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TORT LAW AS A LEGAL-REALIST SYSTEM[*]

Vincenzo Zeno-Zencovich

I. TORT LAW IN ITS ECO-SYSTEM: PRIVATE LAW (I); II. TORT-LAW AND ITS ECO-SYSTEM: PRIVATE LAW (II); III. TORT LAW AND ITS ECO-SYSTEM: PUBLIC LAW; IV. THE HABITAT: THE COURTS; V. NO COURTS, NO TORT LAW; VI. THE HABITAT: REMEDIES PRECEDE RIGHTS; VII. THE HABITAT: THE BURDEN OF THE PROOF; VIII. THE HABITAT: THE (WASTED) LABOUR ON CAUSATION; IX. DAMAGES: THE BOTTOM LINE.

P.G. Monateri has written extensively on the law of torts from an Italian and a comparative perspective[1]. Our views not always have coincided, but this is due to the fact that die-hard legal realists like myself tend to be more blunt than nuanced and therefore inevitably create a mismatch with elegant and intellectually elaborated writings such as those of P.G. Monateri.

These few pages in no way wish to deepen differences, but simply offer – in a rich and diverse collection of essays – one of the many views of the law of torts.

A further caveat is necessary.

These pages are inspired by a minimalistic approach and try to lay down, very succinctly, the conclusions the author believes he has reached in four decades of studying, writing, and practicing tort law.

The approach – I apologise from the beginning – is legal-realist, but when as a young researcher has been struck by the intellectual wand of Jerome Frank, Karl Llewellyn, Alf Ross and, in Italy, of Gino Gorla, Giovanni Tarello and Guido Alpa, that imprinting is impossible to dispel.

But I wish to underline a further aspect, which probably will raise many eyebrows. Tort law is a creature of the courts, and if one has not lived – from the side of the plaintiff or of the defendant – the heat of the case, the clash with one's opponent and the dialectic confrontation with the judge, the enthusiasm or the frustration of the verdict, it is rather difficult to understand what tort law really is about. And this is the reason why some very elegant and profound treatises appear to be cookbooks written by someone who has never set foot in a kitchen and whose recipes seem to be written in fairy tales.

When the first law faculty was founded in 1088, in Bologna – and since then – one of the distinctive features of Italian academic scholarship has been that in order to really know the law you must (also) practice it.

This approach is particularly appropriate in a comparative perspective where one tries to look not at the law in the books but at the law in action. Which in no means aims at

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[*] This article was meant to be published in the *Liber Amicorum* for P.G. Monateri, *The Grand Strategy of Comparative Law*, forthcoming with Routledge. Owing to my misunderstanding of the deadlines I missed the train. I hope this publication *extra ordinem* will make good for my carelessness.

[1] Among his monographs *ex multis* see (1984) *Il quantum del danno a persona,* Giuffrè; (1988) *Il danno alla persona,* Cedam; (1988) *La responsabilità civile,* UTET; (2002) *Illecito e responsabilità civile*, UTET; (2004) *The Law of Torts in Italy,* Kluwer. To which one should add dozens of articles on the most various aspects and cases.

diminishing the role of legal scholarship in this realm and the comparison between different intellectual trends[2], but simply stating what these few pages are **not** about.
With these necessary caveats I will try to lay out a few points, which I am well aware may not be widely shared.

