasoning not driven by the value of social solidarity and by the desire to ensure victim protection, and an important reason for this is the emergence of law and economics in the second part of the 20th century. While some legal economists quickly dismiss loss-spreading and prefer to focus on other issues,[863] leading figures in the field such as Calabresi, Kaplow, and Shavell, think differently. For example, Calabresi takes loss-spreading very seriously and sees it as a means to reduce the 'secondary costs' of accidents (ie the negative effects of leaving a loss concentrated rather than spread).[864] Here loss-

[860] *Lubin* (n 854) 770–771.

[861] See also *Seely v White Motor Co*, 403 P.2d 145, 151 (Cal.1965); *Price v Shell Oil Co*, 466 P.2d 722, 726 (Cal.1970); *Chavez* (n 440) 1214; *Mahowald v Minnesota Gas Co*, 344 N.W.2d 856, 868 (Minn.1984) (Todd J dissenting, with whom Scott J and Wahl J agreed); *Beshada* (n 170) 547.

[862] See section 3.5.2.

[863] See text to nn 881–882.

[864] Calabresi (n 450) 39ff.

spreading is no longer merely a gateway to victim protection, but rather one of the '*methods* or *approaches*' for achieving the fundamental '*subgoal*' of a reduction in secondary costs which, in turn, serves the 'broadest aim' of minimising the total sum of the costs of accidents.[865] Similarly, Shavell and Kaplow acknowledge that if liability rules are to be judged from the standpoint of their effects on individuals' well-being and socio-economic welfare, distribution of income matters, and therefore loss-spreading (as well as deep-pockets) become relevant factors that must be balanced with the effects that the same liability rules have on accident avoidance and litigation costs.[866] It is on this basis that it will then be possible to decide between different types of liability, whether strict or based on fault. In sum, in the works of these legal economists, the distribution of losses is certainly important but it constitutes only one aspect of a broader and complex 'calculus', and it cannot therefore have the same centrality that it enjoys in the reasoning of scholars who, like James, see loss-spreading as the fuel of strict liability (and perhaps of tort law more generally).[867]

A further recognisable pattern of use of loss-spreading in American reasoning is rooted in an ideal of fairness understood as proportionality of burdens and benefits, and it suggests that losses should be distributed among the *beneficiaries* of the harmful activity. This approach, whose main proponent is Keating, is clearly distinct from those seen so far and it maintains that a party who 'is capable of spreading the costs of accidental harm *across those*

[865] Calabresi (n 450) 16 (original emphasis) (therefore combining loss-spreading with accident avoidance and litigation costs).

[866] Kaplow and Shavell (n 565) 119.

[867] On the influence of James on Calabresi's thinking, see Guido Calabresi (n 858).

who benefit from the creation of the relevant risks', should be strictly liable for that harm.[868] This leads to the imposition of strict liability on firms which, by taking out liability insurance and by relying on enterprise spreading, can spread the costs of accidents across all the beneficiaries of their activity, these including the firm itself as well as the consumers and users of the product or service provided. Equally, strict liability should apply to physical individuals if their activities, though diffuse and disorganised, are actuarially significant when taken in the aggregate, so that those carrying out such activities can insure against the attendant risk of harm and therefore spread the costs of accidents:[869] for example, dog owners should be strictly liable for the harm caused by their dogs to third parties because, combined with insurance, strict liability 'should … be able to spread the costs of dogfights across all dog owners, thereby aligning the benefits and burdens of dog ownership as far as the infliction of accidental injuries on strangers is concerned'.[870] Several examples of this approach can be identified in contexts such as liability for abnormally dangerous activities,[871] employers' vicarious liability,[872] and product liability.[873]

[868] Keating (n 420) 1329 (original emphasis). See also id (n 419); 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 S Cal L Rev 193; (n 453); (n 168).

[869] ibid 1331–1339.

[870] ibid 1334.

[871] *Lubin* (n 854) 770 (combining loss-spreading with victim protection); *Bierman* (n 416) 498–499; *Siegler* (n 126) 1188 (Rosellini J, concurring) (loss-spreading standing alone).

[872] *Mary M* (n 570) 1349 (juxtaposing loss-spreading with accident avoidance and victim protection); *Farmers Ins Group v County of Santa Clara*, 906 P.2d 440, 455 (Cal.1995) (juxtaposing loss-spreading with accident avoidance and victim protection); *Montague v AMN Healthcare, Inc*, 223 Cal.App.4th 1515, 1523–1524 (2014) (juxtaposing loss-spreading with accident avoidance and victim protection).

[873] See generally Keating (n 168).

Finally, loss-spreading can sometimes feature, typically in judicial reasoning, as an objective worth pursuing regardless of other goals and without any particular connotation, acting either as a stand-alone justification or in juxtaposition with a variety of other arguments. For example, in relation to employers' vicarious liability, in *Lisa M*, where a hospital was held not liable for torts committed by an ultrasound technician against a patient, the Supreme Court of California Court reasoned that this was the most appropriate conclusion in the light of the 'three policy goals of the respondeat superior doctrine—preventing future injuries, assuring compensation to victims, and spreading the losses caused by an enterprise equitably'.[874] Similarly, in a case involving liability for abnormally dangerous activities, the New Jersey Supreme Court juxtaposes two distinct policy rationales for this type liability, arguing that firms should internalise the external costs of their unusually dangerous activities, and that they are in 'a better position to administer the unusual risk by passing it onto the public'.[875] Again, in the context of product liability, in *US Airways v Elliott Equipment Co*, the United States District Court for the Eastern District of Pennsylvania justifies the imposition of strict liability on the grounds that manufacturers are encouraged to increase product safety and that they can distribute the cost of injuries by charging it in their businesses.[876] In this type of reasoning, it is not easy to pinpoint the exact significance of loss-spreading vis-à-vis the other arguments included in the same reasoning,

[874] *Lisa M* (n 570) 366. See also *Johnston* (n 854) (loss-spreading standing alone); *Hinman* (n 459) 990 (juxtaposing loss-spreading with risk-profit and victim protection); *Schreiner* (n 854) 141; *Lisa M* (n 570) 366–367 (juxtaposing loss-spreading with accident avoidance and victim protection).

[875] *Safety Light Corp* (n 125) 1257 (the somewhat cryptic argument from cost-internalisation is perhaps linked to abnormality of risk and to risk-benefit).

[876] No. CIV.A. 06-1481, 2008 WL 4461849 (E.D. Pa. Sept. 29, 2008) at *5 [sic]. See also *Codling* (n 854) 628 (juxtaposing loss-spreading with accident avoidance).

but the emphasis put on it suggests that the courts usually keep it in high regard or that at least they do not see it as less important than other arguments.

What emerges is therefore a complex picture, where loss-spreading proves to be a flexible argument which, depending on the relevant scholar or judge, may be seen as an independent objective worth pursuing in itself, as a means to promote the protection of victims or the minimisation of the costs of accidents, or as a notion embodying an ideal of fairness as proportionality of burdens and benefits. Or it could even be all (or some of) these things at once, a particularly striking example of this being *Chavez v Southern Pacific Transportation*, where an action was successfully brought for property destruction and personal injuries caused by the explosion of bomb loaded boxcars.[877] According to the United States District Court for the Eastern District of California:

> One public policy now recognized in California as justifying the imposition of strict liability for the miscarriage of an ultrahazardous activity is the social and economic *desirability of distributing the losses*, resulting from such activity, among the general public.[878]
>
> [T]he risk distribution justification for imposing strict liability is well suited to claims arising out of the conduct of ultrahazardous activity. The *victims* of such activity are *defenseless*. … By indirectly imposing liability on *those that benefit from the dangerous activity*, risk distribution benefits the social-economic body in two ways: (1) the *adverse impact of any particular misfortune* is lessened by spreading its cost over a greater population and over a larger time period, and (2) social and economic *resources can be more efficiently allocated* when the actual costs of goods and services (including the losses they entail) are reflected in their price to the consumer.[879]
>
> [The defendant] is in a position to pass along the loss to the public. … [T]he social and economic benefits which are ordinarily derived from imposing strict liability are achieved. *Those which benefit* from the dangerous activity bear the inherent costs. The *harsh impact of inevitable disasters* is softened by *spreading*

[877] *Chavez* (n 440).

[878] ibid 1208 (emphasis added).

[879] ibid 1209 (emphasis added).

> the cost among a greater population and over a larger time period. A more *efficient allocation of resources* results.[880]

In the quoted passages, the court makes use of all the flexibility that loss-spreading possesses: it recognises that loss-spreading is a desirable goal to pursue; it notes that the losses should be distributed among those who benefit from the harmful activity, so that a proportionate sharing of benefits and burdens is achieved; it treats loss-spreading as a means to soften the misfortunes or disasters afflicting the victims, but also as a means to bring about a more efficient allocation of resources. In reasoning like this, it is difficult to discern the relative weight of all the ideas put forward, but what is clear is that loss-spreading is given the utmost importance.

In sum, subjected to a variety of approaches and used in different ways and for different purposes, loss-spreading constitutes a key justification for the imposition of strict liability in the United States. However, this does not mean that the argument has remained unchallenged. First, while it is true that legal economists such as Calabresi, Kaplow, and Shavell recognise the importance of distributing losses through tort rules, others working in the same field do not. An influential figure such as Posner dismisses loss-spreading by arguing that 'there is little to this argument' and that the claimant 'can avoid a concentrated loss by insuring',[881] and he prefers to focus on tort law's ability to promote the adoption of efficient precautions and the maximisation of wealth.[882] Secondly, as already mentioned in relation to actual insurance coverage, theories of tort law based on interpersonal justice marginalise or reject any 'collective' concerns such as those reflected into loss-spreading

[880] ibid 1214 (emphasis added).

[881] Posner (n 434) 210.

[882] See Posner (n 764).

arguments. For example, according to Weinrib, loss-spreading is unacceptable because, by identifying the party liable on grounds of spreading abilities, it makes determinations of liability depend on factors entirely external to the claimant/defendant relationship.[883] Thirdly, as Keeton puts it, loss-spreading should not supplant concepts of 'individual responsibility, with moral content', which 'remain vital to an understanding of tort decisions and trends'.[884] An illustration of this type of criticism appears to be in action to counteract the New Jersey Supreme Court's decision in *Beshada*, according to which strict product liability applies even to unknowable risks of harm, in rejection of any 'state of the art' (or development risk) defence. While the decision may be on 'solid ground' from the perspective of accident avoidance and loss-spreading, which both feature prominently in the court's reasoning, 'fairness considerations cut strongly the other way', for it is unjust to hold someone liable for risks that they did not have reason to know about when the product was put into circulation.[885] Fourthly and finally, some legal scholars argue that tort adjudication is a poor tool for making decisions about the distribution of losses in society. For Epstein, for example, these require the balancing of a wide range of considerations which cannot be properly assessed in judicial opinions and which should be left to the legislator; furthermore, if what matters is ensuring that everyone is protected from accidents and other misfortunes in life, 'then the most appropriate response is a comprehensive system of first party

[883] Weinrib (n 762); id (n 585) 408; Fletcher (n 308) 547, fn 40.

[884] Robert E Keeton, 'Conditional Fault in the Law of Torts' (1959) 72 Harv L Rev 401, 444.

[885] Robert Rabin, 'Some Thoughts on the Ideology of Enterprise Liability' (1996) 55 Md L Rev 1190, 1205–1206.

insurance', not the tort system; '[t]o allow loss spreading issues covertly to dominate the structure of the tort law will only produce unsound results and bad general principles'.[886]

All these criticisms have certainly affected the attractiveness of loss-spreading and have induced greater caution in deploying this argument to develop or expand rules of strict liability.[887] In this respect, there is a striking contrast with French law, where loss-spreading goes almost unchallenged and is widely used to justify all sorts of strict liabilities. But even so, and whether deployed to protect victims, to minimise the socio-economic costs of accidents, or to bring about a proportionate sharing of burdens and benefits, loss-spreading is part and parcel of American tort reasoning and it still constitutes one of the main arguments put forward to justify the imposition of strict liability in this legal system.

3.5.4. Loss-Spreading in Italy: A Neglected Argument?

Fuelled by both the value of social solidarity and the economic analysis of law in the 1970s, loss-spreading had the potential to become a dominant argument in the Italian context. However, due to a variety of criticisms which were levelled at it and at certain theories which featured it, legal scholars became increasingly dubious about its appropriateness as a justification for strict liability, with the result that the argument failed to become as prominent as it is in France or even in the United States. Today, loss-spreading is mostly used in contexts of liability where firms are involved but, even there, it does not appear as conspicuously as other arguments.

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[886] Richard A Epstein, 'Products Liability: The Search for the Middle Ground' (1978) 56 NCL Rev 643, 658–661.

[887] Nolan and Ursin (n 856) 138–151.

While there are abundant discussions about the interplay between Italian tort law and insurance practices and about the influence that the latter would exert on the development of the former,[888] insurance spreading does not loom large among the reasons offered in support of strict liability. To begin with, as in the United States, leading academics argue that the actual insurance coverage of the parties should not affect the outcome of tort disputes because otherwise tort law would become an economically and socially irrational, a case-by-case 'good Samaritan' system where the insured pays damages for the simple reason that she happened to carry liability insurance.[889] Consistently with this position, legal scholars do not encourage the courts to take into account the insurance status of the parties when deciding how to allocate the costs of accidents. In the light of this, it is surprising to find statements in the literature according to which the courts would be in fact influenced by the insurance cover of the parties, with the consequence that if the defendant took out liability insurance the court would find liability more easily than it would have been otherwise.[890] These scholars, though, are unable to point to a single judicial decision which expressly takes into account the insurance cover of the parties and the few studies dealing with this issue contradict their claim.[891] Furthermore, in keeping with the American approach, a hidden

[888] These discussions are mostly of economic nature and tend to describe or assess the interplay of insurance practices with liability in tort rather than to justify strict liability on loss-spreading grounds. See eg Fabrizio Cosentino, 'La responsabilità civile e le ragioni dell'analisi economica' DR 1996.403; Cooter, Mattei, Monateri, Pardolesi, and Ulen (n 598) 185.

[889] eg Trimarchi (n 289) 30–31; Stefano Rodotà, 'Modelli e funzioni della responsabilità civile' RCDP 1984.595, 602.

[890] eg Ugo Carassale, *Assicurazione Danni e Responsabilità civile: Guida alla lettura della giurisprudenza* (Giuffrè 2005) 2–3; Salvi (n 365) 315. See also Antonio La Torre, 'Colpa, rischio e danno fra responsabilità e assicurazione' Assicurazioni 1979.I.284, 318–319 (arguing that the insurance coverage of the defendant pushes the courts to apply more rigorously the reasonable person standard).

[891] See Ugo Natoli, Francesco D Busnelli and Annamaria Galoppini, 'Responsabilità, assicurazione e solidarietà sociale nel risarcimento dei danni' Annuario di diritto comparato 1970.45, 55–57 (arguing that, as to product liability and the employers' vicarious liability, insurance does not influence the outcome of tort

judicial reliance on actual insurance coverage would sit uneasily with other justifications for strict liability. For example, accident avoidance features conspicuously as a justification in Italian judicial reasoning, and any reliance on actual insurance coverage is likely to remove safety incentives from the parties and therefore hinder the goal of preventing accidents.

Turning to insurability as a justification for the imposition of strict liability, this argument is far from enjoying the same status that it has in the French context. There, insurability features very frequently in a wide variety of contexts, from liability for the deeds of things or the actions of animals, to vicarious liability, product liability, and liability for traffic accidents.[892] In Italy, the situation is very different. Insofar as liability for the deeds of things is concerned, it is true that the 1942 Report of the Ministry of Justice to the *Codice civile* states that 'the harshness of this regime can be corrected via contracts of insurance'.[893] However, courts and scholars do not use insurability as a justification for this liability and prefer other arguments such as accident avoidance, risk, or victim protection.[894] Moreover, in striking contrast with the French approach, insurability is all but absent from discussions concerning liability for animals,[895] which is widely justified on the basis of risk-benefit,[896]

disputes). See also the study of Giovanni Iudica and Alessandro P Scarso, 'Tort Liability and Insurance: Italy' in Gerhard Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 119, [45]–[69].

[892] See section 3.5.2.

[893] n.794: '[L]a durezza di tale situazione . . . può essere corretta mercè contratti di assicurazione'.

[894] The rationale of this liability remains very controversial both for courts and for scholars. For an overview of the various positions, see Comporti (n 388) 294–298.

[895] cf Bitetto (n 613) text to fns 26–32 (discussing loss-spreading with accident avoidance and deep-pockets, with a view to minimising the costs of accidents); Trimarchi (n 310) 276–286, 336ff (combining loss-spreading with accident avoidance and resource allocation, in juxtaposition with victim protection), but see text to nn 911–912.

[896] See text to n 408.

and from discussions concerning parental liability, which are dominated by generic statements concerning the protection of victims and by occasional references to the deep-pockets argument.[897] On the rare occasions where insurability is discussed in the context of parental liability, the effects of insurance spreading are treated with scepticism.[898] Indeed, it is remarked that greater recourse to insurance spreading and strict liability may exacerbate economic inequalities between wealthier and poorer families, as the latter are concerned first with meeting basic needs and only secondarily with taking out insurance coverage.[899] A solution may be the introduction of compulsory insurance,[900] which would therefore become widespread and more easily accessible by the population at large.[901] However, this arrangement is criticised, as it would likely increase the volume of litigation and remove safety incentives from the parents.[902] Given how little attention insurability has attracted in the context of parental liability, it is not surprising to find no evidence of courts employing such an argument; and indeed, while some scholars argue that insurability would nudge judges to find defendants liable, no caselaw is offered to support this claim.[903] Finally,

[897] See text to n 734 and 1048. In addition to this, it must also be remembered that the views of Italian courts as to the nature of parental liability still oscillate between fault and strict liability: see text to nn 252–253 and to nn 749–752.

[898] Patti (n 635) 328ff.

[899] Patti (n 635) 328–329. See also Chiarella (n 399) 986.

[900] Romagnoli and Taccini (n 744) text to fn 34; Monti (n 744) text to fns 29–32.

[901] Patti (n 635) 329.

[902] ibid 329–330. Warning against the negative effects of compulsory insurance on the goal of avoiding accidents, see also Chiarella (n 399) 986. Cf Monti (n 744).

