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MAKING EUROPEAN TORT LAW: THE GAME AND ITS PLAYERS

Marta Infantino*

ABSTRACT

In the last several decades, building a common European tort law has become a primary goal for many European institutions and research groups. On the one hand, EU institutions frequently highlight the need to simplify the current diversity in European tort law, and try to achieve this goal by injecting—so far quite incoherent—pieces of legislation into the European legal framework. On the other hand, many research groups aim to enhance the Europanization process through means that are much differentiated one to the other. Some of these groups (e.g., the European Group on Tort Law and the Study Group on a European Civil Code) adopt a top-down approach, and seek to draft a “soft” European tort law. Others (e.g., the ius Commune Casebook for a Common Law of Europe project and the Common Core of European Private Law project) follow a bottom-up path, committed to developing a better knowledge on tort law across European law-users.

Despite the number and the quality of such enterprises, there is no agreement on what should be done or on who should do it. It is from this debate that this paper takes off, aiming to offer an overview of the endeavors currently under way, of the different techniques and methodologies they adopt, and of the possible outcomes that they are likely to produce in both the short run and the long run.

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Since its foundation in the late 1950s, the European Union has striven to broaden its horizons; to be not only an economic alliance, but also an autonomous political and social entity able to gather European countries together under a single flag. Although such an ambitious project still belongs by and large to the realm of wishful thinking, the EU has certainly succeeded in bringing the Europeanization process to the very heart of European legal debate, and—as far as private law is concerned—in attracting judges’ efforts to the making of a common European law.

Initially, these efforts focused exclusively on the field of contract law. More recently, tort law has been added to the picture, and its harmonization at the European level has become a primary goal for many institutions and research groups.

EU institutions frequently highlight that simplifying the current diversity of national tort laws would facilitate courts’ handling of transnational torts, thus contributing to achieving the wider goal of a common area of free movement of goods, services, capital, and people. Additionally, this situation would decrease the length and complexity of litigation and guarantee uniformity between judicial outcomes. In the EU Commission’s view, a 

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"Unofficial" contract law harmonization efforts worth mentioning here include: (i) the work of the Commission on European Contract Law (chaired by Prof. Ole Lando), which authored PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II, COMBINED AND REVISED (Ole Lando & Hugh Beale eds., 2000), and PRINCIPLES OF EUROPEAN CONTRACT LAW, PART III (Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann eds., 2003); (ii) the efforts of the Académie des Privatistes Européens, under the guidance of Prof. Giuseppe Gandolfi, whose first results are now incorporated into the CODE EUROPÉEN DES CONTRATS: AVANT-PREMIER: LIVRE PREMIER (2002). A second book devoted to "Les Contrats en Particulier" is in preparation. E.g., Giuseppe Gandolfi, La Vendita nel "Codice Europese dei Contratti," 2006 EUR. DIR. PRIVATO 1229.

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5. See Rome III, supra note 4.8

6. See id.
single tort law framework would also allow insurers to better operate throughout the European Union, and to more freely establish and provide services. Moreover, the EU Commission deems that simplifying the current European tort law patchwork would increase the attractiveness of the European market to non-European economic operators. Since an entrepreneur decides where to produce and where to sell in consideration of the liability system she may face in the chosen country, tort law rules may affect the strategic choices of entrepreneurs in developing their production and in orienting their market. From this point-of-view, Europe would be more appealing if economic actors only had to tackle one unified regime, instead of twenty-eight (one supranational and twenty-seven national) different ones.

This institutional fervor has its counterpart in the academic community. In the last two decades, many research groups have been established to support—although through different means—the Europeanization path. Some of these initiatives, like the European Group on Tort Law and the Study Group on a European Civil Code, seek to draft a “soft” European tort law—e.g., a law whose binding force is not derived from the official authority conferred by its source, but from the high reputation enjoyed or displayed by its compilers. Other projects refuse to impose solutions, and instead engage in deepening the dialogue between European legal cultures. This is particularly the case with the Ius Commune Casebook for a Common Law of Europe project and the Common Core of European Private Law project, two enterprises that, despite some divergences, are both devoted to developing a better knowledge of tort law issues within the European landscape.

Whether the above arguments are well grounded or not, two points are clear. First, one of the most powerful engines moving the “harmonization” mechanisms is the scholars’ desire to carve out a new role for themselves. Preparing, drafting, and explaining new common rules is a suitable avenue to enhance the prestige of the scholars involved, enabling them to promote their careers, to collect funding, and to attract social, legal, and economic attention to their work.12

Second, the whole situation recalls the scenario that pushed the American Law Institute to launch the Restatements of Torts initiative in the late twenties. However, there are considerable differences between the European situation and that of the United States. Although the polity of the United States is comprised of fifty-one tort law jurisdictions, including the federal jurisdiction, these regimes have a reservoir of common language, common notions and technicalities, and a U.S. Supreme Court—in the matters it can intervene on—as a driving force for uniform outcomes. Europe, by contrast, lacks a single supreme court for outcomes.
private law matters, and there is not a single common language, but twenty-three distinct ones, each with its own set of notions and technicalities. In sum, Europe may require a solution different from the American one.

This paper aims to offer an overview of starting points, routes, and goals for the various institutional and academic projects currently under way. I will first deal with, and evaluate the limits of, the initiatives taken by EU institutions in harmonizing conflicts of law and substantive rules in tort law matters (Part II). Then, I will analyze the main features of the scholarly enterprises now in progress in Europe, splitting them into code-drafting projects and knowledge-enhancing research (Parts III, IV, and V). The concluding remarks focus on the possible scenarios that each of these scholarly initiatives is bound to open (Part VI).

