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Instrumental Tort Law: Moral Technology or the Promise of a More Advanced Normative Underpinning?

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Abstract: In recent decades, tort law, and the theory on which it is based, have been the subject of intense debate. These debates focus on the underlying rationale of tort law and reflect tensions between instrumental and non-instrumental perspectives. Instrumental perspectives cover a wide variety of approaches in which tort law is seen as a tool to realise social aims. It can be recognised in the theories of legal economists, such as Posner, who emphasise deterrence, but also in the theories of those who consider it to be an instrument to realise compensation or to contribute to distributive justice. The non-instrumental perspective reflects the concerns of those who consider tort law to be based on individual autonomy and liberty. Some advocates of this perspective adopt a straightforward anti-instrumental position. Weinrib and Beever for instance, object to tort law being used as an instrument to realise collective aims. An instrumental approach would make individuals – either the injurers or the victims – the servants of collective aims, whereas tort law should instead protect individual freedom in the face of community needs.

These non-instrumental theories and their individualistic interpretation of liability are unrealistic in a society where people are embedded in wide networks of interdependency, in which risks are often anticipated and deliberately accepted as socially desirable, and in which insurance and its accompanying rationale of actuarial justice play a prominent role.

Nevertheless, the issue I seek to address in this paper is whether the principle of corrective justice might not embody some important values that can be used to counter some problematic aspects of an instrumental approach. Based on an awareness that the concept of corrective justice as a whole is no longer realistic in today's society and building on Habermas' theory of communicative action, I will sketch the contours of an alternative underpinning for tort law that better reflects current

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social realities, while at the same time taking some normative reservations held by advocates of corrective justice against instrumentalism into account.

I Introduction

In recent decades, tort law, and the theory on which it is based, have been the subject of intense debate.[1] These debates focus on the underlying rationale of tort law and reflect tensions between instrumental and non-instrumental perspectives. Instrumental perspectives cover a wide variety of approaches in which tort law is seen as a tool to realise social aims. It can be recognised in the theories of legal economists, such as Posner, who emphasise deterrence, but also in the theories of those who consider it to be an instrument to realise compensation or to contribute to distributive justice.[2] The non-instrumental perspective reflects the concerns of those who consider tort law to be based on individual autonomy and liberty. This perspective focuses on tort law's inherent characteristic structure. Tort law is conceptualised as *corrective justice*: the victim (plaintiff) has been wronged by the injurer (defendant), something that calls for correction.[3] Some advocates of this perspective adopt a straightforward anti-instrumental position. Weinrib and Beever for instance, object to tort law being used as an instrument to realise collective aims.

1 The contrasting positions are eg described in: *EG White*, Tort Law in America: an Intellectual History (exp edn 2003) 291ff; *GC Keating*, Form and Substance in the 'Private Law' of Torts (2021) 14 Journal of Tort Law (JTL) 45; *J Plunkett*, Principle and Policy in Private Law Reasoning [2016] Cambridge Law Journal (CLJ) 366.

2 *RA Posner*, The Learned Hand Formula for Determining Liability, in: RA Posner, Tort Law – Cases and Economic Analysis (1982) 1ff; *M Lobban*/*J Moses*, Introduction, in: M Lobban/J Moses (eds), The Impact of Ideas on Legal Development (2012) 2ff; *ML Rustad*, Torts as Public Wrongs (2010–2011) 38 Pepp Law Review (Pepp L Rev) 433; *J Stapleton*, Duty of Care Factors: A Selection from the Judicial Menus, in: P Cane/J Stapleton (eds), The Law of Obligations: Essays in the Celebration of John Flemming (1998) 59ff; Chamallas and Bublick see equality as an important objective, see *M Chamallas*, Social Justice Tort Theory (2021) 14 JTL 309; *EM Bublick*, Tort Common Law Future: Preventing Harm and Providing Redress to the Uncounted Injured (2021) 14 JTL 279; Richard Abel emphasises the major relevance of deterrence: *RL Abel*, A Critique of American Tort Law (1981) 8 British Journal of Law and Society (Brit J Law & Soc) 199.

3 This anti-instrumental perspective can also be recognised in civil recourse theory. The most prominent advocates of this approach are Goldberg and Zipursky. Both theories, corrective justice and civil recourse, depart from one another in the sense that the former theory deploys a notion of correction or rectification, whereas it is key to a civil recourse theory that tort entitles victims who have been mistreated to obtain the assistance of the court to be compensated by the wrongdoer. See eg *JCP Goldberg*/*BC Zipursky*, Tort Law and Responsibility, in: J Oberdiek (ed), Philosophical Foundations of the Law of Torts (2014) 17ff.

An instrumental approach would make individuals – either the injurers or the victims – the servants of collective aims, whereas tort law should instead protect individual freedom in the face of community needs.[4]

A frequently raised objection to these non-instrumental theories is that they are out of date, because divorced from the modern social context in which tort law functions.[5] I share this opinion.[6] An individualistic interpretation of accidents and the duty to compensate victims is unrealistic in a society where people are embedded in wide networks of interdependency, in which risks are often anticipated and deliberately accepted as socially desirable, and in which insurance and its accompanying rationale of actuarial justice play a prominent role.

Nevertheless, the issue I seek to address in this paper is whether the principle of corrective justice might not embody some important values that can be used to counter some problematic aspects of an instrumental approach. Based on an awareness that the concept of corrective justice as a whole is no longer realistic in today's society, I will sketch the contours of an alternative underpinning for tort law that better reflects current social realities, while at the same time taking some normative reservations held by advocates of corrective justice against instrumentalism into account. In doing so, I rely in particular on the insights of Habermas. In his analysis of law, he recognises the shortcomings of instrumental perspectives, without falling back on an individualistic concept of liability and responsibility. Habermas' concept of *communicative rationality* in particular suggests a more challenging approach, which is not only more realistic, but which also embodies the promise of a more advanced normative underpinning of tort law. I will specifically focus on issues of civil liability concerning accidents, which entail the most significant part of tort law.

First, I will outline the concept of corrective justice according to Weinrib and Beever. In the next section, I introduce alternative (instrumental) accounts of tort law. I also refer to social transformations since the end of the nineteenth century that may explain the increasing prevalence of instrumental approaches.[7] I then question whether instrumental tort law actually fulfils its ambitions: to realise social aims such as compensation, deterrence and a fair allocation of costs. In the

4 *EJ Weinrib*, Understanding Tort Law (1989) 23 Valparaiso University Law Review (VULR) 485, 501ff; *A Beever*, Rediscovering Negligence (2007) 210ff.

5 *White* (fn 1) 336; *D Priel*, Tort Law for Cynics (2014) 75 Modern Law Review (MLR) 703, 717.

6 I will clarify my argument below under the heading 'The inevitability of instrumental concerns'.

7 I explore general tendencies within tort law regarding common law and civil law systems. For more detailed analyses which focus on cross-cultural differences between various European countries, see *K Oliphant*, Cultures of Tort Law in Europe (2012) 3 Journal of European Tort Law (JETL) 147, and subsequent articles in this Special Issue on cultures of tort law in Europe.

following section, I discuss the views of those who try to have the best of both worlds by combining corrective justice and instrumental concerns (*mixed theories*). These theories are only partly satisfying since they rest on the doubtful assumption that there is no friction between corrective justice and instrumental concerns. Finally, I present Habermas' legal theory as an alternative. His line of argument helps us to better position the basic arguments put forward by the adherents of corrective justice against instrumentalism. This does not culminate in an outright rejection of instrumentalism, but in a critical account of how contemporary instrumental tort law functions in practice.

