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## Learned Hand in Europe: a Study in the Comparative Law and Economics of Negligence

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## **Learned Hand in Europe: a Study in the Comparative Law and Economics of Negligence**

### **Abstract**

When investigating the possibilities of uniform European private law, questions regarding unity and diversity of legal concepts emerge. Aim of this paper is to indicate how Law and Economics can contribute to the existing views on this matter, thereby focussing more on unity than on diversity. The branch of Law and Economics that deals with the comparison of legal systems and concepts is known as comparative Law and Economics. Researchers from this field have spent ample attention to the possibility that European unity of law can be reached through legal transplants, where courts transplant a concept from another legal system in their own legal system. A second approach within comparative Law and Economics is the common core approach, where Law and Economics helps in identifying legal concepts that might have different names or formal requisites in different legal systems, but that in practice solve a similar case in a similar manner. In section 2, the main differences between common law and civil law are discussed from a Law and Economics point of view. These differences are often regarded as the main obstacles in reaching uniform private law. In section 3, the comparative Law and Economics approach will be discussed in greater detail and the common core approach will be advocated. In section 4, the legal concept of negligence and the comparable concepts such as *Fahrlässigkeit* and *onzorgvuldigheid* will be presented as an example of a common core.

## *Learned Hand in Europe: a Study in the Comparative Law and Economics of Negligence*

Heico Kerkmeester<sup>†</sup> and Louis Visscher<sup>††</sup>

### 1. Introduction

When investigating the possibilities of uniform European private law, questions regarding unity and diversity of legal concepts emerge. Aim of this paper is to indicate how Law and Economics can contribute to the existing views on this matter, thereby focussing more on unity than on diversity.

The branch of Law and Economics that deals with the comparison of legal systems and concepts is known as *comparative Law and Economics*.<sup>1</sup> Researchers from this field have spent ample attention to the possibility that European unity of law can be reached through *legal transplants*, where courts transplant a concept from another legal system in their own legal system. A second approach within comparative Law and Economics is the *common core* approach, where Law and Economics helps in identifying legal concepts that might have different names or formal requisites in different legal systems, but that in practice solve a similar case in a similar manner.

In section 2, the main differences between common law and civil law are discussed from a Law and Economics point of view. These differences are often regarded as the main obstacles in reaching uniform private law.<sup>2</sup> In section 3, the comparative Law and Economics approach will be discussed in greater detail and the common core approach will be advocated. In section 4, the legal concept of negligence and the comparable concepts such as *Fahrlässigkeit* and *onzorgvuldigheid* will be presented as an example of a common core.

### 2. Law and Economics between common law and civil law

The differences between common law and civil law are regarded as a huge obstacle for unification of European private law. We will discuss the main differences from a Law and Economics perspective, thereby arguing that this approach might be able to bridge the gap between the legal systems. A reason to assume this in advance, is the fact that the approach is developed in a country with a common law system (the United States), but has gained popularity in a number of civil law countries, such as Germany and (to a somewhat lesser extent) Italy.<sup>3</sup>

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<sup>1</sup> A description of this field can be found in U. Mattei and F. Cafaggi, 'Comparative Law and Economics', in: P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law: Volume 1*, Macmillan, London and Basingstoke, 1998, 346-352.

<sup>2</sup> In this paper we do not answer the question whether uniform European private law is to be desired. On this question, see the (critical) essay of R.J. Van den Bergh, 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law', *5 Maastricht Journal of European and Comparative Law*, 1998, 129-152.

<sup>3</sup> Compare e.g. H.-B. Schäfer and C. Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, 3<sup>rd</sup> edition, Springer, Berlin, 2000 respectively A. Chiancone and D. Porrini (eds.), *Lezioni di analisi economica del diritto*, 2<sup>nd</sup> edition, G. Giappichelli Editore, Turin, 1997. In any case, the Law and Economics approach is more popular in these countries than in England.

Different principal differences between civil law and common law can be distinguished.<sup>4</sup> We will discuss the extent of systematization of law, the method of judicial construction, the role of precedents, the differences between judge made law and statute law and the differences in influence of science.

### *Systematization of law*

Systematization of law has been an important process in the development of continental law. The law has been *more geometrico* subsumed in an axiomatic system in which, on the basis of the principles of respecting the property of others, keeping one's word and compensating unlawfully inflicted losses, property law, contract law and tort law are deductively inferred. Such systematic would be alien to common law, which consists of case law, derived from hundreds of thousands of cases.

One can ask if the importance of this difference becomes less, now in continental Europe the authority of systematizing science decreases relative to the authority of courts, while in England the call for a certain degree of systematization is heard,<sup>5</sup> but for our paper this is not the most important objection. More relevant is the fact that Law and Economics has performed the function of systematizing – American – common law in a manner that strongly resembles the more *geometrico* of continental legal science.

