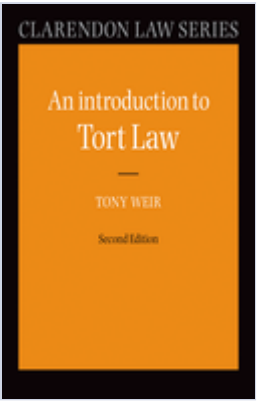

An Introduction to Tort Law (2nd edn)
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5. Strict Liability

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Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter deals with the issue of strict liability. While strict liability is rare at common law, it is relatively common by statute. Sometimes the enactment imposes liability quite explicitly, but often it imposes a duty or creates an offence instead. The chapter addresses the question of when the courts will hold that Parliament has implicitly affected civil liability, or, to put it another way, when the will courts impose liability on the ground that the defendant's conduct contravened a statute which does not mention civil liability at all. Statutory offences, statutory duties, and remoteness are also discussed.

Keywords: common law, statutory liability, tort law, civil liability, statutory offences, statutory duties, remoteness

We have seen that there is a general principle, of a sort, to the effect that one is liable for the foreseeable harm due to one's unreasonable conduct unless it would be unfair, unjust, or unreasonable to impose such liability. Where the harm is caused without any provable fault, however, there is certainly no such general principle. True, trespass, defamation, and conversion are torts of 'strict liability', but those are torts where the law is much more concerned with the vindication of rights than with compensation for harm. What of harm caused by a person who is not to blame at all?

Common Law

Whereas strict liability is said to be axiomatic in contract law (though actually obligations to try are nearly as common as warranties of success), instances in the common law of tort are distinctly rare. The famous example is the decision in *Rylands v Fletcher* in the mid-nineteenth century.[1] In that case an entrepreneur who had retained reputable contractors to build a reservoir on his land was held liable when water from it leaked into the plaintiff's mineworkings nearby and flooded them. It was said to be enough that the entrepreneur had brought on to his land something likely to do damage if it escaped, at any rate if his use of the land was 'non-natural', and it had escaped and done damage. Explosives are certainly unnatural and likely to do damage if they (or rather the blast waves from them) escape, and in *Read v J Lyons & Co* almost a century later there was an explosion in the defendant's munitions factory. The plaintiff was not, however, a neighbour complaining of property damage but a visitor, a person working on the premises, complaining of personal injury. There was no allegation of negligence, and her claim was dis-missed.[2] It was emphasised that nothing had escaped from the defendant's land, but the significance of this point is that the House of Lords was drawing a distinction between an occupier's liability to visitors on the one hand, and an occupier's liability to his neighbour on the other, perhaps also between a claim for personal injury on the one hand and a claim for damage to property on the other. At any rate if, as appears to be the case, strict liability under *Rylands v Fletcher* is a feature only of the law between neighbours, this is perhaps justified by their long-term mutual exposure, and if it does not cover personal injury, this is not because we regard property damage as more important than personal injury, but because citizens must be treated equally as regards their bodily integrity and we would not be treating them equally if we made the protection of their person depend on their property relations. *Read v Lyons* is a very important case: it can be seen as the corollary of *Donoghue v Stevenson,* for if the latter says that negligence is normally sufficient for liability, the former says that it is normally necessary.

It is not everything that escapes from the defendant's land on to the claimant's which generates liability: escape from domestic installations does not count, even from a large water-pipe serving a high-rise apartment block,[3] but the escape of industrial chemicals, however commonly used, makes for liability provided that the harm was a foreseeable consequence of the escape, which need not itself be likely or due to any negligence.[4] *Rylands v Fletcher* has been slightly extended in the United States to cover cases of extremely hazardous activities, whereas in Australia it has been wholly repudiated and is now regarded as an instance of a nondelegable duty of care, or liability for independent contractors. In 2003 the House of Lords was pressed to follow the Australian example, but it elected unanimously to retain *Rylands v Fletcher* in English law as a ground of tortious liability, independent of fault either in the introduction onto one's land of something not properly there or its escape and doing damage to the property of one's neighbour.[5] It is now clear beyond even undergraduate fantasies that it cannot be prayed in aid by the victim of personal injury, even if suffered by a neighbour on his own land.