II. THE EU POINT OF VIEW

A. International Private Law

Following a path already established in contract law,15 the European Parliament and the Council enacted a regulation on the law applicable to non-contractual transnational claims.16 The

Regulation, which came into force on January 11, 2009,17 provides conflict of law rules to designate which law applies in all transnational non-contractual judicial disputes.18 With regard to these claims the seized court must apply a twofold preliminary inquiry: judges must verify whether they have jurisdiction to hear the case, and—when the answer is affirmative—they must determine which substantive law shall govern that case.19 The Regulation solely deals with the latter.20

The general rule in Art. 4(1)—whose enforcement may be affected by parties’ agreement or by policy considerations21—


15 According to art. 2(1), the Regulation shall apply to tort, unjust enrichment, negeosionum gestio, and culpa in contrahendo transnational claims. Id. art. 2(1). The Regulation does not explain what a transnational claim is, but simply refers to “situations involving conflict of laws.” Id. art. 1. Whatever meaning is to be given to the expression “transnational claims,” art. 1(2) specifies that the Regulation will not apply to: claims regarding obligations arising out of family relationships or succession law; obligations arising under bills of exchange, checks and promissory notes; obligations arising out of the law of companies and other bodies, corporate or unincorporated; obligations arising under contracts, assignments of rights, novation, or replacement of parties; and obligations arising out of commercial activity. Rome II, supra note 4, art. 14. As to the impact of policy considerations, art. 16, states that the Regulation shall not “restrict the application of the law of the forum in a situation where they are mandatory,” while art. 26 allows the award of exemplary or punitive damages of an excessive nature. Id. art. 1(2). Art. 1(3) adds that the Regulation does not deal with evidence and procedural issues. Id. art. 1(3).


21 Parties’ choice of the law applicable to a tort claim is considered valid if: (a) the agreement was made after the event giving rise to the damage occurred; or if (b) the agreement was made before the harmful event and all the parties were pursuing a commercial activity. Rome II, supra note 4, art. 14. As to the impact of policy considerations, art. 16, states that the Regulation shall not “restrict the application of the provisions of the law of the forum in a situation where they are mandatory,” while art. 26 enables the court to refuse to apply a provision of the law indicated by the Regulation when “such application is manifestly incompatible with the public policy (ordre public) of the forum.” Id. art. 26. Additionally, according to § 3, this may be the case of provisions allowing the award of exemplary or punitive damages of an excessive nature. Id. § 32.
states that the law applicable to a tort claim should be determined on the basis of where the damage occurred, regardless of the country in which the wrongfull conduct or activity took place and irrespective of the country in which the indirect consequences of such conduct or activity occurred or are likely to occur. The flexibility of the system is guaranteed by an “escape clause,” which allows a departure from this criterion where the circumstances of the case make clear that the tort is more closely connected with a country different from that where the damage materialized.

However, the above “general” rule is not always applicable. Special rules apply to claims on: product liability (art. 5: the law applicable shall be the law of the country in which the product was purchased); unfair competition (art. 6: the law applicable is the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected);25 environmental damage (art. 7, which repeats the above-mentioned criterion set forth by art. 4(1), yet allows victims to base their claims “on the law of the country in which the event giving rise to the damage occurred”);26 infringements of intellectual property rights (art. 8: the clause shall be governed by the law of the country for which protection is claimed);27 industrial action (art. 9: these claims shall be judged according to the law of the country where the action is to be, or has been, taken);28 and culpa in contrahendo (art. 12: the law applicable is the law that applies to the contract or that would have been applicable had it been entered into).29

22 Id. art. 4(1).
23 Id. art. 4(3).
24 The law applicable shall be the law of the country in which the victim “had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that, the law of the country in which the product was purchased); or, failing that, the law of the country in which the damage occurred, if the product was marketed in that country.” Id. art. 5(1). Art. 5 also allows a departure from these criteria where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with another country. Id. art. 5(2).
25 Id. art. 6.
26 Id. art. 7.
27 Id. art. 8.
28 Id. art. 9. In the drafting’s minds, an industrial action is an action involving “the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests.” Id., “such as strike action or lock-out.” Id. § 27.
29 Id. art. 12. The Regulation seems to reject the approach adopted by Germany and Austria, for example, where the initiation of contractual negotiations is deemed as establishing “protective” duties of care, whose breach can give rise to a contractual claim for damages. See, e.g., BAKIS S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS, A COMPARATIVE TREATISE, 10, 95 (4th ed., 2002) (discussing the peculiarities of such an approach); see also VON BAR, supra note 13, at 492. Other special provisions concern the law applicable to the direct action against the insurer of the tortfeasor (art. 18) and to claims proposed by, or against, the party who has the duty to pay damages in lieu of the tortfeasor (art. 19) or together with other tortfeasors (art. 20). Rome II, supra note 4, arts. 16-20.
31 See sources cited supra note 30.
32 See infra notes 133-40 and accompanying text. Other possible problems relate to definitions of “injury,” “direct” and “indirect” consequences, “manifestly more closed," “mandatory provisions,” and so on. See, e.g., Hay, supra note 16, at 119-40, 144; 149; see also Kramer, supra note 16, at 420-22.
33 With special regard to the peculiar way in which Germany and Austria apply the notions of culpa in contrahendo, as well as the legal device known as “contract with protective effect to third parties” (“Vertrag mit schutzwirkung zugunsten dritter”), see WAGNER, supra note 11, at 1296-97; PURE ECONOMIC LOSS IN EUROPE 120, 150 (Mauro Bussani & Vernon V. Palmer eds., 2003); MARKESINIS & UNBERATH, supra note 29, at 10, 95.
34 On the difficulties faced by courts when applying foreign law, see Ruiner Hausmann, Pleading and Proof of Foreign Law—A Comparative Analysis, 8 EUR. LEGAL F. 1-1 (2008); SOFIE GEEROMS, FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS 389-94 (2004); BAKIS S. Markesinis, Learning from Europe and Learning in Europe, in THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN...
from the well-known tendency that national jurists have to interpret foreign law in light of their national notions, categories, and rules of law, or even to apply in these very cases their own national law.35

B. The EU Point of View: Substantive Law

EU institutions are also involved in the making of European substantive tort law36 through statutory acts and judicial decisions rendered by the European Court of Justice.

