The Common Core Sounds. Short Notes on Themes, Harmonies and Disharmonies of European Tort Law

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INTRODUCTION

European Tort Law

Ken Oliphant

The aim of this Special Issue is to provide an introduction to the major contemporary projects in European tort law, and an opportunity for critical reflection on them.

In the last two decades, European tort law has been the focus of an extraordinary concentration of scholarly activity, with multiple collaborations between hundreds of researchers in more than 40 countries, and dozens of published outputs. The influence of this research has been felt beyond Europe too, for example in the United States, where the Comments to the newly adopted Third Restatement of Torts: Liability for Physical and Emotional Harm make frequent reference to European tort law scholarship, and in China, where European tort law experts have been advising the government on a new codification.1 It is beyond question that European tort law is one of the most important areas of research in modern private law, not just in Europe but worldwide. In recent years, it has been successfully exploited as a source of persuasive authority in the House of Lords.2 Yet it is comparatively neglected in the mainstream tort literature in the United Kingdom. This special issue is intended to assist in redressing the balance.

"EUROPEAN TORT LAW"

"European tort law" itself can be construed in a variety of different ways.3 At one level it refers to comparative research into the national tort laws of different European legal
The Common Core Sound: Short Notes on Themes, Harmonies and Disharmonies in European Tort Law

Mauro Bussani, Marta Infantino and Franz Werro

1. PRELUDE

The goal of this paper is to present the aims, methods and features of the research carried out by the ‘Common Core of European Private Law’ project in the field of tort law. Accordingly, we will first depict the immediate and long-term goals of the Common Core endeavour, as well as its methodology and organisation (section 2). We will then illustrate the four tort law volumes that have so far been published within the project (section 3). This will lead us to set out the distinctive tenets of the Common Core approach as applied to tort law issues (sections 4-8), and to put forward some remarks about the scenarios that this approach, and those tenets, are bound to open (section 9).

2. THE COMMON CORE OF EUROPEAN PRIVATE LAW PROJECT

As is well known, the Common Core of European Private Law project was launched 15 years ago by Ugo Mattei and one of the authors of the present paper, Mauro Bussani. Another author, Franz Werro, is Chairperson of the Tort Groups working within the Project.

Put in very simple terms, the project aims to unearth the common core of the body of European private law within the general categories of Contract, Tort and Property. This is a search for what is different and what is already common behind the different legal
forms of the Member States of the EU.\(^1\) Such a common core is deemed to be worth revealing in order to obtain at least the main outline of a reliable geographical map of Europe's multi-legal framework. For a transnational lawyer, indeed, the present European situation is like that of a traveller compelled to use a number of different local maps, each containing information which (due to the biased or hidden assumptions of municipal lawyers) can often be misleading. The primary purpose of the Common Core project is to connect these maps comparatively, that is to say that, while as Common Core researchers we view cultural diversity in the law as an asset, we do not wish to take a preservationist approach, nor do we wish to push in the direction of uniformity.

This is possibly the most important cultural difference between our project and other notable enterprises—such as the ‘Gandolfi Group’,\(^2\) the ‘Acquis Group’,\(^3\) the European Group on Tort Law,\(^4\) the Eurohypothec,\(^5\) the Commission on European Family Law,\(^6\) and

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\(^4\) In 2005 the European Group on Tort Law published the *Principles of European Tort Law* (hereinafter PETL), on which see Koch, this issue.


the Study Group on a European Civil Code\textsuperscript{7}—which may be all seen as engaged in city planning rather than cartographic drafting. Undoubtedly, through the use of the comparative method many common features that remained obscure in traditional legal analysis of the selected field may be revealed. But this is because the instruments and techniques provide more accurate and correct analysis, not because they force convergence where it does not exist. Rather, more detailed knowledge may yield closer integration, so that the Common Core research may also be considered as pushing indirectly towards more uniformity and less diversity. Furthermore, one could note that our research may be a useful instrument for legal harmonisation, in the sense that it provides reliable data for use in devising new common solutions that may prove workable in practice. But, again, this has nothing to do with the Common Core research in itself, whose endeavour is to produce reliable information, whatever its policy application may be. All of this strongly differentiates the Common Core project from the ‘integrative’\textsuperscript{8} enterprises mentioned above. The latter involve the pursuit of rationality, harmony and reform ideals, and this task implies the selection of the legal rules and materials that are best suited to it. What does not fit into the framework is discarded. With regard to tort law endeavours, for instance, both the European Group on Tort Law and the Study Group on a European Civil Code decided not to look for the rules most widely accepted across European countries. They instead chose to seek the ‘best’ solution to every tort law problem, whether or not this ‘best solution’ reflects principles or rules already established within any European jurisdiction.\textsuperscript{9} This would be anathema from an analytical perspective such as that of the Common Core, whereby the very fact that rules and


