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European Tort Law in the New Millennium: Reflections on Dover Beach

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Introduction

This paper offers some thoughts on creating a European Law of Tort, for a United Europe. The task has already been undertaken in Germany, Austria and elsewhere, with two completed sets of European Tort Principles already published, and is an unavoidable result of the irreversible march towards a Common Private Law of Europe of the sister-countries of our Continent. My ambition is to offer some thoughts on a new European Tort Law from the other side of the English channel, from a jurisdiction that stands alone (together with Ireland) in not sharing the roots and culture of Roman Law in Europe, and from a country that is regularly seen as politically unfriendly to greater European integration [1]. I am encouraged by the voice of an English scholar, who is generally considered as one of the most authoritative and brilliant masters of the Common law, and defenders of its purity and originality, but, also, at the same time, who is known for his devotion in translating modern German masterpieces of European legal science into English. He once wrote: "law is...[the] cement... and faith in law ...[the] spiritual foundation" of the European Union.

The European role of Tort law in the private enforcement of European Community legal standards and principles has been recently placed centre stage by major judgments of the European Court of Justice, such as Munoz and Manfred. But fragmented and incoherent law that changes every time a citizen of the United Europe crosses the narrow frontiers of the country of his birth cannot cement anything. I hear very clearly the other voices noting the diversity of legal culture, concepts and techniques in European Legal systems, and alarmed by the spectre of uniformity at the expense of tradition, language and dogmatic elegance; to be sure, these are important worries. But does anyone wish to seriously argue that such considerations should stand in the way of improving the lot of European citizens? The point can be made with reference to several, important in real, rather than academic, terms, European harmonization measures, already accomplished in the filed of the law of civil liability [2]. One example is enough: the Product Liability Directive of 1985, which, despite its lack of elegance and theoretical purity, and its disregard for subtle conceptual divergences in national legal systems and for traditional principles and techniques, has proved highly successful in promoting uniform civil law enforcement across the European Union of standards of product safety.

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

English Law can be described as an "open" case–law system, in which, as Cardozo J. put it, the truths given by induction tend to form the premises for new deductions. The development of the Common Law of Tort was characterized by a separate evolution of individual torts until the advent of Donoghue v Stevenson and the generic tort of Negligence. Negligence, together with another "generic" tort, Nuisance, provides now the main actions for non–premeditated harm. Before the landmark- case of Hedley Byrne, there was also a strong judicial conviction, sometimes referred to as the product of a certain "principle" of Common Law, documented in a wealth of precedent, that there could be no liability for non–premeditated harm of a purely financial nature, except in special circumstances, including those where an action for Public Nuisance might lie. It must be noted here that, as some recent developments have also indicated, the Common Law attitude to non-premeditated financial harm, both before and after Hedley Byrne, is better explained as the product of a design of tortious liability based on the significance of the kind of injury caused, rather than the quality of the interest involved. In this respect, Anglo-American law is stylistically quite different than both French and German law [3]. This difference is a primary reason for certain outwardly similar concepts, rules or, even, general principles of liability performing dissimilar functions in the three systems. The French and German tort systems are founded on codified rules and principles. They both are, however, much less "closed" than what might be expected. In France, in particular, the application of the laconic provisions of the general clauses of art. 1382 et seq. of the Code Civil can only be understood in the light of the principles and rules contained in the massive volume of jurisprudence that these provisions have generated [4].

The courts have created, in applying those provisions, a body of case law that has made the French Law of tortious liability more open, flexible and liberal than many a contemporary tort system.

In German Tort Law the rights and interests protected by the law are directly (e.g. in paras. 823I or 824), or indirectly, (e.g. in paras. 823 II and 839) enumerated in the BGB. To this enumeration the clausula doli of para. 826 BGB must be added, which provides a remedy for wilful damage (also merely pecuniary) caused contra bonos mores ("gegen die guten Sitten") [5]. In para. 823I BGB, containing the main action for non–premeditated harm, pure financial interests ("Vermogen") are not included in the enumeration of the "protected rights".

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