

# Unde Venis et Quo Vadis? European tort law revisited

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## I. Introduction ■■■■

The task of producing a common theory and common principles of European tort law has gone apace, with substantial theoretical and empirical work undertaken in Germany, Austria and elsewhere,<sup>2</sup> with two completed sets of European tort principles already published,<sup>3</sup> and is an unavoidable result of the march towards a common private law of Europe. In this paper, I wish to offer some

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<sup>2</sup> See for a sample of the burgeoning literature: Yearbook on European Tort Law (2001–), Publications of the European Centre for Tort and Insurance Law (ECTIL), edited by Koziol and others; W. VAN BOOM, H. KOZIOL/CH. A. WITTING (eds), *Pure Economic Loss*, 2004; B.A. KOCH (ed.), *Terrorism, Tort Law and Insurance*, 2004; H. KOZIOL/W. DORALT (eds), *Abschlussprüfer. Haftung und Versicherung*, 2004; H. KOZIOL/A. WARZILEK (eds), *Persönlichkeitsschutz gegenüber Massenmedien/The Protection of Personality Rights against Invasions by Mass Media*, 2005; M. FAURE/T. HARTLIEF (eds), *Financial Compensation for Victims of Catastrophes: A Comparative Legal Approach*, 2006; G. WAGNER (ed.), *Tort Law and Liability Insurance*, 2005; MIQUEL MARTÍN-CASALS (ed.), *Children in Tort Law, Part I: Children as Tortfeasors*, 2006; MIQUEL MARTÍN-CASALS (ed.), *Children in Tort Law, Part II: Children as Victims*, 2006; W.H. VAN BOOM/M. LUKAS/C. KISSLING (eds), *Tort and Regulatory Law*, 2007; S. KLOSSE/T. HARTLIEF (eds), *Shifts in Compensating Work-Related Injuries and Diseases*, 2007; M. FAURE/A. VERHEIJ (eds), *Shifts in Compensation for Environmental Damage*, 2007; W.H. VAN BOOM/M. FAURE (eds), *Shifts in Compensation between Private and Public Systems*, 2007; see also von Bar, *The Common European Law of Torts*, OUP 1998; GERT BRUEGGERMEIER, *Common Principles of Tort Law*, London 2004; CEES VAN DAM, *European Tort Law*, Oxford 2006; NILS JANSEN, 'Principles of European Tort Law?', *Grundwertungen und Systembildung im europäischen Haftungsrecht*, *Rebels Zeitschrift fuer auslaendisches und internationales Privatrecht*, 70, 32–770 (2006); Stathis Banakas, 'European Tort Law: Is it Possible?' 9 *European Review of Private Law*, 363–375 (2002); FAIRGRIEVE, ANDENAS, BELL (eds) *Tort Liability of Public Authorities in Comparative perspective*, London 2002; Christian von Bar, ULRICH DROBNIG (eds), *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study*, Sellier Publishers 2004; MAURO BUSSANI (ed.), *European Tort Law, Eastern and Western Perspectives*, Sellier Publishers 2006.

<sup>3</sup> See European Group on Tort Law, *Principles of European Tort Law, with Commentaries*, Springer verlag 2004, available online at <http://www.egtl.org/> (last visited 4.2.2008); see also the final version of the text on Principles of Civil Liability for Damages produced by the The Study Group on a European Civil Code, available online at [http://www.sgecc.net/media/downloads/updatetortlawarticles\\_copy.doc](http://www.sgecc.net/media/downloads/updatetortlawarticles_copy.doc) (last visited 4.3.2008).

thoughts on a *new* European tort law from the other side of the English channel, from a jurisdiction that stands alone (together with Ireland) in not sharing the roots and culture of Roman law in Europe,<sup>4</sup> and from a country that is regularly seen as politically unfriendly to greater European integration. I am, however, encouraged by the voice of an English scholar, who is generally considered to be one of the most authoritative and brilliant masters of the common law, a defender of its purity and originality, but who simultaneously, is also known for his devotion to translating modern German masterpieces of European legal science into English. He once wrote:

‘law is ... [the] cement ... and faith in law ... [the] spiritual foundation’ of the European Union.<sup>5</sup>

The European role of tort law in the private enforcement of European Community legal standards and principles has recently been placed centre stage by major judgments of the European Court of Justice, such as *Munoz*<sup>6</sup> and *Manfredi*.<sup>7</sup> Nevertheless, fragmented and incoherent law that changes every time a citizen of the United Europe crosses the narrow frontiers of the country of his birth cannot cement anything. I can clearly hear the other voices noting the diversity of legal culture, concepts and techniques in European legal systems, and who are alarmed by the spectre of uniformity at the expense of tradition, language and dogmatic elegance. To be sure, these are important worries,<sup>8</sup> but does anyone wish to seriously argue that such considerations should stand in the way of improving the lot of European citizens? The point can be made with reference to several European harmonisation measures that have already been accomplished in the field of the law of civil liability, and which are important in real rather than simply academic terms. One example is enough: the Product Liabil-

<sup>4</sup> But see a different view in DAVID IBBETSON, ‘Harmonisation of the Law of Tort and Delict: A Comparative and Historical Perspective’, in R. ZIMMERMANN (ed.), *Grundstrukturen des Europäischen Deliktrechts*, 2003, 133 f.

<sup>5</sup> Tony Weir, Foreword to Reinhard Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, OUP 1996; see also HELMUT KOZIOL, *Comparative Law – A Must in the European Union: Demonstrated by Tort Law as an Example*, *Journal of Tort Law* Volume 1/Issue 3 (October 2007), available online at <http://www.bepress.com/jtl/vol1/iss3/> (last visited 19.3.2008).

<sup>6</sup> Case C-253/00, Muñoz and Fruiticola [2002] ECR I-7289 (of 17 September 2002), [2002] 3 C.M.L.R. 26; see GERRIT BETLEM, ‘Torts, A European Ius Commune and the Private Enforcement of Community Law,’ [2005] *Cambridge Law Journal* 126.

<sup>7</sup> Joined cases 295/04 to 298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (295/04) etc., 13 July 2006 (ECJ) 37–52; see note by GIORGIO AFFERNI in *European review of contract law* 2007, 179–190; FRANCISCO MARCOS/ALBERT SÁNCHEZ GRAELLS, ‘Towards a European Tort Law? Damages actions for breach of the EC antitrust rules: harmonising Tort Law through the back door?’, SSRN Working Papers, available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1028963#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028963#PaperDownload) (last visited 4.2.2008).

<sup>8</sup> See PIERRE LEGRAND, ‘Sens et non-sens d’un code civil européen’, (1996) *Revue Internationale de Droit Compare*, 779, and ‘Against a European Civil Code’, 60 *Modern L. Rev* 44 (1997).

ity Directive of 1985, which despite its lack of elegance and theoretical purity and its disregard for subtle conceptual divergences in national legal systems and for traditional principles and techniques, has proved highly successful in promoting the uniform civil law enforcement of standards in product safety across the European Union.

In the ongoing process of harmonisation of European private law, Swiss law is far from an outside observer, looking in with interest. European legal developments are, as is well known, followed closely in Switzerland, where more often than not, major European private law is swiftly incorporated into Swiss law, as the example of the Product Liability Directive of 1985 demonstrates.<sup>9</sup> Additionally, Swiss legal doctrine and several leading Swiss scholars,<sup>10</sup> often contribute new and original ideas directly to the debate on European private law. Later on in this paper, I will seek to illustrate this contribution with particular reference to one important and forward-looking Swiss civil liability principle, which bridges the gap between contract and tort law, namely the principle of extra-contractual liability for reasonable reliance (*Vertrauenshaftung*).<sup>11</sup>

## II. ■■■■

Let me now offer a comparative overview of the three leading European tort traditions: English, French and German law; their richness and diversity hides the fact that all three aim at the same results but use cumbersome and often unnecessarily complicated conceptual apparatuses.

<sup>9</sup> The Swiss Product Liability Act, enacted on January 1, 1994, largely adheres to the principles of EC Directive 85/374, and provides for strict liability of a manufacturer, importer or supplier for death, injuries, damages or destruction of an object for private use caused by a defective product. Article 8 provides that the liability of a producer to an injured person may not be limited or excluded by contract.

<sup>10</sup> Professor Franz Werro of the University of Fribourg is currently the Chair of the Tort group in the Common Core of European Private Law project, and joint editor and editor of two volumes in the series already published: see MAURO BUSSANI AND UGO MATTEI (eds), *The Common Core of European Private Law*, 2002.

<sup>11</sup> See, generally, CHAPPUIS, CHRISTINE/WINIGER, BÉNÉDICT (Hrsg.), *La responsabilité fondée sur la confiance, Vertrauenshaftung*, Zürich 2001; KRAMER, ERNST A./PROBST, TH., *Bundesgerichtspraxis zum Allgemeinen Teil des Schweizerischen Obligationenrechts*, Zürich 2003. See also my article 'Liability for Incorrect Financial Information: Theory and Practice in a General Clause System and in a Protected Interests System', in *7 European Review of Private Law* 261–286, (1999), for a Comparative study of English, French and German law.

## A. ■■■■

English law can be described as an ‘open’ case-law system, in which, as Cardozo J. put it, the truths given by induction tend to form the premises for new deductions.<sup>12</sup> The development of the English law of tort was characterised by a separate evolution of individual torts until the advent of *Donoghue v Stevenson*<sup>13</sup> and the generic tort of negligence. Negligence, together with another ‘generic’ tort, Nuisance, now provides the main actions for non-premeditated harm. Before the landmark case of *Hedley Byrne*,<sup>14</sup> there was also a strong judicial conviction, sometimes referred to as the product of a certain ‘principle’ of common law, documented in a wealth of precedent, that there could be no liability for non-premeditated harm of a purely financial nature, except in special circumstances, including those where an action for public nuisance might lie. It must be noted here that, as some recent developments have also indicat(ed.), the common law attitude to non-premeditated financial harm, both before and after *Hedley Byrne*, is better explained as the product of a design of tortious liability based on the significance of the *kind* of injury caus(ed.), rather than the quality of the interest involved. In this respect, Anglo-American law is stylistically quite different from both French and German law. This difference is a primary reason that certain outwardly similar concepts, rules or even general principles of liability perform dissimilar functions in each of the three systems.<sup>15</sup>

## B. ■■■■

The French and German tort systems are founded upon codified rules and principles. They are both, however, much less ‘closed’ than might be expected. In France, in particular, the application of the laconic provisions of the general clauses of arts. 1382 et seq. of the Code Civil can only be understood in the light of the principles and rules contained in the massive volume of jurisprudence that these provisions have generated. The courts have creat(ed.), in applying those provisions, a body of case law that has made the French law of tor-

<sup>12</sup> CARDOZO, *The Nature of the Judicial Process*, 1921, p. 124, see also COING, *Grundzüge der Rechtsphilosophie* 2nd ed., p. 347 f.; see also the remark by Atiyah: ‘...the [common law] system works as a whole even if we cannot say why it works and what rational purpose the different bits may serve’: P.S. ATIYAH, *Pragmatism and theory in english law*, London 1987, p. 34.