Animals provided another instance of strict liability at common law. If your 'cattle' escaped and trespassed on neighbouring land you were strictly liable, as you were for damage done by a nasty foreign animal you kept, or even a native animal with a nasty disposition you knew about. Both of these have been replaced by statutory liabilities in the Animals Act 1971, the former, significantly, by covering only damage to property, and the latter by a provision whose effect on the law was uncertain, thanks to a degree of opacity exceptional even in the products of the Law Commission, of which this was the first example. The uncertainty has now been

resolved (erroneously) by a bare majority of the House of Lords which has been pleased to hold that one may be liable for the damage done by a perfectly normal pet which reacts in a perfectly normal way to abnormal circumstances even if one had not the faintest idea that such abnormal circumstances actually existed.[6]

Statutory Liability

If strict liability is rare at common law, it is relatively common by statute. Sometimes the enactment imposes liability quite explicitly, but often, as we shall see, it imposes a duty or creates an offence instead. When the harm is due to something under the defendant's control strict liability is quite often imposed explicitly, as it is, for example, on the owner of an aircraft when it or anything from it falls on a groundling, on the operator of a radiation complex for the physical harm done by the escape of radioactive material, on the water authority for the escape of water from a mains, on the ship-owner for oil pollution, and on the producer of products which prove to be defective. These are all statutory claims for compensatory damages, usually in respect of physical harm only, where the quantum of damages is worked out in the normal way. Thus when a dwelling was rendered virtually unsaleable owing to ionising radiation emanating from the nuclear plant at nearby Sellafield, the owners failed to recover under the Nuclear Installations Act 1965 because no physical damage had been done to their property.[7] Everything depends on the precise terms of each statute, for it will be recalled that statutes are never applied by analogy.

Product Liability

Of these statutory liabilities we here consider only the liability for damage done by defective products under the Consumer Protection Act 1987, based on the more readable EC Directive of 5 July 1985. Whereas the claimant under *Donoghue v Stevenson* has in principle to prove that the manufacturer was at fault, the claimant under the Directive need show only that the product was defective and caused appropriate damage. The application of the Directive is controlled by the Court in Luxembourg, which somewhat hesitantly rejected the Commission's challenge to the Consumer Protection Act 1987 as not adequately reflecting the Directive,[8] now amended (thanks to mad cow disease) to include primary agricultural products.

For the first ten years after its enactment, the Directive seems to have generated no litigation in England, and rather little elsewhere. The calm is now over. Lawsuits have involved polluted water, a leaking condom, breast implants, sheep-dip, combined contraceptive pills, the MMR vaccine and hot coffee, as well as contaminated blood and a baby blanket, shortly to be considered. Quite a number of these claims have failed, on a finding either that the product was not defective (hot coffee) or that the defect did not cause the condition complained of (sheep-dip).

Suit lies against the apparent or actual manufacturer/importer into the EU, or any intermediate supplier who fails to identify them or his own supplier. The claimant must prove that the product was defective, that is, was less safe than people generally are entitled to expect, given the way it was presented, the use to which it was likely to be put, and how long ago it was produced (rights are extinguished ten years after the producer first

put the item into circulation). In other words, the defect must render the product dangerous. Not all defective goods are dangerous or vice versa: a sharp knife is dangerous but not defective, a blunt knife is defective but not dangerous, a sharp knife with a wonky handle is both.

The claimant must also prove that the defect caused damage of the defined variety, namely, personal injury, death, or damage to personal (not commercial) property above a certain amount. Damages are reduced where the fault of the claimant, though not that of a third party, contributes to the harm, but the only important complete defence for the producer is that of 'development risks': if at the time of circulation it was quite impossible, owing to the state of current knowledge, to ascertain the respect in which, as we now know, the product was defective, the producer is not liable. It is not a negligence liability based on what the producer should reasonably have known, but a strict liability with a defence that he could not possibly have known.

Two cases show the Act/Directive in operation. In one case the product was blood which had infected the recipients with hepatitis C, a disease not usually disabling, but occasionally serious and sometimes fatal. At the time of the transfusions, the medical authorities were aware of the risk of such infection but had no technical means of ascertaining whether any particular batch of blood was so contaminated. The judge held that persons generally were entitled to expect that the blood provided would be 100% safe, not just as safe as technically possible; by this very strict test, the blood was held defective. The defendants therefore raised the development risks defence. This the judge disallowed on the ground that the risk was known to the medical profession, even if they had no means of countering it. To hold that the blood was defective because consumers did not know of the inherent and unavoidable risk and that the defendants had no defence because they did know of it is to apply consumer protection with a vengeance.[9]