I. Tort law in its eco-system: Private law (I)

Tort law cannot be understood and described if one does not take into account the legal eco-system in which it has developed and lives. Metaphorically, if tort law is a wood made of large and small trees, and countless bushes and thickets, it is mostly surrounded by cultivated land, the land of contract. And on one of its sides, it borders with a wasteland full of brushwood but also, sometimes, wild medicinal herbs (unjust enrichment).
The extent of these three terrains is in direct relation one with another. The larger the expansion of the field of contract, the less the space left to the wood of torts. And if the damaged party cannot find solace in either, it will venture into its last resort, unjust enrichment. Historically one could compare the relationship between tort and contract law in England, Germany and France[3]. Or look at the explosion, in the first fifteen years of the BGB, of case law on § 812 in order to escape the rigidity of § 823.
The effectivity of tort law and the shape it takes has to be constantly compared with its neighbouring fields: the most egregious examples are those of pure economic loss; of contracts with protective effects towards third parties; of direct actions against the ultimate producer different from the vendor.
A comparative approach therefore leads to examine not the theoretical tenets, but the path followed by the damaged party. In the case of medical malpractice should it be non-performance of contract or violation of bodily integrity?
At the end of the day, one must consider that the plaintiff – or rather his or her lawyer – has no academic qualms but is seeking the safest way to reach the result: award of damages. This determines a path-dependency: a certain action lies in tort, in contract or in unjust enrichment because that is the easiest way to the objective and the one which has a multitude of precedents and will find a favourably biased court.

II. Tort-law and its eco-system: Private law (II)

But the relationship between tort law and contract law is not only about shifting boundaries. There is a much more stable aspect and that is the role of insurance contracts. From a business point of view insurance transforms the uncertainty of litigation (both as cost and as outcome) into a certainty (the premium) which is transferred as part of the production cost to the final buyer or user[4]. The interest of the defendant in the trial is

[2] The author is still intellectually indebted towards the works – which he feels are essential in understanding what the law of torts is about – of Patrick Atiyah (1970) *Accidents, Compensation and the Law*, Cambridge U.P.; and of John G. Fleming (1968) *An Introduction to the Law of Torts*, Clarendon Press.
[3] The unsurpassed text for comparing these various relationships in the main European legal systems, and with reference also to the US in Basil S. Marklesinins et al (2019) *The German Law of Torts,* V ed., Bloomsbury.
[4] Not for some sort of chauvinist attitude it should be pointed out that a decade before Richard Posner's celebrated book on Economic Analysis of Law (1973, Aspen Pub.), Pietro Trimarchi, at that time a professor in his twenties at the University of Urbino, before moving to Genoa and Milan, presented this theory in (1961) *Rischio e responsabilità oggettiva*, Giuffrè.

reduced because it will not bear the brunt of a negative decision (except for, maybe, an increase in the premium which will be again transferred downstream). Insurance companies – who often manage the claim and the litigation – have a mostly actuarial approach to the case. Provided the overall liquidated damages do not go beyond a certain threshold they see a negative outcome as an ordinary business risk and having a deep pocket they will view favourably out-of-court settlements.

This scenario is even more enhanced in the many areas where third party insurance is compulsory – circulation of practically all vehicles (road, rail, air, water), medical institutions, professionals, owners of buildings etc. – and often allows the damaged party to bring a direct claim against the insurer.

This circumstance – the nature of the effective defendant (if ever one gets to court) – has a significant effect on the psychological attitude of the judge who generally takes into account the nature and economic power of the parties.

III. TORT LAW AND ITS ECO-SYSTEM: PUBLIC LAW

The context in which tort law must operate is further influenced by both traditional and more recent procedures to face damages.

a) *Criminal law*. As is well known, tortious actions are the development, both in Roman law and in English law, of criminal actions (*furtum, rapina, iniuria* and trespass).

This genealogy is not only historical. In those jurisdictions (France and its followers) where the damaged party can decide to be *partie civile* in the criminal case, damages are awarded in a significantly different context.

On the one side it may be more favourable for the defendant, owing to the much higher burden of the proof which is put on the prosecution (beyond a reasonable doubt vs. preponderance of the evidence). But at the same time, once a crime has been ascertained there will be little leniency in the liquidation of damages which become an element of both general and specific deterrence.

b) *Compensation schemes*. A much broader and pervasive public law intervention in the realm of torts is represented by the growing tendency to introduce compensation schemes for damages that hypothetically could fall within a tort action but, in reality, do not because of the extreme difficulty (if not impossibility) to recover any damages.

The obvious example is compensation for victims of violent crimes or of terrorism[5] where the author is or dead or impecunious. But one finds a multitude of other instances: compensation of victims of medical malpractice in public institutions (which is the rule introduced over fifty years ago in Scandinavian countries); compensation for victims of natural disasters due also to some negligence of the public authorities in controlling, directing or warning; compensation for wrongful arrest or detention.

