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ARTICLES

CORRECTIVE AND DISTRIBUTIVE JUSTICE IN TORT LAW

On the Restoration of Autonomy and a Minimal Level of Protection of the Victim

MARC A. LOTH*

ABSTRACT

Liability in tort law is traditionally justified by the notion of corrective justice, but what about the role of distributive justice? This simple question brings up fundamental issues, such as exactly what it is in which the victim is restored after the tort of the wrongdoer, and how to define the limits of this operation. The author defends a mixed theory of corrective and distributive justice in tort law, using the capability approach of Amartya Sen and Martha Nussbaum. According to this theory compensation is to be understood as the restoration of the autonomy of the victim, that is, of his or her capabilities. Since the capability approach is a theory of social justice, to be safeguarded by public institutions like the courts, this involves a minimal level of protection of the victim. Rethinking the role of justice in tort law opens a whole new range of questions.

Keywords: autonomy; capabilities; justice; liability; protection

§1. INTRODUCTION

Tort law is one of the most dynamic fields of private law. One of its main characteristics is its constant application to new societal questions, thus turning them into legal ones to be decided by the courts. In this article I will discuss some examples from the domain of new medical technology and of historical grief (see Section 2).

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One of the consequences is that tort law is the battlefield for the debate about the distribution of new social risks. From this perspective, tort law is a system and practice for the permanent debate about the distribution of the risks of the unhappy incidents that we may face in our lives. But there is a downside as well. The application of tort law to new domains stretches its concepts and rules far beyond their original boundaries, which not only threatens its coherence but also makes it rather indeterminate and unpredictable. Most of the time an adequate justification for a proposed new application is lacking, apart from the policy of victim-protection (which in itself justifies any tort claim). As a result, tort law is rather unprincipled and its doctrine is always some paces behind societal developments. What is lacking, from this perspective, is a serious quest for principles and policies that have the potential to justify and limit liability in specific cases, and thus to develop tort law on a theoretical level as well. There is nothing as practical as a good theory, so the saying goes, and there is a lot of truth in that.

This article attempts to contribute to this quest for justification in tort law. More in particular, it addresses the question to what extent the principles of corrective and distributive justice (or a combination of these) can contribute to the justification and limitation of non-contractual liability. To achieve this end, I will first present some recent examples of unprincipled liabilities, investigating what is lacking (Section 2).

Next, I will turn to the purposes of tort law as established and recognized by legal doctrine (Section 3). Are they of any help in the search for justification? The notions of corrective justice and distributive justice will then be analysed (Sections 4 and 5). We will end with a mixed theory, claiming that considerations of corrective and distributive justice each play their distinctive role in tort law (Section 6).

In an attempt to give that role flesh and bones, I make use of the capability-approach, as developed by Amartya Sen and Martha Nussbaum (Section 7). According to this approach, tort law is about the restoration of the autonomy of the victim after the harm inflicted upon him or her by the wrongdoer. The capability-approach will help to specify a minimal standard of protection in tort law, which offers not only a list of protected interests in tort law, but also a standard for restoration after a wrongful violation of one of those interests (Section 8). After sketching some further questions for research (Section 9), I will return to the unprincipled liabilities to see whether any progress in the quest for justification and limitation has been made (Section 10).

This article consists of two parts. The first half deals with the principles of corrective and distributive justice and tries to find the right mix of both types of considerations for tort law (Sections 3 to 6). The second part is an attempt to outline tort law as a system and practice for the protection and restoration of individual autonomy (Sections 7 to 9). Although the second part of this article rests on the particular mix of corrective and distributive justice that is stipulated in the first part, both parts can be studied and appreciated separately. The claims made in the second part do not follow from those of the first part, logically or otherwise, although I do think, of course, that both parts mutually strengthen each other.

§2. UNPRINCIPLED LIABILITIES

About ten years ago the Dutch Supreme Court (*Hoge Raad*) decided a wrongful life case.¹ Due to a chromosomal disorder, baby Kelly was born with severe handicaps, both of a physical and mental nature. The medical care provider had failed to diagnose the disorder during pregnancy, although the mother had informed her about antecedents in the family. This was later considered to be a medical fault by all experts involved. As a result the parents were robbed of the opportunity to have an abortion. They sued the care provider and the hospital for damages, claiming the defendants had infringed their right to self-determination.

The *Hoge Raad* sustained the claim, thereby surpassing the obstacle that the assessment of the damage requires a comparison of the actual situation with the hypothetical situation that would have occurred if the tort had not been committed. This involves a comparison with the situation had Kelly not been born, which is generally considered to be ‘outside the realm of human competence’.² The *Hoge Raad*, however, compared the actual situation with the situation in which Kelly would have been born healthy. This is remarkable, since the latter situation was outside the reach of the care providers in any event: Kelly suffered from a hereditary defect. The *Hoge Raad* justified its decision with an appeal to the discretionary power of the court to assess the damage in the most appropriate manner.³ Furthermore, the decision was justified with the argument that sustaining the claim enables Kelly, as far as money can support her, to lead a dignified life. I will not dispute this decision, but its justification is clearly insufficient. The first argument fails, because the power of the court to assess the damage in the most appropriate way was never intended to stretch the requirement of causation. The second argument seems intuitively right, but stated like this it is over-inclusive since it justifies almost any tort claim.

One other example may serve to illustrate my point. It concerns cases of ‘historical grief’, that is, the use of tort law in society to come to terms with its own, often painful past. A Dutch case that has attracted international attention is the *Srebreniça* case, in which the *Hoge Raad* held the Dutch state liable for the deaths of victims of the genocide that took place in 1995.⁴ Although the Dutch operated under the supervision of the UN, and the UN enjoys immunity from liability, the Dutch state was held liable to pay compensation in the form of damages. This decision was based on the principle of dual responsibility, considered to be a standard of international law, which entails responsibility on both levels, that of the sending states and that of the UN. The decision, whatever its legal merits, was generally considered to express a sense of collective responsibility on the part of the

¹ HR 18 March 2005, NL:HR:2005:5213, NJ 2006/606 (*baby Kelly*).

² In the words of the Supreme Court of California on 3 May 1982, 31 Cal. 3d 220, 643 P. 2d 954; 182 Cal. Rptr. 337 (1982) (*Turpin v. Sortini*). Recently the Belgian Court of Cassation (*Cour de Cassation*) decided accordingly (14 November 2014, C. 13.0441.N).

³ Article 6:97 Dutch Civil Code (*Burgerlijk Wetboek*).

⁴ HR 6 September 2013, NL:HR:2013:9225/9228.

Dutch for the genocide that took place. The same goes for the decisions of the court of first instance (*Rechtbank*) in The Hague in the case of Rawagedeh in Indonesia.⁵ The court held the Dutch state liable for several executions of citizens in the post-colonial war in the years 1947–1949. It is remarkable that the state's argument that the claims had expired was rejected by the court, since it was considered to be unacceptable according to the standards of reasonableness and fairness. Clearly, the courts do not hesitate to stretch liability to historical occurrences, but how far does this liability stretch? Claims for the compensation of historical wrongs such as the slave trade before 1863 are foreseeable, but are they sustainable? If so, on what grounds? And if not, why not? We are in need of principles here.

