TORTS, COURTS, AND LEGISLATURES

COMPARATIVE REMARKS ON CIVIL LAW CODIFICATIONS OF TORT LAW

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Abstract

This contribution reflects on the relationship between courts and the legislature in tort law from a comparative European perspective. Though there is a substantial body of comparative literature on tort law as such, the relationship between the judiciary and the legislature in comparative tort law has received significantly attention. Here, the approach under civil law systems to tort law is and the interaction between the judiciary and the legislature under those systems is explored. If we look beyond the misconception among common lawyers that civil law courts act merely as 'porte-parole de la loi' there is much flexibility to be found. In tort cases, civil law courts may assume a role that complements the role assumed by the legislature. Where codes give leeway for case law to create, develop, and innovate in tort law, courts will fill the space. Where the legislature is active, courts may assume a more subservient role. Yet, there is no single concept of power balance in civil law tort systems. In some countries, courts may be more willing than in others to show policy initiative where the legislature fails to act. The overall conclusion must be that although there is a fundamental difference in the starting point between the common law and those legal systems that have a codified tort law system, the balance between the legislature and the courts may be similar in many respects.

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I. Introduction

Without a doubt, civil law and common law jurisdictions have different conceptions of the relationship between the judiciary and the legislature in the realm of private law. Dissimilar points of departure in terms of historical roots and institutional pedigree account for many of these differences. Notwithstanding – or perhaps due to – these differences, however, there is a rich academic culture of comparative tort law,[1] and it has been said that this is because 'the law of delict or torts is particularly amenable to a comparatist endeavour, as the patterns of cases are almost identical across different societies'.[2] In other words, conducting comparative legal analyses of tort law by the functional method of comparing cases and their outcomes is considered rewarding because of the comparability of cases. Although one could counter that this can be said of most areas of private law, it is certainly true that by comparing tort cases a better understanding can be gained of the relationship between fault-based liability and strict liability on the one hand, and between contract, tort, and restitution on the other.

What comparative tort law may also have to offer is a more detailed insight into the relationship between the judiciary and the legislature. How true is the persistent misconception that common law courts autonomously create and develop tort law in contrast to civil law courts that act merely as 'porte-parole de la loi'? How different is the interplay between courts and the legislature in reality?

With this contribution, I would like to devote a few basic reflections to the relationship between courts and the legislature in tort law from a comparative perspective. Though there is a substantial body of comparative literature on tort law as such, the relationship between the judiciary and the legislature in comparative tort law has received significantly less attention in legal writing. Therefore, this contribution aspires to add to the extant literature by surveying the approach under civil law systems to tort law and the interaction between the judiciary and the legislature under those systems. The examples I will give serve the purpose of illustration rather than exhaustion of this multi-layered subject. What follows is an introduction without a strong focus on particular legal systems; I will draw examples in an eclectic manner from diverse jurisdictions.

II. Tort Law in a Civil Law Environment

What do we consider to be 'civil' tort law as opposed to the English common law of torts? First, I should stress that there really is no unified approach to tort law in civil law systems. Perhaps it is better to think of our subject as the tort law systems in those countries that have a systematic *codification* of the general part of 'patrimonial' law – essentially consisting of the law of contract, tort, property, and restitution.

It bears remembering that codifications of civil law in the 19th century served several and not always necessarily legal purposes. Promoting a sense of national unity, establishing political supremacy, clearing the legal obstacles of differences in law within recently unified territories, and

[1] I refer merely to the many projects initiated by the European Centre for Tort and Insurance Law, the recently launched Journal of European Tort Law (JETL), and the abundance of comparative scholarship referred to in subsequent footnotes.
[2] G Wagner, 'Comparative Tort Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006) 1004.

similar political and economic goals were more likely to be uppermost in the mind of the legislature.[3] Naturally, 19th century codifications were not created in a vacuum. Influenced as they may have been by the legacy of the Natural Law and Enlightenment, 19th century codifications of private law were actually imbued with various notions stemming from sources as disparate as Roman law, existing local customary laws, and earlier (partial) codifications, and drew on the expertise of practitioners and scholars.[4] Thus, the French 1804 *Code Civil* implemented several customary laws, and the German 1896 *Bürgerliches Gesetzbuch* (*BGB*) was in many ways a reception of elements of Roman law.[5]

Moreover, the process of codification had been preceded and guided by scholarly efforts to systematise the different aspects of patrimonial law. Scholars such as Domat and von Kübel had already postulated general clauses of tortious liability, which later ended up in the *Code Civil* and *BGB*.