<sup>13</sup> [1932] A.C. 562.

<sup>14</sup> See the account of English law before *Hedley Byrne* in Atiyah (1967) 83 *Law Quarterly Review* 249 f.

<sup>15</sup> On ‘functionality’ as the basic methodological principle of Comparative Law see ZWEIGERT/KOTZ (WEIR) *An Introduction to Comparative Law*, I, 2nd ed., 1987, p. 28 f., with important further references.

tious liability more open, flexible and liberal than many a contemporary tort system.

In German tort law the rights and interests protected by the law are directly (e.g. in paras. 823I or 824), or indirectly, (e.g. in paras. 823 II and 839) enumerated in the BGB. To this enumeration the *clausula doli* of para. 826 BGB must be add(ed.), which provides a remedy for wilful damage (and the merely pecuniary) caused *contra bonos mores* ('gegen die guten Sitten'). In para. 823I BGB, which contains the main action for non-premeditated harm, pure financial interests ('Vermögen') are not included in the enumeration of the 'protected rights'. These are specified as the rights to one's life, body, health, freedom or property, or 'other' similar rights, i.e. according to the prevailing view in the literature, of a similarly 'absolute' nature (e.g. various property rights or family rights). However, the rigidity of this 'enumerative' system has occasionally been put to the test by the courts, and especially so in the late 50s and early 60s, when in a daring formulation of two additional protected rights, the 'right to an established and operating business' and the 'general right of personality' were found.<sup>16</sup>

### C. The Legal Concept of Damage

A prerequisite of civil liability, which in every jurisdiction the plaintiff must be able to establish in order for his claim to commence, is that the defendant's conduct resulted in a type of injury recognised by the law as capable of giving rise to a legal claim, i.e. legally significant 'damage'. The question of what is legally recognised damage is always a question of law, to be resolved by the court: *jura novit curia*. The plaintiff must prove in every case, as a matter of fact, that his injury falls under this category. It is important not to confuse this question with the issue of whether an injury that is legally significant 'damage' (*damnum*), has been also wrongfully inflicted (as with *damnum iniuria datum* of the Roman *Lex Aquilia*), under the individual circumstances of each particular case. The latter issue is, conceptually, quite separate from the former, referring to the defendant's conduct rather than the plaintiff's injury, and it raises both a point of law and a point of fact in all legal systems.

Not every injury is necessarily a 'damage' in the eyes of the law, although there are systems that profess to have adopted an 'open' legal concept of damage, which is able to accommodate most kinds of harm. A legal system may choose to adopt a concept of damage that has either a 'factual' or a 'normative' complexion. A 'factual' complexion is evident where (a) all kinds of actual

<sup>16</sup> See the seminal article of V. CAEMMERER 'Wandlungen des Deliktsrechts', *Gesammelte Schriften*, Vol 1, 1968, p. 452 f.

harm can qualify as ‘damage’, and where (b) there can never be legally significant ‘damage’ in the absence of actual harm of some sort. A ‘normative’ complexion means that only selected types of actual harm qualify as ‘damage’ in the eyes of the law, and that it is also possible for the law to accept the presence of legally significant ‘damage’ even when no actual harm is outwardly evident. Especially in the area of non-premeditated harm, it appears that both Anglo-American and French law employ, in principle, a predominantly factual concept of damage, with certain important exceptions. The position of German law is far less clear.

a. Under French law it appears that the presence of actual harm is a *sine qua non* condition of compensation: ‘sans dommage, pas de droit a reparation’.<sup>17</sup> This principle is not, however, easy to reconcile with certain cases where compensation is given for losses that have, in truth, already been made good to the plaintiff in some other way.<sup>18</sup> And the rise of the sovereign power of the trial courts in the assessment of damages, coupled with their well-known refusal to disclose details about the method that they use, has not allowed a study of the exact role of normative considerations in such assessments. That said, there are also certain defined areas of the French law of damages where a normative concept of damage with a specifically determined scope and function is openly used. The so-called ‘prejudice collectif’, i.e. injury to the legitimate collective interests of a professional or a trade union, is a most notable example in this regard.<sup>19</sup>

b. The English law of torts has, on the other hand, a tradition of so-called ‘torts actionable per se’.<sup>20</sup> Given that in the past the action for damages also used to serve the purpose of testing for the existence of a ‘right’; in such cases, the presence of actual harm was not always necessary for the plaintiff to be able to sue. In negligence, however, only actual harm is compensated.<sup>21</sup> However, with their practice of ‘general damages’ awards, English courts have allowed themselves considerable space for normative manoeuvring. It is often the case

<sup>17</sup> See WEILL/TERRE/LEQUETTE, *Droit Civil, Les Obligations*, 6th ed., 1996, nos 668 f.; for a more recent work, see Philippe Brun, *Responsabilite Civile Extarcontractuelle*, LexisNexis/Litec, 2005.

<sup>18</sup> See the discussion *ibid.*; and Civ. 2e, DS 1976 J. 137 note Le Tourneau, as well as Civ. 2e Juin 1976, RGAT 1977, 369.

<sup>19</sup> See WEILL/TERRE, no 769; for ‘syndicats professionnels’ see art. L. 411?11 C. Tr.

<sup>20</sup> In some cases an action in tort lies without any proof of damage; the reason is historical: see CLERK AND LINDSELL TORTS, para. 302, supplying a catalogue of cases where actual damage is unnecessary. Trespass to land, person (but unintentional trespass to person may now need proof of damage: see *Letang v. Cooper* [1965]1 Q.B. 232, 245 per Diplock L.J.) or goods, and libel (see *Hayward v. Hayward* (1887) 34 Ch. D. 198) are notable examples of torts actionable per se.

<sup>21</sup> The tort of negligence is ‘traditionally described as damage, which is not too remote, caused by a breach of a duty of care owed by the defendant to the plaintiff’: Clerk & Lindsell, *Torts*, para. 859, referring to *Lochgelly Iron & Coal Co. v. M'Mullan* [1934] A.C. 1, 25 per Lord Wright.

that such awards go far beyond the monetary value of the actual harm suffered. The usefulness of this practice becomes only too evident with novel types of injury: if the courts feel that they are fit for compensation, the mechanism is there to accommodate them. English courts have had the opportunity of accommodating several novel claims for losses whose nature is far from clear, e.g. a claim for the loss of the enjoyment of a holiday. The practice of awarding general damages has spared English courts the dogmatic controversy that similar claims have caused elsewhere.

c. In Germany, it is often argued that the BGB, apparently under the strong influence of MOMMSEN,<sup>22</sup> endorsed a strictly factual, 'materialistic' concept of damage. His is considered to be the philosophy behind the principle of non-compensation of so-called 'non-material' losses (para. 253 BGB). But the comparative work of NEUNER in the 1930s, and several other German scholars more recently, has created a theoretical movement in favour of revising the orthodoxy of this view. NEUNER'S 'normative' theory of damage was directly inspired by the old common law tradition of using the tortious action as a testing ground for the existence of a right; NEUNER called this the 'rechtsverfolgende Funktion' of the action for damages. NEUNER became, in this way, the apostle of a new faith that has proved hard to fight for MOMMSEN'S intellectual disciples in the decades following his seminal article in the 'Archiv für die civilistische Praxis'.<sup>23</sup> NEUNER'S work, and its effect on the evolution of German doctrine and jurisprudence, provide a rare and striking example of the transplantation not merely of a principle or a doctrine, but of a whole tradition, from a legal system with a highly individual experimental style, into a legal system of the highest dogmatic sophistication. The transplantation becomes even more noteworthy if one considers that the tradition in question was, at the time of its initiation in Germany, rapidly declining in England, and today is only of peripheral importance.

From the 'rechtsverfolgende Funktion' of the tortious action NEUNER concluded that the concept of 'damage' itself has to be a normative concept. The law should be left free to work out its own concept of damage for its own purposes. Assessment of damages should, furthermore, be made on the objective basis of the 'common value' of the perished interest ('gemeine Wert'), rather than on the basis of its subjective value. The latter was another postulate of the traditional Mommsenian concept of damage. NEUNER'S ideas were further de-

<sup>22</sup> MOMMSEN, 'Zur Lehre von dem Interesse', 1855.

<sup>23</sup> NEUNER, 'Interesse und Vermögensschaden', AcP 133, 277 f. (1931); see also, a year later, WILBURG, 'Zur Lehre von der Vorteilsausgleichung', in JherJb 82, 51 f. For a critical account of the literature following these two articles see GRUNSKY, Aktuelle probleme zum Begriff des Vermögensschadens, 1968; HAGEN, 'Fort – oder Fehlenentwicklung des Schadensbegriffs', JuS 1969, 61 f.; HAUSS, in ZVersWiss 1967, 15 1; ZEUNER, 'Schadensbegriff und Ersatz von Vermögensschaden', AcP 163, 380 (1963); *idem*, in Gedachtnisschrift für Dietz 1972, 99 f.; BAUR, in FS Raiser, 1974, at p. 120 f.

veloped by several other authors; among others, by BYDLINSKI (he calls the award of damages ‘a sanction for the injured interest or good’),<sup>24</sup> and LARENZ (who introduced the idea of a ‘Rechtsfortsetzungsfunktion’ of the action for damages).<sup>25</sup> Nevertheless, the theoretical debate has not made things easier for the courts; a series of important decisions now favour a normative concept of damage, which they fail, however, to define in any clear terms, but rather use as a policy platform. And dogmatists have come up with an even more confusing series of theories.<sup>26</sup> Case-law and doctrine are now so divided., that it is not possible to identify with certainty the criteria of ‘damage’ under German law, and to determine what function is served by damages awards.

