FACULTY OF LAW AND CRIMINOLOGY

Instituut FINANCIEEL RECHT
FINANCIAL LAW Institute

SOME THOUGHTS ON THE REGULATORY USE OF TORT LAW IN A CORPORATE CONTEXT

WP 2022-23

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Financial Law Institute
Working Paper Series

UNIVERSITEIT GENT

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Abstract

This paper is the draft version of my contribution to the now already published Liber Amicorum Xavier Dieux. It is a very essayistic text, as is allowed in a Festschrift. In it, I argue that tort law is being transformed from a mechanism to award damages into a regulatory tool that can be used by judges to create new rules that they then enforce against corporations (always at the request of a plaintiff, of course). This development is only possible because some -the Dutch legal system is a primary example- have transformed the concept of negligence from a standard, i.e. a yardstick to measure and judge behaviour, into a duty to at all times behave with due care, and have allowed private plaintiffs who have not suffered any damage (let alone even argued about causality), but who have at best been exposed to a risk, to enforce this new-found duty. I argue the first instance decision in the Dutch climate litigation against Shell is an illustration of the excesses to which this can lead; I argue this Dutch court decision would in Belgium be incompatible with our statutory provisions on tort law, and would be unconstitutional because it violates the separation of powers by creating and allocating a new subjective right on the basis of a political balancing of interests which the court misleadingly tries to present as the mere application or enforcement of a pre-existing human right (right to life which entails right to a climate that does not heat up too much).

In the contribution I also offer some (again, essayistic) thoughts on the ideal distribution of liability between companies on the one hand and their directors and managers on the other. I discuss the circularity problem and whether it can be solved by concentrating liability exclusively on directors/managers instead of on the corporation. This seems to be necessary if one seriously thinks tort law and enforcement in general can have preventive (prophylactic, ex ante) behavioral effects, an idea for which there seems to be, however, little empirical proof.

The author welcomes your comments at hans.dewulf@ugent.be

The final version of this paper is published in *Liber Amicorum Xavier Dieux* (Larcier, Brussels, 2022, 2 vols., 1847 p.

The entire working paper series can be consulted at www.fli.ugent.be

Some thoughts on the regulatory use of tort law in a corporate context

Including: why *Shell Milieudefensie* constitutes an abuse of tort law

Hans De Wulf, Financial Law Institute, UGent

Xavier: no god, but still great

The first time I came across Xavier's name was probably in my third year of law at university, when our professor of administrative law (yes) mentioned that he was this extremely gifted young lawyer, the greatest talent of his generation, at ease in various disparate fields of law, whose brilliant article on a topic I forget (the lecture was about contracting with the government and with state-owned firms like our national railway company) we absolutely had to read as an example of how we ourselves should learn to reason. I thought to myself: here, apparently, is a name to remember (and easily remembered). Later, when writing my Ph.D. on whether anything like a UK/US-style duty of loyalty in corporate law could be construed by judges in continental European jurisdictions, Xavier's then "fresh from the printing press" Ph.D. on "The respect due to the legitimate expectations of others"[1] as a general principle of law (and as the true source of contractual and tort obligations) was one of the few intellectually stimulating Belgian works of legal doctrine I consulted (others, but they were rare, were "Bewindsbevoegdheid" by Walter van Gerven, and Matthias Storme's book on good faith, in my view similar in intellectual spirit- but not in content- to Dieux's work; and there were of course a few smaller gems by Ludo Cornelis). Here was indeed someone who did quite a bit more than many Belgian legal scholars at the time (that mainly developed rhetorical arguments for a point of view on some point of law, unless they restricted themselves to describing statute and court cases), someone who was prepared to think for himself- and capable of doing so- with the justified confidence not to be too bothered by how others had approached the topics at hand.

Originally I intended to write a contribution for this *liber amicorum* on how Xavier's ideas in "Le respect dû aux anticipations légitimes d'autrui" had not even been radical enough, but I began work on that topic too late to produce something considered, so I took another topic. But rereading *Le respect dû* made me realize that that work contains many discussions that are relevant to the topic I'm going to discuss here, such as the considerations in the first two chapters on the role of general principles (of law) in creating law and obligations, and the thoughts on *gouvernement des juges* in the later chapters of the book.

Readers should be warned though: in what follows I roam widely and not exactly in a straight line. Also, my treatment of the broad, even vast topics I touch upon (and it is merely touching upon) are note exactly based on an exhaustive analysis of a comprehensive set of literature,

[1] X. Dieux, *Le respect dû aux anticpations légitimes d'autrui- genèse d'un principe general de droit*, Brussels: Bruylant, 1995, 286 p.

nor have many ideas attained a sufficient degree of ripeness. So I'll be presenting green fruits. But that's the beauty of *Festschrifte*: they allow academics to freewheel, instead of surgically analyzing a well-defined problem. Xavier himself has roamed widely during his writing career and made important contributions to not only corporate law and securities regulation, but to civil law in general, and so I thought it would be fitting to write on a topic at the intersection of torts and corporate law.

I. The transformation of tort law (or: what is tort law for?)

1. From a *standard* of care to an independently enforceable *duty* of care used for quasi-regulatory purposes

This contribution starts from the finding that tort law is being transformed: from a set of rules that allows injured parties to claim compensation for damage that was inflicted as a result of fault (negligence) or risk creation (strict liability), to an instrument not only of private enforcement but even of regulation through courts, at the initiative of private parties.[2]

Of course, many reading the previous sentence will immediately cry out that tort law even in western continental Europe -the part of the world we're concentrating on- has always been about more than the traditional trio of fault, damage and causation as enshrined in the first ever statutory provision most law students hear of, in Belgium: art. 1382 Civil Code. That's certainly true. The domain of strict liability -faultless liability- has constantly expanded[3]. Instead of paying monetary damages, restitution in kind has always been and still is an important -and in Belgium theoretically the primary and favoured way- of making good[4]. Awarding damage is not restricted only to reparation and compensation, but symbolic damages are awarded in order to offer "official" recognition (and the satisfaction that may come with that) to persons whose interests have been damaged or whose (eg. personality) rights have been infringed, and even outside the area of US-style punitive damages (unknown in Europe), tort law damages are used to set an example (exemplary damages) and hence also at least partially to have a deterrent effect, but sometimes also to express through the official

[2] On the functions of tort law, and esp. the (alleged) possibility to obtain a declaratory judgment based on art. 1382 Civil Code, see recently in Belgium P. Gillaerts 'De multifunctionaliteit van het buitencontractuele aansprakelijkheidsrecht en de meerwaarde van de declaratoire vordering', *RW* 2020-2021, p. 1242-1259.

[3] For Belgium, see already a long time ago H. Bocken,"Van fout naar risico: een overzicht van de objective aansprakelijkheidsregelingen naar Belgisch recht", *TPR* 1984, 329 ff. See generally on the difference between strict and fault liability, and arguing (§ 1005, p. 306)) that because of the blurred lines of the distinction, it is essentially outdated, C. Van Dam, *European Tort Law,* 2nd edition 2013, Oxford: Oxford University Press, p. 297 ff.

[4] See recently very thoroughly on restitution in kind S. De Rey, *Herstel in natura*, Brugge: die Keure 2019 and the summary in S. De Rey, 'Herstel in natura van contractuele en buitencontractuele schade: onbekend, onbemind?', *RW* 2019-2020, afl. 5, p. 163-180.

representative of the state that is the judge, the moral condemnation of certain torts by the community[5]. This is all old hat.

More importantly for our purposes, many would argue that deterrence, and therefore some form of policy in the sense of an attempt to regulate behaviour, has always been a function of tort law[6] – a point of view that received considerable impetus with the publication of Calabresi's landmark *The Cost of Accidents* in 1970 and the subsequent economic analysis of tort law. Also, in Europe debates about private enforcement in their present-day form go back at least 20 years, to the competition law cases of *Courage* and *Manfredi* [7]and their progeny in which the European Court of Justice stressed that the effective enforcement of competition law required a possibility for private parties to claim damages for the infringement of competition law rules.

Still, recent developments in Europe are in my view indicative of a transformation taking place, in which private enforcement of behavioral rules through tort law is taken to a next level. This transformation in the use and conception of tort law takes place against the background of increased attention in public debates, policy and among firms towards ESG issues[8]. Dutch courts play a vanguard role in this transformation.

Some elements of the transformation include: a conception that there exists a general legal duty of "careful", non-negligent behavior that can be enforced as such through tort law, irrespective of whether concrete damage and a causal link have been established; the idea that human rights are a core element of this general, stand-alone duty of care; consequently, the conviction that the order that the judge issues based on tort law can consist not of a damage award, but of an injunction that is intended to prevent damage (where this injunction sometimes has the effect of a "preventive" restitution in kind); more generally, shoving aside for policy reasons the requirements to determine causation and damages on the basis of the traditional theories, and focusing instead on the goal of internalizing negative externalities caused by firms, that is, forcing the company to bear the real societal costs of its production process[9]; and by allowing the judge, acting as a regulator, to "find" norms of behaviour that are deduced from the general duty of care, to determine what the general good requires in

[5] See the examples of tort law judgements in the UK, France and Germany being used for purposes of recognition, vindication, punishment and prevention in C. Van Dam, *European Tort Law,* 2nd edition 2013, p. 349-352.

[6] From a French perspective, see Geneviève Viney, *Introduction à la responsabilité*, Paris: LGDJ, 4th edition 2019 but already in the second edition of 1995. For Belgium, see the many references to Belgian authors in footnote 36 of P. Gillaerts 'De multifunctionaliteit van het buitencontractuele aansprakelijkheidsrecht en de meerwaarde van de declaratoire vordering', *RW* 2020-2021, 1242. Generally, see also, with less emphasis, European Group on Tort law, *Principles of European Tort Law*, Vienna: Springer, 2015, 38.

[7] Case C-453/99 Courage Ltd v. Bernard Crehan [2001], ECR I-06297 ("Courage"), paras 26–28 and joined cases C-295/04 – C-298/04 Manfredi [2006], ECR I-06619 ("Manfredi"), paras 60, 89–91.

[8] Environmental, social and governance issues, where "social" is deemed to include a reference to human rights.

[9] We use "production process" in a broad sense, also covering those firms who do not produce any products, but only provide services.

specific domains, like the reduction of CO2 emissions, which can easily lead to a *gouvernement des juges*[10], by which I mean that judges take political decisions, namely decisions to decide to which extent one value will win from another with which it is irreconcilable. The first instance decision of the The Hague court in *Shell Milieudefensie*[11], which we'll discuss towards the end of this contribution, is illustrative of most of these trends.

Using tort law as a regulatory tool towards corporations raises at least three sets of questions, and we here want to offer some thoughts on mainly the first and third of these issues:

- Who should be addressed by this new-fangled duty of diligence and by liability claims: the corporation, its directors and/or officers, or both? A discussion of this question must involve a discussion of the so-called "circularity problem".
- Should shareholders, too, especially controlling shareholders like parent companies, be held liable for torts committed "by" corporations, and is this incompatible with limited liability (maybe) and if so, is limited liability for torts desirable ? (the jury is still out).
- Is the regulatory use of tort law compatible with the separation of law and politics? (yes, except if as is happening now fact-finding judges applying tort law do not limit themselves to establishing that a *right* or a pre-existing statutory *rule* has been violated, but seize the power to determine what the general *interest* requires, based on an interpretation of human rights; this is a political task -weighing incompatible interests against each other in order to come up with a decision on the behaviour required of citizens and firms- in which only constitutional courts should be involved, not regular courts).

