

# Comparative notes on injunction and wrongful risk-taking

Willem H. van Boom<sup>♦</sup>

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## Abstract

*This article looks into the role of injunctive relief in tort law. More specifically, it focuses on the role of injunction in cases concerning wrongful risk-taking behaviour (as opposed to intentional or deliberate wrongdoing). Although there seems to be little practical experience with injunctive relief in cases of wrongful risk-taking behaviour, both the dogmatic and practical implications of allowing or rejecting such claims are formidable. By granting petitions for injunctive relief, courts effectively convert ex post claims for compensation into primary duties to act or omit. By contrast, rejecting injunctive relief renders tort law rules into mere taxes on wrongful behaviour. Which of these two routes is chosen by courts and legislators and how forceful are the arguments used to support either choice?*

*The aim of this paper is twofold: firstly, to gain a better understanding of the French, German and English legal systems with respect to the role of injunction in tort law and secondly, by drawing on the comparative analysis, to identify the implications of allowing and rejecting injunctive relief for the understanding of tort law. If indeed the role of injunctive relief in cases of wrongful risk-taking behaviour sheds light on tort law's ends, then perhaps a threefold conception of tort law is in order.*

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<sup>♦</sup> Willem van Boom is professor of private law at the Rotterdam Institute of Private Law, Erasmus University Rotterdam, the Netherlands. This article was completed in February 2010; developments after that date have not been included. The author wishes to express his gratitude to Benoit Allemeersch, Caroline Cauffman, Siewert Lindenberg and the anonymous reviewer, and the participants of the *Ius Commune* November 2009 Workshop for stimulating discussion and helpful comments.

## § 1. The notorious Lucius Veratius

[11] Over the centuries, the case of Lucius Veratius has been the subject of some debate among lawyers.<sup>1</sup> The law of the Twelve Tables provided that the private penalty for causing injury to a person was 25 as. The cruel and abundantly rich Lucius Veratius derived much pleasure from going out into the streets, followed by his slave who carried a money purse, and indiscriminately hitting innocent passers-by. Lucius would instantly compensate his victims, thus fully complying with his legal duties. Is this the way tort law should work? The case of Lucius Veratius poses pertinent questions and unsurprisingly lawyers through the centuries have asked themselves whether this outcome was fair and just, whether tort law should be considered merely as a tariff or tax on wrongful behaviour instead of a set of rules with preventive aspirations that provides for some remedy that would actually help to prevent or stop the likes of Lucius in their hitting sprees.

Obviously, from a perspective of prevention one could ask oneself whether the ex post penalty in tort for deliberate wrongdoing of Lucius should not be set at a punitive level to completely eradicate such wrongdoing. However, there is also an alternative line of enquiry which I set out to investigate in this paper: the role of injunctive relief in tort law. Designing mechanisms for injunctive relief in cases concerning deliberate torts was as daunting to the Romans as considering an overarching conception of injunctive relief in tort is to modern European legal systems. In order to better understand why such an overarching conception is still lacking, this article sets out to survey the French, German and English legal systems with respect to the role of injunction in tort law. With the comparative analysis thus retained it may be possible to analyse the role of injunction in a particular set of cases, namely cases concerning wrongful risk-taking behaviour. This set may be apt to uncover force fields underlying tort and injunction. Take for instance an employer negligently in breach of an uncodified duty of care vis-à-vis his employees to refrain from exposing them to certain risks. Does such a breach warrant injunctive relief petitioned for by the employees? And if so, under which conditions? And if not, what does that tell us about the nature of duties of care in tort?

Admittedly, there seems to be little practical experience with injunctive relief in the set of cases I set out to investigate. Nevertheless, the implications of allowing or rejecting such claims are formidable. By granting petitions for injunctive relief, courts effectively convert ex post claims for compensation into primary duties to act or omit. By contrast, rejecting injunctive relief renders tort law rules into mere taxes on wrongful behaviour. Which of these two routes is chosen by courts and legislators and how forceful are the arguments used to support either choice? Drawing on the comparative analysis, I will attempt to identify the implications of sustaining and disallowing injunctive relief for [12] the understanding of tort law. If, indeed, allowing or rejecting claims for injunctive relief sheds light on tort law's ends, perhaps a threefold conception of tort law is in order.

As concerns the scope of this paper, it is understood that by no means does it present an overarching concept as referred to earlier. Moreover, four important complications are left untreated. First, no specific attention is devoted to the relationship in civil procedure between the summary procedure and main proceedings. Secondly, issues of convergence and coordination with other sources of law, notably regulatory law and criminal law, remain largely uncovered. Thirdly, issues of collective claims for injunction such as group litigation or collective litigation by interest groups and associations are excluded unless relevant for the subject of wrongful risk-taking. Fourthly, no attention is paid to the method of enforcement of

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<sup>1</sup>Holford-Strevens, *Aulus Gellius - An Antonine Scholar and His Achievement*, (OUP, 2005), p.127; Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle* (thèse Aix-Marseille III), (Dalloz 2008), p.19.

injunction judgements, for example, money penalties for non-compliance, *l'astreinte*, *Ordnungsgeld*, imprisonment, committal, or *Ordnungshaft*.

## § 2. Tort and injunction; a comparative analysis

### a. Koziol's puzzlement

In a recent book discussing the Israeli Draft Civil Code, Austrian law professor Helmut Koziol discusses Section 366 of the Israeli Draft, which reads: 'Tort liability is liability for damage caused by wrongful conduct or liability for the conduct itself.' Koziol is puzzled by the wording of this Section and he wonders how a person can be liable without having caused damage.<sup>2</sup> He continues to argue that the Draft does not fit either the Israeli concept of tort law, or the continental European way of thinking, because:

*(...) it is almost generally accepted that the primary aim of tort law is the compensation of loss suffered by the victim. As far as I am aware, the widespread opinion is that injunctions are not a subject of tort law and that they need fewer requirements than claims for compensation.*

Koziol's remark raises a number of interesting questions. Firstly, is the issue of injunction indeed not considered to be part of tort law, as Koziol suggests? And if so, what *are* they considered to be part of? Secondly, does it really matter for the relationship between tort law and injunction whether injunctive relief is in fact a part of tort law, or whatever part of the law? One could also pose the question whether injunctions in tort should ideally be considered to also be part and parcel of tort law.

[13] It is not difficult to appreciate Koziol's puzzlement, both from a common law and civil law perspective. Most legal systems in one way or another distinguish between the law of torts and damages as substantive law on the one hand and injunction, declaratory judgement, penalty payment and contempt of court (where applicable) as issues of procedural law on the other. From a conceptual point of view, however, the connecting points between substantive law and procedural law are obvious. One cannot obtain a judgment declaring that the defendant has acted wrongfully if there was actually no wrongful act from a substantive legal point of view. Further, prohibiting someone from acting wrongfully in the future is logically inconceivable, without first ascertaining wrongfulness of that (future) behaviour. That is, unless the law develops different categories of wrongfulness depending on the remedy sought, for example, by distinguishing between categories of wrongful acts which are *actionable per se* and those that only give rise to a cause of action if damage is proven, or if it links injunctive relief to something else than wrongful behaviour.

Hence, it is theoretically conceivable to consider prohibitory injunction as a totally separate response to infringement of property rights, which would link injunctive relief as a procedural sequel to ownership (*actio negatoria*, *rei vindicatio*) and would leave issues of wrongfulness untreated. Comparably, injunctive relief for nuisance and slanderous communications could be construed as a form of relief for specific categories of tort, unavailable for other categories. These are undoubtedly practical ways to climb out of the labyrinth, but rather than climbing our way out, it seems more fruitful to consider how the labyrinth was built by taking a closer look from the inside.

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<sup>2</sup> Koziol, 'Changes in Israeli Tort Law: A Continental European Perspective', in K. Siehr and R. Zimmermann (ed.) *The Draft Civil Code for Israel in Comparative Perspective*, (Mohr Siebeck, Tuebingen 2008) p. 142. Koziol considers the possibility that Sec. 366 of the Israeli Draft should be considered part of a legal system that allows the mere infringement of a right to give rise to tortious liability – irrespective of whether the infringer was at fault or the infringement had in fact caused damage. Koziol discusses and dismisses this possibility.