The latest theoretical constructions have aggravated rather than removed this uncertainty.<sup>27</sup> One of these, the so-called ‘commercialisation’ doctrine,<sup>28</sup> is trying to dress novel types of harm (which can hardly qualify as straightforward cases of material loss) under the guise of a ‘commercial’ hypostasis, allowing their compensation, by circumventing in this way the barrier of para. 253 BGB.

## D. The Causal Link

Proof of sufficient causal link is required by every modern tort system as a necessary condition of liability; a postulate of the principle of personal responsibility. The causal connection is preferable to any other, such as, for instance, a spatio-temporal one.<sup>29</sup>

<sup>24</sup> Probleme der Schadensverursachung nach deutschem und österreichischem Recht, 1964, p. 29 f.

<sup>25</sup> Schuldrecht, Vol. 1, 11th ed., p. 346. A good account of the German debate on the concept of damage can be found in HERMANN LANGE, Schadensersatz 1979, p. ■■■ See also E. WOLF, in FS Schiedermaier 1976, 545 f. KONDGEN, in AcP 177, 1f. (1977), attempts an economic analysis of the issue. Finally, a detailed comparative study is MAGNUS, Schaden und Ersatz, 1987.

<sup>26</sup> E.g. WILBURG, IherJb 82, 51 f.; f.r. in MERTENS, Der Begriff des Vermögensschadens im Bürgerlichen Recht, 1967, pp. 50 f., 87 f. KEUK, Vermögensschaden und Interesse, 1972, HAGEN, JuS 1969, 61, and KONDGEN, AcP 177, 1 f. are all critical of Neuner’s original approach.

<sup>27</sup> See, e.g., HANSEN, Normativer Schadensbegriff und Schadensberechnung, 1977. And the comments of Baur, in FS Raiser 1974, 119 f., to which those of LIEB, JZ 1971, 3S8, HAGEN, in FS Larenz 1973, 867 f. STOLL, Begriff und Grenzen des Vermögensschadens 1973, 1 f., 36 f., and IDEM, in JZ 1975, 252 and JZ 1977, 97, must be added.

<sup>28</sup> References to Jurisprudence and Doctrine can be found in KUPPERS, Verdorbene Genüsse und vereitelte Aufwendungen im Schadensersatzrecht, 1976; TOLK, Der Frustrierungsgedanke und die Kommerzialisierung immaterieller Schaden, 1977. See also HELDRICH, NJW 1967, 1737; GRUNSKY, NJW 1975, 609 f.; MAMEY, NJW 1969, 1150; BARTL, NJW 1972; 505 f; STOLL AND SCHMIDT, under BGH (BGHZ 63, 98) JZ 1975, 249, and LM Nr 37 zu para. 249 (A) BGB respectively; STOLL, in JZ 1977, 96 under OLG Frankfurt 6.4.1976; HONSELL, JuS 1976, 222; and Hermann Lange Schadensersatz, 1979, p. 167 f., 229 f., 235 f., w.f.r.

<sup>29</sup> See the discussion in HONORE, International Encyclopedia of Comparative Law XI, ch. 7, p.7 f.; for a more recent European Comparative study see BENEDICT WINIGER, HELMUT KOZIOL, BERNHARD A.



A great deal of ink has been spilt on the question of the proper criterion of legal causation. Apart from the self-evident fact (on which all tort systems using the causal explanation cannot but agree) that the defendant's conduct must be at least a condition '*sine qua non*' of the harm complained of, there appears to exist a healthy diversity in modern tort laws as to the criteria of 'legal' causation that the courts apply next.

a. In French law, it is commonly accepted in the context of art. 1382 f. of the C.C. that a 'direct' causal link must exist between the defendant's conduct and the damage suffered. The exact meaning of this (unwritten though apparently indisputable) rule,<sup>30</sup> is not very clear. It cannot mean that the defendant's conduct must be the sole condition of the harm, because this would be defining liability too narrowly. It has been suggested that whenever there is an independent or subsequent condition of the harm, other than the defendant's conduct, with a special 'explanatory' force (e.g. where it may be considered 'abnormal' under the circumstances), then the defendant's conduct ceases to be a 'direct' cause of the harm.<sup>31</sup> Another view is that only 'necessary' consequences are 'direct' consequences, but this hardly explains anything.<sup>32</sup> It is, on the other hand, noteworthy that 'foreseeability', so important a criterion in common law and, also, of central importance in German law, too, has been described as 'une idee directrice' for the judge in this connection.<sup>33</sup> Some recent French decisions have actually turned to a test of legal causation similar to the German 'adequacy' test.<sup>34</sup> Of special interest is, also, another interpretation of 'directness', which relates the causation rule to the legal notion of fault: the more serious the defendant's fault, the more 'direct' its consequences. If the fault is extremely serious, e.g. malice, the defendant must account for virtually all harmful consequences. Marteau, who advanced this view,<sup>35</sup> was probably influenced by the treatment of serious fault in other legal systems. In common law, for example, there is a well-established principle, according to which 'intended conse-

KOCH, REINHARD ZIMMERMANN (eds), *Essential Cases on Natural Causation: 1* (Digest of European Tort Law), Springer Verlag, 2007.

<sup>30</sup> See WEILL/TERRE, *Obligations*, 2nd ed., p. 810 f.; MAZEAUD/MAZEAUD, *Traite*, Vol. 11, 6th ed., No. 1666 f.; *Le Tourneau Responsabilite Civile*, 2nd ed., p. 197 f.; *Carbonnier Droit Civil*, IV, 7th ed., p. 319 f. And also the comparative discussion in *Honore IntEncCompL XI*, ch. 7, p. 40 f.

<sup>31</sup> HONORE, *op. cit.*, p. 41.

<sup>32</sup> See, e.g., the discussion in MAZEAUD/MAZEAUD, *Traite*, II, 6th ed., No. 1673.

<sup>33</sup> MAZEAUD/MAZEAUD, 6th ed. II, p. 791; foreseeability plays a central role also in contractual liability, and it has been suggested by R. SAVATIER (*Responsabilite Civile*, 2d (ed.) , II, No. 472) that all foreseeable harm could qualify as 'direct', regardless of cause of action.

<sup>34</sup> See, e.g., MAZEAUD/MAZEAUD, 6th ed., II, No. 1442-2; WEILL/TERRE, *Obligations*, 2nd ed., p. 811; compare *Le Tourneau Responsabilite*, 2nd ed., Nos 528 f.

<sup>35</sup> MARTEAU, *La causalite dans la responsabilite civile*, 1914, p. 221 f.

quences' are 'never too remote',<sup>36</sup> and in Germany wrongful intention receives similarly harsh treatment.<sup>37</sup> MARTEAU considered the defendant's fault to be the most important factor to influence the judge's mind as to the imputability of certain consequences; he believed that 'la formule du dommage indirect est une fausse etiquette qui sert a designer le jus moderandi du juge francais'.<sup>38</sup> However, three objections were advanced against this:<sup>39</sup> firstly, it has been noted that a similar distinction between intentional and non-intentional consequences is not made in the field of contractual liability (art. 1151 C.C.), where, besides 'directness' itself as a criterion of causation, originates. Secondly, it has been observed that the very idea of a moderating power of the judge in awarding damages is contrary to the wishes of the authors of the Code Civil, as revealed in the record of its 'motives'. Thirdly, since the application of the principle of directness affects the legal issue of causation, it is subjected to the control of the Cour de Cassation; a '*jus moderandi*', belonging to the sovereign power of the trial judge, would make this control virtually impossible.

It is submitted., however, that MARTEAU'S observations are not entirely devoid of truth. In an oblique way the French judge has in fact been given a certain '*jus moderandi*' i.e. by being granted., in practice, an effective discretion in the actual assessment of damages. And the courts cannot but be influenced by the degree of fault involved when deciding the issue of 'directness'. CARBONNIER would go so far as to say that 'on donne une idee assez juste de la jurisprudence, en disant qu'elle s'attache a une causalite morale plutot que materiel-

<sup>36</sup> 'The intention to injure the plaintiff disposes of any question of remoteness': *Quinn v. Leatham* [1901] A.C. 495, 537 per Lord Lindley. The same applies to reckless indifference regarding a harmful event: for the purposes of liability, recklessness is treated as bad intention: see CLERK & LINDSELL, *Torts*, 14th ed., para. 339. Deceitful statements engage the tortfeasor's liability for all damage flowing directly from the fraud, whether foreseeable or not: *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158 (C.A.); this is the case despite the fact that the damage is only pecuniary (contrary to what appears to be the general causation rule in negligence, regarding the extent of liability for pecuniary damage).

<sup>37</sup> The tortfeasor must account for intended harm, even when it fails to qualify as an 'objectively probable' (i.e. 'adequate') consequence of his conduct; 'Wer einen Menschen mit einer Schusswaffe verletzen will und trifft, hat für diese Folge einzustehen, selbst wenn die Wahrscheinlichkeit einer Verletzung dem Standort des Schützen nach in der Nähe der Nullgrenze bewegt': HERMANN LANGE, *Schadensersatz*, p. 70, stating and explaining the rule that liability also extends to 'non-adequate' harm, when the latter is intended.

<sup>38</sup> Marteau, op. cit. *supra*, p. 221. See the strikingly similar pragmatic approach of a leading English judge, LORD HOFFMANN, who noted that:

'There is nothing special or mysterious about the law of causation. One decides, as a matter of law, what causal connection the law requires and one then decides, as a question of fact, whether the claimant has satisfied the requirements of the law. There is, in my opinion, nothing more to be said'. See LEONARD HOFFMANN, 'Causation', *Law Quarterly Review* 2005, 121, 592, 603.