The most characteristic example in this respect is the heroic attempt of Richard Posner to explain the entire common law on the basis of the idea of efficiency.<sup>6</sup> With this, he elaborates on the famous article *The Problem of Social Cost* by Ronald Coase,<sup>7</sup> who on the basis of an extensive analysis of 19<sup>th</sup> century common law cases showed that courts take all kinds of economic relevant factors into account, even factors that are overlooked by economists.

Especially the three aforementioned principles can be understood as results of the efficiency principle, more specifically as attempts to solve problems that can be characterized as prisoners' dilemma.<sup>8</sup> The principle to respect the property of others is needed to give individuals the incentive to engage in the – also social beneficial – activities that yield property. The important property rights approach in Law and Economics is based on this premise.<sup>9</sup> The principle of keeping one's word prevents that mutual beneficial agreements are not met or not made in the first place. And the principle of compensating unlawfully inflicted losses prevents that actors hurt each other in situations where the disadvantages outweigh the advantages.

### *Method of judicial construction*

A second point of difference is that the method of judicial construction between common law and civil law courts allegedly differs strongly. The former would reason from case to case, while the latter would reason syllogistically, thereby subsuming a concrete case under a

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<sup>4</sup> See for a more extensive overview J.M. Smits, *Europees privaatrecht in wording: naar een Ius Commune Europaeum als gemengd rechtsstelsel*, Intersentia, Antwerpen en Groningen, 1999, 86-115.

<sup>5</sup> See Smits, 107-109.

<sup>6</sup> See R.A. Posner, 'A Theory of Negligence', 1 *Journal of Legal Studies*, 1972, 29-96. The proposition was expanded to (virtually) the entire domain of the common law in R.A. Posner, *Economic Analysis of Law*, Little, Brown & Co., Boston and Toronto, 1972.

<sup>7</sup> See R.H. Coase, 'The Problem of Social Cost', 3 *Journal of Law and Economics*, 1960, 1-44.

<sup>8</sup> This is the binding element in H.O. Kerkmeester, *Recht en speltheorie: Een economisch model voor het ontstaan van staten en recht*, diss. EUR, Koninklijke Vermande, Lelystad, 1989, 130-136.

<sup>9</sup> See H. Demsetz, 'The Exchange and Enforcement of Property Rights', 7 *Journal of Law and Economics*, 1964, 11-26.

general rule. The special procedural character of the common law with its focus on specific actions would advance this difference.

An economic analysis of this matter suggests that the focus on concrete actions and e.g. the huge diversity of possible torts has no or little consequences. The economic analysis studies mainly the tort of negligence and the rules of strict liability, such as the rule from *Rylands v. Fletcher*.<sup>10</sup> Apart from topics like differences between the rules which determine who has to bear the costs of litigation and other possible influencing factors regarding the choice between suit or settlement, which are not relevant for the topic of this paper, scant attention is spent on typical procedural issues. This in itself might be a pity, but it confirms that a Law and Economics approach succeeds in finding general principles in common law and rising above the case-to-case approach.

On top of this, if Posner's thesis is correct, syllogisms can play a role in common law after all. Courts then do not focus primarily on the separate cases, but on the founding principles of law. Although they will not be inclined to *legitimize* their decisions this way, it cannot be said that the decisions cannot be *understood* in this manner.

### *The role of precedents*

In light of the above, the relevance of precedents in common law can also be put in perspective. One could counter-argue that there is a difference in the sense that a precedent in the common law system will influence behavior of parties sooner than a legal ruling in a civil law system. The Law and Economics ideal that actors receive clear rules for behavior would then be better achieved in a common law system and the applicability of the economic analysis on continental tort law would be undermined.

However, in a fine article that specifically aims at tort law, Germans Claus Ott and Hans-Bernd Schäfer have shown that an efficient standard of conduct can evolve, even if courts are not focussing on developing precedents.<sup>11</sup> Because courts repeatedly have to rule in comparable cases that do differ in the facts, over time it is increasingly accurately determined which standards parties have to uphold. In Section 4 we will return to this topic.

### *Judge made law versus statute law*

The next difference is between judge made law, which dominates common law, and statute law, which is typical for the continental system. This topic is important, because the theory of legal transplants, which will be discussed in Section 3, emphasizes the role of courts.

Several Law and Economics scholars have argued that judge made law generally speaking is more efficient than statute law, and they have offered possible explanations for this. The danger of inefficient statute law is a general idea from Public Choice theory, the theory dealing with economic aspects of public decision-making.

The alleged efficiency of judge made law is firstly explained by the working of spontaneous selection mechanisms. Inefficient rules are more likely to be brought before courts by parties than efficient rules, so that the chance of revision of those inefficient rules is larger.<sup>12</sup> Because this process toward efficient rules is not top-down, it is not necessary that courts know which

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<sup>10</sup> See A.W.B. Simpson, 'Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v. Fletcher*', 13 *Journal of Legal Studies*, 1984, 209-264.

