Reconceptualising Strict Liability for the Tort of Another

Christine Beuermann

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

A catalogue record for this book is available from the British Library.

A catalogue record for this book is available from the Library of Congress.

ISBN: HB: 978-1-50991-753-2
ePDF: 978-1-50991-755-6
ePub: 978-1-50991-754-9

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

9

Conclusion

This book has argued that strict liability for the tort of another can be reconceptualised as a response to the potential for abuse of the authority found in each of the three main types of relationships in which the courts currently impose such liability. On this basis, a new expositive framework has been devised within which three main forms of strict liability for the tort of another have been identified: conferred authority strict liability; employee strict liability; and agent strict liability. Each form of strict liability has been shown to reflect differences in the nature of the authority present in each of the relationships in which strict liability for the tort of another is imposed.

I. The Importance of the Book

By focusing on the common features of the relationships in which strict liability for the tort of another is currently imposed, this book has been able to reveal, for the first time, the internal consistency of strict liability for the tort of another. The book has shown not only why there are different forms of strict liability for the tort of another, but how they interrelate.

Conferred authority strict liability is found in both the employment and school relationships and responds to the potential for abuse of the power relationship created by an employer or school conferring its authority to direct the conduct of an employee or student upon another person. The potential for abuse of the power relationship exists because the power relationship enables the person upon whom authority has been conferred to direct the conduct of an employee or student and creates an expectation that the employee or student will obey.

Employee strict liability is limited to the employment relationship and responds to the potential for an employer to abuse its authority to direct the conduct of an employee for its own benefit. The potential for abuse exists because an employer may discipline an employee for failing to follow directions, putting the employee in a position that the employee may unduly prioritise compliance with the directions of the employer rather than give due weight to alternate considerations that might lead the employee to conduct herself differently in the circumstances.

Agent strict liability is limited to the agency relationship and responds to the potential for abuse of the power relationship created by a principal conferring

authority upon an agent to effect legal relations on the principal's behalf. The potential for abuse of the power relationship exists because the power relationship enables the agent to effect legal relations on behalf of the principal in circumstances in which the party wishing to enter into legal relations with the principal is not expected to confirm with the principal the details of those legal relations.

The differences between the various forms of strict liability for the tort of another can be summarised as follows:

Table 1 Comparison of the Three Different Forms of Strict Liability for the Tort of Another

	Conferred Authority Strict Liability	**Employee Strict Liability**	**Agent Strict Liability**
Who can sue?	Persons over whom authority has been conferred to a third party to direct the conduct of that person (typically employees and students)	Strangers to employment relationship	Transactional party effecting legal relations with principal through agent
Who can be sued?	Person conferring authority (typically employers and schools)	Employers	Principals
For whose tort does liability arise?	Employee, independent contractor or volunteer	Employee	Employee, independent contractor or volunteer
Type of damage	Physical damage	Unrestricted	Economic or property loss resulting from damage to contractual expectancies
Scope of liability	Conduct within actual or apparent scope of authority conferred upon third party (can extend to intentional misconduct if third party purporting to exercise apparent authority over claimant immediately prior to tort being committed)	Limited to conduct within actual scope of authority or, more appropriately, directions issued by employer (either express or implied) (does not typically extend to intentional misconduct)	Conduct within actual or apparent scope of authority vested in agent (can extend to intentional misconduct if agent purporting to exercise apparent authority immediately prior to tort being committed)

An understanding of the differences between the various forms of strict liability for the tort of another can assist judges to overcome some of the difficulties previously experienced in imposing such liability. For instance, it can now be seen that there was no need in the child sexual assault cases to find that the deliberate and self-serving act of sexually assaulting a child could occur within the 'course of employment'. The strict liability imposed in those cases did not arise by reason of the employment relationship, but by reason of the relationship between the school or closely analogous institution and the child in its care. Employee strict liability could not be imposed because it is limited by what it is an employee is *actually* authorised, or more appropriately, directed to do[1] and does not typically extend to intentional misconduct unless that intentional misconduct has been directed by the employer.[2] In contrast, conferred authority strict liability could be imposed in the child sexual assault cases because it arises in circumstances in which the person upon whom authority has been conferred by an employer or school is acting within the *apparent* scope of that authority immediately prior to the sexual assault and can extend to intentional misconduct.