<sup>39</sup> MAZEAUD/MAZEAUD, 6th ed., II, No. 1672.

le'.<sup>40</sup> The influence of the degree of fault is, besides, no lesser in the context of an 'adequacy' theory of causation relating the 'generally foreseeable' harm (the most common criterion of 'adequacy') to the type of harm of which the defendant's conduct significantly increased the probability. This version of the 'adequacy' theory has been criticised, too, for confusing fault and causation.<sup>41</sup>

b. In German law, the *conditio sine qua non* test is coupled with a test of 'adequate cause', whose correctional intervention is meant to avert an intolerable expansion of liability. The most common version of the 'adequacy' theory employs a test according to which a condition of the harm may be considered as a *causa adequata* when it has increased the objective probability of the harm. The significance of a condition is considered *ex post facto* (forecast with hindsight: in German 'nachträgliche Prognose'). It is, moreover, the 'hindsight' of a most prudent and perceptive observer that is to be taken into account, and the calculation of harm-probability is done in the light of 'all the knowledge of laws and generalisations' available to mankind.<sup>42</sup>

This formula has run into difficulties in practice, especially in connection with certain types of consequential loss (e.g. ulterior harm).<sup>43</sup>

c. The common law test of 'reasonable foreseeability' has strong similarities with the German 'adequacy' test.<sup>44</sup> For example it has been held that foreseeability is determined in the light of the knowledge of the 'reasonable' man after the act.<sup>45</sup> Proof of foreseeability is an absolutely necessary condition for a claim to be accepted in negligence, in Anglo-American law. If the harm is not shown to be foreseeable 'in kind', then there is no question of recovery, even if it can be shown to be 'direct'.<sup>46</sup> On the other hand, a physical loss that is shown to

<sup>40</sup> CARBONNIER, *Droit Civil*, 7th (ed.) IV, p. 319.

<sup>41</sup> See Dalcq, *Traite de la responsabilité civile*, Vol. II, No. 2374; but in most versions of the adequacy theory the 'generally foreseeable' or 'objectively probable' condition is so defined (see *infra*, under b in the text) as to defeat this criticism: see HONORE, in *IntEncCompL XI* ch. 7, no. 86. 'Adequacy' gives way, on the other hand, to the simple *conditio sine qua non* test in the case of intended harm: *supra*. And in the case of non-premeditated harm it is often likely that a serious amount of carelessness will have a stronger explanatory force, no matter how objectively the 'adequate' cause is defined; this is not, however, a confusion of fault and causation, but a reflection of the fact that a causation theory based on probability cannot but take into account the degree to which seriousness of fault and probability of harm are in proportion.

<sup>42</sup> For the adequacy theory used in Germany see DEUTSCH, *Haftungsrecht*, I, 1976, p. 146 f.; HERMAN LANGE, *Schadensersatz*, p. 57 f., both with comprehensive further references to literature and jurisprudence. See also HONORE, *IntEncCompL XI*, ch. 7, p. 49 f., for a general discussion of 'probability' theories of causation, of which the adequacy theory is by far the most important.

<sup>43</sup> HONORE, *op. cit.*, p. 54.

<sup>44</sup> See STATHIS BANAKAS, 'Causalité juridique et imputation: réflexions sur quelques développements récents en droit anglais', *Revue Lamy Droit Civil*, Suppl. au No 40, July/August 2007, 93.

<sup>45</sup> See the analysis in DIAS, [1967] *C.L.J.* 62, 68, 77–82.

<sup>46</sup> Since *The Wagon Mound* (No 1) [1961] *A.C.* 388, the House of Lords has held that if the damage is foreseeable in kind neither the unforeseeable extent of the injury nor the unforeseeable manner of its

have been foreseeable may be recoverable, even if it is ‘indirect’.<sup>47</sup> In German law, too, it seems that physical losses, if they can be taken to be among the objectively foreseeable consequences of the harmful event, are recoverable, even when they appear to be ‘indirect’.<sup>48</sup>

### E. The Additional German Condition of ‘Unlawfulness’<sup>49</sup> and the Common Law Concept of the ‘Duty of Care’<sup>50</sup>

‘Damage’ in a legal sense and the causal connection between damage and fault (or any other recognised harmful event) are the absolutely necessary conditions of civil liability in any compensation system which is not based on risk-insurance (public or private). It may be that these two also are the only formal conditions of tortious liability, as in the case of articles 1382 et seq. of the French Code Civil. Sometimes, however, a legal system also requires that the defendant’s behaviour, as against the plaintiff’s harm, is ‘unlawful’. This may be merely meant to emphasize that there are no grounds of legal justification at issue, like, for instance, self defence. However, it may further mean, as it does in German law, that the law recognises in a particular event an objectively offensive nature, which is contrary to the residual postulates of the legal order, and which alone may create a legal obligation to provide satisfaction, in the form of compensation or otherwise. Unlawfulness in this sense (‘Rechtswidrigkeit’) is, in German law, a necessary condition of tortious liability. In a parallel way, the breach of an existing duty of care is a necessary condition of liability in the common law of negligence.

incidence can absolve the defendant: see *Smith v. Leech Brain & Co., Ltd.*, [1962] 2 Q.B. 405; *Hughes v. Lord Advocate* [1963] A.C. 837. These principles apply only to physical loss, i.e. injury to person or property.

<sup>47</sup> As has been illustrated by the House of Lords decision in the case of *Dorset Yacht Ltd. v. Home Office* [1970] A.C. 1004: see the remarks of LORD DENNING M.R., in *S.C.M. v. W.J. Whittall & Son, Ltd* [1971] 1 Q.B. 337, 43. In *Hedley Byrne*, too, the loss complained of was ‘indirect’, according to LORD DENNING M.R., in the *S.C.M.* case (at p. 343); it follows that the *Hedley Byrne* duty of care extends to all reasonably foreseeable damage, whether ‘direct’ or not. In this respect liability for economic loss from negligent misstatements is, perhaps, similar to liability for physical loss.

<sup>48</sup> See BGHZ 41,123.

<sup>49</sup> See v. CAEMMERER, op. cit., supra, note 48, and RABEL, *Das Recht des Warenkaufs* 1936 for two pioneering comparative studies. Also LIMPENS, *La theorie de la relativite aquilienne en droit compare*, *Melanges Savatier*, 1965, 550; DEUTSCH, *Haftungsrecht* I, 1976, p. 234 f.; HONORE, in *IntEncCompL* XI, ch. 7, esp. p. 60 f.

<sup>50</sup> A classic account is CLERK & LINDSELL, *Torts*, paras. 861 & 861a.

a. The concept of ‘unlawfulness’, as a general condition of civil liability,<sup>51</sup> is an original product of German law, a creation of the great spirits of HEGEL<sup>52</sup> and JHERING.<sup>53</sup> It is shared by all systems belonging to the German legal family.<sup>54</sup> German scholars acknowledge that there is no satisfactory definition of ‘unlawfulness’, except perhaps a ‘tautological’ one: ‘unlawful’ is that which is contrary to the legal order’.<sup>55</sup> Professor DEUTSCH notes that this formula has the advantage of being ‘luckenhaft und unbestimmt’, allowing for necessary flexibility.<sup>56</sup> A certain course of conduct may, in the first instance, be directly declared ‘unlawful’ by the law.<sup>57</sup> Secondly, its unlawfulness while not expressly declared may arise from its express prohibition by the law. Thirdly, an act may be unlawful when it transgresses a so-called primary rule (‘norm’). Evidence of such a transgression is found where a particular conduct gives rise to a right of compensation.

Cases of the latter kind have created problems. It is obvious that conduct expressly prohibited by the law is, without more, ‘unlawful’: e.g. driving without a licence. However where the law merely enumerates ‘protected interests’, without prescribing the type of unlawful conduct that gives rise to compensation, (para. 823 I BGB), there is a need to define which conduct is meant to be ‘unlawful’. This task befalls on the scholars, those influential *jurtsprudentes* of German legal life.

Two main theories have emerged.

First, the older ‘classical’ doctrine of the ‘unlawfulness of the result’ (‘Erfolgsunrechtslehre’; followed even today by a section of the jurisprudence,

<sup>51</sup> For details see the major textbooks (LARENZ, ESSER/SCHMIDT, FIKENTSCHER, DEUTSCH, HERMANN LANGE) and: v. CAEMMERER, Die absoluten Rechte in para. 8231 BGB, GesSchriften 1, 1968, p. 554 f.; DEUTSCH, Fahrlaessigkeit und erforderliche Sorgfalt, 1963; NIPPERDEY, in Karlsruher Forum 61, 3; IDEM, NJW 1957, 1977; WEITNAUER, ‘Kausalitätsprobleme in rechtsvergleichender Sicht’, FS Wahl, 1973, 109 f; SOURLAS, Adäquanztheorie und Normzwecklehre bei der Begründung der Haftung nach para. 8231 BGB, 1974, esp. p. 26 f., 35 f, w.f.r. HERMANN LANGE, in JZ 1976, 198 f; IDEM, Schadensersatz, p. 73 w.f.r. For Austria see WELSER, in OJZ 1975, 1 f. & 37 f. also KRAMER, in JZ 1976 338 f. For Switzerland see DESCHENEUX, ‘Norme et causalite en responsabilité civile’, in FS Schw. BG 1975, 399 w.f. comparative references; also TANDOGAN, De l’utilite en droit suisse des notions de rapport d’illicéite et d’adequation sociale, 1972.

<sup>52</sup> HEGEL (ed. Hoffmeister), Grundlinien der Philosophie des Rechts, 4th ed., 1955, paras. 82 f.

<sup>53</sup> JHERING, Das Schuldmoment im römischen Privatrecht, 1867, p. 5.

<sup>54</sup> See Stoll in RabelsZ 1959, 370; v. CAEMMERER (op. cit., *supra*), GesSchriften 1, 1968, 452, esp. p. 542 f. where German and Swiss law are compared to French and Anglo-American. Also Deutsch Haftungsrecht I, 1976, p. 192 f. w.f.r.

<sup>55</sup> DEUTSCH, *ibid.*, p. 190; for Austria see KOZIOL, Osterreichisches Haftpflichtrecht, Vol I, p. 70.

<sup>56</sup> DEUTSCH, *ibid.*, p. 191.