2. From compensation to deterrence

Traditionally, the function and objective or purpose of tort law was to provide compensatory justice[12], that is to award damages. We need not discuss the extent to which tort law damages were initially mixed up with the idea of paying a ("penal", "public law"?) fine -also as an alternative to blood feuds and revenge by victims- or to which extent punitive damages were allowed or to which extent not damages but restoring the situation as it was before the tort intervened was the preferred policy option, to be confident in our assertion that at least for the past two centuries, first time students of tort law in Europe would regard tort law essentially as a system for awarding damages. And of course, in Europe most professors of tort law would

[10] On the general issue in the law of obligations, see of course R. Kruithof, "Naar een 'gouvernement des juges' in het Belgische verbintenissenrecht ?", in *Hulde aan Prof. dr. Robert Kruithof*, Antwerpen: Maklu, 1992, 29-79.

[11] Court of first instance Den Haag (Netherlands) 26 May 2021, ECLI:NL:RBDHA:2021:5337, available (also in English) at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5337

[12] Christopher Hodges cites a series of philosophers, from Aristotle through Grotius to enlightenment authors like Samuel Pufendorf who apparently saw this as the proper function of tort law: C. Hodges, *Law and corporate behaviour*, Oxford, Hart/Beck/Nomos, 2015, 50, footnote 23.

still assume that this is by far the most important function of tort law-some would argue the only one. Many textbooks will add that tort law can also have deterrent effect[13], but in Europe this does not seem to be regarded as a primary function or goal of tort law, or is, at the very least, usually not put on equal footing with compensation as a goal of tort law; at most it plays a subsidiary role, or deterrence is seen as a possible side effect of tort law, but not one of its core functions, or goals pursued. Also, many doubt civil liability/tort law has in actual fact serious deterrent effects. This is not so much because many dangerous activities are covered by insurance which to some extent seems to undermine the incentives for individual behaviour that could potentially emanate from tort law rules, but simply because most students of law do not believe that many people are rational cost-benefit analysers or because they believe the deterrent effect will mainly be on those who were not inclined to commit torts anyway, a group of people who will thus at most from seeing others condemned on the basis of tort law receive positive feedback reinforcing their tendency for virtuous behaviour, while those who are prone to committing torts and actually commit them are not deterred by tort law.

In the US, a different attitude seems more widespread, although probably not dominant: deterrence is far more frequently than in Europe regarded as a primary goal of tort law. My hunch is that this has something to do with the fact that US scholarship took a more theoretical turn about 20 years earlier than European legal scholarship (he difference is still considerable) and at least in certain areas, certainly the study of business law, was considerably more influenced by law& economics/ welfare economics analysis, which probably contributed to the conviction that it was important to analyse the *effects* of tort law and closely linked to that, a belief that deterrence is its primary goal.

In Steven Shavell's classic *Foundations of Economic Analysis of Law*, the first chapter of the Part on Accident Law is entitled "Liability and deterrence: basic theory". So this chapter starts from the assumption that deterrence is the primary or sole aim of tort liability and Shavell obviously did not feel the need to argue this point from the start. Probably the assumption is that this follows naturally from the tenet of much economic analysis of law that legal systems should be designed to maximalise social welfare, or produce outcomes that are Kaldor-Hicks efficient. It's only about 90 pages further, in a chapter on liability, risk-bearing and insurance[14], that Shavell discusses the purpose of liability and states "*Reduction of risk through deterrence of harm is the true purpose of liability today, but compensation and avoidance of strife were also important historically*"[15]. Shavell – who first signals that in the US too, most legal scholars assume that compensation is the primary purpose of accident liability and that some even explicitly deny that deterrence is a purpose[16]- explains that the wide availability today of accident insurance (sometimes complemented with social insurance) means that the liability system is not really

[13] See the references in footnote 6. From a Belgian perspective, see also e.g. C. Caufman and B. Weyts, "Privaatrecht en rechtshandhaving" in *Preadviezen 2009*, Vereniging voor de vergelijkende studie van het recht van Nederland en België, Den Haag: Boom juridische uitgevers, 2009, 315.
[14] Steven Shavell, *Foundations of Economic Analysis of Law*, Cambridge, MA: Belknap Press, 2004, p. 268-269
[15] This is the title of a paragraph (5.2).
[16] Steven Shavell, *Foundations of Economic Analysis of Law*, Cambridge, MA: Belknap Press, 2004, § 5.1, p. 267-68.

needed for compensation purposes. I find this not very convincing: while some sort of government-designed compensation system could be imagined (and designed), the actual accident insurance systems[17] are merely tag-ons on the liability-system (which is based on traditional tort concepts) and the insurance-system merely shifts who is doing the compensation.

Be that as it may, I think deterrence has indeed become an independent, stand-alone goal of the tort system and that in this sense, the tort system is being used to pursue regulatory goals, in the sense that it wants to influence people's behaviour and even influence the level of activity in certain areas of economic life, instead of just awarding compensation once a tort has been committed. This will become even more the case if the emerging trend to assume the existence of an enforceable duty to behave properly independent of whether damage has (already) been caused, becomes more prevalent, which I think is likely in view of the increase over the past decades in legislation which enables non-governmental organisations to sue for injunctive relief and thus enforce the requirements of the general good/the public interest in specific areas of social life[18]. Tort law, increasingly used to pursue injunctive relief rather than compensation but also when it is still used to obtain monetary damages, is thus part of an increased reliance on private enforcement. Private enforcement of rules should be encouraged, because it allows the affected individuals to pursue the protection of their own interests, but also because in many areas, public authorities are too weak to on their own attain socially desirable levels of enforcement. However, facilitating private enforcement should not be motivated by a desire to scale back public enforcement for its own sake, and should not degenerate into a privatization of the enforcement of rules. Moreover, enabling the use of tort law as a tool of regulation through private enforcement, allows judges to exercise a function which in democracies they should not exercise: the political function of creating new rights and rules, based on a weighing of often irreconcilable values in order to determine, in the course of private litigation, what the general interest is and requires in a specific situation. This could indeed lead to a *gouvernement des juges* that is both politically undesirable and detrimental to the quality of legal behavioral rules (because judges will more often than not have insufficient and insufficiently neutral information to take a well-founded decision, and in matters like these, hiring a few experts will not help). I will come back to the topic of the blurring of the lines between politics and "the new tort law" towards the end of this essay, when we discuss *Shell Milieudefensie*.

II. Liability of the corporate entity or of its directors and managers? Circularity

If one wants to use tort liability to deter firms from wrongdoing, or even merely to force them to internalize negative externalities, the question arises to whom the liability should attach: to

[17] This is different for social insurance, including public compensation funds.

[18] On this, see the brilliant analysis of Marc Kruithof, "Privaatrechtelijke facetten van algemeenbelangacties bij de Belgische justitiële rechter" in *De algemeenbelangactie en de civiele rechter*, Vereniging voor de vergelijkende studie van het recht van Nederland en België, Preadviezen 2020-2021, Boom juridisch: Den Haag/Antwerpen, 2021, 73 ff.

the corporation, its directors and/or officers or both? This is a traditional question of tort law as applied to corporations[19], even in a damage-focused system.

1. *Traditional Belgian rules on attribution of torts in a corporate context*

The traditional theoretical answer under Belgian law goes like this. First, companies as entitities are liable in tort because a natural person has acted on their behalf. There is no theory which would explain how acts linked to a firm are directly, in tort, attributed to the legal person -but as we'll discuss shortly, in actual practice courts have developed an approach where such a direct attribution takes place. Companies are liable either vicariously, for the acts of their subordinate agents ("aangestelden", préposés, art. 1384, section 3 Civil Code) or "directly", because of the acts of a "company organ" like the board or the CEO.

Three reasons explain why the Belgian legal system- like many others on the European continent- felt the need to apply "the organ theory" in the area of tort liability. First, the policy desire to hold the corporation, with its assets, liable for torts committed by natural persons to the benefit of the corporation while exercising their duties towards the corporation (deep pockets argument). Second, the impossibility to bring about this attribution vicariously once legal systems had decided -as such factually correctly- that boards cannot be regarded as subordinates within the meaning of the statutory rules on vicarious liability. And finally the initial refusal of legal theory as developed by courts to contemplate the direct liability of the corporate entity on the basis of what clearly are actions emanating from its sphere of influence; the need was felt to find a natural person or group of natural persons whose actions could be attributed to the legal person.

Over the past 20 years especially, Belgian corporate law doctrine has recognized the need for some realism in this picture. First, it has been recognized/argued by some that courts, in spite of legal theories, in actual fact do engage in direct attribution of torts: in many cases, perhaps especially when the tort consist of a violation of a statutory duty, negligent behaviour has been imputed to corporations without identifying the persons who committed the negligent act (and therefore without any possibility to check whether he or she were organs, subordinates or whatever). This led Eddy Wymeersch (in his teaching to generations of students, including myself in the 1990s)[20], myself[21] and Joeri Vananroye[22] to plead in favour of a recognition that

[19] In this text, "company" and "corporation" are used interchangeably for companies whose shareholders enjoy limited liability, even though under Belgian law one and the same word (company) is used for both companies with limited liability (corporations) and companies whose shareholders are exposed to unlimited liability (partnerships).

[20] See E. Wymeersch, *Inleiding tot het vennootschapsrecht*, Deel 1, Syllabus UGent, 1989, p. 258.

[21] H. De Wulf and S. De Geyter, "Aansprakelijkheid van rechtspersonen en hun vertegenwoordigers" in *Aansprakelijkheid, aansprakelijkheidsverzekering en andere schadevergoedingssytemen*, (Cyclus Delva), Mechelen: Kluwer, 2007, 15à e.v.; See also S. De Geyter, *Organisatieaansprakelijkheid*, Antwerpen: Intersentia, 2012, esp. 175 ff.

[22] J. Vananroye "Toerekening aan rectspersonen en andere organisaties", *Liber amicorum TPR en Marcel Storme=TPR 2004/1*, 755.

the "organ theory" is in actual fact (what judges do) not very important for the attribution of torts, knowledge or other "legal facts"[23] and that, looking at what Belgian courts do, they attribute torts in the same way Dutch courts do, namely based on "verkeersopvattingen", meaning on the impressions a third party, outsider to the corporation, would have of a certain behaviour, namely whether the average outsider would reasonably assume that a certain act can, in view of the circumstances, be considered to be an act of the organization that takes the legal form of a corporation. Xavier Dieux, too, seemed to approve of this approach[24], which is not surprising since it is just another application of what Xavier rightly identified as the fundamental (and uniform) source of obligations both in tort and contract (and "unilateral acts"), namely the respect due to the legitimate expectations of others[25]. As Joeri Vananroye pointed out, this approach had already been "codified" in criminal law, where art. 5 of the Belgian criminal code clearly exemplifies the same philosophy when it states that a crime can be attributed to a legal person when it is intrinsically linked to the pursuit of the legal person's objectives (purposes, goals) or the defense of its interests or, in view of the specific circumstances of the case, has been committed on its account. This "theory" -rather, empirical finding of what courts do- was, however, rejected by Jeroen Delvoie, who wrote his Ph.d. about the organ theory and argued that (at least for the attribution of torts) the organ theory should be replaced by simply applying the rules on vicarious liability to directors, who, even though they are not subordinate to the general meeting or the legal person as such, should nevertheless be treated as subordinates in the sense of article 1384 section 3 Civil Code[26]. Delvoie took part in drafting the rules on attribution to legal persons in the tort law part of the new Belgian civil Code that is currently under construction, and this rule was copied from is Ph.D. into the draft article 5.158 of the new Civil Code[27].

