European Tort Law – A Way Forward

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European Tort Law – A Way Forward?

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0. One may wonder how this Meeting and its results might be of any possible use to the efforts of codification, or harmonization, of the European Law of Torts.

Leaving aside any positive or negative bias vis-à-vis the reasons underpinning these efforts, what seems clear to me is that the survey we made in these two days confirms how deeply conscious those drafting the rules will need to be of the overall implications of reframing this field of the law.

1. The kind of awareness that is required in legal debate can be simply illustrated recalling two main problems.

   The first problem arises from the need of a systematic coordination for the rich catalogue of notions which straddle the tort and the contract law fields, such as 'standard of conduct';

   

1  See, for example, the discussion carried on by U. MAGNUS, T. HARTLIEB and P. WIDMER, in J. SMITS and H. SCHNEIDER (eds.), Toward a European Ius Commune in Legal Education and Research, Antwerp: Intresenta, 2002, 205–236.


Various research groups have recently undertaken an effort to put together a European Tort Law. See, in particular, the Study Group on a European Civil Code and its currently progressing Principles of European Law: Non-Contractual Liability Arising out of Damage Caused to Another (hereinafter PETL), published at www.sgece.net; and the European Group on Tort Law, which worked out the Principles of European Tort Law (hereinafter PEL), published in European Group on Tort Law, Principles of European Tort Law. Text and Commentary, Vienna-New York: Springer, 2005.


The notion of 'standard of conduct' is referred to by both the above mentioned (previous note) Projects: cp. Art. 3:102 PEL and Art. 4:101, 4:102 I, 4:202 I, 6:101, 6:102 I PETL.
possibility will permit recovery of the economic loss, regardless of whether it is called consequential or pure. If possession is not included in the property framework, however, or if the power of control over the thing is not sufficient in and of itself for the holder to be deemed a possessor, then the recoverability of the economic loss caused to the holder (by interference with the thing itself) becomes an issue to be settled.

(ii) If the right to electricity (but the same could apply to hertzian or other electromagnetic waves) is deemed a right in rem whose transfer from the supplier to the user is completed as of the date of the agreement, any damage to the system supplying that energy (such as the cutting of power cables) will be considered an infringement of property rights and therefore will raise no problems in most of the legal systems.

(iii) If the manner in which Germany and Austria apply the notions of culpa in contrahendo or the ‘contract with protective effect to third parties’ is adopted as a model for a European Code, or any other harmonizing instrument, it is beyond doubt that many of the issues raised in ‘pure economic loss’ cases will be settled by contract principles, with little need to resort to tort law rules.

(iv) The Code’s infrastructure regarding transfer of ownership would clearly have manifold effects in any ‘Double Sale’ case. Indeed, the right of the first, pre-empted buyer (solo consensu) to obtain compensation from the second-in-time buyer depends on a variety of factors, the role of which is actually to define who holds the property right in the thing. These factors include the presence of good or bad faith, the comple-

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7 Other examples come from the flexible boundaries that comparative analysis enables us to draw as to the so-called “consequential” economic loss (i.e. an economic loss connected to the even slightest damage to the person or property of the plaintiff), as well as from the great reliance of certain regimes upon contract rules in handling issues that in other regimes are straightforwardly governed by tort law. See M. BUSSANI and V.V. PALMER (eds.), Pure Economic Loss in Europe, Cambridge: University Press, 2003, 3 ff., 15 f., 537 ff.


11 See M. BUSSANI and V.V. PALMER (eds.), Pure Economic Loss (fn. 8), 120, 150 ff.; B.S. MARKESINIS and H. UNBERATH, The German Law of Torts (fn. 10), 10, 95 ff. The same could be said for such notions as the French concept of ‘chaine de contrats’. This refers to a series of contracts which, though distinct in law, form part of an economic complex. An example can be found in the chain which links a site owner to the contractor, the contractor to the sub-contractor and the latter to the supplier of the building materials. See H. KOTZ & A. PLESSNER, European Contract Law, I, trans. T. Weir, Oxford: Oxford University Press (1997), 255 ff. As to this technical notion and its actual impact on the recovery of pure economic losses, see G. VINEY, Introduction à la responsabilité, Paris: LGDJ (1995), 338 ff.; W. VAN GERVER, J. LEVER, P. LAROCHE, Tort Law, Oxford: Hart (2000), 32 ff., 236 ff.
tion of delivery (for movables), compliance with formalities like registration and recordation (for immovables) and the effects assigned to the registration itself.