The Napoleonic approach to the relationship between the legislature and courts was clearly one of 'master and servant', where courts were not allowed to lay down general rules and principles, while at the same time being firmly reminded not to refuse to decide a case by reason of the Code being obscure (Articles 4 and 5 *Code Civil*). Though the German approach seemed slightly less stringent, effectively in both legal systems court decisions were not considered to be official sources of law in their own right.[6] Indeed, the political concept of separation of powers primarily authorised courts to enforce legislation rather than legislate or decree themselves.[7] In tort law, however, the powers were to become balanced somewhat differently.

In the past, much emphasis was placed on the intrinsic and fundamental differences in legal reasoning and epistemology between civil law and common law. Some argued that civil law differs from common law much as rationalism differs from empiricism or deduction from induction, that 'civilians' reason from principles to cases rather than from case to precedent, and that they have an unstoppable urge to systematise instead of to reason from case to case.[8]

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[3] F Terré, *Introduction générale au droit*, 8th edn (Paris, Dalloz, 2009) 73 f; J-L Halpérin, *Histoire du droit privé français depuis 1804* (Paris, PUF, 1996) 15 ff; U Wesel, *Geschichte des Rechts in Europa - Von den Griechen bis zum Vertrag von Lissabon* (München, Beck, 2010) 475; H James, *A German Identity - 1770 to present day* (London, Phoenix Press, 2000) 88.

[4] *cf* HP Glenn, *Legal traditions of the world,* 4th edn (Oxford, Oxford University Press, 2010) 145 ff.

[5] *cf* Halpérin (n 3) 15 ff; BS Markesinis and H Unberath, *The German Law of Torts: A Comparative Treatise* (Oxford, Hart, 2002) 23 ff.

[6] Terré (n 3) 292 ff; D Merten, 'Die Rechtsstaatidee im Allgemeinen Landrecht' in F Ebel (ed) *Gemeinwohl - Freiheit - Vernunft - Rechtsstaat; 200 Jahre Allgemeines Landrecht für die Preußischen Staaten* (Berlin/New York, De Gruyter, 1995) 130. For the contemporary interpretation, *cf* the overview by R Youngs, *English, French & German Comparative Law* (Abingdon, Routledge-Cavendish 2007) 12 ff, 70; W Heun, *The Constitution of Germany - A Contextual Analysis* (Constitutional Systems of the World, Hart Publishing, Oxford 2011) 159 ff. The current situation in German private law is that court decisions as such do not constitute law but customary laws do. See Art 2 *Einführungsgesetz zum Bürgerlichen Gesetzbuche*; P Bassenge et al (eds), *Palandt Bürgerliches Gesetzbuch*, 70th edn (München, Verlag CH Beck, 2011) 4.

[7] *cf* the *trias politica* doctrine as developed by Charles de Secondat, Baron de Montesquieu (1689-1755) in *De l'esprit des lois* (1748), building on John Locke's concept of separation of powers (1632-1704; *Two Treatises of Government* (1690)). One of the differences between Locke and Montesquieu was that the former did not distinguish judicial power from executive power. See R Lesaffer, *European Legal History - A Cultural and Political Perspective* (Cambridge, Cambridge University Press, 2009) 387 ff. See also the development of the concept of 'Rechtsstaat' (which is difficult to translate; the closest a translation would come is 'State in which law rules', but this does not fully catch its tenor), which features the dominance and indeed lawmaking monopoly of the legislature; *cf* Merten (n 6) 114 ff; H Conrad, *Deutsche Rechtsgeschichte. Band 2: Neuzeit bis 1806* (Karlsruhe, CF Müller, 1966) 382 ff; Heun (n 6) 35 ff.