The development of tort law, however, lacks the use of principles justifying and thus limiting its application. In that sense, liability is unprincipled. Of course, legal doctrine refers to established purposes of tort law and we will turn to them in the next section. But they somehow do not play a substantive role in the discourse on liability in specific cases, perhaps with a few exceptions. One exception is the prevailing policy of victim protection, often used to justify liability. In tort law, it has been the justification of many developments, such as the extended use of the deepest pockets-argument, the growth of no-fault liabilities, and the reversal of the burden of proof in specific cases. The problem with victim protection, however, is that in itself it justifies any liability without restriction. It is one of those considerations of distributive justice that tends to dominate the debate (see Sections 5 and 6 below). Apart from the policy of victim protection, courts tend to make eclectic use of an amalgam of principles and policies – such as the principle of direct benefit, the principle of reasonableness and fairness, and economic goals like the saving of social costs or transactional costs – appealing to whichever principle suits their purposes best. Legal doctrine is to a large extent responsible for this situation, at least in the Netherlands, as it has systematically neglected the analysis and development of principles of tort law. Therefore, we need to turn to the principles of tort law, especially the principles of corrective and distributive justice, which have attracted attention in legal doctrine in the United States, as will be seen.

§3. THE PURPOSES OF TORT LAW

According to established doctrine tort law fulfils several purposes, such as (i) providing compensation, (ii) loss shifting and spreading, and (iii) deterrence.⁶ Besides this civil liability serves other purposes such as the satisfaction and appeasement of the victim,

⁵ District Court of The Hague 14 September 2011, NL:RBSGR:2011:BS8793; and District Court of The Hague 11 March 2015, NL:RBDH:2015:2442/2449.

⁶ W. van Gerven et al. (eds.), *Tort Law, Casebooks for the Common Law of Europe* (Hart Publishing, 2000), p. 18–21, with further references. I leave out the 'avoidance of economically inefficient behaviour', since that is not a generally recognized purpose of tort law in legal doctrine (as it is in the Law & Economics analysis of tort law).

the recognition of his or her legitimate interests, and the finding of the truth in specific cases. Tort law's main purpose however is to compensate the victim for the harm done to him or her. That compensation can come in different forms. First, compensation can be an equivalent for what has been lost. This so-called *equivalence compensation* can again be in different forms. (A) Compensation may come down to a restoration of the status quo, such as when someone is physically deprived of valuable property or money (which can be replaced by money). (B) Compensation may refer to a payment of the costs that are incurred by the victim, such as medical costs. (C) Compensation may refer to lost expectations, such as a specific earning capacity. Next, compensation can be a substitute or solace for what has been lost, and cannot be regained. This so-called *substitute compensation* serves the purpose to provide some advantage for the victim instead of those he can no longer enjoy, or to give him or her redress for pain or stress suffered, or for the loss of a loved one. Finally, sometimes compensation is used to justify a kind of egalitarianism. An example is the compensation of baby Kelly in terms of the life of a healthy child, although that was never a possibility (since she suffered from a hereditary disease). Apart from this last category, compensation is generally considered to be the domain of corrective justice, as justifying and limiting principle. The reason is that corrective justice requires equivalence between the compensation and the damage suffered, as will be explained in the next section (Section 4).

Apart from compensation, loss shifting and spreading are other functions of tort law. Tort law has, as a functioning system and practice, actual consequences in terms of shifting money between individuals as well as between individuals and collective bodies: that is, it has economic consequences. These consequences are caused by the functioning of markets, but also by the intervention of private insurance and social security. Especially when insurance is obligatory, damage will be collectivized to a large extent (road traffic is an example). In those cases, the question whether the tort is attributable to fault becomes less important and tort law simply establishes a redistribution of risks. That is why tort law as a system and practice for the distribution of social risks is not only the domain of corrective justice but also of distributive justice (distributive justice being the principle applicable in case of the distribution of scarce goods or opportunities between the members of a group or political community). Tort law also serves another social function, namely the deterrence of socially unacceptable or unwanted behaviour. As such, it can be an instrument for influencing behaviour and for the maintenance of other systems of norms. Deterrence differs in at least two ways from compensation and loss shifting and spreading. First, it refers to the behaviour of the wrongdoer, and not to that of the victim. Next, it is future-oriented instead of backward-looking. This is why deterrence is not quite suitable in tort law.

The question is whether the objectives of tort law have the potential to justify and limit liability. In theory they do but in practice they are not fit for the task because the infringement that a tort constitutes and the restoration it invites are not measurable or even comparable entities. For equivalence compensation the comparison between

infringement and restoration is still feasible, but for substitute compensation this is far less so, while the compensation of inequality clearly rests on the considerations of distributive justice. The same goes for loss shifting and loss spreading, since these goals of tort law refer to a whole population of justice seekers. Next, the immaterial purposes of tort law, like providing satisfaction for the victim, impose little or no restrictions on the attribution of liability. The satisfaction of the victim – being a subjective notion – can stretch liability in almost any feasible case. Finally, the prevention of misbehaviour fails in this respect as well, because the question for the preventive functioning of a remedy rests on an assessment of future events. Will the wrongdoer be kept from future misbehaviour by this remedy? Or will the remedy result in a calculating, or even defensive behaviour in the future? The answers to these questions will probably not offer a legal scheme to justify and limit the establishment or the amount of liability.⁷ It is most likely that the reverse is true: just because the purposes of tort law offer so little in this respect, they do not play a significant role in tort law. They are left alone, used mainly for educational purposes. That is too bad, since they do have – as guiding principles – a potential for justifying and limiting power in the interpretation of the concepts and rules of tort law. For that purpose, however, they have to be brought to life again, which provides the framework for the rest of this article.

§4. BEYOND CORRECTIVE JUSTICE

Let us start with the Aristotelian distinction between corrective and distributive justice, which has already been referred to. Corrective justice refers to a relationship between two parties in a voluntary or involuntary transaction (like contract or tort). In case of a disturbance of that relationship by a tort that causes damage – to which case the discussion will be limited – corrective justice requires restoration of the former situation. The restoration is equivalent to the infringement.

Distributive justice, on the other hand, refers to the members of a group or political community. The principle of distributive justice requires an equal distribution of goods or burdens between the members of the community, according to some predefined standard.

Both concepts of justice connect parties according to a sense of equality. Justice is about the fair distribution of one thing or another, since it is considered to be an injustice if one has too much or too little in comparison to another. In a common analysis, both forms of justice construe equality differently: distributive justice as the equal division of benefits or burdens according to standards of proportional equality, and corrective justice as the restoration of an existing equilibrium before one party acted wrongfully towards another and thus caused damages. For the law, the only thing that matters is

⁷ Although it may invite an economic scheme.

that one party acted wrongfully towards another and thus caused damage.⁸ It is then up to the court to compensate this injustice, because the injustice has caused inequality. Aristotle uses the picture of two equivalent lines. The wrongful act connects a part of one line with the other, corrective justice restores the initial position between both lines.⁹ On this basis, Weinrib and Coleman construed corrective justice as the prevailing principle in tort law.

Although their analyses diverge on crucial points, I will argue that they both suffer from the same defect, namely that the principle of corrective justice does not restrict liability and is in that sense ‘empty’.¹⁰ The reason is that it is impossible to make a strict distinction between corrective and distributive justice, and at the same time construe corrective justice in such a way that it limits liability. As soon as corrective justice has implications for positive tort law, it is not pure corrective justice anymore, but it rests on considerations of distributive justice as well.¹¹ The conclusion will be that tort law is not only ruled by the principle of corrective justice but by the principle of distributive justice as well. Therefore we cannot escape a mixed theory according to which both principles play their distinctive roles in tort law (Section 6). In this section, I will elaborate on the role of the principle of corrective justice, thus showing that the principle as such – that is, without considerations of distributive justice – is doomed to remain without teeth. This offers an opportunity to elaborate on the role that the principle of corrective justice can play in tort law (see below in this section).