2. The above simple remarks only hint at the web of relationships that affect our subject. The matter is far more complex. Even when all the above (and possibly other) boundary issues have been clearly settled, the would-be liability regime will still depend on other critical choices — and, first among these, is the broad political choice that needs to be made at a more general level. Indeed, any decision to decrease, enlarge or simply maintain the existing unequal levels of protection for loss bearers across Europe is first and foremost a policy question, to which an answer must be found.

Should Europe attempt to codify on the basis of the selected situations in which the liability rule is widely accepted and enforced across its frontiers? Would it be better to generalize from the greater protection for the victims one can find in legal regimes like the French one? Would it be best to reduce the level of protection to a lower common denominator in order to cover (either selectively or not) only intentionally inflicted loss? Any answer to these questions initially depends upon setting a policy with respect to the compensation issue.

To be sure, the substantive decision necessarily has implications for the draft methodology to be adopted. Yet — as I suggest further on — one should have no illusions that even the clearest policies, whether stated in general clauses or in ‘protected interests’ formulas, will be translated into the “law in action” without undergoing interpretative development by judges and scholars.

3. Furthermore, any general assessment must take the time factor into account.


This is a choice that should be grounded on an unconditional faith in laisses faire economics. The hypothesis is definitely extreme and highly unlikely but one could note that — see M. BUSSANI and V.V. PALMER (eds.), Pure Economic Loss in Europe (fn. 8), 3, 16 ff., 530 ff. —, such a codistic scenario would entail no disagreement in Europe as to compensation for pure economic loss. For the principle that “bad people (must) pay more” see T. WEIR, A Casebook on Tort, 10th edn., London: Sweet and Maxwell (2004), 10 ff.; see also W.V.H. ROGERS, Keeping the Floodgates Shut: Mitigation and ‘Limitation’ of Tort Liability in the English Common Law, in J. SPIER (ed.), The Limits of Liability: Keeping the Floodgates Shut, The Hague: Kluwer (1996), 75 ff.

For instance, if the decision is to protect pure economic loss in general, rather than in highly specific privileged loss-type situations (see M. BUSSANI and V.V. PALMER (eds.), Pure Economic Loss in Europe [fn. 8], 537 ff.), then a general clause will be the legal instrument to implement it, rather than a formula based on a list of pre-selected protected interests.

Just in passing, it is worth recalling what R. SCHULZE — European Private Law and Existing EC Law, 1 ERP (2005), 3, at 16 — stresses about (not the BGB, the Code Napoléon, the Italian Codice Civile, but) the ‘Lando Principles’: They “need to be examined and further developed. The reason for this is that in the few years that have passed since they were drawn up, significant changes with regard to their basis have already taken place”.

12 For instance, our issue would certainly be affected, both theoretically and operationally, by any decision to allow or forbid the concurrence of tortious and contractual actions. The second alternative is better known as the French ‘règle du non-cumul’. This rule clearly has a particular bearing because, if the European Code embraces it, we would predict that some cases on pure economic loss would disappear from tort law only to reappear as contract law questions. See CH. VON BAR and U. DRONING, The Interaction of Contract Law and Tort Law in Europe (fn. 2), 189.

Art. 1:103 (“Scope of Application”) PETL provides that Articles 1:101 and 1:102 (entitled “Basic Rule” and “Prevention” respectively) (“c) do not apply in so far as their application would contradict the purpose of other private law rules”. On these provisions, see J.W.G. BLACKIE, Tort/Defect in the Work of the European Civil Code Project of the Study Group on a European Civil Code, in B. ZIMMERMANN (ed.), Grundstrukturen eines Europäischen Deliktrechts, Baden-Baden: Nomos (2003), 133, 135. The PETL do not contain such a rule. It has been noticed how the danger entailed by the ‘non-cumul’ rule is that contract law “may be sidestepped, or even swallowed up, by the law of tort, and with it the specific risk-allocation established by its rules concerning non-performance”: R. ZIMMERMANN, Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact, in H. KOZIOL – R. STEINDLINGER (eds.), European Tort Law (2003), Vienna-New York: Springer (2004), 2, 11.

On the web of problems arising whenever a legal issue is subject to two or more different (national or not) judicial decisions, decisions which may have conflicting outcomes as their consequence, see A. TÖMBÖRN (ed.), Parallel and Conflicting Enforcement of Law, Stockholm: Norstedts Juridik (2005).

13 This seems to be the solution adopted both by the PETL and PETL: cp. Art. 1:101 PEL (even if the definition adopted therein loses its precise meaning because of the
only effectively changed its spots during the past forty years from a system of "protected interests" to a general clause system. Within that same period England and Scotland admitted as many as five exceptions to the rule of no recovery.

