1 The object of law

The term "laws" is both perplexing and crucial when viewed through the lens of legal science. In its plural form, "laws" specifically denotes rules or statutes enacted by a legislative body. However, it’s important to note that not all laws pertain to legal matters; some are associated with regulation. Despite the potential confusion, a regulation is essentially designed to "regulate" something. The act of "regulating" involves controlling, directing, or managing a subject according to specific rules, standards, or guidelines, with the overarching aim of ensuring order, fairness (utility), or efficiency. In this context, regulation emerges as a method of addressing coordination problems within a society. Essentially, a coordination problem can be viewed as an economic challenge, with the primary objective being the realization of distributive justice or, in the context of Aristotle’s Nicomachean Ethics, Partitive Justice.[1] It involves the transfer of means from one group to another to mitigate disparities, as seen in practices like taxes and social security. Essentially, it involves the re-allocation of means within society, grounded on the major premise that the existing distribution is deemed unjust (or ineffective in sustaining social stability). The key distinguishing feature, in contrast to what I would label as law, is that regulations do not prescribe or imply normative behavior.[2] Non-compliance with a regulation is, in my view, only a derived form of abnormal behavior. The primary abnormal behavior lies in neglecting the rights granted to others by the regulation.

Laws excluding regulations (hereafter denoted by law), on the other hand, functions as a mechanism for addressing communication challenges within a society.[3] Our legal system is founded on the shared acceptance that the current distribution of means, legally termed as possession, is equitable.[4] Post-regulation, any human caused unlawful disruption of this distribution is considered legally abnormal behavior. The primary aim of law is to maintain order and stability in this fair distribution by prescribing corrective measures. Achieving corrective justice (Aristotle: Rectificatory Justice) entails rectifying damage caused. The communication challenge arises because there is ambiguity
regarding what constitutes this distribution of means, what qualifies as unlawful disruption, and who bears the responsibility for restoring the status-quo. These determinations hinge on norms, which are in our legal system collectively shaped by the opinions of all members of society. However, since these norms are predominantly unwritten and dynamic, individuals find it challenging to precisely discern them. Law thus functions as a solution to communication challenges associated with the norms governing corrective justice. The aim of law is to achieve corrective justice in society, based on the foundational principle (grund norm) that the existing distribution is deemed fair.

2 Three pivotal legal inquiries

If we presume that the distribution of means is fair and that voluntary and intentional acts by individuals to relinquish or exchange possession are considered a priori acceptable within our legal system, this suggests that the fairness of the distribution is absolute and not dependent on others’ possessions (relative). Although this may not consistently hold true in reality, it serves as a legal construct. With more individuals beginning to evaluate the distribution relative to others, one might hypothesize a decrease in law acceptance. This could mark the beginning of the phenomenon wherein individuals start questioning the fairness of the distribution. Returning to the concept of a just distribution, any involuntary or unintentional deviation from this distribution would render it unjust, prompting the need for a set of rules to determine corrective actions to restore the initial distribution. If these rules conclude not to rectify the deviation from the distribution and we assume that the distribution is just, then relinquishment or exchange is considered voluntary and intentional. In other words, individuals are, under these conditions, held responsible for failing to safeguard their possessions adequately.

As previously mentioned, law serves as a solution to the communication hurdles related to the norms governing corrective justice. In a society comprised of numerous individuals, it is impractical to be aware of the distribution of means, which changes in possession are deemed acceptable, and the current system of corrective rules as this involves the opinions of all members of society. The lack of this knowledge stems from a communication gap, as it is unfeasible to communicate with every individual in society. In this context, it can be asserted that both a codified law interpreted by the judiciary or a judicial system grounded in precedent (common law) offer solutions to this communication challenge. When restricting legal inquiry to the manifestation or practice of law, there’s a potential for the emphasis to shift towards assessing the effectiveness of the present institutionalized communication solutions rather than focusing on the object of law itself. It’s highly probable that our perception of law, under these circumstances, is influenced by the operation of these solutions, resulting in the generation of knowledge that may be distorted or incomplete.

When examining the object of law, I hypothesize it boils down to addressing three fundamental inquiries:

1. What constitutes the current distribution of means, or in legal terms, possession?
2. What constitutes a lawful transfer of means? In the context of corrective justice, Aristotle discussed the concept of commutative justice, wherein individuals exchange goods or services under the condition that the exchange is fair and proportionate. In contemporary times, there appears to be less emphasis on proportionality in exchanges, possibly due to diminished concerns over voluntariness in our current political climate. However, it could be argued that for maintaining focus on absolute rather than relative distribution of means in society by individuals, proportionality indirectly contributes to social stability and warrants further research exploration.