Another case involved 'Cosytoes', a sleeping bag which was to be attached to an infant's pushchair by means of elastic straps and a metal buckle. In trying to attach it, the 12 year old claimant lost hold of the strap; the taut elastic flew back and the buckle hit him in the eye. ' Cosytoes' had been in production for ten years, no such accident had ever been known, and the experts were agreed that no reasonable manufacturer could prior to this accident have been aware of the risk of its occurrence. Nevertheless the court held that 'Cosytoes' was unnecessarily dangerous, and therefore defective: a non-elastic method of attachment would have been possible, or a warning should have been issued[10]—as if a 12 year old could manage strings or heed a warning. The holding seems very dubious. After all, zips can catch quite painfully where flybuttons would not, but surely that doesn't mean we must abandon the zip. In the United States, where the idea of strict product liability in tort originated (it has always existed in contracts of sale), a distinction is drawn between manufacturing defects, where the product does not meet the producer's own standards (snail in bottle), and design defects, where, as in Cosytoes, the whole range of a product is impugned: in the latter case the test is whether the design was, objectively, a reasonable one. If the Court of Appeal is right, the failure of the Directive to distinguish these two types of defect has resulted in a wider liability here than there; indeed, in the case of the infected blood, the judge held the distinction inapplicable.

The manufacturer of Cosytoes, held strictly liable, was not negligent, since no accident could reasonably be foreseen. Does this mean that *Donoghue v Stevenson,* under which the manufacturer had to be shown at fault, has no further role to play? No: it depends on the nature of the harm. Since the Directive covers only personal injury and death, plus damage to private property, the common law of negligence continues to apply where the claim is for damage to commercial property, in respect of which we can expect the courts to be more

exigent in finding a breach now that personal injury is covered by statute. If the harm due to the defect is purely economic, whether to an individual or to a company, there will be no liability at all in the absence of a contract, even if the producer is shown to have been careless, as the *Muirhead* case shows.[11]

Inexplicit Statutes

The statutes mentioned so far impose civil liability explicitly and in terms. About such liability there can be little debate. We now address a different question: when will the courts hold that Parliament has *implicitly* affected civil liability, or, to put it another way, when will the courts impose liability on the ground that the defendant's conduct contravened a statute which does not mention civil liability at all? The question of the civil liability of the offender is dealt with under the heading of 'breach of statutory duty', but the heading is not very apt, since the word 'duty' may well not figure in the statute at all. Statutes vary so enormously in purpose and draftsmanship that general statements about them are almost bound to be misleading, but for present purposes we can distinguish two main types, those directed to private persons and those addressed to public bodies.

Statutes which lay down what private persons must or must not do generally impose a penalty for contravention, and provide no other sanction or remedy. The question is whether the victim of an offence can claim damages from the offender on the ground simply that he committed an offence. Can one say 'You broke the law and I got hurt in consequence so you owe me'? Generally not. Bad people pay more, of course, and offenders sound like bad people, but not all punishable conduct is wicked: a person may be fined although he is not at fault in any real sense. It would be a strict liability if he were then made liable in damages, and the courts dislike strict liability. It is not as odd as it sounds to say that those who break the law are not necessarily liable to those who are injured by their illegal conduct, for if the defendant has behaved unreasonably and caused foreseeable physical damage he will almost certainly be liable at common law, though admittedly the burden of proof may well be greater.

Statutes addressed to public bodies, on the other hand, usually attach no sanction such as a fine, but rather expressly impose a duty to act in a certain way. This is perhaps because there are measures in administrative law whereby a public body, unlike a private individual, may be compelled actually to do its duty (which is what we want). Breach of the duty by no means always entails liability in damages. For example, local authorities are under a statutory duty to 'secure that accommodation is made available' to certain classes of homeless persons, and though a Court of Appeal in 1979 had eccentrically held that a qualified applicant could claim damages if accommodation was not provided, the House of Lords overruled this decision in 1997[12] and noted that breach of a duty to provide a benefit would rarely give rise to a damages claim, especially as judicial review of the decision would be available unless some special statutory appeal procedure was laid down, as it is in cases of refusal to pay a social security benefit.[13] The claim in the earlier case of *Cutler v Wandsworth Stadium*[14] was less meritorious: a bookie claimed damages for the profits he would have made at the dog races had the local authority, which occupied the track, provided him, as required by statute, with space in which to ply his trade—a claim for damages so hopeless that it is surprising to find the case so frequently cited as an authority.