<sup>11</sup> See C. Ott and H.-B. Schäfer, 'Negligence as Untaken Precaution, Limited Information, and Efficient Standard Formation in the Civil Liability System', 17 *International Review of Law and Economics*, 1997, 15-29.

<sup>12</sup> See P.H. Rubin, 'Why is the Common Law Efficient?', 6 *Journal of Legal Studies*, 1977, 51-63 and G.L. Priest, 'The Common Law Process and the Selection of Efficient Rules', 6 *Journal of Legal Studies*, 1977, 65-82.

rule is efficient. However, it is clear that a process in which correction of inefficient rules depends on parties going to court, hoping that the court will revise the rule, can only lead to efficiency in the long run. Moreover, there is no proof that such an evolution in law indeed takes place.

The second possible explanation is that courts have their own utility-functions which lead them to choose efficient rules, mainly because they are less receptive for pressure groups than politicians.<sup>13</sup> However, courts tend to use an ex-post approach and are more concerned with issues of fairness in the case at hand than with forming an efficient rule for future cases.<sup>14</sup> Due to the fact that their decisions will act as precedents, it can be expected that this problem is less severe for courts in common law countries than in civil law countries. On the other hand, the problems that public choice theory notices with respect to statute law are (almost) not relevant in a process of codification, and codification is much more important in civil law countries than in common law countries. Interest groups exert relatively little influence on a process of codification, that by its long duration takes more time than most interest groups are willing or able to spend. Moreover, the process takes place on a relatively abstract level, leaving little concrete advantages to be gained by interest groups. This leads to the interesting conclusion that both common law and civil law, from a Law and Economics point of view, are relatively invulnerable to the influence of interest groups.<sup>15</sup>

A last topic in the relation between judge made law and statute law is flexibility of law. On the one hand, judge made law is more flexible than statute law, especially if courts have the task of filling in open norms and if statute law is the result of a process of codification. On the other hand, flexibility of judge made law can be undermined by the commitment to precedents.

In conclusion, the differences between judge made law and statute law have to be taken seriously and they might have an influence on the efficiency of the produced legal rules. Also, mainly because of the commitment to precedents, one should be cautious regarding possible differences between judge made law in common law and on the continent. Common law judge made law might be more efficient yet less flexible than civil law judge made law, but on the other hand the (largely codified) civil law statute law might be more efficient yet less flexible than the common law statute law.

### *Influence of science*

One can question whether the limited influence of science is typical for the common law, or that it is a feature of English legal culture. In English law, courts play a very important role, while the influence of science is limited. In this respect, English law does not only differ from e.g. German law, but also from American law.<sup>16</sup> Of course, this does not remove the importance of the differences with continental law, but it helps in explaining why Law and Economics has gained much less attention in England than in the United States.

On the continent as well, there are important differences regarding the respective influence of science and jurisprudence. The influence of science in Germany is much larger than in e.g. France, where courts generally do not refer to scientific literature.<sup>17</sup>

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<sup>13</sup> See R.A. Posner, *Overcoming Law*, Harvard University Press, Cambridge (Mass.) and London, 1995, 109-144 ('What Do Judges Maximize?').

<sup>14</sup> See R.J. Van den Bergh, *Averchts recht*, Intersentia, Antwerpen en Groningen, 2000, 8.

<sup>15</sup> See U.A. Mattei, *Comparative Law and Economics*, University of Michigan Press, Ann Arbor, 1997, 76.

<sup>16</sup> See R.A. Posner, *Law and Legal Theory in the UK and USA*, Clarendon Press, Oxford, 1996.

<sup>17</sup> See Smits, 95.

Hence, this point is not characteristic for the differences between common law and civil law, but it might be of importance for the extent in which Law and Economics views can get an explicit place in jurisprudence.

### *Conclusion*

The first conclusion that can be drawn is that, on the basis of the structural differences between common law and civil law, it is not possible to give a general opinion regarding an expected larger degree of efficiency of one system relative to the other. Nor is there reason to assume that one system is better or worse suited for economic analysis than the other. Although Law and Economics has a systemizing approach, it clearly is not hindered by the case-to-case character of common law.

The other conclusion is that the degree of unity of law that can be reached strongly depends on the area of law. Generally speaking, unification is easier if there is less influence of public law and if courts have a larger degree of freedom in judicial construction. In the area of e.g. family law the cultural differences are huge and unification is unthinkable (some sectors excluded). On the other hand, in certain areas of private law the structural differences are small. Regarding e.g. tort law, the influence of judge made law is large and legal decisions in fact serve as precedents in continental legal systems as well. For these reasons, in this paper we will focus on tort law.

