VISIONS OF TORT LAW IN DIFFERENT TRADITIONS: WHAT ARE THE CHALLENGES AHEAD?

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-'*Le préjudice doit être réparé dans son intégralité et non pour le principe*'

-'*Die Generalklauseln ...[sind mit Recht] ...als die "Einbruchstellen" der Grundrechte in das burgerliche Recht bezeichnet worden*'

-*'In a case-law system such as the English, even more obviously than in a codified system, the distinction between what the law is and what the law ought to be is often blurred'*

- '*Tort law is just like love'*

Tortious (delictual) liability is compensatory, and, exceptionally only, punitive. Continental European legal systems are still rooted in a 'relational' view of delict, conceived by the great Roman jurists and laid down in the Digest (*lex Aquilia)*. This view of delict envisages liability *ex lege* to repair or compensate damage caused by one person to another and is, essentially, moral. The great modern Continental European legal traditions are, however, split about the issue of whether all morally wrong damage (i.e. caused by the defendant's fault) is a delict, or only damage that is specified as 'unlawful' by the legal order. The German Pandectist science has proposed a doctrine of 'unlawful injury' (*damnum injuria datum*) as inherent in the design of the *lex Aquilia*, excluding from

delictual liability damage or loss not prescribed as unlawful (*damnum sine injuria*). This doctrine brings delict in line with a fundamental principle of criminal law (*nullum crimen nulla poena sine lege*), and it is not surprising that it can be traced in ancient law at a time when crime and delict were almost inseparable in legal thought.

What is, perhaps, more remarkable is that this view of delict as an unlawful act, as crime, has survived in the great majority of modern European Codifications, with the notable exception of the French Civil Code; the latter opting, simply, for general clauses of delictual liability based on the principle of individual responsibility. Very little real innovation in fundamental delictual theory has occurred in Europe since the *lex Aquilia*.

I

One exception to this has been the development in the Germanic tradition of a normative concept of damage (*normativer Schadensbegriff*) following a quite remarkable transplantation of a common law idea into Continental European soil.

A first condition of civil liability, which in every jurisdiction the plaintiff must be able to establish, in order that their claim can get off to a start, 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". In the Germanic legal tradition, the question of what is legally significant damage is often related to the issue of whether an injury has been wrongfully inflicted, under the individual circumstances of each case. Even though the latter issue is, conceptually, quite separate from the former, referring to the defendant's conduct rather than the plaintiff's injury.

Not every actual injury is necessarily a "damage" in the eyes of the law,

although there are legal systems that profess to have adopted an "open" legal concept of damage, able to accommodate most kinds of actual harm. Legal systems seem to vacillate between a concept of damage of a "factual" or a "normative" complexion.

A "factual" concept of legal damage implies that

(a) all kinds of actual harm can qualify as "damage",

and that

(b) there can never be legally significant "damage" in the absence of actual harm of some sort.

A "normative" concept of legal damage means that only selected types of actual harm qualify as a "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.

The Anglo-American law of Negligence is based on the principle that there can be no actionable wrong of Negligence and no legal claim without actual harm. But 'actual harm' is defined very broadly. 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'1

The principle of actual harm means very little more in practice than that there can be no start of an action without actual, and objectively dangerous, conduct of the defendant having occurred; i.e. that a state of mind of indifference or inadvertence, unaccompanied by conduct, can never be actionable under the tort of Negligence.

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1 *Restatement (Second) of Torts* Para. 282 (1965); see also Harper & James, *The Law of Torts*, Third Edition by Oscar S. Gray, Boston/Toronto 2007, Vol. 3, p.382 f., with further references.

The English and American Law of Torts also knows, traditionally, so-called "torts actionable *per se*". In some cases, an action in tort lies without any proof of actual damage. The reason is historical2. Trespass to land, trespass to the person3 or goods4, and libel are notable examples of torts actionable *per se*. In Anglo-American law, the action for damages also serves the purpose of testing out the existence of a legal right; special remedies, such as the *vindicatio* of Roman law in cases of infringement of property rights, were never directly adopted by Anglo-American law to enforce rights. If rights of personal safety or property are infringed, it is, therefore, important that the law does not require the presence of actual harm for the plaintiff to be able to raise a claim.

In English law, 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"5.

But with their practice of "general damages" awards, English courts have allowed themselves considerable space for normative manoeuvring, even in an action in Negligence. It is often the case that awards for general damages 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

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2 See Clerk and Lindsell, Torts, para. 302, with a list of cases of actionable claims where proof of actual damage is unnecessary.

3 Unintentional trespass to person may need proof of actual damage: *Letang* v. *Cooper* [1965] 1 Q.B. 232, 245 per Diplock L.J.). But see also the decision of the House of Lords in *Stubbings* v *Webb* [1993] A. C. 498: it is now clear that if an intentional battery is committed, there is a cause of action in trespass which, as far as the all too important issue of Limitation is concerned, is separate from Negligence.