II Corrective justice

Those who consider law to be based on corrective justice see law as a way of regulating and correcting a conflict between two parties. Weinrib and Beever are prominent advocates of this approach.[8] They consider it to be in the fundamental nature of tort law to ensure just relations between persons and they have objections to using it as an instrument to realise social aims. Their account of tort law is based on the Kantian assumption of voluntary interaction between free persons. Consequently, the point of tort litigation is to resolve a specific dispute between the parties directly involved with exclusive reference to what has transpired between these parties.[9] The litigants are assumed to be equal, despite their possible inequality in wealth, virtue, or needs. An assumption that relates to a formal equality that ignores the particularities of the litigants and the situation.[10] Weinrib summarises this abstract perception of the parties with the concept of 'personality'.[11] In addition to personality, 'correlativity' is the second fundamental concept underpinning tort law. It implies that the injurer's inflicting harm on the victim, and the victim's claim

8 *EJ Weinrib*, The Idea of Private Law (1995); *Weinrib* (1989) 23 VULR 485; *EJ Weinrib*, Corrective Justice (2012); *Beever* (fn 4). Other prominent advocates of corrective justice: *A Ripstein*, Private Wrongs (2016); *JL Coleman*, The Practice of Principle, In Defence of a Pragmatist Approach to Legal Theory (2003); *JL Coleman*, Tort Law and Tort Theory, Preliminary Reflections on Method, in: GJ Postema (ed), Philosophy and the Law of Tort (2001) 182ff; *GP Fletcher*, Fairness and Utility in Tort Theory (1972) 85 Harvard Law Review 537.

9 *Ripstein* (fn 8) 23.

10 *EJ Weinrib*, The Insurance Justification and Private Law (1985) 14 The Journal of Legal Studies (JLS) 681, 686.

11 *Weinrib*, Corrective Justice (fn 8) 21ff; In philosophical accounts exploring Kant's and Weinrib's ideas 'personality' is often addressed as 'autonomy'. See eg *C Witting*, The House that Dr. Beever Built: Corrective Justice, Principle and the Law of Negligence' (Review) (2008) 71 Modern Law Review (MLR) 621, 628ff; *J Habermas*, Between Facts and Norms (1997) 83ff.

of compensation are mutually connected. This is what Weinrib refers to as the *bipolar structure* of tort. What is at stake in litigation is what the appropriate response is when an injurer breaches a duty (commits 'a wrong') correlative to the victim's right.[12]

In Weinrib's and Beever's account of corrective justice, tort law is seen in its own terms, grounded on principles which define its internal structure, without recourse to external social aims. Concerns such as deterrence, compensation and issues of distributive justice, which address the distribution of goods across the community as a whole, are foreign to this approach. Making tort law instrumental to the realisation of social aims would undermine its coherence and its identity.[13]

This principle of corrective justice had a central place in the classical liberal thought of the nineteenth century when tort, contract and property were the hallmarks of the liberal legal order.[14] These legal concepts guaranteed the liberty of individuals, a liberty based on absolute property rights, voluntary consent (contract) and the compensation of damage (tort) that was predominantly fault-based.[15] Rights and duties defined domains of action and immunity within which each person was allowed to act freely – any infringements of these domains were sanctioned.

Private law was seen as autonomous: it governed the relationships of citizens who were presumed to be free and equal. Tort law responded to an injury inflicted by a single injurer on a single victim.[16] Private and public law were regarded as completely separate domains of law.[17] Tort law did not address public issues and was not regarded as an instrument to achieve social aims.

This perception of freedom and autonomy was founded on the assumption that the market and the economy were domains unaffected by differences in power.

12 *Weinrib* (1989) 23 VULR 485, 493ff and 511ff.

13 *Weinrib* (1989) 23 VULR 485, 491; *Beever* (fn 4) 10f; *J Morgan*, Tort, Insurance and Incoherence (2004) 67 MLR 384, 394.

14 Henry Steiner addresses the relationship between corrective justice and nineteenth century liberalism, see *HJ Steiner*, Moral Argument and Social Vision in the Courts, A Study of Tort Accident Law (1987) 48ff; also *JF Witt*, The Accidental Republic, Crippled Workingmen, Destitute Widows and the Remaking of American Law (2014) 45ff; that tort law in nineteenth century England, France and Germany was premised on liberal individualism: *Lobban*/*Moses* (fn 2) 2ff; that Beever's position is built on liberal premises, see *Dan Priel*, Private Law: Commutative or Distributive? (2014) 77 MLR 308, 329.

15 *White* (fn 1) 291ff; *LM Friedman*, A History of American Law (4th edn 2019) 444; *Lobban*/*Moses* (fn 2) 1ff; *DG Gifford*, Technological Triggers to Tort Revolutions: Steam Locomotives Autonomous Vehicles, and Accident Compensation (2018) 11 JTL 73, 94; *N Jansen*, The development of legal doctrine in Europe, Extracontractual liability for fault, in: N Jansen (ed), The development and making of legal doctrine (2010) 5ff.

16 *White* (fn 1) 296; *Steiner* (fn 14) 112ff.

17 *D Priel*, A Public Role for the Intentional Torts (2011) 22 King's Law Journal 183.

Since the end of the nineteenth century, this assumption that there is a neutral private domain has increasingly been questioned. Instrumentalism developed in tandem with this realisation.[18] Nevertheless, since the 1980s, corrective justice has gained a more prominent place in philosophical accounts of tort law.[19]

III Tort law as an instrument to further social aims

Tort law changed profoundly during the course of the twentieth century. The distribution of damages became less determined by considerations of corrective justice and increasingly determined by considerations of policy and attention to contextual social factors.[20] Tort law became instrumental to aims such as compensation, deterrence and a fair allocation of costs across groups in society, and was mobilised to address public issues. This trend was accompanied by a rising prevalence of strict liability.[21]

When liability is based on a non-instrumental approach as corrective justice, it is determined in a 'backward looking' perspective, in which the focus is on the wrong inflicted by the injurer on another person. Contrary to this, in an instrumental approach, the attribution of liability is based on a 'forward looking' perspective: the assessment of the duty to compensate is ex ante attached to particular roles and activities and seen as an instrument to realise social aims.[22]

This shift from an individualistic standard of liability to instrumentalism can be explained by several social transformations.[23] Nineteenth century liberalism limited legally guaranteed compensation, because it had high expectations of moral obliga-

18 In a first phase, instrumentalism had merely an impact on legislation, and, in the course of the twentieth century, it also affected adjudication, see *B Tamanaha*, Law as a Means to an End, Threat to the Rule of Law (2006) 43ff.

19 *GT Schwartz*, Mixed Theories of Tort Law: Affirming both Deterrence and Corrective Justice (1997) 7 Texas Law Review (Texas L Rev) 1801, 1802; *Plunkett* [2016] CLJ 366, 367.

20 *White* (fn 1) 296ff; *PS Atiyah*, American Tort Law in Crisis (1987) 7 Oxford Journal of Legal Studies 279, 288ff; *Jansen* (fn 15) 23; *Lobban*/*Moses* (fn 2) 11ff.