Weinrib and Coleman differ in the way they construe the nature and role of the principle of corrective justice, although they both regard it as the leading principle in tort law. For Weinrib, the upshot of the principle of corrective justice is to restore the starting point between two parties – that is, what existed before one of them acted wrongfully towards the other. In that case, the principle of corrective justice requires restoration of the original situation. What the wrongdoer did and what happened to the victim are the active and the passive side of the same injustice. Restoration corrects both the injustice of the wrongdoer and the damage of the victim in one operation. Injustice and restoration are therefore correlatively structured.¹² The right of the victim that is violated and the one in which he or she is restored, are identical (‘the thesis of identity’). Therefore the

⁸ What counts as wrongful, is not defined here, but presupposed (R.A. Posner, ‘The concept of corrective justice in recent theories of tort law’, in S. Levmore (ed.), *Foundations of Tort Law* (Oxford University Press, 1994), p. 59–67, 61).

⁹ Aristoteles, *The Nicomachean Ethics* (Heinemann (ed.), Harvard University Press, 1975), book V, para. 2, no. 12, para. 4 and 5. So the standard interpretation goes, according to which corrective justice is essentially compensatory. For a different interpretation compare T.C. Brickhouse, ‘Aristotle on corrective justice’, 18 *Journal of Ethics* (2014), p. 187.

¹⁰ R.W. Wright, ‘Substantive corrective justice’, 77 *Iowa Law Review* (1992), p. 625–711, 630.

¹¹ W. Lucy, *Philosophy of Private Law* (Oxford University Press, 2007), p. 268 – 326.

¹² E.J. Weinrib, *Corrective Justice* (Oxford University Press, 2012), p. 9–38. Compare E.J. Weinrib, *The Idea of Private Law* (Oxford University Press, 2012). For criticism on the application of this idea of correlativity, compare A. Porat, ‘Questioning the Idea of Correlativity in Weinrib’s Theory of Corrective Justice’, *Theoretical Inquiries in Law* (2001), p. 161–174.

injustice does not entitle the victim to more, or to a different claim than the one to which the infringed right entitles ('the thesis of limitation'). Corrective justice is in that sense not only a ground of liability but also imposes a limit on liability.¹³ It excludes punitive damages, for example, since that remedy contains a punitive element and is therefore not equivalent to the infringement. So far for the limiting potential of the principle of corrective justice. The question of what rights parties have towards each other is not answered by the principle of corrective justice but by positive tort law. The principle of corrective justice requires restoration of the balance that is disturbed by the wrongful act, nothing more or less.

The notion of corrective justice in the hands of Coleman is more intertwined with tort law and therefore less formal than in Weinrib's analysis.¹⁴ Corrective justice is a moral principle that provides for reasons for restoration by the wrongdoer. This corresponds with a right to restoration of the victim. This is a second-order right, which only comes into existence after the infringement of a first-order right. Again, the question of what are the rights and duties between parties is answered by positive law, not by the principle of corrective justice. Corrective justice, then, consists of two elements: wrongfulness and responsibility (in the sense of agency).¹⁵ The functioning of the principle, however, is limited. As it provides for moral reasons for the wrongdoer for restoration, there may be contradictory reasons, and the last ones may even be overriding. A justified defence under prevailing law for example, overrides moral reasons for restoration. The principle of corrective justice is therefore conditional upon diverging rules in the law itself.¹⁶ Although the principle of corrective justice does restrict the application of tort law – since it is the expression of certain liberal values such as equality, respect for one's wealth and personality, and responsibility for the consequences of one's own actions¹⁷ – its influence is eventually limited. As Coleman himself mentions, at the end of the day it offers nothing more than an unspecified conception of the duties tort law can maintain.¹⁸ Although less 'empty' than in Weinrib's theory, corrective justice still does not offer anything close to a catalogue of protected rights or interests, which would indeed justify and limit liability.

It seems that the principle of corrective justice, however defined, does not provide for standards that have the potential to justify and limit liability. This is in any case the result of the analyses of both Weinrib and Coleman, which are the most sophisticated available. It is also in line with Aristotle. This does not mean, of course, that we can do without this principle. First, it offers a standard for the equivalence between the infringement

¹³ E.J. Weinrib, *Corrective Justice*, p. 91, 92.

¹⁴ Wright refers to both theories as 'Weinrib's explicit formalism' and 'Coleman's de facto formalism', which seems an adequate characterization (R.W. Wright, 77 *Iowa Law Review* (1992), p. 625).

¹⁵ J.L. Coleman, *Risks and Wrongs* (Oxford University Press, 1992), p. 325, 326.

¹⁶ *Ibid.*, p. 395–406.

¹⁷ *Ibid.*, p. 433.

¹⁸ J.L. Coleman, *The Practice of Principle, in Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2001), p. 34; W. Lucy, *Philosophy of Private Law*, p. 308–313.

and the restoration, although that standard is of a formal nature. According to the principle of corrective justice, the compensation will not extend the infringement. This is however just a formal, and not a substantial criteria. For a substantial criteria we would need an answer to the question: restoration in what? As long as we do not have that, we clearly lack an applicable standard for compensation. That explains why the principle of corrective justice alone cannot justify the decision of the *Hoge Raad* in the case of *bay Kelly* (see Section 2). The comparison between infringement and restoration needs a perspective. Money seems an appropriate means; that explains the preference of Weinrib and Coleman for financial compensation. Compensation provides restoration in the financial position of the victim. The downside of this preferred means of compensation is that it offers little opportunity for other remedies of an immaterial nature in tort law, like the offering of excuses.¹⁹

Next, the principle of corrective justice explains the bilateral structure of the civil trial, in which a claimant sues a defendant whom he holds responsible for his damage. The question then is who *in this trial* is to pay the damage – the claimant or the defendant – and not who *in this world* is to pay the damage.²⁰ Corrective justice is, in that sense, agent-relative. Besides, claimant and defendant are connected through happenings in the past. It is the wrongful act that has brought them together, even if they did not know one another (other than in contract law). Tort law is backward-looking, in that sense, to be distinguished from the forward-looking perspective in the economic analysis of tort law. The prevention of wrongful behaviour is a future-oriented goal, and therefore at odds with this characteristic of tort law. In short, the principle of corrective justice brings the parties together in a civil trial and offers a formal standard for the restoration required. As such, it safeguards tort law against any kind of instrumentalism, whether that is of a social, economic, or political nature. Therefore, it cannot be missed in tort law, although it is not sufficient for our justifying purposes.²¹ We have to move on, beyond corrective justice.

§5. NOT WITHOUT DISTRIBUTIVE JUSTICE

Distributive justice refers to the distribution of goods, opportunities or burdens amongst the members of a group according to general principles. The notion of distributive justice is in itself, like that of corrective justice, rather ‘empty’.²² To give it form and substance, two questions have to be answered. The first is what exactly is distributed, what is the

¹⁹ W. Lucy, *Philosophy of Private Law*, p. 313–317.