Understanding the differences between the various forms of strict liability for the tort of another can also help resolve the historical difficulties in determining who is both an 'employee' and an 'agent' for the purposes of strict liability for the tort of another. Fixing upon a single definition of who is an 'employee' has always been difficult due to the range of circumstances in which the term is applied; tax, pensions, workplace health and safety legislation etc.[3] But it is not essential to fix upon a single definition. The definition of an 'employee' will most likely vary depending on the task to which the term is put. It is, however, now possible to fix a definition of who is an 'employee' for the purposes of strict liability for the tort of another.

It has been argued in this book that employee strict liability responds to the potential for an employer to abuse its authority to direct the conduct of an employee by putting an employee in a position that the employee may unduly prioritise compliance with the directions of the employer rather than give due weight to alternate considerations that might lead the employee to conduct herself differently in the circumstances. By definition, an 'employee' must therefore be someone who does not have sufficient freedom of action to determine her own conduct and is therefore at risk of altering her conduct in accordance with an exercise of authority by another person given the threat of disciplinary action for failing to so act.[4] Defining an 'employee' in such terms requires courts to consider the specifics of a particular relationship before determining whether employee

[1] Those directions being express or implied.

[2] In which case the employer may be seen to have itself committed a tort; MA Jones, JF Clerk and WHB Lindsell, *Clerk and Lindsell on Torts* (21st ed, London, Sweet & Maxwell, 2018) [5.76].

[3] *Hollis* v *Vabu Pty Ltd* (2001) 207 CLR 21.

[4] See further chs 3 and 5.

strict liability might apply. That is, the definition of an 'employee' will need to be assessed on a case by case basis. To this extent, the definition of 'employee' does not necessarily reflect workers previously classified as an 'employee' as opposed to an 'independent contractor'. The distinction remains valid, but the boundary between an 'employee' and an 'independent contractor' can now be more firmly grasped. The is because the limits of the process for determining who is an 'employee' for the purposes of employee strict liability are set by the risk to which the liability can now be seen to respond. It follows that the courts do not have an open invitation to extend employee strict liability to relationships 'akin' to employment.[5] There was no basis for the Supreme Court of the United Kingdom to make such an extension and the extension should now be reversed.

Greater assistance can also be derived in determining who is an 'agent'. Traditionally, agent strict liability was associated with employee strict liability; the two forms of strict liability were described using the same label and were thought to be justified on similar grounds. This association was difficult, however, as it enabled agent strict liability to be used to side-step the general rule that an employer could not be held strictly liable for the tort of an independent contractor. It can now be seen that agent strict liability is much more closely associated with conferred authority strict liability than employee strict liability. As a result, the definition of who is an agent is much more confined, being restricted to a person who is conferred authority to effect legal relations on behalf of the principal.[6] It follows that the scope of agent strict liability is similarly confined, leaving the general rule of no strict liability for the torts of an independent contractor (or, at the very least, a person who is not an employee) largely intact.

II. Authority

The new expositive framework put forward by this book for understanding strict liability for the tort of another is based upon the concept of authority.

'Authority', in this respect, is distinct from the concept of 'authorisation' that historically underpinned the Salmond 'course of employment' test. 'Authorisation' refers, in general terms, to whether an employee has permission to engage in the particular conduct that resulted in harm to the claimant. Its focus is the association between the directions issued by the employer to the employee and the tort committed by that employee. In contrast, the concept of 'authority' is much broader and refers, in general terms, to a capacity to exercise the power to direct another person's conduct. Its focus is not the actions engaged in by the person who committed the tort and whether such conduct was permitted by the defendant, but the vulnerability of the claimant or the person who committed the tort to an

[5] *Various Claimants* v *Catholic Child Welfare Society* [2013] 2 AC 1.
[6] See further ch 6.

exercise of the power vested in the defendant to direct the conduct of that person and, in some circumstances, to confer that power upon a third party. To avoid confusion, the consequence of an exercise of authority by an employer has been described in this book in terms of what an employer has 'directed', as opposed to 'authorised', an employer to do (either expressly or impliedly).

Note that the concept of 'authority' is also distinct from 'control'. 'Authority' refers to the *capacity* to direct the behaviour of another person or location of a thing,[7] whereas 'control' refers to the *actual exercise* of that capacity.[8] 'Control' failed as the basis of employee strict liability because it was not always present; consequently, it was neither necessary nor sufficient for employee strict liability to be imposed. 'Authority' though is always present in the identified relationships; and there is always an inherent risk that the authority present in each of the relationships in which strict liability for the tort of another is imposed will be abused. This risk appears sufficient for strict liability for the tort of another to be imposed.