As to the latter, the European Court of Justice is charged with ensuring the compliance of Member States with EU treaties.37 Consequently, it is entitled to directly influence national tort rules only in relation to treaty breaches, i.e. Member States’ or European Community infringements of EU rules.38 Thus, the European Court of Justice plays an important role in shaping the liability of public bodies,39 but, outside this field, it may only be

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40 See id. arts. 260(1)-(3), and 340(2).
41 See, e.g., Walter van Gerven, Judicial Convergence of Laws and Minds in European Tort Law and Related Matters, in HAFTUNGSRECHT IM DREITEN MILLENNIUM [LIABILITY IN THE THIRD MILLENNIUM] 29, 32-33 (Aurelia Colombi Ciacchi, Christine Godt, Peter Rott & Lesley Jane Smith eds., 2009) (investigating the impact of ECJ jurisprudence on national tort law systems); see also vAN DAM, supra note 13.
42 See Reinhard Zimmermann, Europeanization of Private Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 539, 545 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (discussing the limited the role that the European Court of Justice is bound to play in the European tort and private law framework).
On the statutory side, EU institutions have thus far chosen to adopt a soft approach—"soft" as to both its content and scope. EU tort law legislation has taken the form of directives, and has only dealt with tort law issues affecting transnational litigation, such as environmental liability, product liability, and compulsory insurance of motor vehicle liability. More specifically, EU legislation: (a) has introduced a common framework for environmental protection based on the "polluter pays" principle; (b) has pursued consumer safety through the adoption of a strict liability regime for producers of defective products; and (c) has established a harmonized system of compulsory insurance to facilitate people's free movement and to guarantee compensation to persons injured in a Member State different from their own.

45 Von Bar, supra note 13, at 401-07.
46 Von Bar, supra note 13, at 408.
50 Id.
institutions lack—among other features— a common vocabulary and a standard terminology capable of summarizing the different notions arising from the European linguistic and legal plurality. Similar contradictions may also appear within the national legal context where EU rules have been or are to be implemented, due to the lack of homogeneity between EU and national languages, concepts, and rules. The notion of “damage caused by death or by personal injuries,” set forth by art. 9 of the product liability directive, has been interpreted very differently by French, German, and Italian legislators. In France, art. 1386-2 Code Civil requires a “dommage qui résulte d’une atteinte à la personne” / “damage ensuing from an attack upon a person.” In Germany, §1(1) Produkthaftungsgesetz obliges the producer to compensate the damage “[w]ird... jemand getötet, sein Körper oder seine Gesundheit verletzt?” / “if... a person is killed, is physically injured or affected in his health.” In Italy, art. 123(1)(a) reads: “danno cagionato dalla morte o da lesioni personali” / “damage caused by death or by personal injuries.”

All these aspects are worsened by the very use of the directives as main legislative tools. Directives have the virtue of flexibility, i.e. of guaranteeing that each state could adapt EU acts into its national categories, but the flip side is that—besides the lack of lawyers and judges enjoying a common legal culture across the continent—they must be implemented by national legislators. Frequently, the outcomes of the processes of implementation diverge greatly, due to the tendency of Member State legislators to replicate the traditional features of their legal system into the implemented rules. Thus, directives may lead to intensifying legislative differences as opposed to supporting uniformity. For example, in the transplant of the product liability directive, the United Kingdom introduced subjective criteria for the “consumer expectation” test, i.e. the test for product defectiveness based on reasonable man’s safety expectations, while the test was deemed by EU institutions as objective. Similarly, France, whose tort regime is comparatively generous toward plaintiffs, imposed direct liability on suppliers who bear only subsidiary liability under the directive, and failed to transpose the directive’s provision denying compensation for property damage of less than 500 Euros.

The above considerations led many scholars to pave the way towards a different way of shaping a truly common European tort law. The aims and methods of these endeavors are very dissimilar from one another; some groups are engaged in ascertaining which solutions may best regulate certain legal problems in a common way, while others are concerned with improving actual knowledge about the different tort law systems, rather than drafting new rules.
III. The “Striving-for-Harmonization” Research Groups

A. The European Group on Tort Law

The European Group on Tort Law was established in 1992 within the Viennese European Centre of Tort and Insurance Law.69 It is made up of scholars representing Austria, Belgium, Czech Republic, France, Germany, Greece, Italy, Netherlands, Portugal, Spain, Sweden, United Kingdom, and, outside the European Union, Israel, South Africa, Switzerland and the United States.70

From 1992 to 2005, the Group accomplished many studies, whose results have been collected in a series called Principles of European Tort Law, published by Kluwer Law International.71 Each of these volumes gathers the results of an inquiry on a single tort law topic (e.g., causation, fault, wrongfulness, strict liability, etc.). In particular, each participant was asked to describe the legal treatment of the topic in the country in which he is a citizen by responding to some theoretical issues and by solving concrete cases.72 The outcome of this research has been used as a starting point to draft the Principles of European Tort Law (PETL).73

70 Id. (under “Members” tab).
72 Jaap Spier, Introduction, in EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW 12, 14-16 (2005).
74 PETL, supra note 13, at 1-10.
75 Spier, supra note 72, at 16-17; Koch, supra note 73, at 205; Koziol, supra note 54, at 108-09; Wagner, supra note 11, at 1282.
76 Spier, supra note 72, at 15 (“[I]n our exercises we did not endeavour to postulate merely a possible common core. In each case, we posed the question whether such a common core would be the best solution for Europe.”); see also Koch, supra note 73, at 206.
77 PETL, supra note 13, at 68 (art. 4:101: Fault) (“A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct.”).
78 Id. at 93 (art. 4:202(1): Enterprise Liability) (“A person pursuing a lasting enterprise for economic or professional purposes who uses auxiliaries or technical equipment is liable for any harm caused by a defect of such enterprise or of its output unless he proves that he has conformed to the required standard of conduct.”).
79 Id. at 105. According to the PETL (art. 5:101(2): Abnormally Dangerous Activities), an activity is considered “abnormally dangerous” if “(a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and (b) it is not a matter of common usage.” Id.
employers for the damage caused by employees and with vicarious liability for the damage caused by a minor or mentally disabled person. It is worth mentioning that, according to the PETL, minors and mentally disabled persons are not exonerated from personal liability.

The existence of a loss causally connected to the defendant may not be sufficient to hold him liable. There is no doubt about the abstract recoverability of the losses derived from the infringement of life, bodily and mental integrity, human dignity, liberty, and property; however, pure economic interests are, in the Group's view, "neither obvious nor do they have clear contours." Therefore, their protection "may be more limited in scope." The vagueness of the provision is notable, especially when compared with the detailed treatment reserved for other kinds of damage, such as pain and suffering. Also, the latter's recoverability is restricted, and the PETL specifies meticulously which conditions may justify its redress. Contrast, no guidance is given with reference to pure economic losses, thus leaving to the interpreters the task of determining when, and to what extent, compensation would be available in case of infringement of such interests.

