

Ernst Karner (ed)

Tortious and Contractual Liability

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Chinese and European Perspectives



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Preface

In the context of their cooperation agreement, the Sino-European Private Law Institute (Yantai University, China), the Institute for European Tort Law of the Austrian Academy of Sciences together with the University of Graz (ETL, Vienna), and the European Centre of Tort and Insurance Law (ECTIL, Vienna) organised a conference on the topic of ‘Tortious and Contractual Liability’ in Yantai on 29 September 2017. Following on from successful preceding conferences on the ‘Legal Protection of Personality Rights’ (2013) and ‘The Aims of Tort Law’ (2015), the topic chosen for this third project moves to consider not only tort law itself, but its critical neighbour, contract. Seeing a promising subject for comparative study in the different concepts and functions that underlie these two spheres of liability, as well as the boundary line traced between the two, the organisers set out to draw together continental European, Common law and Chinese perspectives on these issues.

At the conference, presentations on two core topics were given by participants from each of the Chinese, Common law and continental European traditions; alongside these featured responses to two critical case scenarios from Chinese and European/Common law authors. In each case, speakers explicated and analysed the issues from their respective jurisdictional perspectives. These presentations, together with introductory remarks, are now published in extended form in the present volume. The contributions were put together for the conference in 2017, but authors had an opportunity to introduce updates in 2020; the latest Chinese provisions have been accounted for. The organisers of the project hope thereby to have contributed to understandings of the different conceptual approaches of Chinese and European legal scholars when faced with these core areas of legal liability. Comparative lawyers will gain much from the insights and broader perspectives secured as they face these two archetypes of obligations, the spectrum of possible forms of liability within and between them, and the often-blurred boundary lines traced along the way.

I would like to thank all those who presented and contributed papers for their commitment and enthusiasm as project participants and cooperation partners. My particular thanks are owed to the Dean

of Yantai University Law School, Professor Zhang Pinghua, and the Executive Director of the Sino-European Tort Law Institute of Yantai University, Associate Professor Zhang Yudong, for their tireless and invaluable support in the organisation of the project. I would also like to offer special thanks to the staff of ETL and ECTIL, in particular Andrew Bell, David Messner, Kathrin Karner-Strobach, Donna Stockenhuber and Lisa Zeiler for their commitment.

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Differences between Contractual and Tortious Liability and their Reasons

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I. Introduction

The distinction between contractual and tortious liability dates back to Roman law, when *Gaius* distinguished *obligationes ex contractu* from *obligationes ex delicto*.¹ This twofold scheme of the law of obligations (*summa divisio obligationum*) is outdated,² but the dichotomy between contract and tort (delict) remains firmly entrenched in all jurisdictions. For example, the German Civil Code visibly distinguishes between liability for the breach of a contractual duty (§ 280ff BGB) and liability for torts (§ 823ff BGB). In a comparative book on tort law, we even read that ‘*contract and tort are so much seen in contradistinction to one another that the exclusion of contract is often made part of the definition of tort*’.³

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II. Historical and comparative background

Given this long-standing universal division, lawyers necessarily look at the differences between contract and tort from different national an-

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1 *Gaius*, Institutiones 3.88; *R Zimmermann*, The Law of Obligations (1996) 10 ff.

2 East-Roman jurists already added quasi-contractual and quasi-delictual obligations, including unjust enrichment and *negotiorum gestio*, *M Kaser*, Das römische Privatrecht II (1959) 262 f, 310; *G Wagner* in: Münchener Kommentar zum BGB (7th edn 2017) Vor § 823 no 1; on the (not favourable) reception of this fourfold scheme *Zimmermann* (fn 1) 14 ff.

3 *W van Gerven/J Lever/P Larouche*, Tort Law (2000) 32.

gles. It is therefore imperative to clarify the authors' starting point by briefly sketching the historical and comparative background.

A. Criminal law, tort law and the law of delict

3 From a historical viewpoint, one might be inclined to argue that the proximity to criminal law separates tort (delict) from contract. After all, tort law shares its roots with public criminal law.⁴ In its early stages, Roman law therefore provided the victim of a tort with a pledge-like right to vengeance over the bodily integrity of the tortfeasor.⁵

4 The Roman *lex Aquilia* – the cradle of modern tort law – still provided for *actiones mixtae* which served both a penal and a private purpose.⁶ The Aquilian rules on the calculation of damages provided for damages that could be significantly higher than the damage inflicted. And the claim against the tortfeasor could not be enforced against his heirs (passive intransmissibility).⁷

5 From a modern perspective, criminal law and tort law are still intertwined insofar as many torts are also crimes.⁸ In continental Europe, however, the penal nature of Aquilian remedies dissipated in the modern era. German lawyers gave up the peculiar Aquilian assessment rules and passive intransmissibility.⁹ With the 'Aquilian mask' being torn off the modern action for damages,¹⁰ the main purpose of the continental law of delict is now compensation.¹¹

6 This transition from vengeance to compensation also materialised in a transition of remedies. Ancient Roman law already restricted the

4 MüKo/Wagner (fn 2) Vor § 823 no 2.

5 Zimmermann (fn 1) 1 ff.

6 M Kaser, *Das römische Privatrecht I* (2nd edn 1971) 611 ff; MüKo/Wagner (fn 2) Vor § 823 no 3.

7 Zimmermann (fn 1) 973 ff.

8 MüKo/Wagner (fn 2) Vor § 823 no 2.

9 Zimmermann (fn 1) 1019 ff. In the UK, however, passive intransmissibility applied until 1934, *T Weir*, *An Introduction to Tort Law* (2nd edn 2006) 3.

10 C Thomasius, *Larva legis Aquiliae detracta actioni de damno dato* (1703), cf Zimmermann (fn 1) 1017 ff.

11 E Karner, *Prevention, Deterrence, Punishment*, in: H Koziol (ed), *The Aims of Tort Law* (2017) no 1 ff; H Koziol, *Harmonisation and Fundamental Questions of European Tort Law* (2017) no 6/66 ff.

tortfeasor's liability to financial damages.¹² According to Roman procedural rules, compensation was granted exclusively in money: *omnis condemnatio pecuniaria est*.¹³ Ever since, restitution in money has been the primary tort remedy in most European jurisdictions.¹⁴ The civil codes of Germany and Austria, however, found a more 'natural' mode of compensation, as *F v Zeiller* – the architect of the Austrian Civil Code and a natural lawyer – put it.¹⁵ They provide for compensation in kind (§§ 249 BGB, 1323 ABGB: 'natural restoration') as the primary tort remedy. Yet in practice, compensation in money is the rule rather than the exception. A combined system is also stipulated by the Principles of European Tort Law (arts 10:101–10:104 PETL).

From a continental perspective, tort law has therefore fully emancipated itself from criminal law. Common lawyers, however, might have a different view. They particularly stress tort law's preventive function¹⁶ and they are still familiar with the concept of punitive and exemplary damages.¹⁷

Common lawyers might further highlight that the common law of torts comprises about 70 different torts¹⁸ that serve very different purposes. They range from reipersecutory purposes to the disgorgement of profits.¹⁹ Commentators therefore argue that '*tort is what is in the tort*

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12 Kaser (fn 6) 150; Zimmermann (fn 1) 2 ff.

13 Kaser (fn 6) 610; Zimmermann (fn 1) 825 f.

14 N Jansen, Konturen eines europäischen Schadensersatzrechts, *Juristenzeitung* (JZ) 2005, 160, 172.

15 *F v Zeiller*, Kommentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie III (1813) 756; *R Reischauer* in: P Rummel (ed), *Kommentar zum ABGB* (3rd edn 2004) § 1323 no 1. The notion of natural restoration is often also attributed to canon law: *Peccatum non dimittitur, nisi restituatur ablatum*, M Gebauer, *Hypothetische Kausalität und Haftungsgrund* (2007) 277 fn 340 with further references.

16 G Wagner, *Comparative Tort Law*, in: M Reimann/R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 1003, 1023; on the preventive function of the continental law of delict G Wagner, *Präventivschadenersatz im Kontinental-Europäischen Privatrecht*, in: FS Koziol (2010) 925; *Karner* (fn 11) no 5 ff.

17 *BS Markesinis*, *The Not so Dissimilar Tort and Delict*, *Law Quarterly Review* (LQR) 93 (1977) 84 f.

18 *K Oliphant*, *England and Wales*, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), *Digest of European Tort Law II: Damage* (2011) 1/12 no 1.

19 *K Zweigert/H Kötz*, *Einführung in die Rechtsvergleichung* (3rd edn 1996) 609; from an Austrian perspective *M Brunner/S Perner*, *Disgorgement of Profits Under Austrian Law*, in: E Hondius/A Janssen (eds), *Disgorgement of Profits* (2015) 209.

books, and the only thing holding it together is their binding'.²⁰ The continental law of delict, on the other hand, is a rather 'coherent body of rules',²¹ primarily concerned with compensation. This makes the common equating of the law of delict with tort law misleading.²² From a comparative perspective, it therefore makes sense to focus on the compensatory function of tort law only.²³ Under this assumption, neither the notion of punishment nor the dispersed functions of tort law can separate tortious liability from contractual liability.

