Book Review

Justifying Strict Liability: A Comparative Analysis in Legal Reasoning
Marco Cappelletti Oxford University Press 2022
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In *Justifying Strict Liability*, Cappelletti seeks to provide the first in-depth comparative analysis of the main rationales for strict liability in tort. In exploring the justificatory basis of strict liability, he focusses exclusively on the legal systems in four particular countries: England, the United States, France and Italy. Primarily through an analysis of case law and scholarly work, Cappelletti outlines seven justifications for strict liability. He identifies these as: risk; accident avoidance; deep pockets; loss spreading; victim protection; a reduction in administrative costs; and individual responsibility. One of the purported aims of this book is to examine – from a 'jurisprudential' and 'structural' approach to comparative law – the 'intimate relationship' between these seven rationales, and how the patterns of reasoning in strict liability can change depending on the arguments, attitudes and goals of the legal actors who employ them. Importantly, Cappelletti eschews any detailed normative analysis, as he openly concedes that his goal is *not* to assess the attractiveness of these various justifications for strict liability. As such, it is fair to say that this work is a classic example of descriptive comparative research.

The book is separated into four largely overlapping parts. After outlining the basic premise of his arguments in the introduction (Part One), Cappelletti sets out in Part Two to provide an overview of how strict liability is understood in each of the four systems. He opts to structure this analysis by presenting the four legal systems separately, even though many of the strict liability rules he peruses – such as vicarious liability, product liability and the liability of public authorities – are commonly found throughout all four of the legal systems. Although this structure appears to make it more difficult to precisely identify the similarities and differences between each jurisdiction, this concern is mitigated by his excellent conclusion to Part Two.[1] There, he outlines a spectrum of reliance on strict liability across the four systems. At one end, where strict liability is most widespread, is the French position; at the other end, where strict liability is least frequently invoked, is the English position. The Italian and US legal systems fall somewhere in between, with strict liability featuring more conspicuously in the former than in the latter.

Perhaps the only slight criticism of Part Two is that some contexts of strict liability are not quite afforded the level of attention that they seemingly deserve. The primary example here is that of vicarious liability in the English context. Whilst the scope of, and theoretical justification for, this doctrine has been the subject of much judicial debate over the past decade or so,[2] Cappelletti only begins to examine vicarious liability after firstly considering the rule in *Rylands v Fletcher*, harm caused by animals, and private nuisance. He also devotes just as much (if not more) attention here to product liability as he does to vicarious liability. Perhaps a slight restructuring of the relevant contexts of strict liability in each section could have made it clearer as to what the more interesting (and contentious) rules in each jurisdiction are. That said, however, Part Two is still a very useful – though perhaps a less interesting[3] – section of the book that helps to set up the more engaging analysis in Part Three.

Indeed, Part Three – which consists of eight chapters – is the meat of the book, and it is here that

[1] At p 13, Cappelletti also notes that he decided to present the four laws separately 'so as to convey a clear sense of their own specificities vis-à-vis the role of strict liability'.

[2] See, e.g., Various Claimants v Catholic Child Welfare Society [2012] UKSC 56, [2013] 2 AC 1; Cox v Ministry of Justice [2016] UKSC 10, [2016] AC 660; Armes v Nottinghamshire County Council [2017] UKSC 60, [2018] AC 355; Barclays Bank plc v Various Claimants [2020] UKSC 13, [2020] AC 973; WM Morrison Supermarkets v Various Claimants [2020] UKSC 12, [2020] AC 989.

[3] Cappelletti himself recognises (at p 12) that many readers may already be aware of the substantive law in one or more of the tort systems, and he suggests that those readers could proceed directly to Part Three.