Moreover, even when an interest is deemed worthy of protection, the PETL pushes the judge to take into account all the relevant circumstances of the case in order to determine whether or not the recovery is undesirable in light of other public interests or the necessary "liberty of action" of the defendant. A similar instruction comes into play in defining the scope of liability, or fixing the standard of conduct to be met by the defendant, and in

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80 Id. at 115 (art. 6:102: Liability for Auxiliaries) ("A person is liable for damage caused by his auxiliaries acting within the scope of their functions provided that they violated the required standard of conduct. (2) An independent contractor is not regarded as an auxiliary for the purposes of this Article.").

81 Id. at 113 (art. 6:101: Liability for Minors or Mentally Disabled Persons) ("A person in charge of another who is a minor or subject to mental disability is liable for damage caused by the other unless the person in charge shows that he has conformed to the required standard of conduct in supervision.").

82 Id. at 75 (art. 4:102: Required Standard of Conduct) ("(2) The above standard of conduct may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it."). By contrast, in the majority of European jurisdictions there is a rule of no personal liability for children or mentally disabled persons. See, e.g., Birutė Lewaszkiewicz-Petrzykowska, Le Discernement en tant que Condition de la Responsabilité Civile Décisuelle, in DE TOUS HORIZON: MÉLANGES XAVIER BLANC-JOUVAN 623, 626-27 (2005); Franz Werro, L'Homme Raisonnable a Perda sa Pipa, in FIGURES JURIDIQUES RECHTSFIGUREN: MELANGES DISTRÉSS POUR PIERRE TERCIER 109-110 (Peter Gauch & Pascal Pichonnaz eds., 2003); Mauro Buassi, Perfis Comparativos Sobre la Responsabilidad Civil: La Culpa al Servicio de los Débiles, in MODERNAS TENDENCIAS DEL DERECHO EN AMERICA LATINA: ACTAS DE LA I CONVENCION LATINOAMERICANA DE DERECHO 393, 393-94 (José F. Palomino Maschego & Ricardo Velasquez Ramirez eds., 1997); Mauro Buassi, Falsifiers Oblige, in I SCRITI IN ONORE DI RODOLFO SACCO: LA COMPARAZIONE GIURIDICA ALLE SOGLIE DEL III MILLENNIO 67, 67-68 (Paolo Cendon ed., 1994); Mauro Buassi, LA COLPA SOGGETTIVA: MODELLI DI VALUTAZIONE DELLA CONDOTTA NELLA RESPONSABILITÀ ETRACONTRATTUALE (1991).

83 PETL, supra note 13, at 29 (art. 2:102: Protected Interests) ("(2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection. (3) Extensive protection is granted to property rights, including those in intangible property.").

84 Id. at 33.

85 Id. at 29 (art. 2:102: Protected Interests) ("(4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim"). On these provisions, see Oliphant.
assessing the quantum of damages to be awarded. Supra id. at 159 (art. 10:103: Benefits Gained Through the Damaging Event) ("When determining the amount of damages benefits which the injured party gains through the damaging event are to be taken into account unless this cannot be reconciled with the purpose of the benefit."). Thus, in principle, art. 10:103 does not follow the so-called "collateral source" rule (according to which, in the United States, payments made to the victim because of the injury, whether by private insurers, social insurances, or other third parties, shall not be considered in determining the damage award). The same provision, however, enables the judge to disregard benefits gained by the plaintiff when the deduction is not "reconcilable with the purpose of the benefit." Id. at 158.


would be the “best” for Europe; whether the solution reflects an existing law provision or not was considered irrelevant. In the light of the PEL—and again, similarly to the PETL—liability is primarily based on fault (art. 1:101(1)). Vicarious liability is established upon supervisors for supervised persons’ acts and upon employers for their employees’ wrongs. Strict liability, or, in von Bar’s terms, “liability without personal misconduct,” is established for damage caused by the dangerous state of an immovable, by animals, by defective products, by defective supervision of the person causing the damage.”

The Study Group on a European Civil Code is also active in drafting the Common Frame of Reference, whose function should be, in the European Commission’s mind, to “set out common fundamental principles of contract law.” European Contract Law and the Revision of the Acquis: The Way Forward, at 11, COM (2004) 651 final (Oct. 11, 2004). Notwithstanding the formal limits assigned to the role and contents of the Common Frame of Reference by the European Commission, the Draft Common Frame of Reference (DCFPR) prepared by the Study Group also deals with non-contractual obligations on the assumption that in many areas “it would have simply made no sense to restrict the relevant model rules to contract law.” Christian von Bar, Non-Contractual Liability, supra note 3, at 33. The tort provisions of the DCFP are, by large, similar to the PEL drafted in 2006 and examined in the text; similarities and dissimilarities between the two sets of principles will be highlighted in the footnotes.


motor vehicles, and by dangerous substances or emissions. Special rules are designed for the personal liability of minors and persons with a diminished mental capacity.

including: (a) the nature of the immovable; (b) the access to the immovable; and (c) the cost of avoiding the immovable being in that state. (2) A person exercises independent control over an immovable if that person exercises such control that it is reasonable to impose a duty on that person to prevent legally relevant damage within the scope of this Article. (3) The owner of the immovable is to be regarded as independently exercising control, unless the owner shows that another independently exercises control); accord DCFR, supra note 101, at 401-02 (VI. - 3:202).