## b. English law

The role of injunction under English law can only properly be understood against the historical background of two divisions in the common law: on the one hand the division between torts *actionable per se* and torts *actionable upon damage*, and, on the other, the division between law and equity.

The first division concerns two distinct categories of tort. Traditionally, certain categories of torts (torts actionable on proof of damage) were fundamentally construed as merely giving a right to monetary compensation after the tort had been committed, rather than actual and direct protection against the infringement as such.<sup>3</sup> Essentially, courts [14] at law were not considered to be enforcers of rights and protected interests but rather to be appliers of tariffs for committed wrongs. Other torts, however, were considered to be *actionable per se* – to be heard by courts of law without the need for evidence of damage.<sup>4</sup> This category includes such torts as trespass and defamation. These causes of action were held to provide legal protection to ‘interests considered fundamental to English society and the rule of law such as property, liberty and reputation’.<sup>5</sup>

The second division concerns the distinction between law and equity. Here, an analogy between common law and Roman law can be made. In classical Roman law, *omnis condemnatio est pecuniaria* and only at a later stage did the practice of protecting interests by actually granting injunctive relief through praetorian interdicts develop.<sup>6</sup> Likewise, the common law remedy for torts was pecuniary in form and therefore backward-looking by nature.<sup>7</sup> In England and Wales, a more comprehensive ideal of actual protection against tortious behaviour was developed only *in equity* by courts with equitable jurisdiction.<sup>8</sup> This protection could take the form of injunctive relief in equity where it would not be granted at law.

Originally, injunctive relief was seen as an *ultimum remedium* to be administered only in cases where the available remedies at law were perceived as inadequate or inappropriate, for example, if the monetary damage was trivial but (repeated) infringement was nevertheless considered intolerable.<sup>9</sup> The current

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<sup>3</sup> See the overview presented by J. Steele, *Tort law : Text, Cases, and Materials*, (Oxford University Press, Oxford 2007), p. 8 ff; Cf. W. Rogers, *Winfield & Jolowicz on Tort*, (Sweet & Maxwell, London 2002), chapters 1-2; R. Stevens, *Torts and Rights*, (Oxford University Press, Oxford 2007), p. 284 et seq.; Varuhas, 'A Tort-Based Approach to Damages under the Human Rights Act 1998' (72), 5 *Modern Law Review* (2009), p. 766. See also Steele, 'Damages in tort and under the Human Rights Act: remedial or functional separation?' (67), 3 *Cambridge Law Journal* (2008), p. 607, referring to *Watkins v. Secretary of State for the Home Department* [2006] UKHL 17at [9] (Lord Bingham) and *Van Colle v. Chief Constable of Hertfordshire Police*; *Smith v. Chief Constable of Sussex Police* [2008] UKHL 50at [138] (Lord Brown).

<sup>4</sup> Important to note is also that the range of damages available where such ‘vindicatory torts’ are involved, is much wider than where ‘compensatory torts’ such as negligence are involved. See fn. 3.

<sup>5</sup> Varuhas, 5 *Modern Law Review* (2009), p. 765.

<sup>6</sup> C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle* (thèse Aix-Marseille III, Dalloz, 2008), p. 8 et seq.; G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, (EUL Verlag 2005), p. 32 et seq.; J. Fritzsche, *Unterlassungsanspruch und Unterlassungsklage*, (Springer, Wien 2000), p. 15-16. Note, however, that the analogy between Roman and English law is far from perfect. The Romans in fact introduced a quasi-contractual penalty payment (*poena sponsionis*) fining those who did not comply with the praetor-ordered injunction, while the common law developed a more court-centred concept of ‘contempt of court’.

<sup>7</sup> Cf. J. Martin, *Modern Equity*, (Sweet & Maxwell / Thomson Reuters, London 2009), p. 34.

<sup>8</sup> I. Spry, *The Principles of Equitable Remedies - Specific performance, injunctions, rectification and equitable remedies*, (Thomson Legal & Regulatory / Sweet & Maxwell, London 2007), p. 322 et seq., p. 383; W. van Gerven *et al.*, *Cases, Materials and Texts on National, Supranational and International Tort Law (Ius Commune Casebook)*, (Hart, Oxford 2000), p. 848.

<sup>9</sup> Cf. I. Spry, *The Principles of Equitable Remedies - Specific performance, injunctions, rectification and equitable remedies*, p. 398 ('In many situations where the threatened acts of the defendant are expected to be continuous or repeated the recovery of small or nominal damages is found not to provide sufficient protection. Sometimes, indeed, it is precisely in cases of this kind that the preventive action of a court of equity is most needed (...)' )

position is more balanced; the general test is whether it would be more just to grant an injunction than to award damages.<sup>10</sup>

That said, two important features from the historical basis of injunctive relief in equity remain. The first feature is that injunction is fundamentally considered to be a **[15]** discretionary power of the court and not a *right* of the claimant.<sup>11</sup> In exercising this power, courts pay attention to the practicability of injunction in the given circumstances. This requires the balancing of risks and benefits in the light of the interests involved.<sup>12</sup> Such balancing is especially apparent in case of prohibitory injunction aimed at averting potential wrongful risk-taking such as a *quia timet* injunction. A *quia timet* injunction is conditional upon the weighing of factors such as the prospect of grave and irreversible harm,<sup>13</sup> the balancing of the magnitude of the evil against the chances of its occurrence,<sup>14</sup> proof of imminent danger of very substantial damage,<sup>15</sup> as well as previous disregard of the rights of the claimant.<sup>16</sup>

Moreover, in judging petitions for injunction, the court will consider the prospect of the court (and parties) being excessively burdened by recurring applications for orders and directions as to the execution of the order.<sup>17</sup> This may lead the court to refuse the injunction or to ensure that the court order and its terms are expressed in as clear and unambiguous language as is reasonably possible.<sup>18</sup> Ideally, the court order focuses on the required outcome rather than the process towards the outcome but depending on circumstances, a step-by-step guidance may have to be given.<sup>19</sup>

All in all, courts seem to want to avoid excessively intervening in private relationships themselves and having parties immoderately rely on injunctive relief.<sup>20</sup> Clearly, this dilemma requires a subtle weighing-process. A few examples may illustrate the extent to which English courts are willing to allow injunctive relief. In *Redland Bricks Ltd. v Morris*, the defendant brick company excavated a quarry and as a consequence the **[16]** neighbour's land subsided onto the defendant's land.<sup>21</sup> It was likely that further damage would occur. Hence, the wrongful withdrawal of support had already taken place and the question was merely whether the claimant could get a mandatory injunction to prevent further damage. However, it was estimated that preventing further damage would cost as much as 35,000 GBP whereas the potential damage would not exceed 1,600 GBP. A mandatory injunction was therefore denied.

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<sup>10</sup> Ibid, p. 383; D. Bean, *Injunctions*, (Sweet & Maxwell, London 2010), p. 15 f. [2.02]. Note that this test allows for some level of competition rather than coordination between remedies at law and in equity.

<sup>11</sup> Cf. the wording of section 37 of the Supreme Court Act 1981: 'The High Court may by order (...) grant an injunction (...) in all cases in which it appears to the court to be just and convenient to do so'. Moreover, injunctions not merely serve to protect the claimant but can also serve to avoid interference with due process of the court (e.g. freezing orders, interlocutory and interim injunctions, and injunctions prohibiting oppressive or vexatious conduct). Hence, the generic category of injunction as such is firmly rooted in procedural rather than substantive law.

<sup>12</sup> Cf. R. Heuston and R. Buckley, *Salmond & Heuston on the Law of Torts*, (Sweet & Maxwell, London 1996), p. 556 et seq.

<sup>13</sup> *Runnymede Borough Council v Ball* [1986] 1 WLR 353.

<sup>14</sup> *Earl of Ripon v. Hobart* [1834] 3 My. & K. 169 at 176.