4 *Hayward* v. *Hayward* (1887) 34 Ch. D. 198

5 Clerk & Lindsell, *on* Torts, 14th ed 1975, para. 859; *Lochgelly Iron & Coal Co.* v. *M'Mullan* [1934] A.C. 1, 25 *per* Lord Wright.

for losses far from clear in their nature, i.e. a claim for the loss of the enjoyment of a holiday6. The practice of awarding general damages has spared Anglo-American courts the dogmatic controversy that similar claims have caused in German law7. That it has created an entirely different, practical, problem, known as the 'liability crisis', especially in America8, is, of course, another matter.

In Germany, it has been often argued that the Civil Code (*Buergerliches Gesetz Buch,* in short, *BGB*), apparently under the strong influence of Mommsen9, was endorsing a factual, "materialistic" concept of damage. His is the philosophy behind the principle of non-compensation of so-called "non–material" losses (para. 253 BGB). In the 1930s, however, a comparative study by a German scholar, Neuner, opened the way for normative considerations to infiltrate into the law of damages of the BGB10. Neuner's "normative" theory of Damage was directly inspired by the old Common Law tradition of using the tort action as a test–ground for the existence of a right; Neuner called this the "*rechtsverfolgende Funktion*" of the action for damages. Neuner's work, and its

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6 See, e.g., *Ichard* v. *Frangoulis* [1977] 1 W. L. R. 556

7 See Heldrich, 'Compensating Non-Economic Losses in the Affluent Society', (1979) 18 *Am. J. Comp. L.* 22; for problems arising out of claims of 'holiday losses' in German Law see Grunsky *Neue Juristische Wochenschrift* 1975, 609; Honsell *Juristiche Schulung* 1976, 222

8 Pain and Suffering (also known as 'disfigurement) awards, as general damages, have reached legendary amounts in America: An eminent French tort lawyer and comparativist gives a graphic account: A. Tunc, *La Responsabilite Civile*, Paris 1981, p. 1 f.; see also Banakas, S., 'Non-Pecuniary Loss in Personal Injury: Topography Architecture and Nomenclature in the European Landscape', in *10:2 Journal of Comparative Law*, 2015, 291-342. For a penetrating critical account by an American lawyer see Richard L. Abel, 'A Critique of Torts', (1990) 37 *U. C. L. A. L. Rev.* 785.

9 Mommsen, *Zur Lehre von dem Interesse*, Braunschweig,1853-55.

10 Neuner, 'Interesse und Vermogensschaden', *Archiv fuer die civilistische Praxis* 133, 277 f. (1931); see also, a year later, Wilburg, 'Zur Lehre von der Vorteilsausgleichung', in *Jhering Jahrbuch* 82, 51 f. For a critical account of the literature following these two articles see Grunsky *Aktuelle probleme zum Begriff des Vermogensschadens*, 1968; Hagen, 'Fort– oder Fehlenentwicklung des Schadensbegriffs', *Juristiche Schulung* 1969, 61 f; Hauss, in *Zeitschrift fuer die Versicherungs Wissenschaft* 1967,15 1 ; Zeuner, 'Schadensbegriff und Ersatz von Vermogensschaden', *Archiv fuer die civilistische Praxis* 163, 380 (1963); *idem* in *Gedachtnisschrift fur Dietz* 1972, 99 f; Baur in *Festchrift Raiser*, 1974, at p. 120 f

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 legal culture, from a legal system with a highly individual experimental style, into a legal system of the highest dogmatic sophistication.

From the "*rechtsverfolgende Funktion*" of the tortious action Neuner concluded that the concept of "damage" itself must 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 based on its subjective value. The latter was another postulate of the traditional Mommsenian concept of damage. Neuner's ideas were further developed by several other authors; among others, by leading scholars such as Bydlinski (who called the award of damages "a sanction for the injured interest or good")11, and Larenz, who introduced the idea of a "*Rechtsfortsetzungsfunction*"12 of the action for damages13.

Under French Law it appears that the presence of actual harm is a *sine qua non* condition of compensation: "*sans dommage, pas de droit* à *réparation*"14. This principle is not, however, easy to reconcile with certain cases where

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11 *Probleme der Schadensverursachung nach deutschem und osterreichischem Recht,* Wien, 1964, p. 29 f.

12 'The function of pursuing a right' is a possible English translation of this very difficult German concept.