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a rule is questionable, considering that European tort law victims cannot rely on the class action device and that the rule closes the door to certain claims without supplying an alternative mechanism (e.g., mediation, alternative dispute resolution, small claims track) to handle them.\footnote{112}

Another main feature of the tort law chapter of the PEL is that liability flows from injuries to the victim's body, health,\footnote{113} dignity, liberty, and privacy;\footnote{114} from the infringement of ownership rights or lawful possession;\footnote{115} and from the frustration of pure economic interests. However, in the latter case, compensation should only be awarded if the defendant acted with malice,\footnote{116} if she could "reasonably be expected to" foresee the perverse consequences of her act,\footnote{117} or if the damage results from an "unlawful impairment of [business]."\footnote{118} By contrast, the victim

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whose privacy has been violated may recover not only non-economic damages like pain and suffering,\footnote{119} but may also receive compensation when there is no evidence that the victim has suffered any actual loss. In fact, paragraph (1) of art. 2:203 ("Infringement of Dignity, Liberty and Privacy") reads, "Loss caused to a natural person as a result of infringement of his or her right to respect for his or her dignity, such as the rights to liberty and privacy, and the injury as such are legally relevant damage," while art. 6:204 ("Compensation for Injury as Such") explains that "[i]njury as such is to be compensated independent of compensation for economic or non-economic loss."\footnote{120} Thus, for example, while the plaintiff who claims a pure economic loss could recover only if he succeeds in proving, besides the existence and the extent of the loss, the defendant's intention and the unreasonableness or the unlawfulness of his conduct, the plaintiff who claims that his privacy has been violated may receive compensation just by demonstrating that the defendant's negligence infringed his personal sphere, even if he has not suffered any actual loss.

Strictures stemming from the above hierarchical framework may be counterbalanced by a rule that works as a safety valve, and instils flexibility into the rigid pre-determined selection of recoverable losses. The rule provides that, while evaluating the recoverability of the plaintiff's loss, the judge shall consider whether or not, in light of all the circumstances of the case,
granting compensation would be "fair and reasonable." Indeed, an analogous inquiry about the decision's fairness and reasonableness is required to hold the defendant liable when he was mentally incompetent at the time of conduct, or when he is a minor and the victim has no other means to recover for damages. But, in the assessment of damages, the same test should also be made to take into account: the defendant's profits generated from the wrongdoing; to deduct from the compensation award any benefit obtained by the plaintiff as a consequence of the wrongdoing; and to relieve the faulty defendant from liability when "liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it." 

That way, the PEL adopts an approach resembling the one chosen by the PETL; they determine which interests should be protected by tort law and to what extent, and then they try to give

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126 PEL, supra note 51, at 303 (art. 2:101(2)-(3): Meaning of Legally Relevant Damage) ("(2) . . . loss or injury constitutes legally relevant damage only if it would be fair and reasonable for there to be a right to reparation or prevention, as the case may be, under articles 1:101 or 1:102. (3) In considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the nature and proximity of the damage or impending damage, to the reasonable expectations of the person who suffers or would suffer the damage, and to considerations of public policy."); accord DCFR, supra note 101, at 396 (VI. - 2:101 (2)-(3)). For further commentary, see PEL, supra note 51, at 309-10.

127 See PEL, supra note 51, at 872 (art. 5:301: Mental Incompetence). See also supra note 110.


129 PEL, supra note 51, at 907 (art. 6:101(4): Aim and Forms of Reparation) ("As an alternative to reinstatement under paragraph (1), but only where this is reasonable, reparation may take the form of recovery from the person accountable for the causation of the legally relevant damage of any advantage obtained by the latter in connection with causing the damage."); accord DCFR, supra note 101, at 409 (VI. - 6:101(4)).

130 PEL, supra note 51, at 932 (art. 6:103: Equalisation of Benefits) ("(1) Benefits arising to the person suffering legally relevant damage as a result of the damaging event are to be disregarded unless it would be fair and reasonable to take them into account. (2) In deciding whether it would be fair and reasonable to take the benefits into account, regard shall be had to the kind of damage . . . and, where the benefits are conferred by a third party, the purpose of conferring those benefits."). Cf. supra note 96 (discussing the different approach adopted in common law legal systems).

131 PEL, supra note 51, at 971 (art. 6:202: Reduction of Liability) ("Where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it."); accord DCFR, supra note 101, at 411 (VI. - 6:202).

127 PEL, supra note 51, at 907 (art. 6:101(1)-(2): Aims and Forms of Reparation); accord DCFR, supra note 101, at 409 (VI. - 6:101(1)-(2)). The defendant could be obliged to pay damages to the plaintiff, or to take some specific action to restore the plaintiff's rights, as is appropriate according to the circumstances.

128 Even when the defendant's conduct is deemed to be so blameworthy as to justify the plaintiff's recovery of the profits that the defendant gained from the wrongdoing, the remedy could be granted only "[a s an a lternative] to compensation. PEL, supra note 51, at 907 (art. 6:101).

129 Id. at 359 (art. 2:101(2)-(3): Meaning of Legally Relevant Damage); accord DCFR, supra note 101, at 396 (VI. - 2:101(2)-(3)). See also PEL, supra note 51, at 991 (art. 6:301 (Right to Prevention) ("(1) The right to prevention exists only in so far as (a) reparation would not be an adequate alternative remedy; and (b) it is reasonable for the person who would be accountable for the causation of the damage to prevent it from occurring. (2) Where the source of danger is an object or an animal and it is not reasonably possible for the endangered person to avoid the danger the right to prevention includes a right to have the source of danger removed."); accord DCFR, supra note 101, at 411 (VI. - 6:301); PEL, supra note 51, at 998 (art. 6:302: Liability for Loss in Preventing Damage) ("A person who has reasonably incurred expenditure or suffered other loss in order to prevent an impending damage from occurring to them, or in order to limit the extent of severity of the damage which occurs to them, has a right to compensation from the person who would have been accountable for the causation of the damage."); accord DCFR, at 411 (VI. - 6:302).

130 Compare the way in which the PETL and PEL treat underage defendants. Compare PETL, supra note 13, at 75 (art. 4:102(2): Required Standard of Conduct), with PEL, supra note 51, at 601 (art. 3:103: Persons Under Eighteen); compare PETL, supra note 13, at 156 (art. 10:103: Benefits Gained Through the Damaging Event), with PEL, supra note 51, at 932 (art. 6:103: Equalisation of Benefits) (taking into account the benefits gained by the victim as a consequence of wrongdoing); compare PETL, supra note 13, at 159 (art. 10:104:...


the borders of unfair competition law—is likely to call tort law into play.