2. *Reverse attribution and absorption*

One type of negligence is the violation of specific statutory rules, and here the danger of "reverse attribution" to directors and officers looms[28]. If statute imposes a rule on corporations -say, for listed companies, disclosing in a timely manner all market sensitive information concerning themselves and their securities- then it would be a mistake to deduce from the fact

[23] As opposed to "legal acts", *Rechtshandlung*en: there the organ theory is still crucially important, for instance in view of the Prokura doctrine as enshrined in EU law, because in civil and criminal procedure acts by organs are deemed to be acts of the legal person itself, and because organ theory allows one to avoid the application of the rules on agency, as when the representative of a company who is an organ and not a mere agent, does not have to prove its authority as an agent on the basis of a notarial deed (eg. in real estate transactions that require notarial deeds).

[24] See X. Dieux and Y. De Cordt, "Examen de jurisprudence (1991-2005); Les sociétés commerciales", *RCJB* 2008, 516.

[25] X. Dieux, *Le respect dû aux anticpations légitimes d'autrui- genèse d'un principe general de droit*, Brussels: Bruylant, 1995.

[26] See J. Delvoie, *Orgaantheorie en rechtspersonen van privaatrecht*, Antwerp: Intersentia, 2010, esp. p.511-555 for his criticism of the "verkeersopvattingen"-approach.

[27] See the discussion in J. Delvoie, "Aansprakelijkheid van rechtspersonen in het ontwerp buitencontractuele aansprakelijkheid" *TPR* 2021/1, 47-64.

[28] On this problem, see e.g. V. Simonart, "La théorie de l'organe"in *Liber amicorum Michel Coipel*, Brussel: Kluwer, 2004, (713), 724.

that the corporation as an organization has not met this obligation, that its directors or officers have committed a tort. This is of course wrong: it should be shown that the natural persons the plaintiff wants to hold liable did themselves behave negligently. In the case of attempts to hold directors liable for faulty disclosures by the corporation, it should be shown that it belonged to the tasks of the directors to take care of these disclosures. The larger the organization, the less likely it is in the personal remit of directors to deal with such issues, but the question will then become whether the directors were under a duty to make sure others within the organisation took care of the disclosures, whether the directors provided enough budget and perhaps also guidelines for the development of a disclosure system and whether re generally, they monitored the situation and developed a compliance system and culture. Directors will then be held liable if it is shown that the corporation violated its disclosure duties and the directors had not developed a compliance and monitoring system, even if he plaintiff does not actively show that there is a causal link between the deficient nature of the compliance system and the faulty disclosure (this causal link will be presumed, at best the directors will be allowed to show- with the burden of proof de facto on them- that even if they had performed all their duties diligently, the faulty disclosure would still have ensued).

Conversely, the fact that negligent acts by directors engender the liability of the legal person, does not absorp the personal liability of the director. This is different in France, where torts committed by directors only lead to personal liability if the can be considered a "faute détachable", that is, a kind of negligent act that is sufficiently separated from the exercise of the functions of the director on behalf of the corporation that he should be personally liable for it. This approach was never accepted under Belgian law.[29]

Officers who are not directors are largely immune to personal liability for corporate deisions under Belgian law. Legally they are either self-employed consultants (often offering their services through a "management company") or employees, and therefore subordinates in the sense of art. 1384 section 3 Civil Code, whose negligence will bring about the liability of the corporation towards victims but if they are employees, they will be able to invoke art. 18 of the Act on Employment contracts, meaning they can only be held liable in tort, by the corporation or by outside victims, of they committed a "gross mistake" close to intentional fault. The previous minister of justice (Koen Geens) considered this (and, more importantly, the limitation of liability that external auditors enjoy) an unjustifiable discrimination of corporate directors compared to employees, which was one reason why he tried to introduce

[29] See however a defense of it in V. Simonart La quasi-immunité des organes de droit privé", R.C.J.B. 1999, 758 e.v.. whose opinion seemed to be confirmed in Cour de cassation 16 February 2001, *TBH* 2002, 703 ann. C. Gheys. That decision was, however, a "misstep" and was reversed by Cassation 20 June 2005, as discussed by H. De Wulf, *TBH* 2005, 891. On this whole debate, see X. Dieux, "La responsabilité civile des admini- strateurs ou gérants d'une personne morale à l'égard des tiers: une révolution de velours", *Mélanges John Kirkpatrick*, Brussel, Kluwer, 2004, 236 and H. De Wulf, "Het Hof van cassatie en de extra-contractuele aansprakelijkheid van vennootschapsbestuurders", in *Liber Amicorum Christian De Wulf, Brugge, die Keure, 2003, 517.*

a rule limiting the personal liability of directors for professional negligence to a capped amount of money[30].

III. Policy considerations on the distribution of liability between corporation, directors and officers

But is this a good system? Should perhaps the liability of the corporation absorb personal liability of the directors, or should, conversely, liability of firms be excluded for "mistakes" (negligent behaviour) that results from a breach of duty by the directors, who under this conception should be exclusively liable (i.e. to the exclusion of the company)?[31]

1. Reasons for preferring liability of the company

At first sight, it seems obvious that a liability system should make sure that the corporation can be held liable for torts committed in its interest or linked to its activities by directors. First because the company usually has deeper pockets than the directors, so that entity liability is good if policy is intended to be victim-friendly[32]. This is not true, however, in many small companies, where shareholders often have deeper pockets than the company itself, and victims may be tempted to take recourse against the directors if the company has been declared bankrupt, especially when the directors, who are usually also shareholders in these companies, have received assets from the company in the period leading up to the insolvency. In large companies, directors are often insured against liability (at the initiative of the company, which bears insurance costs) so that the pockets of the directors or rather their insurer are as deep as those of the company ('s insurer).

A second reason for attaching liability to the corporate entity is that if rulemakers want to address a rule to an organization and hope for compliance, it seems best to address that rule to the organisation at such, so that all its parts and stakeholders are implied and at least indirectly addressed by the rule. Likewise, arguably, for liability: if the organization is the addressee of the rule, at least the organization itself should be liable.

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[30] For the result, see art. 2:53 WVV (2019 Belgian Code on Companies and Associations). I have tried to offer an insider's perspective on the genesis of this provision in H. De Wulf, "De totstandkoming van het Wetboek van vennootschapen en verenigingen: enkele impressies over het maken van wetgevingsworsten" in I. Claeys (ed.) *Recente wetgevende hervormingen: nieuw en beter? Verslagboek XLVe Postuniversitaire Cyclus Willy Delva*, Mechelen: Wolters Kluwer, 2021, (85),143-146.

[31] The classic articles on the design of vicarious liability in a corporate context are A.O. Sykes, "The Economics of Vicarious Liability", 93 *Yale Law Journal*, 1984, 1231-1280 and L. A. Kornhauser, "An Economic Analysis of the Choice Between Enterprise and Personal Liability For Accidents", 70 *California Law Review*, 1982, 1345-1392.

[32] And especially when the directors are "judgement proof", i.e. do not have the resources to pay the "required" damages. See S. Shavell, *Foundations of Economic Analysis of Law*, Cambridge, MA: Belknap Press, 2004, 223 § 4.2.

A third and related reason for attaching tort liability to the legal person and either not or not only to the acting natural persons, is that it creates an incentive for the organization as such to invest in precautionary measures and compliance systems to avoid breaches of duty/negligence in order to avoid liability. But this seems to assume that the organization as such can influence the behavior in this regard of managers or directors, at least the level of activity they cause the firm to engage in, which is doubtful in many cases.

In addition to these reasons that are all founded on the idea that the system should be designed so as to reach the goals that it is intended to perform (and in that sense efficiency reasons), one could also invoke fairness as an independent reason for concentrating liability on the organization rather than on the directors or officers: irrespective of who factually caused the damage to the victim, the corporation as an organization will often have benefited from the negligence, or at least from the activities in the course of which the negligence was committed. Secondly, even though directors and officers lead a company, in larger companies they are a relatively small part of (metaphorically speaking) a team that produces outcomes and produces whatever the company produces, and their individual actual and potential influence on what happens with the corporate box is limited -this is especially true for non-executive directors. Take the example of Boeing which for a certain time produced certain aircraft with a dangerous type of take-off mechanism, leading to some air crashes. Designing, building and marketing these aircraft is a huge operation involving thousands at Boeing. Is it fair to hold only the engineers who designed the system responsible -should they be liable at all towards victims of the air crashes? And the directors, who oversaw the activities of Boeing but where not at all involved in the engineering design, would not have recognized design flaws if the design had been explicitly pointed out to them, and presumably did not know about the dangers of the system? Assuming the directors did not consciously oversee or encourage a policy where safety corners were cut or safety concerns put aside in relentless pursuit of profits and market share with major competitor Airbus, would it be reasonable to hold them personally liable towards the victims of the air-crashes ? I think it wouldn't be. One of the lines of argument of the Canadian philosopher Bruce Waller, who is a free will skeptic, against personal responsibility, is that many activities in our society are collective activities and that it is unfair, in his view, to assign individual responsibility for what goes wrong in such a collective context[33].

A major problem with imposing liability on the corporation is the circularity problem, which we'll discuss separately. First a look at the other side of the coin

2. **Arguments in favour of director liability**

[33] See generally Bruce Waller, *The Stubborn System of Moral Responsibility* 2014, MIT Press.

But there are of course also arguments in favor of imposing liability also (and in view of circularity perhaps exclusively, as we'll see) on corporate directors and officers. First of all, unless and until AI one day takes over, decisions in organizations are taken by humans. Therefore it seems (at first) rather obvious to target these humans with liability for the decision. When deciding which group of humans to target, it seems obvious to focus on those "leading" the corporation and exercising ultimate power over it, the directors. Indeed, in firms "the corporation" is led by the directors in conjunction with top management (which usually plays a dominant), and it is misleading for our purposes to present things as if the corporation itself could take decisions; those who in the view of agency theory are the principals of directors and officers, namely shareholders, in large corporations usually can't influence the level of care the directors, officers of company engage in.

But imposing liability on directors may on second thoughts be less obvious in many cases. First, in some companies, namely those with a fully dominant shareholder, directors are mere puppets of shareholders (the extreme case is a 100% subsidiary where the directors are in fact employees of the parent). Here major decisions are de facto taken by the shareholders (often: the managers of the parent company; sometimes the major shareholders of the parent company). Even so, directors who have accepted their own nomination, are supposed to defend the company's interest, and whatever one may think of how to construe this famously amorphous concept ("narrow", broad, …), sometimes this will entail the *de facto* duty to give precedence over the interests of creditors over those of shareholders, and on a perhaps regular basis the (rather demanding, in view of the factual position of the directors) duty to resist decisions that would have the subsidiary commit illegal acts. In addition, burdening primarily directors with liability may be less obvious than it at first seems for those decisions that were in fact taken by top management without close involvement of the board. In major firms many and probably most decisions that bring about major liability risks are not prepared and taken as such by the board, but by top managers. Sometimes such decisions will be ratified by the board, more often they will be part of an overarching strategy approved by the board, whose task it is to monitor management, which latter task mainly involves appointing and dismissing managers and allocating budgets and being a sounding board for strategy, not overseeing individual decisions, even though they are important. Think back, for a moment, to the major banks that veered on the brink of insolvency (or went over the edge) during the 2007-08 financial crisis. Corporate policies that caused the major risks to which those banks had been exposed had often been signed off by the board, but had been initiated and implemented by top managers, the majority of whom were not board members. These management teams had sometimes done this under pressure from shareholders who had come to expect unrealistic returns on equity. I'm not arguing that in those circumstances the board should not bear liability for the ensuing polices and decisions. I merely want to point out that it is not necessarily very convincing to try to justify this liability on the basis that board members *took* these decisions, and that it is perhaps a bit odd if one were to insulate the top managers/officers who had far more influence on the decision-making from liability, and place this exclusively on the shoulders of directors. This would be a bit like mainly or exclusively "blaming" a weak smoke detector and sprinkler system for the havoc wrought by a fire, and not the inflammable building material that was used, or the arsonist.