²⁰ J.L. Coleman, *Risks and Wrongs*, p. 374–385.

²¹ ‘So there is no tort law without corrective justice’, Gardner wrote (J. Gardner, ‘What is tort law for? Part 1, the place of corrective justice’, 30 *Law and Philosophy* (2011), p. 50), ‘on the other hand, there has to be more to tort law than corrective justice’.

²² I. Englund, *The Philosophy of Tort Law* (Dartmouth, 1993), p. 11.

substance of justice?²³ The usual answer is that distributive justice is about the distribution of goods, of wealth. Amartya Sen disagrees, since distributive justice is actually not about the distribution of wealth, but about the distribution of life opportunities. Wealth is just a means to reach that goal.²⁴ That is why Sen does not focus on the rise of income or the accumulation of wealth, but on the capabilities to live the life we choose. Individual autonomy is more important than wealth; what we can *do* is more important than what we *owe*. This insight has in fact influenced economics. In UN reports, the GNP as a standard of living has been replaced by the Human Development Index (HDI), which includes indicators like education and life expectancy. Besides, Martha Nussbaum has given this capability approach a twist, which makes it relevant for law as well (Section 7).

The second question each theory on distributive justice faces is according to what standard does a just distribution take place. As Sen points out, in the tradition of Enlightenment philosophy two kinds of answers have been provided. The first is that of the transcendental-institutional approaches, which seek the answer in general principles characteristic of just institutions (contract philosophers like John Rawls are the most familiar example). The problem with this approach is that general principles of justice are neither sufficient nor necessary in actual debates on justice. On the one hand, they would not be of any help even if they were available, on the other hand we can do very well without them in our attempts to identify and eliminate social injustice in a piecemeal fashion.²⁵ According to Sen, we need to shift the focus from the quest for general principles of justice to the comparison of different social arrangements under the perspective of justice. The goal of our research then, is not an encompassing theory of justice, but the practical comparison of different societies under this perspective. Of course, that will not result in a unified standard for the just distribution of life opportunities, but it will offer a better starting point for the elimination of injustice.

What does this all mean for private law? Considerations of distributive justice do play a role in tort law, both in concrete cases and for tort law as such. The case of Croesus and Diogenes can illustrate the first point.²⁶ Suppose Croesus unlawfully causes damage to Diogenes. In that case there are reasons of corrective justice to hold Croesus liable to compensate the damage. But there are considerations of distributive justice supporting that judgment as well, since compensation involves a shift of money from the rich Croesus to the poor Diogenes. Their role is however of a subsidiary nature. To illustrate this point we only have to 'reverse' the case. Suppose now that Diogenes wrongfully causes damage to Croesus. Now we have reasons of corrective justice to support liability of Diogenes, but reasons of distributive justice to reject liability (since that would involve a shift of money from the poor Diogenes to the rich Croesus). In tort law, however, they are overridden by reasons of corrective justice; Diogenes will be held liable to compensate the damage

²³ A. Sen, *The Idea of Justice* (Penguin, 2009), p. 225–321.

²⁴ *Ibid.*, p. 87–114.

²⁵ *Ibid.*

²⁶ W. Lucy, *Philosophy of Private Law*, p. 358.

of Croesus, whatever their relative wealth. Considerations of distributive justice can play a role in assessing the amount of damages,²⁷ however, which allows for a distinction. It seems that corrective justice is the justifying principle for liability in tort law, and that distributive justice plays a subsidiary role in the establishment of the remedy, and in the assessment of the damages to be compensated. Considerations of distributive justice, however, are like a cuckold in the nest of private law. Once they are in, they tend to dominate the deliberation.²⁸

Considerations of distributive justice do not only play a role in concrete cases, but in tort law in general as well. This can be illustrated by investigating the two questions mentioned, namely the substance of justice and the standard of equality (see further above in this section). The usual answer to the first question is that the purpose of tort law is to distribute risks, that is, burdens that are attached to our social activities. Honoré, for example, takes as a starting point of his analysis of tort law the principle that we are responsible for the good and the bad things that we cause by our actions. This is what he calls *outcome responsibility*.²⁹ Liability in tort law serves to maintain and effectuate this outcome responsibility. This goes for both fault liability and strict liability, since a faulty action is not a precondition of outcome responsibility. Thus, we are also responsible for the consequences of sheer bad luck. The justification is that responsibility for the risks of our social actions is the downside of the fact that we also profit from the fruits of those actions. This rests on an attribution of risks (the *risk principle*) that is grounded by considerations of distributive justice (*risk distributive justice*). The analysis of Honoré is helpful, since it shows that distributive justice in tort law refers to risks, that is, potential burdens or disadvantages.

Any distribution of potential burdens, however, implies a distribution of potential advantages. The distribution of risks and opportunities comes together. Considerations of distributive justice justifying a distribution of risks also then justify a distribution of opportunities. The most telling example is the direct benefit principle, which attaches the distribution of risks to the opportunity to benefit from certain activities (compare the notion of outcome responsibility). In tort law the direct benefit principle contributes to the justification of certain vicarious liabilities, such as that of employers for employees, or the possessors of a property.³⁰ However, in tort law, risks and opportunities are connected at a deeper level as well. The compensation for damages and other remedies can be regarded as attempts to offer the victim the same opportunities he had before the tort. If there is a risk principle for the just division of risks, then there is something like a *benefit principle* for the just distribution of opportunities as well. From the perspective of distributive justice, tort law is about the distribution of bad and good opportunities. Therefore, both principles fit well with the pretention of tort law, which is to provide for a fair distribution of the consequences of the bad things that can happen in a human life. From the perspective

²⁷ Article 6:109 Dutch Civil Code (*Burgerlijk Wetboek*).

²⁸ *Ibid.*, p. 368.

²⁹ T. Honoré, *Responsibility and Fault* (Hart Publishing, 1999), p. 14.

³⁰ C. van Dam, *European Tort Law* (2nd edition, Oxford University Press, 2013), p. 491.

of distributive justice, tort law is a system and practice of the distribution of risks and opportunities. Tort law does not provide a single set of standards or principles for this distribution, however, but it does offer a whole range of considerations of a distributive nature (which is the answer to our second question). These considerations are moral reasons to hold someone liable, complementing the reasons offered by the principle of corrective justice. Both principles do their work in tort law in close cooperation.

§6. INTERMEDIATE CONCLUSIONS

Our quest for the justification of liability in tort law allows for a few provisional conclusions. The first is that the most promising theory of justice is a mixed theory that unites elements of corrective and distributive justice.³¹ Corrective and distributive justice do their work in coordination. Corrective justice brings parties together. The tort creates the obligation for the wrongdoer to compensate the victim. This has both a substantive and a procedural component. The substantive component is the equivalence between the infringement and the restoration. The procedural component is the bilateral structure of the civil trial, where the debate takes place between the victim and the one he holds responsible for his loss. Distributive justice in tort law is about the distribution of risks and opportunities in society. It provides moral reasons for the attribution of risks in the form of the risk principle and the benefit principle. Further, it opens a perspective on the restoration of the victim in his or her individual autonomy, that is, in a position in which he or she enjoys the same opportunities for a dignified life in the way before the tort was committed.