13 Schuldrecht, Vol. 1, 11th ed 1976, p. 346, repeated in subsequent editions; see, generally, Hermann Lange und Gottfried Schiemann *Schadensersatz*, 3rd edition, Tübingen, 2003, *passim*; E. Wolf in *Festschrift Schiedermaier* 1976, 545 f. Kondgen, in *Archiv fuer die civilistische Praxis* 177, 1 f. (1977), attempts an economic analysis of the issue. An excellent comparative study of the meaning of legal damage can be found in the monograph by Magnus, *Schaden und Ersatz*, Tübingen 1987.

14 See Weill/Terre *Droit Civil*, *Les Obligations*, 2d ed Paris, 1975, p 657 f., repeated in subsequent editions.

compensation is given for losses that have, in truth, already been made good to the plaintiff in some other way15. 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 assessments16. French courts have awarded 'symbolic' damages (*dommages-intérêts symboliques*), in cases of abusive violation of rights, a practice condemned by the *Cour de Cassation*, which proclaimed recently17 that '*le préjudice doit être réparé dans son intégralité et non pour le principe*'18, under the long- standing principle of *réparation intégrale* assumed in article 1240 (old 1382) of the French Civil Code.

II

For real innovation in legal thinking on delictual liability one must turn to the common law world. American tort law has led the way towards a new conception of delictual liability, often described as 'instrumental'19, and the

15 See the discussion *ibid.;* and *Cour de Cassation, Chambre Civile* 2e, *Dalloz-Sirey* 1976 Jurisprudence. 137 note Le Tourneau, as well as *Civ*. 2e Juin 1976, *Revue Generale des Assurances Terrestres* 1977, 369.

16 Furthermore, 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*", ie injury to the legitimate collective interests of a professional or a trades union, is a most notable example in this connection. See Weill/Terre, no 769; for "*syndicats professionnels*" see art. L. 411–11 Code du Travail.

17 *Cour de cassation chambre civile* 1, 21 novembre 2018 , N° de pourvoi: 17-26766, not published seehttps://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000037676942&fastReqId=388428355&fastPos=15&oldAction=rechJuriJudi (accessed 01.08.2019)

18 'Harm must be compensated in full and not for the sake of principle'.

19 A term first used 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 an early critique of 'instrumentalist' tort thinking, see Charles O. Gregory, 'Contribution Among Joint

contextual study of legal problems, based on an economic analysis of the effect of legal rules in the market place. But whereas the original instrumental theories emphasized the compensatory aspects of tort law, as a 'public law in disguise'20, having a regulatory and distributional character, aiming at spreading the cost of injuries across the community21, 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[22].

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

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Tortfeasors: A Defense' 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).; *idem, Corrective Justice*, OUP, Oxford 2012.

20 This point is addressed, in the light of the experience of the 1990s 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).

21 See the pioneering work of Keeton & O'Connel, *Basic Protection for Accident Victims*, 1965; T. Ison, *The Forensic Lottery*, 1967; also from an English law perspective Atiyah, *The Damages Lottery*, Oxford 1997; *idem Atiyah's Accidents, Compensation and the Law*, by Cane and Goudkamp, 9th edtion, Cambridge 2018.

22 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*, 9th ed., New York 2014, ch. 6. In Germany, the movement attracted a great deal of interest, and generated original works such as Schafer/Ott *Lehrbuch der Okonomischen Analyse des Zivilrechts,* 1986. For English law, from a vast literature see Burrows & Veljanowski, *The Economic Approach to Law*, 1981. A recent comparative collection is Anthony Ogus and Willem H. van Boom, *Juxtaposing Autonomy and Paternalism in Private law*, Oxford 2011.

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 and in a different legal culture (no juries in England), with a very restrained input from any parallel criminal proceedings allowed through into the tort case. Contrary to European Continental systems, which make extensive use of the civil action before the criminal jurisdiction. It is not surprising that in such systems the emancipation of tort law from the influence of criminal law philosophy and style is a long way coming. Criminal courts operate in a moral atmosphere, in which instrumentalist views of harmful conduct cannot make any way whatsoever. So, French tort law that bravely departed from notions of unlawfulness in articles 1240 (old 1382) *et seq.* Code Civil, suffered a serious setback in the hands of criminal judges heavily involved in tort litigation of claims by 'civil' parties to criminal proceedings: for a long time, French criminal courts imposed a notion of *injuria* on delictual liability (the so-called theory of an *'interet legitime juridiquement protege*').

To return to Anglo-American tort law, purposeful dangerous activity, or intentional harmful activity, will often be socially dysfunctional and, therefore, in principle, tortious (in the case of harmful intention with important exceptions where economic harm is concerned). But the picture is much more unclear about negligent or accidental harm.