Of course, cultural differences might exist and different countries might have different social norms, so that legal norms might have different results in different countries.

## **3. Comparative Law and Economics**

### *Legal transplants*

The concept of legal transplants is introduced by Alan Watson<sup>18</sup> and is incorporated into Law and Economics by Ugo Mattei.<sup>19</sup> According to Mattei, European unity of law can be reached through legal transplant, meaning that courts import an element from another legal system into their own legal system. For example the doctrine of *loss of a chance* was already known in French law (*perte d'une chance*<sup>20</sup>) and is only recently accepted in Dutch law.<sup>21</sup>

*Legal formants* is a broader concept than legal transplants,<sup>22</sup> and indicates that *any* suggestion that can offer a solution to a legal problem might be used in the importing legal system. Hence, not only the traditional sources of law, but also ideas from foreign legal systems and writings of scientists might serve as a legal formant. Hence, comparative Law and Economics does not use a closed system of legal sources. However, in accordance with usage we will use the term legal transplant, even though the relevant concept might be derived from another source than a traditional legal one.

An advantage of the use of legal transplants as compared to centralized top-down codification of European law could be that they are more acceptable because they are self-chosen instead of imposed. The problem of the top-down approach can be that it unifies also in areas where there is no need for uniformity and that uniform rules might have different effects in different

<sup>18</sup> See A. Watson, *Legal Transplants*, 2nd edition, Athens (GA), 1993.

<sup>19</sup> See Mattei, esp. 123 ff.

<sup>20</sup> See G. Viney and P. Jourdain, *Traité de droit civil: les conditions de la responsabilité*, 2<sup>nd</sup> edition, Librairie Générale de Droit et de Jurisprudence, E.J.A., Paris, 1998, 278-284.

<sup>21</sup> Hof Amsterdam, January 4, 1996, *NJ* 1997, 213.

<sup>22</sup> P.G. Monateri and R. Sacco, 'Legal Formants', in: P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law: Volume 2*, Macmillan, London and Basingstoke, 1998, 531-533.

legal cultures.<sup>23</sup> Courts will only choose a certain legal transplant if it fits in their own legal system. Hence, the transplant will not be placed in a context in which it gets a totally different, unintended meaning.<sup>24</sup> Moreover, uniformity will only be brought about if there is a need for it. Finally, legal transplants are flexible. If a transplant does not have the desired effects, it can be replaced by another.

From a Law and Economics perspective, it is doubtful whether legal transplants will spontaneously lead to uniform law through a process of fruitful competition in which only the most efficient rules will survive.<sup>25</sup> Competition generally leads to diversity rather than unity.<sup>26</sup> This diversity of legal rules might be positive, because the different rules can be used in practice and information can be gathered regarding the efficiency of the different rules. However, it cannot be simply assumed that courts will choose the efficient rules. Firstly, courts have limited information regarding the possible candidates for a legal transplant. Not all possible rules are known, and sufficient information pertaining the efficiency of the rules is missing.

Secondly the question can be asked why courts would choose the most efficient rule. As explained in Section 2, there are two possible explanations for this alleged tendency toward efficiency, but neither is convincing. The alleged evolutionary process can only tend toward more efficient legal rules in the long term and there is no empirical research indicating that this indeed is happening. The alternative explanations via utility-functions of courts encounters the problem that courts naturally tend to use an ex-post approach and are more concerned with issues of fairness in the case at hand than with forming an efficient rule for future cases. Hence, the evolutionary processes need some external guidance that, as will be argued, Law and Economics can provide.

### *The common core approach*

Ugo Mattei has mentioned the common core approach as an alternative way in which comparative Law and Economics can contribute to unity of law. Generally speaking, law is a cultural and linguistic phenomenon, hence differences in culture and language imply differences in law as well. In particular if broad and generally defined concepts are used, it can be reasonable assumed that applications will differ from state to state.<sup>27</sup> Mattei is precisely interested in the possibility that different concepts have a similar meaning. He was the first to argue that economics can contribute to comparative law by determining such a common core. More specifically, he states that this common core can be found by comparing the different legal systems to the efficient model that is offered by economics.<sup>28</sup> Not the legal terms as such are of importance, but the effects the legal rules have on human behavior. Law and Economics studies these effects of legal rules, thereby realizing that rules with different wordings might lead to a similar result.

<sup>23</sup> Compare P. Legrand, 'Sens et non-sens d'un code civil européen', 48 *Revue Internationale de Droit Comparé*, 1996, 779-812 and P. Legrand, 'Against a European Civil Code', 60 *Modern Law Review*, 1997, 44-63.

<sup>24</sup> This difficulty is pointed out by P. Legrand, 'The impossibility of 'Legal Transplants'', 4 *Maastricht Journal of European and Comparative Law*, 1997, 111.

