Introduction

A THINKING IN NETWORKS

But remember that words are signals, counters. They are not immortal. And it can happen... that a civilisation can be imprisoned in a linguistic contour which no longer matches the landscape of... fact.¹

The new century is already twenty years old, but the old debates of the twentieth century still cast a long shadow over tort theory. This book in many ways is an attempt to go beyond the current academic debate in tort law by widening our vista in theoretical, methodological and conceptual terms. Theoretically, it breaks with mainstream tort law scholarship as it is neither a contribution to the philosophy of tort law nor the economic analysis of law. Instead, it opens a new theoretical line of enquiry by adopting insights from systems theory as its ‘analytical frame of reference’ to advance a theory of tort law beyond the state.² Methodologically, it engages in comparative theoretical investigations examining, first, the law France, the United Kingdom and the United States, before, secondly, moving from a comparative to a transnational orientation when confronting the role of tort law in the twenty-first century. The story that it tells is, I hope, a compelling and insightful one. The internal evolution of tort law from models of individual responsibility to organisational responsibility cannot be understood without reference to the broader social epistemologies in which tort law is embedded. The story is one of mutual

¹ This phrase is taken from B Friel, Translations: Selected Plays (Washington, DC: Catholic University of America Press, 1984), 418, 419.
feedback between law and society in which different knowledge paradigms – ways of seeing the world – have contributed, and also been influenced by, different models of responsibility. Today, the society of networks forms the social epistemology of law and, it will be argued, tort law is, in bits and pieces, re-pivoting towards the society of networks. The final and conceptual contribution the book will make is to show how a new and distinctive form of responsibility – ‘network responsibility’ – is the best and most persuasive way to coherently braid these ‘bits and pieces’ into a new model of tort law for a new regime of liability beyond the state.

Making the case for network responsibility as an overall architecture for a new approach to tort law requires a reconstruction of tort law and its relationship with its wider social epistemologies. Therefore, once the theoretical ‘frame of reference’ has been established our attention turns to reconstructing the tort law of the nineteenth and twentieth centuries as giving rise to two models of responsibility – individual and organisational responsibility. The first two chapters are devoted to retracing and in some ways retelling the evolution of modern tort law from its classical foundations through the twentieth century to the challenges facing tort law today. In broad terms, they retrace the evolution of twentieth-century tort law from a paradigm of individual responsibility to a paradigm of vertical vicarious liability or organisational liability. These models of responsibility, it will argued, cannot be divorced from broader transformations in the knowledge base of society. The common threads in this analysis will be drawn out through a sustained focus on product

3 This is not based on what systems theory characterises as an input–output model, but rather on autopoiesis of the legal system where the law reacts reflexively to changes in its environment. See Ladeur (n 2).
6 G Teubner, ‘The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability’ in G Teubner, L Farmer & Declan Murphy (eds), Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization (Chichester: Wiley, 1994), 17. ‘With “vertical” vicarious liability in hierarchical organizations, employers are made responsible for the actions of their employees. Here the law, by imputing causation where no causal link can actually be proven, makes one individual vicariously responsible “horizontally”, for wrongs that have been committed by some other members of a group of actors.’ For the term organisational liability, see G Brüggemeier, Common Principles of Tort Law: A Pre-Statement of Law (London: BIICL, 2004).
liability and state liability considered as illustrative of broader reorientations within tort law. The first two chapters recount the rise of individual responsibility as a form of liability appropriate to a ‘society of individuals’ and how it was supplemented by secondary remodelling of tort law in the course of the twentieth century by organisational responsibility as a second and self-standing model of legal responsibility. This evolution will be retraced by examining public bureaucracy (the state) and private bureaucracy (the firm), in which it will be argued that whatever the precise doctrinal designation, organisational responsibility is the most plausible account of the tort liability regime that developed. On the public side, I will examine English and French law in particular, with the *Anns* decision in the United Kingdom and *Feutry* in France representing key turning points in the march of organisational responsibility. Twentieth-century courts viewed the activities of subcontractors in terms of a delegation of public activities and, as such, that public authorities should be held liable either for negligence or on the doctrinal basis of breach of statutory duty. This is the public face, as it were, of organisational liability. Thus, on an organisational model, the real addressee of liability ought to be the state. This mirrors developments on the private side, so to speak, as like the employer in vicarious liability or the firm in the case of product liability, the state was ultimately imputed responsibility when that risk materialised in harm. Organisational liability might be understood as a ‘secondary normative remodelling’ of tort law that made it more reflexively oriented for a society of (hierarchical) organisations. None of these changes could have been conceived or realised without reference to changing ideas of risk.