21 On increasing relevance of strict liability since the end of the nineteenth century: *Friedman* (fn 15) 451ff; *Jansen* (fn 15) 15ff; *J Flume*, Strict Liability in Austrian and German Law, On the concept of strict liability in the age of technological advancement (2021) 12 JETL 205, 206ff.

22 *Rustad* (2010–2011) 38 Pepp L Rev 433, 440ff; *Lobban*/*Moses* (fn 2) 11ff; *M Lobban*, English Jurisprudence and Tort Theory, in: M Lobban/J Moses (eds), The Impact of Ideas on Legal Development (2012) 127, 134; *JCP Goldberg*/*BC Zipursky*, The Myths of MacPherson (2016) 9 JTL 91, 99ff; *Keating* (2021) 14 JTL 45, 83.

23 Sociological analyses of these changes: *F Ewald*, L'Etat Providence (1986); *Gifford* (2018) 11 JTL 73ff; *RJS Schwitters*, De risico's van de arbeid. Het ontstaan van de Ongevallenwet in sociologisch perspectief (1991); *RJS Schwitters*, Riskante aansprakelijkheid (1991) 17 Recht en kritiek 5; attention for social factors: *Friedman* (fn 15) 443ff.

tions and voluntary assistance.[24] To some extent these expectations had a material substratum, since in those areas where the consequences of industrialisation were still limited, traditional patterns of voluntary assistance survived.[25] In those circumstances, it was less heartless to adhere to Holmes' assumption that 'the general principle of our law is that loss from accident must lie where it falls'. As he saw it, only accidents based on fault created a duty to compensate the victim.[26] However, in the course of the nineteenth century, the rising pace of industrialisation (large scale production and high mobility rates) eroded patterns of voluntary assistance on a massive scale. This made the victims of damage more dependent on legally guaranteed compensation.[27]

Not only did the emergence of industrial society erode patterns of voluntary assistance, it also led to the emergence of physical injuries that could be attributed to a distinct cause: the steam machine.[28] Industrialisation also implies that accidents are mostly the consequence of the cooperation of numerous actors in more complex settings. In these circumstances, attributing blame is virtually impossible, especially as judges and juries often simply lack the expertise to determine the standards of appropriate behaviour.

Another factor that eroded the individualistic private character of accidents is that the regulation of safety in technologically advanced conditions relies to a large extent on the expertise of specialists. Such experts (factory inspectors, for instance) are less likely to consider accidents as the consequence of individual shortcomings. Rather, they tend to perceive accidents in terms of risks, which shifts the focus from individual shortcomings to contextual causes of accidents such as production methods and deficient regulation.[29] Moreover, the behaviour of individual actors becomes less relevant when the production process and the organisation of labour is based on scientific knowledge. And since, generally speaking, organisations (government or companies) apply this knowledge, it is these organisations that are seen as being responsible.[30]

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24 *Schwitters*, De risico's van de arbeid (fn 23) 96ff; attention to non-legal interventions and remedies: *M Bussani*/*M Infantino*, Tort Law and Legal Cultures (2015) 63 The American Journal of Comparative Law 77.

25 *PS Atiyah*, The Rise and Fall of Freedom of Contract (2003) 258ff; *Schwitters*, De risico's van de arbeid (fn 23) 21f; *Ewald* (fn 23) 61ff.

26 *OW Holmes*, The Common Law (2009) (1st edn 1881) 87; on the relevance of fault in the nineteenth century in Europe, see *Jansen* (fn 15) 5ff.

27 *Schwitters*, De risico's van de arbeid (fn 23) 193ff.

28 *Schwitters*, De risico's van de arbeid (fn 23) 209.

29 *Schwitters*, De risico's van de arbeid (fn 23) 196.

30 On the relation between industrialisation and the changing perception of responsibility for accidents, see *Friedman* (fn 15); *Gifford* (2018) 11 JTL 73; *Schwitters*, De risico's van de arbeid (fn 23) 183ff.

Increasing intervention to correct the deficiencies of the market not only contributed to the expansion of public law, but it also gave private law (such as tort) a public dimension. Hence tort law is now viewed as being a regulatory system, among alternative systems, through which social aims can be realised.[31] Moreover, once the welfare state is omnipresent, harm is more likely to be attributed to the welfare state's introduction of inadequate legal rules, its failing policy, or its flawed administration of rules.[32] As Keating observes, 'overemphasising law's private status obscures the fact that accidental harm is a basic and systemic feature of a technologically advanced society. How we respond to these accidents is an issue of common concern'.[33] Accidents are increasingly perceived as the consequence of a defective organisation and regulation.

The expansion of the economic market meant that actors increasingly began to perceive risky activities in terms of cost/benefit calculations. In the debates preceding the Workmen's Compensation Acts, jurists began to criticise fault-liability and focused on the social causes of accidents, such as the fact that workers were often forced by their employers to take insufficient care in order to not interrupt the production process. This perspective of jurists that accidents are the unavoidable side effect of industrialisation reflected a new general concern that risks are the price we have to pay for realising social wealth.[34] Moreover, this insight led to the conviction that those enjoying the benefits of risky activities have a duty to compensate victims of accidents.[35]

This device of balancing of the costs of accidents against the benefits of risky activities is established in law and economics – a discipline that started to play a prominent role in legal theory in the 1970s and that gave an enormous boost to instrumentalism.[36] From an economic point of view, tort law has to contribute to the maximisation of social wealth, an aim which requires an efficient allocation of costs (optimal deterrence). This is expressed in the *Learned Hand Formula*, a standard for calculating negligence that states that if the cost of avoiding the harm is less than the cost of the harm, extra safety measures must be implemented.[37]

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31 *P Gillaerts*, Extracontractual Liability Law as a Policy Instrument: Public Law in Disguise or in Chains? (2020) 11 JETL 16; *Keating* (2021) 14 JTL 45, 84ff; *P Cane*, Tort law as Regulation (2002) 31 Common Law World Review 31, 84ff.

32 *LM Friedman*, The Security State (1985) 71.

33 *Keating* (2021) 14 JTL 45, 84ff.

34 *Schwitters*, De risico's van de arbeid (fn 23) 245ff; *P Cane*, Atiyah's Accidents, Compensation and the Law (7th edn 2006) 186ff.

35 *Witt* (fn 14) 63ff.

36 *GL Priest*, The New Legal Structure of Risk Control (1990) 119 Daedalus 207, 208f.

37 *Posner* (fn 2).

Undoubtedly, the most important factor in eroding corrective justice has been the rising prevalence of insurance since the end of the nineteenth century.[38] Insurance interferes in the direct relationship between shortcomings (fault) and the duty to compensate. This relationship is undermined by the fact that courts and legislators, being aware that an insured defendant is able to spread the costs, are inclined to take the weaker position of the victim into account, thus widening the standards of care.[39]

The statistical rationale that underpins how insurance operates contributes to a *forward-looking* perspective in which policy considerations are predominant.[40] For insurance companies, it is less relevant which individual is to blame for an accident. They are more interested in the regulation of risks. They may, for instance, observe that given the amount of traffic accidents occurring within a specific district, these accidents cannot be attributed to the shortcomings of individual drivers but rather to shortcomings in road maintenance.