<sup>25</sup> See for a rebuttal of the legal politics objections against the use of legal transplants as articulated by O.A. Haazen, 'Comparative Law and Economics en het Europees privaatrecht als ongemengd rechtsstelsel', 73 *Nederlands Juristenblad*, 1998, 1227-1233, H.O. Kerkmeester and R.W. Holzhauser, 'Europees Privaatrecht', 73 *Nederlands Juristenblad*, 1998, 1873.

<sup>26</sup> See M. Hesselink, 'Rubriek Europees recht', 66 *AA Katern*, 1998, 3181.

<sup>27</sup> H. Kötz, 'Rechtsvereinheitlichung: Nutzen, Kosten, Methoden, Ziele', 50 *Rabels Zeitschrift*, 1986, 18 mentions this as a factor that can contribute to the fact that the costs of unification may outweigh the benefits in some legal areas.

<sup>28</sup> See Mattei, 95-96.

Although Mattei's approach of the common core sounds appealing, some problems exist. Characteristic of his approach is, that it regards Law and Economics as an empirical science that regards the actual effects of legal rule as decisive for the law. This is in accordance with the methodological foundation of Law and Economics, but not with the way in which it functions in practice.

The impact of Law and Economics in the legal discourse (especially in the United States but also elsewhere) cannot be explained by her relevance as an empirical science. Granted, on several issues empirical research supports the recommendations of Law and Economics,<sup>29</sup> but this is not sufficient to account for the extent of the impact, especially considering the skepticism lawyers generally feel toward empirical sciences: 'facts are no facts'. Presumably, the significance of Law and Economics is mainly based in the fact that it offers a coherent, systematic perspective to the law.

Decisive for the applicability of the common core approach therefore is not the availability or feasibility of empirical research to the effects of legal rules, but the question whether the economic approach logically fits into the different legal systems. This could be investigated by analyzing if a certain recommendation from the economic approach, according to Law and Economics scholars fits in their national legal system. For instance, if scholars from different countries argue that the Hand formula gives a good description of the way in which their national equivalent of the negligent standard is or should be applied, this offers an interesting hypothesis. Of course, further research is needed, because the Law and Economics scholar might have prematurely reached this conclusion, e.g. because he is not familiar enough with his own legal system. As a striking feature of continental comparative Law and Economics literature, authors only seldom see problems in applying non- or barely amended theories from American literature to their own legal systems. In the cases where the authors are economics instead of lawyers, this could be attributed to their unfamiliarity with the relevant differences, but a famous comparative lawyer such as Hein Kötz<sup>30</sup> is of course familiar with these differences.

A huge advantage of the common core approach is the fact that the problem attached to legal transplants (i.e. that it is not known whether the legal rule is efficient) is not present. As all scientists, Law and Economics scholars may have different opinions, but generally there is consensus about the way in which efficiency of legal rules has to be evaluated. A model is continuously refined, until the common opinion is reached that the model covers the important features of reality in a correct fashion. Because of this – especially in legal contexts strikingly - large extent of concordance, an appeal to authority arguments is not often needed. Such arguments only have limited value anyway, in cases where unity has to be found between different legal systems.

#### 4. Learned Hand in Europe

##### *The Hand formula and its amendments: introduction*

The Hand formula is the Law and Economics candidate for the design of the negligence rule and its diverse counterparts such as *Fahrlässigkeit* and *onzorgvuldigheid*. It is named after the American judge Learned Hand who in the case *United States v. Carroll Towing Co.* argued

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<sup>29</sup> See for a review of empirical research regarding accident law D. Dewees, D. Duff and M. Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously*, Oxford University Press, Oxford and New York, 1996.

<sup>30</sup> Co-author of, among others, the textbook K. Zweigert and H. Kötz, *An introduction to comparative law*, 3<sup>rd</sup> edition, Clarendon Press, Oxford, 1998.

that liability depends on the answer to the question whether the costs of adequate precaution are higher or lower than the expected losses. Hand used the algebraic function  $B < p * L$ , where B denotes the burden of precautions, p the probability of losses and L the magnitude of the losses if an accident occurs.

In 1973, John Prather Brown corrected the Hand formula by stating that not the absolute values, but the marginal values of the parameters are decisive.<sup>31</sup> Negligence is not determined by the absolute level of care costs and expected losses, but by the question whether the costs of additional care measures are higher or lower than the resulting decrease in expected losses. In the meantime it is also widely established that the formula is not concerned with a specific probability of a specific loss, but with a range of probabilities of different types of accidents, each with its losses, which might differ in magnitude.