On the relationship between corrective and distributive justice several views are proposed. Some writers propose a ‘distributive justice takes priority view’, according to which corrective justice is nothing more than a complement on a ‘distributively’ just society.³² This may seem an attractive division of labour at first sight; distributive justice establishes a legitimate distribution, and corrective justice refers to its restoration in case of an infringement. Yet, this idea is clearly distorted. If this was the division of labour between the two principles we would not need the principle of corrective justice in the first place, since the principle of distributive justice alone would do the job.³³ Next, the

³¹ Compare W. Lucy, *Philosophy of Private Law*, p. 266: ‘Mixed theories are where the (intellectual) action is (and that’s a good thing, too)’.

³² See for example R. Dworkin, *Law’s Empire* (The Belknap Press, 1986), p. 297–309; and R.L. Lippke, ‘Torts, Corrective Justice, and Distributive Justice’, 5 *Legal theory* (1999), p. 149–169. For criticism compare S.R. Perry, ‘On the Relationship between Corrective and Distributive Justice’, in J. Horder (ed.), *Oxford Series of Jurisprudence, fourth series* (Oxford University Press, 2002), p. 237–263; and S. Scheffler, ‘Distributive Justice, the Basic Structure and the Place of Private Law’, 35 *Oxford Journal of Legal Studies* (2015), p. 213–235.

³³ If the principle of distributive justice justifies a specific equilibrium, it also justifies the restoration of that equilibrium in case of an infringement (a clear example of Ockham’s razor) (P. Benson, ‘The Basis of Corrective Justice and its Relation to Distributive Justice’, 77 *Iowa Law Review* (1992), p. 531).

function of corrective justice is not to safeguard a just distribution, but to offer a remedy in the case of a wrongfully inflicted harm. Therefore, the considerations are at least partly different and the outcome need not coincide with the most just distribution of goods or benefits.³⁴ Others, like Weinrib, defend an ‘independence view’, according to which corrective justice is completely independent of distributive justice.³⁵ This proposal raises further questions as well, since at the end of the day both corrective justice and distributive justice are forms of justice. Others defend an ‘interdependent view’, according to which both notions are complementary with a priority for corrective justice. Taking into account the structure of private law, this last view seems most appropriate, in the sense that corrective justice prevails, but is in specific circumstances substantiated and complemented by considerations of distributive justice. As said before, corrective justice justifies liability, and distributive justice plays its subsidiary role in the substantiation of restoration and in the determination of the remedy that is most appropriate or in the assessment of the amount of damages to be compensated (see Section 5 above).

Two conclusions follow from this. First, distributive reasons alone can never establish liability. Liability can only be established on individual responsibility for damage caused by a wrongful act. Next, in determining the remedy and the amount of damages considerations of fair distribution do play a role. Besides, they substantiate the notion of restoration as the restoration of autonomy. As it turns out, considerations of distributive justice have a well-defined domain. Nevertheless, they behave like a cuckold in the nest of private law; once they are in, they tend to dominate the deliberation on liability. The dominance of the policy goal of victim protection is perhaps the clearest example. This makes the question into the justification and limitation of liability even more urgent. We will see that considerations of distributive justice do play a role here as well, since they can contribute to the justification and the limitation of liability. This begins with the recognition that tort law, as far as it rests on considerations of distributive justice, is not only ruled by a risk principle, but by a benefit principle as well, that is, tort law distributes not only bad, but also good opportunities.

§7. THE CAPABILITY APPROACH

The capability approach, as developed by Amartya Sen (see Section 5 above), is made relevant for law by Martha Nussbaum. For her, the core of this approach is the idea that certain capabilities are of crucial importance for a dignified life that is lived in freedom and cooperation with others. To live a worthy and autonomous life each human being must have certain capabilities and must be free to use them the way he or she prefers. In principle, it is possible to identify and list those capabilities. In the next paragraph,

³⁴ In other words, distributive and corrective justice differ in functional and normative perspectives.

³⁵ See for example E.J. Weinrib, *Corrective Justice*; E.J. Weinrib, *The Idea of Private Law*; and R.W. Wright, *77 Iowa Law Review* (1992).

I will present the list of Nussbaum. For now, it suffices to name the capabilities that are on it: life, health, bodily integrity, sensory perception, imagination, thinking, practical reason, emotions, social ties, other biological species, play, and the shaping of one's surroundings.³⁶ These capabilities are considered to be of crucial importance in the life of any human being, however this person wishes to use them. At a more fundamental level the notion of a capacity is the ultimate referent of moral respect and of the recognition of a human being as a subject of rights. Under the heading of 'the capable subject', Ricoeur has characterized the capacities to speak, to act, and to make moral imputations, as constitutive for the notion of a person in law.³⁷ The purpose of fundamental rights and their enforcement, therefore, is the protection and promotion of the distinctive capabilities of persons.³⁸

About the use of this list a few remarks are put forth. First, the list is not closed or definite, but on the contrary, is open and ready for development. In any society, it forms the object of debate and democratic decision-making, both in politics and in law. Nussbaum herself provided for a different list in her later work than in her earlier work.³⁹ Sen pointed out that it is also possible to use different lists for different practical purposes.⁴⁰ Second, the list mentions capabilities that the government should provide for every individual citizen in a just society. The principle of each person as a goal, and not just as a means for a goal, inspires the notion that a global level for a society as a whole is not sufficient.⁴¹ Nussbaum does pretend, however, that the list of capabilities transcends a specific culture, and rests in that sense on an overlapping consensus between different ways of life.⁴² Third, Nussbaum acknowledges the list does not entail a complete theory of justice but provides a foundation for a social minimum. For any capability, a threshold value can be defined, beneath which truly human functioning is not available for citizens.⁴³ Fourth, not all capabilities are of equal weight; practical reason and social ties, for example, seem to be of special importance for what it means to be a human being (that is, to live in freedom and in cooperation with others). Finally, Nussbaum distinguishes between different types of capabilities. Basic capabilities are our

³⁶ M.C. Nussbaum, *Frontiers of Justice, Disability, Nationality, Species Membership* (The Belknap Press of Harvard University Press, 2006), quoted from the Dutch translation, M.C. Nussbaum, *Grensgebieden van het recht, over sociale rechtvaardigheid* (Ambo, 2006), p. 76–78.

³⁷ P. Ricoeur, *The Just* (The University of Chicago Press, 2000), p. 2–4.

³⁸ B.P. Dauenhauer and M.L. Wells, 'Corrective Justice and Constitutional Torts', 35 *Georgia Law Review* (2000–2001), p. 912.

³⁹ Compare M.C. Nussbaum, *Grensgebieden van het recht, over sociale rechtvaardigheid*, p. 76–78; and M.C. Nussbaum, *Women and Human Development, the Capabilities Approach* (Cambridge University Press, 2000), p. 78–80.

⁴⁰ A. Sen, 'Capabilities, Lists, and Public Reason: Continuing the Conversation', 10 *Feminist Economics* (2004), p. 79.

⁴¹ M.C. Nussbaum, *Women and Human Development, the Capabilities Approach*, p. 74.

⁴² Referring to J. Rawls, *The Law of Peoples* (Harvard University Press, 1999), p. 133–172.

⁴³ M.C. Nussbaum, *Women and Human Development, the Capabilities Approach*, p. 75; and M.C. Nussbaum, *Grensgebieden van het recht, over sociale rechtvaardigheid*, p. 71.

inherited instruments (like sensory perception). Internal capabilities are the developed states of human individuals that are sufficient for the execution of specific functions (like the capability to make political choices). If, besides that, the (external) opportunity for the use of these capabilities is ensured as well, we speak of ‘combined capabilities’. The capabilities on the list belong to these combined capabilities, which means that they presuppose both the capacity and the opportunity to be used.⁴⁴ ‘Capabilities’, therefore, are synonymous with ‘possibilities’, or even ‘freedoms’.