<sup>15</sup> *Fletcher v. Bealey* [1885] 28 Ch. D. 688 at 698. In this case it seems the court applied a test somewhat similar to the well known Learned Hand test (*United States v. Carroll Towing Co.* [1947] 159 F. 169); Cf. I. Spry, *The Principles of Equitable Remedies - Specific performance, injunctions, rectification and equitable remedies*, p. 379 f.; J. Martin, *Modern Equity*, p. 797 [25-007]; Murphy, 'Rethinking Injunctions in Tort Law' (27), 3 *Oxford Journal of Legal Studies* (2007), p. 510.

<sup>16</sup> I. Spry, *The Principles of Equitable Remedies - Specific performance, injunctions, rectification and equitable remedies*, p. 380.

<sup>17</sup> Cf. Ibid p. 106; p. 543 et seq.

<sup>18</sup> Ibid. 374; 545; J. Martin, *Modern Equity*, p. 799 [25-011]; See *Redland Bricks Ltd. v Morris* [1970] AC 652.

<sup>19</sup> See *Kennard v. Cory Brothers and Co. Ltd.* [1922] 2 Ch. 1.

<sup>20</sup> Cf. A. Ogus, *Costs and Cautionary Tales - Economic Insights for the Law*, (Hart Publishing, Oxford 2006), p. 80.

<sup>21</sup> See I. Spry, *The Principles of Equitable Remedies - Specific performance, injunctions, rectification and equitable remedies*, p. 550.

In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*, the defendant put up houses in breach of a contractual clause against development. However, the value of the surrounding estate had not been reduced by the development. A mandatory restorative injunction was refused, as it was held that demolition of the houses would constitute a waste of much needed housing.<sup>22</sup> Instead, the claimant was awarded an amount in damages equal to what he could reasonably have demanded prior to building, in return for waiving his rights under the clause.<sup>23</sup>

In *Miller v Jackson*, a cricket club allowed balls to land on the claimants' property. An injunction sought on the basis of nuisance and negligence was refused. The public interest in enabling the locals to enjoy outdoor recreation prevailed over the owners' rights to quietly enjoy their properties (notwithstanding the owners' right to compensation).<sup>24</sup> This case seems to give authority to the inclusion of interests wider than those of the litigants in the weighing process.<sup>25</sup> Contrastingly, in *Kennaway v Thompson*, a prohibitory injunction for nuisance caused by excessive noise from a motor boat racing club was partially granted, notwithstanding the interests of the public involved in the racing activities.<sup>26</sup> This gives some credence to the proposition that, in judging claims for injunctive relief for nuisance, courts engage in a process of weighing the interests involved.<sup>27</sup>

The second feature of injunction is that it is primarily considered to be an equitable remedy to support a *legal right* of a private individual rather than a sanction for wrongful behaviour. Indeed, in most of the cases mentioned earlier, a property right was involved. If there is no legal right involved, the court may be more reticent in granting an injunction. For example, it was held that the owner of a house named 'Ashford House' did not have a legal right to the name and as a result, prohibitory injunction was denied. Equally, the husband of a pregnant woman seeking injunction against her plan to have an abortion [17] was held not to have a legal right ready for protection by injunction. From other case law, however, it seems that the concept of 'legal right' may be less than decisive. For instance, there is ample case law on the protection of obligations of confidentiality through injunction.<sup>28</sup>

As far as injunction for breach of statutory duties is concerned, *Gouriet v. Union of Post Office Workers* shows the reluctance of English courts to give individuals a right to 'specific performance' in tort. In *Gouriet v. Union of Post Office Workers*, the issue before the court was whether an individual claimant should be granted an injunction compelling the defendant to perform a statutory duty. Postal workers' unions announced that they would call on their members not to handle mail to South Africa for an entire week by way of anti-apartheid boycott. This boycott would contravene postal legislation which positively obliges postal workers not to wilfully delay or omit to deliver letters. An individual member of the public, Mr. Gouriet, initiated proceedings in his own name for mandatory injunction against the unions. One of the main questions was whether a statutory duty – enforceable by criminal law – could be alternatively enforced by individuals seeking injunction. Unmistakably, this was not merely an isolated issue of civil law and it deserved a holistic constitutional approach: can injunction be sought by individuals pursuing enforcement of statutory duties vis-à-vis the general public, or should this be a prerogative of public authorities with specific statutory powers? The House of Lords decided that Mr. Gouriet could not be granted injunctive relief,

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<sup>22</sup> *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 811 (Brightman J).

<sup>23</sup> Pearce and Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication', 1 *Oxford Journal of Legal Studies* (2008), p. 19 f.; See also A. Ogus, *Costs and Cautionary Tales - Economic Insights for the Law*, p. 202.

<sup>24</sup> *Miller v Jackson* [1977] QB 966; Cf. J. Martin, *Modern Equity*, p. 854 f. [25-066].

<sup>25</sup> J. Martin, *Modern Equity*, p. 798 f. [25-010].

<sup>26</sup> *Kennaway v Thompson* [1981] QB 88. Cf; W. van Gerven et al., *Cases, Materials and Texts on National, Supranational and International Tort Law*, p. 856.

<sup>27</sup> A. Ogus, *Costs and Cautionary Tales - Economic Insights for the Law*, p. 204 f.

<sup>28</sup> See the cases referred to by J. Martin, *Modern Equity*, p. 804 f.



essentially because he could not show any particular interest or special damage.<sup>29</sup> Hence, the mere fact that an individual expects to suffer damage by the breach of a statutory duty does not give rise to injunctive relief. However, if an individual claimant can show that the statutory duty was designed to protect a class of which he is a member, then the claimant has standing and injunction may be granted.<sup>30</sup>

The discretionary nature of the court's powers and the requirement of a legal right do not preclude, however, the procedure for injunction leaving its mark, or even moulding rights and duties under substantive law. In fact, it is sometimes said that English law is becoming more rights-based, making the vindicatory function of remedies increasingly [18] relevant.<sup>31</sup> If true, this development may also herald a shift towards a more rights-based approach in injunction for negligent wrongdoing. Currently, however, this seems to be truer for contract law than for tort law. In the general area of negligence, there is still the dominant view that tortious liability in the tort of negligence is founded on the consequences of the act rather than on the act itself and that there is no free standing duty of care in negligence.<sup>32</sup> It still seems to be conventional wisdom that there is only significance in the primary duty preceding the secondary obligation to compensate, if breach of the duty *per se* is actionable - as is the case with torts *actionable per se*.<sup>33</sup> That said, statutory duties designed to protect specific interests do seem to be free standing and hence enforceable through injunction. This might indicate an increasing convergence of legal rights *actionable per se* and 'legal interests' traditionally not considered to be so.

### c. French law

The French law of torts centres around the unitary concept of *responsabilité pour faute*. The concept of *faute* encapsulates both the wrongful act and imputability (*l'illégitimité et imputabilité*) – although the French themselves would not spontaneously dissect their concept of *faute* into such elements.<sup>34</sup> Indeed, it is precisely this lack of dissection that makes it difficult for French law to dovetail tort law with injunction. Article 1382 Code Civil (CC) is explicitly geared towards compensation and does not impose a direct prohibition of committing torts.

This did not stop Planiol from theorizing that liability under Article 1382 presupposes a primary obligation to act or to refrain from acting and that liability is in fact the secondary, rather than the primary obligation.<sup>35</sup>

<sup>29</sup> *Gouriet v. Union of Post Office Workers* [1977] A.C. 435 (HL); Cf. *Gouriet v. Union of Post Office Workers* [1978] Q.B. 729 (CA) at 770 per Lawton L.J., at 778 per Ormrod L.J.; See generally J. Martin, *Modern Equity*, p. 800 et seq. [25-013]; D. Bean, *Injunctions*, p. 62 [4.43]; A comparable issue arose before the French Cour de Cassation, where neighbours fought over a structure that had been erected by one of them in contravention of building regulation. The other filed for a mandatory injunction for demolition but since he did not suffer any damage or nuisance by the fact that the building was in violation of public law rules, the injunction was rejected; See Cour de Cassation Civ 2e, 18 décembre 2003, N° 02-13092, Bulletin 2003 II N° 405 p. 335; RTD Civ. 2004, p. 294 (note P. Jourdain); C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 462 (footnote 1574).