Mark Grady has expressed his doubts regarding the alleged use courts would make of the Hand formula by first determining the optimal amount of care and then comparing the actual care level with this optimal level.<sup>32</sup> Such a procedure in itself would fit the prevailing view on negligence in the United States, as expressed by Oliver Wendell Holmes. Because negligence is regarded as an objective instead of a subjective standard, it is first determined which level of care should have been taken in the case at hand and subsequently the behavior of the defendant is measured against this norm. According to Grady, the use of this two-step-process is theory, but not practice. In reality, the plaintiff is to suggest a certain *untaken precaution*, so a care measure that the defendant could have taken but did not take. The court then examines whether the additional costs of this untaken precaution outweigh the corresponding reduction in expected accident losses. This comparison is made in accordance with the Hand formula, so in an objective way. The disadvantage of Grady's approach from an efficiency point of view is that it does not directly formulate an optimal care standard. On the other hand, the approach saves considerably on *tertiary costs*, being the administrative costs attached to establishing liability.<sup>33</sup>

Grady's approach is important for our paper because, as will become clear, the thesis that courts are lead by the untaken precaution as proposed by the plaintiff has important advocates in Europe.

### England

Apart from specific torts like battery, assault, trespass to chattels *et cetera*, English law since the famous - in first instance Scottish - case *Donoghue v. Stevenson*<sup>34</sup> also has the more general tort of *negligence*.

The problem of Law and Economics scholars not being familiar with their own positive law - especially among economists - also exists in England. Economist Antony Dnes mentions the Hand formula in his textbook on Law and Economics, but he relies almost solely on non-English common law cases, without asking the question whether English law might differ from American law on relevant points.<sup>35</sup>

Unlike in American literature, English authors do not apply the Hand formula directly to the prerequisite of negligence, but on one of the elements. As a complication, English courts are even less concerned with making a clear distinction between the different elements than their

<sup>31</sup> J.P. Brown, 'Towards an Economic Theory of Liability', 2 *Journal of Legal Studies*, 1973, 323-350.

<sup>32</sup> E.g. M.F. Grady, 'Untaken Precautions', 18 *Journal of Legal Studies*, 1989, 139-156.

<sup>33</sup> See G. Calabresi, *The Costs of Accidents: A Legal and Economical Analysis*, Yale University Press, New Haven and London, 1970, esp. 225 ff.

<sup>34</sup> [1932] A.C. 562 (H.L.).

<sup>35</sup> See A.W. Dnes, *The Economics of Law*, International Thomson Business Press, London, 1996, 126. On the differences between negligence in England and the United States, see D.W. Robertson, 'An American Perspective', in: B.S. Markesinis and S.F. Deakin, *Tort Law*, 3<sup>rd</sup> edition, Clarendon Press, 1994, 193-227.

foreign colleagues. Fortunately, scientific literature sheds some light on the issue. In their book on causation, Hart and Honoré analyze the Hand formula in the chapter entitled *Foreseeability and risk*.<sup>36</sup> Nevertheless they focus on the duty of care and use the Hand formula to illustrate their point that the existence of such a duty not only depends on the accident probability, but on many other factors as well. Even if losses are foreseeable, there is not necessarily a moral or legal duty to prevent these losses, e.g. if the losses are not likely enough, if they are trivial or if the benefits that have to be forgone in order to take care are too large. This might suggest that Hart and Honoré – different than the Hand formula but in line with the approach of Frank Stephen<sup>37</sup> – view the probability and the magnitude of losses as two separate factors, but this is not the case. They emphasize the mutual relation of the factors to evaluate if the losses are ‘foreseeable in the practical sense’.

Markesinis and Deakin analyze the Hand formula in their textbook in the section regarding the breach of duty.<sup>38</sup> They argue, referring to judgments of the House of Lords, that both the magnitude of the losses and the probability that losses will occur are relevant factors of consideration. However, the authors are hesitant whether English courts spent specific attention to the last element of the Hand formula, the burden of precautionary measures. They refer to *Bolton v. Stone*,<sup>39</sup> a case in which a successful attempt to score six points with cricket resulted in the plaintiff walking on a street outside the field being hit by the ball. The House of Lords would not have been concerned so much with the costs of prevention in this case, different than in e.g. *Latimer v. AEC Ltd.*<sup>40</sup> Nevertheless, the authors conclude that “it is fair to say that the ‘Hand formula’, loosely conceived, is an approach followed by the English courts in appropriate cases.”<sup>41</sup>

Richard Posner regards *Latimer v. AEC Ltd.*, which addresses the question which precautionary measures should have been taken to prevent slipping on a slippery floor, as the English equivalent of *United States v. Carroll Towing Co.*<sup>42</sup> A noticeable difference between England and the United States according to Posner is, that English law connects to the norms that are present in society, whereas in the United States, economic efficiency can directly be called upon as a policy norm. Although this implies that American cases are more open to explicit economic reasoning, this does not mean that English cases cannot be united with economic principles.