The concept of 'authority' is not without difficulty. There is no one settled meaning which applies in all circumstances. Authority does, however, generally connote some type of power held by one person over another person or thing. The question then is the extent of the power required before one person might be held strictly liable for the tort of another. This is something for which an understanding can be developed over time from the facts of the cases. At present the cases indicate that the standard required is quite high. For instance, in cases of conferred authority strict liability or employee strict liability, the authority consists not only of a power to direct the conduct of another person, but also the right to discipline that person in the event of non-compliance. In cases of agent strict liability, the authority consists of a power to effect legal relations on behalf of another person. The question in subsequent cases will be whether the type of authority present is sufficiently analogous to justify imposing strict liability for the tort of another. This will be a particularly important question in cases involving the potential liability of a church for a sexual assault committed by a priest or other church official.[9]

III. Normative Underpinnings

The new expositive framework put forward by this book has explained both the basis of the various forms of strict liability for the tort of another and the circumstances in which those various forms of liability arise. What it has not explained is *why* strict liability for the tort of another is imposed. Although an important question, there has been insufficient space within the scope of the book to fully explore the normative justification of the liability.

[7] JAH Murray, *The Oxford English Dictionary* (Oxford, Clarendon Press, 1923) v 1, 572.
[8] Ibid v 2, 927.
[9] See generally ch 4.

There is space, however, to speculate briefly as to what that justification might be. The book has shown that what attracts the concern and intervention of the law in cases of strict liability for the tort of another is the potential for abuse of the authority present in each of the relationships in which such liability is imposed. Such a concern with an abuse of authority or power can be seen elsewhere in private law. For example, the doctrine of undue influence in contract law enables transactions to be set aside where a person in a position of influence over another person takes advantage of that influence whilst transacting. Similarly, the doctrine of unconscionability enables transactions to be set aside where a transaction has been procured with a person who was at a special disadvantage.[10] Both these doctrines respond to the potential for a position of power between transacting parties to be abused, although they can be distinguished from strict liability for the tort of another on the basis that evidence of conduct personally engaged in by the defendant (as opposed to a third party) needs to be shown for both doctrines before a transaction can be set aside.

A form of liability which is closer in nature to strict liability for the tort of another is the strict liability imposed in equity for breach of a fiduciary duty. A fiduciary is in a position of power with respect to the beneficiary of the duty and is entrusted to act not in her own interests, but in the interests of the beneficiary.[11] Where a fiduciary puts herself in a position of conflict or potential conflict with the interests of the beneficiary or puts the interests of the beneficiary in conflict or potential conflict with the interests of another person and the beneficiary suffers damage as a result, the fiduciary can be held strictly liable to the beneficiary for any damage the beneficiary suffers as a result.[12] It does not matter for this purpose whether the fiduciary was 'well-intentioned' or 'acting in good faith'; the existence of the conflict or potential conflict is sufficient for strict liability to be imposed.[13] A fiduciary is also generally required to exercise her duties as a fiduciary personally. This means that in certain circumstances where a fiduciary delegates the exercise of any such duties to another person, the fiduciary can be held strictly liable for any conduct engaged in by that person which attracts liability in respect of the beneficiary.[14]

As can be seen, strict liability for breach of fiduciary duty shares a number of features with strict liability for the tort of another; both forms of strict liability respond to the potential for abuse of a power relationship and both forms of liability can be imposed, in certain circumstances, regardless of the defendant personally engaging in any conduct which might attract liability in and of itself.

[10] At least in Australia; *Commercial Bank of Australia* v *Amadio* (1983) 151 CLR 447. cf the position in England and Wales; *Lloyds Bank Ltd* v *Bundy* [1975] QB 326.

[11] GE Dal Pont and DRC Chalmers, *Equity and Trusts in Australia* (4th ed, Sydney, LawBook Co, 2007) 100–02.

[12] Ibid 92.

[13] Ibid 95.

[14] Particularly where the fiduciary is a trustee; JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, Sydney, LexisNexis Butterworths, 2006) 391–92.

It is possible therefore that the justification for strict liability for the tort of another might also be similar to the justification for strict liability for breach of a fiduciary duty. Justice Mason of the High Court of Australia outlined the justification for the fiduciary duty in *Hospital Products Ltd v United States Surgical Corporation*:[15]

> The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility.