If we leave aside the pure economic loss issue and take an even longer view, we may note that in the 20th century France abandoned a more restrictive attitude that had been current throughout the previous century (based on a rigid conception of unlawfulness) in order to match its liberal codistic façade more closely.\(^{17}\)

Going up another road, Austrian history shows a departure from the liberal façade of the ABGB in the second half of the 19th century, and since then its legal system has been accepting German doctrinal thought as a body, together with the usual justifications for the control of liability expansion.\(^{18}\)

I could go on but my point is simply that legal positions never stand still and some have abruptly changed and may change again. Therefore, anything old, and even current, snapshots of the law – if not historically and factually contextualized – may be of limited utility in determining any future of the law in this field.

4. My skepticism aside, let me try to gain better understanding of the most notable alternatives available to the legal harmonizers or Code-drafters. This can be done depicting the basic scenarios that they may consider. What follows is an attempt to clarify the solutions that can be given to the issue, squaring the future (virtual) landscape with the current operative rules.

For these purposes, I will take two possible frameworks into consideration – it goes without saying that these are over-simplified scenarios and that any in-between choice is bound to open a Pandora’s box filled with details whose examination would lie beyond the boundaries of this paper.

\(^{17}\) This historical turnabout is discussed in M. BUSSANI and V.V. PALMER (eds.), Pure Economic Loss in Europe (fn. 8), 120, 126.

\(^{18}\) See also H. KOZIOŁ, Mitigation of Damages under Austrian Law and Ideas for Future Regulations, in J. SPIER (ed.), The Limits of Liability (fn. 15), 53, 62; M. BUSSANI and V.V. PALMER (eds.), Pure Economic Loss in Europe (fn. 8), 120, 152 ff. for the discussion of Austria’s "massive interior transplant".

The first framework involves a tort law system where the Code-drafters cast a set of provisions in which they have pre-determined (along with the other possible requirements of the cause of action) the only types of harm that can trigger tort liability.\(^{19}\) This is a neat option, which would re-enact at the European level a general feature to be found in many notable national legal systems. The second scenario considers the adoption of another distinctive feature already present in a good many national regimes: this is a general clause which, based on the requirement of faulty behaviour, leaves scholars and judges free to mark out the contours of tort law recoverability.

These two scenarios will be addressed in a short while, but it should be noted that we will confine our discussion to fault-based regimes.

I dispense the reader from any extensive review of strict liability rules\(^{20}\) because in this field any solution would depend on a different set of policy choices to be taken up by the codifiers\(^{21}\). These options concern
at least: (i) the selection of the matters to be covered by strict liability rules; (ii) the choice between a rigid type-cast pattern denying the application of strict liability provisions beyond their own original scope on the one hand, and the possibility of expanding the scope of strict liability provisions by analogy or otherwise on the other. One should be aware, moreover, (iii) that throughout Western legal systems the most important economic burden of strict liability rules in many areas rests upon entrepreneurs and enterprises, that is to say, upon subjects and activities for which it is usually impossible to compress the number of accidents that they are obliged to compensate below a given threshold. Therefore, one could at least urge a harmonization, which – even more stringently than in other tort law fields – enables: (a) European entrepreneurs to rationalize the foreseeable cost of accidents that they must compensate; and (b) European citizens not to suffer discrimination according to the place where they have suffered the damage.

5. Coming back to the possible fault-based tort law scenarios, let me present them as follows.


The picture would be sufficiently clear were the harmonizers/codifiers to adopt – following the Swedish, Finnish and German path – 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; and see European Group on Tort Law, Principles of European Tort Law, Text and Commentary (fn. 9), 93.

Consequently, whatever unified regime is adopted it should be linked to a parallel adoption of a uniform insurance liability, also as regards the standard clauses intended to cover (at least) the major risks of enterprise liability. The relevance of, and the debate on, this issue is surveyed by J. Stapleton, Tort, Insurance and Ideology, 58 M.L.R. (1995), 820 ff.; S. Deakin, A. Johnston and B.S. Markesinis, Markesinis and Deakin's Tort Law (fn. 3), 3, 44 ff.; B.S. Markesinis and H. Unberath, Comparative Conclusions, in Id.,.Globalization of the Tort Law: The Hague: Kluwer (2002), 359 ff. See Art. 1:101 III PEL (see above, fn. 20) and Art. 5:102 II PEL, which identifies, as a suitable field for strict liability, the one occupied by “abnormally dangerous activities”, but also states “unless national law provides otherwise, certain categories of strict liability can be found by analogy to other source of comparable risk of damage”.