Similarly, tort law may be deeply influenced by the scope and contents assigned to contract law and unjust enrichment law. The application of tort law rules may be limited or amplified, depending on the availability of contractual and restitutionary remedies, as well as on the possibility, for the plaintiff of accumulating different claims against the same defendant. In addition, the interdependence between legal domains also relates to the law of civil procedure and to insurance. Neither the PETL nor the PEL deal with procedural law issues, which may indeed deeply impinge on the concrete application of their tort law rules. Moreover, the PETL are silent on the possible interrelations between public and private regulation of both insurance law and tort law, while the PEL explicitly submit the issue to national laws. However, it is quite obvious that whatever unified tort law regime is adopted should be linked to a parallel adoption of a uniform insurance law. At the very least, this would serve the purpose of filling the transnational gap faced by plaintiffs suing defendants whose third-party insurance may cover risks that are very different from one country to the other.

The second point deserveing attention concerns the methodology adopted by both the PETL and PEL. Following the Swedish, Finnish, and German approaches—and, although from a different perspective, the English and Scottish ones—the above projects predetermine the types of harm that can trigger liability. They fix a set of protected interests whose infringement is a prerequisite for liability, and then provide many escape clauses, such as the “relevance of the circumstances of the case” test or the “fair and reasonable” test, in order to mitigate the rigidity of the general provision. This model is familiar to the jurisdictions referred to above, but it is foreign to many others. Leaving aside the extensive recourse German law gives to contractual rules as a means of overcoming the narrowness of tort protection, suffice it to recall that in many national regimes one finds a general clause which, based on the requirement of faulty behavior, leaves scholars and judges free to mark out the contours of tort law recoverability. In the latter systems, the top-down imposition of a rigid set of protected interests would require judges and scholars to become accustomed to a completely new tort law pattern, and to develop methods and techniques that are foreign to their legal tradition. At least in the short run, the lack of such traditional accumulation of methods and techniques is likely to drive jurists not accustomed to that pattern to continue to rely on their own legal culture and on their traditional repertoire of solutions and technicalities—solutions and technicalities that can be very different from those with which the Swedish, Finnish, and German systems and traditions are endowed. Thus, the very risk of a top-down imposition of (not-so-common) principles is the
perpetuation of divergences, which are precisely what the harmonization process aims to reduce.\textsuperscript{146}

V. THE "KNOWLEDGE-BUILDING" RESEARCH GROUPS

Aware that solutions to the above issues are critical and crucial, other scholars pursued a path toward building a common legal culture, rather than drafting rules to be imposed upon all European countries. This is both the starting point and the final aim of the three projects that I will introduce. One is led by practitioners, the other two by scholars.

A. The Pan European Organisation of Personal Injury Lawyers

The Pan European Organisation of Personal Injury Lawyers (PEOPIL), is an association founded in Birmingham, United Kingdom, in 1996, composed mostly of practicing lawyers, with the purpose of promoting—within the field of personal injury litigation—judicial cooperation and mutual knowledge of legal and judiciary systems of European jurisdictions.\textsuperscript{147}

According to PEOPIL’s founders, improving cooperation and knowledge will contribute to facilitating compensation of personal injuries in transnational claims, and will allow those who sustain a personal injury to obtain, across all of Europe, proper and fair compensation.\textsuperscript{147} In PEOPIL’s view, improving knowledge in the field of personal injury compensation could also help to strengthen consumer protection, providing incentives to producers and suppliers to raise the standard of care applied in their activities.\textsuperscript{148} In order to fulfil these objectives, PEOPIL encourages contact amongst European lawyers and provides them with information on the personal injury field through the publication of books and a bimonthly newsletter,\textsuperscript{149} as well as through the organization of conferences and seminars.\textsuperscript{150} PEOPIL also actively participates in the EU legislative process, and remains in contact with many organizations related to personal injury issues across Europe and beyond—including the Council of the Bars and Law Societies of the European Union, and the American Trial Lawyers Association.\textsuperscript{151}

B. The Ius Commune Casebooks for the Common Law of Europe Project

On the scholarly side, the first initiative to be mentioned is the Ius Commune Casebooks for the Common Law of Europe project.\textsuperscript{152} The enterprise was launched in 1994 by Professor Walter van Gerven with the aim of producing a collection of casebooks covering each of the main fields of private law.\textsuperscript{153} Every

\textsuperscript{146} See Stapleton, Benefits, supra note 13, at 43; \textit{Pure Economic Loss in Europe}, supra note 33, at 545; Bussani, \textit{A Way Forward?}, supra note 53, at 369; Mauro Bussani, "Integrative" Comparative Law Enterprise and the Inner Stratification of Legal System, \textit{8 EUR. REV. PRIVATE L.} \textbf{89}, 99 (2000). On the other hand, grounding the future of European tort law on a general clause would not avoid the risk that courts and scholars of some legal systems may fulfill the general clause’s requirements by referring to a (hidden) check-list of absolute rights, thereby barring recovery for any loss not included in their traditional repertoire of tort rights. See Bussani, \textit{A Way Forward?}, supra note 53, at 393.

\textsuperscript{147} Although the organization’s structure and aims recall those peculiar to the American Lawyers Trial Association at its beginnings (see Samuel Issacharoff & John F. Witt, \textit{The Ineluctability of Aggregate Settlement: An Institutional Account of American Tort Law}, \textit{57 VAND. L. R.} \textbf{1571}, 1610 (2004)) it does not seem likely, for the time being, that PEOPIL will become the European counterpart of the ATL. At the very least, this is because the aggregating power of the former is not comparable to that of the latter. In contrast to the United States, European legal education is nationally-based, training is deeply influenced by the features of the local bar, and even the bar exam greatly differs from one Member State to another.


\textsuperscript{151} See id.


\textsuperscript{153} As of now, five volumes have been published by Hart, with six more forthcoming: Walter van Gerven, \textit{Jeremy Lever, Pierre Larouche, Christian Von Ba6 Geneviève Viney, Cases, Materials and Text on National Supranation
casebook collects cases, legislative materials, excerpts from books, and articles from various jurisdictions, which are accompanied by introductory and expilatory notes. Two editions of the tort law volume have already been published.154

The long-term purpose of the Ius Commune project is to “uncover common general principles which are already present in the living law of the European countries” for the benefit of European students.155 The casebooks are indeed primarily conceived as teaching materials, to be used in the curricula of law schools, in order to promote a common European education.