[903] Antonio La Torre, *L'assicurazione nella storia delle idee. La risposta giuridica al bisogno di sicurezza economica: ieri e oggi* (Giuffrè 2000) 276–277 and fns 659–660.

insurability is also largely neglected in relation to liability for dangerous activities,[904] with arguments such as accident avoidance and victim protection being far more popular. The picture which emerges suggests that insurability (let alone the actual insurance coverage of the parties) is not an argument frequently used to justify the imposition of strict liability in contexts where defendants are often physical individuals.

The role of insurability becomes more significant, though, if we move to situations where defendants are typically firms, as in the contexts of employers' vicarious liability and product liability. Here, loss-spreading features in the legal reasoning seeking to justify the imposition of strict liability in the form of insurability and/or enterprise spreading, and it is clear that both spreading strategies are well entrenched in the minds of Italian legal actors. Couched in these terms, the loss-spreading argument acquired considerable force in Italy in the 1970s as a result of the convergence of two quite distinct intellectual commitments, one rooted in the value of social solidarity, the other in law and economics. At the same time, though, a wide range of doubts were cast on loss-spreading, with the result that the significance of this argument looks weaker in Italy than in the French or even in the American context.

From the 1960s, Italian tort law (and private law more generally) has undergone a process of profound transformation under the guidance of legal scholars.[905] Taking the Constitutional principle of social solidarity as a source of inspiration,[906] legal scholars started

[904] cf Trimarchi (n 310) 404–405, 280, 282–286 (as per his general theory, combining loss-spreading with accident avoidance and resource allocation, in juxtaposition with victim protection).

[905] For a recent account of these developments, see Giovanni Marini, 'Gli anni settanta della responsabilità civile (prima parte). Uno studio sulla relazione pubblico/privato' RCDP 2008.I.23, 27–29.

[906] Article 2 of the Italian Constitution reads as follows: 'The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The

to reframe the fundamental question of tort law, which shifted from 'why the harm-doer should be held liable [to] why the victim should bear the loss'.[907] This new approach went hand in hand with an expansion of the list of legally protected interests[908] and with a reassessment of the role of fault, which lost its primacy within the system and became one of the many criteria laid down in the *Codice civile* for imposing liability.[909] In this new framework, tort law was seen as one of the instruments available to protect citizens from the 'adversities of life', and firms as able to 'contribute to a project for the "global" protection of individuals against harms connected to life in society'.[910] In this intellectual climate, distributive issues moved to the forefront, and the spreading of losses became key, especially in relation to the strict liability of firms, as a means to protect victims.

In parallel with these developments, the economic analysis of tort law emerged and gained ground in Italy, with two main approaches proving particularly influential. First, as already discussed,[911] Trimarchi's theory of *responsabilità per rischio di impresa* suggests that strict liability should apply wherever the defendant's activity presents a minimum of continuity and organisation and the relevant risk of harm can be calculated and therefore absorbed through spreading mechanisms.[912] If this were not the case, strict liability would

Republic expects that the fundamental duties of political, economic, and social solidarity be fulfilled' (translation available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

[907] Marini (n 905) 27.

[908] Francesco D Busnelli, *La lesione del credito da parte di terzi* (Giuffrè 1964); Rodotà (n 249).

[909] Rodotà (n 249) 127 ff.

[910] Rodotà (n 889) 599.

[911] See text to nn 367–371.

[912] Trimarchi (n 289) 36, 44; id (n 310) 280, 285, 359–360.

not promote accident avoidance and would simply inflict hard blows on unprepared defendants.[913] For Trimarchi, the availability of insurance or other spreading devices is key because it helps to decide which categories of defendants should be held strictly liable and which not. However, his avowed primary goals of strict liability are the avoidance of accidents and the efficient allocation of resources,[914] with the distribution of losses being expressly seen as subordinated to the other two.[915] Along with Trimarchi's theory of *rischio di impresa*, the work of Calabresi in the United States has had a great influence on Italian scholars. As has been seen,[916] in Calabresi's work the spreading of losses plays a fundamental role in seeking to minimise the secondary costs of accidents and, in turn, the total sum of the costs of accidents. In both Trimarchi's and Calabresi's view, compensating victims and spreading losses cannot be the sole concern, for otherwise solutions such as a comprehensive system of social security or first-party insurance would score far better than tort law and all its costly procedures; if there is a law of torts, it is because the legal system wishes to reduce the risks of accidents.[917]

As a result of the convergence of these intellectual movements—one stressing the importance of social solidarity and the other elaborating on the insights of law and economics—loss-spreading emerged as an important justification for strict liability during the 1970s. All this is particularly evident in relation to employers' vicarious liability and

[913] ibid 359.

[914] Trimarchi (n 310) 276–277.

[915] ibid 8, 279–280. See also id (n 289) 30–38.

[916] See text to nn 864–865.

[917] Trimarchi (n 310) 279. Calabresi (n 450) 43–44.

strict product liability, for it is in these contexts that firms were typically involved and that the need to protect weaker parties as well as to accomplish a rational distribution of losses was felt more acutely.

As already seen,[918] Trimarchi's theory was and is frequently invoked to justify employers' vicarious liability. While different scholars interpret the theory in different ways, many of them consider the ability to spread losses as one of the reasons for imposing vicarious liability on employers,[919] and at times accord to it even more importance than what Trimarchi himself does.[920] By prescribing that employers internalise the costs of accidents caused by their employees, the theory of *rischio di impresa* leads them to rely on insurance and enterprise spreading, therefore achieving a distribution of losses which aligns with economic rationality and the principle of social solidarity.[921] More difficult to disentangle is the position of judges: occasionally, they refer to *rischio di impresa* and state that the damage caused by the employees must be treated as a cost of the employer's business; however, they do not provide any further clarification, with the result that it is difficult to pinpoint their reading of Trimarchi's theory and to understand whether there is any concern in particular,

[918] See pp 94–95.

[919] See eg Monateri (n 179) 979 (discussing insurability with accident avoidance and, arguably, resource allocation) but cf 1003 (observing that the primary goal of all tort doctrines and rules should be providing incentives for an efficient avoidance of accidents); Pizzetti (n 609) text to fn 18; Alessandro D'Adda, 'Il nesso di occasionalità necessaria tra mansioni e condotta dannosa del preposto: ancora una discutibile pronuncia della Suprema Corte' NGCC 2010.2.1.189, 192 (juxtaposing loss-spreading with risk-profit, resource allocation, and victim protection).

[920] As seen above, for Trimarchi loss-spreading is not a primary justification for the imposition of strict liability, but only a secondary one.

[921] Guido Alpa, *Responsabilità dell'impresa e tutela del consumatore* (Giuffrè 1975) 397. See also Civ (III) 22.10.2004 n.20588 which, in reconstructing the academic views as to the foundation of article 2049 Cod civ, refers both to *rischio di impresa* and to the Constitutional principle of social solidarity, emphasising their loss-spreading implications.

be it accident avoidance, the spreading of losses, or victim protection, which drives their reasoning.[922] True, one may argue that the courts are fully aware of the loss-spreading prong of Trimarchi's theory, and yet it is noteworthy that, unlike American courts, they virtually never make any direct reference to it.[923]

It is, however, in the context of product liability in the 1970s that the convergence between social solidarity and law and economics became more evident and that legal scholars engaged in a lively discussion on loss-spreading. At a time when there was no dedicated law governing the extra-contractual liability of manufacturers (the Product Liability Directive coming into force only a decade later), individual scholars differed as to the provisions of the *Codice civile* to which they appealed to find a ground for strict product liability, such as article 2049 on employers' vicarious liability, article 2050 on liability for dangerous activities, or article 2051 on liability for the deeds of things. Regardless of the provisions relied upon, major works in the field such as those by Alpa and Castronovo considered loss-spreading as an important reason for supporting the manufacturers' strict liability.[924] The idea was that, by relying on liability insurance and by adjusting prices in consequence of their potential or actual tort liabilities, firms could achieve an equitable and rational distribution of losses. Particularly supportive of loss-spreading was Castronovo who, in embracing Calabresi's approach, argued in his early writings that the spreading of

[922] See eg Civ (III) 20.6.2001 n. 8381.

[923] cf Civ (III) 19.7.2012 n.12448.

[924] Alpa (n 610) 299, 303 (combining loss-spreading with accident avoidance); Carnevali (n 610) 47–49 (combining loss-spreading/deep-pockets with accident avoidance and a reduction in administrative/litigation costs); Alpa (n 921) 70–84, 294–309, 334–340; Gustavo Ghidini, 'Prevenzione e risarcimento nella responsabilità del produttore' Rivista delle società 1975.530, 532; Castronovo (n 605). See also Gianmaria Volpe, 'Esercizio di attività pericolose, rischio d'impresa e controllo delle tecnologie' GM 1974.4-5.1.381, 382–383.

losses was a fundamental concern of tort law,[925] that such concern found expression in the Constitutional principle of social solidarity,[926] and that loss-spreading could even be the settling criterion in allocating losses where it was difficult to identify the cheapest cost avoider.[927]

Given all this, one would have expected loss-spreading to thrive in Italian legal reasoning and establish itself as a truly dominant justification, but in fact the argument did not manage to break through and today looks less significant than justifications such as risk, accident avoidance, or victim protection. How has this happened? The explanation must be found in the criticisms made against the argument and in the turn which economic analysis has taken in Italy. First, some of the same scholars who mentioned loss-spreading as a reason for imposing strict liability on firms cast doubt on the idea that they are always in a position to spread the costs of their liabilities: on the one hand, adjusting prices to reflect these costs may not be possible because of the specific conditions of market competition and of consumers demand, or because of the costs of raw materials and workforce; on the other hand, insurance cover may not be available for certain types of risks, and there may be indemnity ceilings as well as other terms in insurance policies which in effect prevent a meaningful spreading of losses.[928] Secondly, some scholars warned that an excessive reliance on the combination of strict liability and liability insurance could distort the dynamics of the insurance market, undermine the protection of the weaker parties (with

[925] Castronovo (n 605) 628–629, 634–635.

[926] ibid 595ff.

[927] ibid 654–655, 797–798, 800.

[928] Alpa (n 921) 454–458; Bessone, ‘Profili’ (n 636) 11, 37–38.

poorer consumers cross-subsidising richer ones), and hinder the avoidance of accidents.[929] Thirdly, the whole idea of making consumers or other third parties the ultimate payers of firms' liability was seen as the product of a market logic which was disquieting in that it translated liability into a subsidy to firms[930] and encouraged firms to carry on 'morally repugnant' cost-benefit analyses.[931] Fourthly, as Marini suggests in his reconstruction of the development of Italian tort theory of the 1970s, legal scholars (especially from the left) failed to appreciate to the full the significance of Calabresi's theory and its distributive implications: they distrusted Calabresi's emphasis on the market as a mechanism to avoid accidents ('market deterrence') and failed to realise that he put collective decision-making ('specific deterrence') next to it as a complementary strategy for the avoidance of accidents;[932] at the same time, legal scholars did not realise the fundamental role that distributive concerns played in Calabresi's approach and his constant balancing exercise between the two goals of avoiding accidents and spreading losses.[933] Fifthly, in the field of law and economics, accident avoidance and allocative efficiency receive more attention than loss-spreading today. Certainly, the influence of Calabresi is visible in the work of a high number of Italian legal scholars, and even courts,[934] but not many of either have put particular

[929] Giulio Ponzanelli, 'Nuove figure di danno alla persona e tecniche assicurative' RCP 1989.409, 405–406, 421; id, *La responsabilità civile. Profili di diritto comparato* (Il Mulino 1992) 103–104 (criticising the approaches of James and Calabresi).

[930] Alpa (n 921) 303; Bessone, 'Profili' (n 636) 26.

[931] Marini (n 905) 60.

[932] Giovanni Marini, 'Gli anni settanta della responsabilità civile. Uno studio sulla relazione pubblico/privato (parte II)' RCDP 2008.II.229, 234–244.

[933] ibid 234, 240.

[934] See Roberto Pardolesi and Bruno Tassone, 'Guido Calabresi on torts: Italian courts and the cheapest cost avoider' (2008) 4 Erasmus Law Review 7.

emphasis on the spreading of losses. A notable exception is Castronovo: besides espousing the model of the 'cheapest cost avoider' for purposes of accident avoidance, he keeps recognising the importance of diluting the costs of accidents and thinks that loss-spreading considerations may be decisive when devising the strict liability of *firms or other professional entities*, for these can generally pass the costs of liability on to consumers/users.[935] And we earlier saw that Trimarchi recognises a role, even if subordinated, to distributive concerns, and that he considers the ability to spread losses as a condition for imposing strict liability.[936]Apart from these scholars, however, other leading Italian academics working in the field of law and economics either marginalise or treat with caution distributional considerations and arguments from loss-spreading, on the basis that these may be in potential conflict with the primary goal of avoiding accidents efficiently.[937]

As a result of all this, the role of loss-spreading in Italy is not as prominent as in France or even as in the United States. Whether out of fear for the undesirable effects that an excessive reliance on loss-spreading may have on accidents avoidance, or because of the perverse results to which it may lead in terms of subsidising firms and of cross-subsidising richer consumers, in the Italian context loss-spreading is approached with some caution. This is true even for instances of reasoning where the protection of victims is central and which, as such, may be thought to have everything to gain by relying on loss-spreading. In this respect, the contrast with France is striking, for there the paramount goal of victim protection finds an indispensable buttress in loss-spreading, which is therefore widely relied upon. In

[935] Castronovo (n 265) 23–24.

[936] See text to nn 912–915.

[937] See Cooter, Mattei, Monateri, Pardolesi, and Ulen (n 393) 222–223; Enrico Baffi and Dario Nardi, 'L'analisi economica del diritto e la giurisprudenza' DR 2016.10.1012, text to fn 9.

Italy, victim protection is also one of the most common arguments for the imposition of strict liability,[938] but the loss-spreading justification is not used as frequently to support it. In addition to this, many of the legal scholars currently engaging with the economic analysis of law ignore loss-spreading and prefer focusing on the effects that tort rules have on the efficient avoidance of accidents. In this respect, the Italian reasoning departs to some extent from the approach adopted in the United States, where a higher number of prominent legal economists attach weight to the spreading of losses (and other distributive considerations). Finally, in contrast to several American scholars and courts, Italian legal actors do not give consideration to loss-spreading understood as proportionality of burdens and benefits, in this way depriving the loss-spreading argument of a potentially useful buttress.

To conclude, in the 1970s loss-spreading received considerable attention among Italian legal scholars, both because of the ethos of social solidarity which had been imbuing Italian law since the intellectual revolution initiated in the 1960s, and because of the emphasis placed on it by some prominent figures in the law and economics movements around the same years. However, the argument was also met with several criticisms and, perhaps reflecting doubts about market deterrence, many Italian scholars refrained from supporting Calabresi's view of loss-spreading with any conviction. All this scepticism hampered the ascendancy of the argument as a dominant justification in the Italian context, and while it is possible that it lives covertly in generic invocations of social solidarity and more explicitly in references to Trimarchi's *rischio di impresa* (particularly in relation to vicarious liability),

[938] See section 3.6.3.

the argument is handled with care, especially if compared to the treatment it receives in the French and American reasoning.

3.5.5. Loss-Spreading in England: the Most Controversial Argument of All?

Compared to the other three systems, English law is the one where loss-spreading is met with the most widespread and most explicit scepticism. In most contexts of liability, the argument is relied upon only rarely and other justifications dominate the scene, though with the important exception of vicarious liability, where the argument is often seen in academic and especially judicial reasoning as a key reason for strict liability. However, several criticisms target loss-spreading, both within and outside the context of vicarious liability, with the result that the argument proves very controversial in English law.

A clear starting-point is that insurance coverage is generally not considered an attractive justification for the imposition of strict liability in England. To be sure, prominent figures such as Honoré and Lord Denning rely on it: the former argues that 'there seems no moral reason to require fault as a condition of tort liability' if the defendant is insured or likely to be insured (eg because required by the law to take out insurance) and if 'the insurance premium is modest';[939] the latter, in considering motor vehicle owners' vicarious liability for traffic accidents, notes the existence of compulsory insurance and refers to the actual insurance coverage of the defendant owner as a reason for imposing strict liability on her.[940] These, however, are very rare examples of actual insurance coverage being used to

[939] Honoré (n 516) 88.

[940] See *Launchbury* (n 91) 254–255 (combining this argument (and insurability) with victim protection); *Nettleship* (n 35) 700 (using here actual insurance coverage in the tort of negligence). See also Lord Denning's

support strict liability. This fact, coupled with the plethora of criticisms levelled at the loss-spreading argument in general (which include actual insurance coverage),[941] suggest that the significance of the latter is extremely limited.

By contrast, a very different picture emerges in relation to the use and significance of both insurability and enterprise spreading. As will be seen, these arguments surface in English reasoning as justifications for strict liability and, especially where firms or other large entities are involved, they are often put forward together and seen as equally important ways of spreading losses. In this respect, English reasoning resembles the American and Italian approaches where, in contrast with France, enterprise spreading is no less important than insurability. Moreover, in English reasoning loss-spreading is approached in a variety of ways, presenting important similarities and differences with the other three systems.

First, the loss-spreading argument is sometimes relied upon regardless of any specific context of liability. For example, Jolowicz argues that '[t]he proliferation of large enterprises and the prevalence of liability insurance have produced the result that the losses suffered by successful plaintiffs are most frequently placed in the so-called channels of distribution'.[942] In his view, courts should consider the existence of these spreading mechanisms and the victims of accidents should not be refused compensation.[943] Loss-spreading features also prominently in the 1978 Pearson Commission's report on civil liability and compensation for personal injuries, particularly in the part concerning the protection of individuals exposed

remarks in *Morris v Ford Motor Co Ltd* [1973] QB 792, 798; *Lamb v Camden LBC* [1981] 1 QB 625, 637–638.

[941] See text to 975–990.

[942] Jolowicz (n 789) 58.

[943] ibid 59–63.

to exceptional risks of harm.[944] In the Pearson Commission's view, the legislative introduction of strict liability would be appropriate because firms can charge 'the incidental cost of personal injuries … to the cost of the business, and so ultimately spread [it] overall consumers of the goods or services in question',[945] adding that compulsory insurance would be 'appropriate in most cases'.[946]

Turning to specific liabilities, insurability and/or enterprise spreading surface with varying frequency in a number of contexts. For example, in relation to liability for animals, the Law Commission identifies the ability of keepers of dangerous animals to insure against the risk of harm as a reason for recommending the statutory introduction of strict liability.[947] In the context of the rule in *Rylands v Fletcher*, some scholars see loss-spreading as one of the reasons which led to the establishment of the rule,[948] and which should support the rule nowadays as well.[949] In the context of private nuisance, Baron Bramwell's reasoning in *Hammersmith* discloses an attraction for loss-spreading, arguing that compensation for losses caused by running locomotives 'comes from the public which gets the benefit. It comes from those who do the damage, but ultimately from the public in the fares they pay'.[950]

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[944] Pearson Commission (n 494) ch 31.