[5] see e.g. the EC Directive 2004/80 on the compensation to crime victims

The rationale behind these schemes can be referred to classical Hobbesian theory. The King (nowadays Government), having received the allegiance of his subjects, has the duty to protect them. If he fails, he must make good for the damage they have suffered[6].
In Europe the expansion of compensation schemes is also the result of two converging principles, that of solidarity (the heir of the French idea of "*fraternité*") and of general welfare, which find their first application at the end of the 19th century with compensation funds for injuries to workers.

IV. THE HABITAT: THE COURTS

Having indicated the context in which tort law is immersed and which deeply influences its actual reach, one can pass to examine the "wood" in which it operates. The first point that must be made is that in every Western jurisdiction the Lord and Master of tort law are the courts. Contracts are mostly left to the parties, compensation schemes to the Legislature. But tort law is the undisputable domain of the Courts. The best evidence of such a situation is given by the fate of the countless attempts by all Parliaments to limit judicial activism and creativity. As, at the end of the day, as the ultimate interpreter of the law are the Courts, the latter will easily argue that the piece of legislation that is meant to direct or even to impose certain solutions must be construed in a restrictive way (the golden rule), or in the light of constitutional and fundamental rights principles, or in conjunction with other pieces of legislation that have not been taken into account by Parliament[7].
The bottom line is that the legislature, which surely has bigger fish to fry, realizes that its attempts are if not hopeless, useless and surrenders to the will of the courts.
This suggests two converging analyses. The first is that tort law is the thermometer of the balance between the first Power (Parliament) and the third Power (the judiciary). One can compare policies, tendencies towards innovation or in favour of conserving the *status quo*, convergencies and divergencies, agenda settings. The situation of dialogue or of conflict is most obvious when Parliament subtracts areas from the competence of the Courts and hands them to non-judiciary bodies and compensation schemes, or sets new procedural rules (e.g. class actions).
The second aspect is that tort law is the living portrait of how the judiciary is and sees itself. The first clear distinction is the UK tort law system which is under the century old principle of judicial self-restraint *versus* the rest of the Western world, where tort law is the gym of judicial activism. But here too, a certain degree of distinguishing is required because the level of activism depends on the procedures through which judges are recruited, their mentality, the structure of the judicial organization, the more or lesser strength of *stare decisis*. Tort law – or rather the jurisprudence in tort cases – is the best example of judicial

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[6] And going even further back in time to the "Hundreds Act" (Statute of Winchester, 1285) which stated that individual members of a community could be held liable if a member of that community had committed a serious crime and had not been apprehended (see William Blackstone (1807) *Commentaries on the Laws of England,* Portland vol. III, p. 160)
[7] The egregious example is the French law 2002/303 on medical malpractice (the so-called Loi Kouchner) and the reaction by the courts: see App. Paris 4.5.2005 in *D.* 2005, 2131; or App. Paris 7.10.2004, in Gaz. Pal. 2005, Somm. 1382

reasoning. Given exactly the same facts, how do judges A and B, in different jurisdictions, come to the same conclusions? What are their arguments? To what extent do they rely on the *ius positum*, on precedent, on evidence, on external data (e.g. statistics, scientific reports)? Tort law renders at its best the style of a legal system: the unsurpassable elegance of English Law Lords, the legal realism of American justices, the analytical approach of German judges, the self-explanatory phrases which compose the "*attendus*" of the French Cassation.

For these reasons tort law is the Eldorado of private law comparison where one can see at its best the law in action.

V. NO COURTS, NO TORT LAW

If tort law is the creation of the courts and their purest expression, the inescapable consequence is that outside the courts there is no tort law. There is a damaged party, there is somebody that decides, there may be some kind of award, but the context is completely different. Metaphorically, one eats both in a restaurant and in a fast-food, but the two meals are not comparable.