One potential reason for holding directors and officers liable and not only or not the corporation is precisely the idea that liability rules can influence future behaviour. If one wants firms to avoid negligent decisions, and wants them to spend a reasonable[34] amount on measures to prevent accidents, then it seems a good strategy to try to influence the behaviour of those who take or at least approve the relevant decisions, not on the "abstract" entity of the corporation, to whom these decisions are attributed. This kind of reasoning also surfaced regularly in both the press and scholarly articles after the financial crisis: in order to have a deterrent effect, individuals at banks, so the theory, needed to be targeted, not so much to hurt them personally (although some no doubt thought this would have been fair from a moral retributive perspective), but in order to have an effect on future potential sinners: for the bank (or other corporation) fines and liability for breaches of regulation or torts would often simply be costs of business, bearable and sometimes already taken into account when the business model was developed. But for the executive who was held liable, or barred from the profession, or whose reputation was damaged, or who was at least made to walk the "walk of shame" by being publicly escorted in handcuffs by the police, the cost of legal sanctions (like liability) would be harder to bear and write off, so that a company that, as an entity, didn't care about the liability, would still try to avoid negligent behavior under the influence of its officers who wanted to avoid personal detrimental effects.

3. The circularity problem

Putting liability squarely but also *exclusively* on the shoulders of directors and officers would also help avoid the circularity problem. But what is this circularity problem?

a. Stakeholders, not the legal persons, bear liability and regulatory costs

The term seems to have been developed by US scholars discussing securities class actions. [35] Briefly, this argument holds that in the typical securities class action, one group of innocent shareholders (not belonging to the plaintiff class because they did not trade) ends up compensating another group of shareholders (the class): if a company is ordered to pay damages to investors because the firm e.g. disclosed price-sensitive information far too late, meaning some shareholders bought shares at inflated prices, from an economic perspective the financial burden of these damages is borne by the firm's shareholders (and, one should add, its other stakeholders), except for the shareholders belonging to the class, since of course the damages are awarded to them (after lawyers' fees). The argument thus is that securities class actions are a mechanism for unwarranted wealth transfers and that the main beneficiaries

[34] We will not here evaluate what yardsticks should be used to determine what such a reasonable investment would be.

[35] For rewarding treatments of the problem, see D. Langevoort, "Capping Damages for Open-Market Securities Fraud", 38 *Ariz. L. Rev*. 1996, 640-664; J. Cox, "Making Securities Class Actions Virtuous", 39 *Ariz. L. Rev*., 1997, 497, 509-515; J. Coffee, "Reforming the Securities Class Action: an Essay on Deterrence and Its Implementation", 106 *Columbia L. Rev.*,2006, 1534, esp. 1556-1566; J. Fisch, "Confronting the Circularity Problem in Private Securities Litigation", *Wis. L. Rev.*,2009, 333-350.

of the whole process are therefore plaintiffs' lawyers, who pocket fees and other benefits as a result of their class action work. It is very striking how, in the US literature on circularity, it is usually assumed as a given that securities class actions play no serious compensatory role[36], and that therefore if one wants to keep them, it must be for deterrence purposes.

I would argue that if tort law actually has an effective deterrent effect, that can be a reason for keeping a tort law rule -like the rules on securities fraud[37]- as a private enforcement rule- especially in areas, like the enforcement of securities regulation in Belgium and continental Europe in general where it is doubtful that optimal levels of public enforcement have been reached or are achievable in the near future.

In other words, circularity should perhaps not be seen as a serious issue when a liability rule creates deterrence and contributes to enforcement.

Professor James Cox, who is probably the father of the "circularity" expression[38] argues that circularity does not make securities class actions different from other cases of enterprise or entity liability[39], in other words doctrines that have the same effect as vicarious liability as applied to firms. Cox, after having fully acknowledged that shareholders in companies sued for secondary market securities fraud are almost always "innocent", concludes "*Managerial misbehavior, after all, is a portion of the risk that accompanies ownership. It is a risk internalized through the concept of entity liability. The financial burdens of a securities fraud settlement borne by the innocent stockholders of the corporate violator is (sic) indistinguishable from the burden borne by the shareholders of the corporation that produces a defective product or violates the environmental laws*" [40].

This is true; the imposition of costs is not only a feature of tort law used as a deterrent device (in this case, securities class actions leading to damage awards paid by the company or its insurer), but of any form of regulation of firms' economic activity, and even more of damages awarded because of the violation of such regulation. And *ex post* vicarious liability or "enterprise liability" (or "entity liability" or whatever one prefers to call it) does indeed impose

[36] This is because empirical evidence shows that shareholders usually recover far less, in the form of damages, than 10 % of the drop in value of the firm's securities as a result of the securities fraud.
[37] Substantively speaking, securities fraud is a form of tort. I'm aware this characterisation could be (very) controversial under US law because of the implications it could have, e.g. for the respective competences of states and the federal government to regulate securities fraud, but these debates should not distract from the fact that substantively, securities fraud has the same character as a tort, it is an intentional form of negligence (if negligence is understood as behaviour that deviates from the/a standard of care).
[38] Even though D. Langevoort was probably the first to devote systematic attention to the issue in a scholarly article, without using the word, whereas J. Coffee's 2006 article no doubt greatly contributed to the popularity of the expression.
[39] J. Cox, "Making securities class actions virtuous", 39 *Arizona Law Review*, 1997, (497), 510-511.
[40] J. Cox (previous footnote) at 511.

these costs on "innocent" parties (like shareholders or employees)- although they may not always be that "innocent" as we'll see in a minute.

b. Bearable and undesirable costs of regulation

If regulation (quite apart, in a first phase, from damage awards for violation of the regulation) imposes safety and environmental standards, this causes costs for the firm and its stakeholders (lower profits, lower level of employment or lower wages etc.). If these regulatory costs (including the administrative enforcement cost) exceed the level of costs that is needed to prevent or offset the negative externalities that the firm's activities would generate if its activities were unregulated, then, in a simple utilitarian calculus approach to these matters, the regulation will have lowered social welfare. The same is true if the deterrent effect of such regulation is "too large", namely scaring risk-averse firms or their managers away from projects which would, on balance, have increased social welfare. This does not of course mean that we should have no safety and environmental regulation, only that, in this calculus model, the regulation should be set at such a level that it does not prevent optimal levels of activity and does not impose costs that are unnecessarily high in preventing negative externalities (this would be the case, but not only the case, when the costs imposed on firms and their stakeholders clearly exceed the negative consequences of firm activity for outsiders).

There are several potential objections to looking at the issue of regulation from his perspective. One objection I would raise is not so much that this approach neglects human dignity and sacrifices absolute values but also right[41] on the altar of cost-benefit analysis -one might have been tempted to argue, for instance, that most humans will rationally want to avoid or seriously curtail certain fundamental risks, like death by car accident, and would be very happy if society "overinvested" in precautionary measures that in the aggregate lowered aggregate social welfare in order to avoid or largely reduce such risks; until one observes that in societies around the world, citizens seem to accept the "fundamental risk" of death by taking part in car traffic. A more convincing objection that I would raise is that the social welfare approach tends to miscalculate social welfare by missing or neglecting the effects of regulatory regimes on "systemic public goods", like trust and/or on others that are not directly involved in a series of transactions or events. Suppose, hypothetically, that for transactions on financial markets mutual inter-human trust is important. Suppose also that a certain type of trader (A) can systematically benefit from a certain type of transaction with another type of trader (D), at the expense of the latter. The benefits accruing from such trades to group A vastly outweigh the negative effects of these trades on group D. Then such trades are beneficial and desirable from a social welfare perspective. Except that, if D feel cheated by this type of trade after having engaged in it for a few times, they will lose trust in the system/in group A, and will cease engaging in this type of trade (for lack of trust). Assume now that trading activity was not only beneficial to group A, but also supported a separate market (e.g. in the building of mortgage-financed housing) that has great benefits for society at large, then as a result of

[41] Eg. The right to property and the secondary right to receive compensation for the infringements of that property right when damages is caused to one's property.

D's loss of trust, this second market will disappear, or drop to levels that are far too low from the viewpoint of social welfare. Though the framework of welfare economics can accommodate such factors like the importance of safeguarding these (what I called) public goods, I have the impression that in specific welfare economics arguments about specific topics, attention for them regularly goes missing, when arguments are developed about things like the desirable level of regulation of some activity.

c. Stakeholders may not be "innocent", but may have enjoyed rents

Putting all this to one side, the "problem" remains that if a legal system imposes liability on firms, i.e. on the corporate entity, for breaches of regulation, because one wants to induce the firm to invest in reducing negative externalities to the desirable levels, this liability for damages or fines hits "innocent" parties. If , hypothetically[42], Volkswagen has to pay billions in damages to car buyers, and billions more in fines to regulatory authorities, for installing "defeat devices" in its cars (damages which may bear no relationship to the environmental damage caused by the excess level of diesel emission)this could have a negative effect on all kinds of stakeholders in Volkswagen: shareholders see a drop in the value of their shares (perhaps leading them to claim damages from the managers who actually caused the problem for Volkswagen, claims which lead to costly litigation), thousands of employees are made redundant because of a drop in Volkswagen's profits/the collapse of the market for diesel cars, and 60% of them are out of work for a year (or alternatively, they have to accept a wage cut to retain their jobs); Volkswagen may no longer be able to service its debts to certain banks because it has to pay the damages.

Is this a reason for not imposing the liability on the firm? Probably not. First, because liability does cause firms to bear the costs they create, even though the costs the firm and its stakeholders (in away, the firm itself does not bear costs; economically, they' are all borne by the affected stakeholders) bear may be larger than the benefit that accrues to the victims. If optimal deterrence would the goal of a liability system, it may of course be necessary in any case to have the firm pay higher damages than the adverse effect on victims, in view of the fact that chances of getting caught/having to pay -even if the firm is not judgement proof- may be low. But irrespective of this, it seems an empirical fact that our societies have decided (implicitly) that it would be unacceptable to organize liability systems on a utilitarian, social-welfare oriented basis. The legal and moral basis of liability is the idea that the legitimate interests of the victim were harmed and that the "natural order" has to be restored, whatever the calculus at the level of society/ social welfare. One may regret this approach, and favour an approach solely geared towards solutions that best serve social welfare as calculated in welfare economics, but I repeat that it seems an obvious empirical fact that that is not he approach taken in our societies. In other words, "compensation as fairness" is pursued as an independent value in our legal systems and societies.

[42] By which, in this example, I want to indicate that not all aspects of the example as I develop it correspond to the real facts of the Volkswagen Dieselgate affair.

Second, even if enterprise liability is undesirable, because of circularity, as a compensation mechanism, it may be desirable to pursue it for whatever deterrence effects it may have.