3. How can an unlawful disruption in the distribution of means be rectified? In other words, what is the system of rules governing corrective justice?

In summary, the objective of law is to maintain a perceived fairness in the distribution of means in society. I propose the rather bold hypothesis that all laws within the Dutch Civil Code, excluding regulations, can be linked to addressing one of these questions. For the remainder of this paper, I will concentrate on the dynamics in liability law.

3 Application: Liability Law

Liability law, also referred to as tort law in certain jurisdictions, regulates the legal accountability that one party may bear for causing harm or injury to another. In essence, it outlines the procedures for addressing an unlawful disruption (the legal accountability that one party may bear) in the distribution of means (harm or injury), thus addressing the third question posed. "Harm" and "injury" are categories of damage within the scope of liability law, referring to the adverse consequences experienced by an individual due to another party’s actions or negligence. While "harm" encompasses a broader spectrum of negative effects, including physical, emotional, and financial harm, "injury" specifically denotes physical harm or damage to one’s body or health. Liability law encompasses various scenarios where individuals or entities may be held liable for their actions or failures that result in damage, whether it be physical, emotional, or financial. These aspects are all intertwined with the concept of possession. Therefore, in determining whether corrective measures could be pursued, it is essential to address the questions surrounding possession, as damage cannot be discussed in legal terms without considering possession. Damage of possession cannot occur unless there was possession initially. The applicability of liability law is contingent upon the extent and breadth of what is defined as possession within society.

Liability law encompasses various aspects, including instances of failing to meet obligations, negligence (including breaches of duty of care), intentional torts, strict liability, and product liability, among others. These represent different scenarios where the transfer of means is deemed unlawful. Laws may either outline the necessary criteria for lawful transfers or identify deficiencies in transfers that are considered unlawful. While intentional torts, strict liability, and product liability involve specific conditions or circumstances that give rise to liability, negligence focuses on the failure to meet the
standard of care expected in a particular situation, thereby constituting a shortcoming in the duty owed to others. These specific conditions in liability law pertain to activities that society deems too risky due to the potential for harm or damage they pose. These activities typically cannot be entirely mitigated or made safe through reasonable precautions. As a result, individuals undertaking such activities may be held liable for any resulting harm or damage, even if they took precautions or acted with care. In certain cases, these activities are explicitly addressed in the civil code, as seen in product liability laws. Alternatively, the accepted level of risk-taking in society is guided by common opinion (Dutch: verkeersopvatting). The failure to meet the standard of care expected in a particular situation, mostly related to negligence, is the other main category of unlawful transfers. It is related to acts where individuals did not take sufficient precautionary measure to prevent the occurrence of damage, while this would have been possible. Hence, within the domain of liability law, it becomes crucial to explore the second question posed: what defines a permissible transfer? I propose that while an action ideally remains unrestricted, when it inherently entails too much risks of damage (potentially leading to an unjust distribution of means), it falls under the scope of liability law. Therefore, the permissibility of transfers, and subsequently, the required stability of the initial distribution, along with the applicability of liability law, is intricately linked to the level of risk tolerance prevalent in society.

The objective of liability law is to compensate for the damage incurred. Therefore, liability law is a solution to communication challenges associated with the norms governing corrective justice. It represents a blend of a positive set of rules and normative charges driven by society. Within this positive set of rules, there exists a decision mechanism that ultimately categorizes damage as eligible for retribution or not. It’s a classification challenge where all incurred damages form a comprehensive set, some of which necessitate correction. In my monologue, Quantitative Liability Law[10], I elucidate that the decision mechanism is a nuanced interaction between what is commonly termed, albeit perhaps inaccurately, causality and societal norms regarding the distribution of risks in society. The positive set of rules is driven by legal causality and the normative charges are driven by the verkeersopvatting. In the remainder of this section, I will discuss the role of legal causality.[11] For the sake of clarity, I will utilize the term “causality” in the ensuing discussion, although it’s worth noting that the term encompasses various applications and interpretations, rendering it somewhat ambiguous. Fundamentally, within liability law, it is inherently unjust to interfere with an individual’s distributed means by mandating compensation for damage without proper justification. In our legal system, we justify this intervention by arguing that the individual should be at least partially responsible for the occurrence of the damage. The idea of cause and effect aiding in establishing this responsibility is merely a minor step.[12] Legal causality should serve as a possible method for determining the assignment of responsibility, rather than being an absolute prerequisite for establishing liability. The obligation to rectify injustice should be proportional to the real influence the implicated party has in preventing the damage either by abstaining from the action or by mitigating associated risks. In our existing liability law framework, this is linked to legal causality, which governs attribution, the duty of care (relativity), and legally normal behavior. The necessary degree of legal
causality for initializing corrective measures is determined by societal norms (verkeersopvatting), where the normative charge intersects with the stable legal causality-driven positive system of rules. Through the development of a quantitative model of liability law, I demonstrated that liability law is fundamentally influenced by measures of causality and various societal norms dictating the weighing of these causal factors. These components are intricately intertwined within liability law. As anticipated, the model mirrors the structure of Dutch codified liability law. This underscores that our existing liability law system effectively addresses communication challenges inherent in the norms governing corrective justice pertaining to damages.