\textsuperscript{9} As to the European Group on Tort Law, see J Spier, ‘Introduction’ in European Group on Tort Law, Principles of European Tort Law (Springer, 2005) 15; for the Study Group, see C von Bar, ‘The Study Group on a European Civil Code’ in European Parliament, The Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code, Working Paper, Legal Affairs Series, JURI 103 EN, 1999, 133, 137. Unsurprisingly, this quest for the ‘best’ rule may produce divergent results: compare the way the PETL and PEL treat underage defendants (see, respectively, Art 4:102 (2) PETL and Art 3:103 PEL), take into account the benefits gained by the victim as a consequence of wrongdoing (see, respectively, Art 10:103 PETL and Art 6:103 PEL), and arrange the forms of reparation (see, respectively, Art 10:104 PETL and Art 6:101 (1) PEL).
materials exist in a legal system requires that they be taken into consideration in the analysis and become part of the final ‘map’.\textsuperscript{10}

In order to carry out such a plan, the Common Core—on the shoulders of Rudolf B Schlesinger and Rodolfo Sacco’s path-breaking research\textsuperscript{11}—adopts a method based on the factual approach as underpinned by the so-called dissociation of ‘legal formants’ (meaning the different elements—statutory rules, judicial decisions, academic opinions, etc.—which together make up ‘the law’ of a particular system). At the very foundation of the Common Core’s efforts is an assumption that, 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. Secondly, domestic jurists usually assume that their legal system is made by a coherent set of principles and rules. This is not necessarily true, also because the complex relationship between legal actors (bar, bench, scholars, legislators, and every other lawmaker) often lead them to conflict and compete with one another.

The awareness of these aspects, and the need to find a way to obtain comparable answers from jurists coming from different jurisdictions, led the Common Core General Editors to adopt factual questionnaires as a key methodological tool. The research develops in the following way. First, when a topic is selected, the person charged with editing a volume on that particular topic drafts a questionnaire made up of factual hypotheticals. This is done with a sufficient degree of specificity as to require the respondent’s answers to address all the factors that in her/his system have a practical impact on the operative rules. This method guarantees that black-letter rules that are

\textsuperscript{10} These features bring the Common Core project near to the ‘Ius Commune Casebook for the Common Law of Europe’ project, an initiative launched in 1994 by Professor van Gerven with the aim—in the short term—to produce a collection of casebooks covering each of the main fields of private law, and—in the long term—to ‘uncover common general principles which are already present in the living law of the European countries’ (W van Gerven, ‘Casebooks for the Common Law of Europe: Presentation of the Project’ (1996) 4 European Review of Private Law 67, 68). Both the Common Core project and the Casebook project are indeed analytical, not openly prescriptive, and intend to consider the common features of private law in European national systems. However, what differentiates the two studies lies in their targets and their methods. The Common Core project is aimed at scholars, while the Casebooks project is for teaching purposes. Ultimately, the latter’s goal is to provide students with a grasp of foreign law whilst educating them as common European lawyers, even though the casebooks mainly concentrate on the English, French and German systems, including materials from other European systems only if they provide original solutions. The Common Core project, too, may provide some useful materials for teaching purposes, but this is not its primary task. It investigates more specific areas of law, delving deeply into technical problems. Moreover, it focuses on all European legal systems, avoiding—as with the other project—placing an emphasis on systems that are, or could be, considered to be leading or paradigmatic systems.

apparently identical, but which may produce different applications, are not regarded as identical. The use of fact-based questionnaires also aims (i) to develop a better understanding of whether, and to what extent, the final solution depends on legal rules outside the private law field, such as procedural rules (including rules of evidence), administrative or constitutional provisions; and (ii) to shed light on all the other factors affecting the operational (ie the law-in-action) level, such as policy considerations, economic reasons, social context and values, as well as the structure of the legal process (for example, the organisation and the jurisdictional competence of the courts). Then, responses to the questionnaires are publicly analysed and discussed, compared and subsequently collected by the topic editors in a volume. These volumes are published by Stämpfli, Berne, or Cambridge University Press (Cambridge, UK), after extensive international and anonymous peer review, in a specific autonomous series entitled 'The Common Core Project of European Private Law' under the direction of Mauro Bussani and Ugo Mattei.12

3. FOUR VARIATIONS ON TORT LAW THROUGH THE COMMON CORE LENS

Following the above method, four Common Core volumes have so far been published in the field of tort law.13 They are: Mauro Bussani and Vernon Valentine Palmer’s Pure Economic Loss in Europe (2003); Franz Werro and Vernon Valentine Palmer’s The