[8] TM Cooper, 'The common and the civil law - a Scot's view' (1950) 63 *Harv L Rev* 468, 470-471. In a similar vein, G Radbruch, *Der Geist des Englischen Rechts* (Heidelberg, Adolf Rausch Verlag, 1947) 9 ff and, more recently, C van Dam, 'European Tort Law and the Many Cultures of Europe' in T Wilhelmsson (ed) *Private Law and the Cultures of Europe* (The Hague, Kluwer Law International, 2007) 69. *cf* K Zweigert and H Kötz, *An introduction to comparative law*, 3rd rev edn (Oxford, Oxford University Press, 1998) 263. On these differences in approach, see also R Zimmermann, 'Statuta Sunt Stricte Interpretanda? Statutes and the Common Law: A Continental Perspective' (1997) 56 *CLJ* 315, 315 ff; D Fairgrieve and H Muir Watt, *Common Law et tradition civiliste: convergence ou concurrence?* (Paris, Presses Universitaires de France, 2006) 30-31.

Nowadays, opinions will surely have regressed to the mean, and no one will seriously argue that in civil law countries 'the principal role of the judge is mechanically to apply statutory rules so closely interwoven that there is no room left for any vital development of the law by the judge'.[9]

However, major conceptual differences exist.[10] To mention just one, civil law jurisdictions are unfamiliar with the concept of equity as a separate source of law that cuts through all branches of patrimonial law, including the law of torts and the law of damages. Moreover, there is conceptual divergence in legal hermeneutics in the sense that patrimonial law as laid down in codes does indeed tend towards abstract all-encompassing principles, thus purporting to air the appearance of a complete and coherent conceptual system instead of a practical, pragmatic, and continuously developing body of organically grown rules.[11] Yet, in the realm of tort law the practice of civil law courts is comparable to the common law approach of analysing cases against a comprehensive background of precedents. For example, the general clause of 'faute' in the *Code Civil* does not contain information on what constitutes wrongful behaviour, nor does the Dutch wrongfulness concept of 'doen of nalaten in strijd met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt' (act or omission contrary to the standards of conduct applicable according to unwritten law in societal interaction). Indubitably, civil law legislatures choose such open-textured norms in order to assign some of their rulemaking powers to the courts. For instance, the Dutch equivalent of the common law duty of care concept grew slowly from some 150 years of interpretation of the single word 'unlawful' in the 1838 Civil Code, and was eventually codified in the abstract wordings of the 1992 Civil Code's wrongfulness concept.[12] The wordings of the Code contain no information on *when* certain conduct is to be considered wrongful, and it does little to categorise or systematise, thus explicitly leaving room for courts to create new duties of care and to develop existing ones incrementally. These duties are by nature 'common law duties' in the sense that they are uncodified and are voiced by autonomous courts. What follows – and indeed precedes such norms – is the judicial craft of collecting, comparing, arranging, and distinguishing cases while building incremental tort policies. Hence, much like in the common law of torts, if one tries to make sense of tort law in a civil law context, the best thing to do is to study and compare a number of cases.[13] This is especially true for liability for tortious behaviour and perhaps less so for other bases for liability.

All in all, there are differences – some more substantial than others. Certain optimists go as far as to hold that civil tort law and the common law of torts 'could easily be merged by simply abandoning the lush variety of intentional torts kept alive in England without much practical use'.[14] Yet, the reality may be more complex, since there remain major conceptual differences that may or

[9] Zweigert and Kötz (n 8) 268. *cf* Wagner (n 2) 1007; W Fikentscher, *Methoden des Rechts IV - Dogmatischer Teil* (Tübingen, Mohr, 1977) 269 ff (in particular 310 ff).
[10] There is also the issue of difference in constitutional setting. The concept of 'independence of the judiciary' in common law means something different than it does under a Montesquieu tripartite separation of powers of government. See generally Lesaffer (n 7) 384 ff. *cf* Fairgrieve and Muir Watt (n 8) 13 ff.
[11] M Vranken, *Fundamentals of European Civil Law* (Sydney, Federation Press, 2010) 43 ff. For an interesting cultural explanation of these differences, see van Dam (n 8) 67 ff.
[12] N Jansen, 'The development of legal doctrine in Europe - Extracontractual liability for fault' in N Jansen (ed) *The Development and Making of Legal Doctrine*, vol 6 (in D Ibbetson and J Bell (eds) *Comparative Studies in the Development of the Law of Torts in Europe*) (Cambridge, Cambridge University Press, 2010) 37.
[13] *cf* Radbruch (n 8) 30.
[14] Wagner (n 2) 1009 f.