A recent tendency is for tort law to be mobilised to address corporate wrongdoings, such as climate change, oil spills, defective cars and the immense suffering created by war.[41] Tort law may alert citizens and public regulators to social problems and create public support for social reform.

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38 *R Lewis*, Insurance and the Tort System (2005) 25 Legal Studies (LS) 85ff; *R Lewis*/*A Morris*, Tort Law Culture: Image and Reality (2012) 39 Journal of Law and Society (J Law & Soc) 562, 572; *DN Dewees*/*D Duff*/*MJ Trebilcock*, Exploring the Domain of Accident Law: Taking the Facts Seriously (1996); *Witt* (fn 14) 43ff; *Cane* (fn 34) 203.

39 Stapleton's claim that insurance does not have an impact on tort law is widely rejected: *J Stapleton*, Tort, Insurance and Ideology (1997) 58 MLR 820ff; Her claim is rejected by eg: *Morgan* (2004) 67 MLR 384, 391; *KS Abraham*/*G White*, Rethinking the development of modern tort liability (2021) 101 Boston University Law Review 101, 1289ff; *A Hol*, Fault in Legal Doctrine in the Netherlands, in: N Jansen (ed), The Development and Making of Legal Doctrine (2010) 166, 179; empirical evidence that the imposition of liability is strongly influenced by the wish to compensate via liability insurance, see *Dewees*/*Duff*/*Trebilcock* (fn 38); opinions vary widely about Stapleton's claim that making insurance relevant to the attribution of liability would undermine the coherence of tort law. Weinrib and Morgan agree with her: *Weinrib* (1985) 14 JLS 681, 682ff; *Morgan* (2004) 67 MLR 384, 400f; *Plunkett* [2016] CLJ 366 claims that in today's society coherence cannot be based on corrective justice. According to him, policy-based reasons play a role anyhow, however, mostly hidden, and it would be better to address them explicitly; Loth claims that the impact of insurance and concerns of distributive justice do not have to erode coherence when tort law is grounded on a capability approach, see *M Loth*, Corrective and Distributive Justice in Tort Law, On the Restoration of Autonomy and a Minimal Level of Protection of the Victim (2015) 22 Maastricht Journal of European and Comparative Law (Maastricht J Eur & Comp L) 788ff.

40 *Steiner* (fn 14) 101.

41 *L Enneking*, Foreign Direct Liability and Beyond, Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) 553ff; *Rustad* (2010–2011) 38 Pepp L Rev 438, 470; *C van Dam*, Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law

In sum: The erosion of traditional patterns of voluntary assistance, the fact that accidents are increasingly the product of cooperative activities, the proliferation of third-party insurance, the deliberate acceptance of risks on the basis of cost-benefit calculations, all explain why tort law has inevitably been made instrumental to the realisation of social aims such as compensation, deterrence and a fair allocation of costs. Tort law has been injected with a public dimension.[42] A dimension emphasised by those who deliberately mobilise tort law to address social issues.

IV The inevitability of instrumental concerns

Basing tort law on corrective justice is no longer feasible. It cannot be presumed, as its adherents do, that only the mutual rights of the litigants are at stake and that issues of distributive justice can simply be ignored.

For instance, would a judge, being aware of the urgent needs of a seriously injured victim, be able to ignore the fact that the damages will finally be borne by an insurer? Although judges do not often explicitly address the impact of insurance on their decisions, it is assumed that it has at least some relevance.[43]

Witting claims that not even within a framework of corrective justice can issues of distributive justice be completely ignored. As observed, corrective justice is based on a system of negative duties of non-interference with the rights of others.[44] These rights have to guarantee the liberty and autonomy of citizens. Witting observes that, in tort litigation, the choice has to be made either to protect the ability of the injurer/defendant to act (as far as possible) without legal obstacles (autonomy), or to award damages to the injured/claimant in order to restore (as far as possible) his or her capacities to enjoy an autonomous existence.[45] Given the fact that two modes of autonomy have to be balanced, it is difficult to ignore the prevalence of insurance as a relevant consideration.

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in the Area of Business and Human Rights (2011) 2 JETL 221; *L Burgers*, Justitia, the People's Power and Mother Earth, Democratic legitimacy of judicial law-making in European private law cases on climate change (2020); *D Priel*, Structure, Function, and Tort Law (2020) 13 JTL 31, 51.

42 *Gillaerts* (2020) 11 JETL 16.

43 *P Cane*, Tort Law and Economic Interests (1991) 441; that German judges did not tend to explicitly address distributive concerns in their legal decisions, see *Jansen* (fn 15) 25; Morgan gives an overview of legal decisions (UK and USA) in which the relevance of insurance is explicitly addressed, see *Morgan* (2004) 67 MLR 384, 385ff.

44 *Weinrib*, Corrective Justice (fn 8) 11.

45 *Witting* (2008) 71 MLR 621, 634f; Marc Loth stresses that tort law is also a tool to restore the autonomy of the victim, something that indicates that tort law cannot be exclusively based on corrective justice: *Loth* (2015) 22 Maastricht J Eur & Comp L 788ff.

The fact that wider social concerns are relevant is also related to the character of accidents in a technologically advanced society. The risk of accidents can no longer be regarded as something that happens exclusively within the bipolar relationship of injurer and victim. Risks are simply accepted as the flipside of our social wealth. According to Cane, it may then be asked whether it is not fair to require those gaining the financial benefits of risky activities to bear the burden of these accidents.[46] This is the rationale underlying strict liability. It is not that Weinrib rejects strict liability, but he is at pains to ground it on a wrong that has been committed, because he considers this form of liability as liability for the creation of *abnormal* risks.[47] However, the risks Cane refers to are not abnormal risks, but socially accepted risks, or *normal* risks.

The fact that many risky activities take place in the context of the market, where decisions are based on cost/benefit calculations, implies that individuals can no longer be seen as separate loci of control. They are integrated in wide networks of interdependency, in which normative duties are translated in terms of incentives, which affect the behaviour of many. In this context deterrence soon becomes opportune.

Furthermore, insurance tends to increase attention to the fair allocation of damages across groups in society, in other words, to the issue of distributive justice. The prevalence of insurance means that the costs of accidents are not borne by individuals (injurers or victims) but by collectives (eg motorists or pedestrians, producers or consumers, employers or employees).[48] In sum, instrumental concerns cannot be abandoned in contemporary tort law. In today's society, it is not realistic to focus exclusively on directly involved litigants. Increasing power differences amongst litigants, societies' deliberate acceptance of risky activities, the impact of insurance, and the fact that social issues are addressed in public interest litigation implies the relevance of wider social concerns.

V Does tort law realise the social aims it is made instrumental to?

The fact that instrumental concerns play a role in today's tort law does not mean that this is taken for granted. As observed, in recent decades, theories based on

46 *Cane* (fn 34) 185f.

47 *Weinrib*, The Idea of Private Law (fn 8) 187ff.

48 *S Sugarman*, Doing Away with Tort Law (1989) 73 California Law Review 555, 558; *Steiner* (fn 14) 62ff.

corrective justice have undergone a revival. One question being raised by the proponents of this regards the *raison d'être* of tort law: do approaches of tort law that make it instrumental to the realisation of external (social) aims not erode the very identity of tort law?[49] Another question is that if tort law is exclusively seen as a tool to realise aims external to it, does its existence not become dependent on the extent to which it effectively furthers these aims?[50] If the conclusion is that tort law is a deficient tool in this respect and there are superior alternatives available, tort law could simply be dispensed with. And there are, indeed, numerous indications that tort law is unable to fulfill its instrumental ambitions.