The authority to which strict liability for the tort of another responds does not precisely mirror the authority found in a relationship in which a fiduciary duty arises. The biggest difference is that the authority to which strict liability for the tort of another responds may sometimes be exercised by a party in its own interests (as with an employer), whereas a fiduciary is always required to act in the interests of the beneficiary. Notwithstanding this difference, the two forms of liability are sufficiently similar to give rise to the possibility that they might be justified on similar grounds. That is, strict liability for the tort of another might be justified in terms of the authority entrusted to and accepted by a defendant and the vulnerability of a claimant to a potential abuse of such authority.

There is also the possibility that strict liability for the tort of another may be justified on the basis that a defendant's dealings with authority may have itself contributed to a claimant's damage. This is because the authority present in the relationships within which strict liability for the tort of another is imposed has the potential to enable or facilitate the tort in respect of which the claimant is suing. For example, where an employer or school confers authority upon another person to direct the conduct of an employee or student, they not only create an opportunity for a tort to occur but may actually provide the means by which the tort can occur. A teacher, for instance, can use the authority conferred upon them by a school to direct a student into a private room in order to perpetrate a sexual assault. Strict liability for the tort of another might, therefore, not just respond to the potential for abuse of the authority present in the relationships within which strict liability for the tort of another is imposed, but seek to hold a defendant accountable to the extent that its dealings with such authority may actually have contributed to the commission of the tort. In this way, tort law effectively places the onus on the defendant to prove that its dealings with authority did not contribute to the tort complained of by the claimant. This onus can be discharged through separate indemnity or contribution proceedings brought by the defendant against the person who committed the tort against the claimant.

[15] (1984) 156 CLR 41, 96–97.

Evidently, there are a number of grounds upon which strict liability for the tort of another might be justified and identifying an appropriate justification for the liability will be a considerable project. A suggestion for how such a project might be approached is set out in the postscript to this chapter. This book has, however, assisted in this task by developing a clearer understanding of the basis of strict liability for the tort of another and the circumstances in which such liability is imposed.

IV. Personal Liability v Strict Liability

The focus of this book was strict liability for the tort of another. Personal liability, however, is also imposed within the various relationships which were examined. It is possible, therefore, that the authority present in the relationships examined by this book may have an impact not only on the imposition of strict liability for the tort of another but also the imposition of personal liability.

Consider the employment relationship. It is well established that an employer owes an employee a duty of care, so that an employer must take reasonable steps to prevent an employee coming to any reasonably foreseeable harm. Historically, this duty has been expressed as a number of specifically enumerated duties, such as a duty to provide a safe place of work, safe tools and equipment with which to work and a safe system of work to operate under. Outside the employment relationship, however, it is unusual in modern tort law for specific duties to be enunciated in this way. When describing the liability of car drivers, for instance, a car driver is said to owe a duty to use reasonable care. It has not been suggested that a car driver owes a specific duty to select an appropriate vehicle, ensure the vehicle is adequately maintained or to keep their driving skills up-to-date.

The reason modern tort law does not generally enunciate a specific duty of care is because the formulation of the duty in this way suggests a certain conclusion on liability.[16] When a specific duty is enunciated, breach of that duty is more easily determined because delineation of the duty specifically dictates what should have been done, directing attention away from the issue of whether the holder of the duty behaved reasonably or not. Specifically enumerated duties of care also enable courts to side-step or divert attention away from many of the concerns generally focused upon when assessing liability in tort. In particular, such duties allow liability for omissions to be established more easily because the unreasonable conduct of a defendant can be described as a positive act, rather than an omission. For example a failure by an employer to install a safety guard on a piece of dangerous equipment, a clear omission, can be described as the installation of unsafe

[16] See Jane Stapleton's comment on Lord Hoffmann's attempt to specifically enumerate a duty of care in *South Australia Asset Management Company v York Montague* [1997] AC 191 in 'Negligent Valuers and Falls in the Property Market' (1997) 113 *Law Quarterly Review* 1.

equipment,[17] a positive act. This feature of specifically enumerated duties was particularly significant at the time the duties of an employer were devised because such liability was being steadfastly denied in other categories of case.[18]

The question then is why tort law has persisted in enumerating these specific employers' duties. The historical difficulties faced by an employee in suing her employer, such as contributory negligence being a complete defence, are of limited explanatory force because many of these difficulties have since been removed.[19] A concern with the safety of employees also does not offer much assistance. There are many occasions where safety is in issue but tort law does not resort to the enumeration of specific duties, for instance, when determining the liability of road users. Nor can it be a concern simply with risks being created by the employer for the employee, there being very few instances of human conduct that do not result in the creation of some type of risk. Perhaps then it can be explained in terms of the authority vested in an employer to direct the conduct of an employee. The potential for an employer to abuse its authority to direct the conduct of an employee by putting an employee in a position that the employee unduly prioritises compliance with the directions of the employer rather than give due weight to alternate considerations that might lead an employee to conduct herself differently in the circumstances not only puts strangers to the employment relationship at risk of harm, but the employee herself. Authority, therefore, may not only explain strict liability for the tort of another, but the enhanced personal liability which is typically found in the same relationships.