B. Fault and strict liability

- 9 Common lawyers might, however, present the requirement of fault as a distinctive feature between contract and tort. After all, they have traditionally construed contractual liability as strict: 'it is [...] immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best'.²⁴ Tortious liability, on the other hand, has traditionally been based on moral blameworthiness following Roman notions of *iniuria* and *culpa*.²⁵
- 10 But from a comparative viewpoint, the requirement of fault is not a suitable criterion to distinguish tortious from contractual liability for numerous reasons.
- 11 Firstly, continental lawyers employ the fault principle in both tort and contract.²⁶ Secondly, common lawyers accept numerous exceptions to strict liability in contract law.²⁷ Hence, they rather favour a combined

20 *Weir* (fn 9) ix.

21 *Zimmermann* (fn 1) 907.

22 *H Koziol*, Schadenersatzrecht and the Law of Torts: Different terms and different ways of thinking, *Journal of European Tort Law (JETL)* 5 (2014) 257; but cf *Markesinis*, LQR 93 (1977) 78, 83 ff.

23 *Koziol* (fn 11) no 2/10 ff.

24 *Rainieri v Miles* [1981] Appeal Cases (AC) 1050; cf *Paradine v Jane* [1647] England & Wales High Court King's Bench (EWHC KB) J5; *EA Posner*, Fault in Contract Law, *Michigan Law Review (Mich L Rev)* 107 (2009) 1431; *R Zimmermann*, Konturen eines Europäischen Vertragsrechts, *JZ* 1995, 477, 481.

25 Cf *Zimmermann* (fn 1) 998 ff.

26 *K Riesenhuber*, Damages for Non-Performance and the Fault Principle, *European Review of Contract Law (ERCL)* 4 (2008) 119, 121 ff. An exception is provided for by art 79 CISG, which is of course an international intruder.

27 *J Gordley*, Contract and delict: toward a unified law of obligations, *Edinburgh Law Review* 1 (1997) 345, 347 ff; *Posner*, *Mich L Rev* 107, 1431, 1436 ff.

approach. Continental lawyers, on the other hand, have effectively undermined the fault principle in contract law, especially by applying an objective standard of care (cf § 1299 ABGB).²⁸ Thirdly, strict liability has become an important part of tort law, too.

Drawing on Roman notions of strict liability, eg for innkeepers and building owners (*obligationes quasi ex delicto*),²⁹ legislators and courts around the globe have established strict liability for hazardous activities.³⁰ Historically, strict liability's breakthrough can be attributed to the aftermath of the Industrial Revolution, when rapid technological progress, like railway traffic or industrial plants, posed new challenges for tort law.³¹ Today, most legal systems hold railroad operators and motor vehicle owners liable regardless of fault in order to deal with the risks of modern traffic.³² Even though long considered an anomaly in tort law,³³ strict liability now represents an equally important second track of tort liability next to liability for fault.³⁴ The natural next step would be to liberate it from the '*special, somewhat haphazard*'³⁵ statutes it is dealt with in and include it in the general rules. This is why art 1:101 PETL attributes damage to a person either (a) for her fault or (b) for her abnormally dangerous activities.

From a modern comparative perspective, the fault criterion should, therefore, not be employed to distinguish tortious liability from contractual liability, since both branches contain elements of both fault and strict liability.

28 *Riesenhuber*, ERCL 4, 119, 124 ff: (no-fault) remedies for non-performance are functionally equivalent to damages and the burden of proof is reversed (cf § 1298 ABGB).

29 *Zimmermann* (fn 1) 19f; *Kaser* (fn 2) 310.

30 An early example is the Prussian law on railway enterprises from 1838; for the common law cf *Rylands v Fletcher* [1868] United Kingdom House of Lords (UKHL) 1.

31 *AA Ehrenzweig*, Negligence Without Fault, California Law Review 54 (1966) 1422, 1429 ff; *Wagner* (fn 16) 1003, 1030.

32 *H Koziol*, Comparative Conclusions, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) no 8/36: § 5 EKHG (Austria), § 7 StVG (Germany); art 58 SVG (Switzerland); Loi Badinter no 85-677 (France); on English law *K Zweigert/H Kötz* [translated by T Weir], An Introduction to Comparative Law (3rd edn 1998) 666 f.

33 The drafters of the German Civil Code still perceived the principle of fault as the result of a higher cultural development, Protokolle des Entwurfs des BGB II (1898) II 1074.

34 *J Esser*, Die Zweispurigkeit unseres Haftungsrechts, JZ 1953, 129.

35 *Zimmermann* (fn 1) 22.

III. The main differences between contractual and tortious liability

- 14 With this in mind, one can further elaborate on the differences between contractual and tortious liability. The main structural difference is that contractual liability arises in relationships of two or more parties who are linked by a special nexus, whereas tort liability applies regardless of such a relationship.³⁶ The only link between a reckless driver and his victim is the traffic accident, ie the tort, itself. It will come as no surprise that this structural difference triggers a number of important practical consequences.³⁷
- 15 However, within the scope of this article it is impossible to elaborate on all of these differences. We need to leave aside private international law³⁸ and the international law of civil procedure,³⁹ as well as potential differences in the period of limitation,⁴⁰ and instead focus on the most important aspects. Especially from a Germanic perspective, these concern the compensation of pure economic loss (A), vicarious liability (B) and the burden of proof for fault (C).⁴¹

A. Pure economic loss

- 16 The first, and a particularly important, issue is pure economic loss. Pure economic loss is pecuniary loss which does not follow from harm to absolute rights such as personal rights or property rights.⁴² The question is whether pure economic interests are protected under contract law and tort law.

36 *C v Bar*, Gemeineuropäisches Deliktsrecht I (1996) no 1; *Zimmermann* (fn 1) 904.

37 *E Picker*, Vertragliche und deliktische Schadenshaftung, JZ 1987, 1041.

38 Regulation 'Rome I' (EC/593/2008) applies to contractual obligations, whereas the 'Rome II' Regulation (EC/864/2007) applies to non-contractual obligations.

39 Cf art 7 of the Brussels I Regulation (EU/1215/2012).

40 Cf *B Markesinis*, An Expanding Tort Law – The Price of a Rigid Contract Law, LQR 103 (1987) 354, 378; v *Gerven/Lever/Larouche* (fn 3) 34f.

41 *J Hager* in: J von Staudinger, Kommentar zum BGB (2017) Vor § 823 ff no 37.

42 Cf *W van Boom*, A Comparative Perspective, in: WH v Boom/H Koziol/C Witting (eds), Pure Economic Loss (2004) no 5 ff with further specifications.

1. Contract

Under contract law, the answer to this question is easy: pure economic loss can be recovered in all jurisdictions.⁴³ For instance, a seller who culpably fails to deliver purchased goods on time or delivers defective goods is generally liable to the buyer. After all, contracts are the primary vehicle to create and pursue financial interests. By virtue of a private agreement, the parties to a contract determine the extent to which their economic interests should be protected.⁴⁴ The legal order must therefore provide for far-reaching protection of these contractual interests. Otherwise, entering into contracts would be ‘*too risky*’.⁴⁵ This could have devastating effects on the economy and would be undesirable from an economic point of view.⁴⁶ Moreover, the contractual relationship is governed by trust, but prone to vulnerability: the parties to a contract open their financial spheres to their partners.⁴⁷ This is why a contracting party is not only liable ‘*for making things worse, [but] for not making them better*’.⁴⁸

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Of course, there are exceptions to this rule. A contracting party will not be liable to a contractual partner who incurs losses which are not covered by the ‘protective scope’ of the contract⁴⁹ or for ‘inadequate’ losses. But as a general rule, pure economic interests are universally protected under contract law.

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43 *H Koziol*, A Continental Lawyer’s Perspective, in: *W v Boom/H Koziol/C Witting* (eds), *Pure Economic Loss* (2004) no 13.

44 *Picker*, JZ 1987, 1041, 1044; *Zimmermann* (fn 1) 904.

45 *Koziol* (fn 43) no 17; *G Wagner*, Grundstrukturen des Europäischen Deliktsrechts, in: *R Zimmermann* (ed), *Grundstrukturen des Europäischen Deliktsrechts* (2003) 189, 213 f.

46 *R Welser*, Vertretung ohne Vollmacht (1970) 73 ff; *F Bydlinski*, System und Prinzipien des Privatrechts (1996) 210.

47 *CW Canaris*, Schutzgesetze – Verkehrspflichten – Schutzpflichten, in: *FS Larenz II* (1983) 27, 38; *W Fikentscher/A Heinemann*, Schuldrecht (11th edn 2017) no 38; *H Koziol*, Generalnorm und Einzelatbestände als Systeme der Verschuldenshaftung: Unterschiede und Angleichungsmöglichkeiten, *Zeitschrift für Europäisches Privatrecht (ZEuP)* 1995, 359, 363.

48 *T Weir*, in: *International Encyclopedia of Comparative Law XI/2*, Chapter 12, 5.

49 *E Rabel*, *Das Recht des Warenkaufs I* (1936) 496. For example, a bank would not be liable to its customers if its employee unlawfully discloses information on the customer’s financial status to tax authorities which consequently claim payment of taxes for prior years, cf *H Koziol*, *Haftpflichtrecht I* (4th edn 2020) no C/10/51. In Austria, liability for loss of profit is furthermore limited to gross negligence, § 1324 ABGB; but cf § 349 UGB.