In other words, quite apart from the codifications of product liability law, the development of the tort of negligence in the twentieth century can be understood in these terms. Brüggemeier (n 6). So, incidentally, can developments within contract and corporate law. This is because all areas of private law have reacted in a dynamic and contingent way to their environment. But not exclusively. Important US pivotal judgments will be examined as well, eg *MacPherson v Buick Motor Co*, 217 NY 382, 111 NE 1050 (1916); *Escola v Coca-Cola Bottling Co*, 24 Cald 453, 150 Pd 436 (1944). The United Kingdom, apart from being the major legal system I am most familiar with, is also a good example of a legal system where the individualistic model has the most lasting impact, especially at a scholarly level; see P Benson, ‘Misfeasance as an Organizing Normative Idea in Private Law’ (2010) 60 University of Toronto Law Journal 731. For this reason, it is a good testing ground for our argument.

See Ladeur (n 2). That is, a society of rational organisation. We will develop the concept of secondary normative remodelling later in our theoretical framework section, Section C.

As we enter the society of networks, the existing models of tortious responsibility are failing to adequately respond to their environment. Networks, and their governance, do not respect national boundaries and so the focus of our investigations turn to the context of the EU legal order. Understood as an *avant garde* experiment in transnational governance, it is the site for developing a theory of network responsibility. It will be shown how the inchoate beginnings of an idea of network responsibility can, indeed, already be detected. Today, in the context of EU law, while the hard and fast distinction between public and private is blurring, effacing even, the models of both individual and organisational responsibility are strained. They are strained because neither model of liability adequately reflects the societal knowledge base, which has migrated from organisations to networks. These networks, unlike in the society of organisations, cannot neatly divide into public and private spheres. Secondly, the society of networks is also a society of risk in which classical understandings of causation become increasingly difficult to apply to harms occasioned by ‘network failures’. Thirdly, networks have broken out of the frame of the territorial state and, it is argued, a form of liability law that takes the concept of network as its ‘frame of reference’ in a multi-level legal order is required. This line of reasoning will be pursued in Chapters 3 and 4 with specific focus on the New Approach to Technical Standards (NATS) which is a characteristic example of ‘network governance’ in a risk society. Ultimately, it will be argued that what is now required is a concept of network responsibility for network failures, which is normative in substance, and represents an overall cupola for which individual responsibility and organisational liability form constituent elements. In the final chapter, it will be demonstrated how by recasting and reimagining *Francovich* liability, expanding on how its principles have already been applied to both public and private actors, it can be repurposed as a new form of secondary liability within an overarching concept of network responsibility, which can contribute to rethinking tort liability, more generally, in a transnational society of networks.

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12 See Teubner (n 5).
13 Indeed, it will be argued that thinking in terms of public and private is not an adequate theoretical frame of reference; see GP Calliess & P Zumbansen, *Rough Consensus and Running Code* (Oxford: Hart Publishing, 2012).
These preliminary observations can be presented in the form of a matrix (Table 0.1), which forms the entry-point and foreshadows the argument to come.¹⁵

The rest of the chapter will be devoted to explaining how I reached this position on contemporary tort law. It will distinguish a systems theory frame of reference from those more commonly associated with tort theory. Then its basic assumptions will be outlined before returning to the main argument about how European law offers the promise of law of torts for a society of networks.

**B BREAKING ACADEMIC FRAMES OF REFERENCE**

Tort law is in many ways a subject revitalised due to the processes of Europeanisation and globalisation of law. The process of Europeanisation has provoked scholars of private law to once more focus on the question of legal evolution and the social embeddedness of private law.¹⁶ This ‘irritates’

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¹⁵ See Ladeur (n 2).

private law theory that for a long time has been in the grip of what White describes as ‘neoconceptualism’ – primarily, the seemingly intractable debate between legal economists and moral philosophers of tort law.\textsuperscript{17} In the debate, stripped back to its most essential assumptions, moral philosophers build their model of tort law around the individual, and their obligations in accordance with a theory of individual right and reciprocity, while legal economists focus on aggregative individual preferences, largely arguing how tort law does or should correspond to economic efficiency. In this respect, they argue for tort law’s function as a proxy for contract when transaction costs prevent \textit{ex ante} voluntary exchange from taking place.\textsuperscript{18}

Our starting point, inspired by systems theory, is different. To be sure, individual and aggregative concerns are germane to tort law, hence the impasse in scholarship. Our point can be summarised quickly: there is no law of torts \textit{in abstracto}, which requires explanation. Instead, tort law is a dynamic and contingent system. Earlier common law theorists grasped this insight. As Holmes argued:

\begin{quote}
What has been said will explain the failure of all theories which consider the law only from its formal side; whether they attempt to deduce the corpus from \textit{a priori} postulates, or fall into the humbler error of supposing the science of the law to reside in the \textit{elegantia juris}, or logical cohesion of part with part. The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.\textsuperscript{19}
\end{quote}

It is well-known that while Holmes pointed to the ‘bricolage’ of the common law, he went on to provide his own formal theory dividing tort law neatly into negligence, strict liability and intentional torts.\textsuperscript{20} Nevertheless, he was at least cognisant of the importance of the diachronic dimension to law to

\textsuperscript{17} GE White, \textit{Tort Law in America: An Intellectual History} (New York: Oxford University Press, 1980). It is also ‘parochial’, even if it seems to make ‘universalist’ claims; see B Bix, ‘The Promise and Problems of Universal, General Theories of Contract Law’ (2017) \textit{30}(4) \textit{Ratio Juris} 391–402.