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 deterrence and retribution, the job is left to criminal law. As far as civil liability is concerned, negligent harm ceases to be personal, it becomes social. Large areas of contemporary Anglo-American negligence law are imbued with such instrumentalist thinking: for example, causation and evidence rules in personal injury cases (most notably the so-called egg-thin-skull rule and the rule *res ipsa loquitur*), product liability, occupiers' liability, and, recently, in the United States, the so-called proportional (or Enterprise or market-share) liability (liability without causation)23. The most common application of this new concept has been the trend first appearing in American tort law to impose collective liability on manufacturers even though plaintiffs were unable to identify which company sold the (common) defective product, in some cases holding a manufacturer liable and assessing damages even after he proved that he could not have possibly caused the harm24. Courts apply the so-called 'market-share test', and assess damages against the manufacturer in proportion to his share of sales in the market, not in proportion to his share of blame for the injury caused25.

III

23 Jude P. Dougherty, 'Accountability Without Causality: Tort Litigation Reaches Fairy Tale Levels' 41 *Catholic Univ. L. Rev.* 1 (1991). A recent Comparative collection of National reports is Israel Gilead , Michael D. Green and Bernhard A. Koch (eds), *Proportional Liability, Analytical and Comparative Perspectives,* Berlin 2013

24 e.g. *Hymovitz* v *Eli Lilly & Co.* 539 N. E. 2d 1069, 1078-79 (N.Y.), *cert. denied*, 493 U.S. 944 (1989).

25 *e.g. Sindell v Abbott Labs.* 607 P. 2d 924, 027 (Cal.), c*ert. denied*, 449 U.S. 912 (1980). For another paradigm of proportional liability, restricted to cases of compensation claims against employers for exposure to asbestos causing Mesothelioma, see the English case of *Fairchild* v *Glenhaven Funeral Services Ltd* [2002] UKHL 22, confined to mesothelioma case by the *Compensation Act* 2006.

Liability without causation takes Tort law far away from the Roman model of the *lex Aquilia*, and traditional ideas of rectificatory justice. 'Social objectives supersede legitimate accountability or fault'[26]. Some writers have sought to explain market-share liability based on alternative causation theories, reflecting the shifting perspective of modern Tort law: from a formerly 'theistic' foundation, and a natural law approach to human nature, to a secular one, based on materialism and social and psychological determinism. An American author challenged traditional theories of objective legal causation and 'causal chain' as early as 1870: 'To every event there are certain antecedents...The true cause is the whole set of antecedents taken together'[27].

Furthermore, in the Anglo-American (in contrast with the German) legal culture, tort claims are, in principle, for damages, i.e. monetary compensation, *restitutio in naturam* being a very rare exception; therefore, financial arguments prevail in determining legal policy. Harm of any kind must be given a price-tag, before tort law can deal with it. This turns a personal injury, a psychiatric condition, a property damage or a deprivation of personal freedom and privacy into a sum of money, seriously undermining traditional relational tort theory. Clearly, what the defendant is ordered to give to the plaintiff is almost never what he has taken away. When money is involved, the whole community is involved, as money is the purest form of social interaction. It is hardly surprising, therefore, that new tort theories are emerging of collective culpability, aiming at an allocation of certain losses not to individuals but to the community. Not only the stage becomes bigger than the two (individual or corporate) protagonists (i.e. the parties named in the tort action) and their relative position as between each other

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26 Dogherty, 'Accountability Without Causality' *supra*, note 24, p. 11.

27 Nicholas St. John Green, 'Proximate and Remote Cause', 4 *American L. Rev.* 201 (1870).

(for example, collateral benefits for the plaintiff and collateral profits for the defendant); loss- and liability insurance are also lurking behind the (apparent) judicial allocation of losses.

In a sophisticated market economy tort law can, furthermore, be used not only to restore unfair or socially dysfunctional loss, but, additionally, to produce wealth for certain professions28, or to increase the assets of a business, as a useful way of so called 'paper-entrepreneurism'29. This seriously aggravates the already dramatic crisis of the mounting social cost of tort litigation in America, adding urgency to the task of developing an economically sound tort theory for the future[30]. Any interest in *injuria* as a personal affront pales into insignificance before the political and economic implications of the social cost of tort litigation. We are a long way away from the idyllic, rural world of the *lex Aquilia*. In Anglo-American tort law, *injuria* has mutated to a vehicle of social and economic policy. Continental European law has not yet experienced this to such an extent; traditional natural law views of responsibility and causation are better preserved, and tort liability remains a rectificatory mechanism of loss distribution[31].

IV

28 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).

29 See R. Reich, *The Next American Frontier*, New York, 1983, ch. 7

30 'Tort crisis' and 'Tort Reform' have been hotly debated in America for several years, and figure often as political issues in Presidential elections. See Robert L. Rabin 'The Politics of Tort Reform', 26 *Valparaiso Univ. L. Rev.* 709 (1992).