2. Tort

19 In tort law, the answer to the question of the compensability of pure economic loss is not that clear. Granting damages for all such losses could restrict personal liberty of action to an intolerable extent.⁵⁰ This argument is often supported with the famous example of an opera singer who is negligently injured in a traffic accident.⁵¹ The singer therefore has to cancel his performance and can naturally recover the costs of medical treatment and loss of earnings. But the accident's consequences may go well beyond that. Can the opera operator recover his expenses if he has to reimburse the audience for cancelling the performance? Can the neighbouring innkeepers and the operator of a nearby garage recover their lost profits? Will the cloakroom attendant in the opera house be entitled to damages because he did not receive tips? German lawyers would routinely answer these questions in the negative, even though the victim has an undeniable interest in compensation. Where do their reservations come from?

a. *The formal structure of tort law*

20 At first sight, one might be inclined to point to the formal structure of German tort law. After all, the German Civil Code only protects life, physical integrity and health, freedom, property and 'other rights' under tort law (§ 823 para 1 BGB). These 'other rights' exclude pure economic interests.⁵² Clearly, § 823 BGB seems to leave no room for the compensation of pure economic loss.

21 This approach is also in line with Roman law, which restricted protection under tort law to specific patterns of interference with specific goods. Roman law mainly distinguished between *iniuria* (defamation of a freeman), *furtum* (theft in a broad sense) and the Aquilian delicts.⁵³ Chapter one of the *lex Aquilia* applied to the killing of a slave or a four-legged grazing animal. Under chapter three, damage to all other goods

50 *H Koziol*, Schadenersatz für reine Vermögensschäden, *Juristische Blätter (JBl)* 2004, 273, 274; *Picker*, *JZ* 1987, 1041, 1052; *Welser* (fn 46) 75.

51 *R Reinhardt*, *Der Ersatz des Drittschadens* (1933) 96 ff.

52 *Staudinger/Hager* (fn 41) § 823 no 20; *MüKo/Wagner* (fn 2) § 823 no 370 ff; *Zweigert/Kötz* (fn 19) 602.

53 *Zweigert/Kötz* (fn 19) 598.

by burning, breaking or smashing (*urere, frangere, rumpere*) allowed for the *actio legis Aquiliae*.

This idea is typical of a case law system, in which rules emerge from particular cases.⁵⁴ It still influences the work of common lawyers who – throughout the centuries – have established a ‘pigeon-hole system of nominate torts’.⁵⁵ However, this case-based approach soon turned out to be too inflexible. Roman lawyers therefore established the concept of *corrumpere* to deal with harmful conduct that was not *urere, frangere* or *rumpere*. The notion of *corrumpere* covered all cases of culpably inflicted deterioration of goods; remaining gaps could be filled with so-called *actiones in factum*.⁵⁶ Still, Roman jurists did not extend protection to pure economic interests.⁵⁷

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When continental lawyers finally overcame the Roman case-based approach in the Middle Ages, however, they started awarding damages for pure economic loss. Their very generous interpretation of the Latin concept *alterum non laedere*⁵⁸ appealed to natural lawyers like S Pufendorf, C Thomasius or C Wolff⁵⁹ and consequently inspired art 1382 (now art 1240) of the French *Code Civil* and § 1295 of the Austrian ABGB.⁶⁰ Both provisions draw upon the general principle that a tortfeasor is liable for any damage he has negligently or intentionally inflicted. Hence, they provide for a formal approach to tort liability fundamentally opposed to that of Roman law and the German Civil Code.⁶¹ Legislators throughout the world have followed suit and introduced similar clauses in their civil codes, for example in Italy (art 2043), Greece (art 914), the Netherlands (art 6:162 para 2 NBW), Portugal (art 483 para 1 *código civil*), Spain (art 1902 *código civil*) and Switzerland (art 41 OR).⁶² All these provisions provide judges with great flexibility to protect pure economic interests.

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54 Wagner (fn 45) 201; Zweigert/Kötz (fn 19) 607.

55 FF Stone, Touchstones of Tort Liability, Stanford Law Review 2 (1950) 259, 272.

56 Zimmermann (fn 1) 983 ff.

57 J Gordley, Edinburgh L Rev 1, 356.

58 Zimmermann (fn 1) 1022 ff with reference to *W Durantis'* Speculum iudiciale, which was compiled in 1271; cf Picker, JZ 1987, 1041, 1047 ff.

59 HP Benöhr, Die Redaktion der Paragraphen 823 und 826 BGB, in: R Zimmermann/ R Knütel/JP Meincke (eds), Rechtsgeschichte und Privatrechtsdogmatik (1999) 499, 503.

60 Wagner (fn 16) 1003, 1007 f.

61 Cf Koziol, ZEuP 1995, 359, 361; Wagner (fn 16) 1005 ff.

62 Zweigert/Kötz (fn 19) 620.

- 24 In this regard, one might draw a parallel to the UK. There, courts also reduced the fragmentation of tort law by establishing the tort of negligence,⁶³ which now ‘*outshines all of the other torts*’⁶⁴. In principle, this tort is supple enough to cover pure economic interests, too.⁶⁵ Such broad interpretation of the tort of negligence was indeed proposed by Lord *Devlin*, who rejected the distinction between pure economic loss and physical injury as pure ‘*nonsense*’.⁶⁶
- 25 The downside of open basic rules, however, is that courts might interpret them diversely.⁶⁷ The burden of defining the scope of protection is shifted from the legislator to courts.⁶⁸ This is why the German legislator refrained from introducing a similar provision in the German Civil Code.⁶⁹ Even though the first draft of the BGB still drew on a broad general clause,⁷⁰ the final drafters were concerned with avoiding excessive liability.⁷¹ The final version of § 823 para 1 BGB, therefore, deliberately deviated from the French example. A small concession to victims, however, can be found in two clauses imposing liability for pure economic loss for the breach of a protective statute (§ 823 para 2) and for intentional conduct *contra bonos mores* (§ 826).
- 26 This short comparative glimpse shows that the formal structure of tort law differs greatly throughout Europe, which has certainly shaped national lawyers’ views.⁷² It perfectly explains why German lawyers are

63 *Donoghue v Stevenson* [1932] UKHL 100.

64 *Wagner* (fn 16) 1003, 1014 f.

65 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4; *C Witting*, A Common Lawyer’s Perspective, in: WH v Boom/H Koziol/C Witting (eds), *Pure Economic Loss* (2004) no 22.

66 Lord *Devlin* in: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 517.

67 *Koziol* (fn 32) no 8/58 f; cf *Canaris* (fn 47) 35 ff.

68 *Canaris* (fn 47) 35 ff.

69 Protokolle II (fn 33) 571; *Wagner* (fn 45) 189, 213 f.

70 They followed the French example and the example of the General State Laws for the Prussian States, *Picker*, JZ 1987, 1041, 1051 with further references; *Zweigert/Kötz* (fn 19) 599 ff; for further details cf *Benöhr* (fn 59) 499 ff.

71 Protokolle II (fn 33) 571.

72 For example, French and Italian courts held a building contractor liable for the negligent interruption of an electricity supply, Cassation civile (Cass civ) 8.5.1970, Bulletin des Arrêts de la Cour de Cassation (Bull) II no 160; *G Hager*, Haftung bei Störung der Energiezufuhr, JZ 1979, 53; *R Omodei-Salè/A Zaccaria*, Italian Law, in: W v Boom/H Koziol/C Witting (eds), *Pure Economic Loss* (2004) no 18 f; German and English courts, on the other hand, did not hold building contractors liable in very similar cases, BGHZ 66, 388, 394; cf *E Picker*, Deliktsrechtlicher Eigentumschutz bei Störung der Energieversorgung? in: FS Koziol (2010) 813; *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27.

restrictive in granting damages for pure economic losses. Conversely, French, Austrian and Swiss lawyers would be expected to grant damages generously.

On closer inspection, however, this is not the case. On the contrary, comparative studies suggest that the various national systems converge on the practical results.⁷³ French courts have found their ways to restrict compensation of pure economic loss, especially by requiring a direct causal link (*lien de causalité*) between the negligent conduct and the damage.⁷⁴ The French *Cour de Cassation* decided a case closely resembling the opera singer example in favour of the tortfeasor. It quashed a verdict awarding damages to a theatre operator for the loss of his profits following the death of an actor.⁷⁵ Similarly, Austrian courts traditionally do not award damages for pure economic loss in non-contractual cases despite the broad general clause in § 1295 para 1 ABGB.⁷⁶ The same approach seems to be taken by Swiss courts.⁷⁷ Courts in all these countries have found the open basic rule to be too broad.

In conclusion, the formal structure of tort law does not necessarily answer the question whether pure economic loss is compensated in tort law. On the contrary, balancing the victim's interest and the actor's interest is a global and eternal task for tort law,⁷⁸ which must be dealt with at the substantive rather than at the formal level. This shifts the focus of attention to substantive matters.

b. *The substantive questions*

From a substantive viewpoint, we will find good 'policy'⁷⁹ reasons not to compensate pure economic loss in tort law.