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12 To date, the following volumes have been published: R Zimmermann and S Whittaker (eds), Good Faith in European Contract Law (Cambridge University Press, 2000); J Gordley (ed), The Enforceability of Promises in European Contract Law (Cambridge University Press, 2001); M Bussani and VV Palmer (eds), Pure Economic Loss in Europe (Cambridge University Press, 2003); E-M Kieninger (ed), Security Rights in Movable Property in European Private Law (Cambridge University Press, 2004); F Werro and VV Palmer, The Boundaries of Strict Liability in European Tort Law (Carolina Academic Press/Bruylant/Stämpfl, 2004); R Sefton-Green (ed), Mistake, Fraud and Duties to Inform in European Contract Law (Cambridge University Press, 2005); M Graziadei, U Mattei and I Smith (eds), Commercial Trusts in European Private Law (Cambridge University Press, 2005); B Pozzo (ed), Property and Environment (Carolina Academic Press/Bruylant/Stämpfl, 2007); M Bussani and U Mattei (eds), Opening Up European Private Law (n 1); TMJ Möllers and A Heinemann (eds), The Enforcement of Competition Law in Europe (Cambridge University Press, 2007); M Hinteregger (ed), Environmental Liability and Ecological Damage in European Law (Cambridge University Press, 2008); J Cartwright and M Hesselink (eds), Precontractual Liability in European Private Law (Cambridge University Press, 2009). Forthcoming is G Brüggemeier, A Colombi Ciacchi and P O’Callaghan (eds), Personality Rights (Cambridge University Press). In the pipeline are: S Banakas, P Brun and G Comandé (eds), Personal Injury Compensation; D Beyleveld, C Godt, G van Overwalle and L Guibault (eds), Boundaries to Information Property; C van der Merwe, R Caterina and A Verbeke (eds), Time-Limited Interests in Land; C van der Merwe, F Fiorentini and G Watt (eds), Security Rights in Immovable Property; EH Hondius and HC Grigoleit (eds), Unexpected Circumstances; D Panforti, A Miranda, O Roy and C Dadomo (eds), Duties of Care and Duties of Cash in Family Law; N Cohen, R Stevens and G Dannemann (eds), Restitution in Contractual Context; P Pichonnaz (ed), Set-Off; P Giliker, B Gsell and T Rüfner (eds), Remedies in Contract Law; E Cooke and I Martinez (eds), Transfer of Immovable Property.

13 Many others are in the pipeline: see in particular the volumes on ‘personality rights’ and ‘personal injury compensation’ mentioned above, n 12.
Boundaries of Strict Liability in European Tort Law (2004); Monika Hinteregger’s Environmental Liability and Ecological Damage in European Law (2007); and John Cartwright and Martijn Hesselink’s Precontractual Liability in European Private Law.14

The first—Pure Economic Loss in Europe—analyses principles, policies and rules governing liability for losses, which are not connected to any physical injury to the plaintiff’s person or property.15 The study covers 13 legal systems (Austria, Belgium, England, Finland, France, Germany, Greece, Italy, Portugal, Scotland, Spain, Sweden, The Netherlands).16

Twelve jurisdictions (Austria, Belgium, England, Finland, France, Germany, Greece, Italy, Portugal, Scotland, Spain, The Netherlands)17 are considered in the second book, The Boundaries of Strict Liability in European Tort Law. The volume analyses and makes clear to what extent liability in Europe is strict or based on fault18 in a number of areas, such as vicarious liability, liability of property owners and neighbours, liability for dangerous things and activities, for defective products and services, for road traffic accidents, and for environmental harm.19

14 As is well known, in some jurisdictions the nature of the latter form of liability is either disputed, or arranged under the contractual umbrella. The reason for including the volume on precontractual liability in the tort law basket is simply that, according to the editors of the book, eight out of 13 European legal systems deal with the issue in tort, while two European jurisdictions place it within the contractual liability regime, and five jurisdictions put it somewhere between the two. See Cartwright and Hesselink, Precontractual Liability (n 12) 457–60.

15 In particular, cases 1, 2, 3, 5 and 10 involve pure economic ‘ricochet’ harm, ie a loss which arises when physical damage is done to the property or person of one party, and that loss in turn causes the impairment of a plaintiff’s rights. Cases 4 and 8 deal with ‘transferred’ pure economic loss—‘transferred’ means that a loss ordinarily falling on the primary victim is passed on, by operation of contract or of statute, to a secondary victim, whose loss is purely pecuniary because s/he has no antecedent property loss. Purely financial losses caused by the closure of public markets, transportation corridors and public infrastructures are considered by cases 6, 15 and 16. Pure economic loss stemming from product defects is analysed by case 9. Case 12 is a double-sale case, Case 13 deals with subcontractors’ liability, and Case 19 is about precontractual liability. Cases 7, 11, 14, 17, 18 and 20 concern the pure economic losses arising out of the reliance placed by A on the data prepared, or on the services rendered, by B, a professional, with whom A has no contractual relationship.

16 National reporters were W Posch and B Schlücher (Austria); J-M Trigaux (Belgium); E Banakas (England); VV Palmer and C de Noblet (France); M Reimann (Germany); K Christodoulou (Greece); PG Monateri and A Musy (Italy); J Sinde Monteiro (Portugal); J Thomson and L Embleton (Scotland); P del Olmo and F Pantaleon (Spain); A Simoni (Sweden and Finland); W van Boom (The Netherlands).

17 The contributors to the case studies were: W Posch and B Schlücher (Austria); H Isager and L Kjaergaard (Denmark); E Banakas (England); M Fabre-Magnan (France); M Hemmo (Finland); G Brüggemeier (Germany); PI Koziris and A Valtoudis (Greece); G Comandò and G Ponzanelli (Italy); E Hondius (The Netherlands); LM Leitão (Portugal); E Reid (Scotland); F Hernanza and J Martinez (Spain).