31 See the conclusions of Ulrich Magnus in Reformuberlegungen fur das osterreichische Haftpflichtrecht, *Verhandlungen des XII Osterreichischen Juristen*tages, Wien 1994, p.82 f.

Yet, despite this transformation of tort law in the Anglo-American legal family, the language of judicial decisions continues today to reflect the old morality, based on a traditional relational approach to the issue of allocating even accidental losses. There is little difference between this moral terminology, and that to be found in judicial decisions in Continental legal systems, for example, in German law, where, however, the link between law and morality in the field of Torts (*Unerlaubte Handlungen*) has been explicitly legislated in paragraph 826 BGB. This provision has found extensive and remarkable application in German case-law, covering several diverse areas, which in English law fall under the scope of different torts, such as deceit, defamation, intimidation, conspiracy, interference with contractual relations and others. But what is even more remarkable for a common law lawyer is the manner in which the German Federal Constitutional Court (*Bundesverfassungsgericht*) has combined this provision with the articles of the German Constitution (*Grundgesetz*), guaranteeing Basic Rights of citizens, to create a moral high ground on which delictual behaviour is judged. The Court has said that 'the General Clauses [i.e. paragraphs 823 f. of the German Civil Code setting out the general rules of German Tort law].. have rightly been described as the 'break-in' points of fundamental rights in Private law'32. The *Bundesverfassungsgericht* has held, further, that general clauses such as para. 826 BGB

'refer to the judging of human conduct by criteria which are outside civil law, in fact chiefly outside the law altogether... in deciding what these social precepts require at any given time in the individual case, one must primarily proceed from the totality of value concepts which the people have reached at a

32 "*... die Generalklauseln ...[sind mit Recht] ...als die "Einbruchstellen" der Grundrechte in das burgerliche Recht bezeichnet worden"*: *Bundesverfassungsgericht* (German Federal Constitutional Court) in a seminal judgment in 1958, reported in *Bundesverfassubgsgerict Entscheidungen* (*BVerfGE*) 7, 198

certain point in time of their intellectual and cultural development and established in their Constitution'33.

By contrast, the modern English Tort Law, and the Law of Negligence, has been shaped not by Constitutional statutes or codes but in several important judicial decisions, of the 20th century, the first of which was the decision of the House of Lords in *Donoghue* v *Stevenson*.34 Before this case was decided in 1932, the English law of Tort did not know of any comprehensive principles of liability for negligent conduct, and in the absence of liability based on Contract or some other "nominate" tort, claims for negligently inflicted injury were unlikely to succeed. *Donoghue* inaugurated the modern law of negligence by introducing the general rule of the duty of care as the basis of liability. What is interesting is, however, the way this was done, in the leading speech of Lord Atkin, that has been ever since regarded as the cornerstone of Negligence liability in English law

'I content myself with pointing out that in English law *there must be*, and *is*, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances'[35]. Commenting on this passage, a great master of the common law and comparative lawyer, Tony Jolowicz observed that 'in a case-law system such as the English, even more obviously than in a codified system, the distinction between what the law is and what the law ought to be is often blurred'[36]

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33 *ibid.*

34 [1932] A. C. 562

35 [1932] A. C. at p. 580 (emphasis added)

36 In 'Compensation for Personal Injury and Fault', *Accident Compensation After Pearson*, Edited by Allen/Bourn/Holyoak, London 1979, at p. 75

V

The moral language of tort decisions contrasts sharply with the professed commitment of the judges to developing the law according to the requirements of a broader economic and social policy. Yet, the moral language of English Tort law has been revived in several major cases dealing with what has been a most urgent and serious issue of tort liability in England, the problem of liability for negligent financial harm. This issue has been traditionally regarded as *par excellence* an issue of "legal policy", i.e. to be solved, in each case, in the light of broader economic, social, or, even, political considerations. In a leading decision of the House of Lords, taken by a panel of seven, rather than five, as usually is the case, judges, in the case of *Murphy* v *Brentwood D. C.37,* the House of Lords departed from precedent to secure the financial position of local authorities against claims for negligence of building inspectors employed by them, raised by owners of badly built homes which had, nevertheless, been licensed as built safely. The basis of this decision was the legal policy against such claims; but the language of the judges remained the old, moral language of personal responsibility. Rather that talking sociological or economic jargon, judges continue to use words loaded with moral, and sometimes, emotional, feelings.

The technological progress, accelerating the quick spread and interdependence of financial relations and the interaction between different sectors of the industries and the professions, is taking place at a time when, at both sides of the Atlantic, tort law is undergoing a fundamental re-thinking. It has again become fashionable to emphasise its 'relational', i.e. moral, nature. The instrumental approach to the operation of tort principles, i.e. as a means of accomplishing collective goals, is under attack from a variety of different

37 [1991] 1 A. C. 398

theoretical perspectives38. In the age of the information technology revolution, the protection of individuals and their distinct identity and potential is becoming again fashionable, gaining importance over the pursuit of collective goals and interests.