[945] ibid [1641]–[1645] (combining loss-spreading with abnormality of risk and victim protection).

[946] ibid [1668].

[947] Law Comm No 13 (n 77) [14], [16]–[18], [20], [24] (juxtaposing loss-spreading with abnormality of risk, accident avoidance, and litigation costs (the last insofar as cattle trespass is concerned, at [63]). See also *Mirvahedy* (n 487) [157] (Lord Walker); *Welsh* (n 641) [47] (both discussing loss-spreading and accident avoidance).

[948] See Murphy (n 44) 665 and 659ff (juxtaposing loss-spreading with accident avoidance and resource allocation, and with a combination of arguments featuring abnormality of risk, risk-profit, and deep-pockets); Steele and Merkin (n 468) 305–306 (juxtaposing loss-spreading with risk-creation).

[949] Murphy (n 44) 665.

[950] *Hammersmith* (n 666) 231.

More frequent is the reliance placed on loss-spreading in the context of product liability. Both the Law Commission and the Pearson Commission identify one of the reasons in favour of adopting strict liability in the producer's ability insure against the risk of harm and pass the relevant costs on to consumers.[951] Among legal scholars, Jolowicz argues that, whether or not liability insurance is taken out, the cost of manufacturers' and sellers' liability will 'be reflected in the prices that they charge' and ultimately borne by consumers and users.[952] Similarly, today scholars such as McBride and Bagshaw justify strict product liability on the basis of manufacturers' spreading abilities.[953]

It is, however, in the context of vicarious liability that loss-spreading emerges most often as a rationale for the imposition of strict liability, finding support in the work of several leading scholars and in many judgments of the highest judicial authorities. As early as the 1950s, Williams argues that '[t]o turn the undeserved loss of the individual into the loss of the community may accord with sound social and economic policy'; '[b]y distributing it among the many, it becomes more easily borne'.[954] Similarly, Atiyah observes that 'the primary justification of vicarious liability lies in the distribution of costs and losses throughout the customers of an industry, generally by means of insurance'.[955] More recently,

[951] Law Comm No 82 (n 466) [23] and [38] (juxtaposing loss-spreading with accident avoidance, risk-creation, and litigation costs); Pearson Commission (n 494) [1234]–[1235] (juxtaposing loss-spreading with several other arguments, including accident avoidance and victim protection).

[952] Jolowicz (n 654) 12, 14.

[953] McBride and Bagshaw (n 12) 376–378 (juxtaposing loss-spreading with accident avoidance, nonreciprocity of risk, victim protection, and resource allocation).

[954] Williams (n 655) 440–441.

[955] Patrick Atiyah, *Vicarious Liability in the Law of Tort* (Butterworths 1967) 172 (arguably combining loss-spreading with victim protection, which he sees as the ultimate goal of vicarious liability, at 26). Cf id (n 518) 16 (no longer finding loss-spreading a 'persuasive' justification and arguing that all that can be said is that vicarious liability 'appears ... to rest on ideas of distributive justice and not of corrective justice').

Steele identifies the spreading abilities of the defendants as a key reason for imposing strict vicarious liability, which she considers 'the most promising route for compensation'.[956] Next to the reasoning of academics, a high number of judicial statements, mostly from the UK Supreme Court (or House of Lords), suggests that loss-spreading is a key rationale of vicarious liability. In *Lister*, Lord Millet defines vicarious liability 'as a loss-distribution device',[957] adding in *Dubai Aluminium* that this device is 'based on grounds of social and economic policy'.[958] In *Majrowski*, Lord Nicholls maintains that 'the financial loss from the wrongs can be spread more widely, by liability insurance and higher prices'.[959] In *CCWS*, Lord Phillips states that corporate entities 'can usually be expected to insure against the risk of such liability, so that this risk is more widely spread',[960] and that, compared to the employee, 'the employer … can be expected to have insured against' the risk of liability.[961] In *Armes*, Lord Reed suggests that, by finding the defendant local authority vicariously liable, 'the burden of a risk borne in the general interest is shared, rather than being borne

[956] Steele (n 37) 578–581 (combining loss-spreading with deep-pockets and victim protection, and discussing them with accident avoidance, risk-creation, and risk-benefit). See also Ewan McKendrick, 'Vicarious Liability and Independent Contractors: A Re-Examination' (1990) 53 MLR 770, 784 (arguably combining loss-spreading with victim protection); Fleming (n 487) 410 (discussing loss-spreading with risk-profit, deep-pockets, accident avoidance, and resource allocation); Peel and Goudkamp (n 20) [21-006] (juxtaposing loss-spreading with accident avoidance, risk-profit, and deep-pockets, and adding that 'the institution [of vicarious liability] is probably to be explained not by reference to any single reason but by the cumulation of several').

[957] *Lister* (n 86) [65] (discussing loss-spreading with risk-benefit).

[958] *Dubai Aluminium* (n 469) [107] (arguably adding a risk-creation argument).

[959] *Majrowski* (n 469) [9] (combining loss-spreading with risk-creation, victim protection, and deep-pockets, arguably in juxtaposition with accident avoidance).

[960] *CCWS* (n 81) [34] (discussing loss-spreading with deep-pockets, for purposes of victim protection).

[961] ibid [35] (combining loss-spreading with risk-creation, deep-pockets, and other arguments relating to the delegation of task from employer to employee and the degree of control of the former on the latter).

solely by the victims'.[962] In sum, in the law of vicarious liability there is very widespread reliance on loss-spreading and, while the argument is invariably combined or juxtaposed with many others (above all the various permutations of risk), English scholars and especially courts appear to hold it in high regard.

Taking a step back from the materials discussed above, a number of points emerge regarding the use of loss-spreading in English law. First, there are substantial variations in the frequency with which the argument is used across the various strict liabilities. While loss-spreading is rarely invoked in a majority of contexts, it occasionally surfaces in discussions on product liability and, more importantly, it is used on a regular basis in legal reasoning (especially judicial) regarding the law of vicarious liability. In this respect, there is some resemblance with the American approach, for there too loss-spreading is used more conspicuously in contexts of this type, where firms or other large entities are involved.

Secondly, we saw that in Italy and in the United States the loss-spreading justification is sometimes put forward by legal scholars working in the field of law and economics. This way of looking at loss-spreading is difficult to find in the English context and the closest we have to it is probably Lord Millet's definition in *Dubai Aluminium* of vicarious liability as 'a loss distribution device based on grounds of social and *economic* policy'.[963] The explanation for this missing pattern is that, apart from Atiyah, English scholars show scant interest in law and economics. And even Atiyah, who has always paid attention to Calabresi's approach, is very cautious about its usefulness for English law. In particular, he

[962] *Armes* (n 88) [57]–[58], [61]–[63] (combining loss-spreading with deep-pockets, victim protection, risk-creation, and risk-benefit, though adding at [67] that it is risk-benefit which constitutes 'the most influential idea in modern times' in the law of vicarious liability). See also *Various claimants v Barclays Bank plc*, [2017] EWHC 1929 (QB), [45]; *WM Morrison Supermarkets plc v Various Claimants*, [2018] EWCA Civ 2339, [78].

[963] *Dubai Aluminium* (n 469) [107] (emphasis added).

argues that the goals of avoiding accidents and spreading losses may conflict and be difficult to reconcile.[964] Moreover, given the inherent difficulties in operating the complex approach envisaged by Calabresi, Atiyah suggests that 'it is not easy to see why—in the field of personal injuries and sickness—the loss distribution function should not be undertaken by a social security system paid for out of taxation'.[965]

Thirdly, an understanding of loss-spreading as proportionality of burdens and benefits emerges in the English context. For example, in maintaining that the imposition of strict liability is justified so long as its costs are spread rather than left concentrated on the defendant, Honoré points to a 'system that redistributes losses among those who benefit from the activities that cause them'.[966] Similarly, Baron Bramwell's remarks on loss-spreading in *Hammersmith* are couched in terms of burden-benefit proportionality,[967] and the same is true of the Pearson Commission's recommendations on product liability.[968] This pattern shows an effort to qualify in some way the loss-spreading argument and to attribute to it some fairness-based flavour which can increase the appeal of strict liability: not all channels of distribution are acceptable, but only those which spread the loss over those who gained some benefit from the existence of the harmful activity, a typical example being manufacturers and consumers of defective products. This pattern, however, has little significance in English

[964] Atiyah (n 514) 603–606.

[965] ibid 612.

[966] Honoré (n 516) 90.

[967] See text immediately following n 950.

[968] Pearson Commission (n 494) [1235] ('it [is] justifiable and sensible that consumers as a whole should pay for the cost of insuring against injuries caused by a product from which they benefit, just as they pay for its other costs'). See also Jolowicz (n 654) 14.

reasoning, especially if compared to the American or French approach, for the English examples are rare and relatively old. Moreover, the idea of imposing strict liability to achieve a proportional sharing of burdens and benefits does not align with the approach that some English legal actors adopt towards the allocation of losses: as Lord Scott puts it in *Transco* in speaking about activities authorised or required by statute, 'members of the public are expected to put up with any adverse side-effects of such an activity provided always that it is carried on with due care'.[969] Here we have a striking contrast with the French position, if one considers the importance that French law attributes to the principle of 'equality before public burdens'.[970]

Fourthly, by far the most important pattern in English law is the use of loss-spreading as a means to ensure that victims of accidents are compensated. Paramount examples of this pattern can be found in Jolowicz's piece on liability for accidents,[971] in the Pearson Commission's report,[972] and in a variety of academic and judicial statements on vicarious liability which were considered above.[973] In all these instances, the court or legal scholar finds loss-spreading attractive because, by imposing strict liability on someone who can spread the loss either through insurance or through enterprise spreading, it is ensured that no one will be financially crushed by the costs of accidents, whether the claimant, the defendant, or any other third party. However, this pattern is not as widespread in England as it is in legal

[969] *Transco* (n 51) [89].

[970] See text to nn 844–848.

[971] Jolowicz (n 789) esp 57–61.

[972] Pearson Commission (n 494) ch 31 (on 'exceptional risks').

[973] See eg *Majrowski* (n 469) [9]; *CCWS* (n 81) [34]; *Armes* (n 88) [61]; Atiyah (n 955) 26 and 172; McKendrick (n 956) 784; Steele (n 37) 580.

systems where victim protection has higher priority, and here the contrast with France is again particularly marked: the first and foremost concern of French law is to ensure that victims of accidents get compensation, and this result is achieved without penalising financially the defendants thanks to spreading mechanisms. By contrast, many scholars and judges in England think that there is more to tort law than just the compensation of victims,[974] with the result that any attempt to promote a broad and deep socialisation of losses through tort law is handled with care.

It is not surprising, therefore, to see that loss-spreading is met with several criticisms, especially in legal scholarship, either in general or in relation to specific contexts of strict liability.

At the level of general criticisms, many legal scholars oppose loss-spreading on the ground that it is at odds with the structure and functions of tort law. For example, Cane points out that tort law is best understood as an ethical system of personal responsibility, and that any spreading function would be incompatible with its underpinning principles, backward-looking nature, and bilateral structure.[975] In a similar vein, Stapleton argues that 'so long as tort … is viewed and structured as a system of individual responsibility, we cannot convincingly draw a moral distinction between defendants merely on the basis of their capacity to share or offload that responsibility onto others in an insurance pool'.[976] And Morgan warns courts not to bend tort law to serve the purposes of victim protection and loss-

[974] See section 3.6.5.

[975] See Cane (n 484) 53; id 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471, 480; id (n 23) 228–231; id (n 36) 200–201; id, *Responsibility in Law and Morality* (Hart Publishing 2002) 247; Cane and Goudkamp (n 90) 238.

[976] Stapleton (n 303) 825. See also *Lister v Romford Ice and Cold Storage Co Ltd*, [1957] AC 555, 576–577 (Viscount Simonds); *Hunter v Severs*, [1994] 2 AC 350, 363 (Lord Bridge).

spreading, and encourages them to 'reaffirm their commitment to the principle of individual responsibility and corrective justice, which alone can explain the law of tort'.[977] Again, Nolan suggests that using a 'mechanism of corrective justice' such as tort law 'to pursue broader social goals of compensation [ie loss-spreading] and deterrence will inevitably lead to incoherence'.[978] Moreover, while legal scholars recognise that insurance has an enormous impact on the practical operation of the tort system,[979] and do not exclude that courts are sometimes influenced by the actual insurance coverage of the parties,[980] they warn that judges are ill-equipped to decide tort cases based on mechanisms (eg insurance) about which they know relatively little, especially where the insurance position of the parties is unknown.[981]

Turning now to specific contexts of strict liability, criticisms of loss-spreading can be identified in relation to the rule in *Rylands v Fletcher* and to strict product liability, although the vast majority of them is concentrated in the law of vicarious liability, which is hardly surprising as vicarious liability is the context in which loss-spreading is most forcefully supported. As regards the rule in *Rylands,* Lord Hoffmann in *Transco* considers Baron Bramwell's approach in *Rylands* itself (and in some nuisance cases) and argues that '[i]t is tempting to see, beneath the surface of the rule, a policy of requiring the costs of a commercial enterprise to be internalised; to require the entrepreneur to provide, *by insurance*

[977] Jonathan Morgan, 'Tort, Insurance and Incoherence' (2004) 67 MLR 384, 400.

[978] Nolan (n 672) 189.

[979] Richard Lewis, 'The relationship between tort law and insurance in England and Wales' in Gerhard Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 47.

[980] Clarke (n 647) 319–320; see references in n 940. Cf Stapleton (n 303) 826–827.

[981] Clarke (n 647) 323, 330, 333. See also Stapleton (n 303) 829–832.

or otherwise, for the risks to others which his enterprise creates'; however, he continues, the fear of hindering economic growth prevented the development of any broad principle of strict liability and, '[o]n the whole', it is 'no liability without fault … which gained the ascendancy'.[982] As to strict product liability, Stapleton suggests that merely focusing on compensation and on the spreading ability of manufacturers does not provide a solid theoretical basis to the Product Liability Directive, and that it leads to serious problems of uncertainty in the attribution of liability.[983] Finally, insofar as vicarious liability is concerned, many legal scholars see the loss-spreading rationale as both descriptively inaccurate and normatively undesirable.[984] In particular, it is argued that this rationale cannot explain why liability attaches to 'employers of domestic staff who are without customers or insurance' and why liability is limited to cases where employees committed a tort in the course of their employment.[985] Furthermore, it is argued that the bilateral structure of tort law makes it a poor loss-spreading device and that, '[i]f the court were allowed to go beyond those two parties, it might identify a much better loss spreader than either of them'.[986] Finally, it is warned that 'there is a danger of placing too much faith in the general panacea of insurance cover' in the field of vicarious liability, for this may eventually impact adversely the

[982] *Transco* (n 51) [29] (emphasis added).

[983] Stapleton (n 99) 394.

[984] eg Stapleton (n 303) 827–828; Cane (n 23) 228–231; Robert Stevens, 'A servant of two masters' (2006) 122 LQR 201, 201–202.

[985] Stevens (n 477) 258; McBride and Bagshaw (n 12) 853. See also Morgan (n 481) 618; id (n 647) 247–248.

[986] Cane (n 23) 231, 229–230. See also Häcker (n 198) 173 (arguing that '[s]ince a defendant insures against liability, it would lead to a vicious logical circle to maintain that his liability depends on whether or not insurance will ultimately cover it').

insurance market and the level of premiums.[987] In addition to scholarly objections, the appropriateness of loss-spreading was called into question by the UK Supreme Court's decision in *Cox*. In considering the five policy factors which in *CCWS* Lord Phillips regarded as inspiring vicarious liability,[988] the court in *Cox* discusses together the deep-pockets and loss-spreading rationales, holding that '[n]either of these is a principled justification for imposing liability',[989] and that '[a]s for insurance, employers insure themselves because they are liable: they are not liable because they have insured themselves'.[990] On the other hand, the force of this judicial statement should not be exaggerated, for several earlier as well as subsequent judgments (such as the Supreme Court's decision in *Armes* and the Court of Appeal's decision in *Morrison Supermarkets*) suggest that the spreading ability of defendants constitutes a very important consideration in judicial reasoning. More generally, therefore, in the field of vicarious liability there seems to be a profound disagreement between a majority of legal scholars, who shows a clear antipathy against loss-spreading, and the highest judicial authorities which see loss-spreading as an important reason buttressing the imposition of vicarious liability.

Given all this, then, what is the significance of loss-spreading as a justification for strict liability in English law? The overall picture is a complex one and the argument is probably the most controversial of all. In a legal milieu where the tort system is often reconstructed on the basis of principles of individual responsibility or corrective justice, loss-

[987] Giliker, *Vicarious Liability in Tort* (n 481) 239–240. See also id, 'Vicarious Liability, Non-Delegable Duties and Teachers: Can you Outsource Liability for Lessons"' (2015) 31 PN 259.

[988] *CCWS* (n 81) [35].

[989] ibid [20].

[990] ibid.

spreading attracts many criticisms and therefore struggles to become a dominant argument. The scarcity of its use in contexts such as the rule in *Rylands*, liability for nuisance, and liability for animals, attests to this impression. However, the position changes somewhat in relation to liability for products and is dramatically different in the context of vicarious liability, where widespread reliance is placed on loss-spreading (along with other arguments) to justify strict liability. Today, vicarious liability constitutes the battlefield for the clash between supporters and opponents of loss-spreading; while a majority of legal scholars frown upon this argument and object to it in several ways, many other scholars do not and, perhaps more importantly, English courts seem perfectly comfortable with it as a key rationale for this liability.

3.5.6. Concluding Remarks

Overall, the patterns of use and significance of arguments based on loss-spreading present marked variations across the four systems studied. These differences are inextricably linked to the ways in which the debate on the functions of tort law has unfolded and, in this respect, there are two key elements. First, the degree to which the four legal systems are committed to the idea that tort law should be concerned only with considerations of interpersonal justice, to the exclusion of broader, collective concerns. Secondly, and relatedly, the extent to which values such as social solidarity and burden-benefit proportionality or goals such as the protection of victims or the minimisation of the costs of accidents influence decisions as to the allocation of losses.