In spite of what Markesinis and Deakin imply, *Bolton v. Stone* fits perfectly in an economic approach of negligence, provided that Grady’s correction is applied, so that it does not suggest that courts exactly define the level of due care. In this case the relevant question was whether placing a higher fence around the cricket field would have been an efficient precautionary measure.

### Germany

From the continental legal systems, Germany deserves the most extensive review. Not only because German law as such is important, but also because the Law and Economics approach in Europe has received attention especially in Germany.<sup>43</sup> The Hand formula has even found a place in positive legal literature regarding tort law. In his textbook *Deliktsrecht*, Hein Kötz

<sup>36</sup> See H.L.A. Hart and A.M. Honoré, *Causation in the Law*, 2<sup>nd</sup> edition, Clarendon Press, Oxford, 1985, 263.

<sup>37</sup> F.H. Stephen, ‘Expected damage and due care’, 1 *European Journal of Law and Economics*, 1994, 23-31.

<sup>38</sup> See Markesinis and Deakin, 143-146.

<sup>39</sup> [1951] AC 850

<sup>40</sup> [1953] AC 643.

<sup>41</sup> See Markesinis and Deakin, 146.

<sup>42</sup> See R.A. Posner, *Law and Legal Theory in the UK and USA*, Clarendon Press, Oxford, 1996, 39-41.

<sup>43</sup> Regarding tort law, e.g. already see M. Adams, *Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung*, R.v. Decker’s/C.F. Müller, Heidelberg, 1985.

discusses the Hand formula extensively. He already starts with this when discussing the goals of tort law.<sup>44</sup> According to Kötz, prevention of losses is important, but not at all cost. Goal of tort law should be to influence the behavior of people in such a way that they prevent accidents that should be prevented from a perspective of social welfare.

The most important specification of this goal is mentioned when the criterion of *Fahrlässigkeit* is discussed.<sup>45</sup> Under explicit reference to Learned Hand, numerical examples illustrate the weighing of care costs against expected accident losses. In accordance with the Hand formula and the American Law and economics interpretation thereof, an injurer that causes losses escapes liability if he exercises (at least) optimal care. Here we find the principal difference with *Gefährdungshaftung*, where the injurer also is liable if he has taken at least optimal care.<sup>46</sup>

The leading German Law and Economics textbook is for a large part concerned with tort law, and much attention is spent to the Hand formula.<sup>47</sup> Authors Hans-Bernd Schäfer and Claus Ott attach the Hand formula to the concept of *Fahrlässigkeit*, just as Kötz – who often refers to them – did.<sup>48</sup> It is interesting to note that the authors in a previous article already explicitly paid attention to Grady's idea of the untaken precaution and the relevance of it for continental – especially German – law. They argue in concordance with Grady that courts seldom test the facts of a case with a previously formulated standard of due care.<sup>49</sup> Also in Germany, the plaintiff proposes an untaken precaution that the defendant could have taken, and the court determines in a way similar to the Hand formula whether the failure of taking this measure was negligent. This approach does not prevent the evolution of efficient norms over time, which indicate the due care level on different areas.

### *The Netherlands*

Dutch Law and Economics scholars massively argue that the famous *Kelderluik*-case<sup>50</sup> has introduced the Hand formula into Dutch law. In this case, the Supreme Court enumerates the factors that are relevant in determining negligence: (1) the probability that someone does not take the required attention and care, (2) the probability that this leads to accidents, (3) the gravity of the consequences of the accident and (4) the burden of adequate precautions.

Analogously to the American distinction between negligence and strict liability, Nentjes in his textbook distinguishes between *schuldaansprakelijkheid* and *risicoaansprakelijkheid*.<sup>51</sup> Without explicit reference to the Hand formula, he discusses the weighing of care costs against accident losses in a way that is totally compatible with the prevailing analysis. If an injurer in a regime of *schuldaansprakelijkheid* takes less than due care, he is negligent.<sup>52</sup> In a regime of *risicoaansprakelijkheid* the injurer is also liable for the losses he has caused if he has taken at least due care.

The approach of Nentjes strongly resembles the way in which Kötz analyses German law. By sticking as close as possible to the original model, a clear and schematic framework for research is created. A closer analysis of research however shows that also in Dutch law, courts use the approach as described by Grady instead of formulating a general norm according to the Hand formula. In the *Kelderluik*-case itself, the plaintiff suggested that the employee of

<sup>44</sup> See H. Kötz, *Deliktsrecht*, 8<sup>th</sup> edition, Luchterhand, Neuwied and Kriftel, 1998, 18-19.

<sup>45</sup> *Idem*, esp. 50-52.

<sup>46</sup> *Idem*, 138-139. Because the injurer bears all losses under strict liability, he will take optimal care.

<sup>47</sup> See Schäfer and Ott, 146 ff.

<sup>48</sup> Kötz refers to the 2<sup>nd</sup> edition of the book of Schäfer and Ott.