In addition to duties imposed on them, public bodies often have powers conferred on them to act in certain ways. Here, too, the phrase 'breach of statutory duty' is inappropriate, since powers ('you may') are distinct from duties ('you must'). It is, however, open to the courts to hold that there may well be a common law duty to exercise such powers reasonably, unless to impose liability would be inconsistent with Parliament's presumed intention to leave the matter to the body in question, but even if they are disinclined to impose on the authority any duty at common law to exercise its powers reasonably, they can frequently reach the same result by holding that the authority must answer for any negligence on the part of those to whom it has entrusted the execution of its powers.[15]

Statutory Offences

In the private sphere, where traffic and industrial accidents give rise to the bulk of tort claims, owners of vehicles and employers alike are guilty of an offence if they do not have the requisite insurance cover against liability to their victims and employees. Rather surprisingly, the courts have held that while the uninsured owner of the vehicle is liable to the unpaid victim of a permitted motorist's negligence,[16] the unpaid employee has no claim against the director of an uninsured employer, although he is equally guilty of an offence.[17] This is all the odder in that the courts readily impose liability if an employer, though not negligent at all, is in punishable breach of safety regulations, but steadfastly refuse to grant damages to the victim of a non-negligent traffic offence: the illegal nature of a motorist's driving or parking may interest the police, but the courts are concerned only with whether or not it was unreasonably dangerous, the only apparent exception being where a motorist runs over a pedestrian on a pedestrian crossing.

Thus in a case from 1923 the plaintiff's van was damaged in a collision with a lorry belonging to the defendant. The plaintiff could not show that the lorry driver was negligent, but did prove that the lorry was in an illegal condition such that the defendant could have been fined. His claim was dismissed, the court stating it as the 'general rule' that where a remedy was provided (here the fine) Parliament should be taken not to have intended to confer a civil remedy by way of action.[18] Contrast this case. A postman fell off his bike when it suddenly seized up owing to a latent structural defect. The defect being undetectable, the employer was not liable for breach of his common law duty to take care regarding the safety of the equipment provided for his workforce, but he was nevertheless held liable under a statutory instrument which provided that 'Every employer shall ensure that work equipment is maintained in an efficient state, efficient working order and in good repair'.[19] For over a century the courts have held that breach of such safety regulations triggers not only a fine but also a liability in damages towards the person protected, here the employee. Indeed, the Health and Safety at Work Act 1974 itself now provides that specific regulations regarding the safety of equipment, workplaces and so on—regulations largely responsive to the 20-odd Directives from Brussels—give rise to liability even if the general statutory duties of the employer (and the workmen themselves) do not.[20]

Industrial injuries apart, it may be said that in general a defendant will rarely be held liable in damages just for contravening a statutory prohibition unless the statute so provides. Such provision is made, for example, in the Environmental Protection Act 1990, s 73 where the defendant has dumped waste illegally, and in the investment field a private person may claim damages from an authorised operator who contravenes a rule laid down under the Financial Services and Markets Act 2000, s 150. Damages may also be awarded against an

undertaking which has infringed either of the statutory prohibitions contained in the Competition Act 1998—abusing a dominant position in a market or being party to an agreement which distorts or restricts competition. The original provisions on the 'civil liability of an undertaking for harm caused by infringement', which were extremely coy, have been beefed up by the Enterprise Act 2002, which permits the Office of Fair Trading to award damages to individuals or representative bodies.

Statutory Duties

Neither of these last two enactments are in terms of 'duty'—the Human Rights Act 1998 makes conduct 'unlawful' and the Competition Act says what is 'prohibited'—but as an example of a duty expressly imposed on public bodies we may instance the Highways Act 1980, s 41: 'The highway authority are under a duty to maintain the highway'. For many years there was acute disagreement in the courts about the scope of this duty. Did 'maintain' mean simply 'keep in repair' or did it include 'remove obstructions [such as snow and ice] from? The House of Lords resolved the dispute in the former sense,[21] but Parliament then laid down that the authority's duty did extend to the removal of snow and ice (but presumably not, given that statutes cover only what they specify, the removal of mud or slurry). The duty under s 41 as so extended is strict in that the claimant need not show that the authority was at fault, but the statute provides a defence in s 58 if 'the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.' It is not uncommon for such defences to be provided by statute and quite common for them to fail in the courts.