It may be that the relational approach to tort law leads to a socially inefficient allocation of losses. However, it is hard to argue against tort law being the original, and, still, the only available, mechanism of a morally acceptable allocation of personal blame for wrongful action and its consequences. If an issue has nothing to do with morality, it should not be a tort issue (for example, accidents through unavoidable error are, arguably, better left to collective compensation schemes); conversely, if an issue is a tort issue, the moral dimension cannot be ignored. It cannot be denied, furthermore, that in Negligence cases there is a clear moral dimension, a question as to the fairness of the personal behaviour of this party towards that one. By contrast, legal policy does not necessarily have to be linked to the common sense of morality in the community, and often judges let this to become apparent in their reasoning. Nevertheless, in explaining the policy of the law, judges only seem comfortable when using the moral language of the traditional law of Negligence. A common expression is that it would be 'unfair, unjust and unreasonable' to impose a duty on the defendant to compensate the plaintiff except in those cases, where the claim is allowed, again, precisely because it said to be 'fair, just and reasonable' for the defendant to pay39. This is, of course, in a more general sense, hardly

38 Weinrib,'Thinking About Tort Law', [1992] 26 *Valparaiso Univ. L. Rev.* 717 provided an influential analysis of the relational and instrumental conceptions of tort law

39 Courts consistently apply these words to the existence of a Duty of Care in economic loss cases nd not only: see, e.g., *Caparo Industries Plc* v *Dickman* [1990] 2 A. C. 605 at 617-618 *per* Lord Bridge and at 632-633 *per* Lord Oliver; *Spring* v *Guardian Assurance Plc* [1994] 3 All E R 129 at 161 *per* Lord Slynn and at 176 *per* Lord Woolf.

surprising: economic or any other pragmatic or technical arguments, disrobed of moral language, are simply not enough to explain to the parties, and to the wider community, the judgment of a court of law. As it has been rightly observed:

'the legal text constitutes a visible material surface, a "terranean screen", a body of law whose figurative function is that of representing an invisible order, a spiritual coherence, a dogma or unity which will both identify and direct the thought or the vision of the subject of law to its licit mythic image or source'40. The importance of traditional moral language for the authority of the judicial text is well illustrated in, among others, the leading decision of the House of Lords in England, in the case of *Spring* v *Guardian Assurance Plc*41. In accepting the claim of the plaintiff that his former employer owed him a duty of care not to negligently write an inaccurate reference that could have costed him his new job, the House of Lords are showing in this case emotions unprecedented in records of judgments of the highest jurisdiction in the country. The judgment of Lord Lowry, for example, is full of such emotions: the issue is surely moral, and at least he had no doubt that it can be wrong for the law of tort not to recognise an economic loss claim on grounds of wider legal policy, as, for example, policy dictated by predictions of adverse market repercussions of doubtful foundation42.

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40 Peter Goodrich, "*Jani anglo*rum: signs, symptoms, slips and interpretation in law", in *Politics, Postmodernity and Critical Legal Studies*, edited by Douzinas/Goodrich/Hachamovitch, Routledge, London 1994, 107, at p. 135

41 [1994] 3 All E R 129

42 Speaking on a legal policy argument against liability in negligence for a non-malicious inaccurate reference, derived from an alleged need to protect the proper province of the torts of Defamation and injurious falsehood, he said: 'This argument falls to be considered on the assumption that, but for the overriding effect of public policy, a plaintiff who is in the necessary proximate relation to the defendant will be entitled to succeed in negligence if he proves his case. To assess the validity of the argument entails not the resolution of a point of law but a balancing of moral and political arguments. This exercise could no doubt produce different answers but, for my own part, I come down decisively on the side of the plaintiff': [1994] 3 All E R 129, 152. Then he became, uncharacteristically for a judge of his rank on record, openly emotional saying: 'One the one hand looms the probability, often amounting to certainty, of damage to the individual, which in some cases will be serious and may indeed be irreparable.

