Tortious and Contractual Liability – Introductory Remarks

Ernst KARNER*

https://doi.org/10.52018/INKB-00275-B001

The aim of our project and its 2017 conference has been to explore the similarities, differences and relationship between tortious and contractual liability in a comparative perspective. Given the fact that even the rules governing tortious liability differ greatly, this is indisputably quite a challenging enterprise. However, such a broadening of our research focus will doubtless promote understanding of our different liability systems in more detail and depth. **1**

The structure of the project is intended to alleviate the difficulties involved by combining parallel Chinese, Common law and continental European responses to general discussion topics (chapters 2–4 and 7–8) with parallel Chinese and Common law/European analyses targeted at concrete factual scenarios that interrogate the boundary lines between contract and tort liabilities (chapters 5–6 and 9–10). This is, finally, supplemented with a special piece on Dutch responses to all of the issues raised across the stated topics and case scenarios, which is intended to highlight the idiosyncrasies of that system's particular approach as compared to other European traditions. **2**

In the following introductory discussion, meanwhile, I will attempt to address in overview the differences between tortious and contractual liability, as well as the decisive reasons for those differences. This I seek to do from a wider-ranging comparative perspective, drawing on various European and Common law jurisdictions, as well as Chinese law and a number of transnational instruments. **3**

* Institute for European Tort Law, Austrian Academy of Sciences and University of Graz.

I. Comparison of the different legal structures for contractual liability

4 The difference between a contractual and tortious liability was already familiar to Roman law[1] and very great importance may be ascribed to it in all modern legal systems. This is even true for English and Scottish law, where a distinction between 'tortious' or 'contractual' liability was originally unknown and actions for a breach of an agreement in part first developed out of elements of tort.[2] Serious differences between contractual and tortious liability exist in particular in respect of the recoverability of pure economic loss, more extensive duties to take care and the duty to actively prevent damage. The same applies for the question of fault as a requirement for liability, liability for subordinates and in many respects also for prescription.[3]

5 Looking comparatively at the details of contractual liability for loss, it is clear that it is structured very variably. Thus, in the Germanic legal systems, both tortious and contractual liability depend on fault. In part – as in Austrian law in particular (§ 1293 ff Austrian Civil Code, ABGB) – the same general rules are even applicable to both contract and tort in that respect. In respect of, for example, causation, this also seems entirely sensible. Nevertheless, multiple means provide for a more burdensome liability in contract. Thus, in Austria, pure economic losses are generally only recoverable in contract, a reversed burden of proof is applicable (§ 1298 ABGB), and stricter rules apply to liability for subordinates in contract than in tort (§§ 1313a, 1315 ABGB). Much the same is true for German and Swiss law, which also formally regulate tortious and contractual liability separately to a large extent.[4] By contrast, French law is

1 Gaius, Institutes 3.88: obligationes ex contractu versus obligationes ex delicto; on which see further *R Zimmermann,* The Law of Obligations (1996) 10 ff.

2 Thus, for example, the action of covenant (for breach of an agreement) originally developed out of the tort of trespass (an action to redress injuries to persons, goods or land) and such historical developments continue to have an effect today; see *M Hogg,* Field of application of contractual and tortious liability, in this volume, no 1.

3 In fact, a consistent line cannot be seen here – sometimes the prescription periods in tort law are longer than those in contract, as for example in Poland, but sometimes noticeably shorter, as for example in Japan.

4 In Germany, only the form, content and extent of compensation are uniformly regulated (§ 249 ff BGB), whilst § 276 ff of the German Civil Code (Bürgerliches Gesetzbuch, BGB) only govern performance obligations and § 823 ff BGB only tort

more demanding still, differentiating between mere obligations of care and obligations of result: fault is only relevant in respect of an obligation of care *(obligation de moyens)* – such as for medical treatment. If the obligation is, however, to secure the result *(obligation de résultat)* – for example, delivery of a thing – then liability is independent of fault, ie strict.[5] Significant differences also exist in respect of concurrent claims in tort and contract. Whilst claims in tort and contract can certainly co-exist in the Germanic legal systems,[6] exactly the opposite position is adopted by French law on the basis of the non-cumul principle: insofar as a contractual claim exists, tort liability is out of the question.

Even clearer divergences appear when one turns to the Common law. **6**
In contrast with tort, where a fault allegation is frequently required – particularly in the form of negligence – contract generally provides for a no-fault liability.[7] The same applies for the Scandinavian,[8] Dutch, Hungarian[9] and Chinese[10] legal systems, as well as the liability regime of the United Nations Convention on Contracts for the International Sale of

claims. The Swiss Civil Code (Obligationenrecht, OR) also separates contractual liability (art 97 ff OR) from liability in tort (art 41 ff OR).