As an instrument for compensation, tort law has serious defects. The criterion of liability, even if less restrictive than fault, excludes many victims from being able to claim compensation. Those injured who cannot attribute their harm to a liable party have to bear the costs themselves. What is more, tort law is an expensive tool to compensate victims.[51] Tort-based compensation generally requires time-consuming complex procedures. And if tort law really were to function as a more efficient system of compensation, this would imply a claim-culture that many would be hesitant to accept. Social security and first-party insurance seem to be much cheaper, more accessible, more efficient and less conflict-provoking compensation systems.[52]

Tort law's deterrent capacities may also be open to doubt.[53] From an economic perspective, optimal deterrence requires (potential) injurers to take into account all the external costs of their activities. But legal limitations on which losses can be compensated and slack claim activity make it unlikely that injurers will be confronted with all these costs.[54]

Given the prevalence of insurance, tort law tends to be seen as an instrument to achieve a fair distribution of the costs of accidents across groups in society (distributive justice). However, the extent to which tort law is an apt instrument to achieve this aim is questionable. First, it is not specific enough in the sense that it merely differentiates general categories of persons, a categorisation that only roughly corresponds with factual differences in wealth: not all consumers are financially more vulnerable than producers, not all car drivers are more affluent

49 *Weinrib* (1989) 23 VULR 485, 491; *Beever* (fn 4) 10 f.

50 *Weinrib* (1989) 23 VULR 485, 502.

51 *Morgan* (2004) 23 MLR 384, 394 f.

52 *P Cane*, The Anatomy of Tort Law (1997) 233 ff.

53 *WJ Cardi*/*RD Penfield*/*AH Yoon*, Does Tort Law Deter Individuals? A Behavioral Science Study (2012) 9 Journal of Empirical Legal Studies 567; *B van Rooij*/*M Brownlee*, Does Tort Deter? Inconclusive Empirical Evidence about the Effect of Liability in Preventing Harmful Behaviour, in: B van Rooij /DD Sokol (eds), The Cambridge Handbook of Compliance (2021) 311; *Dewees*/*Duff*/*Trebilcock* (fn 38).

54 *WH van Boom*, Handhaven in het privaatrecht (2007) 16 Nederlands Juristenblad 982.

than pedestrians. Second, tort law is not sufficiently inclusive to realise distributive justice. Only those whose damage can be attributed to liable injurers have the opportunity to be compensated. It may be questioned whether it is fair to put only those victims whose damage is coincidentally caused by a liable other in a privileged position.[55] In sum, tort law has rather limited capacities to realise a fair distribution of costs. Tax and subsidies seem to be more effective instruments to achieve this.[56]

Of course, it may be suggested that it is not fair to assess the value of tort law in terms of its efficacy in achieving single aims. As long as one merely focuses on single aims such as compensation or deterrence there will always be superior alternatives to tort law. But being inferior to an alternative regulation in connection with a single aim does not mean that tort law fails to adequately realise the various social aims collectively.[57] Is that not a sufficient argument for its existence?

But what if all the social aims tort law has been made instrumental to could be better achieved by other branches of law, such as administrative or criminal law? Strikingly, Weinrib does not seem to have any objections to handing over compensation issues related to accidents to public law. He claims, for instance, that confirming the adequacy of private law to the field of corrective justice is not at all inconsistent with the replacement of tort law by a compensation scheme on a New Zealand-model.[58] Nevertheless, once tort law governs, it has to be grounded on corrective justice. Its very structure excludes issues of distributive justice. What matters to Weinrib is that private law and public law retain their own separate identities: respectively based on corrective justice and distributive justice.[59] He claims that both systems of law 'actualise freedom in man's external relationships, and the freedom that law actualises – the recognition of a person's status as a self-determining entity – is the same for law in both its public and its private aspects'.[60] But how the law should combine these public and private aspects in order to promote freedom and autonomy cannot be derived from his analysis.

Below, I will explore this question in more detail with reference to Habermas' concept of private and public autonomy. Habermas' theory is a useful basis for understanding normative concerns held by corrective justice advocates without refer-

55 *PS Atiyah*, The Damages Lottery (1997) 97ff; *G Calabresi*, The Cost of Accidents, A legal and economic analysis (1970) 301ff.

56 *Enneking* (fn 41) 620ff.

57 *Cane* (fn 52) 232ff.

58 *Weinrib* (1989) 23 VULR 485, 681ff.

59 Weinrib does not clarify sufficiently why it is important that both modes of justice are neatly distinguished and divided among private law (corrective justice) and public law (distributive justice).

60 *Weinrib* (1989) 23 VULR 485, 687.

ence to their unrealistic anti-instrumentalism. First, I will address mixed theories, the approach of those who believe that tort law can be grounded on both corrective justice and instrumental considerations.

VI Mixed theories

In mixed theories, the essence of tort law, as governing reciprocal personal responsibility, is acknowledged without denying the relevance of instrumental concerns.[61] Cane, for instance, maintains that the raison d'etre behind tort law can be completely explained neither by its internal structure nor by its social functions. It is simply impossible for judges to ignore the wider social effects of their decisions. In cases such as *Donoghue v Stevenson*, the judge could not avoid the issue of which of two groups in society, consumers or manufacturers, should bear the risk of injuries caused by defective products.[62] Yet Cane does subscribe to Weinrib's claim that tort law should not be identified with the social aims it is made instrumental to. By regarding tort law merely as a system to compensate victims it can, for instance, not be distinguished from social security. And considering, as do legal economists, damages exclusively as providing financial incentives to deter negligent or risky behaviour generates the flawed presumption that an individual is allowed to inflict injury on another, provided that they are prepared to pay for the right to do so. This would undermine the standards of proper conduct which tort law embodies.[63] Tort law always has to be evaluated within the framework of its intrinsic or correlative structure, which means that its nature as a set of principles of personal responsibility cannot be ignored.[64]

Priel too suggests combining the correlative structure of tort law with its instrumental ambitions.[65] As he sees it, transformations of tort law are the product of a dynamic interaction of structure and the social aims it is made instrumental to.[66] Priel rejects the presumption of advocates of corrective justice that the law's intrinsic structure cannot change. Technological and social changes have created new

61 *Schwartz* (1997) 75 Texas L Rev 1801; *Cane* (fn 52) 228 f; *Plunkett* [2016] CLJ 366; *Priel* (2020) 13 JTL 31, 39 ff; *Keating* (2021) 14 JTL 45; *Loth* (2015) 22 Maastricht J Eur & Comp L 788; *AD On*, Strict Liability and the Aims of Tort Law, A Doctrinal, Comparative and Normative Study of Strict Liability Regimes (2020) 33.

62 *Donoghue v Stevenson* (1932) Appeal Cases (AC) 562; *Cane* (fn 52) 227.

63 *Cane* (fn 52) 217.

64 *Cane* (fn 52) 216 f, 230 f.

65 *Priel* (2020) 13 JTL 31, 39 ff.