Nussbaum’s list of capabilities has both a political and a legal meaning. The political meaning is that it is considered to be a requirement of distributive justice that the government guaranties its citizens a dignified life, that is, the realization of the capabilities above their threshold value. The listed capabilities display political consensus in a community, on the basis of which any citizen can make his or her own choices. Thus, they form the standard for a minimal level of justice. Of course, the list therefore has legal meaning as well. The list shows resemblance with catalogues of human rights, such as the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.⁴⁵ The list can be seen as a variance of, or an underpinning of, a theory of fundamental rights.⁴⁶ Given the purpose of fundamental rights – which is the protection and promotion of the distinctive capabilities of persons (see above in this section) – we can expect a similarity between Nussbaum’s list and fundamental rights. The central position of human dignity, the importance of the fundamental freedoms that constitute a plural society (like the freedom of speech, of conscience, and of union), the responsibility of the government to achieve this, the continuing discourse on its content and extension, and the combination of the elements and the open end of the list – all these characteristics are shared by the list of capabilities and catalogues of fundamental rights.

Still, Nussbaum sees advantages in the conceptualization in terms of capabilities.⁴⁷ The notion of a capability is deeper than that of a right, in the sense that capabilities constitute the foundation of fundamental rights, and not the other way around (see above in this section). Next, the notion of a capability makes it possible to leave some distinctions behind us that come with the use of a fundamental right, like that between a performance and an omission of the government, the recognition of a right and its realization, and its execution in the public and the private domain. For capabilities and their use, these distinctions are not relevant. Besides, the list of capabilities entails both rights of the first and the second generation, that is, both political and civic freedoms and economic and social rights. Thinking in terms of capabilities offers a benchmark for the question what it is to effectuate a fundamental right. Finally, capabilities are universal,

⁴⁴ M.C. Nussbaum, *Women and Human Development, the Capabilities Approach*, p. 85.

⁴⁵ Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391.

⁴⁶ M.C. Nussbaum, *Grensgebieden van het recht, over sociale rechtvaardigheid*, p. 78.

⁴⁷ *Ibid.*, p. 284–291; and M.C. Nussbaum, *Women and Human Development, the Capabilities Approach*, p. 96–101.

while the discourse on fundamental rights is still suspected of being of a Western nature. The worldwide application of capabilities is therefore more evident than that of rights.

What is the relevance of all of this for private law? The capability approach fits well with tort law, to which I limit myself here. As has been said, tort law is about the distribution of risks and capabilities, that is, about the distribution of good and bad opportunities in life. In that perspective, the wrongful causation of damage can be seen as the infringement of the autonomy of the victim, since he or she is robbed from capabilities, freedoms or opportunities. Evidently, this primarily refers to damage to a person, like in the case of *baby Kelly*. The duty to undo the consequences of this infringement of the individual autonomy of the victim comprises therefore both the restoration of the injustice done, as well as the damage in which it resulted. This duty implies that the victim is to be restored in his or her capabilities, that is, in his or her possibilities to live his or her life in freedom. In short, compensation is the restoration of autonomy. This provides an answer to the question: restoration in what? (see Section 4). The answer is: compensation is restoration in autonomy. This allows for a shift of focus from what the victim is no longer able to do (which is the usual focus) to what he or she is still able to do (which seems a more promising focus). This answer is based on a mix of considerations of corrective and distributive justice. Corrective justice requires restoration, and for reasons of distributive justice we understand that as: restoration of autonomy.

Besides, the principle of distributive justice can imply that the restoration of the autonomy of the victim is an appropriate response of the government as well. From the idea that a just society offers her citizens an equal right to a worthy life, the notion of a capability connects individual needs with public rights. This bridges the gap between public law and private law as well. The capability approach fits well with the growing influence of fundamental rights in private law (the constitutionalization of private law). From this perspective, public institutions like the legislator, the government, and the judiciary have a responsibility to safeguard for citizens a minimum threshold of human capabilities that constitute a just society. For political authorities like the legislator and the government this is more or less self-evident, but the judiciary has a responsibility in this respect as well, especially when the tort causes the victim to fall below an accepted minimal standard in society. The capability approach therefore not only provides a framework for the justification of liability, but also a theory on the just distribution in society. An example is offered by the legal means against discrimination designed to secure the right to equal dignity, the application of which is not only limited to public law, but extends to private law as well.

The following case offers a telling example. A girl of ten years old was the victim of a serious traffic accident which caused lasting impairment. The insurance company of the wrongdoer assessed the damage to the girl (who had said she wanted to become a hairdresser) on the expectation that she would have had children. Her earning capacity was diminished, which was justified by the statistical probability that she would have

stopped working to raise her children between the ages of 26 and 36, and would have worked from then onwards on a part-time basis. The compensation she received was therefore less than a man in her position would have received. Is this a realistic assessment of the damage, or a discriminatory infringement of her equal right to compensation? From the perspective of the capability approach, the conclusion that the insurance company discriminated against the girl seems inescapable. First the accident robbed the victim of the opportunity to lead a normal life, by which I mean an autonomous life of her own free choice.

On top of that, the assessment of damage robbed her of the (hypothetical) choice (if the accident would not have taken place) to continue working on a full-time basis (with or without children). According to the capability approach, the victim would have to be restored in the position, as far as it is possible in the given circumstances, to exercise her equal right to a dignified life. This requires a comparison between the life she expects to live and the life she would have led if the accident would not have taken place. The equal right to a dignified life requires, moreover, that this hypothetical life is not modelled after a statistical average life that may not correspond with her own life choices, but to a life in which she would have enjoyed all the freedom necessary to make existential choices of her own. Justice requires nothing less.

§8. A MINIMAL STANDARD OF PROTECTION

The capability approach sketches a picture of a just society whose members have the capability to lead a dignified life. In such a society they are enabled to live a life of their own choosing, to a certain extent secured by the government. This central idea of the capability approach is meant to be applied to fundamental rights, according to standards of distributive justice. However, it is relevant for private law as well. In tort law for example, normally two parties are in conflict about an unhappy event in the past that brought them together. As a result, the victim is offended in his or her person and claims damage from the person he or she holds responsible for this. The task of the intervening court, then, is threefold. First, it has to establish the responsibility of the defendant, which often requires an investigation into the facts of the case. Next, the court has to compensate the infringement of the legal interests protected by law. Finally, it has to find an appropriate remedy to restore the victim to a position equal to the one he or she occupied before the wrongful act of the wrongdoer.

In executing this threefold task, the court has to apply the principle of corrective justice, securing the equivalence between the remedy and the infringement. Against the background of its deliberation, considerations of distributive justice also play a role, however, since the court, as an institution of the state, is bound by this principle as well. When the tort is the responsibility of the defendant, and if it had a negative impact on the capabilities of the victim, it is up to the court to re-establish the victim as far as

possible in his or her original position. The central aim is to offer the victim the same opportunities he or she had before the tort, that is, as far as this is still possible. As said before, compensation is the restoration of autonomy (see Section 7 above). In serving this purpose, the list of capabilities can function as a guideline; not only for the legal interests that are protected, but also for the appropriate remedy to restore the victim to his or her original position. This raises questions yet to be answered, but for now the list with capabilities will be quoted.⁴⁸

1. Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
2. Bodily health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. Bodily integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. Senses, imagination, and thought. Being able to use the senses, to imagine, to think, and reason – and to do these things in a 'truly human' way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non beneficial pain.
5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
6. Practical reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)
7. Affiliation.
 - a. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

⁴⁸ M.C. Nussbaum, *Grensgebieden van het recht, over sociale rechtvaardigheid*, p. 76–78.