18 Needless to say, between the two extremes of (the most) strict liability and liability for (the slightest) fault there are a fair number of intermediate positions. See, eg, Werro and Palmer, The Boundaries of Strict Liability (n 12) 455; M Bussani, La colpa soggettiva. Modelli di valutazione della condotta nella responsabilità extracontrattuale (Cedam, 1991) 83 ff.

19 The questionnaire sets out to examine the requirement of negligence liability, in particular the problem of legal capacity (cases 1 and 2). Cases 1, 5, 6 and 20, on parents’ and employers’ liability, explore the importance
The latter issue is the main focus of the third book, *Environmental Liability and Ecological Damage in European Law*. The survey covers written rules, and actual remedies for environmental harm,20 in 14 jurisdictions (Austria, Belgium, England, Finland, France, Germany, Greece, Italy, Ireland, The Netherlands, Portugal, Scotland, Spain, Sweden),21 while 16 legal systems (Austria, Denmark, England, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Scotland, Spain, Sweden, Switzerland)22 have been studied in the research on liability for misconduct in contractual negotiations. *Precontractual Liability in European Private Law* is meant to cover all types of case that in any of the European systems are regarded as dealing with liability for lack of due care (including faulty omissions) during the precontractual stage.23

Reasons of time and space prevent us from presenting in detail the findings of these four volumes, and the fallouts they may have on the code-drafting projects’ agenda. Suffice of the fault principle for liability of the act of another. Other cases (7, 8, 17) concern situations where the plaintiff is unable to prove negligence, but where certain factual elements point to the conclusion that the harm would not have occurred without a lack of care on the part of the defendant. Cases 8, 9 and 14 are meant to test the limits of negligence, while in cases 10–13 there is clearly no claim under negligence, either because the defendant acted with all due care (cases 10, 11), or because he was allowed to perform a harmful activity (cases 12, 13). Cases 15 and 16 concern product liability, while cases 18 and 19 deal with liability for road traffic accidents. Finally, case 20 discusses the role of no-fault compensation schemes in the field of work-related injuries and diseases.

Cases 1, 2 and 9 deal with harm caused by industrial plants. Cases 3–8 take into consideration specific risks, such as those stemming from dangerous substances (case 3), genetically modified organisms (case 4), dangerous micro-organisms (case 5), disposal and processing of waste (case 6), production of hazardous waste (case 7), and the operation of nuclear power plants (case 8). Case 10 addresses the statute of limitations problem, while case 11 investigates the level of probability necessary to establish causation. Cases 12–14 focus on the significance of statistical evidence for the establishment of causation (case 12) and the availability of joint and several liability in cases of multiple causation (cases 13, 14). Cases 15–17 explore the scope of attributable damage, with regard to damage to land (case 15) and damage to water (cases 16, 17). Case 18 is meant to analyse the scope of compensation for personal injury and loss of life caused by the contamination of water with chemicals.

The reporters were: M Hinteregger (Austria); H Bocken (Belgium); N Hird, G Howells, P Root, C Shelborne (England); EJ Hollo (Finlandia); P Guillot (France); TMJ Möllers (Germany); E Dacoronia (Greece); A Doyle (Ireland); B Pozzo (Italy); M-L Larsson (Sweden); E Reid (Scotland); DAJ Roomberg (The Netherlands); J Cunhal Sendim (Portugal); A Ruda (Spain).

The reporters were: W Posh (Austria); O Lando (Denmark); J Cartwright (England); M Rudanko (Finland); O Deshayes (France); S Lorenz and W Vogelsang (Germany); G Arnikouros (Greece); R Friel (Ireland); A Musy (Italy); M Hesselink (Netherlands); J Simonsen (Norway); L Menezes Leitão (Portugal); M Hogg and H MacQueen (Scotland); F Hernanz (Spain); C Ramberg (Sweden); P Loser (Switzerland).

The situations considered are the following: breakdown of negotiations in relation to the sale of the premises of a bookshop (cases 1, 8), the renewal of a lease (case 2), the merger between two firms (case 7), the building of a house (case 9). Case 3 deals with a mistake about the ownership of land to be sold; case 4 explores the issue of parallel negotiations. The breaking off of an engagement is at the core of case 5, while at stake in case 6 is a lockout agreement. Wrongful adjudication through a public bidding (case 10), contract for the sale of a house which fails for lack of formality (case 11), exploitation of confidential design information provided during negotiations (case 12) misrepresentation or silence about a harvester’s capacity (case 13) complete the coverage of the topic.
to say here that all of the above surveys highlight what is too often underestimated in contemporary tort law research: that, notwithstanding similar outcomes that can be detected in a number of situations, legal systems are particularly divided over theories of relief and causes of action, for each system retains its distinctive way of approaching and thinking about liability. In other words, despite the more or less broad affinity between solutions that may be recognised at the substantive level, European tort lawyers are still lacking a methodological common core.