4 How does liability law change in time

In the first section, I argued that law serves as a remedy for the communication challenges inherent in norms related to corrective justice. This hinges on the assumption that society collectively agrees to the fairness of the current distribution of means among individuals. Since exchange of means is inevitable, there are norms dictating how transfers should occur to maintain this perceived distributed fairness. Any deviation from these norms constitutes abnormal legal behavior and may necessitate corrective measures to restore the just distribution. Given the complexity and dynamism of these norms, it’s practically impossible for individuals to fully grasp them. Law aims to address this communication gap. Moreover, there is a legal fiction that states that all individuals know the law, thereby resolving the remaining communication problem. In the second section, I proposed that understanding the object of law requires answering three fundamental questions: 1) What constitutes possession? 2) What defines a lawful transfer? and 3) What comprises the system of rules governing corrective justice? These inquiries pertain to the initial distribution of means, the mechanisms of transfer, and the systems for maintaining fairness in distribution. The ultimate goal of an effective legal system is to uphold fairness in means distribution at all times, or at the very least, prevent deviations from fairness that would prompt individuals to question the legitimacy of the legal system. In the third section, I address the introduced fundamental questions within the context of liability law. I argue that the question of possession is leading for the determination of damage. Furthermore, I argue that individuals, in the transfer process, should either abstain from engaging in too risky activities altogether, or take steps to mitigate those risks if possible (negligence). If individuals choose to engage in activities that are unacceptably risky and impossible to mitigate (for example in strict liability cases), they must accept the obligation to compensate for any resulting damage. Finally, I elucidate that the norms governing corrective justice encompass a stable positive system of rules, which, within our present legal system, is heavily influenced by the concept of legal causality (token causality, attributivity, relativity, proximity, etc.). Additionally, these norms are subject to changes influenced by dynamic societal norms regarding the required degree of strictness in legal causality. These norms, or the common opinion, are connected to the degree of risk acceptance prevailing in society. Thus, by addressing these questions, I decode the five requisites of liability: causality,
attributivity, relativity, unlawfulness and damage, as outlined in the Dutch civil code (Art. 6:162). Consequently, it becomes evident that the Dutch civil code serves as an effective solution to the communication challenges inherent in norms pertaining to corrective justice.

To "decode" means to interpret something that is difficult to understand, especially a system of symbols or a complex message, into a comprehensible form. It involves unraveling complexities to reveal the underlying information. The conceptual model of liability law that was presented in this paper, offers an opportunity to decode the dynamics within liability law. Understanding future liability law is crucial for sound decision-making, as it impacts the potential consequences of present actions.

The dynamics of liability law can be characterized as waves that determine its scope of applicability. High-frequency waves with low amplitudes arise from shifts in the generally accepted societal opinion regarding the tolerance for risk associated with engaging in activities that may cause damage. These opinions influence the degree of attributivity, the level of duty of care, and the permissible riskiness of conducts when mitigation options are unavailable. As risk tolerance decreases, the corrective justice system becomes more stringent, necessitating the correction of more damages. Understanding the factors that drive these fluctuations in risk tolerance requires further research. It's likely influenced by a myriad of economic, social, and cultural factors, given that law is a societal construct. The volume and diversity of legal cases in liability law have significantly increased over the past century. This growth can be partly attributed to a decline in risk tolerance within Western European society. The rise in strict and product liability cases correlates directly with this decreased risk acceptance. Additionally, negligence cases, for example in the medical field, illustrate a heightened expectation for the duty of care. It should be noted, however, that risks that are produced by human activities within society have increased, and we are increasingly inhabiting what can be termed a risk society.[13] Further research is necessary to gain a clearer understanding of this risk tolerance phenomenon. Legal scholars could, for example, draw inspiration from the work of Kahneman and Tversky, particularly their research on behavioural economics, to approach the study of risk tolerance in liability law from an economical and psychological perspective.[14] Similarly, they could explore the insights of researchers like Knobe and Nichols on norms if they wish to approach the subject from the experimental philosophy side.[15]