- b. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.
8. Other species. Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. Play. Being able to laugh, to play, to enjoy recreational activities.
10. Control over one's environment.
 - a. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.
 - b. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Some remarks about the intended use of this list of capabilities in tort law may be helpful.⁴⁹ The list contains ten capabilities which specify a worthy life, define individual autonomy, and are to be safeguarded to a certain level by the government in a just society. The infringement of one or more of these capabilities justifies restoration of the autonomy of the victim by the wrongdoer. Besides, that infringement may offer sufficient justification of a court order to restore the victim's autonomy, if the wrong committed has the consequence that the victim falls below a minimum level of capabilities. As said before, a truly human functioning is not possible beneath a certain threshold which is to be safeguarded by the government (see Section 7 above). It is up to the court, on a case-by-case approach, to fix these thresholds in its daily work. The list of capabilities therefore not only functions as a catalogue of protected interests, but also as a guideline to decide whether the threshold has been exceeded. In that sense, the list is the written codex of the protection the government offers to each victim, that is, to a model victim ('the other man on the Clapham omnibus', one might say).

So, the list of basic capabilities functions as a catalogue of legally protected interests. Remember, we were lacking such a catalogue, since the notion of corrective justice alone turned out to be rather toothless with regard to the limitation of liability. The notion of corrective justice in itself is rather 'empty', we concluded, since it does not provide for a list of protected rights or interests (see Section 4 above). Weinrib and Coleman were of the opinion that corrective justice refers to the rights and interests that are recognized by the law itself. This left us empty-handed. For this reason we turned to distributive justice,

⁴⁹ Next to the ones made in the previous section.

and we now end up with the idea that the principle of distributive justice does play a useful role in private law, in the sense that it supplies content for the principle of corrective justice, thus giving it teeth.⁵⁰ Thanks to the principle of distributive justice, we now have a list of protected interests at our disposal, in the form of the list of capabilities.⁵¹ This list of capabilities, moreover, seems to be specific enough to justify and limit liability. As far as the establishment and amount of liability contributes to the protection of the enlisted legal interests, liability is justified by the principles of corrective and distributive justice. If not, it clearly is not.⁵² The list therefore provides for an answer to this research question: whether the principles of corrective and distributive justice can contribute to the justification which decisions such as the *baby Kelly* case clearly lack. The answer is: yes, they can, by providing a list of capabilities or legal interests that constitute a minimum standard of protection in tort law.

Moreover, the list of capabilities serves another purpose as well, because it specifies and justifies the condition in which the victim is to be restored. Take the decision in the *baby Kelly* case. The principles of corrective and distributive justice justify that Kelly was brought into a situation in which she could live an autonomous life as if she had been born healthy. The justification is not to be found in the fact that her present condition is the full consequence of the negligence of the care provider and the hospital (which it clearly is not, because she suffered from a hereditary disease), but in the fact that this constitutes (in the circumstances) the best approximation of a situation in which she has the same life opportunities as any other. As a result, the decision that baby Kelly should be compensated to the extent that she can live an autonomous life as fully as possible is justified by a combination of the principles of corrective and distributive justice. Of course, these principles impose limits on the compensation to Kelly and her parents as well. There can be good distributive reasons for a further shift of money from the insurance company to the parents of Kelly, of course, but here the principle of corrective justice comes in, excluding such a shift. The reason is that such a further shift of money, however justified from the perspective of distributive justice, does not fit in the relationship between the parties involved.⁵³

⁵⁰ This may be called ‘a partly distributive-responsive view of corrective justice’ (after Walt), although the mix of corrective and distributive considerations that I propose is not mentioned by Walt (S. Walt, ‘Eliminating Corrective Justice’, *Virginia Law Review* (2016), p. 1322–1323).

⁵¹ Compare §823(1) BGB (*Bürgerliches Gesetzbuch*) in German law, which requires the violation of a right (to life, body, health, freedom, property, or another right (for example intellectual property, personality rights)).

⁵² Which does not exclude the justification by other principles or policies.

⁵³ The case of Croesus and Diogenes shows in fact the reverse. The first can claim damages on the ground of considerations of corrective justice, despite considerations of distributive justice. This corresponds with the first type of case distinguished by Walt (S. Walt, *Virginia Law Review* (2016), p. 1322): ‘cases in which there is a wrongful harm and a demand by distributive justice that it is not repaired’. Different from the proposal of Walt, considerations of corrective justice prevail here, although considerations of distributive justice may (according to Dutch law) play their role in the assessment of the amount of damages to be compensated (Article 6:109 Dutch Civil Code).

The capability approach further suggests that compensation in the form of the payment of a sum of money is not the primary purpose of tort law. Its primary purpose is to restore the victim to the position in which he or she can, as far as possible, live an autonomous life, that is, use the capabilities enlisted according to his or her own choices. The payment of money is a means to serve that purpose, nothing more nor less (as is rightly stressed by Sen, following a suggestion of Aristotle),⁵⁴ which implies that other remedies may be more appropriate (such as a declaration of the court, an injunction, apologies from the wrongdoer, and so on). The capability approach suggests that the court must first look for the most appropriate means to restore the victim to his or her capabilities. It is only if pecuniary compensation alone is available that this form of payment is appropriate.⁵⁵ In that case, the restoration of the capabilities of the victim is the standard for the assessment of the damage (taking the threshold into account). Thus, the list of capabilities is the standard for both the form and the amount of compensation.

One question remains to be addressed, and that is what it means to restore a victim to a position as if the tort had never happened.⁵⁶ Restoration in the historical situation which existed before the wrongful act is, of course, impossible, since time cannot be reversed. Restoration in the (counterfactual) situation which would have existed, if the tort had never taken place, may be hard to establish as well, since it refers to a hypothetical situation that never existed, nor ever will come into being. One of the practicalities that is hard to tackle in the assessment of damages, is that we never know with certainty what the life of the victim would have looked like, had the wrongful act not been committed (compare the case of the injured girl above). It therefore seems a more promising approach to forget about the notion of 'going back' to some kind of historical or counterfactual situation, and acknowledge from the start that the compensation of a victim of a tort by a remedy establishes a new situation. Of course, this shifts the problem of finding the most appropriate remedy from the restoration of some kind of situation in the past to a new situation, related to the old one by a justified intervention of the court. The question 'what if?' is replaced by the question 'what now?' This problem-shift seems to be a progressive one though, since it allows for considerations of distributive justice, next to considerations of corrective justice. The old situation is connected to the new one by a practical reasoning, in which both the principles of corrective and distributive justice do their work. The result is the best approximation of just liability that is within our reach.

⁵⁴ A. Sen, *The Idea of Justice*, p. 226.

⁵⁵ As in German law, where 'Naturalherstellung' has priority (§249(1) BGB).

⁵⁶ In the formulation of A. Ripstein, 'As if it Had Never Happened', *William & Mary Law Review* (2007), p. 1957.

