

EDITORIAL

THE POWER OF INJUNCTIVE RELIEF IN TORT: AN INTRODUCTION

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Guest editors*

INTRODUCTION: COMBINING TWO STRANDS OF IUS COMMUNE RESEARCH

On November 27th, 2009, the 'Liability & Insurance' and the 'Procedural Law' research programs of the *Ius Commune Research School* co-organized a joint workshop on 'The Power of Injunctive Relief in Tort', as part of the yearly *Ius Commune Conference 2009*, held in Maastricht, The Netherlands. In some legal systems the topic of injunctive relief is treated as a theme stemming from and belonging to the area of procedural law, even though it has very important ramifications for many substantive areas within private law, not least for tort law (the law of delict). Considering that influence, the topic of injunctive relief might, however, just as well be considered to be part and parcel of substantive tort law (or of any other part of substantive private law that it influences). Thus seen, injunctions are no longer 'merely' procedural in character; they are of 'substantive' importance as well. Given this state of affairs, the organizers of the aforementioned workshop and now guest editors of this special issue of the *Maastricht Journal of European and Comparative Law* thought it wise to combine the two previously mentioned research programmes in one workshop, anticipating that the merger of expertise from both areas of the law would have added value. This special *MJ* issue presents the adjusted and reviewed papers that were given during that workshop.

§1. WHY INJUNCTIVE RELIEF? TWO REASONS

The topic of the current special issue and the *Ius Commune* workshop was selected as such for two reasons: its dual (and thus highly interesting) character and nature, hinted

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§3. TWO: THE DUALITY OF ITS CHARACTER

Injunctive relief is a topic that is in essence dual in nature and thus challenging: one needs to combine expertise from two different, though related, legal perspectives. This duality becomes readily apparent when reading those authors who state that injunctions are not part of tort law, and thus not to be treated under the umbrella of tort, but of something else, probably procedural law. The paper by Van Boom published in this issue deals with this aspect. But if injunctions can be used in a tort setting, as they are in daily practice, this question as to what part of the law injunctions might belong to is of course hardly significant in the real world, where people are using the law in general to attain the needs they seek to meet, irrespective of what part of private law they invoke. Thus, an analysis of the use and influence of injunctions is needed, regardless of the area of law which forms the basis of the claim.

In line with this reasoning, the recent Volume 7 of the Book Series devoted to the Draft Common Frame of Reference (DCFR) determines, when dealing with tort law,⁴ that where damage is impending, the person who would suffer the damage has a right to prevent this from happening.⁵ This is achieved by, for instance, granting that person a right to prohibit the action. From the outset it is then made clear that this is done without taking a stand on the theoretical question as to what part of the law this rule would belong to.⁶

§4. NOT AN EASY TASK...

Taking up this specific topic is difficult. This is especially the case in an *ius commune* setting focused on comparative law and on the possibilities of harmonization or even unification.⁷ Precisely because ‘injunctive relief’ is connected to not just one but indeed several substantive areas of the law,⁸ a workable comparison is difficult. The dual nature of the topic extends in several directions at the same time. One should thus probably research and master all substantive areas of the law that are relevant to injunctive relief, which of course is a formidable task in this day and age of specialization in the law. And even if one were to succeed in convincingly doing this, harmonization across the board

⁴ In the DCFR system tort law is re-named as ‘Non-Contractual Liability Arising out of Damage caused to Another’.

⁵ See Article 1:102 Principles of European Law (PEL). Non-Contractual Liability Arising out of Damage Caused to Another (Liab. Dam.), and the further requirements in Article 6:301 PEL Liab. Dam.

⁶ See C. von Bar, *Principles of European Law. Non-Contractual Liability Arising out of Damage Caused to Another*, (OUP, Oxford 2009), p. 229 and pp. 265–266.

⁷ See for instance W. Kennet, ‘Enforcement: general report’, in M. Storme (Ed.), *Procedural Laws in Europe. Towards harmonization*, (Maklu, Antwerpen 2003), p. 110.

⁸ Not only torts but also land law, property law, intellectual property law and contract law.