73 *C v Dam*, European Tort Law (2nd edn 2013) 209 f; *Koziol*, ZEuP 1995, 359, 361 ff.

74 Cass civ 21.2.1979, *JurisClasseur Périodique* (JCP) 1979, IV, 145; *v Dam* (fn 73) 209; *H Honsell*, *Der Ersatz reiner Vermögensschäden in Rechtsgeschichte und Rechtsvergleichung*, in: FS W Lorenz (2001) 483, 487; *C Radé/L Bloch*, *French Law*, in: *v Boom/Koziol/Witting* (eds), *Pure Economic Loss* (2004) no 17 ff; *Wagner* (fn 16) 1003, 1015 ff.

75 Cass civ 14.11.1958, *Gazette du Palais* (*Gaz Pal*) 1959; *Zweigert/Kötz* (fn 19) 622.

76 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), *ABGB Kurzkommentar (KBB)* (6th edn 2020) § 1295 no 2 with further references. In Austria, this interpretation can legitimately be based on §§ 1295 para 2 and 1311 ABGB, *Zimmermann* (fn 1) 1042.

77 *Honsell* (fn 74) 483 f; on Italian law cf *Omodei-Salè/Zaccaria* (fn 72).

78 *v Dam* (fn 73) 219 ff.

79 *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27; *Markesinis*, LQR 93, 78, 110; *v Boom* (fn 42) no 92.

- 30 In this regard, commentators often refer to the example of lawful competition, which inevitably causes economic losses with less successful competitors. Still, these competitors cannot recoup their losses since lawful competition fosters economic growth and innovation and should not be impeded.⁸⁰
- 31 This example might be misleading. It focuses on the damage rather than on the conduct giving rise to the damage, even though the crucial point in determining liability is misconduct rather than the mere fact that somebody incurred a loss. A lawful competitor, however, can never be blamed for misconduct anyway, regardless of what type of damage results from his (lawful) behaviour.
- 32 Still, the example anticipates the main point: granting full protection of pure economic interests would impose an unreasonable standard of care. It would restrict general liberty of action to an intolerable extent.⁸¹ Granting compensation to every person that incurred pure economic loss would open the ‘floodgates’ to claims from all sources.⁸² This would force everybody to take costly precautions to avoid all sorts of potential damage. After all, one could become liable ‘*in an indeterminate amount for an indeterminate time to an indeterminate class*’.⁸³
- 33 In this regard, contract law and tort law are indeed fundamentally different. Contract law naturally limits the number of potential claimants to the contractual partners, whereas the potential victims of tortious conduct could literally be the rest of the world.⁸⁴ The negligent driver would not only be liable to the opera singer, but also to the opera operator, the surrounding innkeepers and garage operators and the

80 KBB/Karner (fn 76) § 1295 no 2; Koziol, JBl 2004, 274; Wagner (fn 45) 237 f.

81 Koziol, ZEuP 1995, 359, 363; E Picker, Positive Forderungsverletzung und culpa in contrahendo – Zur Problematik der Haftungen »zwischen« Vertrag und Delikt, Archiv für die civilistische Praxis (AcP) 183 (1983) 369, 471 ff; see R Jhering, Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen, Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts (JherJB) 4 (1861) 12 f: ‘anything and everything – an unwitting utterance, carrying a tale, making a false report, giving bad advice [...] would make one liable for the harm even if one was in perfect good faith; [...] conversation would be gravely inhibited, and the most innocent language would become a snare!’ (translated by Zweigert/Kötz (fn 32) 598).

82 v Boom (fn 42) no 84 ff; Canaris (fn 47) 27, 37; J Spier (ed), The Limits of Liability: Keeping the Floodgates Shut (1996); MüKo/Wagner (fn 2) § 823 no 370; but cf v Dam (fn 73) 209; Markesinis, LQR 103, 354, 380.

83 Cardozo, *Ultramares Corporation v Touche* (1931) 255 New York Reports (NY) 170, 174 North Eastern Reporter (NE) 441, 444.

84 Canaris (fn 47) 38; Picker, JZ 1987, 1041, 1052 ff; Koziol, ZEuP 1995, 359, 363.

cloakroom attendants. If his negligent driving causes a traffic jam, he could become liable to a carrier who cannot deliver on time, or to an entrepreneur who suffers a loss of profit because he cannot attend a business meeting for being stuck in traffic, etc.⁸⁵

Along with these floodgate concerns, the nature of pure economic interests speaks against their full protection. Whereas the rights to life, liberty or property have clear contours, pure economic interests are not at all obvious.⁸⁶ Respecting your neighbour's property is not very burdensome because it is easy to determine where the property starts and where it ends. But it is far more difficult to even recognise pure economic interests.

Furthermore, pure economic interests are ranked rather low on the scale of rights. Rights of personality deserve the highest protection, followed by property rights and other rights in rem. Pure economic interests, on the other hand, are not considered similarly important and do not enjoy the same level of protection.⁸⁷ In conclusion, the distinction between pure economic loss and physical injury cannot simply be rejected as 'nonsense'.⁸⁸ On the contrary, it is firmly based on good reasons.

c. *The basic rule and its exceptions*

From a Germanic perspective, pure economic loss is therefore generally not compensable under tort as a basic rule.

However, statutory law itself provides for exceptions to this rule. § 1311 ABGB and § 823 para 2 BGB extend liability for pure economic losses to the breach of protective statutes, which can be found in criminal law in particular. For example, fraudulent conduct by the tortfeasor makes him liable for pure economic loss.⁸⁹ Antitrust and competition rules may serve as further important examples. Fuelled by EU rules, 'private enforcement' by tort victims plays an ever-increasing role in this field.

85 *Koziol*, JBl 2004, 273, 274.

86 *Canaris* (fn 47) 27, 37; *Koziol* (fn 43) no 8 f; *Picker*, JZ 1987, 1041, 1054; cf *v Boom* (fn 42) 95.

87 *Koziol*, JBl 2004, 273, 275; *Markesinis*, LQR 103, 354, 380; *Witting* (fn 65) no 22; but cf *v Boom* (fn 42) no 79 ff.

88 *Wagner* (fn 45) 230.

89 *Förster* in: *Hau/Poseck* (eds), *Beck'scher Online-Kommentar BGB* (54th edn 2020) § 823 no 290; *Staudinger/Hager* (fn 41) § 823 no G 20.

- 38 Moreover, consequential loss, ie economic loss resulting from the infringement of absolute rights, is generally compensated within the boundaries of adequacy and protective scope.⁹⁰ After all, holding the tortfeasor liable for consequential damage does not subject him to additional duties since he is obliged to refrain from violating absolute rights anyway. Moreover, the floodgate concerns do not apply, since claims are limited to persons whose absolute rights have been violated.⁹¹
- 39 Furthermore, most legal systems provide for damages for relational loss.⁹² In cases of death or personal injury, the victim's relatives are entitled to damages for loss of financial support.⁹³ These rules take into account the particularly vulnerable position of these relatives, who depended on the victim's support.⁹⁴ Moreover, these rules only benefit a defined circle of claimants so that the tortfeasor is not liable to an infinite number of persons.
- 40 In addition, § 826 BGB and § 1295 para 2 ABGB hold the tortfeasor liable if he acted intentionally *contra bonos mores*. Starting from these provisions, the protection of pure economic interests has been cautiously expanded by courts and doctrine to the intentional infliction of harm without reasonable justification.⁹⁵ For example, the intentional infringement of contracts makes the wrongdoer liable for the victim's pure economic loss in many jurisdictions.⁹⁶ The tortfeasor's interest in his (intentional) action is not worth protecting. One might therefore tentatively conclude that tort law generally protects pure economic interests against particularly reprehensible conduct.
- 41 But courts and doctrine have not stopped there. On the contrary, they have extended protection of pure economic interests much further. German courts and doctrine especially have found § 823 para 1 BGB to be too restrictive.⁹⁷ This reveals an interesting convergence between the

90 *Koziol* (fn 43) no 24. Cf § 252 BGB and § 1324 ABGB (further limiting liability to gross negligence).

91 *Koziol*, JBl 2004, 273, 277 f.

92 *Koziol* (fn 43) no 28 f; v *Boom* (fn 42) no 56 ff.

93 § 1327 ABGB; § 844 para 2 BGB.

94 *W v Boom/H Koziol/C Witting*, Outlook, in: v *Boom/Koziol/Witting* (eds), Pure Economic Loss (2004) no 22.

95 *Koziol*, JBl 2004, 273, 277; v *Boom* (fn 42) no 34 ff.

96 *Koziol* (fn 43) no 25; v *Gerven/Lever/Larouche* (fn 3) 247 f; *Zweigert/Kötz* (fn 19) 610; *H Koziol*, Beeinträchtigung fremder Forderungsrechte (1967).