Legal policy expressed in moral terms needs to be explained in moral terms. However, the plaintiffs in earlier 'tough' English cases of economic loss, such as *The Aliakmon43*, *Caparo44*, *Murphy*45*,* (to mention a few leading cases among many) were not told in moral terms by judges rejecting their claims why it was 'unfair, unjust and unreasonable' for the defendants to pay them for their losses, clearly the result not of unavoidable errors, but negligence, pure and simple. In these, as in many other economic loss cases, the policy of non-recovery appears to have been based on a view taken by judges of the unfairness of the defendant's conduct towards the plaintiff being of lesser significance, compared either to the unfairness of recovery to society, or to the unfairness to the defendant himself in imposing a greater liability on him than that which could be imposed on a third party. However, in such cases, as, indeed, in all tort cases, the basis of a decision on liability is explained in terms of the parties' relationship, and judges often say that 'the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope *upon the one party for the benefit of the other' (emphasis* added)46. The importance of getting the balance right, first and foremost, as between the plaintiff and the defendant,

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The entire future prosperity and happiness of someone who is the subject of a damaging reference which is given carelessly but in perfectly good faith may be irreparably blighted. Against this prospect is set the possibility that some referees will be deterred from giving frank references or indeed any references... I am inclined to view this possibility as a spectre conjured up by the defendants to frighten your Lordships into submission': [1994] 3 All E R 129, 153.

43 [1986] A. C. 785
44 [1990] 2 A. C. 605
45 [1991] 1 A. C. 398
46 [1990] 2 AC 605 at 617-618 *per* Lord Bridge; cited with approval by Lord Slynn of Hadley in *Spring* v *Guardian Assurance Plc*, [1994] 3 All ER 129 at 161

and *then* considering, for the purposes of restricting the ambit of liability, third-party effects, is the basis of Lord Woolf's judgment in *Spring* v *Guardian Assurance Plc*. In finding for the plaintiff, he said:

'To make an employer liable for an inaccurate reference, but only if he is careless, is, I would suggest, wholly fair. It would balance the respective interests of the employer and the employee. *It would amount to a development of the law of negligence which accords with the principles which should control its development*' (emphasis added)47.

VI

The scene is no different in America. As Gary T. Schwartz pointed out: 'Much of tort scholarship [i.e. in the USA] is now affected by a general debate about whether efficiency or instead justice provides the proper criterion for tort liability doctrines'48

Ernest J. Weinrib, one of the most influential theoreticians of contemporary Tort law, and a leading advocate of the prevalence in tort law of ideas of corrective justice over social goals and market-efficiency, is emphatic:

'Perhaps... we should replace tort law with a regime of public compensation. Perhaps also, more generous provisions of public welfare, especially health insurance, would alleviate the temptation... to use tort adjudication to provide what the political process has withheld. But tort law is fundamentally relational: it presupposes a normative bond that singles out and

47 [1994] 3 All E R 129 at 172

48 'The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience', in Efstathios Banakas (ed.), *Civil Liability for Pure Economic Loss*, London, Boston 1996, ch. 5.

connects the particular parties to the litigation'49.

It may well be that Anglo-American Tort law in general, and the law of Negligence are returning to the orthodoxy of their traditional function as ways of importing moral considerations into social and economic life. This, if it happens, would be a remarkable departure from the instrumental-utilitarianist philosophy prevalent in recent years. Thus, if Tort law, whatever the legal tradition, is still grounded in a sense of moral wrong, it will not cease to depend on the effectiveness of a monetary (material) compensation to have any effect. Monetary compensation rather than sympathy is what victims want. As brilliantly put long ago by Jehring, monetary compensation for loss, including non-material personal injury loss, is an indispensable foundation of social action, both in ancient and in modern society. Money is the only equal and perfect reward for achievement, or satisfaction for loss, in social intercourse. It was evident to Jehring that the violation of every interest is capable of reparation, indeed, that reparation in the form of monetary compensation is fundamental to every kind of social intercourse[50]. 'There is no idea, like the idea of compensation, that has for human beings something so mandatory[51]. 'Only money is capable to truly solve the task of social intercourse, i.e. to establish the real system of guaranteed full satisfaction of human needs…Money satisfies every need, the most noble and the lowest, and to every calculable degree, the highest as well as the smallest'.[52] Our personal freedom and independence is about being able and obliged to pay…on

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49 Ernest J. Weinrib, 'Thinking About Tort Law', 26 *Valparaiso Univ. L. Rev.* 717 (1992); see also his book *The Idea of Private Law*, Cambridge, Mass., 1995.

50 Rudolph von Jehring , *Der Zweck im Recht, Erster Band*, Leipzig 1877,

51 *id*., at p. 124: '*Es gibt keine Idee, die fuer den Menschen etwas so Zwingendes haette, wie die der Ausgleichung'*

52 id., at p. 127: *'Nur das Geld ist im Stande, die Aufgabe des Verkehrs wirklich zu loesen d. h. das reale System der gesicherten Befriedigung der menschliche Beduerfnisse in vollender Weise herzustellen' 'das Geld befriedigt alle Beduerfnisse, die edelsten wie die niedersten, und in jedem beliehigen Maasse, in groessten wie in kleinsten'*

money clings not only our financial, but also our non-material independence'.[53]