<sup>57</sup> E.g. para. 858I BGB (unlawful interference with possession). Deutsch calls this an ‘authentic interpretation’ by the law of ‘unlawfulness’ in connection with a particular course of conduct: Haftungsrecht I, p. 191.

especially within the lower courts)<sup>58</sup> proposes that every invasion of a protected right is *ex definitio* ‘unlawful’, provided there are no grounds of legal justification (‘Rechtfertigungsgründe’). The invasion ‘indicates’ its own unlawfulness. NIPPERDEY,<sup>59</sup> REICHEL,<sup>60</sup> WIETHOLTER,<sup>61</sup> and other German scholars<sup>62</sup> have strongly attacked this theory on the grounds that it produces unsatisfactorily harsh results with regard to non-intentional harm. They have argued that non-intentional invasions of a protected right are not always unlawful; only when expressly so prescribed by the law (e.g. driving without a licence) or when they amount to a breach of a certain ‘general duty of care’ (‘allgemeines Sorgfaltspflicht’). This approach has been further elaborated upon by VON CAEMMERER and has become known as the ‘doctrine of the unlawfulness of action’ (‘Handlungsunrechtslehre’). It is the second and more modern of the two current doctrines, and it teaches, in brief, that while intentional invasions of protected rights are always unlawful, indirect non-intentional invasions are only unlawful if, objectively judged., they constitute a breach of the ‘general duty of care’. An example of an ‘indirect’ non-intentional but unlawful invasion of such right is given by the famous BGH case concerning a chicken incubator machine.<sup>63</sup> There, a person responsible for a non-intentional power-cut was found liable for an unlawful invasion of the right of property of the owner of the machine, when incubating eggs, which were in the machine at the time of the black-out, were damaged. The ‘unlawfulness’ of the invasion was affirmed after the court found that the defendant had breached his ‘general duty of care’. VON CAEMMERER’S theory,<sup>64</sup> further pursued by STOLL,<sup>65</sup> LARENZ,<sup>66</sup> and DEUTSCH,<sup>67</sup> has found significant BGH support in a decision of the Grosser Zivilsenat.<sup>68</sup> To the extent, however, that the BGH also appeared prepared to accept in that decision that ‘conduct in conformity with the law’ is generally a valid ground of legal justification in connection with a tortious claim, it has encountered due criticism.<sup>69</sup>

<sup>58</sup> See the account given by EIKE SCHMIDT, in Vahlen Zivilrecht I, p. 495 f.

<sup>59</sup> In NJW 1957, 1779, NJW 1967, 1989 and ENNECERUS-NIPPERDEY, Allgemeiner Teil des Bürgerlichen Rechts, 15th ed. I-II, 1959–1960, para. 209.

<sup>60</sup> In Verh. d. 34 DJT, I, 136, 140 f; see DEUTSCH, Haftungsrecht, I, 1976, p. 193, pointing out that REICHEL’S suggestions were advanced *de lege ferenda* and not, like NIPPERDEY’S or WIETHOLTER’S (and those of several others) *de lege lata*: p. 193 footnote 20.

<sup>61</sup> Der Rechtfertigungsgrund des verkehrsrichtigen Verhaltens, 1960.

<sup>62</sup> See the references in DEUTSCH, Haftungsrecht, I, 1976, p. 193.

<sup>63</sup> BGHZ 41, 123.

<sup>64</sup> Geschriften I, 1968, p. 484 f.

<sup>65</sup> AcP 162, 228.

<sup>66</sup> Schuldrecht I, Vol. II, para. 72 I.

<sup>67</sup> Haftungsrecht I, 1976, p. 195 f.

<sup>68</sup> BGHZ 24, 21 (GZS); see STOLL, in JZ 1958, 137; DEUTSCH, Haftungsrecht I, 1976, p. 198 f.

<sup>69</sup> E.g. STOLL, JZ 1958, 140; also DEUTSCH, Haftungsrecht I, 1976, p. 199.

## F. Flexibility and Pragmatism in the Heart of the Old Continent: The Modern Swiss Approach to Civil Liability

Swiss tort law, in its greater simplicity and flexibility, has been seen as deviating from the solid Germanic dogmatic structures of tort liability anchored in the protection of important legal goods (rights),<sup>70</sup> embedded in par. 823 of the German Civil Code.<sup>71</sup> The principal deviation, which gives Swiss law its greater flexibility and progressive outlook, is the disposal of the German system of a *numerus clausus* of interests protected in tort law, in favour of a wider principle of liability for illegal and culpable behaviour that causes injury.<sup>72</sup> This capacity of Swiss law to adapt to changing demands of social and economic policy is enhanced by the greater degree of judicial creativity allowed under the Swiss system and encouraged by the Swiss Civil Code.<sup>73</sup> A recent example of dynamic judicial activism taking Swiss civil liability law further forward has been the development in the case law of the Federal Tribunal on the principle of liability based on reliance (*Vertrauenshaftung*),<sup>74</sup> an idea originally put forward in Ger-

<sup>70</sup> See my paper 'Liability for Incorrect Financial Information: Theory and Practice in a General Clause System and in a Protected Interests System', in 7 *European Review of Private Law* 261–286, (1999), with further references to comparative law literature.

<sup>71</sup> See, for what follows, generally, *BaslerKomm/BEARBEITER*: Heinrich Honsell et al. (Hrsg.), *Kommentar zum schweizerischen Privatrecht, Zivilgesetzbuch I*, Art. 1–456 ZGB, 2. Aufl., Basel 2002; *Obligationenrecht I*, Art. 1–529 OR, 3. Aufl., Basel 2003; GAUCH PETER/SCHLUEP WALTER/SCHMID JÖRG/REY HEINZ, *Schweizerisches Obligationenrecht, Allgemeiner Teil*, 2 Bände, 8. Aufl., Zürich 2003; HONSELL HEINRICH, *Schweizerisches Haftpflichtrecht*, 4. Aufl., Zürich 2005; FRANZ WERRO, *La Responsabilité Civile*, Bern 2005.

<sup>72</sup> Although retaining, at the same time, the *clausula doli* that is also found in para. 826 of the German Civil Code. Article 41 of the Swiss Law of Obligations, a law incorporated into the Swiss Civil Code as its Fifth Part but enacted separately earlier, and with its own enumeration of articles, states: '**A. Haftung im Allgemeinen I. Voraussetzungen der Haftung** 1 Wer einem andern widerrechtlich Schaden zufügt, sei es mit Absicht, sei es aus Fahrlässigkeit, wird ihm zum Ersatze verpflichtet. 2 Ebenso ist zum Ersatze verpflichtet, wer einem andern in einer gegen die guten Sitten verstossenden Weise absichtlich Schaden zufügt.' These two principles of tort liability of article 41 of the Swiss Law of Obligations have been adopted almost verbatim by the Greek Civil Code of 1946, in articles 914 and 919, and also verbatim by the Turkish Civil Code, a direct transplant from Switzerland in 1926 (a new version was introduced in 2002).

<sup>73</sup> Article 1 *SchwZGB*, states: '... Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde ... Es folgt dabei bewährter Lehre und Überlieferung.'

<sup>74</sup> See the ground-braking cases: BGE 120 II 331 ('Swissair case'); BGE 121 III 350 ('Sporting Association case'); BGE 124 III 363 ('Lawyers' Association case'); BGE 124 III 355 ('Building consortium case'); BGE 130 III 345 ('Surveyor's case'), as well as a number of more recent cases, such as BGE 9. July 2004 (5C.45/2004, E. 2), 28. February 2005 (4C.256/2004, E. 9.2.1), 1. June 2005 (5C.267/2004, E. 5.2/5.3), 9. December 2004 (4C.47/2004, E. 3), 4C.134/2004 of 14. October 2004, E. 5, 5C.134/2004 of 1. October 2004, E. 5, 4C.182/2004 of 23. August 2004, E. 4 ('bounced

man legal doctrine by Canaris,<sup>75</sup> but never fully espoused by the courts in Germany. The Swiss Federal Tribunal was first to venture in this area of a so-called ‘third source of civil liability’, besides and beyond the two traditional sources, contract and tort.<sup>76</sup> In my understanding, this third source or kind of liability can

cheque’); 4C.291/2003 of 4. February 2003, E. 7 (‘Garden wall’); 4P.137/2002 of 4. July 2003, E. , 74C.225/2002 of 7. February 2003, E. 3, 4C.215/2002 of 11. November 2002, E. 2 (‘Bank responsibility for financial advice’), 4C.12/2002 of 14. May 2002, E. 3.2, 4C.278/2001 of 20. February 2002, E. 6 4C.71/2001 of 30. May 2001, E. 6, 4C.107/2000 of 3. April 2001, E. 3 , 4C.100/2000 of 11. Juli 2000, E. 4, 4C.194/1999 of 18. January 2000, E. 4 (Protective effect in favour of third parties of reliance liability), 25 February 2005, 4C.357/2004.

<sup>75</sup> See CLAUS-WILHELM CANARIS, *Die Vertrauenshaftung im deutschen Privatrecht*, München 1971.