As to the work organization, each casebook is written by a task force composed of academics representing the main European legal families.156 A distinctive feature of the project is that each member of the task force, instead of dealing solely with the issues relating to her national legal system, is charged with writing an entire chapter (or more), even if it refers to legal systems different from that of her country of origin. This distribution of work guarantees that the final outcome is not a patchwork of national reports but is, instead, the genuine result of a true comparative effort.

The method underpinning the research is characterized by: (a) the strategic use of comparative law, as a means able to stress the similarities among European legal systems;157 (b) an approach that looks at cases and concrete situations, rather than at principles and

AND INTERNATIONAL TORT LAW—SCOPE OF PROTECTION (1998) [hereinafter VAN GERVEN, TORT SCOPE]; van Gerven, Larouche & Lever, supra note 36; CASES, MATERIALS AND TEXT ON CONTRACT LAW (Hugh Beale, Denis Tallon, Ludovic Bernardeau, Robert Williams eds., 2002); CASES, MATERIALS AND TEXT ON UNJUSTIFIED ENRICHMENT (Jack Beatson & Eltjo J.H. Schrage eds., 2003); CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-Discrimination LAW (Dagmar Schiek, Lisa Waddington, Mark Bell eds., 2002); see also CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL PROPERTY LAW (Josephus H.M. van Erp, ed., forthcoming); CASEBOOK ON CONTRACT LAW (Hugh Beale, Denis Tallon, Bénédicte Fauvaque-Cosson, Jacobien W. Rutgers & Stefan Vogenaer eds., 2005, forthcoming); CASEBOOK ON CONSUMER LAW (Hans W. Micklitz, Jules Stuyck & Evelyne Terryn eds., forthcoming); CASEBOOK ON CIVIL PROCEDURE (Cornelis H. van Rhee & Paul Oberhammer eds., forthcoming); CASEBOOK ON LAW AND ART (Hildegard Schneider ed., forthcoming); and CASEBOOK ON LABOUR LAW (Anne Davies, Frank Hendrickx, Rüdiger Krause, M. Schmidt, Evert Verhulp, Christophe Vigneau eds., forthcoming).

154 VAN GERVEN, TORT SCOPE, supra note 153; van Gerven, TORT, supra note 36.

155 See van Gerven, TORT, supra note 36, at 68.

156 Id. pts. VI-VII.

On the shoulders of Rudolf B. Schlesinger's and Rodolfo Sacco's path-breaking research, the Common Core adopts a method based on the factual approach as underpinned by the "dissociation of legal formants." At the very foundation of the Common Core's efforts, there is the assumption that, in order to have complete knowledge of a legal system, it is impossible to trust entirely what domestic jurists say. First, circumstances that are officially ignored and considered to be irrelevant in a legal system often operate in secrecy, slipping in silently between the formulation of the rule and its application by the courts. Second, domestic jurists usually assume that their legal system is comprised of a coherent set of principles and rules. This is not necessarily true, because the complex relationship between legal actors—bar, bench, scholars, and lawmakers—often lead them to conflict and compete with one another.

Awareness of these aspects, and the need to find a way to obtain comparable answers from jurists from different jurisdictions, led the Common Core's General Editors to adopt questionnaires as a key methodological tool. Indeed, the research work develops as follows: when a topic is chosen, the person charged with editing a volume on that particular topic drafts a factual questionnaire. The questionnaire is drafted with a sufficient degree of specificity as to require the respondent's answers to address all the factors that have a practical impact on the operative rules in his system. This method guarantees that black-letter rules that are apparently identical, but which may produce different applications, are not regarded as identical. The use of fact-based questionnaires also aims (a) to better understand blackletter rules that are apparently identical, but which may differ in application in various jurisdictions; (b) to shed light on all the other factors affecting the final solution; and (c) to better understand the operative (i.e., the law-in-action) level, such as policy considerations, economic reasons, social context, and values, as well as the structure of the legal process (e.g., the organization and the jurisdictional competence of the courts).

The responses to the questionnaires are publicly analyzed, discussed, compared, and subsequently collected by the topic-editors of a volume. Until now, four volumes have been published in the field of tort law. In particular, volumes have been published on the recoverability of pure economic losses, on the boundaries of strict liability, on ecological damage and on pre-contractual liability, many others are in the pipeline.

With the exception of some books edited by Stampfl, Berne, and Carolin: Academic Press, (Durham, N.C.), Cambridge University Press (Cambridge, U.K.) has published the volumes. E.g., GOOD FAITH IN EUROPEN CONTRACT LAW (Reinhart Zimmern & Simon Whitaker eds., 2000); THE ENFORCEABILITY OF PROMISES IN EUROPEN CONTRACT LAW (James Gordley ed., 2001); PURE ECONOMIC LOSS IN EUROPEN PRIVATE LAW (Eva-Maria Kieninger ed., 2004); THE BOUNDARIES OF STRICT LIABILITY IN EUROPEN TORT LAW, supra note 47; MISTAKE, FRAUD AND DUTIES TO INFORM IN EUROPEN CONTRACT LAW (Ruth Selton-Green ed., 2005); COMMERCIAL TRUSTS IN EUROPEN PRIVATE LAW (Michele Graziai, Ugo Mattei, Lionél Smith eds., 2005); PROPERTY AND ENVIRONMENT (Barbara Pozzo ed., 2007); OPENING UP EUROPEN LAW, supra note 11; THE ENFORCEMENT OF COMPETITION LAW IN EUROPEN, supra note 130; ENVIRONMENTAL LIABILITY AND ECOLOGICAL DAMAGE IN EUROPEN LAW, supra note 46; PRECONTRACTUAL LIABILITY IN EUROPEN PRIVATE LAW (John Cartwright and Martijn Hesselink eds., 2008).