4. COMMON CORE LEITMOTIFS IN TORT LAW

The distinctive features of the Common Core method as applied to tort law will be the focus of the following pages. This will also lead to a better understanding of the differences between our research and the other endeavours devoted to European tort law.

We will start (i) by insisting that in order to figure out how a tort law system works, one cannot look only at its façade, i.e. the outer appearance, the initial and dominant perception of an observer regarding that legal system. It is necessary, instead, to pierce that veil, and to appreciate how the legal formants interact with and relate to each other. Only through such an analysis does it become possible to ascertain what the existing rules are, and what factors affect their production and application.

Under the Common Core view, a similar attitude—this will be our second point (ii)—has to be applied to the scrutiny of the cause of action as well. Indeed, a longstanding tradition approaches liability by treating each element of the cause of action as completely separate and independent from the others. In several situations, however, this habit proves inadequate to determine how the final decision was reached, and what the tort law process requires for the plaintiff to succeed.

Yet, the interdependencies to be considered do not end here. Common Core researchers know—this is the third point (iii) we will discuss here—that the answers given to tort law questions often depend on legal rules and/or institutions outside tort law, such as contractual principles and procedural rules, as well as private and public insurance mechanisms. They know that the contours of tort protection and the very meaning of tort law notions, concepts and rules are marked by the contents and scope assigned to other institutes and practices of private and public law. They know, therefore, that any study of the former cannot be effectively undertaken without a corresponding study of the latter.

Moreover, and fourthly (iv), a Common Core scholar is fully aware that legal rules are variable not only in space, but also in time, and that, at whatever latitude and under whatever atmosphere s/he finds her/himself, legal rules are always echoing—more or less intensely, more or less openly—the policy considerations prevailing within the domain considered at the given time and place.
5. FAÇADES AND OPERATIVE RULES

Everybody knows that in modern tort law systems, as far as negligence liability is concerned, two alternatives may be observed at first sight. There may be liability whenever a person causes damage to another; or there may be liability only in certain typical situations. The former, known as the principle of *neminem laedere*, is the solution adopted by the French *Code Civil*. The latter, enacted in the German *BGB*, was the solution associated with Roman law and traditional common law. In both of these systems there was a list of actions that a plaintiff could bring against the person who had injured him: in Roman law, actions for theft, robbery, insult and damage wrongfully done; in English law, trespass, nuisance, libel and so forth. Every European tort system may be seen as a variant of these two alternatives.

These imposing structures, however, are not necessarily the most reliable means of viewing liability rules or of predicting outcomes. An explanatory analysis must distinguish appearances from reality. This analysis must take into account a wide variety of factors, traits and formants in order to arrive at the essential differences and similarities between the systems. This often means distinguishing between the systems’ exterior architecture and their interior working, *viz* the operational rules that lie behind or within them. In a codified system the exterior wrapping is usually composed of the black-letter words that the legislator has used; in an uncodified system it may be the words of judges hardened into precedents or the writings of old institutional writers. In either case the façade will be the objective set of public signals which apparently controls liability. Obviously we do not mean that this appearance is always false and misleading. Sometimes the first impression given by the legislator or judge as a lawgiver is also the lasting impression left by jurisprudence and legal scholarship. At other times, however, the deeper one delves into legal scholarship, the cases and the operational rules, the more one is surprised by the contradictions and contrasts between outer appearance and inner reality.

For example, what begins as a general clause may be administered as a scheme of protection focused upon absolute rights—ie, what German jurists refer to as rights to

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life, body, health, freedom and property, which are opposable to the world at large: *erga omnes*. This is what occurred, for instance, with Art 1295 of the Austrian *Allgemeines Bürgerliches Gesetzbuch (ABGB)*, whose broad general clause has been filled up by interpreters from the second half of the 19th century with an absolute rights doctrine. This is what occurred in relation to Article 2043 of the Italian Civil Code of 1942, whose broad wording, in the aftermath of the adoption of the Code itself, has been read by scholars and judges as establishing liability only upon the infringement of an absolute right of the victim. It goes without saying that the same overlap between different tort law patterns may be recognised in the systems characterised by contractual actions which function like tort remedies. For example, in Germany and Austria the denial of recovery in tort for the losses incurred by a party in consequence of his/her reliance on the formation of a contract, or, more generally, of negligently inflicted pure economic loss should not be seen as the end of the story, since in these jurisdictions recovery may in many cases be granted through a resort to contractual remedies.

The caveats regarding the differences between façades and operative rules also apply to liability not based on fault. It is well known that an interpretative practice can transform a rule apparently based on fault in a (more or less pure) strict liability rule and vice versa. These practices may strengthen or relax the usual standard of conduct to be applied to the defendant; they may modify, in one way or another, the defences available to her/him; they may shift the burden of proving some of the elements of the cause of action from one party to the other party. Through any of these devices, a fault-based rule may be converted into a strict liability one, and conversely an apparent strict liability rule may be applied as though it was based on fault. Examples are countless, and two of them will suffice to make clear what we are referring to.

