

TORT LAW FROM THE PERSPECTIVE OF CORRECTIVE AND DISTRIBUTIVE JUSTICE

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Abstract: *In the following paper we will be mapping tort law in the common law, reflecting on the divergence between corrective and distributive justice and their main theoretical defenses deployed by Anglo-American scholars. The concepts are in turn portrayed in their proper context: a legal culture shaped historically different from the continental legal culture. However, at a deeper level, both traditions are motivated by the same goals: how to provide justice for the victims of tort law. Because the road to destination is different, the common law having distinct ways of addressing torts, the continental jurist may need another sets of concepts to understand this domain of law.*

Keywords: *tort law, corrective justice, distributive justice, common law*

1. INTRODUCTION

In the continental- European legal culture, tort law, what we generally know from the French matrix *responsabilité délictuelle*, occupies a specific place in private law. Due to historical and epistemological features of this legal system, tort law is included in the substantial corpus of obligations, obligations in turn included in the civil law.

Not the same phenomenon we depict in the Anglo- American legal culture, where tort law occupies a particularly special place, being the most important domain of private law, retaining the *common law* character of its origins more than any other department of law [6], independent of a general scheme of obligations or subordination to a Civil Code. However, the differences in institutional arrangements specific to each family of law are surpassed and have a converging common reference in the scope of the institution, namely obtaining justice for a party which has been damaged, especially by welfare provisions and liability insurance (these two aspects appear invariably in both legal families). Still, we have here another divergent setting: the *common law* portrays its tort law in a deeply philosophical manner, using the conceptual apparatus of philosophy, politics and economy, while the continental legal culture has developed a specific vocabulary to address the traits of legal liability.

Due to the fact that tort law wasn't encompassed in a generalizing principle of responsibility, as the continental system has done, the fundamentals of tort law were coined by the Anglo-American scholars outside the explicit field of law. Thus, there are constant references to the welfare state and welfare policies, fairness, and social justice and so on. On the other hand, the continental legal literature, because it has followed the model

imposed by the French Civil Code, in its (in)famous 1382-1386 articles, has reflected on tort law only from a legalistic point of view, almost in a kelsenian manner, developing and deducing numerous consequences from the interpretation of the legal precepts, scarcely introducing nuances from political philosophy or economics.

2. TRAITS OF TORT LAW

Generally, the relevance of tort for the general welfare of individuals consists in three traits [4]:

- a) it creates the incentives for potential authors of torts to adjust their conduct in order to limit harm and decrease their chances of having to pay damages. This trait corresponds to the preventive function, as we know it in the continental- European family of law.
- b) it has a function to allocate the risks of accident losses. The problem of accidents, regardless of their nature- traffic, health, working or ecological- was addressed by the Western societies through complex insurance mechanisms in order to guarantee that the damages will not disturb economical activities and the victim will obtain the proper coverage. Here to identify the compensatory function of tort law.
- c) delictual liability affects the distribution of income, in cases where the authors and victims are distinct groups with different levels of income. Because in continental law, tort law is an institution of public order, the problem is not so acute as in *common law*, where the values of compensations may have serious consequences (some victims have received huge sums of money, either from public institutions or private ones, which determined negative systemic effects).

3. FAIRNESS AND DELICTUAL LIABILITY

In our family of law, the main scope of tort law is embedded in the notion itself and legal reference. E.g. “every person who causes...has to repair the damage” (art. 1357 Romanian civil code). From the legal text we infer the obligation to repair the damaged caused to another. The *common law*, in the absence of such provision, of a general principle similar to the one found in our legal system, conceives the duty to repair the damage either as a notion of corrective justice, either as a notion of distributive justice.

One cannot find a definitive account regarding the proper perspective, some authors favoring one perspective, while others the latter one. Not only this, but we can also find significant differences between the British *common law*, rather oriented towards fairness and corrective justice and the American one, with substantial tendencies towards strict liability and distributive justice.

However, due to the major importance of the negligence criterion in tort law, corresponding to what in French law is known as *faute*, we can assert that in its main articulation, the *common law* has a primary corrective function.

4. THE ROOTS OF CORRECTIVE JUSTICE

Undoubtedly, the concepts of distributive and corrective justice belong to Aristotle, who in the *Nicomachean Ethics* has coined for the first time the relation between parties as a bipolarity. What we know, in the continental tradition, as the inseparability of rights and duties in the general matter of obligations (a right and its correlative duty), is determined by the same intellectual framework, only that was filtered by Roman jurists (this explains why Aristotle is forgot by continental scholars when treating the obligations). Justice, in Aristotle's view, is effected by the direct transfer of resources from one party to another. The judge reestablishes equality; it is as if there is a divided line between unequal parts and he takes what exceeds the half of the bigger segment and adds it to the smaller one. The resources represent the plaintiff's wrongful injury and the defendant's wrongful act. Corrective justice treats the wrong, and the transfer of resources that undoes it, as a single nexus of activity and passivity where actor and victim are defined in relation to each other [7].

The concepts used by Aristotle were mathematical metaphors. Distributive justice is geometric and involves proportionality in the allocation of goods among members of society, while corrective justice is arithmetic, and involves adding back what has been taken away, or subtracted, from someone. The one who adds back is the one who gained from a transaction or activity more than he or she should have. Thus, corrective justice involves rectification [8].