<sup>30</sup> J. Martin, *Modern Equity*, p. 801 [25-013]; I. Spry, *The Principles of Equitable Remedies - Specific performance, injunctions, rectification and equitable remedies*, p. 539.

<sup>31</sup> Pearce and Halson, 1 *Oxford Journal of Legal Studies* (2008), p. 1.

<sup>32</sup> *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (the Wagon Mound)* [1961] AC 388 at 425 (Viscount Simonds); *In Re T & N Ltd* [2006] 1 WLR 1728 at no. 25 (David Richards J); Cf. Pearce and Halson, 1 *Oxford Journal of Legal Studies* (2008); J. Murphy, 3 *Oxford Journal of Legal Studies* (2007), p. 520; See also *Johnston v NEI International Combustion Ltd*, [2007] 3 WLR 876 ('the victim of the negligence must await events' (Lord Scott at [67])) and *Kuwait Airways Corp v Iraq Airways Corp*, [2002] 2 AC 883 ('One cannot separate questions of liability from questions of causation. (...) One is never simply liable; one is always liable for something (...)') (Lord Hoffmann at [128])).

<sup>33</sup> Pearce and Halson, 1 *Oxford Journal of Legal Studies* (2008), p. 16.

<sup>34</sup> C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 356 remarks that French lawyers would probably be surprised by the distinction.

<sup>35</sup> *Ibid.* p. 285 et seq.

Others resisted this theory by arguing that uncoded primary duties (*devoirs généraux*) underlying Article 1382, cannot be considered genuine obligations and that there are too much duties to properly categorize them. Recently, however, Bloch argued in support of Planiol that such *devoirs* logically precede the obligation to compensate and that French law should therefore better distinguish between *l'illicéité* and *faute* (the wrongful act and liability). Such a distinction would provide a better basis for injunctive relief in tort.<sup>36</sup>

[19] Currently, French case law is not entirely clear on the necessary nexus between *faute* and injunction. In a recent decision, the *Cour de Cassation* had to deal with the following matter. The owner of a piece of land obtained a mandatory injunction against his neighbour to remove an illegal pigeon hunting post which was in violation with a ministerial order. The owner's claim for compensation of damage, however, was rejected by the Court of Appeal of Pau because no wrongful nuisance was demonstrated. The *Cour de Cassation* found this reasoning flawed in the light of Article 1382 Code Civil:<sup>37</sup>

*Qu'en statuant ainsi, tout en déboutant par ailleurs M. X... de sa demande indemnitaire au motif que celui-ci ne démontrait avoir subi aucun préjudice du fait de la construction irrégulière des deux palombières de M. Y... Z... ni aucune gêne dans l'utilisation de ses propres palombières, la cour d'appel, qui n'a pas constaté l'existence d'un trouble excédant les inconvénients normaux du voisinage et qui a en outre exclu toute relation de causalité entre l'infraction à l'arrêté ministériel et un préjudice personnel quelconque de M. X... s'est contredite et a violé le texte susvisé ;*

*(...) in so ruling, while dismissing Mr X' claim for compensation on the grounds that he had not shown to have suffered any detriment because of the illegal construction of two dove hunting towers by mr. Y. ... Z. .. nor any discomfort in using his own towers, the appellate court, which had not established the existence of a nuisance exceeding the normal inconveniences of neighbourhood and had also ruled out any causal relationship between the breach of the ministerial order and any individual damage suffered by mr. X, has contravened and violated the aforementioned text;*

Clearly, this type of reasoning leaves French tort law with the fundamental question of whether *l'illicite* can really be considered the common denominator for injunctive relief.<sup>38</sup> Rather, case law seems to frame (restorative) injunction as reparation in kind and therefore as damages rather than as a 'genuine' injunction.<sup>39</sup>

Under French law, protection of legal rights (*droits subjectifs*) is traditionally at the forefront of injunctive relief but there is no rigid categorization of cases eligible for injunction.<sup>40</sup> Hence, injunction is also available in other tort areas, such as in the private enforcement of building regulation, neighbour disputes, freedom of expression and libel, unfair competition, employment disputes and industrial action.<sup>41</sup> Indeed, Bloch in his

<sup>36</sup> Ibid. p. 350 et seq.

<sup>37</sup> Cour de Cassation Civ 2e, 18 décembre 2003, N° 02-13092, Bulletin 2003 II N° 405 p. 335 ; RTDciv. 2004, p. 294 (note P. Jourdain).

<sup>38</sup> C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 287 et seq.; p. 294 et seq.

<sup>39</sup> W. van Gerven et al., *Cases, Materials and Texts on National, Supranational and International Tort Law*, p. 862, p. 869; Otherwise, injunction is considered a discretionary interim relief tool in summary proceedings (Art. 809 Code de Procédure Civile): '*Le président peut toujours, même en présence d'une contestation sérieuse, prescrire en référé les mesures conservatoires ou de remise en état qui s'imposent, soit pour prévenir un dommage imminent, soit pour faire cesser un trouble manifestement illicite.*' [The president (of the tribunal) may always, even in case of serious challenge by the respondent, order interim measures conserving or freezing the current state of affairs to prevent imminent damage or to end a clearly wrongful disorderly situation.]

<sup>40</sup> C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 146 et seq.

<sup>41</sup> Ibid. p. 157 et seq., p. 202 et seq.



[20] recent study concludes that there is no logical reason for limiting injunctive relief to cases in which subjective property rights are involved.<sup>42</sup> He concludes that the current wording of Article 1382 CC does not give sufficient credit to the fact that *illicéité* is at the heart of *responsabilité pour faute* and that a second sentence should be added to the article.<sup>43</sup>

*Indépendamment de la réparation du dommage éventuellement subi, le juge prescrit toutes les mesures qui s'imposent pour prévenir ou faire cesser le trouble illicite.*

*Irrespective of compensation for the damage possibly suffered, the court shall order any such measures needed to prevent or stop the wrongful situation/nuisance.*

In the *Avant-Projet Catala*, however, the emphasis is put slightly differently. First, the Catala project considers injunctive relief to be a discretionary power of the court in tort cases rather than a logical stepping stone between *illicéité* and *faute*. Secondly, the Catala project works from the principle that prevention of damage is not a specific function of liability under tort law<sup>44</sup> and that injunction, that is, *reparation in kind*, may be a subsidiary measure rather than a right of the claimant.<sup>45</sup> The Catala project provides:

*Chapitre III - Des effets de la responsabilité, Section 1 Principes*

*La réparation en nature*

*Art. 1369*

*Lorsque le juge ordonne une mesure de réparation en nature, celle-ci doit être spécifiquement apte à supprimer, réduire ou compenser le dommage.*

*Art. 1369-1*

*Lorsque le dommage est susceptible de s'aggraver, de se renouveler ou de se perpétuer, le juge peut ordonner, à la demande de la victime, toute mesure propre à éviter ces conséquences, y compris au besoin la cessation de l'activité dommageable. Le juge peut également autoriser la victime à prendre elle-même ces mesures aux frais du responsable. Celui-ci peut être condamné à faire l'avance des sommes nécessaires.*

*Chapter III – Consequences of liability, Section 1 Principles*

*Restoration in kind*

*Art. 1369*

*When the court orders a remedy in kind, it must be specifically suited to remove, reduce or compensate the damage.*

*Art. 1369-1*

*When the damage is likely to increase, to reoccur or to continue, the court may order, at the request of the victim, any proper measure to prevent these consequences, including if necessary the ending of the harmful activity.*

*The court may also allow the victim to take these measures himself on account of the liable party. The latter can be sentenced to advance the necessary funds.*

As far as French case law is concerned, there are some examples of injunction against wrongful risk-taking. Examples in which French courts awarded injunctive relief to mitigate risk to life, limb and property, include cases where a neighbour used wood [21] to build a wall, thus posing a risk of fire and where the defendant used scaffolding erected alongside a building, posing a risk of burglary. Relevant is also a recent case of a negligently constructed golf course causing danger to neighbouring property and the neighbours themselves. The dangers that the golf course posed were considered to go beyond the '*troubles normaux*

<sup>42</sup> Ibid. p. 168.