First, regarding liability for the acts of a minor, the text of the French *Code civil* provides that parents can be held liable under (what clearly appears to be) a rebuttable presumption of fault. The Cour de cassation, however, decided that this provision should be read as establishing ‘*une responsabilité de plein droit*’, ie a strict liability rule. Parents could only escape liability by proving that the harm had been caused by an event of *force de nature*.

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majeure, or by the victim’s contributory negligence. Moreover, recently, the Cour went a step further in making it clear that the child’s negligence is no precondition to parental liability, the latter being established as soon as the child’s act is shown to have caused the harm.

Secondly, in German law, employers’ liability rests on the fault of the employer, which may be held liable under a rebuttable presumption of fault. In particular, according to §831 of the Bürgerliches Gesetzbuch (BGB), a German employer can escape liability by proving that the employee was carefully selected, and duly supervised, if so required. Courts in Germany have progressively tempered the requirement of personal fault as a condition of the employer’s liability. They have done so by broadening the employer’s duties, requiring her/him to supervise her/his employees more or less permanently (and not only when hiring them), and to provide an adequate organisational framework for protecting both employees and third parties from accidental harm. As a result, employers’ primary liability is today based on different layers of individual and organisational duties, some of which are defined so strictly that a rebuttal of the presumption of fault may seem impossible.

All of the above strengthens our initial assumption: accepting façades at face value can be hazardous, for they are very rarely a sufficient basis for an in-depth analysis and understanding of a legal system.

6. INTERCONNECTIONS BETWEEN THE ELEMENTS OF THE CAUSE OF ACTION

From the same perspective, one cannot rely entirely on the traditional and widespread (especially in the civilian jurisdictions) attitude displayed towards the elements of the

31 Werro and Palmer, The Boundaries of Strict Liability (n 12) 399–400; on this point see also Bussani, La colpa soggettiva (n 18); id, As peculiaridades da noção de culpa: um estudo de direito comparado (Livraria do Advogado, 2000).
34 Ibid, 396.
35 In the older literature, see eg R Gianturco, Sistema di diritto civile italiano, vol I (Pierro, 2nd edn 1894) 227; G Chironi, Colpa extraneotratuale, vol I (Bocca, 2nd edn 1903) 48 ff and 76 ff; G Rotondi, ‘Dalla “Lex Aquila” all’art 1151 cod civ’ [1917] Rivista diritto commerciale 236, 284 ff; A Sourdat, Traité général de la responsabilité, vol I (Marchall Billard, 2nd edn 1872) 417 ff, 458; R Savatier, Traité de la responsabilité civile, vol I (Librairie générale du droit et de la jurisprudence, 2nd edn 1951) 5. See, more recently, S Rodota, Il problema della responsabilità civile (Giuffrè, 1964) 183 ff; V Zeno Žencovich, Responsabilità civile da reato (Cedam, 1989) 64; G Viney and P lourdain, Les conditions de la responsabilité (LGDJ, 2nd edn 1998) 153 f, 318 f and 530 f. (footnote continues overleaf)
cause of action. In focus here is the tendency to represent each of these elements as a separate and independent variable with a distinctive role of its own. Although such an approach—which we will call the ‘modular’ approach—has the reassuring advantage of simplicity, it provides an inaccurate description of reality and an even weaker basis for analysis.

In the modular view, we immediately face the difficulty of explaining a familiar phenomenon: the recurrence of decisions in which the notion and role of the given element ends up being affected by the notion and role attributed to the other elements of the cause of action. More precisely, it becomes difficult to understand why the defendant may incur liability, notwithstanding that the causal link turns out to be indirect, or that the injury is produced by the victim’s behaviour or that of a third party. Still in the modular view, at other times it is unclear why, in order to establish the defendant’s liability, it is not sufficient to show that s/he has infringed a protected right of the victim, that her/his conduct was negligent, and that the causal link was immediate and direct. In such situations, the point is that the judicial outcome is shaped by the relative value assigned by the court to one or more of the following elements: the parties’ interests in behaving as they did, their personal characteristics, their (possibly) different degrees of blameworthiness, and their relative loss-bearing capacities (in light of the resources that are available to them, or, as the case may be, the presence of insurance cover).


For an appraisal of the reasons driving common and civil law jurisdictions to approach differently this (and many other) tort law issues, see Busani and Palmer, Pure Economic Loss in Europe (n 12) 120 ff, with further references.