\textsuperscript{19} OW Holmes, \textit{The Common Law} (1881; reprint New York: Barnes & Noble, 2004), 36. This common law tradition stretches back to Coke’s ‘artificial reason of the law’, noted by Luhmann (n 2), 311–12.

\textsuperscript{20} White (n 17) focuses on Holmes’ place in American legal scholarship as a bridge, as it were, between Langdellian formalism and legal realism. More recently, Holmes has been claimed by those who advocate naturalism for his supposed classical realism. See B Leiter, ‘Holmes, Nietzsche and Classical Realism’ (2000) University of Texas School of Law Publications Law
B Breaking Academic Frames of Reference

furnish a good explanation of current law and its various apparent inconsistencies in objectives not to mention the ‘real’ social problems that legal changes were responding to. What the existing approaches in moral theory of tort law lack, it is submitted, is a focus on this practical dimension, suggesting either that these questions are beyond the province of private law or that a pre-political private law has precedence over them.\(^{21}\) Law and economics (or economic analysis of law – EAL), on the other hand, offers an instrumental theory of private law suggesting it is merely a tool in a regulatory arsenal that might serve in a complementary fashion to public regulation.\(^{22}\) Whereas public regulation is one way to achieve regulatory objectives, private law is an institutional complement to these ends. In the radical form of this argument, private law, tort law in our case, is public law in disguise.\(^{23}\) Yet, as the legal pluralists of tort law have shown, neither theory seems to ‘fit’ tort law on its own terms.\(^{24}\) Fit is achieved at the expense of some questionable stretching of existing doctrines,\(^{25}\) reformulations that seem to


H Dagan & A Dorfman, ‘The Justice of Private Law’ (unpublished manuscript, 24 July 2015), make a valiant effort to incorporate such a perspective into tort law. Their argument is that the justice that tort law embodies is relational. To simplify, while formal equality is often a good proxy for substantive autonomy as self-determination (what they claim to be the normative ends of a liberal, as distinct from libertarian private law), it is not always so. As such, modification is required to ensure ‘real’ (material), as distinct from ‘abstract’ justice is done. Heavy reliance is, at least implicitly, placed on Durkheim’s theory of social interdependence. While it is cited, the link between organic solidarity and private law is not explored overly, although it would appear that the notion of relational justice can be read as at least similar to solidarity.


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ignore the actual history of their development, or through marginalising developments in the law and, in particular, by ignoring the way courts justify their development. Indeed, Lord Hoffmann describes this as a tension in tort law between individual wrongdoing and compensation as social justice that is not fully reconciled. This fits into a pluralist understanding of the tort system. It is worthy of extended quotation:

The law of negligence attempts simultaneously to pursue two quite different objectives. The first is to attribute responsibility on the basis of moral fault and the second is to award compensation by way of redistribution of loss. Responsibility on the basis of moral fault requires that one should have regard to the actual physical and mental ability of the defendant as far as it is practically possible to do so. But redistribution of loss is a matter of social justice which does not require any moral fault at all. It depends upon the proposition that it would be fairer for the loss to be allocated to the insurers or customers of the enterprise which caused it than to be borne by the victim alone. And since no moral fault is required, it does not matter that the defendant was doing his individual best. The question is simply whether his conduct fell below whatever standard the law prescribes for the protection of the plaintiff.

That a celebrated judge should point to the diverse aims of tort law is largely ignored by neo-conceptualist theories of tort law favouring an approach that, like their scholastic antecedents, largely places a gloss on tort law. But, then, what do we propose in its stead? With a reading of tort law inspired by systems criticism in CJ Robinette, ‘Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine’ (2005) 43 Brandeis Law Journal 369.

ignoring how, for example, product liability law was theorised first in terms of loss spreading by, eg, Fleming James and how the intellectual drive here was legal realists on the progressive left who pointed to the real-world inequalities that tort law reinforced. White (n 17).


W Lucy, ‘Method and Fit: Two Problems for Contemporary Philosophies of Tort Law’ (2007) 52 McGill Law Journal 605. In law and economics, the infamous ‘surface froth’ accusation, but Lucy is equally scathing of certain moral philosophical accounts of tort law that purport to take an ‘internal point of view’ but then largely ignore it or take the perspective of certain participants to the exclusion of others without a clear reason for doing so. As an addendum, it might be argued that in a practice such as tort law that has developed over time, the field is inevitably contested, such that it might be implausible to speak of a singular ‘internal point of view’: tort law is simply not that homogeneous or is no longer so.