<sup>43</sup> Ibid. p. 256.

<sup>44</sup> (ed.) (Ministère de la Justice, 2006), p. 168.

<sup>45</sup> C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 18-19.

du voisinage' (the normal nuisance of neighbourhood) and the golf course operator was ordered by the *Cour d'Appel Grenoble* to reconstruct the fairway, bunker and hole no. 2.<sup>46</sup> In a similar case, the *Cour de Cassation* held:<sup>47</sup>

(...) attendu que l'arrêt retient que par suite d'un défaut de conception du tracé du golf la propriété de Mme X... était beaucoup plus exposée que les autres riverains à des tirs de forte puissance, et qu'il ressortait clairement de l'expertise que Mme X..., contrainte de vivre sous la menace constante d'une projection de balles qui devait se produire d'une manière aléatoire et néanmoins inéluctable, et dont le lieu et la force d'impact, comme la gravité des conséquences potentielles, étaient totalement imprévisibles, continuait à subir des inconvénients qui excédaient dans de fortes proportions ceux que l'on pouvait normalement attendre du voisinage d'un parcours de golf ; (...) de sorte qu'il convenait de faire application du principe général selon lequel l'exercice même légitime du droit de propriété devient générateur de responsabilité lorsque le trouble qui en résulte pour autrui dépasse la mesure des obligations ordinaires du voisinage ; (...)

Given that the decision on appeal holds that due to defective design of the layout of the golf course the property of Mrs. X. ... was much more exposed than other residents to hard shots, and it was clear from the evidence that Ms. X. ..., forced to live under the constant threat of a barrage of golf balls in a random yet inevitable way, whose location and impact as well as the severity of potential consequences was totally unpredictable, continued to suffer inconveniences substantially exceeding the level one could normally expect from living near a golf course; (...) therefore it was appropriate to apply the general principle that even the exercise of legitimate ownership leads to liability when the nuisance/condition resulting to others exceeds the ordinary burdens of the neighbourhood; (...)

Note that in the golf course cases the courts allowed injunction for *certain* risks, which is different from allowing injunction for uncertain risks. The former seems to be merely an application of a Learned-Hand based approach while the latter would amount to application of the precautionary principle.<sup>48</sup>

#### d. German law

The position of the German Bürgerliches Gesetzbuch (BGB) is comparable to Article 1382 of the French Code Civil in the sense that the wording of § 823 BGB is primarily concerned with compensation for wrongs. In other words, the BGB does not contain a **[22]** direct prohibition against committing torts.<sup>49</sup> Neither the German Civil Code (BGB) nor the Code of Civil Procedure (Zivilprozessordnung; ZPO) contains general rules on injunction.<sup>50</sup> As a result, the German courts had to develop a system of injunctive relief in civil cases. The development of injunctive remedies was helped by the existence of the so-called *actio negatoria*, the injunctive relief ancillary to the *revindicatio* and neighbour disputes.<sup>51</sup> Nowadays, a more or less general framework for injunctive relief can be found in § 887, § 888 and § 890 ZPO. These Articles merely refer to

<sup>46</sup> CA Grenoble 1re ch. Civ., 22 mai 2000, JCP 11 avril 2001, no. 15-16, no. IV 1 717, p. 787 (SA Golf d'Albon v. Vachier).

<sup>47</sup> Cour de Cassation Civ. 2e, 10 juin 2004, P. no. 03-10434, RTD Civ 2004, p. 738 with comment P. Jourdain (société Massane Loisirs v. Groupama), approving CA Montpellier 5 nov 2002, JD no 241093.

<sup>48</sup> Cf. C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 462 f.

<sup>49</sup> Id 95.

<sup>50</sup> G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, p. 47.

<sup>51</sup> § 907 BGB (prohibitory injunction against neighbour in case of certainty of future cross-border damage), § 908 BGB (mandatory injunction in case of imminent collapse of adjacent building), § 1004 BGB (prohibitory injunction against infringement of property right).

injunctive relief concerning a 'Verpflichtung' (a duty) – which can be anything ranging from ending wrongful emissions and remedying humidity problems, to making a dog stop barking.<sup>52</sup>

§ 887

(1) Erfüllt der Schuldner die Verpflichtung nicht, eine Handlung vorzunehmen, deren Vornahme durch einen Dritten erfolgen kann, so ist der Gläubiger von dem Prozessgericht des ersten Rechtszuges auf Antrag zu ermächtigen, auf Kosten des Schuldners die Handlung vornehmen zu lassen.

(2) Der Gläubiger kann zugleich beantragen, den Schuldner zur Vorauszahlung der Kosten zu verurteilen, die durch die Vornahme der Handlung entstehen werden, unbeschadet des Rechts auf eine Nachforderung, wenn die Vornahme der Handlung einen größeren Kostenaufwand verursacht.

(3) (...)

§ 888

(1) Kann eine Handlung durch einen Dritten nicht vorgenommen werden, so ist, wenn sie ausschließlich von dem Willen des Schuldners abhängt, auf Antrag von dem Prozessgericht des ersten Rechtszuges zu erkennen, dass der Schuldner zur Vornahme der Handlung durch Zwangsgeld und für den Fall, dass dieses nicht beigetrieben werden kann, durch Zwangshaft oder durch Zwangshaft anzuhalten sei. Das einzelne Zwangsgeld darf den Betrag von 25.000 Euro nicht übersteigen. Für die Zwangshaft gelten die Vorschriften des Vierten Abschnitts über die Haft entsprechend.

(2) Eine Androhung der Zwangsmittel findet nicht statt.

(3) Diese Vorschriften kommen im Falle der Verurteilung zur Leistung von Diensten aus einem Dienstvertrag nicht zur Anwendung.

§ 890

(1) Handelt der Schuldner der Verpflichtung zuwider, eine Handlung zu unterlassen oder die Vornahme einer Handlung zu dulden, so ist er wegen einer jeden Zuwiderhandlung auf Antrag des Gläubigers von dem Prozessgericht des ersten Rechtszuges zu einem Ordnungsgeld und für den Fall, dass dieses nicht beigetrieben werden kann, zur Ordnungshaft oder zur Ordnungshaft bis zu sechs Monaten zu verurteilen. Das einzelne Ordnungsgeld darf den Betrag von 250.000 Euro, die Ordnungshaft insgesamt zwei Jahre nicht übersteigen.

(2) Der Verurteilung muss eine entsprechende Androhung vorausgehen, die, wenn sie in dem die Verpflichtung aussprechenden Urteil nicht enthalten ist, auf Antrag von dem Prozessgericht des ersten Rechtszuges erlassen wird.

(3) (...)

§ 887

(1) If the debtor does not meet his duty to undertake an action that can be undertaken by a third party, the creditor shall, on request, be authorized by the court of first instance to perform the action at the expense of the debtor.

(2) The creditor may also petition for the debtor to advance the costs that will be incurred in the performance of the act, notwithstanding the right to be reimbursed later if the performance of the act causes greater expenses.

(3) (...)

§ 888

(1) If an act cannot be done by another person, that is, if it depends solely on the will of the debtor, the court of first instance may order that the debtor is coerced to perform the act through penalty payments and in case these payments can not be recovered is coerced by penalty or coercive confinement (Zwangshaft) .

The payment per case shall not exceed the amount of 25,000 euros. For the compulsory detention of the provisions of the Fourth Section on detention shall apply accordingly.

(2) There is no prior notification of coercion.

(3) These rules do not apply in case of a conviction for the provision of services from a service contract.

§ 890

(1) If the debtor acts contrary to his duty to refrain from an act or refuse to carry out an action, he shall on request of the creditor be convicted by the court of first instance to pay a penalty for reason of infringement and in the event that this penalty cannot be recovered, to detention or imprisonment up to six months. The payment per case shall not exceed the amount of 25,000 euros, the order of detention shall not exceed a total of two years.

(2) The conviction must be preceded by an appropriate notification, which, if it is not included in the verdict expressing the duty, shall be issued by the court of first instance.

(3) (...)

<sup>52</sup> Cf. H. Thomas and H. Putzo, *Zivilprozessordnung Kommentar*, (Beck, München 2008), § 887 - § 890.