66 *Priel* (2020) 13 JTL 31, 63 ff.

problems which affect the structure of tort law. Adjustments to the structure are needed to enable the law to continue to achieve prevailing social aims, or to make it more in tune with new social aims. However, the structure also contains a framework that restricts the incorporation of new tasks in tort law.[67]

VII Habermas: instrumentalism and rational discourse

Whereas Weinrib argues that tort law has to be grounded on principles of proper conduct, on normative considerations that exclude instrumental considerations, advocates of mixed theories do not reject the relevance of instrumental considerations in tort law and claim that both rationales can be aligned with each other. However, Habermas claims that there is some friction between both rationales. A central topic in his theory is how these rationales have to be balanced in order to achieve something that will not be a less major concern of Weinrib: citizens' freedom and autonomy.[68]

Habermas sees instrumentalisation as a driving force and inevitable aspect of the modernisation of societies.[69] It facilitates efficiency within the economic domain and the effective interventionist capacity of the state; necessary conditions of social wealth.[70] Instrumentalism can also be recognised in a materialisation of tort law. It guarantees that citizens do not merely formally enjoy equal liberties, but that they also have an equal opportunity to exercise these liberties in practice.[71]

However, Habermas observes a somewhat unbalanced process of modernisation in which an instrumental rationale, or 'system rationale' as he calls it, is becoming too predominant.[72] It is the consequence of the increasing impact of the economic market and of bureaucratic governing, accompanying an interventionist welfare state. These trends submit widening areas of life to a generalising logic of strategic considerations, efficiency and control. They threaten to crowd out a communicative orientation based on a discursive process of opinion- and will-formation ('rational discourse').

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67 *Priel* (2020) 13 JTL 31, 66 f.

68 I rely especially on *Habermas* (fn 11); and *J Habermas*, The Theory of Communicative Action, vol I: Reason and the Rationalization of Society (1987) and *id*, The Theory of Communicative Action, vol II: Lifeworld and System: A Critique of Functionalist Reason (1987).

69 *Habermas*, The Theory of Communicative Action, vol II (fn 68).

70 Ibid, 275 ff.

71 *Habermas* (fn 11) 404 ff.

72 *Habermas* (fn 11) 78 ff, 118 ff, 408 f.

Rational discourse is a reflexive mode of communicative action. These concepts are the building blocks of Habermas' theory.[73] Freedom, rights and autonomy are largely based on rational discourse. Rational discourse also underlies the integration of modern societies, since that can only, to a limited extent, be based on an instrumentalist means-end rationality (a 'systemic rationality').[74] In pre-modern, less complex societies, in which a systemic rationality was less developed, social order could be based on taken for granted traditional or religious norms. In modern, complex and pluriform societies, more advanced modes of communicative action are needed. Consensus has to be accomplished by the active exchange of arguments, by rational discursive deliberation, which relies on the compelling force of the better argument.[75] Habermas considers it to be the task of social institutions such as the law and mass media to facilitate these rational discourses.[76]

Habermas reformulates the Kantian concept of moral autonomy by putting it in terms of discursive opinion- and will-formation.[77] By implication, within the domain of law, autonomy is not restricted to private autonomy, but it also entails public autonomy. Private autonomy refers to rights providing the greatest measure of individual liberties, to a domain in which citizens can follow their own concept of the good and their own interests. It guarantees the independence necessary for the full participation in deliberation.[78] Public autonomy refers to the fact that citizens can assume they are the authors of the law, implying that they have rights providing them with equal opportunities of participation in the law-making process. They have to regard the legal order as a legitimate order. Both modes of autonomy are mutually connected ('co-original') and are necessary conditions for rational discourse.[79]

Habermas addresses the shortcomings of the liberal formal conception of liberties, since this conception ignores the power of citizens to exercise these liberties equally. State intervention, social entitlements and materialisation or instrumentalisation of tort law are unavoidable if one wants to create conditions that enable all citizens to equally achieve their private autonomy.[80] However, these interventions and transformations of law may impair discursive deliberation. They may create

73 Communicative action concerns action built on the use of language oriented to mutual understanding. It has to be distinguished from strategic action, which is based on a means-end rationale. See *Habermas* (fn 11) 18ff, 55ff, and *id*, The Theory of Communicative Action, vol 1 (fn 68).
74 *Habermas* (fn 11) 22, 39.
75 *Habermas* (fn 11) 22, 96f, 107f.
76 *Habermas* (fn 11) 99ff, 110.
77 *Habermas* (fn 11) 101ff, 120, 399.
78 *Habermas* (fn 11) 101ff, 118.
79 *Habermas* (fn 11) 104, 127, 409.
80 *Habermas* (fn 11) 391ff.

complex systemic interdependencies which subordinate individuals to the needs of the welfare state and erode communicative orientations. The fact that the bureaucratic and anonymous operation of the schemes providing social support prompt their clients to adopt a strategic position illustrates this.[81]

Unlike Weinrib, Habermas does not abandon instrumental concerns in tort law. Instrumentalist interventions may be necessary in order to create the conditions for rational discourse, provided that they do not promote strategic orientations that erode normative orientations based on rational discourse. Moreover, these interventions have to be sufficiently transparent to enable public discussion.[82]

VIII Tort law as a system

Habermas' concepts of private and public autonomy provide us with an evaluative framework within which we can conduct a critical analysis of the instrumentalisation of tort law. This framework does not only enable us to identify the benefits of instrumentalism, but also its pitfalls: the possibility that economic and bureaucratic ('systemic') imperatives may undermine the communicative – discursively based – underpinning of tort law.[83] Since Habermas is not very elaborate on the implications for tort law, I will apply his evaluative framework to this branch of law more specifically.

When tort law opens itself to instrumental concerns and does not exclusively focus on corrective justice, it has the potential to ground liability on a greater variety of normative considerations. However, the setting in which it operates seriously hinders such normative deliberation. The real issue is not the increasing relevance of instrumental considerations as such, as the adherents of corrective justice suggest, but the problematic effects of how tort law is institutionally embedded today.

There are several tendencies that decouple both parties from their conflict, and that erode the normative communicative dimension. In practice, tort litigation claims are seldom brought and defended by individuals. In the great majority of cases, insurers are the defendants.[84] Neither do claimants always present their case in court. The main reason for this is that when they have first-party insurance that

81 *Habermas* (fn 11) 404.

82 *Habermas* (fn 11) 316ff.

83 *Habermas* (fn 11) 392ff.

84 *Lewis* (2005) 25 LS 86–93ff; *Lewis*/*Morris* (2012) 39 J Law & Soc 562, 566f; *T Baker*, Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action (2005) 12 Connecticut Insurance Law Journal 1, 9ff.

covers their costs, the case will be handled by the insurer.[85] This implies that the injurer and the victim hardly play a role in the litigation process: the control over the settlement is often entirely outsourced to insurance companies and legal specialists.[86]

The increasing role of insurance developed in tandem with the growth in the number of lawyers specialising in personal injury. Tort in practice has to a great extent become a personal injury industry. Commercial and financial interests have a serious impact on its functioning.[87] A recent tendency, contributing to the fact that the attribution of liability tends to become completely decoupled from the relationship between victim and injurer, is for claims to be bought by investors, and seen simply as risks attached to investment products.[88]

The growth in insurance means that cases are often processed on a massive scale and in a bureaucratic manner, according to a rationale that compromises individual treatment. Many cases are settled in negotiations between insurance companies. They tend to simplify and routinise complex and difficult cases, in which, when attributing liability, they fall back on placing accidents in simple categories (such as rear-enders and red light cases) and rely on rules of thumb.[89]

This increased role being played by insurance creates a social context in which pragmatic and strategic considerations crowd out what is normatively at stake between injurer and victim. Baker found, for instance, that in the case of ordinary accidents, the damages claimed by the victims are generally determined by what they expect to receive from the injurer's insurance.[90] They tend to waive the opportunity to collect money from the injurer's own pocket. That would require a long procedural battle with unpredictable outcomes and few benefits. It is simpler to collect the compensation covered by insurance. Insurance companies are sometimes even willing to pay more than they are formally obliged to in order to avoid legal procedures.[91]

That the institutional setting may encourage pragmatic calculative motivations may further be derived from empirical evidence that shows that victims and injurers are driven by their lawyers and insurance companies into a strategic posi-

85 *Lewis* (2005) 25 LS 86ff.