The first fundamental difference is that outside the Courts the decision-maker is not a judge, with his or her background, deference, organizational and career constraints. The second point is that the rules of procedure are different, and whoever is familiar with the judicial process knows very well how they influence the outcome. In third place the typical adversarial contest between plaintiff and defendant, the skills and tactics put into place by their lawyers are of hardly any relevance in an administrative procedure which must decide if and how much compensation must be granted. Finally, decisions by the courts are public in the sense that they are reported, debated, used, cited, appealed, repealed or confirmed. Nothing such happens with decisions taken by non-judicial bodies.

VI. THE HABITAT: REMEDIES PRECEDE RIGHTS

A further reason that justifies the passion of comparative lawyers for tort law is that it represents in every jurisdiction – and not only in the duly revered English common law – the expression of the principle that remedies precede rights. A tort exists only if the Court establishes that there has been one. The claim that a right has been violated and requires to be made good is valid only if it is recognized by a Court.

Therefore, in the generality of cases, a party who has suffered damages claims that the acts of the defendant are wrongful because they have violated his right disregarding some rule of conduct (*in iure, non iure*).

Clearly there are some age-old situations which are always protected – one could use the enumeration in § 823 of the BGB: property, life, limb, health, liberty. But when a new "right" tries to make its way through the crowd of generic interests it will search recognition by the legislature and/or by the Courts. Tort law therefore becomes the entrance door to the protection of certain situations and at the same time to the creation of new duties upon the community. In fact, one should not forget that tort law plays a fundamental regulatory role which can be seen comparing the European approach (*ex ante* regulation, with pointilliste definition of the obligations, generally imposed on businesses)

and the US approach which prefers *ex post* judicial intervention which determines what can or cannot be done.

Tort law therefore manifestly embodies policies and plays a governance role. One of the most common areas in which conflicts arise and find in tort law the solution is that of allegedly discriminatory behaviour (e.g. the "gay cake" controversy[8]).

VII. THE HABITAT: THE BURDEN OF THE PROOF

A hard-to-die legal realist such as the author of these pages has a strong temptation to affirm that tort law, in the end, boils down to a question of burden of the proof. If it must be borne by the plaintiff, the chances he or she will succeed are limited. If it is put upon the defendant, the positions are reversed, and the latter has few chances to avoid a negative decision. The situation, however, is more nuanced and requires a certain number of indispensable clarifications.

The first is the differences between the different burdens. Proof of what? Of the wrongful acts? Of the causal link? Of the amount of damages? Is the burden set by the legislature or by case-law? In the first case what kind of tortious acts does it cover? Or is it one of those catch-all Latin expressions (*res ipsa loquitur*)?

One must also take into account the fact that when the legislature introduces no-fault systems (the mere facts justify the claim) it generally attaches a compulsory insurance or a compensation scheme which clearly alters the tort law process (*i.e.* litigation).

The allocation of the burden of the proof is much more than a technical solution. It is policy-laden, it imposes precautionary obligations upon certain individuals (since the Roman quasi-delicts of *de positis et suspensis, de effusis et deiectis*, *actiones contra caupones, nautas et stabularios*), it is aimed also at deflating litigation.

One should also consider – and this is a further area of comparative research – that often a full and direct evidentiary proof is substituted by indirect and circumstantial evidence based on syllogisms or presumptions, generally in favour of the plaintiff (*id quod plerumque accidit*).

At any rate the predominant role of the burden of the proof is evident in the legislative process of regulation of new technologies (whether digital or bio-chemical), putting on the producer the burden of demonstrating some entirely external and unforeseen reason for the damage.

VIII. THE HABITAT: THE (WASTED) LABOUR ON CAUSATION

Over the last two centuries tens of thousands of pages have been written on the issues of causation in tort law. Hundreds of theories, classifications (e.g. causation in fact, causation at law), distinctions.

A legal realist clearly registers this never-ending debate as a matter of fact. At the same time, however, he underlines that this is one of the points were most of academic work is on a different planet in respect of the down-to-earth daily operation of tort law.