97 v *Bar* (fn 36) no 18; v *Dam* (fn 73) 84 f; *Koziol*, ZEuP 1995, 359, 361 f.

two fundamentally opposed formal approaches to tort law. Where the legislator has drafted a broad basic rule, doctrine and courts have restricted protection of pure economic interests (for example in Austria and France).⁹⁸ Where the legislator has taken a restrictive approach (for example in Germany), on the other hand, doctrine and courts have expanded protection. Fully excluding pure economic interests from protection under tort law would be *'neither fair nor just nor reasonable'*.⁹⁹

One prominent example for this expansion is transferred loss, ie loss which – in the special circumstances of the case – arises with a third party who is not the direct victim of the tort.¹⁰⁰ For example, if a buyer of goods already bears the risk, but has not yet acquired the property in the purchased goods, which are destroyed by a third party, his pure economic loss generally lies outside the protective scope of tort rules. Nevertheless, the tortfeasor should not receive a windfall profit and should therefore be subject to liability, either directly or indirectly, to the buyer.¹⁰¹ Here, the floodgate concerns do not apply.¹⁰²

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A further prominent example is liability at the pre-contractual stage (*culpa in contrahendo*). A duty of care towards the prospective contractual partner's pure economic interests is widely accepted in the Germanic countries even if a contract has not yet been concluded.¹⁰³ For example, potential parties to a contract must not raise expectations they know they cannot live up to.¹⁰⁴

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At first sight, it seems odd that the potential parties to a contract are liable according to contractual rules even though a contract has not yet been concluded. However, there are sound reasons for this result. Firstly, at the pre-contractual stage, the floodgate concerns do not apply: liability to an indeterminate class of victims is off the table if liabil-

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98 Koziol, ZEuP 1995, 359, 362; Wagner (fn 16) 1003, 1009.

99 v Boom (fn 42) 96 ff.

100 Koziol (fn 43) no 29; Markesinis, LQR 103, 354, 368 ff.

101 Koziol (fn 49) no 13/10 ff; v Boom (fn 42) no 75 f: the technical and procedural details are subject to ongoing discussion.

102 v Boom/Koziol/Witting (fn 94) no 23.

103 Canaris (fn 47) 27, 90 ff; Koziol, Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich, JBl 1994, 209, 211; v Boom (fn 42) no 51; Welser (fn 46) 73 ff; cf Koziol (fn 32) no 8/179; F Kessler/E Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, Harvard Law Review 77 (1964) 401.

104 Medicus, Die culpa in contrahendo zwischen Vertrag und Delikt, in: FS Keller (1989) 205, 212 ff; from a comparative perspective Kessler/Fine, Harvard L Rev 77 (1964) 401, 404.

ity is limited to potential contracting parties.¹⁰⁵ Secondly, the threat to pure economic interests is as high as in a contractual relationship. After all, the potential parties to a contract open their personal and financial spheres to each other.¹⁰⁶ This also makes pure economic interests more obvious in a pre-contractual environment.¹⁰⁷ Additionally, the partners to a contract pursue their own financial interests. As a corollary, their duties may be intensified.¹⁰⁸ Finally, effective private law rules must not only protect contractually determined interests, but also the preparation of contracts.¹⁰⁹ Otherwise, people might abstain from entering into contracts. In short, the pre-contractual relationship resembles the contractual relationship much more than the mere tortious setting. This is why pure economic interests are protected.

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From a comparative viewpoint, another particularly important exception is negligent statements to guide third parties. If an expert makes a negligent statement on the value of real estate upon the request of a borrower, he is also held liable for the creditor bank's pure economic loss if his expertise was designed to influence the bank's credit decision.¹¹⁰ In such cases, the bank depends on the expert's opinion as trusted source. This makes the expert's conduct particularly dangerous for the bank's financial interests.¹¹¹ Moreover, the floodgates will not be opened since the liability risk is limited to transactions for which the expertise was drafted.¹¹² In addition, the absence of liability would increase transaction costs, because the bank would have to pay for an additional expert's opinion.¹¹³ Courts all around the globe have therefore held experts liable vis-à-vis third parties, mostly based on tort.¹¹⁴ In

105 *Welser* (fn 46) 76.

106 *Fikentscher/Heinemann* (fn 47) no 38.

107 *Picker*, AcP 183, 369, 481 ff.

108 Cf *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 4/9; *Welser* (fn 46) 76 ff.

109 *Welser* (fn 46) 76.

110 *CW Canaris*, Die Reichweite der Expertenhaftung gegenüber Dritten, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* (ZHR) 163 (1999) 206; *E Karner*, Haftung für Rat und Auskunft zwischen Vertrag und Delikt, in: FS Koziol (2010) 695, 703 ff.; *R Welser*, Die Haftung für Rat und Auskunft (1983) 80 ff.

111 *Canaris*, ZHR 163, 206, 222 ff.; *Karner* (fn 110) 695, 705; cf *S Kalss*, The Liability of Banks, in: v Boom/Koziol/Witting (eds), Pure Economic Loss (2004) no 17.

112 Cf v Boom/Koziol/Witting (fn 94) no 20 f.

113 *Karner* (fn 110) 695, 704 f.

114 *W Lorenz*, Das Problem der Haftung für primäre Vermögensschäden bei der Erteilung einer unrichtigen Auskunft, in: FS Larenz (1973) 575.

the Germanic countries, however, experts' liability, like *culpa in contrahendo*, is contractually flavoured.¹¹⁵

3. Results

In conclusion, there are a large number of exceptions to the basic rule. It is true that the basic rule would be '*simple to understand and easy to apply*,¹¹⁶ but it can only be maintained for the core of tort law.¹¹⁷ It cannot be upheld for intentional misconduct, transferred loss, pre-contractual liability or negligent statements, just to mention a few. This is why Anglo-Saxon courts have employed the tort of negligence to partially protect pure economic interests.¹¹⁸ However, the requirement of a duty of care works as a, still somewhat obscure, filter to limit protection to cases of '*proximity*'. A similar, refined approach is advocated by *H Koziol*, who has drafted ten rules on the compensation of pure economic loss, taking into account factors like floodgate concerns, proximity, risk and intent.¹¹⁹ This concept also inspired art 2:102 PETL,¹²⁰ according to which, '*proximity*', '*interests of the actor*', '*public interests*' and '*the fact that the actor is aware of the fact that he will cause damage even though his interests are [...] valued lower than those of the victim*' must be considered. This rule seeks to strike a fair balance between the actor's interests and the victim's interests by tearing down the strict dichotomy between contract and tort.

46

B. Vicarious liability

Against this backdrop, the seemingly clear-cut line between contract and tort has become rather blurred. The same result will be shown for vicarious liability. But at first sight, there is again a striking difference between contractual and tortious liability.

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115 *Canaris*, ZHR 163, 206, 222 ff; *Markesinis*, LQR 103, 354, 363 ff.

116 Lord *Brandon*, in: *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 no 31.

117 *Koziol*, JBl 1994, 209, 214.

118 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4.

119 *Koziol* (fn 43) no 30 ff.

120 *H Koziol* in: *European Group on Tort Law (EGTL)* (ed), *Principles of European Tort Law* (2005) art 2:102 no 5.

1. Contract law

48 In the contractual setting, the master is generally liable for the acts of a servant he employs in order to perform a contract (§ 1313a ABGB, § 278 BGB, art 101 OR). This concept not only dates back to Roman law,¹²¹ but is also well-established in all legal traditions.¹²² Vicarious liability under contract law is strict; it applies regardless of fault on the part of the principal.

49 This notion is firmly based on the principle of corrective justice. The master shall ‘*take the bitter with the sweet*’:¹²³ if – by employing the servant – he is able to perform more contracts, liability for the servant’s unlawful acts comes as a corollary. The principal’s contractual partner should not be disadvantaged by any division of labour.¹²⁴ If there were no vicarious liability, he would be left without a claim if the servant breached a contractual duty he himself was not subject to.¹²⁵ But even if the servant were liable himself, the contractual partner should not be forced to sue the servant, who will often be less wealthy than the principal.¹²⁶ Thus, the insolvency risk of the servant is borne by the principal rather than his contractual partner who has no right to choose the servant.¹²⁷ In the Germanic countries, the principal is therefore also vicariously liable for wrongful acts of independent contractors.¹²⁸

50 In accordance with this reasoning, however, the principal’s liability is limited to cases in which the servant acted ‘*within the scope of his employment*’. The principal is not liable for his servant’s ‘private’ acts. The

121 *H Honsell*, Die Haftung für Hilfspersonen, in: FS Schwenzler (2011) 779, 780; *Zimmermann* (fn 1) 1120 f.

122 *S Galand-Carval*, Comparative Report, in: J Spier (ed), Unification of Tort Law: Liability for Damage Caused by Others (2003) 289, 290 f.

123 *Riesenhuber*, ERCL 4, 119, 126.

124 *Bydlinski* (fn 46) 206 ff; *A Ehrenzweig*, System des österreichischen allgemeinen Privatrechts II/1 (2nd edn 1928) 295; *HP Westermann* in: Erman, BGB (15th edn 2017) § 278 no 1; *M Wilburg*, Haftung für Gehilfen, Zentralblatt für die juristische Praxis (ZBL) 1930, 641, 649.

125 *Koziol* (fn 108) no 6/106.

126 *H Koziol*, Haftpflichtrecht II (3rd edn 2018) no D/2/2.

127 *S Grundmann* in: Münchener Kommentar zum BGB (8th edn 2019) § 278 no 3.