86 *Lewis*/*Morris* (2012) 39 J Law & Soc 562, 567f; *Lewis* (2005) 25 LS 86ff; *HL Ross*, Settled out of Court: The Social Process of Insurance Claims (1970).

87 *Lewis*/*Morris* (2012) 39 J Law & Soc 562, 592; *Steiner* (fn 14) 110.

88 *J Kortmann*, Tort Law as an Industry (Inaugural Lecture University of Amsterdam) (2009) 22ff.

89 *Baker* (2005) 12 Connecticut Insurance Law Journal 1, 11ff; *Lewis* (2005) 25 LS 85ff, 89ff.

90 *T Baker*, Blood Money, New Money and the Moral Economy of Tort Law In Action (2001) 35 Law & Society Review (Law & Soc Rev) 275, 284ff; *Baker* (2005) 12 Connecticut Insurance Law Journal 6ff.

91 *Baker* (2001) 35 Law & Soc Rev 275, 291.

tion. Injurers are, for instance, not permitted to apologise, because an apology might be seen by judges and juries as admitting they were at fault. And victims are not allowed to accept apologies because this might give the impression that they are able to cope with the harm inflicted by the injurer, something that might have a negative effect on the amount of compensation granted. Victims experience this as being foreign to their own moral assessment of the case.[92] In terms of Habermas' theory, these interventions of insurance companies and lawyers compromise the normative communicative underpinning of tort.

We have seen how the operation of insurance is based on an actuarial rationale that focuses more on situational factors. A side effect of this is that the allocation of risks and attribution of liability become a matter of expert knowledge. The assessments of experts may escape common-sense normative intuition. The attribution of liability may also escape the normative assessments of average citizens because the distribution of costs of accidents requires insight in complex market mechanisms and long stretched out networks of interdependency.[93]

Weinrib's and Beever's claim that the individual injurer and victim are made instrumental to collective aims certainly applies to the perspective of law and economics. A deterrence model based on the Learned Hand Formula has a tendency to erode the normative dimension of tort law. By seeing damages exclusively as a financial incentive to deter negligent or risky behaviour, it conceives these damages and the duty to obey behavioural norms as equivalents. This rationale suggests that an individual is allowed to inflict injury on another provided that the individual is prepared to pay for the right to do so.[94] This calculative attitude may undermine normative compliance, compliance which is based on respecting the duties of care embodied by tort law.[95]

Taking into account the rationale underlying the practice of modern tort law, the focus is less on an active balancing of a wide range of values and more on liability and compensation issues being reduced to products of the contingencies of in-

92 *S Lindenbergh*/*P Mascini*, Schurende dilemma's in het aansprakelijkheidsrecht, in: WH van Boom/I Giesen/AJ Verheij (eds), Capita Civilologie, Handboek empirie en privaatrecht (2nd edn 2013) 437ff; *J Ilan*, The Commodification of Compensation? Personal Injuries Claims in an Age of Consumption (2011) 20 Social & Legal Studies 39, 47ff.

93 The liable person or company is often able to shift the costs to the insurer. If an insurer has to cover more damages, it will translate this into higher premiums. Thus, finally the costs will be borne by those who have an insurance policy, and often further be shifted via market mechanisms to other groups, eg to consumers because producers incorporate the extra costs of insurance in their prices.

94 *Abel* (1981) 8 Brit J Law & Soc 199, 203; *Weinrib* (1989) 23 VULR 485, 511ff.

95 *RJS Schwitters*, Non-pecuniary damages, financial incentive or symbol? in: B Niemeijer/RJS Schwitters (eds), Tort Law, Behavior and Context, Special Issue (2012) 2 Recht der Werkelijkheid 48ff.

dependently operating systems, as the markets and the practical and financial concerns of insurers. The classification of behaviour is predominately based on risk management and the particular dynamics of organised settings: the practice of tort law becomes an arena in which multiple pragmatic interests compete.[96]

The fear of Weinrib and Beever that in instrumentalist tort law the directly involved parties will become agents of factors beyond their personal relationship is not unrealistic. However, their suggestion for a restoration of corrective justice would imply a narrow focus on what happened between the injurer and the victim and ignore the communicative potential of law that recognises social concerns. Still, the way modern tort law is institutionally embedded gives rise to the risk that this potential will not be realised. Tort law becomes a 'moral technology', in which its functioning is increasingly determined by systemic imperatives such as its efficiency in achieving the social aims it is made instrumental to, and by the rationale of markets, administrative bodies and expert knowledge. Rather than seeing corrective justice as a remedy, it is crucial that tort law be grounded as much as possible on communicative rationality, a rationality that tends to be crowded out by the predominance of systemic imperatives.

IX A communicative underpinning of tort law

Social transformations imply that tort procedures can no longer be understood as cases in which only the mutual rights of the victim and injurer are at stake to the exclusion of all else. We have become more aware of the impact of social factors on our well-being and now see the causes of harm through a sociological or economic lens as well. However, this awareness is perhaps limited to a diffuse realisation with regard to the complexity of the multiple considerations at stake, and is not being transformed into the ability to make a well-considered balancing of values. The potential of a communicative justification are only realised when systemic rationalities do not erode normative evaluations. With respect to tort, this implies that the justification of liability has to include both an evaluation in terms of private and in terms of public autonomy.

Private autonomy requires an assessment of the extent to which losses can be seen as the consequence of a wrong that occurred within the context of the interpersonal relationship between injurer and victim. The aim of law is to protect the autonomy of both. To guarantee an equal distribution of liberty, law has also to

96 *Habermas* (fn 11) 404; *Steiner* (fn 14) 9, 111.

create conditions that enable everyone to exercise their private autonomy.[97] When I apply this to tort law, it should not exclusively be seen as a tool to realise social aims. However, these aims should not be completely ignored, as Weinrib and Beever claim. They may be relevant to create the conditions for citizens to equally realise their private autonomy. As, for instance, the protection of those victims who have to deal with more powerful injurers, or victims who are injured by risks that are seen as socially acceptable, may be urgent.[98] In other words, including instrumental concerns in tort law does not necessarily impair autonomy.