Cappelletti's illuminating and thought-provoking analysis really shines. In examining how the seven justifications for strict liability are used throughout the four legal systems, he unearths a variety of interesting patterns that help to inform his discussion. The first is the distinction between 'stand-alone' arguments (which justify strict liability by reference to a single rationale), 'combined' arguments (which entail multiple justifications working together harmoniously to explain strict liability), and 'juxtaposed' arguments (in which multiple justifications are listed independently, and do not rely on each other to justify strict liability). Cappelletti also highlights a further pattern of reasoning between means and goals: in some instances, a particular rationale may feature as the ultimate goal that strict liability pursues. In other cases, a rationale may be used to achieve a different goal (such as, for instance, the use of the deep pockets argument to ensure victim protection). Finally, and in assessing the justificatory weight of each rationale, Cappelletti distinguishes between what he terms 'key', 'secondary' and 'make-weight' arguments. A rationale acts as a 'key' argument when it is seen as the most important reason for adopting strict liability. 'Secondary' reasons, which may be combined or juxtaposed, are not as significant as key justifications, but are still seen as important. In contrast, 'make- weight' arguments are often 'thrown in as extras doing little or no work to support the imposition of strict liability'.[4] This well- reasoned framework provides a very useful map that helps to guide readers through the multitude of complex arguments and comparisons that are considered in the following chapters.

The first justification perused in this book is that of risk. Unlike other works that have touched upon the concept of risk in the context of strict liability,[5] Cappelletti does an excellent job of summarising the various permutations of risk. In noting that risk is not one unitary concept, he assesses the four legal systems by sequentially analysing the following rationales: risk creation; abnormality of risk; non-reciprocity of risk; risk-benefit; and risk-profit. This recognition of the subtle differences between these forms of risk allows Cappelletti to make several nuanced conclusions about the similarities and differences of this theory across the four jurisdictions. In particular, he notes that risk creation is largely well received in France, whereas in jurisdictions such as Italy it seems to drown 'in a sea of other justifications'.[6] By contrast, in the US, courts and scholars tend to give more priority to non-reciprocity of risk. Additionally, abnormality of risk, risk- benefit and risk-profit seem to be used in a somewhat different manner in England than in France, Italy and the US. In the latter three jurisdictions, these justifications are utilised very frequently, but they often act as secondary or make-weight arguments. In contrast, risk-benefit and risk-profit are used less frequently in England, but when they are utilised, they seem to act as key justifications. Cappelletti illustrates this with reference to vicarious liability in the English context, and he appropriately dedicates more space here than he did in Part Two to discussing this doctrine. Given the apparent judicial consensus in England that enterprise risk is the 'most influential idea [of vicarious liability] in modern times',[7] the focus on vicarious liability in this section is to be welcomed.

Moving on to accident avoidance in the following chapter, Cappelletti notes that this argument features most prominently in the US, and he usefully outlines the work of many leading scholars (such as Calabresi, Posner and Shavell) to illustrate this point. Likewise, he also highlights that accident avoidance is a leading justification in the Italian legal system. In contrast, this rationale features only modestly in England and France, and this is presumably because the economic analysis of law – which slowly began to develop throughout the 1960s – has largely been frowned upon in these two jurisdictions. What is noteworthy about

[4] At p 70.

[5] See, e.g., Nicholas McBride and Roderick Bagshaw, Tort Law (6th edn, Pearson 2018) pp 854-5 (where the authors seem to conflate the risk and benefit formulations of enterprise liability).

[6] At p 87.

[7] Armes (n 2) para [67] (per Lord Reed).

this chapter, however, is Cappelletti's somewhat narrow focus. Whilst he notes that accident avoidance is concerned with identifying 'the party who is best suited to avoid or reduce the number or severity of accidents',[8] his attention is firmly on the classic theory of deterrence. This comes at the expense of any sustained discussion of the concept of control, despite the fact that proponents of the control theory also 'appeal to placement when they note that A may be in a position to affect how B behaves, or that A may be able to take measures to avoid B causing an accident or to minimise its costs.'[9] In this regard, and whilst Cappelletti does sporadically mention control throughout this chapter,[10] he seems to miss a trick by ignoring the rich body of literature that exists on the relevance of control to various doctrines of strict liability.[11] This could even have informed his discussion of the French approach to accident avoidance, as Article 1242(1) of the French Civil Code (formerly Article 1384(1)) imposes a general regime of strict liability for those under the organisation, direction and control of another.[12]