5 *O Moreteau,* Basic Questions of Tort Law from a French Perspective, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) no 1/74.

6 Sometimes this position results from an understanding that contractual and tortious claims exist independently of one another (concurrence of claims; Anspruchskonkurrenz), sometimes from an understanding that one, single claim exists with multiple bases (concurrence of norms; Anspruchsnormenkonkurrenz), see *H Koziol,* Basic Questions of Tort Law from a Germanic Perspective (2012) no 4/17 ff with further references.

7 Nevertheless, it should be noted that in the Common law – to this extent comparably with the French position discussed above – in practice many contracts set standards which are closer to fault than to strict liability; eg in contracts for services the performing party generally undertakes to exercise reasonable skill and care rather than to guarantee a result; see *S Deakin,* Differences between Contractual and Tortious Liability: The Common Law, in this volume, no 13. For Chinese law, cf also in this respect *Geng Lin,* Differences between Contractual and Tortious Liability and their Reasons, in this volume, no 5 ff.

8 Cf in respect of Norwegian law *B Askeland,* Basic Questions of Tort Law from a Norwegian Perspective, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) no 2/38.

9 Whilst the Hungarian Civil Code (Zivilgesetzbuch, ZGB) of 1959 provided uniform rules for tort and contract and also always required fault as an element of a compensation claim, the ZGB of 2013 incorporated the strict liability system of the CISG for contractual liability; see *A Menyhárd,* Basic Questions of Tort Law from a Hungarian Perspective, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) no 4/60 ff.

10 See *Geng Lin* (fn 7) no 3 ff.

Goods (CISG). In the CISG and the Common law, which set the trend in this respect, contractual liability is certainly not a pure liability as to result, though, but instead admits a number of excuses. One such excuse, in particular, is that the impediment to performance falls outside of the defendant's sphere and could not have been foreseen or prevented by her. Article 79 CISG is paradigmatic in this respect,[11] was substantially influenced by English law and was, in turn, an important influence for Scandinavian, Dutch *(Nieuw Nederlands Burgerliijk Wetboek* of 1992) and Hungarian law.[12] Moreover, the CISG served as a model for the contractual liability frameworks of the Lando Commission's Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) of 2008.[13]

7 It is furthermore notable that contractual and tortious liability are understood in the Common law – much more than in the Germanic and Romance legal families – as completely separate legal fields. Green and Cardi express this particularly clearly in respect of US law, emphasising that: 'American lawyers would not contrast and compare the obligations imposed by tort and contract … Rather, the US legal system considers tort obligations to be ones imposed by law to address relations among

11 Art 79 CISG provides:

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

12 See *F Ranieri,* Europäisches Obligationenrecht (3rd edn 2009) 754 ff with further references. On Hungarian law, see *Menyhárd* (fn 9) no 4/61.

13 See *Ranieri* (fn 12) 754 ff with further references.

strangers. By contrast, contractual obligations are matters of voluntary agreement that arise from that agreement.'[14] The voluntary agreement of the parties is of course in this sense the trigger and reason for the imposition of duties in contract, in contrast with the general regulation of public behavior between strangers that is typical of tort law. From a continental European perspective, it would of course be countered that duties imposed on contractual parties to compensate loss caused to their contractual partners are also often determined – insofar as the parties have not specifically agreed other liability rules – by the legal system itself, rather than through any concrete agreement by those parties.[15] The debate on this boundary changes nothing in respect of the fact that in the Common law the majority of tort lawyers limit themselves to tort law, and those concerned with contractual liability frequently do not take tort law into consideration. This stricter subject division surely contributes to the fact that the differences between these two liability frameworks steadily grow even larger and any commonalities which do exist disappear into the background. Doubtless, though, this strict division of the Common law's own making makes comparative discussion more difficult. For this reason, we may consider ourselves particularly fortunate to have secured Common lawyers well familiar with both areas in Simon Deakin, Martin Hogg und Andrew Bell.

Against this background, it is unsurprising that in the Common law the interplay between contractual and tortious liability presents difficulties. There are also significant differences between the English/Scottish law and US law. English law is today – after earlier reservations – entirely open to concurrence between tortious and contractual compensation claims.[16] By contrast, US law generally opposes concurrence in those cases where a contract as well as a tort claim could be brought.[17] In this context, products and medical liability especially can

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

15 *H Koziol,* Comparative Conclusions, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) no 8/180.

16 A liability in tort is – as in the Germanic systems – only out of the question when validly excluded by the contract, as clearly expressed by Lord Goff, [1995] 2 Appeal Cases (AC) 145 at 193: 'the law of tort is the general law out of which the parties can, if they wish, contract'. On this, see comprehensively *M Hogg,* Field of Application of Contractual and Tortious Liability, in this volume, no 16 ff.

17 On the following, see *Koziol* (fn 15) no 8/81.