128 *KBB/Karner* (fn 76) § 1313a no 4 with further references; *Ondreasova*, Die Gehilfenhaftung (2013) 50 ff; *G Caspers* in: J von Staudinger, Kommentar zum BGB (2019) § 278 BGB no 26; *MüKo/Grundmann* (fn 127) § 278 no 45; *E Schmidt*, Zur Dogmatik des § 278 BGB, AcP 170 (1970) 502, 505; on intricate borderline cases cf *B Burtscher*, Der Erfüllungsgehilfenbegriff im Lichte der aktuellen Rechtsprechung, Österreichische Juristenzeitung (ÖJZ) 2014, 1056.

servant's (mainly intentional) acts committed merely on the occasion of performing the contract do not give rise to vicarious liability.¹²⁹ This distinction between acts committed merely on the occasion of performing the contract and acts within the 'scope of employment' is made under all jurisdictions.¹³⁰ However, the question whether the servant's wrongful act lies within the scope of his employment or whether he has gone 'on a frolic of his own'¹³¹ can be very intricate. To a certain extent, it remains a matter of judicial discretion.¹³²

From a comparative perspective, however, German and Austrian courts and doctrine tend towards a rather restrictive approach. Prevailing opinion would not hold liable a principal whose coach driver raped a passenger he was supposed to transport.¹³³ A company operating a home for the elderly was not held liable for its employee who had stolen a resident's savings book.¹³⁴ And a bank was not held liable for the fraudulent conduct of a bank adviser who had deceived one of the bank's clients.¹³⁵ Comparative studies indicate that these cases would be decided differently in most other countries.¹³⁶ This is especially true for France, where courts have even held the operator of a cinema liable for an employee who had lured a customer to the basement to murder her.¹³⁷

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129 Staudinger/Caspers (fn 128) § 278 no 52 ff; MüKo/Grundmann (fn 127) § 278 no 47 ff; Koziol (fn 108) no 6/107 ff; Erman/Westermann (fn 124) § 278 no 39; but cf E Schmidt, AcP 170, 502, 508; K Spiro, Die Haftung für Erfüllungsgehilfen (1984) 240 ff.

130 S Galand-Carval (fn 122) 301.

131 *Joel v Morrison* (1834) 6 Carrington & Payne's Nisi Prius Reports (C & P) 501 = 172 English Reports (Eng Rep) 1338; *YB Smith*, Frolic and Detour, Columbia L Rev 23 (1923) 444; cf H Fleischer, Zur Privatsphäre von GmbH-Geschäftsführern und Vorstandsmitgliedern: Organpflichten, organschaftliche Zurechnung und private Umstände, Neue Juristische Wochenschrift (NJW) 2006, 3239, 3241.

132 *Roth v First National Bank of New Jersey*, 1979, 169 New Jersey Superior Court Reports (NJ Super) 280, 404 Atlantic Reporter, Second Series (A 2d) 1182; *B Burtscher*, Haftung bei Multiorganschaft (2019) 61 ff, 153 ff.

133 *Ehrenzweig* (fn 124) 296; *M Wilburg*, ZBl 1930, 641, 660 f rejecting a French decision.

134 3 Ob 296/98w; cf Koziol (fn 126) no D/2/48 ff.

135 3 Ob 283/06y Österreichisches BankArchiv (ÖBA) 2007, 744 (Koziol).

136 *J Spier*, Comparative Report, in: J Spier (ed), Unification of Tort Law: Liability for Damage Caused by Others (2003) 309 ff; *S Schäfer*, Zur Haftung für »Gelegenheitsdelikte« der Gehilfen, *RabelsZ* 22 (1957) 409; cf for example *Lister v Heskley Hall Ltd* [2001] UKHL 22; *DA Brodie*, Enterprise Liability: Justifying Vicarious Liability, Oxford Journal of Legal Studies 2007, 493; *Burtscher* (fn 132) 159 ff.

137 *Zweigert/Kötz* (fn 19) 641; *S Galand-Carval*, French Law, in: Spier (ed), Unification of Tort Law (2003) 53.

52 But despite these intricate borderline cases, the general rule that the master is liable for his servants' acts stands firmly in contract law.

2. Tort law

53 As opposed to contract law, the comparative legal background in tort law is disparate. Vicarious liability in tort law has therefore traditionally been a fertile playground for comparative lawyers.

a. Comparative background

54 Generally, one can distinguish two markedly different approaches. Whereas the Germanic rules on vicarious liability are lax, the principle of *respondeat superior* is firmly enshrined in the common law and in the Romanistic countries.¹³⁸ Accordingly, the master is held vicariously liable for all wrongful acts of his servants committed '*in the course of their employment*'.¹³⁹ The most famous statutory anchor for this concept is art 1242 (formerly art 1384) *Code Civil*.¹⁴⁰

55 The roots of *respondeat superior* can be traced back to the Roman noxal liability, ie liability of the *paterfamilias* for wrongful acts committed by his children or slaves.¹⁴¹ The main justification for this plausible rule, however, is provided by the economic analysis of law.¹⁴² Since the servant's financial means are usually limited, he will often not be able to bear the potentially high costs of accidents which may happen in the course of his employment. Hence, he has little or no incentive at all to negotiate with his principal about insurance cover since he would then have to pay his share of the insurance premium.¹⁴³ The principal, on the other hand, is best suited to obtain insurance.¹⁴⁴ Moreover, if the principal is an entrepreneur, he can spread insurance costs among his

138 *Zweigert/Kötz* (fn 19) 638 ff.

139 *Prosser/Keeton*, On the Law of Torts (5th edn 1984) 502 ff; *AO Sykes*, The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines, *Harvard Law Review* 101 (1988) 563.

140 For further rules in other countries cf *Honsell* (fn 121) 782.

141 *Zimmermann* (fn 1) 1118 ff; *Wagner* (fn 45) 290 f.

142 *H Kötz*, Deliktshaftung für selbständige Unternehmer, *ZEuP* 2017, 283, 285.

143 *AO Sykes*, The Economics of Vicarious Liability, *Yale LJ* 93 (1984) 1231, 1242; *HB Schäfer/C Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts (5th edn 2012) 407 ff; *Wagner* (fn 45) 300.

144 *Sykes*, *Yale LJ* 93, 1231, 1236.

customers by raising prices for his products.¹⁴⁵ Additionally, the master has control over his servants who act within his sphere.¹⁴⁶ Finally, vicarious liability works as an incentive to choose particularly careful servants.¹⁴⁷

Still, the Germanic legal family takes a completely different stance. § 831 BGB only holds the master liable if he did not exercise the necessary care in the selection or supervision of his agent (*culpa in eligendo vel custodiendo vel inspiciendo*). Hence, liability is not strict; the burden of proof, however, rests on the master.¹⁴⁸ This rule results from a deliberate rejection of the French approach, which the drafters of the BGB considered incompatible with German ideas of justice and fairness.¹⁴⁹ A similar provision can be found in art 55 of the Swiss *Obligationenrecht* (OR). § 1315 of the Austrian ABGB differs from the German and Swiss approach. According to § 1315, the master is liable only if he employed an unqualified servant (strict liability) or if he knowingly employed a dangerous servant (fault liability).

Despite these important differences in detail between § 831 BGB, art 55 OR and § 1315 ABGB, all three provisions provide for similar practical results: only in rather exceptional cases will the master be liable for his servant's wrongful acts under tort law. This concept will not only sound odd to most lawyers around the globe who are familiar with the notion of *respondeat superior*, it also frequently puzzles observers without a legal background from the Germanic countries.

Ever since their promulgation, § 831 BGB, art 55 OR and § 1315 ABGB have therefore been subject to widespread criticism by the legal community. This criticism dates back to the genesis of the German Civil Code, when an experts' report already put forward the idea of strict vicarious liability in tort law.¹⁵⁰ Later, influential working groups repeatedly called for substantial reforms of the 'manifestly underdeveloped'¹⁵¹ rules on

145 H Koziol, »Supplementary Liability«, in: H Koziol/U Magnus (eds), *Essays in Honour of Jaap Spier* (2016) 161, 178, *Prosser/Keeton* (fn 139) 500 f; cf *v Dam* (fn 73) 512.

146 This is why, under the common law, the master is not liable for independent contractors, *Prosser/Keeton* (fn 139) 509 ff; *Kötz*, *ZEuP* 2017, 283. This notion, however, is undermined by the concept of non-delegable duties, *v Dam* (fn 73) 508.

147 *Prosser/Keeton* (fn 139) 501. An additional, albeit in itself unsatisfactory, justification is that '*damages are taken from a deep pocket*', *T Baty*, *Vicarious Liability* (1916) 154.

148 *MüKo/Wagner* (fn 2) § 831 no 50 ff.

149 *Zimmermann* (fn 1) 1125.

150 *Wagner* (fn 45) 300 f with further references.