V. Where to from here?

This book has sought to make sense of strict liability for the tort of another as that liability is currently imposed by the courts. It has identified several key features of the liability, the most significant of which is arguably that the liability is relational.

[17] eg Russell LJ said of the defendant employers in *Calder v H. Kitson Vickers & Sons (Engineers) Ltd* [1988] ICR 232, 239: 'They provided the plaintiff with *unsafe equipment* whilst condoning what was plainly an unsafe system of working' (emphasis added). See also more generally on the potential to blur the line between misfeasance and non-feasance: P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed, CUP, Cambridge, 1993) 63–67.

[18] See, eg, *Meux v Great Eastern Railway Company* [1895] 2 QB 387, 392 (Kay LJ): 'The law as to such a state of things has been summed up in *Taylor* v *Manchester, Sheffield and Lincolnshire Ry. Co.* [1895] 1 QB 134. That was an action for personal injuries to the plaintiff, and the general doctrine is stated thus by Lindley L.J: "It appears to me that this is an action founded on tort, and the conclusion to which I have arrived is based upon the following reasons. That which caused the injury was not an act of omission, it was not a mere non-feasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance – it was positive negligence".

[19] The apportionment of contributory negligence was introduced by the Law Reform (Contributory Negligence) Act 1945 (UK) c 28. The House of Lords also held in *Smith v Baker* [1891] AC 325 that an employee could no longer be taken to have voluntarily assumed the risks of employment.

It has been shown that strict liability for the tort of another arises by reason of a relationship between either the defendant and the person who committed the tort or the defendant and the claimant. To qualify as a basis upon which to impose strict liability for the tort of another, it must be a feature of that relationship that one person has the authority to direct the conduct of another person.

Evidently, the language adopted by this book does not match the language currently used by the courts. Adopting the new terminology and underlying reasoning can though provide judges with considerable assistance when determining cases of strict liability for the tort of another. The recent decision of the England and Wales Court of Appeal in *Barclays Bank v Various Claimants*[20] provides a good example. The case concerned the practice of Barclays Bank to require new employees to undergo a medical test as a condition of their employment. Barclays had contracted with a GP in Newcastle to examine the new employees and provide a report. The examinations were conducted at a surgery in the GP's home. In the course of the examinations, the GP sexually abused a number of the female employees. It was accepted at trial that the GP was not an employee of Barclays Bank but an independent contractor. Nonetheless, in accordance with recent advancements in 'vicarious liability' in the courts in England and Wales, the Court of Appeal found that the GP was in a position 'akin' to employment and that Barclays Bank could be held strictly liable for the sexual abuse suffered by the employees.[21]

The willingness of the Court of Appeal to disregard the traditional restriction on imposing 'vicarious liability' in respect of the torts of independent contractors can be better appreciated with a closer examination of the facts of the case:[22]

> The Claimants were all young, some very young, at the relevant time. If they wished to be employed by the Bank they had no option but to undergo the examination, and in respect of the minority who were existing employees, they were instructed to comply as part of their employment.

The critical factor here is that the employees were required by the employer to attend at the surgery and undertake the examination.[23] These facts suggest it was not the relationship between Barclays Bank and the GP which was the relevant relationship for the determination of strict liability but the relationship between Barclays Bank and its employees. The case is therefore an example of conferred authority strict liability and not employee strict liability. It is for this reason that it was not a bar to recovery that the GP was an independent contractor. Nor was it problematic that the tort committed by the GP was intentional.

For too long the courts have stumbled around in the dark when imposing strict liability for the tort of another, reaching justifiable decisions but without an adequate theoretical framework by which to explain such decisions. In order to reach those decisions, judges have had to adapt the existing, ill-fitted framework;

[20] *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670.
[21] Ibid [58]–[60].
[22] Ibid [10].
[23] Cf *Brayshaw v Aspley Surgery* [2018] EWHC 3286 (QB).

for instance, by extending employee strict liability to the torts of an independent contractor as occurred in *Barclays Bank v Various Claimants*. As explained in this book, there is no basis for such an extension.