PERSONALITY RIGHTS IN EUROPEN TORT LAW (Gert Brüggemeier, Aureli Colombi Ciacci & Patrick O'Callaghan eds., forthcoming) is in the proofreading stage. Other forthcoming books include: PERSONAL INJURY COMPENSATION (Stathis Banakar: Philippe Brun & Giovanni Comandt eds., forthcoming); BOUNDARIES TO INFORMATION PROPERTY (Deryck Beyleveld, Christine Gott, Lucie Guibault & Geertruï Va Overwalle eds., forthcoming); TIME-LIMITED INTERESTS IN LAND (Cornelius van de Merwe, Alain Verbeke & Raffaele Caterina eds., forthcoming); SECURITY RIGHTS IN IMMOVABLE PROPERTY (Cornelius van der Merwe, Gary Watt & Francesca Fiorentini eds., forthcoming); UNEXPECTED CIRCUMSTANCES (Ewoud H. Hondius & Hans C. GrigoIét eds., forthcoming); DUTIES OF CARE AND DUTIES OF CASH IN FAMILY LAW (Donata Panforti, Antonello Miranda, Odile Roy & Christian Dadomo eds., forthcoming); SET-OFF (Pascal Pichonnaz ed., forthcoming); REMEDIES IN CONTRACT LAW (Paul Giliker, Beate Gsell & Thomas Rüfner eds., forthcoming); and TRANSFER OF IMMOVABLE PROPERTY (Elizabeth Cooke & Luz Martínez eds., forthcoming).


161 Id. at 343-44.

162 Id. at 344-45.

163 Id. at 351.
VI. THE BOTTOM-UP HARMONIZATION SCENARIO

Despite their differences, the "knowledge-building" enterprises share a common view that any attempt to codify or harmonize tort law should be undertaken with the understanding that the enforcement of top-down rules also requires the collateral support of a bottom-up harmonization. Top-down legal change is bound to put into circulation rules foreign to the tradition and heritage of (at least) some of the legal systems involved. The lack of familiarity with the new rules and their underpinning rationales, as well as the possible path-dependency on deep-rooted national traditions, could lead to the defeat of any harmonization plan. Therefore, the real target of European tort law should be the development of a common legal culture, based on as much knowledge as possible of the legal experience of each European jurisdiction. This is probably true for many fields of law, but is even more so in the field of tort law, where legislators' words cannot be and in fact are not as decisive as the words of scholars, judges, and lawyers.172

170 As has been stressed by Mauro Bussani: "All legal changes have aspects of both. Law is in part politics (top down) and in part culture (bottom up)." Mauro Bussani, Current Trends in European Comparative Law: The Common Core Approach, 21 HASTINGS INT'L & COMP. L. REV. 785, 800 (1998). See also Jean-Philippe Dunand, Entre Tradition et Innovation. Analyse Historique du Concept de Code, in LE CODE CIVIL FRANÇAIS DANS LE DROIT EUROPEÉEN, supra note 42, at 7-10; Franz Werro, L'Unification du Droit Privé en Europe: Une Question de Légimité Culturelle, in LE CODE CIVIL FRANÇAIS DANS LE DROIT EUROPEÉEN, supra note 42, at 287, 295; Mark van Hoecke, L'Ideologie d'un Code Civil Europeen, in LE CODE NAPOLÉON, UN ANCIÈRE VENÈRE?: MÉLANGES OFFERTS À JACQUES VANDER Linden 467, 472 (2004) (Fr.).

171 The crucial role played by scholars in the field of tort law is recognized not only in civilian legal systems—see, e.g., Bussani, A Way Forward, supra note 53, at 378; Mauro Bussani & Marta Infantino, Fault, Causation and Damage in the Law of Negligence: A Comparative Appraisal, in HAFTUNGSRECHT IM DRITTEN MILLENNIUM [LIABILITY IN THE THIRD MILLENNIUM], supra note 39, 145-46; von Bar, supra note 13, at 460-61; Marcel Planhol, Georges Ripert & Jean Boulanger, 2 TRAITE DE DROIT CIVIL FRANÇAIS 324-25 (1957)—but also in common law jurisdictions. See, e.g., G. Edward White, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3-4 (2003); Lord Goff, Judge, Juris and Legislation, 2 DENNING L.J. 79, 92-93 (1987).

172 See Stapleton, Benefits, supra note 13, at 32; Wagner, supra note 11, at 1279-80; David Ishbeton, Harmonisation of the Law of Tort and Delict: A Comparative and Historical Perspective, in GRUNDSTÜCKSRECHTS DES EUROPÄISCHEN DEUTSCHRECHTS, supra note 11, at 102-03; André Tunc, LA RESPONSABILITÉ CIVILE 18 (1981); Ernst von Caemmerer, WANDLUNGEN DES DELIKTSRECHTS 478-79 (1960); Georges Ripert, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES 198-99 (4th ed. 1949); Josef Esser, Grundlagen und Entwicklung der Gefahrhaftung 134-35 (1941); Glanville Williams, The Foundation of Tortious Liability, 7 CAMBRIDGE L.J. 111, 131 (1939) (U.K.); Francis H. Bohlen, Fifty Years of Torts, 50 HARV. L. REV. 725, 726

173 See id. at 416.

175 See id. at 417.


177 See, e.g., Curtis E. Moe, Benefits, supra note 13, at 31, and cases cited within.

178 See, e.g., id. at 415, and cases cited within.


182 See id. at 415, and cases cited within.

183 See id. at 416.

184 See id. at 417.

comparative studies on European tort law \(^{183}\) is now mirrored in the courts. The rulings—inspired by solutions adopted in a country other than where the court was seized—are nowadays numerous and well known.\(^{184}\) Let us take, for example, the famous Bundesgerichtshof decision, which looked at English cases that addressed a wrongful birth claim,\(^{185}\) or the even more renowned House of Lords rulings, inspired by German scholarship and case law on solicitors’ liability,\(^{186}\) with regard to the damages to be awarded to the secondary victim whenever the primary victim’s contributory negligence is established.\(^{187}\)

To be sure, these cases are still few compared with the whole mass of national rulings. But the reasons for this scarcity are easy

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\(^{183}\) E.g., CHRISTIAN VON BAR, THE COMMON EUROPEAN LAW OF TORTS (1998-2000) (two volumes); van Gerven, TORT, supra note 36; PURE ECONOMIC LOSS IN EUROPE, supra note 33; GRUNDSTRUKTUREN DES EUROPÄISCHEN DELIKTSRECHTS, supra note 33; BRÜGGEMEIER, supra note 4; VAN DAM, supra note 39; EUROPEAN TORT LAW: EASTERN AND WESTERN PERSPECTIVES, supra note 13.