Of course, Aristotle's distinction cannot be integrated *per se* in the legal domain, due to evident lack of normative content. Aristotle didn't explain why he thought there was a duty of corrective justice; he merely explained what that duty was. Weinrib describes the issue in a decisive manner: the two categories are formal ones, not substantive prescriptions and corrective justice in itself is devoid of a specific content, which, accordingly, must be sought elsewhere [7].

5. PERSPECTIVES ON JUSTICE

Let's see how the two images of justice were re-evaluated by the *common law* in recent period, due to a strong revival after the Second World War. The tension between them is to be seen most clearly in what we name the fundamentals of tort law. Generally, in case of traffic accidents, defective products, work accidents, ultra hazardous activities, the liability is engaged by a strict criterion, while for the other situations negligence is considered enough to attribute liability. However, there is not a uniform legal regime, as we know it in continental law, nor firm statutory provisions or definitive jurisprudence.

Thus, the philosophical relevance of the dichotomy between strict and subjective liability consists in clarifying the conditions in which a certain form of liability can be engaged in the absence of a faulty conduct. The fundamental question is to what extent the imposition of liability under Anglo- American tort law embodies a set of legal principles that displays a defensive normative structure, does that normative structure permit the imposition of liability without fault, and if so, when? [8].

Richard Epstein elaborated a strict- liability corrective justice theory. His main argument is that just as each person who infringes upon another's property right is required by the law to compensate the property owner for the infringement, so each who

causes injury to another's body is also liable to the other for the costs of the injury inflicted. The purpose of tort law is not to compensate or deter certain conducts, but to protect each person and his/her's holding against the infringements of others. Whether these infringements are deliberate or negligent or without fault is largely irrelevant [1].

Fletcher and Coleman reshaped the debate by considering that there is a principle which underlines both strict and subjective liability: the creation of nonreciprocal risks generates liability for the realization of those risks. In day to day activities, risks- like driving- are a usual component of modern life, each of us accepting a degree of risk as a form of vulnerability that we must tolerate in light of our own production of similar risks to others. When people do not use reasonable care in engaging in those activities, they generate a nonreciprocal risk and therefore take responsibility if the risk is realized in an injury. This is negligence based liability. In case of ultra-hazardous activities, the reciprocity of risks does not apply and people who engage in such actions should be held liable for the results. This is strict liability [2] & [8].

A theoretical account with an interesting impact in the Anglo-American law was developed by Tony Honore, who coined the concept "outcome responsibility". This theory is the closest to the epistemological thinking of continental law; because it uses a general term (responsibility is preferred instead of liability, the common term). This term is embedded in morality: the law must recognize a duty of conduct to rectify the injury. The notion of outcome responsibility consists in social practices in which certain outcomes are linked to a person's agency [8]. These practices are similar to bets. Some persons choose a course of action instead of another, considering the possibility of awards (e.g. a driver chooses a U turn, without waiting for the first turnaround, considering that this way he will arrive sooner. He loses the bet if he provokes an accident or the road will be longer. He wins it in the other outcome). To choose a course of action is an implicit bet regarding the outcomes, where the stakes and social rewards are not known in advance [5]. In this context, a notion like fault is necessary to indicate the person who will bear the burden of compensation, but only for some types of actions'.

6. LEGAL TRANSFORMATIONS

In the second part of the XXth century, when the above theories were forged, tort law was under an effect of counter-tide. There was a retreat, then a comeback of fault-based liability. The notion of responsibility entered in the *common law* world, supporting the subjective criterion, strict liability being accommodated to this development. For example, probably the most relevant issue in American law was the reconsideration of strict liability regarding products. The American Law Institute has advocated negligence over strict liability (usually, strict liabilities are imposed by annulling negligence, not the other way around).

In the 1970's, there has been a reconfiguration of causation regarding liabilities related to drugs. The courts relaxed the proof requirements for cause and tortfeasor. Plaintiffs in jurisdictions that permit market-share liability can recover from a drug company that produced the same sort of drug that injured them, without proving that the manufacturer produced the particular brand that injured them [8]. (Needless to say that in

a legal system like ours, such an action would have been rejected from the start by lack of passive procedural quality). By this shift, the courts instituted a strict liability, the companies having to prove that they are not liable or there aren't any exoneration causes.

7. CONCLUSIONS

There are no clear boundaries in *common law* regarding the proper perspective on tort law and also we cannot predict a certain evolution. In different periods of time, due to social and public policy constraints, tort law endorses some image of justice instead of another. Faithful to its own jurisprudential tradition and to the dynamics of social relations, the *common law* will confer the proper remedies according to the circumstances relative to social transformations, regardless of an abstract legal concept or issues involving the internal consistency of the legal system, issues so indispensable to the continental jurist. Yet, this distaste for general concepts may prove a fruitful idea to our legal tradition, due to the fact that legislators are not always able to address the specific issues arising in tort law, the courts operating in a pretorian manner, thus creating law indirectly. On the other hand, the disparity of torts in common law, each tort with its own legal regime, is discomfoting for both Anglo-American and continental jurist. Allowing for some general concepts, as we have seen with Honore's outcome responsibility, will not endanger the common law, but will only allow it to systemise better some legal domains and, why not, create the possibility to close the gap between the two families of law.

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