§5. AIMS AND AMBITIONS: A LOT OF QUESTIONS

However difficult the task that lies before us is going to be, we feel the possible gains justify the effort. The aim and ambition of this special issue is to deal, first, with the foregoing difficulties and, second, with the following issues and questions that come to mind when thinking about injunctive relief in tort cases:

- Is injunctive relief needed for a well equipped system of tort law?
- Should it be a part of tort law?
- What preconditions should be met when granting a form of injunctive relief?¹⁴
- Is injunctive relief available if the wrongful act also serves a greater purpose, beneficial to society?
- How important are injunctions to a tort law system?
- When should a tort system use them?
- What functions do injunctions serve?
- What sort of remedy is superior, compensation or injunctive relief?¹⁵
- How do injunctions fit into a system principally focused on compensation?
- Can tort law injunctions steer behaviour better than other tort remedies?
- Will they do so in practice?
- If prevention is indeed served, what kinds of actions could and/or should be prevented or mandated?
- What influence does the relevant procedural law system have in this respect?
- Are injunctions available to restrain negligent behaviour and should they be?
- Why not, if these can be used to stop other forms of unwanted behavior, such as defamatory statements?¹⁶
- Are penalty payments to reinforce injunctions equipped for this task?
- Are we not overstepping the lines of what private law can and should do?
- Are we not endangering the personal freedom of a possible defendant?
- Is harmonization of the law within Europe in this respect possible and/or feasible?

The questions raised are manifold, as the non-exhaustive list above shows, but not all questions are unanswerable, even though they are complex, to say the least. With this special issue we thus aim to gain some clarity as regards at least a few of the issues raised and some of the questions posed.

¹⁴ See for instance von Bar, *Principles of European Law. Non-Contractual Liability Arising out of Damage Caused to Another*, p. 991 et seq. Since these rules allow a preventive action only if reparation would not be an adequate alternative remedy, even the DCFR adheres to the 'old wisdom', as analyzed by van Boom, *Efficacious Enforcement in Contract and Tort*, that private law is geared towards compensation.

¹⁵ See J. Murphy, 27 *Oxford Journal of Legal Studies*, 3 (2007), p. 512 et seq.

¹⁶ On those questions, see P. Cane, *The Anatomy of Tort Law*, (Hart Publishing, Oxford 1997), p. 131 and p. 136.

In the final contribution, injunctive relief is viewed from a somewhat different, and not solely legal, perspective in the law and economics analysis presented by Anthony Ogus, Emeritus Professor of Law at Manchester University and Professor of Fundamentals of Private Law at the Erasmus University Rotterdam and Louis Visscher, Senior lecturer in Law & Economics at the Erasmus University Rotterdam. They argue that injunctions can and should be approached from three distinct strands of literature, each of which leads to possible courses of action. Although these do not always seem to align perfectly, the authors argue that the literature offers a coherent framework for assessing the incentives that injunctions and damage awards provide. In doing so, it also assists in deciding which approach is preferable under which circumstances. Factors such as social costs and benefits, monitoring costs, judgment proof defendants and the implications of legal decisions on future investment decisions all are important in choosing the right approach.

§7. SOME NOTES ON TERMINOLOGY

In order to avoid, whenever possible, confusion due to the use of certain specific terminology, the guest editors supplied the authors with some definitions for certain specific legal instruments relating to the topic of this issue. For instance, we defined ‘enforcement officers’ as agents appointed to enforce court orders (*huissier de justice*, *gerechtsdeurwaarder*, bailiff, sheriff officer) and a ‘declaratory judgment’ as an official judgment declaring what the position of the law is as regards a certain good, duty, asset etc.

Most importantly, the phrase ‘injunction’ was to be used in this sense: an order requiring or prohibiting the performance of a specified act. Of course one can then subdivide injunctions into either an ‘interim injunction’ or a ‘perpetual injunction’, the former being more of a court order for the benefit (and duration) of the procedure itself whereas the latter is primarily for the benefit of the claimant.

Another important distinction deals, on the one hand, with ‘prohibitory or negative injunctions’. Think of a court ordering the litigant to refrain from acting or an injunction *restraining* the defendant from doing something. As to terminology in this respect, use is commonly made of phrases like *Abwehranspruch* and *Schadenersatzanspruch*, a claim for injunctive relief or a claim for monetary compensation, to be further subdivided into a *Unterlassungsanspruch* (*l’interdiction d’un fait illicite qui menace de se produire*) in case of a future act that threatens the claimant, and a *Beseitigungsanspruch* in case of an already ongoing wrong (*cessation d’un fait illicite qui est en cours*).

On the other hand, the second part of this large distinction relates to the so-called ‘mandatory’ or ‘affirmative’ injunction, one that requires the performance of an act. This is an injunction that involves an obligation to perform particular acts or bring about a particular state of affairs, expressed in an affirmative form. An example is the ‘restorative