The unprincipled expansion of the law of strict liability for the tort of another is not inevitable. The recent relaxation of tests for imposing strict liability for the tort of another, particularly evident in the courts in England and Wales, is the result of confusion as to the differences between the various types of that liability. The new expositive framework proposed by this book provides the means to overcome that confusion and set the law back on track.

Postscript

Any attempt to understand strict liability for the tort of another in and of itself is necessarily limited. The liability forms part of the law of torts and indeed private law more generally. To this extent, efforts to determine the normative underpinnings of strict liability for the tort of another must be informed by a wider understanding of the law of torts. In turn, the expositive framework proposed by this book can provide insights into the structure and operation of the law of torts more generally.

What the expositive framework proposed by this book has shown to be significant when imposing liability in tort is the existence and features of specified pre-existing relationships. It is not just that there is a correlative relationship between the parties to the legal action in the sense that a determination of the legal action will require a consideration of the respective positions of each of the parties to the legal action.[24] The pre-existing relationship between the parties and/or other relevant actors has been shown to have a direct bearing on the process adopted by the courts to determine liability in the law of torts.

Liability in the law of torts has historically been viewed as a function of certain formulas or recipes that prescribe when liability might arise.[25] Many of those formulas or recipes have changed little over time. The use of such formulas or recipes has arguably inhibited the development of a more holistic view of liability in the law of torts. As Maitland famously noted: 'The forms of action we have buried, but they still rule us from their graves'.[26] The ghosts of the writs of trespass, case, assumpsit and nuisance are ever present in the law of torts today.

Over time, strict liability for the tort of another has come to be viewed as a more isolated form of liability operating at the margins of this framework of formulas or recipes.[27] There has consequently not been the same need to explain strict liability for the tort of another in the same terms as what are now seen to

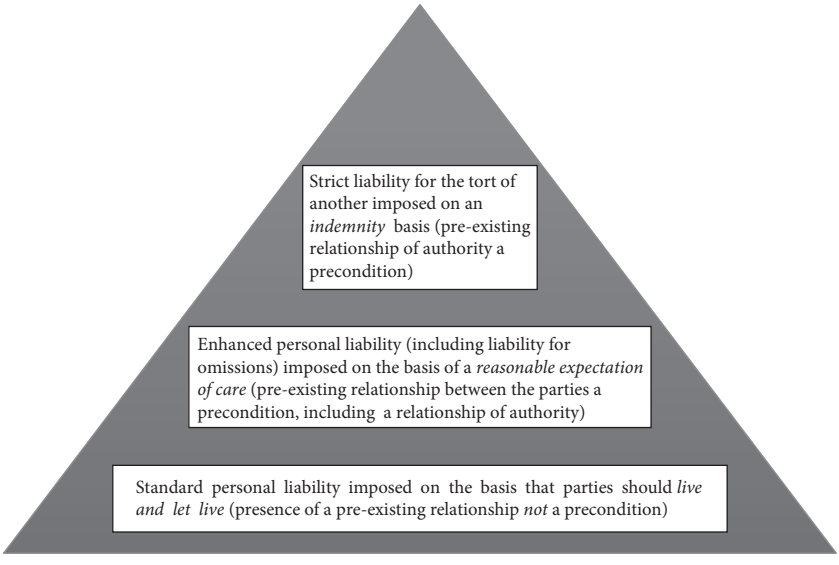
[24] P Cane, *The Anatomy of Tort Law* (Oxford, Hart, 1997) 10–15.
[25] Ibid 2–10.
[26] FW Maitland, *The Forms of Action at Common Law* (Cambridge, CUP, 1909) Lecture I.
[27] Particularly since *Donoghue* v *Stevenson* [1932] AC 562.

be the more mainstream forms of tort liability. Consider the prevailing trend to explain the law of torts in terms of corrective justice. Corrective justice theorists have struggled to explain strict liability for the tort of another given the liability is imposed regardless of the defendant personally engaging in any conduct which may attract liability in tort and therefore in the absence of any 'wrong' in need of correction. One response of corrective justice theorists to such difficulties has been to rebadge strict liability for the tort of another as a form of fault-based liability.[28] Another has been to disregard strict liability for the tort of another as an anomaly and focus on explaining the more mainstream forms of tort liability.[29]

It cannot be denied that strict liability for the tort of another is today an exceptional form of liability. It does not necessarily follow, however, that strict liability for the tort of another is an anomaly. Like other areas of tort, strict liability for the tort of another is relational. It is possible that a relational view of the law of torts might be of more general use in explaining the liability imposed by the courts. One question posed by this book therefore is whether a more convincing explanation of the different types of liability in the law of torts can be derived by shifting the focus from the historical formulas or recipes to the absence or presence of certain pre-existing relationships.