38 In this sense, see P Cendon, Il dolo nella responsabilità extracivile (Giappichelli, 1976) 225.

Let us take, for example, those situations in which, all the other elements of the cause of action being present, the judge deems unrecoverable the losses incurred by the plaintiff. One can be sure that, if the ground for excluding the defendant’s liability were to be found in policy reasons, most of the time the judge would transfer these reasons into the causation dimension, arguing in favour of the remoteness of the damage, its lack of proximity, or any other factor which may be seen as breaking the causation chain. In these cases, causation lends itself to judicial hands as the privileged instrument to deny recovery, not only because it is technically neutral, but also because of its factual dimension, which makes it difficult to review causation upon appeal.41

Let us take another example, on the pure economic loss side. An investor acquires shares of ownership in a company, relying on the inaccurate assertions of an accounting firm, which has judged the financial situation of the company to be healthy and profitable. Soon after, the company goes bankrupt. The investor loses his entire investment and s/he sues the accounting firm. The court refuses to award damages, not because the damage is unrecoverable per se, or because the defendant was not at fault, but in the light of the argument that the losses were too remote, ie not directly caused by the accounting firm’s statements.42

It comes as no surprise, however, that the same factual situation may produce a different legal result whenever the court deems the defendant’s conduct tainted by a 'high degree of fault'.43 On the latter point, possible illustrations are countless. Let us put forward a couple of them, closely connected with the topics investigated by the Common Core tort law volumes.

If X, who owns a bookshop, breaks off his/her negotiations with Y to buy for 1.5 million euro the premises that Y owns, and ultimately Y succeeds in selling the premises for only 1 million euro, a court may find no causal relationship between X’s conduct and Y’s loss.44 Yet the outcome can be different if it is found that: (i) X knew that Z, a

40 This is an attitude particularly widespread in the civilian jurisdictions, where judicial culture is less inclined to allow judges to bring to the fore the policy arguments openly deployed by common law judges. On this specific point, see, e multis, Bussani and Palmer, Pure Economic Loss in Europe (n 12) 11 f.
41 As is well known, the establishment of causation is considered as a finding of fact, whose determination (if sufficiently grounded) is unreviewable by a higher court. See, for Germany, Markesinis and Unberath, The German Law of Torts (n 24) 691; for France, P Le Tourneau, Droit de la responsabilité et des contrats (Dalloz, 2005) 398; Y Lambert-Faivre, ‘De la poursuite à la contribution: quelques arcanes de la causalité’ [1992] Dallaz 311; for Italy, C Salvi, La responsabilità civile (Giuffrè, 2nd edn 2005) 223; for common law jurisdictions, see, among others, JCP Goldberg, Sebok and Zipursky, Tort Law (n 35) 227; AM Honoré, ‘Causation and Remoteness of Damage’, International Encyclopedia of Comparative Law, vol XI, ch 7, 20.
44 Cartwright and Hesselink, Precontractual Liability (n 12) 21–63.
nationwide chain of bookshops, was negotiating with Y to buy Y’s premises for 1.2 million euro; (ii) X started negotiations with Y, alleging that he was prepared to pay a higher price; (iii) X’s substantial purpose was to induce Y to stop his/her negotiations with Z; and (iv) Y acted on X’s misrepresentations and suffered a loss. Under these circumstances, indeed, it will be easy for the judges to consider the loss a direct consequence of Y’s reliance on X’s fraudulent statement.45

Similarly, when A’s land is not contaminated itself by the chemicals released by B’s factory, but only severely affected by the contamination of another property nearby, A’s pure economic loss may go uncompensated, since A’s property has not been directly damaged by the negative interference originating from B’s property.46 However, the fact that the plaintiff claims damages for the infringement of an interest deemed undeserving of a high rank in the tort law hierarchy, like purely economic loss, may not exclude the compensation of such a loss when B’s conduct is found to be grossly negligent. In fact, proof of recklessness on B’s side is likely to lead to the conclusion that A’s loss was foreseeable by B, and thus directly connected to the latter’s polluting activity.47

7. INTERDEPENDENCE BETWEEN LEGAL DOMAINS

On the Common Core view, any attempt to understand and explain tort law rules should take into consideration the impact upon them of rules belonging to other fields of law. Tort law rules may be deeply influenced, for example, by the scope and content assigned to contract law, unjust enrichment law, and insurance law.48 Not only is there a rich catalogue of notions which straddle the tort, contract and unjust enrichment law fields (such as causation49 or restitution50), but the very application of tort law rules may be limited, or amplified, depending on the availability of contractual and restitutionary

45 Ibid.
46 Hinteregger, Environmental Harm (n 12) 443–4.
47 Ibid.
remedies, as well as on the possibility, for the plaintiff, of accumulating different claims
against the same defendant.51

The same argument applies to property law as well. Let us offer a few examples, whose
interest may run across any European legal system. (i) Should the right of a creditor be
deemed as a right in rem (ie opposable to the world at large), or should possession be
included in the framework of property rights, any third party infringement of the
creditor’s or possessor’s right would permit recovery of the pure economic loss arising
therefrom. If the right of the creditor is not considered as a right in rem, or if possession
is not included in the property framework, the recoverability of the pure economic loss
caus ed to the creditor or possessor becomes an issue to be settled.52 (ii) In any ‘double sale’
case, the right of the first buyer (solo consensu) to obtain compensation from the second
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
completion of delivery (for movables), compliance with formalities such as registration
(for immovables), and the effects assigned to the registration itself.53 (iii) The protection
afforded by tort law rules against interference with the use or enjoyment of land is
moulded by the remedies devoted to clearing up conflicts between neighbours. If, under
the law of nuisance, the victim may obtain compensation for all the losses s/he suffered
(including non-patrimonial damages and loss of profits caused by the polluting event),
it is beyond doubt that many of the issues raised in ‘pain and suffering’ cases—and even
in some ‘pure economic loss’ cases—will be solved through recourse to those principles
with little need to resort to mainstream tort law rules.54