On a completely different level, it should be noted that the stakeholders who bear the economic costs of enterprise liability are not always "innocent". Of course, taking again the Volkswagen example, the negatively affected shareholders, employees or creditors were usually not involved in organizing, implementing or even indirectly encouraging the type of tort that would lead to liability[43]. But they often will have borne unwarranted benefits, rents in a way, of the tort: Volkswagen will have been able to sell more cars, or carried less costs in producing the cars than if the defeat device had not been used to evade emissions standards, and this may have inflated the profits of the company to the benefit of the shareholders, to the financial (e.g. through share options, or simply higher remuneration) and reputational benefit of managers, leading also to higher wages or levels of employment that would not have been sustainable if the cars had been built in a way that was compatible with environmental standards.

d. Can personal liability of directors avoid the circularity problem ?

Nevertheless, if not compensation but deterrence is the main aim of a tort law system- I'm not saying it is or should be, but want to assume for argument's sake that it is- then it would be preferable to choose a deterrence system that avoids the circularity/enterprise liability problem provided this alternative system is as good in deterring undesirable activity. Again in the context of securities class actions, John Coffee has argued that such a system may be conceivable[44]. One could imagine a system where the corporation itself (because of statutory immunity) cannot be held liable for securities fraud, but only directors and officers. In case of securities fraud, it's clearly those persons who actually perpetrate the fraud or, which is the same thing, under whose direct influence the corporation perpetrates the fraud. If deterrence works at all here, it seems like a good idea to direct attention to the actual perpetrators: they can be deterred by potential liability. An additional advantage of focusing on the relevant natural persons rather than on the corporate entity is that, thanks mainly to psychology, we know more about how (and to what extent) humans react to certain incentives created by deterrent legal rules than we know about organisational behaviour.[45]Of course, the directors

[43] A counterexample would, again, be the shareholders of banks who prior to the 2007-2008 crisis, invested in toxic derivatives. A case can be made that many of these investments were indirectly encouraged by the desire for shareholders for outsized returns, and therefore by pressure from shareholders on management to make the risky investments that would generate such returns.

[44] J. COFFEE, "Reforming the Securities Class Action: an Essay on Deterrence and Its Implementation", 106 *Columbia Law Review* 2006, 1536.

[45] See Christoph Engel "The Behaviour of Corporate Actors: How Much Can We Learn from the Experimental Literature?" ,February 2010. MPI Collective Goods Preprint, No. 2008/23, available at https://ssrn.com/abstract=1135184.

would not be able, in the vast majority of cases, to pay any meaningful sums of money as compensation to defrauded investors. But remember that we're working here under the assumption that the legal system has given up on liability, in this domain, as a compensation mechanism: we assume, for this example, that its only purpose is deterrence. From that perspective liability that would ruin the director even if it does not even begin to compensate investors, could be greatly deterrent. Even if this liability was capped at a relatively low amount- e.g. to make sure insurers were prepared to insure this potentially huge risk- the likely negative reputational effect (on the job market for managers and directors) of a not completely frivolous claim being launched, could have serious deterrent effect (though probably not in "endgame" situations, where the manager could enrich himself as a result of the fraud and has a good chance of getting away with the proceeds of the fraud and not being dependent any longer on the future job market). This is all the better since in reality, managers and directors would be insured against securities fraud liability, with the insurance premiums being paid by the company. Such insurance should not be outlawed. On the contrary, if one does not give up on the compensatory goal of tort law, one might consider making it mandatory, so that victims more often than not would have "deep pockets" to rely on[46]. But wouldn't such insurance precisely undermine the deterrent effect of liability?[47]It would, but this could be remedied by introducing a mandatory statutory "deductible". The director who would be held liable would then be deterred by the fact that he would have to pay out of pocket a sum of money that would be substantial but not , on average, ruinous for him, while victims would be covered by the much larger sum paid out by the insurance company, while at the same time the circularity problem would be avoided.

Although initially merely intended to shield especially non-executive directors from what policymakers regarded as excessive liability of directors compared to others like external auditors and top managers, the new rules on director liability introduced into arts 2:57 and 2:58 of the 2019 Belgian companies act were inspired by such ideas. These articles try to cap personal director liability, but at the same time outlaw hold harmless clauses whereby the company would insulate the director against liability. The idea was to get to a system where the director would have skin in the game while not being ruined by excessive liability, but in order to achieve this policy goal, it would probably have been necessary or a better idea to introduce mandatory insurance for directors with a mandatory deductible, as outlined above.

IV. Shareholder liability and human rights due diligence (HRDD) duties

Our musings about tort law as a mechanism for deterrence and in that sense its use as a regulatory tool, naturally lead us to the question whether limited shareholder liability for torts is optimal or even acceptable in view of attempts to create an incentive system that maximises

[46] Again, for types of damage that can run into the billions, legislators might consider capping the recoverable damage, or the insurable amount of damage, especially when, as in securities fraud, we're talking about pure economic loss.

[47] See Tom Baker and Sean J. Griffith, *Ensuring Corporate Misconduct- How Liability Insurance Undermines Shareholder Litigation*, Chicago: University of Chicago Press, 2010 for the leading analysis of this issue in the context of shareholder litigation.

social welfare. But we're not going to deal with this issue here, it deserves a detailed careful analysis rather than the essayistic ramblings typical of a *Festschrift*. Suffice it to say that Hansmann/Kraakman famously argued that limited shareholder liability for torts should be abandoned because it prevents an optimal internalization of negative externalities[48], but that their point of view has been criticised by other scholars[49] and, as far as we know, has not been turned into law anywhere in the world.

Of course, if a parent company is often held liable for torts committed by/at the level of a subsidiary, then this can be regarded as a form of shareholder liability. We cannot of course here develop the topic of "corporate group liability" based on torts in full. In corporate groups every entity is deemed to be only liable for its own debt debts and obligations and the board of the parent has no special responsibility for what happens at the level of the subsidiary. At the contractual level, this principle is honoured mainly in the breach, as subsidiaries often are jointly and severally liable for the each others' debt or the debt of a parent when the corporate group enjoys a credit facility from a bank. Also, for decades but perhaps with increasing frequency since the 1990s (after accountancy law with its rules on consolidated accounts had taken a headstart) regulators have enacted specific rules intended to prevent groups from escaping from the useful application of certain rules by splitting up their activities over several companies and/or jurisdictions[50]. But at the level of tort liability, separation is largely maintained. In the US, in at least private companies, piercing the veil is not all that rare, but is has become exceedingly rare in Belgium and the situation in major West-European jurisdictions seems to be similar.

a. From controlling shareholder liability for torts committed through subsidiaries…

However, in a string of cases mainly UK and to a lesser extent Dutch courts have held parent companies liable, in tort for what I will call "things that went seriously wrong", at the level of their foreign, usually non-European subsidiaries[51]. Usually these cases concern liability for

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[48] H. Hansmann and R. Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts", *The Yale Law Journal*, Vol. 100 (7), 1991, 1879-1934.

[49] E.g. S. Bainbridge and S. Henderson, *Limited Liability- A Legal and Economic Analysis*, Cheltenham: Edgar Elgar, 2016, esp. p. 279 ff.; Robert B. Thompson, "Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise", 74 *Vanderbilt Law Review,* 1994, 1 ff.; mostly critical also the important book by Chr. Witting, *Liability of corporate Groups and Networks*, p. 342 ff. See also the balanced views in H.J. de Kluiver, "Het einde van de rechtspersoonlijkheid: een rechtseconomisch perspectief" in *Relativering van rechtspersoonijkheid*, (serie vanwege het Van der Heijden Instituut, 114), Deventer: Kluwer, 2012, 87-98.

[50] Well known examples include the rules on financial conglomerates, or the rules (first set out by the European Court of Justice, then partially enacted in European directives) on antitrust fines. For numerous other examples (from EU and German law), see e.g. Georg Seyfahrt, "Handlungspflichten der Konzernverwaltung im nachgeordneten Bereich am Beispiel Compliance im Konzern" in *Vom Konzern zum Einheitsunternehmen,* ZGR Sonderheft 22, Berlin: de Gruyter, 2020, 87-105.

[51] Many overviews exist, I recommend (partly outdated but very good on the older cases) P. Bergkamp, "Models of Corporate Supply Chain Liability", *Jura Falconis* 55, 2018-19, 178 ; Xavier Thunis and Jean-

human rights abuses (often inhumane labour conditions) or environmental pollution (as in the Dutch[52] and UK Shell Nigeria cases). In my reading of the leading British *Vedanta* case[53], the UK Supreme Court did not hold the parent company in any way liable for a tort committed by a subsidiary. Rather, the court ruled in *Vedanta* and even more clearly in *Okpabi v.Shell*[54] – case where the British parent company had interfered with the operational management of a pipeline owned by its subsidiary in Nigeria- could be held liable for its *own* negligent behaviour. The tort had been committed by the parent, using the assets and perhaps staff of the foreign (Zimbabwe, Nigerian) subsidiary that had been, as it were, the instruments of the parent company. However, this type of case could in future give rise to the development of truly vicarious liability in a corporate group context. If one consults the literature of people who have thoroughly studied the question -like the many German scholars who have dealt with the existence or not of a *Konzernleitungspflicht* – the starting point of analysis is still that there is no general duty for the board of a parent company to engage in group-wide compliance (let alone to run the corporate group in a very centralized way)[55]. But if one assumes that in particular circumstances, a parent company had a legal *duty* to oversee certain aspects of the affairs of subsidiaries, and then something goes wrong at the level of the subsidiary, causing damage to outsiders, and it is assumed that based on its duty to supervise the subsidiary, the parent company should have prevented the event that caused the damage, or should at least have intervened, then one has in effect created a variety of vicarious liability based on a duty to supervise. Technically, liability of the parent in such circumstances may be different from traditional cases of vicarious liability, since the liability is not based only on the behaviour of the subsidiary, but also, as a necessary condition for parent liability, on a violation of its own ("group compliance") duty to supervise (some aspect of the activities of) the subsidiary. But in its application (including liability consequences) there seems to be no difference between the two theoretically different approaches.

Marc Gollier "Devoir de vigilance des entreprises: vers une 'responsabilité des entreprises' juridiquement obligatoire" in *Liber amicorum Benoît Jadot*, Brussel: Larcier, 2021, nrs. 20 ff.; concentrating on the Shell cases (in the UK and the Netherlands) C. Van Dam, "Doorbraak in de aansprakelijkheid van moedervennootschappen- Over drie Shell-nederlagen, het einde van een tijdperk en nieuwe paradigma's" in *Geschriften vanwege de vereniging corporate litigation 2020-2021*, Deventer: Wolters Kluwer, 2021, 177-219. See also briefly H. De Wulf, "ESG en vennootschapsrecht: innig verbonden, maar ook duurzaam?" in *Duurzaam ondernemen en Sustainable Transport,* Preadviezen van de Koninklijke Vereeniging Handelsrecht, Zuphen, Uitgeverij Paris, 2021, (29), p. 90-98.

[52] See the final decision in the *Oguru* case ("Dutch Shell Nigeria") of Court of appeal Den Haag 29 January 2021, ECLI:NL:GHDHA:2021:132 as well as the joined case ("Dooh") of the same date, ECLI:NL:GHDHA:2021:133. Among the numerous comments, see about the case at the intermediate stage (after the court of first instance in Den Haag had taken its decisions of 30 January 2013 which had been less favorable for the plaintiffs, although they obtained a victory on one of the three issues that was litigated), see L. Enneking, "The future of foreign direct liability? Exploring the international relevance of the *Dutch Shell Nigeria* case", 10 *Utrecht Law Review* 2014, p. 44-54.

[53] UKSC, Judgement of 10 April 2019 in *Vedanta resources plc v. Lungowe*, [2019] UKSC 20, available on https://www.supremecourt.uk/cases/uksc-2017-0185.html .