<sup>76</sup> There is a voluminous Swiss, German and Austrian literature on Vertrauenshaftung: See in particular, ARMBRUESTLER, *Vertragliche Haftung für Drittschäden – quo vadis Helvetia?*, in: Eugen Bucher et al. (Hrsg.), *Norm und Wirkung*, FS Wolfgang Wiegand, Bern 2005, 71 ff.; BELGER, *Verhaltenspflichten und Vertrauenshaftung*, Bern 2000; BELGER, *Zur Unterscheidung zwischen Rechtsscheinhaftung und Vertrauenshaftung*, recht 2002, 201 ff.; BUCHER, *Was man aus einem Fall von «Putativ-Vertrauenshaftung» lernen kann*, recht 2001, 65 ff.; BUCHER, *Vertrauenshaftung: Was? Woher? Wohin?*, in: Peter Forstmoser et al. (Hrsg.), *Richterliche Rechtsfortbildung in Theorie und Praxis*, FS Hans Peter Walter, Bern 2005, 231 ff.; CANARIS, *Schutzgesetze – Verkehrspflichten – Schutzpflichten*, in: FS Karl Larenz, München 1983, 27 ff.; CANARIS, *Die Reichweite der Expertenhaftung gegenüber Dritten*, ZHR 1999, 206 ff.; CANARIS, *Die Vertrauenshaftung im Lichte der Rechtsprechung des Bundesgerichtshofs*, in: *50 Jahre Bundesgerichtshof, Festgabe aus der Wissenschaft*, Bd. I, München 2000, 129 ff.; CHAPPUIS/WINNIGER (Hrsg.), *La responsabilité fondée sur la confiance – Vertrauenshaftung*, Zürich 2001; CommRom/BEARBEITER: Luc Thévenoz/Franz Werro (Hrsg.), *Commentaire Romand, Code des obligations I*, Basel 2003; FEHLMANN, *Vertrauenshaftung – Vertrauen als alleinige Haftungsgrundlage*, Diss. Universität St. Gallen, 2002; FROTZ, *Die rechtsdogmatische Einordnung der Haftung für culpa in contrahendo*, in: *Gedenkschrift Franz Gschnitzer*, Innsbruck 1969, 163 ff.; GAUCH, *Der Schätzer und die Dritten*, in: Eugen Bucher et al. (Hrsg.), *Norm und Wirkung*, FS Wolfgang Wiegand, Bern 2005, 823 ff.; GAUCH PETER/SCHLUEP WALTER/SCHMID JÖRG/REY HEINZ, *Schweizerisches Obligationenrecht, Allgemeiner Teil*, 2 Bände, 8. Aufl, Zürich 2003; HAUSHEER HEINZ/JAUN MANUEL, *Die Einleitungsartikel des ZGB*, Bern 2003; HONSELL, *Schweizerisches Haftpflichtrecht*, 4. Aufl., Zürich; HONSELL, *Die Haftung für Auskunft und Gutachten, insbesondere gegenüber Dritten*, in: *Festschrift Peter Nobel*, Bern 2005, S. 939 ff. (zit. FS Nobel 2005); Koller, *Haftung einer Vertragspartei für den Schaden eines vertragsfremden Dritten*, in: Alfred Koller (Hrsg.), *Neue und alte Fragen zum privaten Baurecht*, St. Gallen 2004, 1 ff.; KOLLER, *Ausservertragliche Haftung eines Ingenieurs für mangelhafte Hangsicherung?*, in: Peter Forstmoser et al. (Hrsg.), *Richterliche Rechtsfortbildung in Theorie und Praxis*, FS Hans Peter Walter, Bern 2005, 367 ff.; KRAMER, *Juristische Methodenlehre*, 2. Aufl., Bern/München/Wien 2005; Klebs, *Sonderverbindung und ausserdeliktische Schutzpflichten*, München 2000; KOZIOL, *Österreichisches Haftpflichtrecht*, Bd. I, Allgemeiner Teil, 3. Aufl., Wien 1997; Larenz, *Culpa in contrahendo, Verkehrssicherungspflicht und «sozialer Kontakt»*, MDR 1954, 515 ff.; LOSER, *Kritische Überlegungen zur Reform des privaten Haftpflichtrechts – Haftung aus Treu und Glauben, Verursachung und Verjährung*, ZSR 2003 II, 127 ff.; LOSER, *Schutzwirkungen zugunsten Dritter*, in: *Privatrecht und Methode*, FS Ernst A. Kramer, Basel 2004, 579 ff.; LOSER, *Ausservertragliche Haftung einer Vertragspartei für reine Vermögensschäden Dritter*, in: *Haftung einer Vertragspartei für Schäden vertragsfremder Dritter*, St. Gallen 2005, 111 ff.; LOSER, *Die Vertrauenshaftung im schweizerischen Schuldrecht*, Bern 2006; LUHMANN, *Vertrauen – Ein Mechanismus der Reduktion sozialer Komplexität*, 3. Aufl. der Originalausgabe von 1968, Stuttgart 1989; MORIN, *La responsabilité fondée sur la confiance – étude critique des fondements d’une innovation controversée*, Basel 2002; REY, *Ausservertragliches Haftpflich-*



be seen as founded on the reasonable reliance to its detriment, by one of the parties in a non-contractual, or pre- or post-contractual, relationship on a promise, advice or information, given by the other party.<sup>77</sup>

This is a development that any forward looking harmonization of tort law in Europe should take on board. As I have argued in another paper some years ago,<sup>78</sup> in which I offered a set of new principles of European tort law, constructed on the experience of Europe's legal systems and the American experience, and intended to restate in a unitary, functional approach their diverse toolboxes of liability devices, assumption of responsibility is already emerging as a unifying basis of all civil liability for negligence, especially in Anglo-American, and also, at least on a certain theoretical level, in German, French and Italian law. Such assumption of responsibility should be perceived as an objective, normative concept. It could apply generally in all cases where a person unfairly creates a risk of loss to another for self-interest or profit. This new concept of assumption of responsibility that I propose should be adopted as expressing a *transactional* view of civil liability.<sup>79</sup> The substantial experience of Swiss law in this area, present in the numerous cases decided by the Federal Tribunal and mentioned above, will be invaluable for any future harmonisation of tort law in Europe.

recht, 3. Aufl., Zürich 2003; VITO, Haftung für Dienstleistungen gegenüber vertragsfremden Dritten, in: Christian J. Meier-Schatz/Rainer J. Schweizer (Hrsg.), Recht und Internationalisierung, Festgabe der Juristischen Abteilung der Universität St. Gallen zum Juristentag 2000, Zürich 2000, 137 ff.; VITO, Schweizerisches Haftpflichtrecht, Zürich 2002, Schmid, Vertrauenshaftung bei Formungültigkeit, in: Peter Forstmoser et al. (Hrsg.), Richterliche Rechtsfortbildung in Theorie und Praxis, FS Hans Peter Walter, Bern 2005, 417 ff.; SCHWENZER INGBORG, Schweizerisches Obligationenrecht, Allgemeiner Teil, 3. Aufl., Bern 2003; STOLL, Abschied von der Lehre von der positiven Vertragsverletzung, AcP 136 (1932) 257 ff.; WALTER, Die Vertrauenshaftung: Unkraut oder Blume im Garten des Rechts?, ZSR 2001 I, 79 ff.; WATTER, Investorenschaden wegen falscher Rechnungslegung, in: Aktuelle Fragen des Bank- und Finanzmarktrechts, FS Dieter Zobl, Zürich 2004, 429 ff.; BernerKomm/KRAMER, OR Einleitung, N 150 f.

<sup>77</sup> This formulation of Vertrauenshaftung brings this device very close to the doctrine of promissory estoppel in American contract law which, unlike the English doctrine of the same name, can be used not only as a defence to a contractual action but also as a basis for an action.

<sup>78</sup> STATHIS BANAKAS, 'European Tort Law: Is it Possible?' 9 European Review of Private Law, 363–375 (2002).

<sup>79</sup> As an example, I offered the German Supreme Court case of BGH JZ 1993, 682, deciding under para. 823 Abs. 2 BGB (German Civil Code), that the managing director of a company assumes responsibility for informing prospective creditors of the imminent winding up of the company. Professor Canaris sees this as a case of *culpa in contrahendo* founded on *Vertrauenshaftung*: See CANARIS, 'Die Haftung für fahrlässige Verletzungen der Konkursantragspflicht nach para. 64 GmbHG', Juristenzeitung 1993, 649 f.

## III. ■■■■

The overview of the three leading European tort traditions shows both the difficulty and the futility of a harmonisation of existing dogmatic and conceptual structures of European tort laws.<sup>80</sup> Additionally, a European tort law can, and should, serve the European citizen at the beginning of a new millennium. Rather than looking back at the historical roots of the *jus commune* or even further back to the brilliant inventions of classical Roman jurists, the new tort law of Europe must be designed to build a safer and fairer social and economic environment for all Europeans. Throughout history we can look to find the ancestors of our values, and the beginnings of our craft, and harvest all ideas and devices that are clever and good; but we must set ourselves aims and goals that look to the future. To this end the contemporary scholarly debate in the United States can be helpful.

We can start by reflecting on the (desired) *purpose* of the law of tort in a united Europe in our time.<sup>81</sup> Many centuries ago, GROTIUS and PUFENDORF in medieval Europe declared the moral foundation of the law of delict to be an obligation to make good any damage caused by one's culpable behaviour, causing a major break with the approach of Roman law which was to simply provide remedies for certain types of harm that had been declared unlawful. It is surprising that very little of any importance has been said since, insofar as the discussion of the purposes of tort law is concerned. One must look at the other side of the Atlantic for new ideas closer to our time and age. American scholars have elaborated theories of corrective justice, as well as theories of deterrence and economic efficiency. Even more radical voices have offered critical studies of tort theory that question the need for its very existence. The debate has been ongoing in America for quite some time now, and it is certainly surprising that its only effect in Europe has been academic, and even so, quite limited.

It is my belief that we cannot build the new tort law of Europe without first laying down the ideological foundations of its purpose. To this end, American scholarship is an indispensable aid. But Europe in the shape of the European Union also already has its own very important political, social, and economic aims; these will certainly need to be given priority. Unlike some of the existing national tort systems in Europe that predate the modern states in which they have found themselves, and therefore, have sometimes evolved separately from

<sup>80</sup> As I have pointed out in my paper, *European Tort Law: Is it Possible?* 9 *European Review of Private Law*, 363–375 (2002); see also JANE STAPLETON, *Benefits of Comparative Tort Reasoning: Lost in Translation*, *Journal of tort law* Volume 1/Issue 3 (October 2007), available online at <http://www.bepress.com/jtl/vol1/iss3/> (last visited 19.3.2008).

<sup>81</sup> See STATHIS BANAKAS, 'Trasformazioni della responsabilita' extracontrattuale', (1998) *XLIV Rivista di Diritto Civile*, 69–83.

national aims, the new tort law of Europe cannot be developed separately from the goals of the European political and social union. It follows from the above that a major project of harmonisation of European tort law should deal with:

(A) The purpose of tort law in the emerging European community: tort theories in the beginning of the new millennium in a world in which financial and social globalisation are now a reality (more on this *infra*).

(B) The political, social and economic aims of the European Union, as political underpinnings of the tort law to be developed., and the directional significance of previously accomplished tort law harmonisation. This should lead on to a third more substantial aim of establishing the ‘common core’, such as it might be, of values, methods and techniques shared by national tort systems in Europe.

#### IV. ■■■■

American tort law theory has led the way towards new conceptions of delictual liability. The various different theories can be grouped under two general categories, i.e.:

(A) Theories that can be described as ‘instrumental’<sup>82</sup> or, more narrowly, ‘deterrence’ theories, including the contextual study of legal problems on the basis of an economic analysis of the effect of legal rules in the market place; and

(B) Theories that can be described as ‘relational’ or ‘moral’ or ‘corrective justice theories’.<sup>83</sup> Recently, scholars like GARY T. SCHWARTZ have come out in

<sup>82</sup> First propagated by FLEMING JAMES JR. in his article ‘Contribution among Joint Tortfeasors: A Pragmatic Criticism’, 54 Harvard L. Rev. 1156 (1941). See, further, GEORGE L. PRIEST, ‘The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law’, 14 J. Legal Studies 461 (1985). For a critique of ‘instrumentalist’ tort thinking, see CHARLES O. GREGORY, ‘Contribution Among Joint Tortfeasors: A Defence’ 54 Harvard L. Rev. 1170 (1941), answered by FLEMING JAMES JR. in ‘Replication’, 54 Harvard L. Rev. 1184 (1941). A good summary of the debate between relational and instrumentalist tort theories can be found in ERNEST J. WEINRIB, ‘Thinking About Tort Law’, 26 Valparaiso Univ. L. Rev. 717 (1992).