Jehring's bold affirmation of an interest-based human existence fulfilled by monetary reward or compensation implies that the Law should aim at the compensation for the violation of both a material and a moral interest, and justifies the open-ended, broad regimes of compensation in the French legal tradition, which place the compensation of non-material harm on the same basis as the compensation of material harm. Every harm has a social and economic dimension, no less real than the personal and intimate one. It is because of that dimension that Tort law offers compensation. For the harm, and not for the principle, as put by the French Cour de Cassation. If harm can be caused by man to man, Tort law will remain indispensable, and secondary issues such as transaction costs and other social costs, important as they might be, will remain secondary54. But as already pointed out by Jehring, compensation is not only a duty, but also a right55, making it possible for the community to choose between acceptable and unacceptable risks, and maximise freedom of action.

Hailed as the "Jurisprudence of Hope"[56]by enthusiasts in the quest for

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53 id., at p. 128:' *Unsere persoenliche Freiheit und Unabhaengigkeit beruft darauf, dass wir zahlen koennen und muessen-im Geld steckt nicht bloss unsere oekonomische, sondern auch unsere moralische unabhaengigkeit'*

54 The heyday the 'compensation culture' seems to be over, and issues of financing of an often very expensive litigation seem to have been addressed by the wide use of damages based agreements (DBA), (contingency fee agreements), now embedded in English law by the *Legal Aid, Sentencing and Punishment of Offenders Act (LASPO)*, which came into force on 1 April 2013. There remains, however, the important problem of small Tort claims that seem to fall through the net.

55 Immanuel Kant (in D*ie Metaphysik der Sitten*, 1797, *passim.)* considered the 'right to be (and act) wrong' as a cornerstone of individual moral autonomy, (if, one might add, individuals are prepared to pay the (monetary) price for acting wrong, as the ancient Roman delict of *iniuria* demonstrates).

56. *See* Tom F. Lambert, Jr., *The Jurisprudence of Hope*, 31 J. AM. TRIAL LAW. ASS'N 29 (1965); *see also* 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. 485 (1989), Ernest J. Weinrib goes overboard in his enthusiasm. He states "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.

"juster justice and a more lawful law," tort law, being described as public law in disguise,[57] functions "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."[58]

There is, however, a danger that the primary function of Tort law as a mechanism of restoring victims of harm to the position in which they would have been had the wrongful act not occurred, is challenged by the proliferation of non-compensatory damages59 and their increasing use as the only remedy for wrongdoing in situations in which criminal law does not work, for example, violations of human rights by public authorities60. The French Cour de Cassation saw this danger, overruling in the judgment already mentioned the award by the

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57. Allen M. Linden, *Viva Torts*, 5 *J. HIGH TECH. L.* 139, 142 (2005) (quoting Tom Lambert). Thus, in countries in the French 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.

58. Allen M. Linden, *Viva Torts, above,* at 143.

59 At the time of writing, English law recognizes four different kinds of non-compensatory damages. Besides the ancient and well established practice of *punitive* damages mainly used for restraint of public authority abuses and disgorgement of profits made by the tort, three more types of non-compensatory damages are in use: *Contemptuous*, awarded where the claimant wins the case but the court has formed a low opinion of the merits of the claim (usually in defamation); *Nominal*, i.e. £1, awarded where a person's rights have been infringed but has suffered no actual loss(corresponding to the French *dommages symboliques*); '*Vindicative*', when a fundamental right is violated, i.e. one of the rights protected under the Human Rights Act 1998 (see *Faulkner, R (on the application of)* v *Secretary of State for Justice and another* [2013] UKSC 23).

60 The increasing role of the Tort action as a remedy available to EU citizens and third parties for both unlawful and lawful acts of EU organs and National Governments causing them harm is another example of the 'last-resort' use of Tort law as a restorative justice mechanism in complex open societies: see the excellent summary in a brief published by the European Court of Justice at http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf (last accessed 02.08.2019)

court below of '*dommages symboliques*', and reaffirming the rule of full compensation, while rejecting a nominal award 'of principle', in the case of violation of human rights61. Only a restorative award, based on the principle of full compensation, can 'restore' the unfair advantage gained by the injurer over their victim that lies at the heart of a Tort claim. Concerns about the evaluation of non-pecuniary harm, often the most important kind of harm caused to victims, need to be addressed but should not stand in the way of the very important social (and moral) function of compensation, so brilliantly advocated by Jehring many years ago.

61 In *Michael and others* v *The Chief Constable of South Wales Police and another* [2015] UKSC 2 , the UK Supreme Court once again denied the right of citizens to seek full compensation from the police under the common principles of the law of Negligence, for a negligent violation of their human rights, but did not close the door of a possible claim for 'vindicative' damages for such a violation, under the Human Rights Act 1998. The amount of such awards is fixed.