[54] UK Supreme Court Judgement of 12 February 2021 in *Okpabi & Others v Royal Dutch Shell Plc (RDS) and another*, [2021] UKSC 3, available on https://www.supremecourt.uk/cases/uksc-2018-0068.html.

[55] See for instance A. Schall, "Die Mutter-Verantwortlichkeit für Menschenrechtsverletzungen ihrer Auslandstöchter", *ZGR* 2018, (479), 488 and 500, with further references and esp. the many references in footnotes 57 through 59 of Holger Fleischer and Stefan Korch, "Okpabi v Royal Dutch Shell und das deutsche Deliktsrecht in Konzernlagen", *ZIP* 2021 (709), 712-13.

b… to liability for violation of a group and supply chain statutory due diligence requirement

The "human rights due diligence" (HRDD) legislation that was enacted in the recent past in France[56] and Germany[57], and is being prepared at the level of the EU as I write[58] -not to mention the Belgian Bill that is slowly making its way through parliament[59]- is an illustration of this. Very briefly put, this legislation imposes a duty on parent companies at the head of large corporate groups to chart the risks for respect of ESG norms/human rights that the activities of the group -parent and subsidiaries, wherever they are in the world- and its suppliers or certain groups of business partners create, and to devise a plan to tackle and mitigate these risks. Under the French legislation, an insufficient "*plan de vigilance*" may give rise to liability[60]. Under German law, the *Lieferkettengesetz* (supply chain law) purposely avoids creating additional grounds for liability, but it is not excluded that general tort law principles are applied to human rights due diligence contexts[61], and to me it seems very likely that the

[56] See French Act of 27 March 2017 "relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre", loi 2017-399, available on https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626

[57] Act of 22 july 2021 "über die unternehmerischen Sorgfaltsplichten in Lieferketten", *Bundesgesetzblatt* 2021, Teil I, Nr. 46, 2959. The law will come into force on January 1 2023. One reason for this long grace period is that Germany hopes there will be a European Directive by then. Tellingly, the initial draft was called *Lieferkettenhaftungsesetz*, so Supply Chain *Liability* Act, but after heavy lobbying from German industry, the liability rules were removed from the act, which was reflected in its name.

[58] The most important text publicly available at this stage (early January 2022) is the March 10 2021 resolution by the European Parliament on human rights due diligence, and more in particular the draft directive that accompanies the resolution, see European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2021/2029(NL)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html. I and many others have pointed out the technically deficient nature of this directive (that is, the sloppy drafting), see especially the thorough and convincing critique in ECLE (European Company Law Experts Group) "The European parliament's draft directive on corporate due diligence and corporate accountability", 19 April 2021, https://europeancompanylawexperts.files.wordpress.com/2021/04/ecle_ecgi_19-april-2021.pdf (I subscribe wholeheartedly to the criticisms expressed in this paper, see H. De Wulf, "ESG en vennootschapsrecht: innig verbonden, maar ook duurzaam?" in *Duurzaam ondernemen en Sustainable Transport,* Preadviezen van de Koninklijke Vereeniging Handelsrecht, Zutphen, Uitgeverij Paris, 2021, (29) 84-87). The EU Commission had originally announced it would come forward with its own draft directive in the matter in June 2021, but its preliminary work twice received a so-called "red card" from EU's Scrutiny Board (an internal committee that vets draft legislative initiatives by the Commission); at the time of writing, it seems quite certain that the Commission will publish a proposal (or at least outline) for a Directive by mid-February 2022, irrespective of the opinion of the Scrutiny Board.

[59] See "Proposition de loi instaurant un devoir de vigilance et un devoir de responsabilité à charge des entreprises tout au long de leurs chaînes de valeur", *Parl. St* Kamer, 55 1903/1, available at www.lachambre.be.

[60] See e.g. the case(s) against oil group Total, http://climatecasechart.com/climate-change-litigation/non-us-case/friends-of-the-earth-et-al-v-total/ (the site contains links to the court decisions).

[61] See G. Wagner, "Haftung für Menschenrechtsverletzungen in der Lieferkette", *ZIP* 2021, 1095-1105, which also contains an excellent analysis of the conflicts of laws issues (concluding that, under the Rome II Regulation which for EU member states has universal application, judges should almost always apply

German act, too, will facilitate the recognition by German courts of a group compliance duty (going beyond the group and including due diligence duties towards suppliers).

In any case, once companies are under a statutory duty, as a result of human rights due diligence legislation, to organise a risk assessment and compliance system for their subsidiaries and value chain, it will of course become much easier to sue parent companies in tort based a violation of this statutory duty.

I think it's telling that in the draft directive of the European parliament, the terminology largely avoids concepts like fault, damage and causation. In reality, it seems the texts both in the French law and in the draft European and Belgian legislation, would still require proof of these three elements if a plaintiff wants to sue a company for damages because it allegedly violated it HRDD duties, but the talk is of "harm" (okay, this is probably synonymous with "damage") and "adverse impact", a concept which seems an amalgation of fault and damage. Though it may not play out that way, the use of "adverse impact" in the draft Directive of the European Parliament of 10 March 2021 creates the impression that the draft Directive wants to make the creation of negative externalities an actionable offense. As far as causation is concerned, a causal contribution is sufficient, and in the Belgian legislative proposal, a clear reversal of the burden of proof is provided in art. 24 of the draft bill, which provides that a company will be liable for the damage that emerged if it doesn't prove that it took all necessary and reasonable measures within its power to prevent a violation of human or labour rights or the emergence of health or environmental damage. Separate doctrinal articles will be needed the analyse the precise ambit of these new statutory provision- if they are ever adopted- but they clearly express that the drafters of the bill gave priority to attaining the goal of prevention of human rights violations over the niceties of liability law and the precise formulation of liability rules[62].

V. A duty to behave properly independent of damage: the politicization of tort in order to regulate corporate behavior and enforce human rights against corporations

On May 26 2021 the court of first instance in The Hague, Netherlands, issued a judgement in the *Shell Milieudefensie* case that resounded around the world[63]. I believe this judgement is indicative of wider convictions held by certain judges, citizens and organisations and could be

the tort law of the non-European country where damage emerged, and this law will probably not contain a due diligence requirement on the basis of which the parent could be held liable.)

[62] See also the criticism of the Council of State (legislative branch) in *Parl. St.* Kamer, 55/1903/2.

[63] Court of first instance Den Haag (The Hague, Netherlands) 26 May 2021, ECLI:NL:RBDHA:2021:5337, available (also in English) at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5337.

indicative of trends in the use of tort law that are probably undesirable and some aspects of which are incompatible with our current constitutional order[64].

The judgement orders Shell as a corporate group to reduce its CO2 emissions quicker than Shell had (according to the judge) intended to, essentially so that by the end of 2030, its emissions should be 45% lower than they were in 2019. In calculating the emissions, "scope 3" emissions should be included, which essentially means that the emissions caused by the customers of Shell when they use its products and services should also be taken into account.[65] In reaching this verdict, the court applied the "*unwritten standard of care*[66] *laid out in art. 6:126 (Dutch) Civil Code*", that is the general rule on negligence, "*which entails that acting against what according to unwritten law is unacceptable in social intercourse, is illegitimate*."[67]

The judgement has several striking features.

1. **A very precise behavioral rule is imposed that did not exist prior to court proceedings**

The specific rule that is enforced here- a 45% emissions reduction compared to 2019- is created – I think the word "invented" is appropriate- by the judge in the course of court proceedings. It did not exist prior to those proceedings and does not follow from the merely logical or deductive application of a rule that is binding on Shell and only very indirectly from a rule that is binding on The Netherlands. Shell had not violated any emissions reductions duties that would have been binding on it, and it's not like the court established that without the specific level of emission reduction imposed by the court on Shell, The Netherlands would not be able to honor its own binding emission reduction efforts. No specific damage that had occurred had been established. The judgement and more precisely the obligations it imposes on Shell are the result of an evaluation the court makes: if the EU, the Netherlands and Shell do not take serious action, and more quickly than they intend to do according to the estimates of the court, the goals of the Paris Climate Agreement will not be reached, with catastrophic consequences for the quality of life in The Netherlands. In view of the impact of other emitters

[64] I cannot here discuss all legal aspects of this remarkable judgement, far from it. Shell has appealed against the judgement, but at the time of writing this is still pending. Many commentaries have already been published in law reviews (in addition to dozens of blogposts and client newsletters), I refer to the stimulating B.M. Katan, "Ieder het hare- enkele opmerkingen bij het klimaatvonnis tegen Shell" *Ondernemingsrecht* 2021, 663-669 with further references to other case notes in Dutch law reviews.

[65] According to Shell, Scope 3 emissions constitute 85% of its total emissions.

[66] "Ongeschreven zorgvuldgheidsnorm"; "unwritten *duty* of care" probably sounds more natural in English than "standard" or "norm", but even though "standard" and esp. "norm" (the literal translation of the Dutch) can be defined as "rule that entails a duty", I prefer not to translate as "duty", because in a UK-US legal context "duty" has specific meanings that have nothing to do with the meaning of "zorgvuldigheidsnorm".

[67] § 4.4.1 of the judgement, The Hague district Court 26 May 2021, ECLI:NL:RBDHA:2021:5337.

both inside and outside the Netherlands, it is very uncertain what the impact of Shell's actions in this regard could be, and especially very uncertain at what level the reduction imposed on Shell should be set. Nevertheless the judge imposes a very precise reduction obligation, which we, in our most merciful moods, can call an educated guess about what a useful or fair contribution of Shell to solving the problem could be. All this is done in a spirit of prevention, at a stage when Shell has not only not violated any specific rules yet, but it is not clear it has caused any damage at all. By acting in such a preventive way, the court is able to avoid difficult questions of determining the existence and amount of damage (and of causation, but I personally find that more excusable, because it seems clear to me that traditional causation doctrines will have to be changed in order to allow tort law to play any part in dealing with the type of environmental problems at hand in the Shell case). All this is questionable from the perspective of legal certainty: while Shell certainly knew it had to reduce its emissions below the current level, to what extent it needed to do so could not be known by Shell until a regulator set specific targets for it/the oil industry. Not waiting for the governmental regulator (or legislator), the The Hague court created a regulation for one corporate group itself.

2. An independently enforceable general duty of care deduced from the existence of non-binding recommendations

Even if the court felt it could regulate Shell even though Shell had not violated any specific rules, the court of course was aware that it could only impose remedies on Shell on the basis of law. The court bases itself, as indicated, on the general standard of care. Much could be said about this, but I will limit myself to three remarks.

First, the existence of a duty for Shell to reduce its emissions with the speed determined by the court, in other words the concrete and specific meaning of the duty of care for Shell in the specific circumstances, is derived on the one hand from legal instruments that are binding on the State of The Netherlands but not on a private company like Shell, and secondly from non-binding legal instruments, soft law, binding on no-one. The court regards these soft law instruments as indicative of, or the expression of a "societal consensus". I would argue that the soft law character of these instruments -more clearly: their non-binding character- indicates that there is *no consensus* about their content: states, including The Netherlands, did not want to be bound by them. So, to me, it's odd to state, as the court does, that these non-binding instruments are the expression of a societal consensus.

Even if one argues that there is a societal consensus that something should be done about climate change, there certainly is no societal consensus on *how* this should be done, as everybody surely knows who has followed recent political debates in Belgium about whether we should close our nuclear reactors and focus on natural gas as a source of electricity generation, also in view of social considerations, i.e. worries that increasing gas prices make heating and electricity unaffordable for a considerable section of the population. Should a judge be allowed to decide on the basis of a specification of the general standard of negligence that everybody should switch to an electric car, even though at this stage many people cannot

easily afford such cars (certainly not on top of rising electricity and heating prices), which are much more expensive than fossil fuel cars?