In France, through the relentless work of jurists, supported in a more discreet way by the courts and the occasional intervention of the legislator, tort law has developed as a

markedly socialised system for the allocation of losses, the paramount objective being the protection of victims.[991] The value of social solidarity is highly regarded and it finds expression in the concern of ensuring that the financial costs of accidents are spread widely rather than left concentrated on any particular individual. In all this, little if any resistance comes from concerns about interpersonal justice. Since the community should stand ready to shelter the unlucky victim of an accident, abundant reliance on strict liability is natural and loss-spreading appears to be a key justification for the imposition of strict liability in a wide range of contexts, whether defendants are physical individuals or firms.[992] In this respect, insurance spreading and enterprise spreading are used differently, with very little trace of the latter in the reasoning of French legal actors. This may be due at least in part to the general French antipathy towards the economic analysis of law, given that in other legal systems enterprise spreading is often put forward in theories rooted in law and economics.[993] It is therefore possible that French legal actors deliberately choose to steer clear of a terminology and of ideas reminiscent of economic analysis, while perfectly aware of the existence and operation of enterprise spreading. Finally, inspired again by the value of social solidarity, the principle of 'equality before public burdens' provides one of the key justifications for the liability of public authorities.[994]

In the United States, loss-spreading is also a prominent justification for the imposition of strict liability but, in comparison with France, it is less pervasive, it is handled differently,

[991] See text to nn 806–808.

[992] See text to nn 810–820, 829–832

[993] See text preceding n 842.

[994] See text to nn 844–848.

and it is met with several criticisms. In common with France, the ascendancy of loss-spreading is related to the effort of several scholars and courts in the first half of the 20th century to ensure that, in situations where firms were involved, victims of accidents received adequate compensation, for firms could easily spread the costs of liabilities through insurance and pricing.[995] However, the impact of this approach has diminished over time and it is not comparable to the French experience. Moreover, in sharp contrast with French law, the emergence of law and economics has profoundly influenced the intellectual foundations of American tort law and, at least in the view of some legal economists, the spreading of losses is very important (though still subservient to the minimisation of the costs of accidents or to the increase of individuals' well-being).[996] Furthermore, some legal scholars and courts entertain an understanding of loss-spreading as a strategy to achieve a proportional sharing of burdens and benefits across society, in keeping with the French principle of 'equality before public burdens'.[997] The existence of these different patterns and ways of understanding loss-spreading is clearly reproduced at the level of judgments, where loss-spreading may be put forward alternatively or cumulatively on the basis of economic efficiency, of burden-benefit proportionality, of a desire to protect the victims of accidents, or without any of these connotations.[998] Moreover, while in France loss-spreading is regularly used regardless of the nature of the defendant (whether an individual or a firm), in the United States loss-spreading is typically—though not always—advocated in contexts of

[995] See text to nn 855–862.

[996] See text to nn 864–867.

[997] See text to nn 868–873.

[998] See eg text to nn 877–880.

liability where firms are involved, such as product liability, liability for abnormally dangerous activities, and employers' vicarious liability. Furthermore, again in contrast with the French approach, insurability and enterprise spreading feature both conspicuously in American reasoning, whereas actual insurance coverage is rejected.[999] Finally, loss-spreading is met in the United States with a variety of criticisms, which seek to show its perceived incompatibility with notions corrective justice and personal responsibility, its irrelevance to issues of economic efficiency, or the inappropriateness for courts to decide on distributive issues.[1000]

Compared to the French and American approach, in Italian law loss-spreading plays a less significant role as a justification for strict liability. The intellectual revolution which affected tort law principles and doctrines from the 1960s brought to the forefront of the discussion the need to protect victims in a spirit of social solidarity as well as the insights of the economic analysis of law, with a complete emancipation from an understanding of tort law as a system of interpersonal justice.[1001] Notwithstanding the existence of such ideal conditions for its emergence as a leading argument, loss-spreading has failed to thrive as one would have expected. In relation to contexts where defendants typically are physical individuals, loss-spreading is all but absent,[1002] while in relation to firms the argument features in discussions concerning employers' vicarious liability and product liability,[1003]

[999] See text to nn 851–853.

[1000] See text to nn 881–886.

[1001] See text to nn 905–917.

[1002] See text to nn 893–904.

[1003] See text to nn 918–927.

though not as prominently as in France or the United States. The likely explanation for the failure of loss-spreading to become a dominant justification (even where firms are involved) lies in a variety of factors: the belief that an excessive reliance on tort liability as a spreading device may have detrimental effects such as distorting the insurance market or hindering the goal of avoiding accidents, the distrust for the market logic which underlies loss-spreading as put forward in the law and economics movement, and the tendency of many legal scholars influenced by the economic analysis of law to neglect distributive considerations.[1004] Unsurprisingly, and perhaps as a result of this 'silence' from legal scholars, Italian courts do not mention loss-spreading as a reason for imposing strict liability; whether they are influenced as a matter of fact by it (and particularly by the actual insurance coverage of the parties) is not possible to say.[1005] Certainly, courts do sometimes mention Trimarchi's theory of *rischio di impresa*, mostly in relation to the employer's vicarious liability, but given their generic references to the theory it is difficult to understand their position in relation to loss-spreading.[1006] In sum, the overall picture suggests that, compared to the French and American approaches, loss-spreading features far less prominently in Italian reasoning.

Finally, in English law loss-spreading is surrounded by controversy and caution. The idea that tort law should be concerned with the spreading of losses is firmly rejected by all those legal scholars who see the tort system as based on notions of corrective justice or personal responsibility. Given that loss-spreading embodies distributive concerns and entails considering factors that are wider than 'doing justice' between claimant and defendant, the

[1004] See text to nn 928–937.

[1005] See text to nn 890–891.

[1006] See text to nn 922–923.

argument is seen as irreconcilable with the bilateral structure and backward-looking nature of tort law.[1007] Despite these and other criticisms, though, the argument features conspicuously in academic and especially judicial reasoning as a key reason for imposing vicarious liability[1008] and, though infrequently, it also surfaces in discussions concerning other contexts as well.[1009] The use of loss-spreading in the English context seems guided by a concern to ensure that victims of accidents get compensation for their losses, therefore replicating a pattern which also features in the other three legal systems.[1010] Moreover, loss-spreading is occasionally understood as rooted in an ideal of fairness as proportionality of burdens and benefits, although this pattern is less significant than in France and in the United States.[1011] Finally, in contrast with the American and Italian approaches, loss-spreading lacks the support of the economic analysis of law,[1012] which has never developed in England. All this, combined with a predilection for fault-based liability, has prevented loss-spreading from prospering as an argument in favour of strict liability. Even in the only context where loss-spreading finds considerable support—the law of vicarious liability—many legal scholars and the UK Supreme Court's remarks in *Cox* cast doubt on its significance.

[1007] See text to nn 975–978.

[1008] See text to nn 954–962.

[1009] See text to nn 942–953.

[1010] See pp 251–252.

[1011] See text to nn 967–970.

[1012] See pp 249–250.

3.6. Victim Protection

3.6.1. Victim Protection as a Justification for Strict Liability

Protecting the victims of accidents through compensation for the harm suffered can be easily described as what tort law *does*. Indeed, whenever a judge finds a defendant liable in tort and orders her to pay compensation, the interests of the claimant are protected by means of monetary reparation. However, compensating victims may be also described not just as what tort law does but as what it *seeks to achieve*.[1013]

As a goal, the protection of victims is a recurrent justification for the imposition of strict liability, for the victim of an accident will more easily obtain compensation under a regime of strict liability than under a regime based on fault. In some jurisdictions the concern to compensate victims is so prominent that judicial decisions and even more academic writings sometimes justify strict liability merely by reference to it.[1014] More often, though, sheltering victims from the financial consequences of accidents constitutes the ultimate objective of a more elaborate reasoning in which arguments such as risk, deep-pockets, or loss-spreading are deployed to serve this paramount goal. With victim protection as the goal, these arguments can work as criteria for identifying the person liable, whether the risk-creator, the risk-gainer, the deeper pocket, or the best loss-spreader. Once identified, the person liable (or her insurer) will pay and the goal of protecting victims through compensation can be achieved. In this sense, then, most of the justifications discussed so

[1013] Viney (n 23) [48]; Alpa (n 399) 49–50; Cane (n 23) 206, 213; John CP Goldberg, 'Twentieth-Century Tort Theory' (2002) 91 Geo LJ 513, 521ff.

[1014] See text to nn 1025–1029 (France) and to nn 1039–1041 (Italy).

far—notably risk, deep pockets, and loss-spreading—may be seen as means for removing losses from the victims.

In this section, we shall see how the victim protection argument is used across the four systems under consideration and explore its significance as a justification for strict liability.

3.6.2. The Ultimate Reason for Strict Liability in France?

Compared to the other three legal systems, France is the jurisdiction where the protection of victims features most prominently as a justification for the imposition of strict liability. Since the last quarter of the 19th century, making sure that victims of accidents receive compensation has become 'a true social imperative' stemming from the value of social solidarity,[1015] which drove the expansion of tort law in general and of strict liability in particular throughout the 20th century. This pro-victim attitude has been so strong and overwhelming in the French discourse on civil liability that the expression 'compensation ideology' (*idéologie de la réparation*) has been coined to describe the phenomenon,[1016] with the protection of victims acting as the yardstick of the desirability and effectiveness of liability rules.[1017]

To be sure, especially in more recent times some leading, if somewhat isolated voices have been raised against the idea of reducing tort liability to an instrument of victim protection. For example, Borghetti identifies a variety of objections to this reductionist

[1015] Viney (n 808) 6.

[1016] Loic Cadiet, 'Sur les faits et les méfaits de l'idéologie de la réparation' in *Le juge entre deux millénaires - Mélange offerts à Pierre Drai* (Dalloz 2000) 495.

[1017] Borghetti (n 720) 173.

tendency: first, if compensation was all that mattered, then other systems for the distribution of losses (such as universal no-fault plans) could do the job better than tort law; secondly, focusing exclusively on the interests of victims leads to neglect those of defendants and of society more generally; and finally, the rhetoric of compensation risks putting bodily injuries and economic losses on the same level of importance, a practice not in line with the very humanitarianism that inspires the pro-victim attitude.[1018]

Despite these attempts to question the dominance of the compensation ideology, improving the position of victims remains a fundamental preoccupation of French legal actors and it informs the whole debate on the justifications of strict liability. This key role of victim protection is reflected in the breadth and degree of strictness of French strict liabilities in the law itself. For example, in relation to traffic accidents liability is extremely strict in France,[1019] while it depends in some measure on the assessment of the driver's conduct in Italy and it is generally governed by fault in the United States and England.[1020] Again, strict liability for the action of another is particularly broad in French law compared to the other three jurisdictions,[1021] and this is especially true after the judicial interpretation of article 1384(1) (now 1242(1)) Cc extended strict liability to defendants who have the power to organise and control the way of life of another, and to defendants who supervise or organise

[1018] ibid 174–175. See also Phillippe Remy, 'Critique du système français de responsabilité civile' Revue juridique de l'USEK 1997.5.49.

[1019] See text to nn 236–238.

[1020] See text to nn 90–91 (England), to nn 160–163, including n 162 itself (United States), and text to nn 264–268 (Italy).

[1021] See text to nn 81–95 (England), to nn 149–163 (United States), to nn 252–253 and nn 283–287 (Italy).

the activity of another.[1022] Again, compared to the other three legal systems,[1023] the liability of parents for the harm caused by their children is particularly strict in France.[1024] What emerges from these contrasts is a strong commitment of French courts and legislator to guarantee a very high degree of protection to the victims of accidents, a concern that in the other three systems is present but is not of the same intensity as in the French context.

In order to appreciate the significance of victim protection in strict liability, attention must be now turned to the work of legal scholars. To begin with, compensating victims is so central that sometimes French strict liability is justified or explained by reference to the protection of victims without more. For example, in relation to parental liability, Viney argues that 'what justifies [this] liability is not the concern to sanction a poor upbringing or inadequate monitoring [of children], but the desire to make sure that the victim of a harm caused by the minor receives compensation'.[1025] Statements to the same effect can be found in relation to many other contexts of strict liability, such as employers' vicarious liability,[1026]

[1022] See text to nn 199–204.

[1023] See text to 158 (England), to nn 158–163 (United States), to nn 252–253 and to n 751 (Italy).

[1024] Se text to nn 207–211.

[1025] Viney (n 199) [870] at p 1186.

[1026] Ripert (n 319) [126]; Nicola Molfessis, 'La jurisprudence relative à la responsabilité des commettants du fait de leurs préposés ou l'irrésistible enlisement de la Cour de cassation' in *Ruptures, movements et continuité du droit, Autour de Michelle Gobert* (Economica 2004) 495, [60].

the liability for the action of animals,[1027] the liability for the damage caused by ruinous buildings,[1028] and the liability for the deeds of things.[1029]

Much more often victim protection is discussed with other justifications. Occasionally, it is juxtaposed with arguments which enshrine goals alternative or additional to the protection of victims, most notably the avoidance of accidents.[1030] In these cases, however, the impression is that victim protection plays a more important role, with accident avoidance acting as a secondary or even make-weight justification.[1031] A second, more frequent and significant pattern consists in combining victim protection with justifications such as risk, loss-spreading, or the deep-pockets argument, in this way giving rise to a more elaborate argumentation. The typical pattern of reasoning works in the following way: the party designated as liable to bear the costs of accidents is either the risk-creator, the risk-gainer, the deeper pocket, or the loss-spreader; these criteria for determining the person liable are typically (if not always) put forward with a very specific goal in mind, which is facilitating the compensation of victims. For example, the theories of risk elaborated by Saleilles and Josserand at the turn of the 20th century in relation to liability for the deeds of things were driven by an explicit desire to protect the victims of accidents, especially those arising in the

[1027] eg Starck, Roland, and Boyer (n 320) [657].

[1028] eg Christine Desnoyer, 'La jurisprudence relative à l'articulation des articles 1386 et 1384, alinéa 1er du Code civil. L'instrumentalisation de la règle *Specialia generalibus derogant*' RTD civ 2012.461, 479–480.

[1029] Starck, Roland, and Boyer (n 320) [641]. Cf Jean-Sébastien Borghetti, 'La responsabilité du fait des choses, un régime qui a fait son temps' RTD civ 2010.1, [5] (criticising victim protection as 'too short a justification' for the imposition of strict liability).

[1030] See eg Viney (n 199) [791-1], [813] (on employers' vicarious liability); Viney and Guégan-Lécuyer (n 234) 71–72 (on traffic accidents); Russo (n 688) [742], [756] (on liability in general); Tunc (n 673) 414.

[1031] For an illustration of this point, see text to nn 682–699.

industrial context.[1032] Similarly, the deep-pockets justification often invoked in relation to the vicarious liability of employers and parents was based on the need to provide victims with a solvent defendant.[1033] Again, and in more recent times, loss-spreading is put forward as the mechanism that, through the imposition of strict liability, can ensure a smooth compensation of victims in a wide range of contexts of liability.[1034] In all these cases, then, arguments such as risk, loss-spreading, or the deep-pockets justification act as means to guarantee compensation and show that protecting the victims of accidents is considered the paramount goal in French law.

Overall, therefore, what is the significance of victim protection in the French reasoning? Protecting victims through compensation is probably the single most important reason put forward to justify strict liability in French law. In a sense, then, one could argue that victim protection is so important that it makes a search for further justifications superfluous: as Borghetti puts it in depicting the French approach, 'justification is not so important provided that victims are compensated'.[1035] In another sense, however, looking at the role of other justifications is extremely important, as this reveals the exact extent of the French commitment to the protection of victims. As already seen, in modern discussions the deep-pockets justification is of limited importance, essentially because made redundant by

[1032] See text to nn 311–318.

[1033] Rodière (n 721) [1473], relying on CA Paris 20.10.1934, DH 1934.529 (the same idea is expressed in Cass crim 29.6.2011 no 10-80163 JCP G 2012.530).

[1034] Tunc (n 235) [30]; id 'L'insertion de la loi Badinter dans le droit commun de la responsabilité civile' in *Mélanges Roger O. Dalcq – Responsabilité et assurances* (Larcier 1994) 557, 559 (on traffic accidents); Viney (n 199) [791-1], [813] (on employers' vicarious liability); ibid [877], at p 1199 (on parental liability and liability for the deeds of things); Jourdain (n 311) 92 (on liability for the deeds of things).

[1035] Borghetti (n 720) 178.

the emergence of insurance. As to the arguments based on risk, they are certainly important especially at a theoretical level because they provide reasons to take away certain types of accidents from the fault paradigm, and therefore they constitute an attractive buttress to justify the imposition of strict liability; on the other hand, they do not and cannot provide what it takes to rely as heavily on strict liability as French law in fact does. In this respect, the job is done by another extremely powerful justification, loss-spreading. This argument takes on a double, crucial role in French law: like risk-based arguments, it provides theoretical support to strict liability by pointing out that the costs of accidents will be diluted across society to the point that no one will feel a significant financial effect as a result of such accidents. At the same time, the argument provides practical support to strict liability by making it financially and socially sustainable, even if adopted in a wide range of contexts and if possessing great rigour. In other words, the defendant's ability to distribute widely the costs of accidents is essential to the functioning of French strict liability and to its attractiveness, and if spreading mechanisms—especially cheap insurance coverage—were not available it is very unlikely that the French commitment to protecting victims would be as passionate.[1036] Therefore, it appears that the victim protection argument is very much dependent both theoretically and practically on the distribution of losses, and that the availability of spreading mechanisms draws the limits of the French willingness to resort to strict liability as a means to compensate victims.

[1036] See text to nn 833–838.

3.6.3. A Key Justification, but Not All that Matters in Italian Reasoning

As in France, compensating the victims of accidents is one of the fundamental goals of Italian tort law and it constitutes one of the most significant justifications for the imposition of strict liability. Compared to the French position, however, the Italian approach is less single-minded. Indeed, the patterns of use of victim protection as well as the importance attributed to other goals such as, for example, accident avoidance, show that the protection of victims is not as overwhelming in the Italian context as it is in the French one.

As seen in the section on loss-spreading, since the 1960s legal scholars spearheaded a 'revolution' in tort law which shifted the focus from sanctioning the defendant's wrongful conduct to protecting the victims of accidents.[1037] This new approach, which was fuelled by the Constitutional principle of social solidarity, challenged the primacy of fault in the law of extra-contractual liability[1038] and paved the way towards a broad recognition of strict liability as a regime more conducive to the protection of victims than the fault paradigm. In this context, victim protection became the most important justification for imposing strict liability and even today it remains an extremely significant argument.