Viewing tort law in relational terms suggests an alternate classification of the law of torts. That classification can be depicted diagrammatically as follows:

Figure 1 A Relational Classification of Tort Law



[28] See eg E Weinrib, *The Idea of Private Law* (Oxford, OUP, 2005) 185–187.

[29] Discussed in P Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 *Oxford Journal of Legal Studies* 471, 485–587.

At the peak of the pyramid, reflecting the more limited range of circumstances in which liability might arise, is strict liability for the tort of another. A pre-existing relationship of authority is a precondition to liability being imposed (typically, an employment, school or agency relationship) and the liability effectively takes the form of an *indemnity* for a tort committed by another person. It has been argued in this book that the law of torts responds to the risk of that power relationship being abused.[30]

In the middle of the pyramid is a broader band of liability for which a pre-existing relationship is also a precondition. The liability imposed in this band, however, is liability arising by reason of the defendant's own conduct within the course of the relationship. The presence of the relationship is therefore not of itself sufficient to impose liability on the defendant. In addition to the presence of a particular type of pre-existing relationship, the claimant must show that the defendant has personally engaged in conduct to which liability in tort might attach. The set of pre-existing relationships which attracts this band of liability in the law of torts is broader than, but also includes, the set of pre-existing relationships which attract strict liability for the tort of another. As noted earlier in this chapter the same relationships which give rise to strict liability for the tort of another also give rise to enhanced personal liability in the law of torts. That enhanced liability specifically includes liability for omissions. The relationship between a hospital and patient is an example of a relationship that might fall within this middle band, but not within the top band of the pyramid. This is because although hospitals are regularly held liable for negligent omissions in respect of their patients, they are not subject to strict liability for the tort of another.[31] It might be argued that liability in the law of torts in this middle band responds to a *reasonable expectation of care* being taken by reason of these pre-existing relationships and that the relevant relationships are those which engender such an expectation.

At the base of the period is the largest band of liability in the law of torts for which a pre-existing relationship is not a precondition for the imposition of liability. In these circumstances, liability is imposed regardless of any relationship between the parties; as in the case of road users. In this band, it can be argued that the liability responds to the interests of the parties to the claim being allowed to '*live and let live*' such that the liability ultimately imposed is less extensive than the liability imposed in the other bands, although the circumstances in which the liability might arise are comparatively greater.

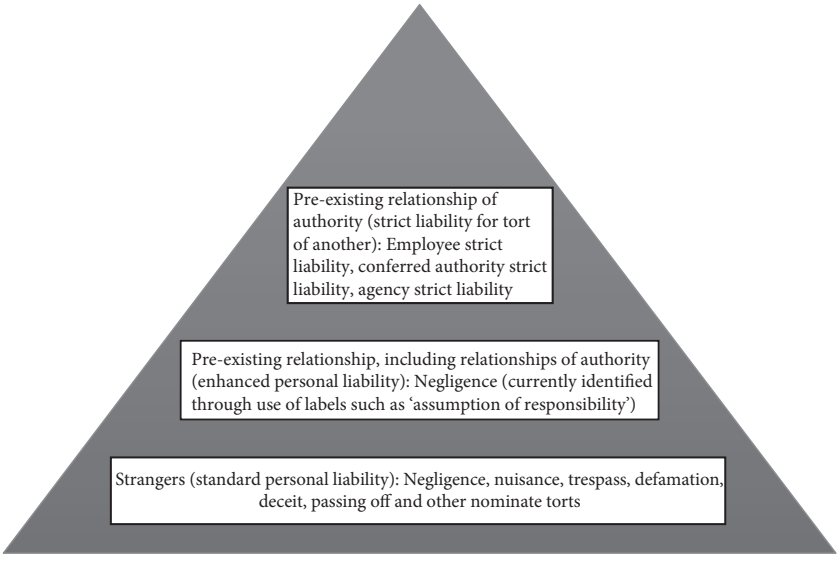
At first glance, this picture of liability in the law of tort appears unfamiliar. One reason is the absence of any labels currently associated with liability in the

[30] It having been shown that there is no need for a claimant to prove that the power relationship has actually been abused.