Second, court decisions like *Shell Milieudefensie* are really only possible if one assumes that there is an independent, enforceable duty to behave diligently, in the sense of non-negligently, with due care. Such a duty is at this stage not part of Belgian law[68]. People or firms can only be condemned on the basis of tort law/the tort of negligence if their negligent behaviour has caused damage, or it is very likely that in the near future they will cause such damage (which the court then orders them to avoid). Imagine there were no statutory speed limits in Belgium for road traffic. Certain drives roar (they still drive fossil fuel cars, or have attached a machine imitating the sound of an old-style exhaust onto their electric cars) along busy, dark and wet highways at 180 km/hour. Most people would agree this is careless and "asocial", and since it endangers others even immoral. But as long as such a driver does not cause accidents, a Belgian judge could not issue an injunction, based on art. 1382 Civil Code, against such a driver, ordering him, on the judge's interpretation of the standard of care, to never drive more than, say, 130 km/hour and in wet and busy condition no more than 110 km/hour, nor could the judge deny such an "asocial" individual access to a car or to highways. That's because art. 1382 is not a license to judges to regulate activities. Art. 1382 does not contain a *duty* to behave carefully/ a prohibition to behave negligently. All it does is allow victims of damage that results from negligent behaviour, to claim damages.

3. Smuggling human rights into the standard of care in order to misleadingly present a political value-decision as the enforcement of a subjective right

Third, in reaching the conclusion that Shell was not behaving in conformity with the general standard of care, the court based itself in part on a landmark decision by The Hoge Raad (the highest court in The Netherlands) which had ruled -in the *Urgenda* case[69]- that the human right to (private life) as enshrined in articles 2 and 8 of The European Convention on Human Rights entailed a duty of the Dutch State (not of private companies) to protect its citizens against climate change and reduce CO2 emissions more quickly than was envisioned in the state's climate plans. Partly from the existence of this case, the The Hague court of first instance deduced that here was a "societal consensus" that climate change had to be combatted through emissions reductions. This illustrates that tort law and human rights have indeed, in the words

[68] See Ludo Cornelis, 'Aansprakelijkheid in de ban van de goede trouw?', in: M. Storme (ed.), *Recht halen uit aansprakelijkheid*, Gent: Mys & Brees 1993, (1), 20; See also L. Cornelis, *Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht*, Vol. I, Antwerpen: Maklu, 1989, p. 9, nr. 5; M. Kruithof (footnote 17), 141-142, esp. nr. 123; See also F. Auvray, "Bedenkingen omtrent het foutbegrip in het hervormingsproject: discussies waar ik graag bij was geweest" *TPR* 2021/1, (87), 101-108, who also discusses the problematic use of the expression "duty of care" in art. 5.147 (and other places) of the draft bill on the planned new tort law section in the Belgian Civil Code.

[69] Hoge Raad 20 December 2019, ECLI:NL:HR:2019:2007. For an English translation see https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf.

of one of Europe's leading specialists in comparative tort law, Cees Van Dam, become "brothers in arms"[70].

Human rights are a bit similar to words that express abstract concepts (or even words in general): they have a core meaning (implication) about which everybody (or every reasonable person whose web of beliefs has been formed by growing up in a similar society) agrees, but there is disagreement about how far and in which direction they radiate[71]. (Also, there is usually disagreement on how to balance two or more fundamental rights when they seem to conflict in "solving" a certain issue, e.g. how to reconcile the right to life with human dignity and the right to self-determination and the "pro-choice" "right" that this entails according to many, when these two fundamental rights or concepts have to applied in cases of abortion or euthanasia). In other words, outside pretty clear core implications, human rights are formulated in such a general way in Constitutions, Bills of Rights and international treaties like the European Convention on Human Rights that they can be used as a device to import evolving societal notions or convictions into the legal system; in a way, they are a license to courts to create new specific legal rules (like "abortion is a right" or "abortion is forbidden under any circumstances"). Unless one sticks to an extremely "originalist" interpretation of human rights provisions- which to my knowledge does not happen anywhere in the western world - specifying the implications of constitutional human rights provisions is very often a political decision.

My personal conviction -but I admit it is only that: a personal conviction- is that this type of decision should be left to a special type of court, constitutional courts, who in my view are inevitably and legitimately *political* courts. Their political nature is especially apparent when they have to decide on clashes between fundamental human rights: this is weighing fundamental values against each other. No moral philosophy has come up with a convincing -let alone generally accepted even within one society, culture or nation state- method of doing this (not for lack of trying). It involves a *decision*, and that decision is political. The core of politics or the political is deciding which direction to take in cases when irreconcilable and sometimes incommensurable[72] *values and interests* clash[73]. Ideally this is based on a careful

[70] Cees Van dam, "Tort Law and Human Rights: Brothers in Arms – On the Role of Tort Law in the Area of Business and Human Rights", *Journal of European Tort Law* 2011, 221-254. On the same topic, see Gerhard Wagner, "Tort Law and Human Rights", in M. SAAGE-MAAß, P. ZUMBANSEN, M. BADER, and P. SHAHAB, (eds.), *Transnational Legal Activism In Global Value Chains*, Springer International Publishing, 2021, 209-233.

[71] Human rights differ among themselves in the extent to which their specific implications are clear: It is comparatively speaking pretty clear what a ban on slavery entails; once one agrees that the "right to life" entails (much) more than the right not to have one's life taken against one's will and the right not to have one's health or bodily integrity deliberately impaired, it becomes far less clear and thus debatable what this right entails in specific circumstances.

[72] Which cannot be measured using the same yardstick and are therefore incomparable.

[73] Compare Chantal Mouffe, *On the Political*, London: Routledge, 2005, 144 p. who has cleansed C. Schmitt's overwrought "friend-enemy"-based verbiage(C. Schmitt, *The Concept of the Political*, expanded edition, Chicago: The University of Chicago Press, 2007 ;translation with comments of the 1932 *Der Begriff des Politischen*) to express a more reasonable view (not involving the concept of war, for instance, and esp. stressing, against Schmitt, that democracy can be /is pluralistic) of what politics is essentially about, nevertheless favorably opposing Schmitt to "post-political" visions (such as those expressed in

analysis of all the interest and values at stake, and of all the relevant facts, but this should not lead to the illusion that "the right solution" can be deduced in a scientific or predictable way - at most some "objectivity" is possible, but in the limited sense of giving due weight to *all* interest and values at stake. Political decisions are not logical, perhaps not even rational decisions, they boil down to cutting Gordian knots[74].This is why such political decisions are only legitimate and acceptable if the substantive outcome (the decision) has been taken in a procedurally correct way. In constitutional democracies, this means by democratically elected politicians and the government departments and agencies that work under their control. Government departments of course work under the law, and the lawmakers (politicians gathered in parliament) who produce those laws, are restricted in their sovereign power to produce laws with the content they prefer by the fundamental values enshrined as human or fundamental rights in the constitution/bill of rights and international human rights instruments. The final arbiter of the scope and meaning of those human rights are constitutional courts and international human rights courts, and these are entitled to weigh irreconcilable values between which no hierarchy exists against each other, thus taking a political decision. That's a core function that in many western democracies has been entrusted to them by the state (the overarching political unit of a society).

Ordinary courts, however, should not abuse tort law by, in a first step, creating a general duty, enforceable as such, to behave without negligence, and then, in the second step, flesh out the specific meaning of such a duty by importing their own interpretation of human rights provisions into the duty of care notion. In doing so, they can argue that they don't have to make the difficult evaluations that have to be made when society has to decide how to tackle climate change: after all, they are allegedly (misleadingly) simply enforcing a (human, fundamental) *right*. Now as Dworkin[75] has reminded all those who would have tended to forget, rights are trumps: if you have a right to something, you can claim it, and your *right* should not be balanced against competing *interests* or weighed against respect for certain

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Negri and Hardt's "Empire" book) that were perhaps more popular around the turn of the millennium than today. She convincingly explains that politics revolves around antagonism and we/they and, well yes, "friend-enemy", but not an enemy that has to be eliminated (as in Schmitt, or so I understand him in spite of apologists with a far greater knowledge of his work than I have denying that he implied this). She coins the term "agonism" to refer to a "we/they relation where the conflicting parties, *although acknowledging that there is no rational solution to their conflict*, nevertheless recognize the legitimacy of their opponents" (See Mouffe, p. 20, my emphasis added because I think that is indeed a core feature of truly political decisions, and also reflects the difference between the neutral application of existing legal rules and the political act of creating legal rules and creating and allocating rights) .

[74] In spite of my assertion that *substantive* rationality is impossible in political matters and one can only hope for a just and rational *procedure* to take decisions, I recommend everybody to read Amartya Sen's *The idea of Justice,* London: Allan Lane, 2009, 467 which seems to suggest that at least some "partial ordering" is possible in a rational way and that this allows not to find "absolute justice", but enables progress in preferring some substantive solutions in value conflicts to others (Of course, it's an understatement to say that others have dealt with the same issues as Sen, but his attempt to tackle the topic seems more convincing to me than most, certainly more convincing than Rawls' attempt in *A Theory of Justice* or the attempts of utalitarians from Bentham onwards; moreover, formally the theories of Rawls, Kant and utalitarians are substantively empty, they are at heart procedural, although they are intended to improve the lot of the worst off (Rawls) or justify essentially secularized versions of Christian values (Kant)).

[75] R. Dworkin, *Taking Rights Seriously*, Cambridge, MA: Harvard University Press, 1977.

values. Your right is a right precisely because the political system has already done this weighing of values and interests, and has come up with the decision that the values and interests enshrined in the right trump other values and interests; that's why we call it a right. If you have a subjective right, you can demand action from others to realize your claim, e.g. your claim, enshrined in your right to life (art. 2 ECHR), to an environment that does not heat more than 1.5 degrees by 2030 compared to 1990. When courts are doing this, they in fact take political decisions under the veil of applying already existing behavioral rules that result from the merger of a duty of care and human rights, whereas in fact, if one looks under the veil, they're inventing new rules, with regulatory effect -but applied unequally to citizens and firms, since these rules are only applicable to, and enforced on those who are sued, e.g. Shell or car producers[76], not on many others, like electricity-generating firms let alone the consumers who send millions of packages back and forth through the return of Amazon, bol.com or Zalando deliveries. These consumers are, however, caught in the "scope 3" emissions of the goods-producing firm, so that these firms are in a way ordered by the court to try and regulate the behavior of their customers.

As indicated, I think this is an illegitimate form of *gouvernement des juges*. In a case like Shell Milieudefensie, some will retort that surely politicians had already decided that something had to be done, by 2030, about climate change, and that the action would encompass CO2 emission reductions. As such that is of course true, but politicians in The Netherlands or elsewhere had not yet decided what the precise role of emission reductions by oil companies would have to be, nor had they weighed the duty of the Dutch state to make sure emissions were reduced by 2030 against such considerations as keeping energy affordable for large swathes of the population.

So I remain convinced that court decisions like "Shell Milieudefensie" would -let's limit myself to Belgium- be incompatible with our constitutional order and political system (a representative democracy with a Montesqieuan balance of powers). In Belgium the role of ordinary courts is limited, by the Constitution, to deciding cases about "subjective rights"[77]. In the Dutch case, an "attenuating circumstance" to excuse the The Hague court of first instance for what it did, was that the highest Dutch court had already ruled that the right to life as enshrined in the ECHR entailed a duty for the state to combat climate change. Still, at the very least, the *Shell Milieudefensie* court of first instance should have limited itself to at most imposing a general (in the sense of unspecified) duty to make a larger *effort* concerning emissions reductions on Shell, without specifying the specific target nor, of course, how Shell should reach that target.