In the following two chapters, Cappelletti discusses the deep pockets and loss spreading justifications for strict liability. After noting that the deep pockets rationale has been roundly criticised by courts and scholars – and thus incapable of standing alone as a justification for strict liability in all four of the studied jurisdictions – he wisely dedicates far more space to discussing what many believe to be the more sophisticated version of the deep pockets argument: the theory of loss spreading. Again, Cappelletti is careful to distinguish between various different types of loss spreading, such as 'insurance spreading' (which refers to a defendants' ability to take out third-party liability insurance cover), 'enterprise spreading' (which justifies strict liability on the basis that firms are able to pass the loss down to others, e.g. to employees by reducing their wages), 'taxation spreading' (which suggests that public bodies can spread the costs of liability among taxpayers), and 'burden-benefit proportionality' (which is concerned with the notion of fairness, and the idea that losses should be rolled upon the beneficiaries of a particular activity). By accurately defining these terms, Cappelletti is able to astutely conclude that the significance of loss spreading in each legal system predominantly depends on two key features: the extent to which each jurisdiction is wedded to a corrective justice-based approach, and the extent to which cultural values such as social solidarity influence the allocation of losses. In this regard, it is unsurprising to see that loss spreading is most at home under the French legal system, and largely at odds with the bilateral, fault-based nature of English tort law.[13]

Much of this discussion overlaps with the analysis in the following chapter, where Cappelletti focuses on the role of victim protection in justifying strict liability. Whilst it may be thought that

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[8] At p 119.

[9] Emmanuel Voyiakis, Private Law and the Value of Choice (Hart 2017) p 216.

[10] See, e.g., at p 135, p 139 and p 149. Surprisingly, control is not mentioned when he discusses vicarious liability in the English legal system (at pp 141–2), and this leads Cappelletti to conclude – erroneously, in my view – that 'accidence avoidance has little or no significance as a justification for vicarious liability'. On this point, see Gravil v Carroll and Redruth Rugby Football Club [2008] EWCA Civ 689, [2008] ICR 1222, paras [26]–[7].

[11] Thomas Baty, Vicarious Liability (Clarendon Press 1916) p 147; Patrick Atiyah, Vicarious Liability in the Law of Torts (Butterworths 1967) p 16; Robert Flannigan, 'Enterprise Control: The Servant- Independent Contractor Distinction' (1987) 37 UTLJ 25; Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71 CLJ 615, pp 642–3. More recently, I have also utilised the concept of control to discuss the appropriate scope of employer liability in the sporting context: see James Brown, 'The Vicarious Liability of Sports Governing Bodies and Competition Organisers' (2023) 43 LS 221.

[12] For a recent case in France demonstrating the relevance of control under Article 1242(1), see Civ 2, 5 July 2018 Bulletin II N° 154.

[13] In what seems to be a running theme throughout the book, vicarious liability is the noted exception to this trend in the UK context. In fact, Cappelletti suggests that vicarious liability in English law 'constitutes the battlefield for the clash between supporters and opponents of loss spreading' (at p 216).

victim protection is simply a by-product of the other arguments already considered, the decision to dedicate a chapter solely to the protection of victims is, in my opinion, a shrewd one. It provides Cappelletti the chance to explore the interplay between victim protection and other (secondary and make-weight) arguments in more detail, as well as shedding light on the extent to which each jurisdiction is committed to an ideology of victim compensation. In a similar manner to the chapters on risk and deep pockets, a spectrum-based approach reveals that adequate compensation for victims is the most important goal attributed to strict liability in France. In jurisdictions such as England and the United States, victim protection tends to be combined or juxtaposed with other arguments, and its attractiveness has been diminished due to the focus on interpersonal justice in those two legal systems. Even in Italian law – which perhaps comes closest to the French position – legal actors recognise that strict liability could be deployed to achieve goals other than victim protection. These very important points may have been somewhat obscured had Cappelletti decided not to discuss victim protection in a stand-alone chapter.