[23] The historical development of injunction in German civil law was briefly as follows. Throughout the 19<sup>th</sup> century, German courts were anxious that issuing an injunction could have catastrophic consequences for the business involved. This prompted them to carefully consider whether compensatory damages was not the preferable option in nuisance cases.<sup>53</sup> On the other hand, injunction orders were used increasingly in protecting 'immaterial rights' such as name, honour and 'the right to undisturbed exploitation of established and operative business'.<sup>54</sup>

The German Reichsgericht (1901) first approached the issue of injunction by connecting actions for damages with actions for injunction, by holding that cases that were actionable for damages were also actionable for prohibitory injunction.<sup>55</sup> The Court's reasoning was criticized for failing to distinguish retrospective from prospective remedies,<sup>56</sup> but it did help German doctrine to better express the conditions for injunctive relief subsequently. For instance, the labelling of 'unlawfulness' and 'fault' in the tort provisions of the BGB was subsequently used to compare and distinguish [24] retrospective and prospective remedies. 'Unlawfulness' of behaviour in view of legally protected interests could thus be considered both retrospectively and prospectively, as in both cases the breach of a duty to respect the legally protected interest was at the heart of the remedy. From this doctrinal reasoning came the conclusion that 'fault' could only be relevant for judging past breaches and not for injunction orders to the extent that these dealt with future breaches.<sup>57</sup>

It was only in 1905 that the Reichsgericht considered the relationship between injunction and enforcement of *Rechte* and *Rechtsgüter* (subjective rights and interests protected by statute) by holding that any right and protected interest was worthy of protection by prohibitory injunction.<sup>58</sup> As a result, currently injunctive relief is also granted currently for breach of statutory duties if the statute aims at protecting the interests of the claimant.<sup>59</sup>

In current German doctrine, the general category *Abwehrensprüche* is subdivided into *Unterlassungsklagen* (prohibitory injunction aimed at refraining from infringement; § 890 ZPO), *quasi-negatorische Beseitigungsklagen* (mandatory injunction aimed at either ending infringement or positive restorative action for the application of § 249 BGB, § 887 and 888 ZPO).<sup>60</sup>

Legal doctrine has extensively debated the nature of injunctive relief in general. Some scholars consider injunctive relief merely a procedural phenomenon without conveying any legal rights on the claimant. However, the majority of legal authors argue that 'substantive rights of action or omission' underlie every type of injunctive relief.

The separation of conditions for injunction and compensation has also led to the assertion that a claim for damages in tort is logically dependent on the pre-existence of a duty to act or omit. This is the Planiol argument.<sup>61</sup> As a consequence, claims concerning compensation are distinguished from those concerning

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<sup>53</sup> G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, p. 48 f.

<sup>54</sup> Ibid. p. 49 et seq. In 1896, the *Gesetz gegen unlauteren Wettbewerb* (Act against Unfair Competition) was enacted, introducing specific stopping orders enforceable by criminal penalties.

<sup>55</sup> Ibid. p. 54.

<sup>56</sup> Ibid. p. 16 et seq.

<sup>57</sup> Cf. W. van Gerven *et al.*, *Cases, Materials and Texts on National, Supranational and International Tort Law*, p. 857.

<sup>58</sup> G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, p. 56.

<sup>59</sup> W. van Gerven *et al.*, *Cases, Materials and Texts on National, Supranational and International Tort Law*, p. 860.

<sup>60</sup> G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, p. 6 et seq., p. 19; W. van Gerven *et al.*, *Cases, Materials and Texts on National, Supranational and International Tort Law*, p. 856.

<sup>61</sup> Kocher, 'Feststellungswirkungen von Unterlassungs- und Schadensersatzurteilen' (117), 4 *Zeitschrift für Zivilprozess* (2004), p. 494; G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, p. 64 et seq.; J. Fritzsche,

injunction. Two cases may illustrate this. First, there is the *Faxkarte* case concerning alleged infringement of copyright of a computer application.<sup>62</sup> The legal issue involved was whether a court [25] decision rejecting a claim for compensation has *res judicata* effect between the litigants in a subsequent procedure for prohibitory injunctive relief. The *Bundesgerichtshof* reasoned that although the facts underlying the claim for prohibition – past infringement of the rights of the claimant – may be identical to the facts that were earlier deemed insufficient for sustaining a claim for compensation in tort, the acts targeted are different: the claim for compensation relates to past acts whereas the claim for prohibitory injunction concerns future acts. Moreover, the two claims offer different forms of protection and this may bring the defendant to display distinct behaviour in defending either claim. He may be more interested in putting up a defence against one claim than against the other. For these reasons, elements of the claim decided in one procedure have no *res judicata* effect in the other procedure.

The second case concerned the extinction of claims for injunction. In a 1990, decision the *Bundesgerichtshof* held that the right to apply for injunctive relief by designated consumer associations under the 1976 General Contract Terms Act was not a procedural remedy *sui generis*, but a substantive right pursuant to § 194 of the German *Bürgerliches Gesetzbuch*. This meant that as such, the right to injunctive relief was considered to be subject to prescription and estoppel.<sup>63</sup>

It seems that the concept of injunction as the procedural materialization of substantive legal rights to action or omission by the defendant can be traced back to Savigny and Windscheid, who helped to distinguish 19<sup>th</sup> century German law from Roman law. Roman law itself did little to distinguish substantive rights from procedural actions. By imbuing German scholarship with the concept of subjective rights, Savigny and Windscheid were seminal in conceptualizing injunctive relief as the procedural side of a genuine right to action or omission.<sup>64</sup> Perhaps this also explains why German law has succeeded better in dovetailing tort law and injunctive relief than English law, as the common law still seems to be in the middle of a process of defining the law of torts as a rights-based system.

The use of injunctive relief in German tort law is twofold: injunction serves to protect subjective rights such as property (*‘geschützter Rechtspositionen’*) and to legally enforce arranged duties to behave in a certain way (i.e. statutory duties and uncodified duties of care enforceable under § 823 et seq. BGB).<sup>65</sup> Hence, in theory it can be used to stop wrongful risk-taking from causing harm. In practice, though, there are some obstacles. For prospective injunction, danger of occurrence, or reoccurrence, is relevant.<sup>66</sup> Imminent danger that the wrongful act will occur is usually the yardstick used.<sup>67</sup> In case of danger of reoccurrence, however, a certain reversal of the burden of proof can be [26] applied. Another issue that may be relevant is the precision of the verdict. To the extent that an injunction is aimed at future acts, describing such acts may be difficult as these by nature are more diffuse and hence more difficult to delineate.<sup>68</sup> This brings courts to

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*Unterlassungsanspruch und Unterlassungsklage*, p. 114 ff; Cf. French law, C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 290.

<sup>62</sup> *Faxkarte* BGHZ 150, 377 (Bundesgerichtshof 2 May 2002) at 383; Cf. E. Kocher, 4 *Zeitschrift für Zivilprozess* (2004), at p. 489; See also *Brunova* [1974] GRUR 99 (Bundesgerichtshof 28 September 1990) at 101 (separate limitation periods for a claim holding both mandatory positive injunction and prohibitory injunction).

<sup>63</sup> [1990] ZIP 511 (Bundesgerichtshof 21 February 1990) at 512.

<sup>64</sup> G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, p. 71 et seq.

<sup>65</sup> J. Fritzsche, *Unterlassungsanspruch und Unterlassungsklage*, p. 111.

<sup>66</sup> G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, p. 89 et seq.; J. Fritzsche, *Unterlassungsanspruch und Unterlassungsklage*, p. 178 et seq.

<sup>67</sup> J. Fritzsche, *Unterlassungsanspruch und Unterlassungsklage*, p. 179.