[31] See ch 2.

law of the torts. Were those labels to be added, the pyramid might look something like this:

Figure 2 Relationships Matched with Forms of Liability



Another reason this picture of liability in the law of tort might appear unfamiliar is that it does not appear to respond to or reflect any of the rules (or formulas or recipes) that have been used by the courts in determining whether to impose liability in the law of torts. The classification looks beyond the form of any individual tort to the substantive process used by the courts when determining liability and how that process changes in the presence or absence of certain pre-existing relationships. On close examination, that process appears to be one of balancing. When determining liability in the law of torts, it can be argued that the courts examine and weigh the respective interests of the parties as members of the broader community and those of any other relevant actors.[32] This balancing is not unprincipled. The relevant interests[33] and the weight to be attached to those interests when balancing has been slowly developed by the courts over time.[34] The nature of the balance to be achieved can be seen, however, to differ depending on the presence or absence of specified pre-existing relationships.

[32] See more generally C Beuermann, 'Are the Torts of Trespass to the Person Obsolete? Part 1: Historical Development (2017) 25(3) *Tort Law Review* 103; and C Beuermann, 'Are the Torts of Trespass to the Person Obsolete? Part 2: Continued Evolution' (2018) 26(1) *Tort Law Review* 6.

[33] Which may be internal or external, depending on the type of relationship in question.

[34] And can be adapted to meet more modern conditions.

It is for this reason that a distinction is made in the above diagram between three discrete outcomes of the different balancing processes undertaken by the courts when determining liability in the law of torts: 'live and let live'; reasonable expectations and indemnity.

To explain further. A finding of 'no liability' in the law of torts generally indicates a determination by the courts that the imposition of liability would unduly interfere with the freedom to act. In the balancing process depicted at the base of the pyramid (identified as 'live and let live'), the courts are carefully trying to balance the interests of defendants in freedom of action and the interests of claimants in freedom from harm in the absence of a relevant pre-existing relationship. Although different labels have been used to describe this balancing process (compare nuisance and negligence, for instance), those labels can be seen to reflect differences in the nature of the interests being interfered with rather than a difference in approach. For example, the range of interests to be balanced in nuisance cases is arguably narrower than in negligence cases more generally given nuisance is a tort that protects only land and land does not move. As people are mobile, there are a broader range of interests to be taken into account when determining liability in torts that protect bodily integrity, such as negligence. The balancing processes might therefore appear to differ in the two torts, but on closer inspection, can be identified as having similar aims.

In contrast, the balancing process depicted in the middle band of the pyramid is different given the presence of a pre-existing relationship that can change the expectation of the parties as to how they will interact. By virtue of such a relationship, a claimant not only expects a defendant not to interfere, but to possibly deliver some type of benefit. The courts therefore take such expectations into account and are more prepared to tip the balance in favour of the claimant's freedom from harm and away from the defendant's freedom to act when determining liability. For example, an employer is required to provide an employee with a safe system of work and safe tools and equipment notwithstanding the cost implications for the employer in making such provision.

In the balancing process depicted at the peak of the pyramid, the fact of the relationship and the presence of a sufficient connection between the tort committed and that relationship is sufficient in and of itself for liability to be imposed so that the defendant is effectively required to hold the claimant harmless and pursue its own claims against the tortfeasor. As evident from the examination of strict liability for the tort of another in this book, any balancing in this band of liability is largely limited to determining whether the requisite relationship and a sufficient connection with that relationship exists.

The classification outlined above with necessary brevity is radical. It does not reflect any existing classification of the liability imposed in the law of torts. The classification has been made possible by starting with one of the more exceptional forms of liability in the law of torts, as opposed to the tort of negligence. Searching for alternate classifications would not be necessary if a convincing explanation of liability in the law of torts had been derived which was capable of providing judges

with adequate assistance when deciding cases. Unfortunately, tort law remains bound by the historical forms of action and has made little progress in escaping such bonds. Adopting a relational view of the law of torts, as suggested by the expositive framework of strict liability for the tort of another proposed by this book, might just provide fertile ground for reconstructing tort liability in order to provide the assistance most clearly sought by the courts. Future projects will pursue this goal.