<sup>49</sup> Concrete German cases are mentioned in Ott and Schäfer, 24-28.

<sup>50</sup> Hoge Raad November 5, 1965, *NJ* 1966, 136.

<sup>51</sup> See A. Nentjes, *Elementaire rechtseconomie*, Wolters-Noordhoff, Groningen, 1993, 76.

<sup>52</sup> *Idem*, 85.

the Coca Cola Company, who left the cellar trapdoor of a café opened when returning to the truck for new supplies (the plaintiff fell in the hole) could have easily barricaded the trapdoor with chairs, instead of only placing three stacked up empty cola crates. Also in two important hospital cases the Grady-approach is visible. In the *bloodtest*-case,<sup>53</sup> a girl faints some time after a little blood was taken for testing and she gets hurt. According to her father, the hospital should have prevented the fall by having enough hospital staff present, even though the chance of fainting some time after the blood is taken is very small (most fainting occurs during or directly after the blood is taken). The court does not agree, not *all* possibilities of fainting justify measures to prevent losses. The proposed untaken precaution is too expensive. In *Hospital De Heel v. Korver*,<sup>54</sup> a patient falls from his bed during recovery after surgery. Experts testify that this is not uncommon in the postoperative phase, and they claim that a cheap measure can prevent it (placing bands or railings to prevent the patient from falling). Here, the untaken precaution is so cheap that not taking it is negligent.

## 5. Conclusion

Our conclusion is clear. Although more research is needed, it is very likely that Grady's interpretation of the way in which the Hand formula is applied is consistent with English, German and Dutch law and moreover that it will lead to efficient norms of behavior. Therefore, it is a serious candidate for shaping the negligence standard in a codified uniform European tort law.<sup>55</sup> Of course, the concrete formulation in each case can differ according to national, cultural differences. Legal authors generally agree that a uniform European tort law should be flexible, leaving space for general clauses.<sup>56</sup>

It is conceivable that refraining from certain activities that might cause losses is considered as being more problematic in some countries than in others. *Bolton v. Stone* offers a good illustration of this, because in England, cricket is regarded as a very important activity.<sup>57</sup> The same line of reasoning holds regarding the magnitude of the losses. Ronald Coase has suggested that English courts are full of understanding regarding the inconvenience the

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53. Hoge Raad 6 november 1981, *NJ* 1982, 567 (concl. P.-G. Berger; m.nt. Brunner).

54. Hoge Raad 13 januari 1995, *NJ* 1997, 175 (concl. A.-G. Hartkamp; m.nt. Brunner).

55. A survey within the framework of the Erasmus-course *Economic Analysis of Tort Law and Insurance* provided us with, among others, the following two interesting cases:

In a Polish case plaintiffs were pushing their broken down car on the road at night with the lights turned off. The defendants' car crashed in from the backside. The court decided that the defendant was not speeding, but that the plaintiffs themselves were (contributory) negligent. They used their flashlight to warn cars on the front side instead of the backside and the court regards this as highly unreasonable. According to the court, the plaintiffs should have made room for every incoming car, warn it about the threat and use the flashlight at the backside. The judgment does not mention if the original defendant proposed these untaken precautions (Wyrok SN 18.04.1986, sygn. akt III CRN 57/86, OSNC 1987/8/117).

In a Greek case, a boy gets hit by a car. The driver stops his car and after checking the boy and seeing he is not severely hurt, he drives off. A pedestrian runs to the place where the boy is still lying, signaling upcoming cars to stop. He gets hit by a car and sues the *first* driver, arguing that if this driver had not left the boy lying in the street, the pedestrian had not been injured. The Supreme Court agrees that leaving the boy in the street was a breach of duty and also that this breach of duty was the cause of the injuries of the pedestrian. This case beautifully shows the fact that the suggested untaken precaution has to serve as the base for both the negligence phase and the causation phase of the trial, a feature stressed by Grady (Areios Pagos 23/1998).

<sup>56</sup> See H. Koziol (ed), *Unification of Tort Law: Wrongfulness*, Kluwer Law International, Den Haag, London and Boston, 1998, 3.

<sup>57</sup> The same thing holds for Australia. See D. Fraser, *Cricket and the Law: The man in white is always right*, Institute of Criminology, Sydney, 1993.

preparation of fish and chips causes: 'England without fish and chips is a contradiction in terms'.<sup>58</sup>

If courts are doing such a good job, is there no reason to assume that the theory of legal transplants will hold after all? The answer has to be negative. It is very questionable if a single judge has read Grady's articles and will use his approach as a legal formant and without codification there is no guarantee that in future cases courts will not take decisions that go into another direction than is desirable from an efficiency point of view.

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<sup>58</sup> See Coase. In contemporary London, the saying might be more appropriate for curry, which confirms the aforementioned cultural dependence.