<sup>68</sup> Cf. Kocher, 4 *Zeitschrift für Zivilprozess* (2004), p. 492.

carefully consider and phrase orders granting a prohibitory injunction and it also indicates that such orders are in inherent need of construction.<sup>69</sup>

An example drawn from German case law may illustrate the difficulties for courts to consider injunction for wrongful risk-taking. The owner of a house with a garden noticed that his garden drew considerable attention from small children in his neighbourhood. Although he had secured his garden with a fence, children from time to time nevertheless succeeded in entering the garden. Quite a number of these stray children fell in the pond. For this reason, the parents feared that the pond would sooner or later cause some harm to the children of the neighbourhood. The parents petitioned the court on the basis of wrongful risk-taking by the pond owner for a mandatory injunction to implement precautions, for example, better fencing.<sup>70</sup> As such, a mandatory injunction is feasible under German law. But how specific may the court be? May it merely order outcome or is it also allowed to formulate the positive duty and how it should be executed?<sup>71</sup> Admittedly, this is a difficult issue as some legal systems would find a court order that merely describes the outcome as too vague to impose legally enforceable duties.<sup>72</sup>

### § 3. Comparative notes

As Kennett rightly noted, 'enforcement laws are deeply embedded in national histories and cultures, and lie at the intersection of many different areas of substantive law', which make them potentially resistant to comparison (let alone harmonization).<sup>73</sup> So the previous comparative overview was merely a first attempt at comparing different styles of enforcement in tort law. The overall conclusion is that injunctive relief for wrongful risk-taking is underdeveloped in the legal systems reviewed earlier. Whether that is deplorable or not is a matter for later discussion. What is interesting here is that at first sight the legal systems seem to have different levels of rigidity in dealing with injunction [27] as a remedy, both in terms of legal practice and dogmatic structure. As far as practice is concerned, use of civil injunction is predominantly made in competition law, intellectual property law, unfair commercial practices, neighbour law, labour disputes, privacy, anti-social behaviour and domestic violence (occupation and non-molestation orders).<sup>74</sup>

As far as the differences between legal systems are concerned, it has been said that German courts are less reticent in allowing mandatory injunction than English courts and that the latter show a clear preference for damages.<sup>75</sup> With regard to wrongful risk-taking, examples are scarce in either jurisdiction. If anything, this renders it impossible to draw firm conclusions. As far as rigidity in structure is concerned, it seems that jurisdictions such as the German one, with a dogmatic distinction between wrongfulness and imputability, have an easier job fitting in injunctive relief in their concept of tort law than those that work with unitary

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<sup>69</sup> Cf. Ibid. 493; G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, p. 146 et seq. For rules of construction of prohibitory injunctive orders under German law; see *Jubiläumsschnäppchen* [2001] Neue Juristische Wochenschrift 3710 (Bundesgerichtshof 7 June 2001) at 3711; See also *Mehrfruchtsäften* [2000] 2001 Neue Juristische Wochenschrift 157 (Bundesgerichtshof 26 September 2000), holding that the court cannot order a prohibitory injunction beyond the boundaries of what the claimant applied for.

<sup>70</sup> Example derived from a decision by Amtsgericht Marbach 1988, referred to by J. Fritzsche, *Unterlassungsanspruch und Unterlassungsklage*, p. 217-218.

<sup>71</sup> Ibid. p. 220.

<sup>72</sup> Ibid. p. 222.

<sup>73</sup> W. Kennett 'Enforcement: general report', in M. Storme (ed.) *Procedural Laws in Europe. Towards Harmonisation*, (Maklu, Antwerpen, 2003), p. 110.

<sup>74</sup> Cf. G. Wiesen, *Zivilprozeßrechtliche Probleme der Unterlassungsklage*, p. 1.

<sup>75</sup> W. van Gerven et al, *Cases, Materials and Texts on National, Supranational and International Tort Law*, p. 870.



concepts such as *faute* and the tort of negligence that stress the outcome of the act rather than the act itself.<sup>76</sup>

On a general level, however, these differences in structure, use and extent of injunction in tort law offer a more profound insight into the role of the judiciary in tort law. As noted by Damaska and Kessler,<sup>77</sup> the organisation of state authority and the prevailing conception of what purposes such authority should serve, in part explain the shape that methods of dispute resolution take in a particular jurisdiction. This is also true for enforcement mechanisms in private law. Take for instance penalty payments available in some jurisdictions (*Zwangsgeld*, *l'astreinte*, *dwangsom*) as an instrument for prodding the defendant to comply with a prohibitory or mandatory injunction: for each day the defendant is in violation of the court-ordered injunction he will forfeit an amount in money. The interesting curiosity here is that in some jurisdictions, the penalty payment flows into the public purse whereas in other jurisdictions it flows into the claimant's purse. It can be argued that these differences between jurisdictions tell us something about the perceived role of judicial authority and the role the judiciary plays in civil disputes. Moreover, it can be maintained that by allowing claimants to collect and keep the penalty payment, the legislature may want to signal to citizens that the judge is not the key player in the procedure and that the function of the judiciary in civil law is more a *provider of adjudicatory services* to the public rather than the enforcement agent vested with exclusive state powers. In any event, it seems plausible that the shape, form and extent of injunctive relief in a given legal system signals how that legal system perceives [28] litigants, courts, and the relationship between procedural law and substantive private law. This underscores the observation that it would be misleading to separate tort law systems from the procedural environment in which they operate.<sup>78</sup>

From this perspective, it may be argued that the stance of the judiciary in petitions for injunction against wrongful risk-taking can reveal something about the core of tort law. We all acknowledge that in practice, tort law provides monetary compensation for wrongs causing harm. That is what it *does*, but what does it *aim* at? Why would it want to compensate? One could easily assess that monetary compensation is merely a remedy and as such cannot be considered a goal of tort law. Surely, tort law must be about more than compensating for compensation's sake. Indeed, tort theorists put forward laudable goals behind the remedy of compensation, such as restorative justice, vindication of rights, etc.

In practice, some legal systems explicitly define tort law in terms of a legal institution aimed at protecting specifically identified *interests* against infringements, such as the German unitary idea of tort. Others work from the central idea that tort law is to protect against wrongful *behaviour* in general, for example, the French idea of tort. Again other legal systems, such as the common law, hold a middle position by categorising some torts as primarily protection of rights (torts *actionable per se*) and others as merely giving rise to compensation for damage after the event as is the case with the tort of negligence. To some extent, legal systems adhering to a rights-based approach in tort law (*ubi ius, ibi remedium*) could be expected to approach the foundations of injunctive relief differently from legal systems historically based on a semi-closed list of writs and remedies. The former could be expected to consider injunctive relief to be one of the claimant's remedies defining his substantive right to action or omission, whereas the latter could be expected to consider injunctive relief to be a court prerogative based on autonomous criteria which may or

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<sup>76</sup> Cf. C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 20 f., referring in this regard to German law as source of inspiration for the development of the concept of *l'illicéité* under French tort law.

<sup>77</sup> M.R. Damaska, *The faces of justice and the state authority: a comparative approach to the legal process*, (Yale University Press, Yale, 1991) quoted by Kessler in 'Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication' 2 *Theoretical Inquiries in Law* (2009), 424 f.

<sup>78</sup> Cf. Hodges 'Some observations on multi-party claims', in M. Storme (ed.) *Procedural Laws in Europe. Towards Harmonisation*, (Maklu, Antwerp 2003), p. 403.

may not coincide with one or more of the conditions for liability in tort. Hence, the rights-based approach will by necessity look for foundation of the injunction in the substantive right. In this approach, the injunction is a remedy in tort and as such cannot go beyond the scope of the right. In other words:

*The close link between right and remedy lies in the fact that a right must necessarily give rise to a remedy which allows the right to be enforced through the judicial process, which actually means that the “constitutive” conditions of the remedy should be the same as the “substantive law” conditions for the underlying right to arise.<sup>79</sup>*

[29] Typically, the remedy cannot go beyond what the right necessitates, nor should it provide less than what the right requires. An example drawn from Dutch law may illustrate this point. A listed building was ruined by fire. The owner of the scorched building decided to tear it down and to remove the remains, which was in contravention with applicable regulations. A positive mandatory injunction for complete restoration was requested by a foundation acting in the common interest. However, since the owner merely destroyed an already ruined building, the court held that the owner could only be held to restore the previous dilapidated and ruined state. Consequently, the injunction was rejected as being too broadly phrased.<sup>80</sup> This reveals a dichotomy. On the one hand, injunction is considered part of tort law as one remedy to vindicate rights and/or stop and prevent wrongdoing, while on the other hand it is thought to be a separate set of procedural tools incidentally touching but not necessarily connecting with substantive tort law.