In the final two chapters, Cappelletti deals with two justifications that are less frequently advanced to justify strict liability: a reduction in administrative costs, and individual responsibility. In relation to the former, a sharp distinction is drawn between those jurisdictions that subscribe to a 'law and economics' approach (United States and Italy) and those that do not (France and England). It is highlighted that a reduction in administrative costs has a more meaningful role to play in those legal systems that are influenced by economic reasoning. In the final chapter of Part Three, Cappelletti assesses individual responsibility as a justification for strict liability. The term 'responsibility' here is taken to mean a 'moral judgment about whether the defendant ought to be answerable in some way to the claimant for the harm caused'.[14] With this in mind, Cappelletti skilfully summarises the responsibility- based theories of various scholars – such as Epstein, Keating, Fletcher, Coleman, Perry, Goldberg and Zipursky, Honoré, Gardner, Stapleton and Cane – to help illustrate an important distinction between the two common law systems and the two civil law systems. Whilst a wide variety of theories developed in the United States and England have sought to justify the imposition of tortious liability on the basis of norms of individual responsibility, the commitment to broader societal concerns in Italy and France has meant that 'there is no room – and perhaps no need – for individual responsibility' in these two civil law systems.[15]

In Part Four of the book, Cappelletti clearly and elegantly ties the various strands of the book together. He reflects upon the various patterns of reasoning across the four laws, as well as on the so-called 'chameleonic nature' of strict liability.[16] Indeed, Cappelletti observes that the way in which strict liability is justified often seems to depend on the broader values and normative preferences of the individual actors who employ these rationales. One particular section in Part Four that stood out for me was his discussion on the justificatory weight of juxtaposed arguments. This is something that I have attempted to grapple with elsewhere,[17] and Cappelletti's excellent comparative analysis shines a further light on this important issue. He suggests that we could achieve a more transparent and intelligible law if legal actors elaborated more fully on the significance of each argument relative to the others. It is refreshing to see, then, that other legal systems outside of England have similarly struggled to outline any concrete hierarchy of (juxtaposed) rationales for strict liability.

A final, yet rather minor, point also struck me as I was reading through Part Four, and it concerns Cappelletti's choice of legal systems. In particular, I wondered why he decided to limit his focus to the law

[14] At p 259.
[15] At p 292.
[16] See p 313.
[17] James Brown, 'Developing a Contextual-pluralist Model of Vicarious Liability' (2021) 28 TLR 123.

in France, Italy, England and the United States at the expense of other systems. Although there is a nice balance between common law and civil law jurisdictions in the book, it did seem to me that additional insight could possibly have been gleaned from analysing the Canadian (and perhaps even the Australian) law on strict liability. After all, it was in fact the two Canadian cases of *Bazley v Curry* and *Jacobi v Griffiths* that contained the first in-depth judicial examination of the theoretical foundations of vicarious liability,[18] and these cases proved particularly influential in the development of that doctrine in the UK.[19] Given that Cappelletti referred to the work of the Canadian-based scholar Ernest Weinrib when discussing the reasoning on strict liability in the US, I do wonder whether it might also have been possible to incorporate a discussion of these two important Canadian cases too.[20] However, in light of Cappelletti's insistence to keep this book within a 'manageable limit',[21] it may be overly demanding to request a consideration of even *more* legal systems in what is already a very comprehensive (and thoroughly well-researched) book.

Overall, this is an excellent piece of scholarship, and I would highly recommend it to anyone interested in comparative law, tort law or private law theory. Comparative research is, by its very nature, often ambitious, as it is usually much easier to focus exclusively on one legal system. However, Cappelletti's timely, original and significant contribution is able to fulfil these ambitious comparative aims, and in doing so he provides a very valuable resource for anyone looking to broaden their knowledge of strict liability in tort law.

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[18] [1999] 2 SCR 534, [1999] 2 SCR 570. Cappelletti is apparently aware of these judgments, as he makes reference to the 'two Canadian cases' at footnote 79 on p 238.
[19] See Lister v Hesley Hall Ltd [2002] 1 AC 215 (HL), para [27] (Lord Steyn referring to the 'luminous and illuminating' judgments in Bazley and Jacobi).
[20] Note Anthony Gray, Vicarious Liability: Critique and Reform (Hart 2018) pp 77-95, who discusses Canadian and US authorities under the broader heading of 'North American Case Law'.
[21] At p 9.