The Road Traffic Act 1988 also imposes 'duties' on local authorities: they 'must take such measures as appear to the authority to be appropriate to prevent... accidents' (s 39). Describing this as a 'target' duty which leaves a fair discretion to the authority, the Court of Appeal was able to dismiss an impertinent complaint by a motorist that there were only two 'Give Way' signs on the minor road from which she emerged with insufficient care.[22] The observation *obiter* that the authority might well be liable at common law if the exercise of its discretion was unreasonable was subsequently discountenanced by the House of Lords when it dismissed another claim by a motorist that her injuries were due to inadequate (but not misleading) signage.[23]

Remoteness

As regards the damage for which compensation may be recovered where statute is involved, the common law test of its foreseeability may be inapplicable, for where the statute imposes liability, the only question is whether its requirements have been met. Take the claim under the Fatal Accidents Act by relatives of a person tortiously killed. Since they have no claim at all unless the deceased himself could have sued the defendant for his injuries, it must be shown that the deceased's injuries were the foreseeable result of the defendant's tort, unless of course the defendant was under a strict statutory liability to him. Once this requirement is met, however, the statutory claim of the relatives kicks in and foreseeability falls out of the picture: they can claim whatever the death cost them, however unforeseeable their loss, or even their existence. Likewise, if a

workman is injured because the workplace is not safe (in the sense that some injury might be foreseen—foreseeability in general being implicit in the notion of 'danger'), it is no answer to say that *that* particular injury could not have been foreseen.[24]

In other cases, as we have seen, where the courts hold that the victim of an offence can sue at all, a teleological or purpose test may be applied: was the harm such that Parliament must have intended it to be guarded against? This is illustrated in the case already mentioned where the claimant's sheep were washed overboard: since it was to prevent contagion, not drowning, that they were to be kept penned in, the claimant lost his claim.[25] To give a more recent instance: one winter's day a driver spent hours digging his milk tanker out of the snow, and icy water leaked into his protective boot through a tiny unobserved and virtually unobservable hole where the reinforced toe-cap joined the sole. He suffered frostbite in his little toe, but got no damages when a divided House of Lords upheld a divided Court of Appeal, on the ground that the boots were not designed to protect him from frostbite.[26] We get more 'risk' talk from Lord Hoffmann: 'Mr Fytche claims that because his boots were designed to protect him against a risk of his employment, his employers are liable in damages because they were inadequate to protect him against an injury which was not a risk of his employment.' Frostbite may not have been a risk of his employment, but he was harmed in his employment and was harmed because the boot was defective. Readers may prefer the powerful and lucid dissenting judgment of Baroness Hale.

Notes

1 (1868) LR 3 HL 330.

2 [1946] 2 All ER 471.

3 *Stockport MBC v British Gas* [2001] Env LR 44.

4 *Cambridge Water Co v Eastern Counties Leather* [1994] 1 All ER 53.

5 *Transco plc v Stockport MBC* [2003] UKHL 61.

6 *Mirvahedy v Henley* [2003] UKHL 16.

7 *Merlin v British Nuclear Fuels* [1990] 3 All ER 711.

8 *European Commission v United Kingdom* [1997] All ER (EC) 481.

9 *A v National Blood Authority* [2001] 3 All ER 289.

10 *Abouzaid v Mothercare (UK)* [2001] TLR 136.

11 *Muirhead v Industrial Tank Specialities* [1985] 3 All ER 705.

12 *O'Rourke v Camden LBC* [1997] 3 All ER 23.

13 *Jones v Department of Employment* [1988] 1 All ER 725.

14 [1949] 1 All ER 544.

15 *Phelps v Hillingdon LBC* [2001] 2 AC 619.

16 *Monk v Warbey* [1935] 1 KB 75.

17 *Richardson v Pitt-Stanley* [1995] 1 All ER 460.

18 *Phillips v Britannia Hygienic Laundry* [1923] 2 KB 832.

19 *Stark v Post Office* [2000] ICR 1013.

20 Health and Safety at Work Act 1974, s 47.

21 *Goodes v East Sussex CC* [2000] 3 All ER 603.

22 *Larner v Solihull Metropolitan Borough Council* [2001] RTR 32.

23 *Gorringe v Calderdale MBC* [2004] UKHL 15.

24 *Millard v Serck Tubes* [1968] 1 All ER 598.

25 *Gorris v Scott* (1874) LR 9 Exch 125.

26 *Fytche v Wincanton Logistics* [2004] UKHL 31.