A justification in terms of private and public autonomy also has implications for the position of victim and injurer in dispute settlements. They should not be seen as passive clients and providers of a bureaucratic compensation system. Moreover, the attribution of liability should not be based on considerations that are completely foreign to the normative concerns of litigants and other citizens. As observed, communicative rationality is largely compromised by how tort law is institutionally embedded. The processing of tort cases is often outsourced to insurance companies and (legal) experts, who handle these cases behind closed doors. The settlement tends to be reduced to a sterile exchange of money, in which the injurer and the victim merely have a subsidiary position. This may not be problematic when it concerns less serious harm. However, in the case of more serious injuries, it is important that both parties have the opportunity to meet each other in a setting in which they can tell their story in a culturally meaningful context where there is ample room for accusations, justifications and apologies.[99] The same empirical studies that showed that victims filing claims are often driven by their lawyers and insurance companies into a strategic position also indicated that many victims are not merely interested in receiving financial compensation, but that they want procedures which facilitate communication with the injurer and acknowledgement of their violated dignity.[100]

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97 *Habermas* (fn 11) 418f.

98 Those who have the benefits of socially desirable activities are not committing wrongs, in the sense of Weinrib. Though why should those who deliberately perform financially beneficial activities not have the duty to compensate the victims of these activities?

99 Still, it must be possible for those victims who prefer a more anonymous and quicker settlement to avoid such procedures.

100 *L Hulst*/*AJ Akkermans*, Can Money Symbolize Acknowledgement? How Victims' Relatives Perceive Monetary Awards for Their Emotional Harm (2011) 4 Psychology, Injury and Law 245; *AJ Akkermans et al*, Slachtoffers en aansprakelijkheid. Een onderzoek naar behoeften, verwachtingen en ervaringen van slachtoffers en hun naasten met betrekking tot het civiele aansprakelijkheidsrecht, Deel II (2008) 43ff; *Lindenbergh*/*Mascini* (fn 92) 439; further empirical evidence which indicates that the appreciation of the tort procedure is strongly determined by facilitating participation, trust and respect, see *EA Lind et al*, In the Eye of the Beholder: Tort Litigants, Evaluations of their Experiences with

Private and public autonomy demand a fruitful interplay between the law, including how it operates in practice, and the normative deliberations of citizens, which implies that the assessment of liability and the distribution of costs should not be submitted to the imperatives of a bureaucratic rationale, financial interests and incomprehensible expert knowledge, which transform issues of civil liability into terms that are merely abstractly related to experiences in real life contexts.[101]

The private and public autonomy of citizens require social aims such as compensation, deterrence and issues of distributive justice to be incorporated into tort law and to be explicitly addressed in legislation and adjudication. While these issues in many cases do play a role, they are often 'hidden' in the motivations.[102] Public autonomy demands that motivations underlying legal decisions be transparent for citizens. In turn, legislator and judge have to be receptive to considerations originating from a public debate among citizens.

Earlier, the question was raised as to whether tort law should be eliminated when the social aims it is made instrumental to would be better achieved by other systems of law. For instance, deterrence might be better realised if the duty to compensate would not only lie with those whose behaviour causes harm, but if all parties violating legally protected standards of behaviour would have to pay fines. These fines could be collected in a fund that provides compensation to all victims of accidents, irrespective of whether the harm to them can be attributed to a liable other or not. This would result in a completely rational device in terms of deterrence and compensation. Yet, important values embedded in tort law might be lost. As Bublick maintains, such a system might be less meaningful for victims.[103] They could be viewed as recipients of welfare, rather than as actors who are morally entitled to compensation and the state might experience few obstacles to reduce the amount of compensation. Moreover, the compensation would be completely decoupled from what happened between injurer and victim. Those violating duties of care would compensate anonymous victims and the latter would not address the actor responsible for their ill fortune, but only have a claim on a fund. This undermines the rationale that someone who causes harm has to contribute to restoring the position of the party injured. Moreover, is it not in line with private autonomy

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the Civil Justice System (1990) 24 Law and Society Review 953ff; *T Tyler*, The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings (1992) 46 SMU Law Review 433ff; that the meaning of the payment of compensation is strongly determined by the context of the procedure, see *DN Hensler*, Money Talks: Searching for Justice through Compensation for Personal Injury and Death (2003) 53 DePaul Law Review 417, 451ff.

101 *Habermas* (fn 11) 411, 420.

102 *Plunkett* [2016] CLJ 366, 374; *Jansen* (fn 15) 23ff.

103 *Bublick* (2021) 14 JTL 279ff.

that the decision whether to claim compensation is the prerogative of the victim? In sum, this alternative compensation system would expropriate the directly involved persons their conflict.

Tort law empowers citizens by providing them with the opportunity to address those who have caused them harm directly. When more serious accidents are involved, it is important that the settlement involves more than just the sterile transfer of money. Victims must have the opportunity to confront the injurer personally with the consequences of their behaviour. However, it is the task of the courts to focus not exclusively on the responsibility of the individual injurer but to also address structural causes.

Fortunately, the realisation of the communicative potential has recently been given an enormous boost by public interest litigation.[104] Tort law has been mobilised as a tool by interest groups with a view to addressing public issues such as oil spills, climate change and fatal accidents on the battlefield that can be attributed to flawed political decisions. It is virtually impossible to evaluate these cases exclusively within a framework of corrective justice. When, for instance, climate cases are involved, interest groups ground their claims on the harm caused to citizens in all countries and future generations.[105] The potential of tort law to address public issues is fully realised in these cases.

In sum: tort law may be a primary device to empower ordinary people who have to pay the price for the social acceptance of risks, the defective functioning of corporate actors and other multifaced problems inherent in a technologically advanced society.

X Conclusion

In line with the perspective of the adherents of corrective justice, Habermas emphasises the value of autonomy, and yet he does not follow them in their claim that autonomy requires a wholesale rejection of instrumental concerns. What can be derived from his ideas and his brief exploration of tort law is that it is not instrumentalism as such that impairs autonomy, but how instrumentalism is embedded in today's tort law practices.

What is key when you follow Habermas' thoughts is the communicative underpinning of tort law, and that requires the mutual development of individual and public autonomy. Private autonomy guarantees the liberty of pursuing one's own

104 *Rustad* (2010–2011) 38 Pepp L Rev 524ff; *Enneking* (fn 41); *Gillaerts* (2020) 11 JETL 17, 22ff.
105 *Burgers* (fn 41).

conception of the good. Interventions by the state, or the instrumentalisation of law, are needed to guarantee the substantive basis for citizens upon which they can realise their autonomy. It is precisely because these interventions may be accompanied by an excessive predominance of systemic rationalities to the detriment of communicative rationalities that they should rely on the active public deliberation of citizens ('public autonomy').

Determining the relevance of tort law and assessing the aims to which tort law is instrumental should not be an anonymous affair in the hands of specialists and insurance companies which takes place behind closed doors. Neither should liability for injuries be translated into a sterile circulation of money. These are all tendencies that entangle citizens in systemic interdependencies that are foreign to their moral convictions and intuitions.

In the hands of insurance companies, experts and investors, tort law becomes a moral technology, a mechanism for the distribution of risks and damages that places citizens in the role of passive recipients of systemic interdependencies. The best device to counter this tendency is to bring the rationale of the tort system more in line with the sensitivities and motivations of citizens, and vice versa. This requires the legal procedure to give ample room not only to issues concerning the interpersonal relationship between injurer and victim, but also to social considerations. What matters most is that the norms and principles underpinning adjudication and legislation are transparent and accessible for citizens.