151 *Bydlinski* (fn 46) 213, translation by the authors.

vicarious liability in all Germanic countries.¹⁵² However – heavily contested by enterprise associations – these efforts were bound to fail. The rules on non-contractual vicarious liability have turned out to be a *'pièce de résistance'*¹⁵³ and continue to be a *'major source of embarrassment'* to the Germanic legal community.¹⁵⁴

b. 'Escape Strategies'

59 Germanic doctrine, courts and practice have therefore been forced to develop a number of escape strategies to circumvent the lax rules on vicarious liability.¹⁵⁵

60 Firstly, German and Swiss courts tend to overstretch the requirements for exculpation under § 831 BGB and art 55 OR.¹⁵⁶ Secondly, business liability insurance contracts for employers usually cover harm caused by their employees in the course of their employment.¹⁵⁷ This has reduced the practical importance of § 831 BGB, § 1315 ABGB, art 55 OR to a large extent.¹⁵⁸

61 Thirdly, corporations are held liable for wrongful acts committed by their directors and officers regardless of whether the requirements of § 831 BGB, § 1315 ABGB or art 55 OR are met.¹⁵⁹ Acts of directors and officers are generally attributed to the corporation.¹⁶⁰ This notion is firmly based on the maxim that legal entities should not be privileged in comparison with natural persons who are liable for their

152 For Germany see *Schmidt*, AcP 170, 502, 520 ff; for Switzerland see *P Widmer*, Reform und Vereinheitlichung des Haftpflichtrechts auf schweizerischer und europäischer Ebene, in: R Zimmermann (ed), Grundstrukturen des Europäischen Deliktsrechts (2003) 171 ff; for Austria *H Koziol*, Die außervertragliche Unternehmerhaftung im Diskussionsentwurf eines neuen österreichischen Schadenersatzrechts, JBl 2006, 18.

153 *Honsell* (fn 121) 779.

154 *Zimmermann* (fn 1) 1126.

155 *v Bar* (fn 36) no 184 ff; *v Gerven/Lever/Larouche* (fn 3) 524.

156 *K Larenz/CW Canaris*, Schuldrecht BT II/2 (13th edn 1994) 483; *A Matusche-Beckmann*, Das Organisationsverschulden (2001) 32 f, 101 ff.

157 *Honsell* (fn 121) 785; *S Perner/M Spitzer/G Kodek*, Bürgerliches Recht (6th edn 2019) 338.

158 *Kötz*, ZEuP 2017, 283, 284; *K Schmidt*, Grundlagen im Zivil- und Versicherungsrecht, Karlsruher Forum 1993 (1993) 4, 5; *MüKo/Wagner* (fn 2) § 831 no 2.

159 § 31 BGB, art 55 ZGB.

160 10 Ob 86/14s; *Rummel/Reischauer* (fn 15) § 1315 no 2a; *Hadding* in: *Soergel I* (13th edn 2000) § 31 no 1; *E von Caemmerer*, Objektive Haftung, Zurechnungsfähigkeit und »Organhaftung«, in: *FS Flume I* (1978) 359, 365; from a comparative angle *Wagner* (fn 45) 291 ff; *Burtscher* (fn 132) 51 ff.

own acts.¹⁶¹ Gradually, liability has therefore been extended to all representatives of corporations that hold an executive, responsible or supervisory function which would otherwise be executed by a sole proprietor himself.¹⁶² Courts, however, have occasionally abused this concept and extended it to subordinate employees, like foremen or attendants.¹⁶³ This strategy clearly serves to circumvent the weak rules on vicarious liability.

Within this article, however, a fourth ‘escape strategy’ deserves special attention: courts and doctrine apply contractual rules to non-contractual cases.¹⁶⁴

The most prominent example has already been introduced above: *culpa in contrahendo*. At the pre-contractual stage, the contractual rules on vicarious liability apply.¹⁶⁵ In this context, pre-contractual duties comprise duties to protect the presumptive contractual partner (‘positive malperformance’), which can be illustrated by a famous case decided by the German *Reichsgericht*. The plaintiff entered the defendant’s warehouse in order to purchase a carpet, but was accidentally injured by the defendant’s employee. The *Reichsgericht* held the defendant vicariously liable under § 278 BGB. It considered the relationship between the potential buyer and the potential seller as contractually flavoured, even though a contract with the plaintiff had not been concluded.¹⁶⁶

From a comparative perspective, one might object that this case should rather be dealt with under tort law.¹⁶⁷ But there is undoubtedly a special relationship between the prospective partners to a contract. As has been pointed out before in no 43 ff (III.A.2.c.), they open their personal spheres to their presumptive contractual partners, making

161 *H Koziol*, Zurechnung ungetreuer Bank-Mitarbeiter (2004) no 84; *H Westermann*, Haftung für fremdes Handeln, Juristische Schulung (JuS) 1961, 333, 335; cf § 26 ABGB.

162 *Bydlinski* (fn 46) 217 ff; *M Martinek*, Repräsentantenhaftung (1979); from a comparative perspective *Galand-Carval* (fn 122) 293.

163 8 Ob 84/02i; 4 Ob 179/99y; cf *M Spitzer*, Neuordnung der Deliktshaftung der juristischen Person? in: FS Iro (2013) 207, 213 ff.

164 *MüKo/Wagner* (fn 2) § 831 no 2.

165 *Fikentscher/Heinemann* (fn 47) nos 38, 89; *KBB/Karner* (fn 76) § 1294 no 5; *D Medicus/J Petersen*, Allgemeiner Teil des Bürgerlichen Rechts (11th edn 2016) § 30 no 44; *Rummel/Reischauer* (fn 15) Vor §§ 918–933 no 14; *Welser* (fn 46) 79 f.

166 RG 7.12.1911, RGZ 78, 239.

167 *v Bar* (fn 36) no 477.

them especially vulnerable to misconduct. Moreover, each contracting party pursues his own economic interests and can therefore be subject to intensified duties. In short, the pre-contractual setting does indeed closely resemble the ‘real’ contractual setting, which is why the contractual rules on vicarious liability are applied.¹⁶⁸

- 65 Another prominent inroad into contract law in the Germanic countries is made by ‘contracts with protective purpose in favour of third parties’.¹⁶⁹ One prominent example is product liability. Under general private law rules, the ultimate consumer who is harmed by a defective product cannot claim damages from the seller if the seller did not do anything wrong. But the consumer cannot claim damages from the manufacturer either if he did not enter into a contractual relationship with him, as long as the requirements of § 831 BGB, § 1315 ABGB or art 55 OR are not met. To fill this gap, doctrine and courts established a ‘quasi-contractual’ liability based on a ‘contract with protective purpose in favour of third parties’ long before the Product Liability Directive entered into force.¹⁷⁰ Since the consumer is foreseeably affected by the manufacturer’s contract with the seller, the manufacturer owes a ‘quasi-contractual’ duty to the consumer. The consumer shall not be disadvantaged by the division of labour between the seller and the manufacturer. Therefore, the manufacturer is held vicariously liable for the negligent acts of his employees.

3. Results

- 66 In conclusion, doctrine and courts have circumvented the Germanic rules on vicarious liability. Modern statutes have already incorporated strict vicarious liability in tort law, mainly for hazardous activities. For example, motor vehicle owners and railroad operators are liable under tort law for the negligent acts of any person using their vehicles with their permission.¹⁷¹ These rules have undermined the weak rules on

168 *Welser* (fn 46) 76.

169 *K Larenz*, NJW 1956, 1193; *F Bydlinski*, Vertragliche Sorgfaltspflichten zugunsten Dritter, JBl 1960, 359; *CW Canaris*, Ansprüche wegen positiver Forderungsverletzung und Schutzwirkung für Dritte bei nichtigen Verträgen, JZ 1965; *KBB/Karner* (fn 76) § 1295 no 19 with further references.

170 Directive 85/374/EEC.

171 § 19 para 2 EKHG; §§ 7, 18 StVG.

vicarious liability. From a policy perspective, the outdated Germanic rules on vicarious liability should therefore be discarded.¹⁷²

However, there is an ongoing discussion about the scope of reform. Following the common law and the Romanistic tradition, art 6:102 PETL¹⁷³ provides for vicarious liability for all types of ‘auxiliaries’. Some Germanic lawyers, however, struggle with the notion of strict vicarious liability for occasional helpers performing daily works.¹⁷⁴ They suggest that vicarious liability should rather be restricted to enterprises for the wrongful acts committed by their employees in the course of their employment.¹⁷⁵ A similar rule was stipulated by § 331 of the Civil Code of the German Democratic Republic. Commentators have therefore argued that this rule could serve as inspiration for future reforms.¹⁷⁶

In the meantime, the creative solutions by Germanic courts and doctrine have relieved the pressure for reforms, especially by blurring the seemingly clear-cut line between contract and tort.

C. Burden of proof

A third important feature distinguishing tort from contract is the burden of proof. Generally, the burden of proof rests on the plaintiff. In contract law, however, the burden of proof for fault is shifted to the debtor. He has to prove that neither he nor his servants acted negligently (§§ 280 BGB, 1298 ABGB).¹⁷⁷

There is a lively discussion in the literature on the rationale for these provisions. Commentators frequently refer to the fact that the debtor has better access to the information necessary for the determination of negligence. The creditor would therefore be in a weak position if he had

172 *Zweigert/Kötz* (fn 32) 643 ff; *MüKo/Wagner* (fn 2) § 831 no 5.

173 *O Moréteau* in: *EGTL* (ed), *Principles of European Tort Law* (2005) art 6:102 no 1.

174 *F Bydlinski*, *Zur Haftung für Verrichtungsgehilfen*, *Zeitschrift für Verkehrsrecht* (ZVR) 1980, 354, 357 ff; *Koziol* (fn 32) no 8/258.