[76] See e.g. the complaint against Volkswagen in order to force it to stop producing cars running on fossil fuels by 2029, filed with the court of first instance of Braunschweig in November 2021 (I cannot find an exact date on my copy of the complaint).

[77] Art. 144, para 1 Belgian Constitution. We have to admit that the primary function of this provision is to make sure that litigation concerning subjective rights is settled by ordinary courts and no jurisdiction over such rights is given to special or administrative courts. Nevertheless it can also be construed as implying that when a dispute does not concern subjective rights, it falls outside the jurisdiction of ordinary courts.

So here we are: if you're a judge who doesn't care much for democratic constitutional orders and wants to act as a philosopher-king by issuing environmental legislation for oil companies that the political authorities and their regulatory enforcement agencies regrettably failed to come up with, there's an easy three step route to power: first transform the statutory provision saying that those who negligently cause damage are liable to compensate that damage into an enforceable duty to at all times behave carefully. In a second step, to determine what careful behavior implies, find a suitable human right and state that someone who violates your interpretation of the extent and operationalized meaning of this human right, does indeed violate a subjective right of the plaintiff. Third, instead of awarding damages (or worrying about calculating them or establishing causal links), issue an injunction concerning the future behaviour of the defendant.

I regret very much that politicians and government agencies are not doing more to combat climate change. It seems very likely that societies will be paying a very heavy price for this in the quite near future (within 30 years), not only in the direct form of extreme weather and flooding of coastlines, but also mass migration and the many disruptions, both of national politics and probably of trade flows and therefore wealth this is likely to bring with it. This is a national security threat which should concentrate minds and galvanize politicians into action to a far greater extent than has happened so far.[78]But this emergency in my view *does not* give courts the legitimacy to "step in" and in the process abuse tort law as an instrument of court-made regulatory policy.

4. NGOs protect the general interest

Of course, in order to be offered the opportunity to impose this very precise emission reduction duty on Shell and thus act as a regulator for Shell, the court of course needed to be seized by someone with an interest in emission reductions. In this case this was not the Dutch government, which could conceivably have acted to force the Shell group to cooperate so that The Netherlands could reach its binding commitments under the Paris Climate agreement or some other legally binding text, nor a Dutch or EU government agency enforcing applicable environmental law against Shell. The main (admissible)[79] plaintiff was a Dutch non-profit called Milieudefensie[80], set up in 1971 to, among other goals, contribute to the solution and prevention of environmental problems and the pursuit of a sustainable society. "Milieudefensie" also received power of attorney from more than 17.000 Dutch citizens to represent them in the suit. The basis for judging admissibility of an NGO like Milieudefensie to bring suit was art. 3:305a Dutch Civil Code. This (essentially) states that a non-profit organization can launch court proceedings with the aim of protecting similar interests of a group of persons other than itself. These so-called "general interests complaints"

[78] A good book in the vast climate change policy literature is Anatol Lieven, *Climate Change and the Nation State* London: Penguin Books, 2021, 202 p.
[79] Several plaintiff organisations had no standing, according to the judgement.
[80] "Environmental defence" or "defense of the environment".

("algemeenbelangacties") pursue general interests (plural) that cannot be indivualised because they are linked to a very large group of persons that is diffuse and indeterminate[81]. In this case, it was contested whether the interests of the persons whose interest were being pursued by Milieudefensie were sufficiently similar. The court ruled that the primarily pursued interests of present and future generations of the whole world population were not sufficiently similar for this purpose, in view of the different timescales and ways in which climate change would impact different parts of the world. However, the interest of the present and future inhabitants of the Netherlands was, in the eyes of the court, sufficiently similar.

We cannot discuss this in any detail here, but it is clear that legislators in Belgium and the Netherlands (and no doubt in other European countries as well) have, especially since the 1980s, created a ream of special statutory provisions that allow non-profits who have made this their goal to protect not only collective interests of a large group of people, but also specific parts of the general interest, e.g. protection of the environment against pollution or of employees against discrimination. Since the turn of the century, these older laws have sometimes been supplemented by general provisions, which allow for the collective defense, through court complaints, of any part of the general interest. Art. 3: 305a Dutch Civil Code is an example of such a provision, in Belgium we have the second paragraph of Art. 17 Belgian Code of Civil Procedure, as introduced in 2018, which goes less far than the Dutch provision: it allows legal persons to bring claims (but not for damages, only injunctive relief) with the aim of protecting human rights, provided the objects clause of the legal person defines a specific purpose (obviously linked to the defense of human rights, even though art. 17 para 2 does not explicitly state this in this way) that can be distinguished from the general interest (while, at the same time, it is clear that the legal person must through its claim be pursuing a part of the general interest, since claims based on art. 17 para2 can clearly not be class actions through which the *individual* interests of a group of people are pursued, provided they have enough in common)[82].

The proliferation of such provisions greatly enables NGOs to enforce the general interest (and not, as happens in class actions, collective interests, i.e. individual interests bundled together). Of course, these are merely provisions of civil procedure. The NGO wishing to change corporate policies under the guise of protecting a part of the general interest, will have to find a substantive norm that it wants to enforce. It is precisely the open-ended nature of the standard for negligence in art. 1382 Civil Code that allows courts to define what the general interest entails and what measures should be taken to realize it, bring it about, implement it.

Of course, the emerging (French, German and soon Belgian and European) human rights due diligence legislation also provides NGOs with a lever to negotiate with companies about their strategic direction, or at least about very important decisions about compliance: French,

[81] See § 4.2.2 of the judgement.

[82] Comp. Marc Kruithof, "Privaatrechtelijke facetten van algemeenbelangacties bij de Belgische justitiële rechter" in *De algemeenbelangactie en de civiele rechter*, Vereniging voor de vergelijkende studie van het recht van Nederland en België, Preadviezen 2020-2021, Boom juridisch: Den Haag/Antwerpen, 2021, p. 131, nr. 104.

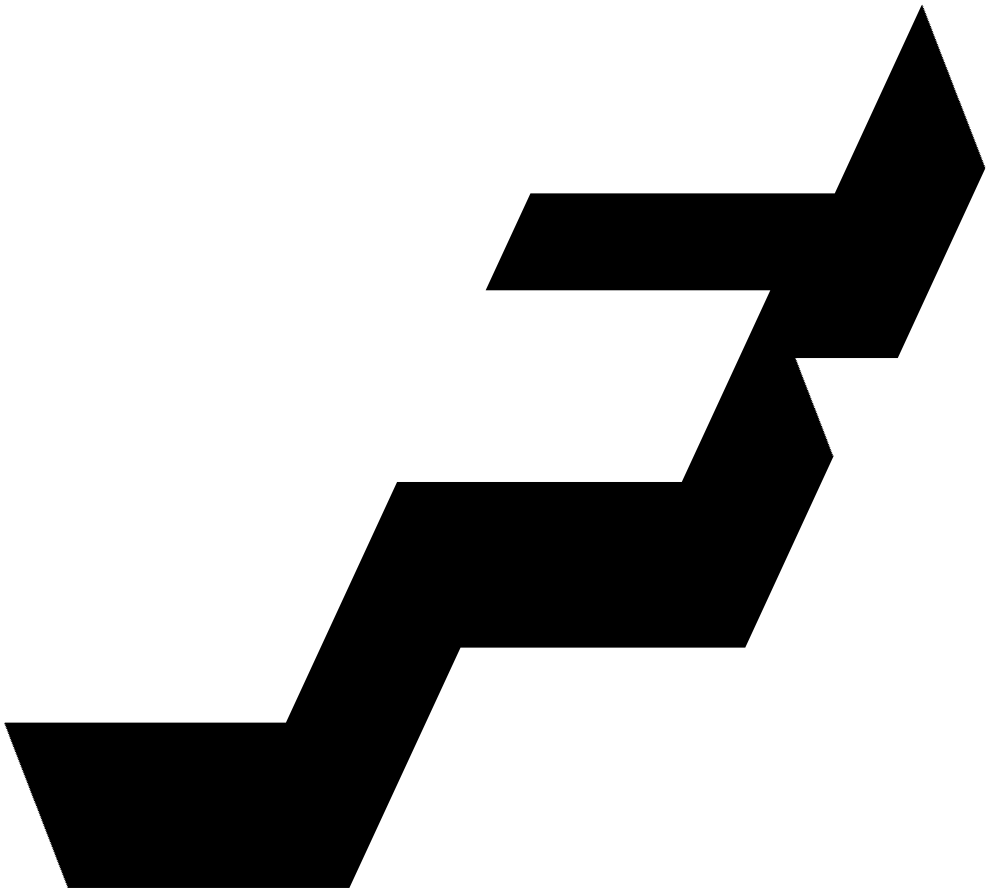
German and future EU rules have in common that the large corporate groups subject to these rules are enjoined to consult with NGOs in developing and also in implementing a HRDD strategy, that they should be open to complaints from NGOs about deficient or badly implemented strategies and that NGOs can first give companies a "yellow card"[83] about the quality of their HRDD plans and, if the company does not remedy the situation, a "red card" in the form of a complaint before a court in order to force the company to take remedial action[84]. In future companies will have to recognise these NGOs as full stakeholders, comparable to their employees or creditors -even though the NGO will not have invested in the company like employees or creditors have or at the very least someone they will have to enter into dialogue with like they have been doing for decades with important regulators.

Conclusion

Many would argue that tort law has always had an important preventive and deterrent function, perhaps secondary to its compensatory function, but very much present nevertheless. In spite of this, I believe we are witnessing a phase change, where tort law is being transformed into an unabashed instrument of private enforcement and regulatory policy, especially concerning environmental, social and human rights issues. I have used the *Shell Milieudefensie case* as a totemic example. I'm generally sympathetic to using tort law as a means of private enforcement, which in many policy areas is a necessary complement of public enforcement (if one has legal rules, one should enforce them; rules not worth enforcing, should lose their status as legal rules). But I believe tort law is abused in a way that violates at least the spirit of the Belgian constitution (separation/balance of powers idea) and more generally the division of the domains within which respectively politics and law can claim to operate legitimately, when judges transform the standard of care from negligence law into a duty to at all times behave carefully and specify what careful behavior entails by claiming that they are simply enforcing respect for a human *right*. This appeal to *rights* allows judges to take decisions that should be the preserve of democratic politicians, namely deciding, without, in reality, any useful guidance from law or even morality, how mutually incompatible *values and interests* should be weighed against each other.

[83] I take the analogy from H.J. de Kluiver, "Kroniek van het ondernemingsrecht" *Nederlands Juristenblad,* 2021, issue 16, 1241.

[84] I briefly described those rules from French, German and draft EU legislation in H. De Wulf, "ESG en vennootschapsrecht: innig verbonden, maar ook duurzaam?" in *Duurzaam ondernemen en Sustainable Transport,* Preadviezen van de Koninklijke Vereeniging Handelsrecht, Zuphen, Uitgeverij Paris, 2021, (29), 78-88. See more extensively in the same volume on the features of HRDD in general M.W. Scheltema," De juridisering van mensenrechten due diligence", p. 105-140 with extensive references to the international literature. See also the invaluable *Study on due diligence requirements through the supply chain-Final report (February 2020)*, prepared under the direction of The British Institute of International and Comparative Law for the European Commission and available at https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.



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