Obviously this is not the end of the story. Tort law rules may also be shaped by the
structure and the procedure of the legal process by which they are implemented. For
instance, the views of the role of the courts in relation to contracts (such as whether or
not it is thought appropriate for the courts to intervene and enforce incomplete
agreements) can deeply influence the outcome of a pre-contractual liability case.55 When
pollution harms a majority of a group within a population, it is clear to all that the
availability, or not, of a collective legal action for redress may directly impinge on the
concrete application of tort law rules, since individual victims do not always have
sufficient incentives to file such an action on their own.56

51 C von Bar and U Drobnig, The Interaction of Contract Law and Tort and Property Law in Europe: A
Comparative Study (Sellier, 2004) 189.
52 M Bussani, ‘European Tort Law—A Way Forward? in id (ed), European Tort Law (n 39) 379–80; see also
Markesinis and Unberath, The German Law of Torts (n 24) 51, 236.
53 See Bussani and Palmer, Pure Economic Loss in Europe (n 12) 383–4.
54 Hinteregger, Environmental Harm (n 12) 69–71.
55 Cartwright and Hesselin, Precontractual Liability (n 12) 481.
56 See Hinteregger, Environmental Harm (n 12) 77–78.
8. TIME AND POLICY FACTORS

Among the methodological awarenesses the Common Core research is grounded upon, we cannot leave out the significance and the value to be assigned to time and policy factors.

In the past 40 years, Italy changed from a system of ‘protected interests’ to a general clause system—a process that resembles the 19th-century French shift from an attitude based on a rigid conception of unlawfulness to a liberal approach, more closely matching the façade of the Code civil. Moving along an opposite path, Austrian history shows a departure from the liberal façade of the ABGB in the second half of the 19th century, and ever since its legal system has accepted German doctrinal thought together with the usual justifications for the control of liability expansion. But examples also abound at a more detailed level. The fault-based regime set forth by §831 BGB with regard to the liability of employers for the acts of their employees has been progressively changed by German scholars into a strict liability rule.

Article 1384, 1 alinea, of the French Code civil experienced a true revolution through which a purely transitional phrase (‘one is liable ... for the damages ... caused ... by things that are in her/his custody’) has been gradually transformed by judges into a general principle of strict liability for things. Thus the point is simply that legal rules are never stagnant; they have changed and may change again. Therefore, any research that commits itself to taking a snapshot of what law is in a given place and at a given moment may be of little use in determining its possible paths of development in the near, as well as in the far future.

Yet historical contextualisation—if not aware of policy factors influencing legal changes—cannot provide a full explanation of specific rules of tort law. Whenever we deal with ‘law’, we deal with something which relies on the background of a political community’s order, translated, time and again, into actual law by the interpretive community. This is possibly true of many fields of law, but, within tort law, it does seem to be the appropriate way to appraise what the making of rules entails. A tort law regime, indeed, constantly depends on political decisions as to whether to decrease, enlarge or maintain particular levels of protection for loss bearers. For instance, it is beyond doubt that differing social views of the nature of personal relationships affect the remedies

57 This historical turnabout is discussed in Bussani and Palmer, Pure Economic Loss in Europe (n 12) 126.
Contrast this rapprochement with the return to the 19th century Germanic model in the PETL principles; for criticism, see F Werro, The Swiss Tort Reform: A Possible Model for Europe? Selected Remarks, Including a Short Assessment of the Principles of European Tort Law, in Bussani, European Tort Law (n 39) 98 ff.
58 See the authors quoted above, n 27.
59 See above, nn 33–34.
60 Werro and Palmer, The Boundaries of Strict Liability (n 12) 419–21.
It is equally clear that the selection of the matters to be covered by strict liability rules, and 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, are both evaluations to be made with regard to the overall policy adopted, in the civil liability field, by the various actors who make up and shape a legal system.64

9. POSTLUDE

All of the above testifies to the inner complexities of tort law and to the sophisticated repertoire of tools and techniques that are needed to cope with rules that are often blurred, and often lacking an authoritative meaning.

Such complexity is something that cannot be reduced at will by legal actors—be they scholars, judges or legislators. To be sure, scholars, judges and legislators are called upon to give order to the life of the law and to the community in which they work. But laws, communities and law-makers do not exist in the air, they live in the composite reality of the system. A reality whose harmonies and disharmonies, coherences and discordances all have to be taken into account, because in law, as in music, there is no noise. Only sound.

62 Cartwright and Hesselink, Precontractual Liability (n 12) 480.
63 Bussani and Palmer, Pure Economic Loss in Europe (n 12) 16–24; Hinteregger, Environmental Harm (n 12) 474–8.
64 See Werro and Palmer, The Boundaries of Strict Liability (n 12) 645–8.