How does this prominence manifest itself in the reasoning of courts and scholars? In so far as judicial decisions are concerned, it is possible to find occasional statements that expressly recognise the protection of victims as a reason for imposing strict liability. For example, the Corte di Cassazione observes that the rationale of articles 2051, 2052, 2053, and 2054 Cod civ 'lies in the need to increase the protection of victims for the primary

[1037] eg Rodotà (n 249) 107; Comporti (n 253).

[1038] ibid 127ff.

purpose of securing the compensation of losses'.[1039] But judicial statements of this sort are not common and the significance of victim protection emerges with greater force in the work of academics than in the reasoning of courts. To begin with, as in France, there are cases where strict liability is justified by a bare reference to victim protection, as if a concern for victims could by itself support a finding of liability. For example, in relation to product liability, Fusaro criticises the courts for interpreting the burden of proof on claimants too rigorously and argues that a more generous attitude, one which treated product liability as truly strict, would provide a better protection to consumers.[1040] Similarly, in relation to traffic accidents, Bianca suggests that the strict liability of vehicle owners under article 2054 para 3 Cod civ finds its rationale in the need to guarantee the compensation to victims.[1041] This use of victim protection as a stand-alone justification for strict liability appears only sporadically, though, for in the vast majority of cases it is either combined or juxtaposed with other justifications.

In keeping with the French approach, the typical pattern is that arguments such as deep-pockets, loss-spreading, or risk-based justifications are combined with victim protection and provide the criteria to identify the party strictly liable (the deeper pocket, the loss-spreader, the risk-gainer, or the creator of abnormal risks), hence acting as means to protect victims.[1042]

[1039] Civ (III) 26.10.1998 n.10629. See also Civ (III) 21.5.2014 n.11270.

[1040] Arianna Fusaro, 'Danno da prodotti pericolosi o difettosi: regole di riferimento ed incertezze ermeneutiche' RCDP 2015.2.203, 234.

[1041] Bianca (n 21) 764; Civ (III) 21.5.2014 n.11270, [1.1].

[1042] eg Comporti (n 253) (on the need to protect victims of harms caused by abnormal risks); Bessone, 'Profili' (n 636) 26–27 (on loss-spreading as the reason to impose strict liability so as to ensure a swift and certain compensation to victims of defective products); Caterina Murgo, 'La responsabilità dei genitori per fatto illecito dei figli minori: una conferma che invita alla riflessione' RCP 2016.2.541, 549 (on parents as deep-pockets guaranteeing compensation); Griffey (n 404) 91 (on risk-benefit as the principle behind liability for

Therefore, inspired by the constitutional principle of social solidarity, these arguments buttress victim protection as a reason for, and a goal of, strict liability. From these patterns of argumentation, it emerges that giving financial relief to the victims of accidents constitutes a key justification for the adoption of strict liability. But while its importance as a reason for strict liability is clear, victim protection is less significant than in France. While the French approach is single-minded in seeing the compensation of victims as the ultimate goal and key justification of strict liability, in Italy victim protection is frequently juxtaposed with arguments that constitute goals additional or alternative to it, most notably the avoidance of accidents.[1043] For example, it is argued that in entrepreneurial contexts strict liability 'offers greater protection to the victims of accidents while also *marginalising accident-prone firms* from the market'.[1044] Similarly, in relation to the position of parents for the harm caused by their children, it is suggested that strict liability 'is about *efficient accident avoidance* and the certainty of compensation in favour of third parties coming into contact with the minor'.[1045] As seen above,[1046] accident avoidance is a goal that receives considerable attention in the Italian reasoning, acting as a key justification for the imposition of strict liability. Therefore, and regardless of whether the particular scholar's reasoning places

traffic accidents (article 2054 para 3 Cod civ), to be read in the framework of the legislator's willingness to protect victims).

[1043] This pattern features only occasionally in the French context: see eg Viney (n 199) [791-1], [813].

[1044] Volpe (n 924) 382 (emphasis added) (relying on the theory of *rischio di impresa* and emphasising the firms' ability to spread the costs of liability through insurance and price adjustments (ibid 383)).

[1045] Monateri (n 179) 947 (emphasis added). On employers' vicarious liability, see Visintini (n 375) 753–754. On liability for dangerous activities, see Covucci (n 611) [2], [2.2]. On liability for the deeds of things, see eg Salvi (n 365) 167, 172 (juxtaposing victim protection with accident avoidance). For traffic accidents under article 2054 para 4 Cod civ, see eg Roppo (n 266) 132, 136, 140. On product liability, see Ponzanelli (n 296) 508–509.

[1046] See section 3.3.3.

victim protection on an equal, less, or more important footing than this competing aim, what emerges is a belief that strict liability can pursue a variety of goals and that victim protection alone may be too brief a justification for it.[1047]

This approach is further confirmed by the position of many authors who disagree with any single-minded pursuit of victim protection and call into question the appropriateness of strict liability. For example Patti, in line with Trimarchi's view, argues that strict liability should be confined to economic activities presenting a minimum of organisation and continuity (eg all entrepreneurial activities) and therefore criticises the pro-victim stance that pushed many Italian courts to read parental liability as strict.[1048] Similarly, in relation to liability for the deeds of things, Benedetti argues that too much emphasis on strict liability and the protection of victims undermines other dimensions of tort law, first and foremost accident avoidance and the usefulness of fault for this purpose.[1049] Finally, but very importantly, the view that victim protection would be the ultimate goal of tort liability is frowned upon in the Italian literature influenced by law and economics. Here it is regularly argued that the aim of tort liability (both strict and fault-based) is not to protect the victims of accidents, but to minimise the social costs of those accidents, with the result that compensating losses is appropriate only if it can advance this goal.[1050] All this suggests that

[1047] For a critical appraisal of victim protection in French law, see Borghetti (n 1029) [5]–[6].

[1048] Salvatore Patti, 'Responsabilità dei genitori: una sentenza in linea con l'evoluzione europea' Familia 2001.4.1174, 1177–1178.

[1049] Aldo P Benedetti, 'La caduta di un alunno durante una gita scolastica: chi risponde?' DR 2012.7.755, text to fns 17–18.

[1050] Paolo Pardolesi, *Profili comparatistici di analisi economica del diritto* (Cacucci 2015) 20.

compensation is not the only concern emerging from the Italian reasoning and that, compared to the French approach, it is a comparatively less significant justification for strict liability.

Overall, therefore, compensating the victims of accidents is certainly a key justification for strict liability in the Italian context, but the legal reasoning of courts and scholars shows considerable attentiveness for other goals too, such as accident avoidance. This reflects an openness to considerations other than victim protection that is not seen in the French context and that ultimately weakens, if only moderately, the importance of victim protection as a justification for Italian strict liability.

3.6.4. The Protection of Victims in the United States: a Falling Star?

Compensating the victims of accidents for the losses they have suffered is often described as one of the primary goals of American tort law,[1051] and one which also features in academic discussions and judicial opinions seeking to justify the imposition of strict liability. As will be seen, the argument from victim protection was especially popular from the 1920s to 1970s among legal scholars supporting the strict liability of firms, but since then it has lost some of its force due to the ascendancy of law and economics and of theories of interpersonal justice. While the footprint of this pro-victim stance is still clearly visible in American legal reasoning, victim protection enjoys less currency than in the past and it is less significant than in the French or even the Italian context.

As seen in our discussion of loss-spreading, since the 1920s and until the 1970s, many scholars in the United States suggested that accidental losses should be seen as the by-product of the industrial age and that fault was wholly inadequate to care for the victims of

[1051] See Kaplow and Shavell (n 565) 88, fn 6 and accompanying text.

accidents.[1052] In order to make sure that victims received compensation, they argued for the imposition of strict liability on those who were in a position to spread losses through insurance and/or enterprise spreading arrangements. This approach targeted first and foremost situations involving firms, as these would typically be excellent loss-spreaders, but also those situations where firms were not involved and yet the financial consequences of accidents could be spread via insurance, as in traffic accidents.[1053]

It is largely by this route that victim protection has come to constitute an important justification for strict liability in the United States.[1054] Unsurprisingly, then, where victim protection is deployed to support strict liability, the relevant reasoning typically includes arguments from loss-spreading. In some cases, victim protection and loss-spreading are presented as distinct and juxtaposed goals.[1055] In this pattern, it is difficult to discern any specific interplay between the two arguments as well as their respective significance; all that can be said is that they constitute important and independent reasons for imposing strict liability. At other times, loss-spreading acts both as an independent goal and as a means to achieve victim protection, with the two justifications being therefore combined.[1056] In this pattern, the goal of compensating victims is achieved, at least in theory, by imposing strict liability on the loss-spreader, meaning that loss-spreading provides the criterion to identify

[1052] See text to nn 855–861.

[1053] See references in n 856.

[1054] For a brief overview of approach, see Goldberg (n 1013) 537–544.

[1055] eg *Mary M* (n 570) 1348–1349; *Lisa M* (n 570) 366–367; *Becker* (n 459) 1214.

[1056] eg Feezer (n 856) 809–810; *Escola* (n 568) 441 (juxtaposing this combination of arguments with accident avoidance and litigation costs); James (n 464) 226–228 (combining victim protection with loss-spreading); *Beshada* (n 170) 547–549 (combining victim protection with loss-spreading, and juxtaposing this combination with accident avoidance, litigation costs, and risk-profit); *Seely* (n 861) 151 (combining victim protection with loss-spreading).

the party strictly liable. Here the interplay (and strong connection) between victim protection and loss-spreading is clear: the existence of spreading mechanisms makes it possible to afford protection to the victims of accidents by imposing the loss on someone who is able to dilute it across society and who therefore will not be crushed by a finding of liability. Absent spreading mechanisms, the case for strict liability in the furtherance of victim protection would be weakened.

While there is a special link between victim protection and the spreading of losses, victim protection can also feature in reasoning that involve other justifications. Arguments such as risk (abnormality of risk, risk-benefit or risk-profit), the deep-pockets justification, and accident avoidance can, alternatively or cumulatively,[1057] be either combined or juxtaposed with victim protection in contexts such as liability for abnormally dangerous activities,[1058] product liability,[1059] vicarious liability,[1060] strict parental liability,[1061] and liability for traffic accidents.[1062] Here two main patterns emerge. First, in keeping with both the French and Italian approaches, victim protection is combined with arguments that

[1057] This does not mean that loss-spreading cannot feature in these instances of reasoning, as shown in some of the examples referenced in nn 1058–1060.

[1058] *Bierman* (n 416) 498–499 (juxtaposing victim protection with loss-spreading, accident avoidance, and abnormality of risk); *Lockheed Propulsion* (n 457) 785 (combining victim protection with loss-spreading and risk-profit); *Cities Service Co* (n 439) 801 (combining victim protection with abnormality of risk).

[1059] eg *Escola* (n 568) 440–441 (combining victim protection with loss-spreading, and juxtaposing this combination with accident avoidance and litigation costs); *Vandermark v Ford Motor Co*, 391 P.2d 168, 171–172 (Cal.1964) (juxtaposing victim protection with accident avoidance).

[1060] *Mary M* (n 570) 1347–1349 (juxtaposing victim protection with accident avoidance and loss-spreading); *Elias v Unisys Corp*, 573 N.E.2d 946, 948 (Mass.1991) (combining victim protection with deep-pockets); *Lisa M* (n 570) 367 (juxtaposing victim protection with accident avoidance and loss-spreading); *Farmers* (n 872) 454 (juxtaposing victim protection with accident avoidance and loss-spreading).

[1061] Graham (n 572) 1727 (juxtaposing victim protection with accident avoidance).

[1062] *Beck* (n 161) 385 (combining victim protection with deep-pockets, in relation to the 'family purpose' doctrine).

identify the party strictly liable (the creator of abnormal risk, the risk-gainer, the deeper pocket).[1063] By being put to such a use, these arguments act as means to ensure the compensation of victims and, in this way, they reinforce the case for imposing strict liability on grounds of victim protection. Secondly, resembling a pattern already discussed in relation to Italy, victim protection can be juxtaposed with arguments indicating further and potentially conflicting goals of strict liability, most notably accident avoidance or loss-spreading (when presented as distinct from victim protection).[1064] This pattern shows an awareness in American legal actors that the goal of strict liability cannot be reduced to victim protection and cannot be the only, or even the more important, justification for the imposition of strict liability. Unfortunately, in many cases the relevant court or scholar does not elaborate on the interplay between victim protection and other goals, with the result that it is difficult to pinpoint their relative significance. What is clear, however, is that, in keeping with the Italian approach,[1065] this type of reasoning shows an attentiveness to goals other than victim protection in justifying strict liability.

This tendency to shun any single-minded attachment to victim protection finds support in the open criticisms that several American scholars level at the idea of justifying strict liability on merely compensatory grounds. First, those who entertain an interpersonal understanding of tort law consider victim protection an unsatisfactory argument because it

[1063] See eg *In State Department of Environmental Protection v Ventron Corp*, 468 A.2d 150, 160 (N.J.1983) (abnormality of risk); *Unisys Corp* (n 1060) 948 (deep-pockets); Anderson (n 440) 135 (risk-benefit and risk-profit).

[1064] On liability for abnormally dangerous activities see eg *Bierman* (n 416) 498–499; *Chavez* (n 440) 1209. On product liability see eg *Escola* (n 568) 440–441; *Vandermark* (n 1059) 171–172; *Beshada* (n 170) 547–549. On employers' vicarious liability, see eg *Mary M* (n 570) 1347–1349; *Lisa M* (n 570) 367; *Farmers* (n 872) 454; *Montague* (n 872) 1523–1524; Harper James, and Gray (n 422) 21. On strict parental liability, see Graham (n 572) 1727.

[1065] See text to nn 1043–1050.

focuses only on the claimant and her needs, breaking the nexus between claimant and defendant from which any justification for liability (strict or fault-based) should be derived.[1066] Secondly, it is argued that victim protection cannot be the sole determinant of liability, for '[o]therwise, the award will be an arbitrary shifting of loss from one person to another at a net loss to society due to the economic and sociological costs of adjudication'.[1067] Thirdly, at least in so far as legal scholars are concerned, economic reasoning can often clash with an argument from victim protection. Indeed, if the goal of tort law is to increase socio-economic welfare and if the main way to achieve this goal is to provide incentives for efficient precautions, a commitment to compensation via strict liability will be unwarranted whenever it gives inappropriate incentives to potential victims.[1068] In sum, there are a variety of reasons why victim protection is seen as an unpalatable argument for the imposition of liability, whether strict or based on fault, and it is clear that, compared to the French and even Italian approach, overall this argument is less significant as a justification for the imposition of strict liability.

To conclude, victim protection is a particularly prominent justification among those scholars and judges advocating the strict liability of firms in the first half of the 20th century in the United States. In this context, the paramount goal of protecting victims is intertwined with loss-spreading, the latter reinforcing the case for strict liability by promising a wide distribution of losses while making tort a viable system of compensation. The footprint of

[1066] Weinrib (n 585) 408–409.

[1067] Robert E Keeton and Jeffrey O'Connell, *Basic Protection for Traffic Victim* (Little, Brown and Company 1965) 242.

[1068] For example, where the intensity of the potential victim's activity impacts on the accident rate more than the intensity of the potential injurer's activity: see Cooter and Ulen (n 115) 204, 212–213.

this approach is clearly visible in the reasoning of more recent courts and scholars, especially in relation to situations involving firms rather than physical individuals as potential defendants. At the same time, however, due to the ascendancy of law and economics and of interpersonal theories of tort law as well as to the establishment of competing justifications, the victim protection argument has been met with increasing scepticism and its use as a justification for strict liability has correspondingly diminished. Here, therefore, we can see a striking contrast with the French and Italian approaches.

3.6.5. Victim Protection in English Law: an Argument to Be Handled with Care

Among the four legal systems studied, English law is where victim protection features less prominently as a justification for strict liability. While this argument is occasionally relied upon, particularly in specific contexts such as the law of vicarious liability, it is also met with broad scepticism and it is often considered at odds with the values and goals that many legal scholars see as inspiring English tort law.

As seen in our discussion of loss-spreading,[1069] there is a strong connection between this argument and victim protection. The possibility of diluting the costs of accidents is seen as an attractive way of ensuring that victims receive compensation while avoiding that anyone else, whether the defendant or other third parties, be excessively burdened by the costs of liability. It is therefore not surprising to see that, in instances of reasoning seeking to justify strict liability in English law, victim protection is often combined with loss-spreading. Examples of this pattern were already illustrated when discussing loss-spreading itself, and they include both academic and judicial reasoning in a variety of contexts,

[1069] See text to nn 971–974.

especially—though not only—the law of vicarious liability.[1070] The upshot is that, in keeping with the other three legal systems,[1071] the availability of insurance and other spreading mechanisms encourages the adoption of strict liability and hence the compensation of victims at little social cost; without such channels of distribution, the case for strict liability would be weakened and any commitment to protect victims would likely be less enthusiastic.

The intimate relationship between victim protection and loss-spreading does not mean, however, that the former is necessarily presented only in combination with the latter, for other justifications may accompany it, for example accident avoidance, the deep-pockets argument, or the various permutations of risk. In these instances, and again in keeping with the approach followed in the other three jurisdictions,[1072] two main patterns emerge. First, victim protection may be combined with arguments which have the function of identifying the party strictly liable: besides the loss-spreader, this could be the deeper pocket, the risk-gainer, or the creator of (abnormal) risks, in contexts such as the rule in *Rylands v Fletcher*,[1073] the operation of dangerous activities,[1074] traffic accidents,[1075] or vicarious

[1070] See Atiyah (n 955 26 and 172; Cane (n 484) 52–53; McKendrick (n 956) 784; Cane (n 975) 40; *Majrowski* (n 469) [9]; *CCWS* (n 81) [34]; *Armes* (n 88) [61]; Steele (n 37) 580. See eg also Jolowicz (n 789) esp 57–61 (on liability in general for accident losses); id (n 654) (on product liability); *Launchbury* (n 91) 254–255 (on traffic accidents); Pearson Commission (n 494) ch 31 (on liability for 'exceptional risks').

[1071] See text to nn 833–838 and n 1036 (France), to nn 1052–1054 (United States), and text to nn 905–910 (Italy).

[1072] See text to nn 1030–1034 (France), to nn 1042–1045 (Italy), to nn 1057–1064 (United States).