G Williams, ‘The Aims of the Law of Tort’ (1951) 4(i) Current Legal Problems 137; today, this approach has been rendered more sophisticated by adopting the concept of pluralism.

theory, are we not culpable of exactly what we criticise, namely, placing yet another gloss on tort law – indeed, it might be argued, one that is considerably more obscure and abstract than the valiant attempts of the systematisers? I argue that the ‘added value’, as it were, of an approach informed by systems theory is to better conceptualise the fact that tort law is a ‘historical machine’, which has developed layers of complexity remodelling itself to changes in the knowledge base of society. From this perspective, the controversy that Lord Hoffmann touches on in the earlier quote is the evolutionary pressures placed on tort law by the development of the ‘practical knowledge base’ of society from one of individuals to one of organisations. Before examining this evolution more closely in Chapters 1 and 2, the basic features of our theoretical standpoint will be unpacked. Once unpacked, it should be apparent that this approach locates tort law in the more general evolution of society in modernity. This meta-theory aims to provide an analytical frame of reference through which tort law can be reconstructed and provides, it is submitted, an instructive and original lens through which to view and conceptualise contemporary tort law. These latter theme will be developed in chapters 3 and 4. Thus, by adopting a systems theory approach, which stresses tort law as a system in a dynamic and contingent relation to its environment, an interpretation of tort law not primarily based on the individual is proffered, whether conceived in terms of abstract right or an aggregation of preferences.

C UNDERSTANDING SYSTEMS THEORY AS AN ANALYTICAL ‘FRAME OF REFERENCE’ RATHER THAN A GRAND THEORY

1 Tort Law from Individuals to Systems: Ladeur’s Debt to Luhmann

It is now germane to make the theoretical commitments explicit by situating the approach in a systems theory ‘frame of reference’. Within systems theory, the argument is ‘Ladeurian’ because it is concerned with the relationship between the internal differentiation of the legal system and its relationship with changes in the knowledge base of society. To unpack these theoretical commitments, however, some central features of Luhmann’s theory require

31 Ladeur (n 2).
32 Ibid, 12.
33 Although it departs from Ladeur’s perspective discussed in Chapters 3 and 4 insofar as he argues normatively for the ‘cognitivisation’ of law, ie that it is desirable to treat law as a ‘learning system’, as both an explanation of postmodern law because of radical knowledge heterarchy and a plea for the law of the twenty-first century. Perhaps I am still too much a lawyer to give up on the function of law as a normative system.
explanation. Once explained, the theoretical commitments of this book will be clearer. At the outset, it should be noted that the systems theory approach does not offer a grand theory of society; although it is clearly a meta-theory, as it is a sociological theory about sociological theories. It is viewed as an analytical frame of reference rather than positing an explanation in the sense of the philosophy of tort law or EAL. We do not attempt to find ‘fit’ between our theory and the actual practices of a legal system as understood by participants, whether by explaining particular doctrines as instantiations of deeper philosophical commitments (deontological or utilitarian) or by drawing out the implicit philosophical foundations of the tort system.  

Systems theory is meant to be ‘an observation of observations’, second-order observations of legal ‘communications’ rather than reconstructions of the internal point of view. It is not an external point of view, properly speaking, but rather relies on existing legal theory but reclassifies these theories according to its second-order observation methodology. Legal theories become, in this light, self-descriptions and are relegated to the level of law’s observations. A crucial methodological step in this approach resituates the individual no longer as a sovereign will shaping laws to their ends, or a group of ‘participants’ within a practice; rather, the law’s individual forms part of law’s self-description. To put this in other terms, Luhmann is not concerned with the individual or groups of individuals (including their purported ‘internal point of view’); instead, his analysis occurs at the level of communicative systems. As King and Thornhill state: ‘Luhmann’s primary unit of analysis is not the individual or groups of people but systems. And these systems consist not of people, but of communications.’ It should be stressed that Luhmann constructs a communicative theory that departs from methodological individualism. Instead of searching for the internal point of view of participants, systems theory examines societal communication.

It is radically different to EAL or philosophy of private law in this respect. ‘The individual’ is not the centre of society and nor should they be the basic unit of social analysis. The individual, according to this approach, is a constructed category, a fiction that can be subdivided into three distinct elements: the living, the psychic and the social system:

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54 Some of the difficulties in terms of the way these theories explain the tort system are analysed by Lucy [n 28].

55 Whose internal point of view is the obvious question: judges, legal scholars? Additionally, there are problems when distinguishing core from periphery, orthodox from heterodox accounts, etc.