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terns (and, from a different perspective, the English and Scottish approach as well) – some sort of *nullum crimen sine lege* principle, whereby the recoverable losses would only be those deriving from a rigid predetermined selection. Once the infliction of a loss had been included in, or excluded from, the *crimina* set down in the selected menu, the answers to most of the questions on recoverability would be forthcoming straightforwardly.

Nevertheless, problematic in this respect would be three well known issues: (i) the need for a careful balance to be struck among the possible reasons underpinning the exclusion or the inclusion of recoverability; (ii) again – the relationship between the tort law options to be adopted and the choices made in other fields (especially in contract and property law) as to the remedies available to the victim; the need of building a common technical culture enabling the whole of European legal communities to become familiar with, and then effectively manage the above tort law pattern.

Indeed, to descend from the lofty heights of theoretical speculation to the concrete reality of the ‘law in action’, one should bear in mind what has occurred to the BGB over the years. The restrictive wording of the German code has never prevented German interpreters from adding new rights to the list (as happened with the ‘right of the established and ongoing commercial enterprise’, *Recht am eingerichteten und ausgeübten Gewerbebetrieb*, included as ‘another right’ under the seamless interpretive elaboration of §823/1); moulding the requirement of an ‘intention contrary to good morals’ (§ 826) in order to absorb a number of grossly negligent conduct; or obtaining ‘lateral support’ from contractual rules in order to compensate pure economic losses otherwise unrecoverable under tort law rules.27

The risk, which any ‘type-cast’ choice should be ready to counter, is therefore easy to detect: such a system may be top-down imposed, but there is no guarantee, at the European level, that it will encounter judges and scholars who are trained to use the complex machinery of weights and counterweights with which the German system and tradition are endowed.

(B) A Tort Law Codification Adopting a “General Clause”: The Selection of Recoverable Losses as the Crucial Choice.

Somewhat different is the perspective that would arise should those undertaking the harmonization/codification fall back on the “general clause” model we find in some tort law regimes. In this direction, the core problem is traditionally constituted by the selection – to be made not *ex ante*, as in the ‘type-cast’ regimes, but *ex post*, by judges and scholars – of the recoverable losses.

Undeniably, there are many further choices which should be added on top of the above – e.g. the relevance of mental capacity, the possible variety of standards of conduct, the questionable equivalence of intention of gross negligence (*culpa lata dolo aequiparatur*), and so forth. Equally true, however, is that when one looks at the ‘liberal’ tort law scenario, one inevitably realizes that the fundamental issue at stake is what interests are to be protected by the law and to what extent.

One should accordingly bear in mind that whenever fault liability is controlled by general rules or general clauses, the wording of the latter has always openly delegated to scholars and judges the task of defining the scope allowed and the technical devices to be employed in the day-to-day administration of liability issues28. Hence, one should be aware of the possible outcomes that might stem from the recourse to such general clauses in a transnational context.

There is no doubt that open-ended rules of this kind may be of great help in overcoming the obstacles raised by local case law and/or scholars in some systems against the recoverability of such and such loss. Nonetheless, this choice would also present a substantial risk which appears to be unavoidable. It is a risk that must be neutrally assessed, because any stance taken for or against it implies the answer to the broader question of

27 See B.S. MARKESIS and H. UNSERATH, *The German Law of Torts* (fn. 10), 13, 69 ff. Indeed, the German, Austrian and English experiences show that there is no reason to impair privity of contract, enabling a third party to profit from this impairment, unless the given system is forced to do so by a failure of the mechanisms supplied by other branches of the law, namely property and tort law. For a similar cultural framework, but with different conclusions as to the mutual role of contract and tort rules, see CH. VON BAR, *The Common European Law of Torts*, I (fn. 6), 464 ff; CH. VON BAR, *The Common European Law of Torts*, II, Oxford: Clarendon Press, 2000, 52 ff.

the costs that one intends to reduce by means a legal harmonization or codification.

The risk is that by exploiting the broad wording of a general clause national courts and scholars continue to rely on their legal culture; that is to say, on their traditional repertoire of solutions and technicalities. This may induce the interpreters of some legal systems to fulfill the general clause requirements by referring to a (hidden) protected-interest agenda, thereby barring recovery for any newcomer — for instance, through the recourse to causation or remoteness of damage arguments. As a consequence, the previously operating national rules would survive through an interpretation of the new ‘written’ rules built upon the old reasonings and the old arguments. In other words, we could have, on the one hand, ‘liberal’ judges and scholars who promote solutions which keep the door open to recoverability, and on the other, ‘conservative’ interpreters who continue to handle the issue with the technical devices to which they are accustomed, exploiting any technical requirements of the cause of action that might serve to bar recovery. Still other regimes — such as England, Scotland but also the Netherlands — could push their candour to the forefront of the debate. Ultimately, and explicitly, policy arguments would retain their decisive role in making the compensation issue swing back