[1073] Pollock (n 486) 52 (combining victim protection with abnormality of risk); *McAlpine* (n 41) 175 (combining victim protection with abnormality of risk).

[1074] Pearson Commission (n 494) ch 31 (on liability for 'exceptional risks') esp [1641]–[1645] (combining victim protection with abnormality of risk and loss-spreading).

[1075] Denning (n 498) 128 (combining victim protection with abnormality of risk).

liability.[1076] Where this happens, these arguments support the imposition of strict liability and the pursuit of victim protection as its goal.

A second pattern consists instead in juxtaposing victim protection with arguments that embody goals different from ensuring compensation, in most cases accident avoidance, but also loss-spreading (where presented as distinct from victim protection) as well as (very rarely) efficient resource allocation or a reduction in litigation costs. Examples of this pattern involve contexts of liability such as private nuisance,[1077] product liability,[1078] liability for breach of a non-delegable duty,[1079] or even accidents in general.[1080] In these instances, then, victim protection is put next to competing goals which may be pursued alternatively (or in addition) to it. At times, it may be possible to infer from the overall reasoning the relative weight given to victim protection in comparison with these other arguments, as in the *NBA*

[1076] See eg JA Jolowicz, 'The Right to Indemnity between Master and Servant' (1956) 14 CLJ 101, 106 (combining victim protection with deep-pockets and loss-spreading); *Majrowski* (n 469) (combining victim protection with risk-creation, deep-pockets, and loss-spreading, arguably in juxtaposition with accident avoidance); *CCWS* (n 81) [34]–[35] (combining victim protection with deep-pockets, loss-spreading, risk-creation, and other arguments relating to the delegation of task from employer to employee and the degree of control of the former on the latter); *Armes* (n 88) [60]–[63] (combining victim protection with risk-benefit, risk-creation, loss-spreading, and deep-pockets); Steele (n 37) 580 (combining victim protection with deep-pockets and loss-spreading).

[1077] *Turnley* (n 666) 84–85 (juxtaposing victim protection and accident avoidance); Paul Burrows, 'Nuisance, Legal Rules and Decentralised Decisions: A Different View of the Cathedral Crypt' in Paul Burrows and Cento G Velijanovski (eds), *Economic Approach to Law* (Butterworths 1981) 151, 152 (juxtaposing victim protection, which he defines as 'justice objective', with efficient accident avoidance.)

[1078] Department of Trade and Industry (n 646) [37], [39] (juxtaposing victim protection with accident avoidance); *NBA* (n 101) [75] (juxtaposing victim protection with accident avoidance); *Wilkes* (n 102) [54] (juxtaposing victim protection with the goal of achieving 'a fair apportionment of the risks inherent in modern technological production'); *Gee* (n 102) [73] (juxtaposing victim protection with all the objectives stated in the Recitals of the Product Liability Directive); McBride and Bagshaw (n 12) 376–378 (juxtaposing victim protection with nonreciprocity of risk, loss-spreading, accident avoidance, and resource allocation).

[1079] See Simon Deakin, "The Evolution of Vicarious Liability", Allen & Overy Annual Lecture, University of Cambridge, 8 November 2017, 9 (juxtaposing victim protection and accident avoidance, in discussing the basis of the *Woodland* decision).

[1080] Jolowicz (n 789) 62–63 (juxtaposing victim protection with a reduction in litigation costs).

case, where Burton J clearly attaches paramount importance to victim protection in interpreting and applying the Product Liability Directive.[1081] At other times, by contrast, it may be difficult to pinpoint or rank the arguments' relative weight. For example, in a couple of cases following the *NBA* decision, English courts departed from Burton J's focus on victim protection and stated that 'the Directive is not driven solely by [consumers'] interests',[1082] or that 'whilst the effective protection of consumers is a key objective of the Directive, it is not the main or overriding objective. It has equal status with the other objectives'.[1083] In these examples, victim protection is not judged as more important than other arguments, and this type of reasoning suggests that, in keeping with the Italian and American approaches,[1084] English legal actors who see victim protection as a goal of strict liability are however open to recognise that strict liability can serve other goals as well.

Finally, victim protection can be put forward as a stand-alone justification, though in the English context this seems to happen only rarely and typically as an attempt to explain the imposition of strict liability in the Product Liability Directive.[1085] As a result, this pattern is of very little significance.

Overall, the emerging picture suggests that the patterns of use of victim protection in English law resemble those characterising the other three jurisdictions studied. There is, however, a fundamental difference, for reliance on victim protection is far less frequent in

[1081] *NBA* (n 101) [13], [31], [75], [178](v).

[1082] *Wilkes* (n 102) [54].

[1083] *Gee* (n 102) [73].

[1084] See p 276 (United States), and text to nn 1043–1047 (Italy).

[1085] See eg Whittaker (n 99) 235; Deards and Twigg-Flesner (n 100) 18–19.

English law than in the other systems, at least at the level of overt reasoning. The explanation for this seems to lie in the reluctance of many English legal actors to reduce strict liability (or, for that matter, tort liability in general) to a compensatory device. This reluctance manifests itself in two quite different ways. First, victim protection as a goal of tort liability is harshly criticised. Particularly illustrative is Stapleton's thinking, according to which

> it is as banal and misleading to say that the "function" or "purpose" of tort is compensation as it is to say that the "function" or "purpose" of a petrol station is to dispense petrol: the question of interest is who is entitled to have the benefit dispensed and why.[1086]

In other words, Stapleton is denying that compensating victims may be in itself a purpose of tort law, which is probably the strongest criticism that can be formulated against victim protection as a justification for strict liability. But even conceding that the protection of victims may conceivably constitute an intelligible goal of tort law, such goal would enshrine a needs-based approach to the allocation of losses which, as such, is incompatible with English tort law as a bilateral system of personal responsibility or corrective justice.[1087] Descending to specific contexts of liability, the tendency of courts to use vicarious liability as a compensatory tool in favour of vulnerable individuals has sparked considerable controversy, and the tension between this judicial approach and norms of responsibility is a source of concern among legal scholars.[1088] Similarly, in relation to product liability,

[1086] Stapleton (n 303) fn 24. See also Salmond (n 85) 10 ('[p]ecuniary compensation is not in itself the ultimate object or a sufficient justification of legal liability'); Nolan (n 672) 166.

[1087] Cane (n 484) 52–53. See also Morgan (n 977) 394–400.

[1088] Paula Giliker 'Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective' (2018) 6 Ch J Comp L 265, 277–278. See also id, 'A revolution in vicarious liability' (n 481) 139; Cane (n 784) 24–26 (commenting on two Canadian cases).

Stapleton is very critical of the *NBA* decision and of the judge's single-minded pro-victim approach which disregards other goals set out in the Product Liability Directive.[1089]

Moreover, the English scepticism for victim protection as a justification for strict liability is also reflected in the formulation of theories of strict liability which are perceived as in accordance with notions of interpersonal justice. Very interestingly, these justificatory attempts draw on risk-based arguments: for example, Honoré combines his theory of outcome-responsibility with abnormality of risk in seeking to justify strict liability in general;[1090] Stapleton combines outcome-responsibility with risk-profit to provide a sound justification for strict product liability;[1091] Cane sees the best justification for vicarious liability again in the risk-profit argument.[1092] In these instances of reasoning, risk-based justifications are key because, contrary to victim protection or any other argument focusing on collective and forward-looking concerns (eg loss-spreading or accident avoidance), they are seen as capable of reconciling strict liability with principles of personal responsibility and corrective justice.[1093] This may also explain a specific pattern of judicial reasoning taking place in the law of vicarious liability: while English courts see this type of liability as conducive to ensuring that victims receive compensation for the harm suffered,[1094] they invariably rely on risk-based reasoning, to the point of recognising risk-benefit as 'the most

[1089] Jane Stapleton, 'Bugs in Anglo-American products liability' in Duncan Fairgrieve (ed), *Product Liability in Comparative Perspective* (CUP 2005) 295, 325–330, 332–333. See also Stapleton (n 38) 93.

[1090] Honoré (n 492).

[1091] Stapleton (n 38) 185ff;

[1092] Cane (n 36) 202, 206.

[1093] Cane and Goudkamp (n 90) 453.

[1094] Giliker, 'A revolution in vicarious liability' (n 481) 133, 136; id (n 1088) 277–278.

influential idea in modern times' for the purpose of justifying vicarious liability.[1095] This willingness to rely on arguments based on risk, whether risk-creation or gain-based, may signify a desire to emphasise aspects of individual responsibility (because focused on the defendant's conduct) with a view to counterbalancing, at the level of reasoning if not of practical results, the overall effort to protect victims.

In sum, especially if compared to the French and Italian approaches, victim protection is handled in England more cautiously when it comes to justifying the imposition of liability in tort. This finding is further buttressed by a comparison of the positive laws in these jurisdictions. If the extent to which strict liability is relied upon is a function of the tort system's commitment to the protection of victims, then one is led to conclude that victim protection in England is considerably less prominent than in the two civil law systems.

To conclude, victim protection is treated prudently as a justification for strict liability in English law. The argument is occasionally relied upon in a variety of contexts, and it seems particularly important in judicial reasoning characterising the law of vicarious liability. On the other hand, several legal scholars criticise it sharply, mainly on the ground that compensation is not a goal of tort law at all, or that it is not compatible with the underlying structure and principles of the tort system. In this respect, then, English reasoning contrasts strikingly with the French and Italian approaches and, even if less dramatically, with the American one too.

[1095] *Armes* (n 88) [67].

3.6.6. Concluding Remarks

Overall, the patterns of use and significance of the victim protection argument present interesting similarities and contrasts across the four legal systems studied.

In France, ensuring that victims of accidents receive adequate compensation is the most important goal attributed to strict liability and a variety of arguments accompany victim protection to bolster the case for strict liability.[1096] Among these, particularly important are, at a theoretical level, risk-based arguments and, both theoretically and practically, arguments based on loss-spreading.[1097] Indeed, it is the availability of mechanisms allowing for a wide distribution of losses that makes it acceptable and possible to rely on broad and rigorous strict liabilities so as to ensure maximum protection to the victims of accidents.[1098] In Italy, victim protection is also a very important justification for the imposition of strict liability. In keeping with the French approach, it is combined with justifications such as the various permutations of risk, the deep-pockets argument, and loss-spreading (though less frequently than in France).[1099] However, the reasoning put forward by Italian legal actors suggests that, unlike France, strict liability may be usefully deployed to achieve goals additional or alternative to victim protection, such as the avoidance of accidents or the efficient allocation of resources. In line with this, several Italian legal scholars—especially those influenced by law and economics—criticise an overemphasis on victim protection and warn against the effects that a systematic recourse to strict liability for such purpose may have on other goals,

[1096] See text to nn 1015–1017.

[1097] See text between n 1035 and n 1036.

[1098] See text to n 1036.

[1099] See text to nn 1037–1042.

such as the avoidance of accidents.[1100] Therefore, while victim protection is a very important argument, Italian law is not as committed to the 'compensation ideology' as French law. In the United States too, victim protection is an important justification for the imposition of strict liability. This argument is often combined or juxtaposed with all the other justifications,[1101] but it presents particularly strong links with loss-spreading,[1102] in this resembling the French approach. It must be noted, however, that while the argument was particularly important in the middle part of the 20th century, its significance has somewhat diminished since then due to the concurrent ascendancy of law and economics and of theories of interpersonal justice.[1103] Both approaches call into question the appropriateness of victim protection as a reason for imposing liability in tort and suggest that goals other than compensating victims may be served by strict liability. Given the force that these intellectual movements enjoy in the United States today, it is not surprising that victim protection is less prominent than in the French or the Italian contexts. In England, the *patterns* of use do not differ from those characterising the other three legal systems: indeed, where used, the argument is often combined with loss-spreading, and at times it is discussed with justifications such as risk or (rarely) the deep-pockets rationale.[1104] However, the argument is relied upon far less frequently than in the other three legal systems, and it is rejected by several leading scholars who seek to show its incompatibility with tort law as a system of

[1100] See text to nn 1048–1050.

[1101] See text to nn 1057–1064.

[1102] See text to nn 1052–1056.

[1103] See text to nn 1066–1068.

[1104] See text to nn 1069–1084.

interpersonal justice and individual responsibility.[1105] Given this, and despite its current popularity in the law of vicarious liability—where protecting the vulnerable appears to have become a priority—victim protection remains highly controversial in English law.

[1105] See text to nn 1086–1095.

4. Concluding Reflections

This thesis has sought to provide a comparative analysis of the substantive arguments put forward to justify strict liability in England, the United States, France, and Italy. While for reasons of space it has not been possible to explore all of the justifications relied upon across the four systems, the present discussion has included the most important arguments, notably risk, accident avoidance, deep-pockets, loss-spreading, and victim protection. These arguments have been analysed comparatively, focusing on how they are used across the four laws and on the significance that they have in each of them. The analysis has painted a complex picture in relation to each argument, and I will not attempt to repeat here an overview of individual arguments. Instead I will comment on the *patterns* of arguments across the four laws as well as on the relationship between legal arguments and the different values and goals which characterise and inspire the reasoning in strict liability in these systems. I will conclude by providing some brief remarks on the complexity of legal reasoning in comparative perspective and on the notion of strict liability itself.

4.1. Some Reflections on the Patterns of Reasoning: Stand-Alone, Juxtaposed, and Combined Arguments

As we saw in Part II of the thesis, strict liability is generally defined negatively as 'liability without fault'. Unless we are given further elucidation, all we can say is that strict liability does not rest on fault, but we do not know on *what it rests*. In trying to answer this question, this study has suggested that there are as many understandings of strict liability as there are distinct instances of reasoning that may be put forward to justify it. In this respect, it may be helpful to think of strict liability as an edifice whose bricks are the arguments used to justify

it. As shown throughout Part III, legal actors across the four legal systems cherry-pick the most attractive bricks to build their own edifice, the overall result being a plethora of different ways of understanding and justifying strict liability. These bricks can be used in a wide variety of ways. In particular, arguments can be put forward as stand-alone justifications, or they can be either combined or juxtaposed with other arguments. Distinguishing among these patterns allows us to understand how legal actors in the four legal systems structure their own thinking about strict liability, and it also provides us with useful information regarding the role (and sometimes the justificatory weight) that these legal actors give to the arguments used. Before considering the various patterns of reasoning in more detail, it should also be mentioned that the analysis in Part III has shown a general lack of context-dependence in the use of arguments from a comparative perspective. While contexts are clearly very influential in understanding the role and significance of arguments in *each* legal system, it is difficult to identify any special connection which links particular arguments to one or more specific contexts of liability but not to others, and which is consistently reproduced across the four legal systems. A rare example is the general tendency in all four jurisdictions to use risk-profit only in relation to contexts where pecuniary gains may be involved, but otherwise most contexts of strict liability are justified by most of the arguments examined and, therefore, no common patterns of context-dependence seem to exist among the four systems.

Turning to patterns of use, stand-alone arguments provide a good starting-point for reflection. Where an argument stands alone, it is put forward as the only justification for strict liability, and it obviously constitutes *the* reason for imposing strict liability in the view of its proponent. As shown in Part III, this pattern can be identified in relation to most of the

arguments discussed, particularly as regards the various permutations of risk,[1106] but also (though less frequently) accident avoidance,[1107] victim protection,[1108] loss-spreading,[1109] and the deep-pockets justification.[1110] Where a stand-alone argument does not embody any goal, as is the case for arguments based on risk and for the deep-pockets justification, one is left to speculate if there is something else behind the relevant argument which is actually driving it. For example, abnormality of risk features in English reasoning as a stand-alone justification in various contexts of strict liability,[1111] but it is unclear in such cases whether strict liability seeks to protect victims, to avoid accidents, to accomplish greater socio-economic welfare, to promote norms of individual responsibility, or to achieve a plurality of goals all at once. Similarly, risk-benefit or risk-profit are used in the other three legal systems as stand-alone arguments in contexts such as liability for animals, employers' vicarious liability, or product liability:[1112] are these arguments an attempt to promote some ideal of fairness or of individual responsibility, or is an undisclosed 'societal' goal being pursued, for example an increased protection of victims? In sum, in the few instances where arguments which do not embody any goal are used as stand-alone justifications, one is left feeling dissatisfied because there appears to be more going on 'behind the curtains' than it

[1106] See text to nn 329–331 and to nn 355–356 (France), nn 400–405 (Italy), text to nn 462–463 (United States), n 466, nn 486–487, text to n 496 (England).

[1107] See text to n 574 (United States), n 614 and n 629 (Italy).

[1108] See text to nn 1025–1029 (France), to nn 1040–1041 (Italy), and to n 1085 (England).

[1109] See Viney (n 822) [19]; *Siegler* (n 126) 1188; *Johnston* (n 854) 851.

[1110] See n 774 (England).

[1111] See text to n 496.

[1112] See Carbonnier (n 355) [1166]; Farolfi (n 269) 4079; *Beech Aircraft* (n 458) 63.

is revealed to the reader. But more generally, and very significantly, reliance on stand-alone justifications is rare in all the four jurisdictions studied. This reveals that strict liability is generally perceived as requiring a reinforced justificatory basis which cannot be provided by merely resorting to one argument; and indeed, legal actors in the four laws typically link strict liability to a constellation of arguments that, as will be now seen, are put together by way of juxtaposition or combination.

As explained in the introduction to Part III,[1113] a juxtaposition of arguments looks like a list of independent justifications, with each of these adding to the reasoning but without showing any meaningful integration or interconnectedness among themselves. In other words, juxtaposed arguments do not work together with a view to an overarching goal and are instead simply thrown in the mix one after another. Precisely because of this, any argument can be juxtaposed with one or more of the others and, as our discussion in Part III has shown, there are really no limits to the inventiveness with which legal actors across the four laws juxtapose arguments, regardless of their nature. First, in all four systems there are juxtapositions between arguments which embody some specific goal, such as victim protection, loss-spreading, or accident avoidance.[1114] Secondly, even if sporadically, juxtapositions may involve only arguments which do not embody any goal, as where the deep-pockets justification is put next to any of the risk-based permutations, or where some of the latter are juxtaposed among themselves.[1115] Finally, frequently juxtapositions take

[1113] See p 74.

[1114] Viney (n 199) [813], [791-1] (on employers' vicarious liability); Monateri (n 179) 947 (on parental liability); Harper, James, and Gray (n 422) 21 (on employers' vicarious liability, adding loss-spreading as well); Deakin (n 1079) 9 (commenting on the basis of the *Woodland* decision for breach of a non-delegable duty).