may not have practical implications. Possibly, one can say that the tort of negligence is to a great extent similar in practical operation to § 823 *BGB*, but the same surely cannot be said of Article 1382 *Code Civil*. Moreover, the extent and rationales of strict liability in the three legal systems diverge considerably. Thus, I would certainly not go as far as to subscribe to the feasibility of a pure and simple merger of the three approaches.

III. Legislatures, courts, and their interaction

As I see it, in a civil law jurisdiction with an existing codification of tort law, there are two main justifications for legislative intervention in tort law: legislation as a response to incidents, and legislation as part of a complete and structural overhaul of the subject matter. Both categories can involve a 'mere' codification of case law – thus encapsulating developments without aspiring to change the law – but such a motive for legislating is more likely to be part of a complete overhaul than of incidental legislation. Intentional correction of case law is a motive that can be found with both types of legislation.

Legislative changes in response to incidents either become part of the Code itself or are laid down in separate stand-alone statutes. A good example of this can be found in German law, where at the turn of the 19th century the newly enacted *BGB* was left intact, and several new strict liabilities were enacted in separate statutes.[15] Indeed, a full appreciation of German tort law involves the study of both the *BGB* and several separate statutes.[16]

Incidents may have many forms. There may be cases that do not reach the courts but do reach politicians. Conversely, there may be cases that reach courts in excess of the courts' capacity to deal with them effectively. For instance, in tort law the need for redress for negligible losses or the efficient settlement of mass tort claims seems to increasingly prompt legislatures to intervene.[17]

A court decision may present itself as an incident as well, cueing the legislature to step in and amend the law. Indeed, even the fear of *future* court decisions may elicit political momentum for intervention in tort law. For example, fear of the stifling effects of potential future claims directed against public authorities responsible for supervision and monitoring in financial markets caused some legislatures to proactively implement certain tort immunities in specific financial market statutes.[18]

The second category involves the well-considered overhaul of an entire section of the law. One can think here of examples such as abandoning tort law liability in the area of medical injuries in favour

[15] eg the *Reichshaftpflichtgesetz* (1871, amended several times) and, at a later stage, several statutes on motor vehicle liability, aircraft liability and other sources of danger were introduced. More recently, the Products Liability Directive was implemented in a special statute. *cf* D Medicus and S Lorenz, *Medicus/ Lorenz - Schuldrecht I Allgemeiner Teil*, 19th edn (München, Beck, 2010) 16 f.
[16] Some of these statutes were subsequently revoked on the occasion of the 2002 overhaul of the law of obligations, and their subject matter became part of the Civil Code.
[17] See further WH Van Boom, 'De Minimis Curat Praetor – Redress for Dispersed Trifle Losses' (2009) 4 *J Comp Law* 171 ff.
[18] See eg German and Belgian law. § 4 (4) *Finanzdienstleistungsaufsichtgesetz*: the German Financial Services Authority BAFIN exerts its authority merely in the general interest, thus barring individual tort claims. Article 68 *Wet Toezicht Financiële Sector en de financiële diensten*: the Belgian Financial Services Authority CBFA can only be held liable in the event of deceit or gross fault.

of a no-fault compensation system.[19] Such operations usually entail committees, consultations and – certainly in tort law – the involvement of academics.