The scope of liability law’s applicability hinges on the definition and scope of possession as understood within society. Over the past century, the concept of legal possession has expanded significantly. At the outset of the 20th century, possession was largely confined to physical assets, financial holdings, and reputation. Over time, the concept of possession has expanded to include various domains, spanning from human rights and intangible assets to historical claims and natural means. As a result, we now encounter a spectrum of new types of damage, such as violations of human dignity, emotional distress, the repercussions of colonialism, and damage to the environment. The legal research community lacks sufficient understanding of the dynamics in legal possession to fully comprehend this evolution. Nevertheless, we should acknowledge it as a genuine societal phenomenon, as evidenced by the alignment of public (lawmakers) and judicial
opinions with the prevailing common opinion in this expansive trajectory. Historically,
these dynamics have been characterized by low-frequency, high-amplitude waves. Over
the past century, our system of positive rules has remained stable. This suggests that
for liability law to remain operative, the thresholds of assuming causality have had to
be lowered to nearly moral causality levels. In this scenario, the accountable individuals
may lack any reasonable causal link to the activity in question, and their accountability
is primarily moral rather than legal. This development is putting our current liability
system to the test. It also suggests an implicit association between risk acceptance and
possession, a correlation that I have yet to fully grasp and merits further investigation.

When a critical mass of individuals begins to question the legal assumption that the
initial distribution is fair, it signals the potential for a significant upheaval. This upheaval
could lead to profound changes in the established system of rules, which currently
rely on legal causality and societal norms. Legal causality is rooted in the mechanistic
worldview that has persisted since the Scientific Revolution, while societal norms
draw from the social contract ideals of the Enlightenment and the French Revolution.
However, following a revolution, these foundations could give way to entirely different
paradigm underlying liability law. These could range from technocratic or autocratic
models to systems influenced by traditional elders or religious principles. In such sce-
narios, even the fundamental notion that the purpose of liability law is corrective justice
may be called into question. These waves typically have extremely low frequency and
very high amplitude. Early indicators of reaching this point warrant research efforts to
understand fully.

Our attention should extend beyond seeking to comprehend the establishment of
norms governing corrective justice. It is equally important to explore alternative so-
lutions to the communication problem, particularly in our era of rapid advancements in
Information and Communication Technology (ICT). There may be substantial improve-
ments yet to be uncovered. Lastly, legal scientists still need to enhance the understanding
of the underlying positive system of rules that forms the basis for corrective justice mea-
sures in liability law. Therefore, they should delve deeper into the fundamentals of legal
causality. To fully decode the dynamics in liability law, it’s essential to comprehend the
system’s sensitivities to the dynamics discussed in this paper, given the stability of the
system of rules within our society.

In summary, to deepen our understanding of the dynamics shaping liability law, the
following research program can be proposed:

1. Investigate further to clarify the influence of risk acceptance on norms within
liability law.

2. Conduct additional research to comprehensively understand the dynamics sur-
rounding legal possession.

3. Investigate the factors influencing and the significance of proportionality in ex-
changes.

4. Explore further the implicit relationship between risk acceptance and possession.
5. Study early indicators of significant (revolutionary) shifts in liability law.

6. Explore alternative solutions to the communication problem driven by advancements in information and communication technology (ICT).

7. Enhance understanding of the underlying positive system of rules that underpins corrective justice measures in liability law. This requires a deeper exploration of the fundamentals of legal causality.

8. Design alternative systems of rules that are not reliant on the principles of causality and the verkeersopvatting.

References


[2] Calabresi, L., Some Thoughts on Risk Distribution and the Law of Torts, *70 Yale L.J.* (1961), 499-553. Calabresi’s model elucidates liability regulation rather than liability law. While it’s conceivable that in some societies, the distribution of means under Calabresi’s model coincides with that derived from corrective justice measures, this isn’t guaranteed. As for whether a society can exist without norms to govern liability law, that’s a question best pondered by philosophers.