[1115] Messineo (n 405) 579 (on employers' vicarious liability, juxtaposing risk-profit with deep-pockets); *McLane* (n 416) 638 (on abnormally dangerous activities, juxtaposing risk-creation with a combination

place between arguments which embody some specific goal and arguments which do not, as where accident avoidance, victim protection, or loss-spreading are combined with the deep-pockets rationale or the risk-based arguments.[1116]

All these juxtapositions reveal a common problem, though, which is a deficit of clarity and transparency in legal reasoning, especially where lots of justifications feature together. In particular, it is often difficult to understand the interplay, if there is any, among the arguments put forward and to pinpoint their relative significance within any broader reasoning. This may be acceptable for instances of reasoning where a legal actor (typically a legal scholar) simply presents or summarises the arguments that other legal actors from the same jurisdiction have used to justify strict liability. However, where instead legal actors are in effect providing their own justifications for strict liability, a greater elaboration on the arguments used is desirable to achieve clarity and transparency. For example, in a reasoning which juxtaposes (say) victim protection and accident avoidance, what is the relative justificatory weight of each of these goals? Do they have the same weight or does either of them take priority over the other? And if there is a conflict between them, meaning that (for example) in a set of situations victim protection would require strict liability while accident avoidance would not, how should the conflict be resolved? Occasionally it is possible to answer this type of questions, for example where the arguments involved in the juxtaposition are expressly ranked, or some other information helps to shed light on the legal actor's thinking (eg one particular argument is mentioned multiple times, or it is given clearly more

between nonreciprocal risk and abnormality of risk); Terré, Simler, Lequette, and Chénedé (n 179) [1228] (juxtaposing risk-profit and risk-creation).

[1116]Jourdain (n 311) 96 (on liability for the deeds of things); Roppo (n 266) 140 (on liability of producers for harm caused by defective motor vehicles); Harper and James (n 437) vol 2, 1373 at fn 12 (on employers' vicarious liability); McBride and Bagshaw (n 12) 376–378 (on product liability).

emphasis than other justifications).[1117] In a majority of cases, however, the reasoning put forward is rather opaque and one is left to speculate about the significance of each argument relative to the others in the list and about their exact role in the broader reasoning. Where this happens, strict liability rests on shaky foundations and scholars such as Stevens may have a point when they argue that '[j]ustifications for legal rules are not like the ingredients of vegetable soup', and that '[w]e cannot simply add together a number of disparate ingredients and expect to get a satisfactory result'.[1118]

Different considerations are in order with respect to combinations of arguments. Where a legal actor combines two or more arguments, they are not put forward as separate, independent rationales, but instead they present some level of integration or interconnectedness.[1119] This means that the justificatory role and significance of each argument depends on the other arguments featuring in the combination; or that, even if not interdependent, combined arguments are presented as working together and as shaping together the reasoning justifying strict liability, so that if one of the arguments were removed, the relevant reasoning would not stand up and it would look very different. In contrast with the juxtaposition pattern, clearer trends can be identified in relation to combinations of arguments. First of all, arguments from victim protection and accident avoidance are never

[1117] See eg King Jr (n 567) 352–356 (giving secondary importance to accident avoidance); Malaurie, Aynès, and Stoffel-Munck (n 179) [158] (arguing that the deep-pockets rationale (for purposes of victim protection) is a more modern justification than risk-based arguments); Jourdain (n 311) 105 (on employers' vicarious liability, mentioning risk-profit, authority, accident avoidance, and deep-pockets, but concluding that the fundamental point is insurability); Brodie (n 473) 495 (seeing accident avoidance as a secondary justification compared to risk-creation and risk-profit); Franzoni (n 11) 762–763 and 767 (on employers' vicarious liability, mentioning risk-profit but putting more emphasis on loss-spreading, resource allocation, and victim protection); Trimarchi (n 310) 8, 279–280 (on liability in general, arguing that compensating victims is a secondary goal and justification as compared to the avoidance of accidents).

[1118] See Stevens (n 477) 259 (discussing the justifications for vicarious liability in English law).

[1119] See pp 73–74.

combined in the four legal systems studied. Why is this so? A plausible explanation is that these two justifications are often seen as ultimate goals of strict liability that neither fuel each other nor work together for the achievement of some other, further goal. In other words, their paths never cross and therefore, while they can be juxtaposed, they are not capable of being combined. Secondly, there are combinations in which none of the arguments embody some specific goal, as where the various permutations of risk are combined together,[1120] or where risk-based arguments are combined with the deep-pockets rationale.[1121] This type of combination, however, is relatively rare and the reason for this appears to be that legal actors generally seek to justify strict liability by linking it to the achievement of some goal. This finds direct confirmation in the fact that, as shown throughout Part III, the most frequent combinations are those where one or more arguments act as goals of strict liability and one or more others act as means to achieve them.

This last type of combination, ie that involving means and goals, is illuminating insofar as the nature of legal arguments is concerned. Indeed, a point which emerges from the analysis in Part III is that the same argument may be used as a means to pursue a variety of different goals. For example, the deep-pockets and the loss-spreading justifications may be relied upon to pursue victim protection (as it typically happens in France and in England), or, quite differently, to promote socio-economic welfare (as happens in the United States and in Italy).[1122] Similarly, the gain-based theories of risk may be used to promote norms of

[1120] See eg *Rylands* (n 39) 279–280; *McLane* (n 416) 638; *Isaacs* (n 447) 865–866; *Stannard* (n 485) [156].

[1121] See Murphy (n 44) 659.

[1122] See sections 3.4.2. and 3.5.2. (France), text to n 780 and to nn 971–974 (England), text to n 737 and to nn 590–595 (Italy), text to nn 758–761 and to nn 864–867 (United States).

individual responsibility and justice (especially in common law quarters),[1123] or, rather differently, to ensure that victims of accidents receive compensation (especially in France and Italy).[1124] Again, abnormality of risk may be used to pursue the avoidance of accidents,[1125] to promote norms of individual responsibility,[1126] or to accomplish the compensation of victims.[1127] Moreover, two of the arguments discussed, namely accident avoidance and loss-spreading, constitute for some legal actors goals worth pursuing in themselves[1128] while, in the view of others, they are inextricably linked to the achievement of further goals such as the increase in socio-economic welfare or (but this is true only for loss-spreading) the compensation of victims.[1129] In sum, in contrast with the juxtaposition pattern, an analysis of the combination pattern allows us to appreciate the chameleonic nature of the arguments examined and to see how these, where combined with certain justifications, can take on distinct justificatory roles and create a variety of lines of argumentation to justify strict liability.

A further, key point is that the problems of clarity and transparency in legal argumentation which occur in relation to the juxtaposition pattern fade away in most instances of combinations of arguments. This is especially true in more sophisticated

[1123] Stapleton (n 38) 186–187; Cane and Goudkamp (n 90) 453.

[1124] Saleilles and Josserand (see nn 313–317 for references); Griffey (n 404) 91.

[1125] See n 344 (France), text to nn 393–396 (Italy), to nn 442–446 (United States), and to n 499 (England).

[1126] See text to n 500 (England).

[1127] See text to nn 344–351 (France), to nn 389–392 (Italy), to nn 437–441 (United States), and to n 498 (England).

[1128] See eg Schwartz (n 570) 1764 (accident avoidance), and p 226 (loss-spreading).

[1129] See pp 144–145 (accident avoidance), text to 590–594 (accident avoidance), text to (and following) n 834 (loss-spreading), text to nn 971–973 (loss-spreading).

reasoning, where combined arguments work harmoniously together towards the achievement of an overarching goal, with each of them playing a well-defined role and having its own significance depend, at least in part, on the other arguments featuring in the same reasoning. Particularly striking examples of this have been discussed in relation to the reasoning put forward in the law and economics literature in the United States and Italy. In combining arguments such as accident avoidance, loss-spreading, and a reduction in litigation costs, legal economists explain how each of these arguments (and goals) relate to one another and to strict liability, whether or not they conflict with one another and how they should be balanced with each other.[1130] Similarly, though from an entirely different perspective, several legal scholars in England and in the United States combine arguments such as abnormality of risk, nonreciprocity of risk, risk-profit or risk-benefit, with theories of individual responsibility (which may vary according to the scholar's preferred normative or interpretive view). Used in this way, such arguments acquire a 'moral' connotation and their aim is to render strict liability consistent with norms of individual justice and responsibility.[1131]

The situation is somewhat different in relation to less elaborate combinations of arguments, where problems of clarity or transparency may occasionally emerge. In many cases, the reasoning justifying strict liability is simple and the relationship among the arguments used is clear: for example, where abnormality of risk or the deep-pockets argument are combined with (say) victim protection, the former act as the means and the latter as the goal to be pursued through strict liability. However, there are combinations

[1130] See eg Trimarchi (n 289) and (n 310), and Calabresi (n 450).

[1131] See eg Stapleton (n 38) 182–200; and Honoré (n 492); Fletcher (n 308); Keating (n 453).

which, despite being prima facie straightforward, present some difficulties when one tries to understand the role and significance of the various arguments put forward.[1132] Where this is the case and the relevant legal actor fails to explain fully how their combination works, one is left wondering what the exact relationship among the different arguments is, if they all have equal force, and how they should be balanced in case of conflict among themselves. This phenomenon is, however, relatively rare and it certainly occurs far less often than in instances of juxtaposition of arguments. The general impression, then, is that the worry of being served a bad soup does not have any real bite where it comes to well-reasoned combinations of arguments in which the role of the various justifications is explained and in which the potential conflict among justifications is resolved by balancing them against each other. In these cases, the soup may not suit our taste, but its ingredients are nevertheless properly combined and produce a satisfactory result.

4.2. Justifying Strict Liability: Arguments, Values, and Goals

The analysis of the reasoning conducted in Part III has revealed that the significance of each argument varies *within* and *across* legal systems. Following my characterisation of arguments as 'key', 'secondary', or 'make-weight', we have seen that legal actors from the same jurisdiction understand each argument in different ways and attribute to it different justificatory weight. By exploring the various instances of reasoning and by paying attention to the contexts of strict liability in which arguments are invoked, the analysis has provided a clear overview of the role and significance of each argument in each of the four laws, and

[1132] See eg Murphy (n 44) 659 (combining deep-pockets with risk-profit and abnormality of risk); Ferri (n 410) 870 (combining risk-profit with the theory of *rischio di impresa*).

it has compared and contrasted the treatment that each argument receives across them. In doing so, the discussion in Part III has reduced each legal system's reasoning in strict liability to its constituent parts (the arguments) in order to provide a fresh analysis. What follows seeks instead to offer an overall picture of each legal system's reasoning by pulling together its constituent parts and by paying attention to the values and goals to which legal actors are committed. This will help us to appreciate and contrast the distinct commitments which shape the role and significance of legal arguments across the four laws and to enhance our understanding of each system's tort culture.

A good starting-point for our discussion is French law. As seen throughout Part III, the value of social solidarity permeates French reasoning and requires that the victims of accidents should be protected by the law and receive adequate compensation for their losses. Driven by a sentiment of compassion for victims, the French approach to strict liability looks at least prima facie single-minded in seeing victim protection as the ultimate goal and justification of strict liability.[1133] In order to guarantee compensation for as many victims as possible, French reasoning relies heavily on risk-based justifications and on loss-spreading (while deep-pockets is today very marginal and widely seen as old-fashioned).[1134] As to the former, since the end of the 19th century the idea that the person who creates a risk of harm or gains from that risk should be liable for the losses inflicted on innocent victims has attracted widespread support in France, and even today it is heavily relied upon to justify a wide variety of strict liabilities (with the exception of parental liability).[1135] Probably because

[1133] See section 3.6.2.

[1134] See sections 3.2.2. (risk) and 3.5.2. (loss-spreading).

[1135] See text to nn 311–318.

they spring from authoritative 'sources' such as Saleilles and Josserand, risk-based justifications are perceived as prestigious and look intuitively fair (*juste, équitable*) to many French legal actors.[1136] As a result, risk-creation and the gain-based theories of risk provide considerable *theoretical* support to the imposition of strict liability. Moreover, even though these justifications may, in principle, be used to promote norms of individual justice and responsibility, it is instead clear that, from the time of their eminent proponents, risk-based arguments are indissolubly bonded to victim protection and that still today they are typically deployed to achieve this goal.

As to loss-spreading, the development of insurance has acted in France as a true 'game-changer', for it has profoundly affected both how accidents are considered and how the law responds to their occurrence. In particular, the existence of insurance fuelled the transformation of French tort law from a system of individual responsibility into a socialised system for the allocation of losses;[1137] and as the analysis in Part III has shown, the *practical* relevance of insurance has spilled over into French reasoning, so as to make loss-spreading—particularly in the form of insurance spreading—a pervasive justification for strict liability.[1138] Therefore, besides being *theoretically* very attractive, loss-spreading is also *practically* essential, for the availability of spreading mechanisms is what renders socially and economically acceptable the widespread reliance on strict liability in France.[1139] Compared to risk-based arguments, then, loss-spreading is more attuned to a system geared

[1136] See eg text following n 333.

[1137] See text to nn 806–808.

[1138] See generally section 3.5.2.

[1139] See pp 215–217.

towards the socialisation of losses and more truly reflective of the French commitment to social solidarity. Indeed, unlike risk-based arguments, loss-spreading ensures that losses are socialised, meaning that the wider community will bear them and that no one will be excessively burdened by the consequences of accidents. In other words, the spreading of losses protects the interests of *both* claimants and defendants. This is very important, for it leads us to qualify the previous statement that the French approach to strict liability is single-minded because focussed exclusively on the victims' interests. While it is certainly true that French legal actors rely on loss-spreading as a means to protect victims, the heavy and systematic reliance placed on the loss-spreading justifications suggests that there is a *covert* balancing going on in the minds of French lawyers between the interests of defendants and the interests of claimants, and that the combined effect of strict liability and loss-spreading is deemed to reconcile them appropriately and in obedience to the value of social solidarity for all.[1140]

In sum, completely emancipated from an understanding of tort law as a system of individual justice, the French reasoning on strict liability is driven by a triad of arguments, namely victim protection, loss-spreading, and risk, each with its own justificatory role and significance. As highlighted in our discussion in Part III, the emphasis of French legal actors on these arguments goes hand in hand with their antipathy for law and economics.[1141] Legal economists focus on incentives and their main concern is to assess and choose liability rules based on their effects on socio-economic welfare. This way of approaching the consequences of accidents is perceived in France as at odds with the value of social solidarity and,

[1140] See eg text following n 838.

[1141] See pp 177–178 and text to n 842.

therefore, as immoral and to be rejected. This hostility towards the economic analysis of law has important repercussions in terms of legal reasoning. Indeed, law and economics places great emphasis on the avoidance of accidents as a key consideration to increase socio-economic welfare, and it therefore provides the ideal intellectual milieu for the flourishing of accident avoidance as a justification for strict liability. The absence of this type of analysis in France explains, at least in part, why only few scholars take accident avoidance seriously with the vast majority of them either ignoring or marginalising it.[1142]

In conclusion, in an environment where notions of individual responsibility have long gone and in which the economic analysis of law is seen as repulsive because of its supposedly 'cold' calculations, there is little left to counterbalance the value of social solidarity and the desire to protect the victims of accidents. Compensation is perceived as a moral and social imperative, and it is therefore not surprising that French law is by far the legal system among the four studied where the rules of strict liability are more numerous and more rigorous. To feed and support the French 'compensation ideology', legal actors from this jurisdiction rely heavily on risk-based arguments and, perhaps more importantly, on loss-spreading. The result of combining strict liability with spreading mechanisms is that the costs of accidents are not left concentred on any one person, whether the victim, the defendant, or a third party. This emphasis on loss-spreading shows that, while the French reasoning may appear single-minded in its commitment to protect victims, the interests of defendants and more generally of society are also taken into account. In sum, more than by a compensation ideology, the French approach to strict liability appears to be driven by an ideology of compensation and distribution.

[1142] See text to nn 698–699.

Compared to France, the legal reasoning seeking to justify strict liability in Italy, England, and the United States is more varied. In each of these legal systems, a wider range of commitments inspire it and reflect distinct values and goals which variously shape the role and significance of legal arguments.

In Italian law, the reasoning on strict liability is shaped by the coexistence of two distinct approaches which are committed to *very* different values and goals. First, in keeping with the French approach, Italian tort law finds an important source of inspiration in the value of social solidarity which, consecrated in the Italian Constitution, has played a key role in shifting the focus of tort law from the defendant's conduct to the victim's need for adequate compensation.[1143] On the other hand, secondly, law and economics has also gained attention in Italy as a credible intellectual movement and it now exerts considerable influence on the debate regarding the functions and goals of Italian tort law by focussing on accidents from the standpoint of their costs.[1144] Common to these two intellectual movements is the belief that tort law pursues broader societal goals and that, therefore, there is much more going on in this area of the law than the doing of justice between the particular claimant and the particular defendant on the basis of some norm of individual responsibility.

It is against this backdrop that we can appreciate in full the Italian reasoning on strict liability and how the various justifications for this type of liability are treated in the Italian context. First, given the importance of the Constitutional principle of social solidarity, it is not surprising that victim protection has become an essential goal of tort law, perhaps the most important one, and that it features very conspicuously in the reasoning seeking to justify

[1143] Text to nn 905–910 and 1037–1038.

[1144] See pp 148–152 and text to nn 911–917.

all sorts of strict liabilities in Italian law.[1145] However, even if the compensation of victims is an essential goal of strict liability, Italian scholars see the latter as in need of more theoretical support than a simple reference to victim protection itself. Therefore, other arguments are relied upon to give effect to the value of social solidarity, namely the various permutations of risk, loss-spreading, and the deep-pockets justification (though very rarely). Particularly significant are, in this respect, abnormality of risk which is codified in article 2050 Cod civ as an element of liability and which is also a key justification for this important and ever-expanding context of strict liability;[1146] and the gain-based theories of risk, which feature in a wide variety of strict liabilities, even though it is only in the context of liability for animals that they dominate the scene (in the form of risk-benefit).[1147] While these risk-based arguments may, in principle, stem from a commitment to norms of individual justice and responsibility, it appears that in Italy they are often used as part of a strategy to achieve victim protection.[1148] In this respect, then, there is some resemblance to the French approach, although the analysis has shown that in Italy risk-creation is widely rejected and much more emphasis is placed on abnormality of risk.[1149] Very importantly, however, a commitment to social solidarity and victim protection should also be sustained by widespread reliance on loss-spreading, as evidenced by the French experience. While loss-spreading is occasionally mentioned, especially by reference to *rischio di impresa* in the context of employers'

[1145] See section 3.6.3.