<sup>83</sup> See Symposium, ‘Corrective Justice and Formalism: The Care One Owes One’s Neighbours’, 77 Iowa L. Rev. 403 (1992); an excellent review of these theories can be found in GARY T. SCHWARTZ, ‘Mixed Theories of Tort Law: Affirming Deterrence and Corrective Justice’, 75 Texas L. Rev. 1801 (1997). On the often heated, highly politicised debate about United States tort reform, see JAY M. FEINMAN, ‘Unmaking and Remaking Tort Law’, 5 J. High tech. L. 61 (2005); STATHIS BANAKAS, ‘What Is Tort Law for in Today’s World?’, in Essays on tort, insurance law and society 99 (2006). On modern American tort theory from a vast literature see, in particular, TOM F. LAMBERT JR., ‘The Jurisprudence of Hope’, 31 J. AM. trial law. ass’N 29 (1965); MICHAEL RUSTAD, ‘The Jurisprudence of Hope: Preserving Humanism in Tort Law’, 28 Suffolk u. L. Rev. 1099 (1994). Tort law is also accorded ‘therapeutic’ qualities. See BRUCE FELDTHUSEN, ‘The Civil Action for Sexual Battery: Therapeutic Jurisprudence?’, 25 Ottawa L. Rev. 203 (1993). In Understanding Tort Law, 23 Val. u. L. Rev.

favour of 'mixed' theories, combining the ostensibly antithetical goals of efficiency and fairness.<sup>84</sup>

(A) Whereas the original instrumental theories emphasised the compensatory aspects of tort law, as a 'public law in disguise',<sup>85</sup> having a regulatory and distributional character, aiming at spreading the cost of injuries across the community,<sup>86</sup> the new economic analysis of tort law, as shown in the work of, among others, Calabresi and Posner, aims at deterrence, and at reducing injuries by devising rules that produce economic incentives for safer behaviour.<sup>87</sup>

The instrumental conception of tort law places the social function of tort remedies centre-stage, emancipating tort law from its historical connection with criminal law and the principle of individual responsibility based on moral wrong. The obligation to repair or compensate damage, or exceptionally, to pay aggravated damages, is determined by social and economic considerations of the allocation of the risk of specific losses. The instrumental theory of tortious liability replaces in the common law systems the concept of 'unlawfulness' with a concept of 'legal policy' based on such considerations. It has been made possible by the historical development of tort law by the judges, as a system of case-law largely unregulated by the legislator, and totally independent from criminal law. In the common law world the civil action, even if the tort is also a crime, will be litigated separately, with a different procedure and in a different legal culture, with a very restrained input from any parallel criminal proceedings allowed through into the tort case.

An instrumental view of liability for negligent harm will give priority not to the moral wrongdoing of the defendant but to considerations of economic efficiency and social utility determining where the loss should ultimately fall. For moral deterrence and retribution, the job is left to criminal law. As far as civil

485 (1989), ERNEST J. WEINRIB goes overboard in his enthusiasm. He states that 'Explaining love in terms of ulterior ends is necessarily a mistake, because a loving relationship has no ulterior end. Love is its own end. In that respect, tort law is just like love.' *Id.* at 526; ALLEN M. LINDEN, *Viva Torts*, 5 *J. High Tech. L.* 139.

<sup>84</sup> *IBID.*

<sup>85</sup> This point is addressed., in the light of the modern experience and the new 'individualistic' turn of social consciousness, by DANIEL A. FARBER & PHILIP P. FRICKLEY, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 *Michigan L. Rev.* 875 (1991).

<sup>86</sup> See, e.g., KEETON & O'CONNEL, *Basic Protection for Accident Victims*, 1965; T. Ison, *The Forensic Lottery*, 1967.

<sup>87</sup> See W. M. LANDES & R. A. POSNER, 'The Positive Economic Theory of Tort Law' 15 *Georgia L. Rev.* 851 (1981); the literature on the economic analysis of tort law is enormous: see, e.g., POSNER, *Economic Analysis of Law*, ch. 6. In Germany, the movement attracted a great deal of interest, and generated original works such as SCHÄFER/OTT, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, 1986. The great English monograph has been ATIYAH (ed. P. Cane), *Accidents, Compensation and the Law*; see also BURROWS & VELJANOWSKI, *The Economic Approach to Law*.

liability is concerned., negligent harm ceases to be personal, it becomes social. 'Social objectives supersede legitimate accountability or fault.'<sup>88</sup>

But in a sophisticated free market economy tort can also be misused., i.e. used not to restore unfair or socially dysfunctional loss, but simply, to produce wealth for certain professions,<sup>89</sup> or to increase the assets of a business, part of the phenomenon of so-called 'paper-entrepreneurism'.<sup>90</sup> This has seriously aggravated the mounting social cost of tort litigation in America, the most significant fact to be taken into account in developing an economically sound European tort theory for the future.<sup>91</sup>

(D) Corrective justice or relational tort theories have been understood as emphasising the moral purpose of tort law. Their principal strength is their focus on the structure of tort suits: tort law is interested not in every person who behaves wrongly, but only those who, by so behaving, cause harm. This shows that tort law is not concerned with deterring wrongful activity, but with correcting its harmful consequences, assessing moreover, the defendant's liability not in reference to the magnitude of the risk created by his conduct, but in reference to the extent of harm suffered by the plaintiff.<sup>92</sup> According to the prevailing theory in America, known as 'conduct theory of negligence', negligence is 'conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm'.<sup>93</sup>

<sup>88</sup> DOGHERTY, *Accountability Without Causality*, p. 11.

<sup>89</sup> Writers in the so-called 'Critical Legal Studies' movement have savagely attacked the capitalist exploitation of tort liability by lawyers, insurers and entrepreneurs: see RICHARD L. ABEL, 'A Critique of Torts', 37 U. C. L. A. L. Rev. 785 (1990). See further, my article *The Method of Comparative Law and the Question of Legal Culture Today*, 3 *Tilburg Foreign Law Rev.* 113, 134 f. (1994).

<sup>90</sup> See R. REICH, *The Next American Frontier*, 1983, ch. 7.

<sup>91</sup> 'Tort crisis' and 'Tort Reform' have been hotly debated in America in recent years, and figured as political issues in the last Presidential election. See ROBERT L. RABIN, *The Politics of Tort Reform*, 26 *Valparaiso Univ. L. Rev.* 709 (1992).

<sup>92</sup> See e.g., ERNEST J. WEINRIB, 'Toward a Moral Theory of Negligence Law', 2 *Law & Philosophy* 37 (1983); JULES L. COLEMAN, *Risks and Wrongs*, 1992, pp. 374–82.

<sup>93</sup> *Restatement (Second) of Torts* Para. 282 (1965); see also Harper & James, *The Law of Torts*, Second Edition by Oscar S. Gray, Boston/Toronto 1986, Vol. 3, p. 382 f., with further references.

## V. ■■■■

The law making activity of the European Union, during the years of its existence, in the area of private law and the harmonisation of EU national private law systems in a number of important areas of injury are realities that cannot be ignored in planning a European tort law. There have been a number of Directives and Draft Directives in diverse areas, such as: Product Liability for Defective Products,<sup>94</sup> Consumer Protection,<sup>95</sup> Consumer Credit,<sup>96</sup> Package Travel, Package Holidays and Package Tours,<sup>97</sup> Unfair terms in Contracts,<sup>98</sup> Proposal for a Directive on the Liability of Suppliers of Services,<sup>99</sup> Proposal for a Directive on Liability for Injury caused by Waste.<sup>100</sup> And, most importantly, the recently published first Draft of the Common Frame of Reference, commissioned by the EU Commission, with rules intended to:

‘... be used primarily in relation to contractual and non-contractual rights and obligations and related property matters’.<sup>101</sup>

Tort law has also been the subject of on-going academic research into the common core of European legal systems,<sup>102</sup> and is of course, an important part of the European Civil Code project.<sup>103</sup> Professor VON BAR first published in Germany his book on the COMMON EUROPEAN TORT LAW,<sup>104</sup> in which he reviews the

<sup>94</sup> Council Directive 85/374/EEC of 25 July 1985, now fully implemented by all EU member states.

<sup>95</sup> Council Directive 85/557/EEC of 20 December 1985 on Consumer Protection in Contracts negotiated away from business premises.

<sup>96</sup> Council Directive 87/102/EEC.

<sup>97</sup> Council Directive 90/314/EEC.

<sup>98</sup> Council Directive 93/13/EEC of 1993.

<sup>99</sup> 91/C12/11 revised in 1992.

<sup>100</sup> 89/C251/04.

<sup>101</sup> Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), interim outline edition available online at <http://web01.ua.ac.be/storme/DCFRInterim.pdf> (last visited 27.2.2008), Article I.-1:101.

<sup>102</sup> MAURO BUSSANI AND UGO MATTEI (General Editors). Volumes on European Tort Law include Pure Economic Loss in Europe, edited by Mauro Bussani/Vernon Palmer, Cambridge University Press, 2003; The Boundaries of Strict Liability in European Tort Law, edited by FRANZ WERRO/VERNON PALMER, Carolina Academic Press, Durham NC/Stämpfli Publishers Ltd, Bern/Bruylant, Bruxelles, 2004; Personal Injury Compensation in European Legal Systems, edited by STATHIS BANAKAS/GIOVANNI COMMANDE/PHILIPPE BRUN (forthcoming 2009).

<sup>103</sup> See the Resolutions of the European Parliament of 26 May 1989, OJEC 1989 C 158/400 and 6 May 1994, OJEC 1994 C 205/518; Symposium ‘Towards a European Civil Code’ held in The Hague, 28 February 1997; A. S. HARTKAMP AND OTHERS (eds), Towards a European Civil Code, Dordrecht/Boston/London 1994, reviewed by S. BANAKAS in 11 Arbitration International 222 (1995).