31 This scenario would not differ greatly from either the Austrian situation (notwithstanding § 1295 ABGB) or the one that French, Belgian and Italian interpreters arrived at in the nineteenth century and for some decades of the twentieth, despite their general codicile clauses (art. 1382 French and Belgian Codes, art. 1151 Italian Code of 1865). In the latter countries, indeed, tort liability was imposed only when a particular tort had been committed. The Codes were not read as establishing liability for any damage whatsoever caused through fault; instead: “tort in the sense of the civil law is an act by which, intentionally or negligently, the rights of another person are unlawfully injured”; K.S. ZACHARIAE, Cours de droit civil français, French trans. by C. AUBRY & C. RAI from the 5th German edn. (1839), 2nd edn. Brussels, 1830, II, § 444. But see also C. AUBRY & C. RAI, Cours de droit civil français, IV, 4th edn., Paris, 1871, 745; M. PLANCHET, Traité élémentaire de droit civil, II, 8th edn., Paris, 1921, 60, 275; F. LAURENT, Principes de droit civil, XX, Bruxelles-Paris, 1887, § 401, 404. In Italy, e.g., G. BRUNETTI, Il delitto civile, Firenze, 1906, p. 215; G. GIORGI, Teoria delle obbligazioni nel diritto moderno italiano, V, 7th edn., Firenze, 1909, 215; and up. R. SACCO, L’ingiustizia di cui all’art. 2043, in Foro ped., 1960, I, c. 1420 ff.

and forth, according to what is felt to be ‘just, fair and reasonable’ and not widening (too much) the ‘floodgates’ of recoverability.

6. Awareness of the foregoing considerations prompts us to emphasize the extent to which the absence of a single supreme court for private law matters is bound to affect the effectiveness of any European codification or harmonization outcome. All the above calls for the building of a common culture that is up to the challenges of the legal systems’ increasing interdependence. All the above shows, once more, nothing but what is the real and general problem faced by tort law, no matter the purposes of the debate.

The problem consists in the setting of technically and socially acceptable boundaries to the shifting of losses incurred by the victim onto another party. Whenever this shifting is neither governed by property


See also Art. 2:101 II PEL, according to which “in any case covered only by subparagraphs (b) or (c) of paragraph (1)” (paragraph 1 so provides: “... loss, whether economic or non-economic, or injury is legally relevant damage if: (b) the loss or injury results from a violation of a right otherwise conferred by the law; or (c) the loss or injury results from a violation of an interest worthy of legal protection”), “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” Art. 2:101 III PEL, which states “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 ground of accountability, 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”; and Art. 6:202 PEL: “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”.


34 For a comparative survey of the boundaries between the law of unjust enrichment and tort law, see CH. VON BAR, The Common European Law of Torts, I (fn. 6),
law nor regulated by a contract between these persons, it is up to tort law to provide the solution. Consequently — and in spite of any positivistic approach one may take —, the question of whether or not awarding compensation to the victim falls upon the interpreter charged with making (or inspiring) the choice, that is, the judge (and the scholar).

Both of these actors have crucial tasks to perform. Scholars limit the social costs of direct experimentation before the Courts by foreseeing actual problems and debating prospective solutions, by discussing implications and broadening the possible approaches to the decision, by trying to reconcile new facts with extant rules or by showing why the latter are outdated or irrelevant. In other terms, they build their role of decision-in spirers on their work of social simulation.

Judges too, of course, bring their own legal culture to bear. They have admired or criticized the judicial precedents and have learnt the opinions of the given authorities at law school. They have both an attitude of self-restraint and a reservoir of legal notions, ‘reactions’ and answers stemming from the legal tradition of the country in which they work. This repertoire may also comprise the role that the judiciary plays in the given legal framework: a role entailing a variable degree of respect paid to scholarly opinions, to superior court rulings, to the legislature’s prospective, or actual, choices. Hence, it is no surprise to find that decisions end up being based on the balance between the various circumstances of the given case, as qualified, i.e. seized, in legal terms through the overall interpretative culture of the decisionmaker.

All of this is possibly true of many fields of law. But within private law, and tort law in particular, it does seem to be the appropriate way to appraise what the making of law entails. The point, indeed, is that tort law constantly reveals its interpretative fate, its interpretative mode of existence. This is why any scholar, and especially those who are harmonization- or codification-driven, should keep in mind what K. Popper once stressed, i.e.: that we may become the makers of our fate when we have ceased to pose as its prophets.

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