[1146] See pp 98–99.

[1147] See text to nn 399–406.

[1148] See text to nn 390–392 (abnormality of risk); Alpa (n 399) 467 and Griffey (404) 91 (risk-benefit).

[1149] See text to nn 362–363 (risk-creation), and 383–396 (abnormality of risk).

vicarious liability,[1150] the argument has failed to thrive both because of several criticisms made to it and because of the scarce attention paid to it by scholars working in the field of law and economics.[1151] As a result, while Italian law takes social solidarity and the protection of victims in high regard, it shuns any systematic reliance on the loss-spreading justifications, marking a striking contrast with the French approach.

A second approach shaping Italian reasoning on strict liability is law and economics, which exercises considerable influence on Italian legal scholars and, through them, on Italian courts.[1152] In this respect, there is again a profound difference with French law, which frowns upon law and economics as a persuasive framework of legal analysis. By focusing on the effects that tort rules have on the behaviour of potential defendants and potential claimants, law and economics seeks to promote socio-economic welfare and, for this purpose, it attributes a pivotal role to accident avoidance. While French legal actors typically disregard economic analysis and give little consideration to accident avoidance, these feature prominently in the Italian reasoning justifying strict liability, in essence every time this liability is seen as consistent with the goal of avoiding accidents efficiently.[1153] It is also important to underscore that although spreading considerations could certainly form part of an approach inspired by economic analysis, most Italian scholars working in the field ignore or marginalise them, largely because seen in potential conflict with the aim of efficient

[1150] Text to nn 918–923.

[1151] See text following 927 and text to nn 928–937.

[1152] See pp 148–152 and text to nn 911–917.

[1153] See section 3.3.3.

accident avoidance.[1154] In addition, the type of cost-benefit balancing typical of law and economics leads Italian scholars to criticise any single-minded emphasis on victim protection as well as any excessive reliance on strict liability whenever its imposition is at odds with the objectives of economic analysis.[1155] Therefore, it can be seen very clearly that law and economics has a chilling effect on the type of values and reasoning which are instead so jealously cherished in France.

Given all this, the Italian approach to strict liability differs strikingly from the French one. Certainly, social solidarity and the compensation of victims are highly regarded in both legal systems, and risk-based arguments are often used for such purposes. However, Italian reasoning shuns any systematic engagement with loss-spreading and only occasionally invokes it. Moreover, while Italian legal actors recognise the importance of compensating the victims of accidents, they avoid any single-minded approach, and other key goals (and therefore arguments) enter the picture, most notably the avoidance of accidents. In this respect, the emergence of law and economics has proved to be highly influential in Italian law, introducing a habit for cost-benefit analyses which contrast with the unilateral, pro-victim reasoning dominating the scene in France. As a result, the Italian approach is often characterised by an overt balancing of considerations which, weighed up against each other, may or may not support the imposition of strict liability in different contexts. It is therefore not surprising that Italian law does not rely on strict liability as much as French law does, whether in terms of frequency, breadth or rigour of the strict liabilities adopted.[1156] All this

[1154] See text to nn 934–937.

[1155] See pp 271–273.

[1156] See section 2.2.5.

is a reflection of the fact that commitments to different values and goals coexist in the Italian reasoning on strict liability, with some legal actors appealing to the value of social solidarity and the need to protect victims, and others invoking economic analysis and the goal of avoiding accidents efficiently. It is around these poles that the argumentation on strict liability revolves and its justifications are articulated in Italian law.

The English approach to strict liability presents some tenuous similarities with the Italian and French approach, but it is fundamentally different in several, key respects. The value of social solidarity is really not part of English tort law, the economic analysis of law never took hold, and the view that tort law is better seen as a system of individual responsibility is widespread. In sum, the set of values and goals that inspire the English system contrasts strikingly with the French and the Italian approaches, and, while the types of arguments used to justify strict liability are the same as those encountered in the other two systems, their meaning and significance are generally very different. All this is reflected in the traditionally cautious approach of English law towards the imposition of strict liability.

First, the commitment to social solidarity which pushes Italian and especially French law to rely on strict liability is much less present in England. To be sure, as seen in Part III, English legal actors show on occasion a desire to ensure that the victims of accidents receive adequate compensation for the losses suffered.[1157] This type of commitment is however rare in most contexts of liability, with an important exception being the law of vicarious liability: here several scholars and even more judges justify and support strict liability on a variety of grounds which include victim protection, loss-spreading, and the deep-pockets

[1157] See pp 278–281.

justification.[1158] On the one hand, therefore, some English legal actors seem attracted by the very sort of ideas which in France and in Italy are associated with the value of social solidarity, even though this value is clearly not recognised as such in English law itself. On the other hand, however, victim protection, loss-spreading, and the deep-pockets argument are met with broad and explicit scepticism, especially by legal scholars who perceive these ideas as threatening the values of personal responsibility and justice and as fundamentally at odds with the bilateral and backward-looking structure of English tort law.[1159] This resistance to the adoption of a pro-victim attitude marks a profound difference between England and France, and, to a lesser extent, between England and Italy.

Secondly, as seen above, a key argument for strict liability in Italian law is accident avoidance, especially—though not exclusively—within the framework of analysis provided by law and economics. Here again, English law adopts a very different approach, with the argument receiving a mixed treatment. On the one hand, many legal actors credit accident avoidance as a plausible goal and justification of strict liability (and tort liability more generally) in a wide variety of contexts.[1160] On the other hand, many others doubt whether any meaningful avoidance of accidents can be accomplished through tort law in general, let alone by a type of liability which is independent of any assessment of the defendant's conduct, as is strict liability.[1161] Moreover, as already emphasised in Part III, law and economics has failed to attract meaningful support in England; on the contrary, it is regularly

[1158] See text to nn 774–779, to nn 954–962, and n 1076.

[1159] See text to nn 782–789, to nn 975–990, to nn 1086–1089.

[1160] See text to nn 637–651.

[1161] See pp 165–167.

frowned upon for the same reasons which militate against victim protection or loss-spreading: these are all forward-looking ideas which embody societal goals far removed from the doing of individual justice and are therefore in conflict with an interpersonal understanding of tort law.[1162] As a result, while law and economics in Italy (and in the United States) is a well-regarded theoretical basis where (especially) accident avoidance may be cultivated as a justification for strict liability, in England it is seen as an approach that would undesirably distort the essence of tort law.

Clearly, then, a common thread in our discussion of the English approach is the effect that notions of individual justice and responsibility have on a variety of justifications for strict liability. In particular, English tort law is often presented as based on such notions and this narrative is a brake to all those arguments which embody goals or concerns going beyond the relationship between defendant and claimant and which therefore contravene norms of individual responsibility. These arguments are accident avoidance, the deep-pockets justification, loss-spreading, and victim protection. Other arguments are instead consistent with norms of individual responsibility, namely the various permutations of risk. To be sure, as we saw when discussing France and Italy, risk-based arguments can certainly be used as part of a pro-victim strategy to guarantee compensation; however, this is not the only way in which such arguments can be deployed, and English reasoning provides an example of this. In particular, several leading scholars provide arguments such as abnormality of risk or risk-profit with a moral connotation which brings to the fore notions of individual justice and responsibility, especially—though not only—in relation to vicarious liability.[1163] This does

[1162] See p 169.

[1163] See eg text to nn 1090–1093.

not mean that English reasoning is particularly keen on risk-based arguments, as these too attract several criticisms.[1164] It shows, however, that the same argument may proceed from different commitments and be therefore used for disparate purposes across legal systems.

To conclude, a variety of distinct values and goals are involved in the English approach to strict liability. First, several instances of reasoning show a desire to ensure compensation to the victims of accidents, this commitment finding expression in arguments such as victim protection, loss-spreading, and (occasionally) risk. Secondly, the avoidance of accidents attracts the attention of several legal actors as an appealing justification and goal of strict liability, even though the most formidable framework to support it—law and economics—is rejected in the English context. Finally, a commitment to the values of individual justice and responsibility inspires attempts to justify strict liability on the basis of arguments which can embody these very values, examples being abnormality of risk and risk-profit. This attachment to a vision of tort law as a system of individual responsibility clashes with any argument or commitment which seeks to use strict liability (or tort law more generally) to achieve societal goals such as the compensation of victims, the spreading of losses, or the avoidance of accidents. In sum, English reasoning on strict liability features a remarkable tension—as well as an interesting interplay—between different arguments and commitments, and strict liability itself constitutes a battlefield for the clash between distinct and contrasting approaches to tort law.

More complex is the picture of reasoning in strict liability characterising the United States. American reasoning reflects a variety of commitments to distinct values and goals

[1164] See text to nn 477–481 (risk-creation), to nn 501–511 (abnormality of risk), n 518 and n 525 (risk-profit and risk-benefit).

which connote in different ways the arguments used to justify strict liability. These commitments largely correspond to what we have seen in the other three legal systems—victims' needs, law and economics, and norms of interpersonal justice—but this time they all coexist under the same roof, giving rise to a particularly heterogeneous reasoning.

First, while the term 'social solidarity' does not have any currency in the United States, ideas resonating with it played a historically important role in the development of strict liability, especially in the middle part of the 20th century. In the pursuit of social justice, which really meant meeting the needs of victims, American scholars and courts often relied on the arguments most congenial to that purpose, namely victim protection, loss-spreading and, to a lesser extent, the deep-pockets justification, particularly where firms were involved as potential defendants.[1165] As in France, the emergence of a robust insurance market changed the terms of the discussion regarding the basis of tort liability, and the view became widespread that the availability of spreading mechanisms rendered any fault requirement superfluous or even an obstacle on the way to justice. While this pro-victim and pro-spreading commitment has driven many courts and legal scholars operating in the second half of the 20th century, the force of this intellectual movement has declined considerably with the advent of law and economics and of theories of interpersonal justice.

Legal economists soon abandoned any particular emphasis on the protection of victims and shifted the focus of legal analysis on the social costs of accidents and on how to minimise them (ie to increase socio-economic welfare).[1166] Largely neglected by the pro-victim approach, the avoidance of accidents becomes of paramount importance in law and

[1165] See text to nn 755–756, pp 221–223, and text to nn 1052–1053.

[1166] See text to n 917 and to n 1068.

economics, because reducing the number or the severity of accidents is the first step to minimise their social costs.[1167] However, in keeping with the Italian approach, it must be noted that accident avoidance is not monopolised by law and economics in the United States, for this argument is highly regarded by many legal actors who do not subscribe to the assumptions and goals set by the economic analysis.[1168] Besides accident avoidance, many scholars working in the field of law and economics recognise that once accidents have occurred it becomes a matter of allocating the attendant costs in a way which is the least detrimental to society. As a result, distributing losses appropriately is key and arguments such as loss-spreading or the deep-pockets justification are relied upon in assessing and justifying the 'efficiency' of liability rules.[1169] Clearly, though, the meaning that loss-spreading takes on in American law and economics is not the meaning that it has for French legal actors: seen as a gateway to victim protection by the latter, it instead constitutes one of the methods for minimising the social costs of accidents for the former. As seen in Part III, all these considerations are taken into account in economic analysis, and most scholars working in the field believe that strict liability can score better than fault, although views differ as to the exact circumstances in which this holds true. Contrary to the pro-victim and pro-spreading movement, law and economics has not experienced any decline in importance; quite the opposite, it appears to be exercising an ever-growing influence on American legal thought. As a result, it is inevitable that the debate on strict liability is heavily influenced by the law and economics literature.

[1167] See text to nn 576–577.

[1168] See eg text to n 578.

[1169] See text to nn 759–761, and to nn 864–867.

A common feature of the pro-victim/spreading movement and of law and economics is their instrumental nature, that is their seeing tort law as a tool to achieve societal goals, whether the protection of victims, the spreading of losses, or the minimisation of the costs of accidents. It was seen that approaches and arguments of this type are heavily criticised in England, and exactly the same happens in the United States. As seen in Part III, one criticism common to all instrumental approaches, and therefore to arguments such as accident avoidance, the deep-pockets justification, loss-spreading, and victim protection, is that they sideline the relationship between defendant and claimant and the doing of individual justice.[1170] In other words, they are at odds with the bilateral structure of tort law and with its underlying principles, if these are understood as relating to norms of individual responsibility. Approaches that see tort law as a system of interpersonal justice are heavily influential today and have their own ways of justifying strict liability, the fundamental point being their effort to reconcile this type of liability with their own understanding of tort law. The arguments that allow this reconciliation are those based on risk, particularly nonreciprocity of risk and risk-benefit, for they are expressive of norms of moral and legal responsibility which bring to the fore the interaction between claimant and defendant.[1171] This does not mean that risk-based arguments always have this connotation in the American reasoning, and yet it is significant that, in keeping with the English approach, they can take on a meaning which is difficult to find in either France or Italy.

In sum, a variety of distinct commitments are at play in the United States to justify strict liability. Embedded in the American legal culture, they reflect values and goals which

[1170] See text to nn 585, 762, 853, 883, and 1066.

[1171] See text to nn 428–430, and see also Keating (n 453) 306.

express different visions about the functions and roles of strict liability (and of tort law more generally). To understand the American reasoning, then, it is key to distinguishing among these various commitments, for each provides a different connotation, meaning and significance to the specific arguments invoked. A commitment which seeks to meet the needs of victims will favour arguments such as loss-spreading, the deep-pockets justification and, of course, victim protection itself. A commitment which instead seeks to minimise the social costs of accidents and therefore increase the socio-economic welfare will focus on accident avoidance, while also paying attention to litigation costs as well as to loss-spreading and even to the deep-pockets rationale (though in a very different way as compared to the previous commitment). Finally, a commitment which seeks to promote notions of interpersonal justice is likely to reject all or most of these arguments and will instead rely on justifications which accord with principles of individual responsibility, notably risk in its various permutations. In sum, the emergence and coexistence of distinct and contrasting commitments generates many lines of argumentation which render the American reasoning on strict liability extremely rich and heterogeneous.

4.3. Final Comparative and Critical Reflections on Strict Liability

In conclusion, the analysis conducted in this work highlights the deep interconnectedness between the arguments for strict liability and the broader commitments to values and goals which characterise each of the four legal systems. An emphasis on legal argumentation has allowed us to appreciate that arguments can acquire distinct connotations and express different visions of strict liability, depending on the commitment from which individual legal actors proceed in putting forward their views. Instances of reasoning which include the same

justifications will be profoundly different if they are based on different ways of understanding the functions of strict liability (and of tort law more generally), both within and across jurisdictions. Relatedly, the analysis has shown that commitments to distinct values and goals can and do coexist within a single legal system and that they shape the legal reasoning in strict liability in different ways, generating complex interactions and clashes between the chosen values and goals and between the arguments themselves.

The comparative analysis of legal reasoning has also allowed us to appreciate the chameleonic nature and heterogenous content of 'strict liability'. There is not one understanding of strict liability across legal systems, nor has each of the four systems its own, unitary understanding of strict liability. Rather, within a legal system and across the four systems there is a plethora of different understandings of strict liability, depending on the specific reasoning put forward by individual legal actors, both in terms of patterns of argumentation and in terms of the role and significance attributed to the arguments used. All these variations are a reflection of coexisting different visions about the values and goals that should inspire tort law and the imposition of strict liability.

Against this backdrop of complexity, a tendency has emerged to justify strict liability on the basis of arguments which focus on societal goals more than on the doing of individual justice between claimant and defendant. This may explain, at least in part, why English law and American law are more cautious than French law and Italian law when it comes to the adoption of rules of strict liability. Indeed, the English and (to a lesser extent) American emphasis on tort law as a system of individual justice and responsibility is likely to result in a preference for fault over strict liability, and the many legal scholars who entertain this vision of tort law often look with circumspection at strict liability and at widespread

justifications such as accident avoidance, loss-spreading, the deep-pockets argument, and victim protection. By contrast, the more instrumental understandings of tort law which characterise (in partly different ways) the French and the Italian legal systems go hand in hand with those arguments and it is therefore perfectly consistent with the mind-set of French and Italian legal actors to rely heavily on strict liability for the achievement of societal goals which are broader than the doing of individual justice.

This point of contrast between common law and civil law systems does not mean, however, that the legal reasoning in strict liability traces in any meaningful way the distinction between the common law and the civil law tradition. On the contrary, there are profound differences within the same legal tradition. In particular, as made clear throughout the thesis, the French reasoning on strict liability ignores law and economics, which in France is often seen as a synonym for 'immoral' thinking; by contrast, law and economics attracts considerable support in Italy, where especially legal scholars bring to bear the insights of economic analysis on the reasons for imposing (or not imposing) strict liability. Moreover, attachment to the value of social solidarity is strikingly more pronounced in France than in Italy despite its formal constitutional recognition there, and it translates into a considerably heavier reliance on strict liability in French law. Contrasts of a similar nature have been identified in the common law tradition as well: American legal actors are the 'masters' of law and economics, and this type of analysis pervades the discussions on strict liability, whereas English legal actors see this approach with distrust and frame their reasoning on strict liability in very different ways; moreover, American tort law has experienced a pro-victim movement in the middle part of the 20th century which has profoundly influenced the debate on strict liability and which has never occurred, at least

with comparable force, in England. All this shows that the differences in the historical development of common law systems as opposed to civil law systems do not correspond to a substantive difference in the tort cultures of the four systems along the line civil law *vs* common law and that, at least in some respects, there may be more similarities across that line than on the two sides of it. This shows, once again, that the way in which strict liability (and perhaps tort liability more generally) is justified depends on the values, goals, and even ideologies that prevail at different times in different legal systems.

'Strict liability' (*responsabilité sans faute, responsabilità oggettiva*) has remained nominally untouched for a very long time, but it should be clear by now that the term itself only confuses our understanding of it, *whatever* it may mean, by obscuring the reasons for its imposition and the criteria selected for the allocation of losses. A more promising approach would be to stop using the term altogether and to refer to the arguments which we see as appropriate substitutes for the fault paradigm and to be very clear about the values and goals which we want to fulfil and accomplish through the imposition of this (strict) liability. By doing so, instead of having an undifferentiated and cryptic category of 'strict liability' we will have a multitude of liability rules, each based on its own justification(s) and on its own criterion or criteria of attribution of liability. If we could then extend this effort and undertake a similar examination in relation to fault liabilities, our understanding of tort law would be greatly enhanced, and the coherence and transparency of the tort systems would improve considerably.

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