§9. FURTHER QUESTIONS

The notion of a minimum standard of protection raises several questions, of which I mention two. The first is about its actual functioning. What kind of decisions do the principles of corrective and distributive justice justify? How do they mix? To illustrate these questions I will make use of a simple quantified representation, although I reject of course the suggestion that the capability approach can be quantified (in fact, one of the reasons for its transposition to tort law is the idea that the infringement of basic capabilities cannot be quantified in compensation in the form of money). Let us suppose that the quality of life of an individual as the addition of the threshold of the relevant capabilities amounts to 100. This constitutes the minimum standard of protection. Suppose further that A's quality of life is about 150, but that it is diminished by a wrongful act of B to 120. In this case there are strong moral reasons for restoration in the original position, despite the fact that A still lives above the minimum standard. These are reasons of corrective justice of course, not of distributive justice.⁵⁷

Now, suppose the quality of life of A is diminished by the same cause to a level below the minimum standard, say, of 70. Again there are strong moral reasons to compensate, but these are now of a mixed nature. Up until the level of 100, they are considerations of both corrective and distributive justice, above 100 they are considerations of corrective justice only. This is because the compensation below the minimum standard is not only a matter of restoration, but also a matter of redistribution. Let us take another case. Suppose someone's quality of life does not exceed a value of 80 and suppose further that it decreases because of a wrongdoing to 40. Does the victim then have a claim to 80, or even to 100? Corrective justice justifies a compensation to 80, but distributive justice requires a compensation to the level of 100. One can imagine that considerations of distributive justice prevail, because it is the court's responsibility to guarantee the social minimum that a dignified life requires.⁵⁸ As Klimchuck wrote: '(...) Nothing prevents us (the courts, that is) from taking advantage of a tort to make the world a distributively more just place'.⁵⁹

One may question this, of course. On what ground is it justified to present the bill of some social injustice to the accidental wrongdoer? The answer may be that if the wrongdoer has caused damage, and if corrective justice justifies his liability, he bears the risk that the compensation is higher than was foreseeable. This seems just another

⁵⁷ Compare the third type of case distinguished by Walt (S. Walt, *Virginia Law Review* (2016), p. 1322): 'cases in which there is a wrongful harm but no demand by distributive justice for or against repair'. In this type of case a 'partly distribution-responsive view of corrective justice' (as proposed here) demands restoration on the ground of considerations of corrective justice exclusively.

⁵⁸ Compare the second type of case distinguished by that (S. Walt, *Virginia Law Review* (2016), p. 1322): 'cases in which there is both a wrongful harm and a demand for repair by distributive justice'. In this type of case a 'partly distribution-sensitive view of corrective justice' (as proposed here) demands restoration on the ground of considerations of both corrective justice and distributive justice.

⁵⁹ D. Klimchuck, 'On the Autonomy of Corrective Justice', 23 *Oxford Journal of Legal Studies* (2003), p. 58.

instance of the well-known saying that the tortfeasor takes the victim as he finds him. He may have good luck or bad luck, depending on the circumstances. Again, it is the principle of corrective justice that justifies liability, but the principle of distributive justice comes around the corner in choosing the remedy and in assessing the damages to be compensated (see Sections 5 and 6).⁶⁰ Still, there is something counter-intuitive in this line of reasoning. Is it just to hold the tortfeasor liable for a sum of money that exceeds the damage suffered by the victim as a consequence of the tortfeasor's doing? One way to ease this intuition may be to establish an insurance or fund to compensate the difference, or simply to pass the bill to the government. After all, it is a redistribution taking place here. These issues provide complicated questions for further research and discussion.

A second question may be: why does the list of capabilities mention in particular these interests, and not others? It has been pointed out by Sen that the list of capabilities can vary, dependent of its purpose (see Section 7 above). As a starting point I made use of the list of Martha Nussbaum, without much consideration for the question whether it should be amended for its use in tort law. That interests like the victim's life, bodily integrity, and practical reason, deserve protection in tort law, seems rather obvious. But what about more frivolous interests, like the relation to other species, or play? Do they deserve to be protected by tort law as well? Disagreement is possible here and further debate is required. The debate on the limits of liability could be conducted in terms of the interests to be protected and the thresholds to be taken into account. The courts give guidance in that debate, on a case-by-case basis. The list of capabilities tries to facilitate the debate on liability, its justification and limitation: not by providing a final list (which would rather end than facilitate the debate), but by forming a starting point for the discussion on the justification of liability in the light of protected interests. In that discussion, the principles of corrective and distributive justice do play a role, along with other principle and policies. Further research is required here. This would put new life into the ongoing debate about the principles that rule the decision-making process of courts, and what is more, it would frame that debate in substantive terms about the interests that we consider worthy of protection, and those we deny of that status.

§10. JUSTIFIED LIABILITY?

Can all this help us in dealing with unprincipled liabilities? I have already sketched the consequences for the decision in the *baby Kelly* case, with which we started (see Section 8 above). I do not pretend that the principles of corrective and distributive justice can help us out in any case, if only for the reason that there are more principles and policies at play. However, I do think it helps to identify the violated interests involved, for example in the

⁶⁰ Further complications on the side of the wrongdoer are feasible, for example if he or she falls below the minimum because of the payment of the compensation of damages caused. The court should take that into account as well.

abovementioned cases (see Section 2 above). The events in Srebreniça and Rawagedeh have historical meaning, but they also display torts that have robbed individuals of their loved ones. The victims have lost their lives – the most precious legal interest – for the protection of which Article 2 of the ECHR creates an active duty of care for states. The state of the Netherlands is therefore responsible, the very actor which is also responsible for a just society, in which a minimum level of capabilities is ensured for its members. Interestingly enough, in both cases questions arise whether this responsibility extends to members of another society, even at other times. The question is not hard to answer if the government has assumed responsibility, either by ruling that society (in colonial days), or by accepting the task of securing safety and security (in Srebreniça). Compensation is appropriate in these cases, at least to the level of the minimum standard of protection guaranteed. This implies that the victims are compensated to the extent that they can live an autonomous life, in the society and time they live it.

Let me conclude. Our quest for the justification of liability in tort law, especially in terms of the principles of corrective and distributive justice, shows that these principles are able to justify and limit liability. On its own the principle of corrective justice is rather ‘empty’, but in combination with the principle of distributive justice, it provides for some grip on positive tort law. In this article, I have proposed that the principle of distributive justice is about the equal distribution of life changes or opportunities, thus introducing the capability approach in tort law. This approach fits well with both the overall purpose of tort law (seeking the restoration of autonomy) and its practical application in case law (seeking to protect a list of basic capabilities). Its introduction in tort law illustrates that tort law is not primarily about the payment of damages, but about any remedy that restores or strengthens the autonomy of the victim (immaterial remedies like the offering of excuses included). Moreover, it makes us aware that tort law is not only about the restoration of the relationship between two private citizens, but also about the equal protection of citizens in a just society. The list of basic capabilities and their threshold values represent a minimum level of protection, to be safeguarded by the court, as part of the institutional structure of the state. This amounts to situations in which it may be considered to be justified to hold the wrongdoer liable for compensation that exceeds the actual damage (the difference to be paid from an insurance or fund, or directly by the government). Basic capabilities and fundamental rights are deeply connected. It is not surprising that at the end of the day, the requirements of justice in private law and public law are not that different.