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[8] Lee v. Ashers Baking Company Ltd [2018] UKSC 49

To pick – because doctrinal work is essential to clarify and classify – from the unsurpassed theoretical analysis by Honoré and Hart[9], causation is a rhetorical argument to justify a decision that has already been taken[10]. This means that a certain decision (favourable or negative) is taken not because it passes or does not pass the causation test. But that the verdict on the existence or non-existence of the causal link depends on the paramount decision on the outcome of the case.

The Court will choose the approach which is more convenient in order to explain, plausibly, why the claim has been accepted or rejected. The more "scientific" the causal theory, because it is based on the findings of experts (physicians, engineers, toxicologists, etc.), the more credible, and resistible, the decision will appear. And lawyers and lawmakers, whether in Parliament, in Government or in the Courts regularly resort to "science" to justify their decisions, because it is way to externalize their responsibilities putting them on a supposedly "neutral" body. On the other hand, a sceptical analysis of case law tells us that causation is affirmed or denied on the basis of at least three variable elements:

i. Is the tort the result of an intentional act, of gross negligence, of simple or of slight negligence? In the first two cases the causal claim ends up by including even the most distant and unforeseen consequences. A criminal intent cannot hide behind the niceties and subtilties of causal philosophy.
ii. What is the hierarchy of the rights that have been violated? At the pinnacle we shall place human life. Rights in expectation are placed at a much lower level. In the first case the causation rules will be much more relaxed. In the latter case the exam will be stringent, and a direct effect will be required.
iii. What is the nature and the amount of the damage that has been inflicted? Profound grief and suffering? One's only child? The house one lives in? All one's savings or a petty sum? In some cases, the plaintiff will attract the natural sympathy of the Court. In others the age-old maxim of *de minimis non curat praetor* will apply, and the rules of causation will follow suit. Therefore, the is very little "science" in causation rules and much more *ars aequi et boni* adapted to the facts of the case[11].

The importance of the plight of the damaged party is very clear when, in order to partially accept his or her claim, the causal link is diverted on some different situation. The best example is that of the French "*perte d'une chance*"[12]. One does not have to be a disciple of Parmenides or of Zeno of Elea to understand that when one says that the acts of the defendant have destroyed a chance of profit or of well-being of the plaintiff one has scuttled any rational notion of causal link, substituting it with a merely hypothetical consequence. And a similar approach can be found in the "market share" cases where the producer of the defective good is unknown.[13]

[9] H.L.A. Hart and Tony Honoré (1985) *Causation in the law,* II ed., Clarendon Press.
[10] Especially in Ch. II
[11] These variables are widely analysed in Marta Infantino and Eleni Zervogianni (eds.) (2017) C*ausation in European Tort Law,* Cambridge U.P.
[12] The landmark decision is App. Grenoble 24.10.1962, in *Rev. trim. dr. civ.* 1963, 334.
[13] See Sindell v. Abbott Laboratories (1980) 607 P.2d 924.