<sup>104</sup> Gemeineuropäisches Deliktsrecht, Erster Band: Die Kernbereiche des Deliktsrechts, seine Angleichung in Europa und seine Einbettung in die Gesamtrechtsordnungen, 1996; see also *supra*, note 2, for an English edition.

present state of European tort systems, following on from his earlier editing of a collective work with national reports on European tort systems.<sup>105</sup>

However, all is not well with the European tort law project. As I will be arguing in a forthcoming paper in more detail, the published first Draft of which,<sup>106</sup> despite its claims of modernising European private law, including tort law, and making it fit for the 21<sup>st</sup> century and beyond, is backwards looking to the, admittedly impressive for its time and socio-economic conditions, Pandektenwissenschaft of the 19<sup>th</sup> century.<sup>107</sup> With its emphasis on systematic dogmatic constructions, abstract definitions and dry logical deductive thinking, not to mention the uninspiring language, the Draft misses the point and seems to be blissfully unaware of the reality of the law, especially private law at the point of delivery in a globalised world. It also completely ignores the increasing importance of regulation, self-regulation and soft law<sup>108</sup> that seriously undermine the dogmatic aspirations of traditional private law theory. Additionally, it fails to connect with major regimes and instruments of transnational trade law that of course also apply in EU territory.

Methodologically, as I have argued in one of my more recent articles,<sup>109</sup> a critical assessment of the EU's harmonisation projects needs to be made with a pragmatic approach to global justice, involving, to a certain extent, questions of universal standards of legal protection, and universal enforcement of legal norms. The argument that needs to be put forward is the need for a global, and not merely a regional-insular 'European', private law perspective, including more specifically a view of tort law remedies, as an effective global mechanism

<sup>105</sup> CHRISTIAN VON BAR (ed.), *Deliktsrecht in Europa*, Köln/Berlin/Bonn 1994; see also *supra*, note 3, for the final version of the text on Principles of Civil Liability for Damages produced by the The study group on a European civil code, led by Professor von Bar, available online at [http://www.sgecc.net/media/downloads/updatetortlawarticles\\_copy.doc](http://www.sgecc.net/media/downloads/updatetortlawarticles_copy.doc) (last visited 4.3.2008).

<sup>106</sup> VON BAR, CLIVE, SCHULTE-NÖLKE ET AL. (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*, 2008.

<sup>107</sup> The DCFR is currently undergoing a process of evaluation by a network of several academic groups, including the 'Association Henri Capitant des amis de la culture juridique française' and the 'Société de législation comparée', which have already published 'Principes contractuels communs' and 'Terminologie contractuelle commune', B. Fauvarque-Cosson, D. Mazeaud (dir.), collection '*Droit privé comparé et européen*', Volumes 6 and 7, 2008.

<sup>108</sup> See forthcoming EUI Workshop on 'Private Law Remedies, Soft Law and Global Wrongs', 15<sup>th</sup> December 2008, 3–7pm; also STATHIS BANAKAS, 'A Global Concept of Justice-Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World', 67 *Louisiana Law Review* 1021–1041 (2007).

<sup>109</sup> 'A Global Concept of Justice – Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World', 67 *Louisiana Law Review* 1021 (2007). See also GUNTHER TEUBNER & ANDREAS FISCHER-LESCANO, 'Wandel der Rolle des Rechts in Zeiten der Globalisierung: Fragmentierung, Konstitutionalisierung und Vernetzung globaler Rechtsregimes' in *Globalisierung und Recht* 3, 53 (Junichi Murakami/Hans-Peter Maruschke/Karl Riesenhuber editors, 2007).

of restorative, as well as social<sup>110</sup> justice. An eminent Canadian judge and scholar hailing the global quest for ‘juster justice and a more lawful law,’<sup>111</sup> has described tort law, as public (and one might add, lately, international public) law in disguise, as ‘a compensator, a deterrer, an educator, a psychological therapist, an economic regulator, an ombudsperson, and an instrument for empowering the injured to help themselves and other potential victims of all sorts of wrongdoing in our society.’<sup>112</sup> Such enthusiasm need not be, of course, the main force in harmonising tort law in Europe, but it should at least not be completely ignored. To put it more bluntly, the European debate on harmonisation of tort law needs to be enriched by questions of how tort law can serve global restorative and social justice, and take on board the possibility of global tort law remedies that may include transnational procedures of collective and class actions.<sup>113</sup> Such global jurisdiction for civil liability suits is currently being tested not only in the US, under the old Alien Tort Claims Act of 1789,<sup>114</sup> but also in Europe.<sup>115</sup> Finally, the function of tort law as an alternative source of social welfare, must also inform the debate in Europe. Social welfare, controversial as it is on a national level, becomes a moral conundrum if transposed on the global level.<sup>116</sup> As the United States experience has shown, tort law sometimes offers a safety net when social welfare is inadequate, and social justice in the form of wealth distribution is pursued through class actions and punitive damages for negligence. It is arguable that tort law should not from the point of view of eco-

<sup>110</sup> These two different objectives need not be always in conflict, in fact, restorative justice can contribute to social justice through mechanisms of collective enforcement that spread the wealth of damages to many, such as class actions.

<sup>111</sup> ALLEN M. LINDEN, *Viva Torts*, 5 J. High tech. L. 139, 142 (2005) (quoting TOM LAMBERT).

<sup>112</sup> ALLEN M. LINDEN, *Viva Torts*, 5 J. High tech. L. 139, 143 (2005).

<sup>113</sup> Thus, in countries in the French/Spanish legal tradition with highly developed systems of administrative (public) tort liability, administrative courts enforce tort claims for violations of collective rights: see JUAN CARLOS HENAO, *Collective Rights and Collective Actions: Samples of European and Latin American Contributions*, in *Exploring tort law* 426 (M. Stuart Madden, ed.) (2005), on the ‘*acciones populares*’, an administrative law remedy that serves functions similar to class actions. For another view of the public function of Tort law in the US, see GUIDO CALABRESI, *The Complexity of Torts – The case of Punitive Damages*, in *Exploring tort law* 333 (ibid), arguing at p. 337 that the first function of Tort law is to enforce societal Norms through the use of private Attorney’s General.

<sup>114</sup> Recently exhumed from obscurity in headline-grabbing cases such as *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980). See more in my article ‘A Global Concept of Justice – Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today’s World’, 67 Louisiana Law Review 1021 (2007), at p. 1038 f.

<sup>115</sup> More in my article ‘A Global Concept of Justice – Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today’s World’, 67 Louisiana Law Review 1021 (2007), at p. 1038 f.

<sup>116</sup> See HIROHIDE TAKIKAWA, *Can We Justify the Welfare State in an Age of Globalization? Toward Complex Borders*, in *Derecho y Justicia en una Sociedad Global*, (Manual Escamilla & Modesto Saavedra eds, 2005), at 723.



conomic efficiency be used as a mechanism of wealth distribution for social justice as taxation might do the job better and in any event is better suited to accommodate public choice.<sup>117</sup> But given the fact that taxation is largely a 'no-go area' for European harmonisation, this is not an argument that applies to the harmonisation of tort law in Europe that could, and arguably should, serve specific goals of social justice through wealth distribution. The weakening of Europe's welfare state has indeed caused an increase in tort litigation in the old continent, and it is time, in the process of thinking about a new tort law for Europe, to reconsider the objections raised against an expansion of the availability of punitive damages in European tort law.

## VI. ■■■■

To return to a narrower European perspective, the present trend of European tort law harmonisation needs finally, to reflect the general constitutional policy of the European Union to give consumer protection a priority. This policy was formally adopted by the 1992 European Union Treaty, the Maastricht Treaty, which has been aggressively pursued through the EU Commission's initiatives in European contract law<sup>118</sup> and the recently announced Green Paper on Consumer Law.<sup>119</sup> It is a policy that will have to be taken into account in any attempt to create a European system of tortious liability. This will significantly affect the perception to be formed as to the different aims of a new European tort law.

There is, indeed, no reason for tort law not to combine different aims, such as that of corrective justice, economic efficiency and deterrence, and social justice through wealth distribution, or alternate them in different areas. Consumer protection certainly calls for deterrence; product liability is a liability arising from wrongs that are of a character deprived of the personal element, something that makes corrective justice, in this case, rather unsuitable as the basis of the design of liability. On the contrary, the market operations and the masses of consumers stand to benefit from tort rules designed to promote economic efficiency and deterrence, and, in very deserving cases social justice through wealth

<sup>117</sup> See DAVID A. WEISBACH, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. Chi. L. Rev. 439 (2003). It must be added that public choice is, to a certain extent, served by the jury system widely used in tort trials in the US, which, like punitive damages, is an anathema for most European legal systems.

<sup>118</sup> See, e.g., *A more coherent european contract law an action plan*, com(2003) 68 final, also available online at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/com\\_2003\\_68\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf) (last visited 27.2.2008).

<sup>119</sup> Published in February 2007. Available online at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/green-paper\\_cons\\_acquis\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf) (last visited 4.3.2008).

distribution.<sup>120</sup> Tort rules can work together with administrative or other regulatory measures, such as health and safety regulations or regulation of trading standards, coupled with criminal or administrative sanctions and rights of automatic compensation. Environmental harm is also better dealt with on the basis of a tort philosophy directed towards economic efficiency and deterrence.

Other areas of harmful activity could be better dealt with through tort rules designed on the basis of corrective justice principles. Certainly, all cases of intentional or grossly immoral harmful conduct. Moreover, so too could cases of non-material harm, such as psychological, psychiatric or other non-material harm of similar nature. Finally, some areas such as traffic accident injuries, medical malpractice injuries or harm caused by persons, animals or things under the control of another person, are difficult to deal with in exclusively using either a corrective justice approach, an economic efficiency and deterrence approach, or an approach aiming at social justice. These areas call for a 'mixed' tort philosophy, which takes into account both the personal character of the harm and the need to channel and spread the loss efficiently across the community or certain sections of it.

<sup>120</sup> In the U.S. juries often award punitive damages against manufacturers for harm caused by defective products, designed or manufactured defectively; but such awards can be seen as serving deterrence as well as social justice, rather than corrective justice, as they typically far exceed the amount of actual harm caused. See Restatement (Third) of Torts: Products Liability.