#### *§ 4. Towards a threefold taxonomy of risk-taking in tort*

In this final section, I address the issue of the influence of a given legal system's perception of the functions of tort law on the relationship between tort and injunction. If a tort law system considers the claimant to have *a right not to be subjected to the dangers caused by wrongful risk-taking*, then injunction is a pre-emptive remedy sustaining that right. Logically speaking, this rights-based approach has much to commend it. When courts assess behaviour in a tort case and establish that the defendant was under a duty of care vis-à-vis the claimant for negligently failing to fulfil his duty and that the ensuing damage was in fact caused by wrongful risk-taking, then the behaviour is evaluated according to an *ex tunc* normative standard. Others have convincingly argued that it is logically impossible to state that someone's behaviour fell short of the behaviour that he could have been expected to display, without acknowledging that a certain standard of conduct applied at the moment of the act.<sup>81</sup> In other words: logic demands that *duty* precedes *liability* for wrongful risk-taking. It is not inconceivable, however, to conceptualize liability for risk-taking as not being preceded by a duty. To explore this possibility, which may enable us to better align tort law and injunction, we need to distinguish three forms of risk-taking in tort.<sup>82</sup> [30]

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<sup>79</sup> Van Gerven, 'Of Rights, Remedies and Procedures', 37 Common Market Law Review (2000), p. 525 ; Cf. C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 24 ; Cf. R. Stevens, *Torts and rights*, (Oxford University Press, Oxford 2007), p. 58, who observes: 'The court does not have a discretion at large to grant an injunction when it considers it fair to do so, independent of any underlying right of the claimant'.

<sup>80</sup> Hoge Raad der Nederlanden 8 juni 2007, case no. R05/147HR, Jurisprudentie Aansprakelijkheid 2007, nr. 123 (Stichting Monumentenzorg Curaçao/Scharloo).

<sup>81</sup> C. Bloch, *La cessation de l'illicite - Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle*, p. 290 ; Cf. J. Murphy, 3 *Oxford Journal of Legal Studies* (2007), p. 511, promoting the remedial equivalence of ex post damages and ex ante injunction.

<sup>82</sup> The following draws on the analysis in W.H. van Boom, 'Inherent Risk and Organisational Design in European Tort Law', 108 *Zeitschrift für Vergleichende Rechtswissenschaft* (2009), p. 123. For a similar analysis, see Gilead 'On the

### Category 1

Firstly, there are injuries caused by risk-taking which are left uncompensated, for example, because the injured party is considered to be the unfortunate victim of 'daily' or 'ubiquitous' risks. In these cases, the loss remains where it falls and others are not considered to bear responsibility even though they may well be causally related (in part) to creating the risk. This is the case in certain nuisances that are considered 'bearable' or 'acceptable'.

### Category 2

Secondly, there are those injuries which are compensated through the tort law system by assigning liability for the inherent but socially acceptable dangers of a certain activity. In such cases, the policy choice of a legislature or court to grant compensation, although the activity itself is deemed acceptable, may be based on the idea that the benefits of reducing the risk level by improving the care level do not outweigh the costs thereof, provided such improvement is possible at all. Compensation for the so-called 'residual losses' caused by this 'acceptable risk-taking' is then deemed appropriate.<sup>83</sup> What this entails, however, is that in principle injunction is denied.

### Category 3

Thirdly, there are injuries which are compensated through the tort system because they were the result of wrongful risk-taking, such as the irresponsible omission to take precautionary measures by the person responsible for the source of danger, for example owners, users, or operators. This is the area where tort law compensates for reasons of negligence or wrongful infringement of protected interests. Such negligence or infringement constitutes unacceptable risk-taking, giving rise to both compensatory damages and injunctive relief.

In two specific cases, however, injunction may be denied. The first exception arises when the court, in weighing the interests of the claimant, defendant and other interests in light of a future remedy of compensation, finds that it would be unacceptably burdensome for the defendant to comply with the duty. The duty not to engage in unacceptable risk-taking may thus be converted into a category 2 case. The second exception arises when the court in weighing the interests of the claimant and the defendant, in light [31] of the availability of the *retrospective* remedy of compensation, finds that it would be unacceptably burdensome for the defendant to comply with a duty concerning a restorative injunction.<sup>84</sup>

Clearly, categories 1 and 2 include acceptable risks, whereas category 3 consists of unacceptable and therefore wrongful risk-taking behaviour. Mandatory and prohibitive injunction orders come into play in category 3 while remaining inapplicable in categories 1 and 2. Obviously, the difference between categories

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justifications of strict liability', in H. Koziol and B. Steininger (ed.) *European Tort Law 2004 (Tort and Insurance Law Yearbook)*, (Springer, Wien 2005), p. 28 et seq.

<sup>83</sup> This is what the German doctrine refers to as '*Residualschäden*'. For a clear analysis, see G. Wagner 'Grundstrukturen des Europäischen Deliktsrechts', in Zimmermann (ed.) *Grundstrukturen des Europäischen Deliktsrechts*, (Nomos, Baden-Baden 2003), p. 271 et seq. ; Cf. E. Büyüksagis, 'De l'opportunité de préciser la portée d'une éventuelle clause générale de responsabilité pour risque', 2 *Haftung und Versicherung (HAVE)* 1 (2006). For a further theoretical underpinning; see, e.g. J. Esser, *Grundlagen und Entwicklung der Gefährdungshaftung*, (Beck, München 1941/1969), p. 69 et seq.

<sup>84</sup> For example, article 6:168 of the Dutch Civil Code provides that in case of tortious liability (e.g. industrial nuisance) the civil court may reject an action for obtaining a prohibitory injunction on the ground that the tortious conduct should be tolerated in the common overriding interest of society, however without prejudice to the right to compensation of the damage ensued. Hence, although in principle tortious activities can be stopped by filing for injunctive relief, here an exception is allowed leaving the victim with 'mere' compensation by the tortfeasor. See Kottenhagen and Kottenhagen-Edzes 'Tort and Regulatory Law in The Netherlands', in W.H. van Boom et al. (eds.) *Tort and Regulatory Law*, (Springer, Wien 2007), no. 75.

2 and 3 is the most relevant for our discussion. If in a specific case a court allows a claim for compensation but denies, *ceteris paribus*, the claim for injunction, then this may be a category 3 case. Therefore, it would be interesting to know how courts would react to the following two hypotheticals. The first hypothetical involves an employee who is continuously exposed to a noxious substance. On average, the substance is known to cause serious adverse health effects in 1% of the population of exposed employees. Before the danger materializes, the employee seeks prohibitory injunction. The second hypothetical involves school children running a 1 % risk while attending their school, of inhaling a fatal asbestos fiber and consequently developing mesothelioma after some 30 years. Assume that there is no public law regulation applicable in such as case. Would the court grant injunction petitioned by any of the children (or their legal representatives) ordering the school to remove the asbestos source or to provide an alternative school building?

It may be suggested that although no risk has yet materialised, French, German and English courts alike would grant injunctive relief nevertheless, even though the cases do not involve breach of statutory duties, but merely constitute a breach of uncodified duties of care not to take excessive risks concerning the health of others. Having said that, in view of the reported uncertainties surrounding injunctive relief, I am not entirely confident that injunction would be granted across the board.<sup>85</sup> If indeed an injunction were not to be granted while the court *would* award damages if – all other things being equal – the danger eventually materialized, then apparently the risk-taking as such is not ‘wrongful’ in the sense in which I have used that term here. In that case, the liability cannot be founded on the breach of a duty not to expose the claimant to the risk. In effect, the foundation of liability would be ‘acceptable risk-taking, subject to an obligation to compensate the residual losses’.

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<sup>85</sup> Cf. Murphy, 3 *Oxford Journal of Legal Studies* (2007), p. 523, who evaluates the first hypothetical and concludes that it is uncertain that English courts would issue a mandatory injunction.