175 *G Brüggemeier*, *Haftungsrecht* (2006) 176 ff; *Koziol* (fn 145) 178; cf also *Brodie* (fn 136) 493; for a further distinction between large and small enterprises *Larenz/Canaris* (fn 156) 484.

176 *G Brüggemeier*, *Organisationshaftung*, *AcP* 191 (1991) 33, 41 ff; but cf *Wagner* (fn 45) 303 ff.

177 The burden of proof for intentional acts remains with the claimant, *W Ernst* in: *Münchener Kommentar zum BGB* (8th edn 2019) § 280 no 38; *KBB/Karner* (fn 76) § 1298 no 5.

to prove the debtor's negligence.¹⁷⁸ One might add that contracting parties open their personal and financial spheres to their partners, which makes them particularly vulnerable.¹⁷⁹ Furthermore, the notion of a contractual promise comes into play: since the debtor promises to perform the contract, he should be subject to a less convenient burden of proof if he fails to do so.¹⁸⁰ Hence, an inconvenient burden of proof also encourages the debtor to comply with his contractual promises.¹⁸¹

71 In practice, §§ 280 BGB, 1298 ABGB may be of great use for the creditor in enforcing his claims.¹⁸² It will therefore come as no surprise that courts and doctrine have also reduced the differences between contract and tort in this area. Hence, the burden of proof is frequently reversed at the pre-contractual stage (*culpa in contrahendo*).¹⁸³ Similarly, courts and doctrine reverse the burden of proof when applying contracts with a protective purpose in favour of third parties.¹⁸⁴ This might prove especially helpful in product liability cases which are not covered by the Product Liability Directive. Interestingly, a similar approach seems to be taken in France, where courts grant the ultimate consumer a contractual action against the manufacturer providing him with a more favourable standard of proof.¹⁸⁵

72 In conclusion, the line between contract and tort is blurred as regards the burden of proof, too. Courts and doctrine have partially applied the more generous burden of proof to specific cases outside its original contractual setting.

178 Prölss, Die Beweislastverteilung nach Gefahrenbereichen, Versicherungsrecht (VersR) 1964, 901; Riesenhuber, ERCL 4, 119, 131; Welser (fn 46) 267; cf G Kodek in: Kletečka/Schauer (eds), ABGB-ON¹⁻⁰³ (2018) § 1298 no 2; contra Rummel/Reischauer (fn 15) § 1298 no 3a; Posner, Mich L Rev 107, 1431, 1444 points out that this would be equally true in tort law. He suggests that the different standard can only be explained with historical contingencies.

179 Koziol, JBl 1994, 209, 214; but cf R Reischauer, Neuere Rechtsprechung und Lehre zu § 1298 ABGB (2. Teil), JBl 1998, 560, 564.

180 Kletečka/Schauer/Kodek (fn 178) § 1298 no 2; Koziol (fn 49) no 16/24; H Stoll, Haftungsverlagerung durch beweisrechtliche Mittel, AcP 176 (1976) 145, 149 f; but cf R Reischauer, Die Anwendbarkeit des § 1298 ABGB bei Verletzung von Neben(Leistungs)-, Schutz- und Sorgfaltspflichten, ÖJZ 2000, 534, 541 f.

181 Posner, Mich L Rev 107, 1431, 1444.

182 Cf Stoll, AcP 176, 145.

183 BGH NJW 1962, 31; Koziol (fn 49) no 16/30 ff; M Wolf/J Neuner, Allgemeiner Teil des Bürgerlichen Rechts (11th edn 2016) § 36 no 18; Welser (fn 46) 261 ff.

184 P Gottwald in: Münchener Kommentar zum BGB (8th edn 2019) § 328 no 166; KBB/Karner (fn 76) § 1295 no 19; S Klumpp in: Staudinger (fn 41) (2015) § 328 no 91.

185 Markesinis, LQR 93, 78, 99 ff.

IV. The boundary zone between contract and tort

From the above we can conclude that there are substantial differences between contract law and tort law. This is why the ‘*rigid demarcation*’¹⁸⁶ between contract and tort is still firmly established in all jurisdictions. But we have also seen that the line between contract law and tort law is not as clear-cut as it may seem. Contract and tort have always been ‘sisters’¹⁸⁷ rather than adversaries. 73

In the Germanic countries, pre-contractual liability, product liability and liability for negligent statements have a contractual flavour. In the Anglo-Saxon world, on the other hand, these cases are dealt with under tort law.¹⁸⁸ The Germanic approach has therefore been criticised as a ‘*rather extravagant encroachment of contractual remedies on the law of delict*’.¹⁸⁹ On the other hand, common lawyers are impressed by this approach, since they struggle to convincingly base liability on tort in these cases.¹⁹⁰ After all, the House of Lords justifies experts’ liability vis-à-vis third parties on the basis of a ‘*relationship equivalent to contract*’¹⁹¹ between the expert and the creditor. Hence, there is obviously a strong interdependence between contract and tort. From a UK perspective, B Markesinis therefore pointed out that ‘*an expanding tort law [is] the price of a rigid contract law*’.¹⁹² From a Germanic perspective, one might as well observe an ‘*inflation of contract law [at] the price of a rigid tort law*’.¹⁹³ 74

However, there is no need to proclaim the ‘*Death of Contract*’¹⁹⁴ or the ‘*Death of Tort*’. One should simply recognise that there is a boundary 75

186 *Markesinis*, LQR 103, 354, 384.

187 *Wagner* (fn 45) 197; cf *JC Smith*, *Economic Loss and the Common Law Marriage of Contracts and Torts*, *University of British Columbia Law Review* (UBC L Rev) 18 (1984) 95.

188 *Kötz*, ZEuP 2017, 283, 289; *Markesinis*, LQR 103, 354, 372 ff.

189 *Zimmermann* (fn 1) 1126; cf *Brüggemeier* (fn 175) 135 ff: ‘escape’ to contract law.

190 *Markesinis*, LQR 103, 354, 371.

191 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4; cf *Nocton v Lord Ashburton* [1914] AC 932.

192 *Markesinis*, LQR 103, 354; cf *AJE Jaffey*, *Contract in tort’s clothing*, *Legal Studies* (LS) 5 (1985) 77.

193 *Wagner* (fn 45) 236.

194 *G Gilmore*, *The Death of Contract* (1974).

zone between the two realms.¹⁹⁵ Tort and contract are linked by a chain of intermediate steps, including *culpa in contrahendo*, contracts with protective effects in favour of third parties and negligent statements to guide third parties. Undoubtedly, the pre-contractual relationship between two prospective contracting parties is much more intense than the relationship between a reckless driver and his victim. The same is true for the relationship between a creditor and an expert or between an ultimate consumer and a manufacturer.

76 This idea of convergence between tort and contract might still ‘*bemuse*’¹⁹⁶ some lawyers who are used to a strict distinction between contract and tort. But once formal classifications are discarded, one can direct attention to the substantive questions: Should pure economic loss be compensated? Should the master be vicariously liable for his servants? Should the burden of proof be reversed? As pointed out, scholars have carved out the substantive reasons to answer these questions regardless of formal classifications. In this regard, it does not matter whether experts’ liability is based on contract or tort. What matters is that there are substantive reasons to hold the expert liable for pure economic loss.

77 This finding tears down the strict dichotomy between contract and tort. It provides courts with the necessary flexibility to find adequate solutions for emerging problems. For example, the issuer of a prospectus is frequently held liable for investors’ pure economic losses. After all, a false prospectus poses a particular threat to the patrimony of an investor, who relies on the prospectus as the primary source of information.¹⁹⁷ Prospectus liability is therefore another example of liability in the boundary zone of contract and tort. Certainly, new problems will emerge within this boundary zone. In order to find adequate solutions to these cases, courts will have to apply a flexible liability regime without the formal restraints posed by the classical *summa divisio obligationum*.

195 *Canaris* (fn 47) 27, 83 ff; *Koziol*, JBl 1994, 209; *Medicus* (fn 104) 205; *Picker*, JZ 1987, 1041.

196 *MD Green/WJ Cardi*, USA, in: H Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (2015) no 6/66.

197 *Koziol*, JBl 1994, 209, 218.

V. Conclusion

In conclusion, the long-standing division between contract and tort has materialised in a number of important substantive differences between contract law and tort law. In the Germanic countries, compensation of pure economic loss, strict vicarious liability and the reversal of the burden of proof for fault are generally applied under contract law only. Therefore, the dichotomy between contract and tort is still firmly entrenched in all jurisdictions. In all jurisdictions, however, the seemingly clear-cut line between contract and tort has become blurred. The differences between contract law and tort law are only gradual. Such gradual transitions are nothing new under the sun. On closer inspection, for instance, the differences between strict liability and fault liability are gradual, too.¹⁹⁸ Just as the boundary zone between strict and fault liability calls for a differentiated assessment, the boundary zone between contract and tort requires the application of flexible criteria. To sum up, the long-standing *summa divisio obligationum* is still essential, but it cannot be fully maintained.

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198 R Zimmermann, Wege zu einem europäischen Haftungsrecht, in: Zimmermann (ed), Grundstrukturen des Europäischen Deliktsrechts (2003) 19, 25; Zweigert/Kötz (fn 19) 652; cf Wagner (fn 45) 271 ff.