IX. DAMAGES: THE BOTTOM LINE

Tort law is the most ancient institutional form of allocation of losses. It establishes the criteria through which a loss is passed on to a third party or it must lay where it fell. In its general-preventive function it warns of risks – *hic sunt leones* –, it encourages caution and pre-cautions, it promotes third-party and self-insurance.
The structure of the claim is practically always the same: the damaged party is the plaintiff, the damaging one, the defendant, differently from contractual claims is which any of the two parties can find itself as plaintiff or defendant, and the latter generally responds through counterclaims.
Claims in tort are brought to obtain a judicial remedy in the form or of *restitutio in integrum* or of monetary compensation. Sometimes there is also the aim of vindication (when reputation has been smeared, when a near relative has been killed). But the cases in which the plaintiff asks for *nummo uno* (the typical "*un franc*" in French cases) are a negligeable minority. The award of damages being the direct and main objective of claim in tort, a comparative lawyer immediately notices that while for the *an debeatur* issue practically all Western jurisdictions reach similar results (which the noticeable British exception), when it comes to the *quantum debeatur* the results widely differ. Which, in substance, means that the allocative function of tort law is extremely variable and inevitably influences the eco-system.
The first, obvious, distinction is between the US system and the rest of world. The former is still entrenched in the multimillion-dollar punitive damages system, and whatever the limitations set by the Supreme Court or the power of *remittur* bestowed upon the trial judge, the perspective of big, huge, gains is the driver of tort law.
The latter, instead, follows explicitly or implicitly, the century-old German *differenztheorie*. The damages awarded must make good the loss that has been suffered, but the plaintiff cannot expect to be enrichened by the Courts. As a witty South-African judge put it: "*The figure of Justice holds a pair of scales, not a cornucopea*[14]".
However, the application of the *differenztheorie* brings about widely different results because the criteria of evaluation are far apart in one jurisdiction from another.
The most obvious case is represented by the death of a person through a negligent act. Let us take an unfortunately recurrent case: a middle-aged breadwinner is killed in a road accident and leaves a housewife and two teenage children. There may be some convergence on the calculation of loss of income, but what is the price-tag put on sorrow and grief, on the loss of consortium, on the loss of parental guidance and of all the way of life a family had established? The range is, varying from country to country, from 1 to 10[15].
In one sentence: non-pecuniary damages are liquidated without any real substantial criterion. And this is replicated in a multitude of other cases: Wrongful birth (typically quadriplegia due to anoxia of the foetus during labour), disfiguring accidents, defamation. The consequence is, in most jurisdictions, that of under-deterrence, with forum shopping effects, typically in transnational road accidents and playing on Article 4 of the Rome II

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[14] *Innes v. Visser* 1936 WLD 44 (per Greenberg J.)
[15] The mind goes obviously to Terence G. Ison (1967) *The forensic lottery,* Stapler Press.

Regulation (864/07) which constantly engages the CJEU in lengthy interpretative decisions[16].

When one moves across the Atlantic the situation only apparently is better. On the one side the multimillion punitive damage awards have an overdeterrence effect, which strongly reduces the general-preventive effect of tort law.

A decision which arrives many years *post factum* and generally against business defendants does not really encourage them to improve their production process (which belongs to the past) and therefore misses its indirect regulatory import.

On the other side punitive damages create a "vulture" secondary market in the hands of large law firms which, through champerty and contingent fees, are the main beneficiaries of tortious claims. It is sufficient to look at some common class actions where the class representative receives a modest amount while his or her lawyers have their million dollars legal fees covered.

To sum up the conclusions of this paragraph, an effective comparison between tort law models would require a vast amount of reliable statistics on the numbers of cases brought, the claims decided in favour or against the plaintiff, the incidence of out-of-court settlements (very common when there is insurance coverage), the amounts liquidated, for what kinds of damages (economic assessment or rule-of-thumb?). A good example is that of the so-called "cable cases". A statistical survey could have easily demonstrated that the "floodgates argument" even if espoused by a giant like Lord Denning was entirely fallacious and the courts in other jurisdictions that had, to a certain extent, accepted the claim of the plaintiff, did not suffer the extreme consequences that had been feared in *Spartan Steel*[17].

It would appear, however, that academic lawyers rarely wish to soil their elegant intellectual robes with dreary statistics. The ivory tower of academia loses therefore touch with the prosaic reality of tort law, which is not much different from how chancellor von Bismarck compared law making and sausage making.

* * * *

The author, at the end, wishes to stress that these few pages – many too few – in no way wish to represent the truthful nature and state of extracontractual liability. They are simply – and knowingly – one of the many "views of the Cathedral", or to put it on a more personal keynote, a memoir of many decades spent travelling in the province of the law of tort.

Other travellers will have seen and will have depicted more thoroughly and thoughtfully different landscapes and monuments[18]. The educated and unbiased reader will be able put these various views together and make himself or herself a more holistic idea.

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[16] *ex multis* see case C-577/21 (non-pecuniary damage for road accident and comparison between German and Bulgarian law)

[17] *Spartan Steel and Alloys v. Martin & Co.* (C.A. [1972] 3 All. E.R.557)

[18] See, e.g. the collected essays in Mauro Bussani (ed.) (2007) *European Tort Law. Eastern and Western Perspectives*, Stämpfli Pub.