A full recodification of tort law is a rare event. Partial refurbishments are more likely to take place, and in these instances, court-invented constructions *praeter legem* that have been accepted in legal practice may be codified and thus assimilated into the structure of the Code. A good example is the German construction of *culpa in contrahendo*. This tort-like construction without a clear basis in the *BGB* was developed by German courts to tackle issues of liability for damage caused in precontractual relationships.[20] The construction was welcomed by legal practice and academics, as it filled a gap left by the *BGB* and apparently met societal needs. Finally, on the occasion of a partial modernisation of the *BGB*, the legislature inserted the *culpa* doctrine in the BGB – hence, a mere codification of extant case-law.[21]

In tort law, therefore, the legislature can be either responsive or proactive, but it can just as easily be lethargic when political pressures are too weak, or can take an indecisive position when political forces result in deadlock. Legislatures' inertia may indeed cue courts to come to the fore and innovate or regulate to the extent possible. For example, the Dutch legislature has never proved able to reach political consensus on whether and how to legislate industrial action (strikes and collective action). As a result, there is no special framework for the law of industrial action. Thus, up to now, the Dutch civil courts have used the open standard of wrongfulness to decide claims for damages in tort and writs for injunctive relief issued by employers against trade unions.[22] In practice, this flexible system seems to have functioned even-handedly and to have developed relatively well over the years.[23] Here, tort law has a highly regulatory role to play in the absence of guidance by the legislature.

Thus, courts seem to assume a role commensurate with and complementary to the role assumed by the legislature. This can be seen when looking at the practice of statutory interpretation by courts. Obviously, the toolbox of extensive, restrictive, purposive, autonomous, *praeter*, and *contra legem* interpretation is applied in tort law as it is in other segments of private law,[24] and these tools may be used implicitly or explicitly to extend and create new forms of liability through the interpretation of existing ones.[25]

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[19] *cf* the French and Belgian alternative compensation schemes for medical injuries, briefly referred to in BA Koch (ed), *Medical Liability in Europe - A Comparison of Selected Jurisdictions* (Berlin, De Gruyter, 2011). See also WH Van Boom and MG Faure (eds), *Shifts in Compensation between Private and Public Systems* (Vienna, Springer, 2007) .

[20] For an overview of the development of the case law on 'culpa in contrahendo', see Medicus and Lorenz (n 15) 50 ff.

[21] See § 311 *BGB*; Bassenge (n 6) § 311 marg. no. 11.

[22] See *Losbladige Onrechtmatige Daad*, part VIII.1 (looseleaf), no 1 ff; J Spier et al, *Verbintenissen uit de wet en schadevergoeding*, 5th edn, Studiereeks burgerlijk recht (Deventer, Kluwer, 2009) 67 f.

[23] Since the 1980s, the basis for evaluation is tort law, the 1961 European Social Charter, and the network of collective labour agreements. See further HL Bakels, IP Asscher-Vonk and WHACM Bouwens, *Schets van het Nederlands arbeidsrecht*, 19 edn (Deventer, Kluwer, 2009) 213 ff.

[24] Generally on statutory interpretation in a civil law context, see eg Terré (n 3) 296 ff, 464 ff; S Vogenauer, 'Statutory interpretation' in J Smits (ed) *Elgar Encyclopedia of Comparative Law* (Cheltenham, Edward Elgar, 2006) 677 ff; Zimmermann (n 8) 315 ff. On statutory interpretation in England and Wales, see, e.g. F Bennion, *Understanding Common Law Legislation - Drafting and Interpretation* (Oxford, Oxford University Press, 2001); A Gearey, W Morrison and R Jago, *The Politics of the Common Law - Perspectives, Rights, Processes, Institutions* (London, Routledge-Cavendish, 2009) 102 ff; T Ingman, *The English Legal Process*, 12th edn (Oxford, Oxford University Press, 2008) 148. *cf* F Cownie, A Bradney and M Burton, *English Legal System in Context*, 4th edn (Oxford, Oxford University Press, 2007) 29 ff.

[25] For example: the *BGB* does not explicitly acknowledge a general right of personality, so it was developed in the 1950s-1960s by courts that felt it necessary to synchronise civil law with the German *Grundgesetz*. A good example of statutory interpretation beyond the legislative purpose is offered by Art 1384 *Code Civil* (*fait de chose*). French courts went beyond the text and intention of the legislature by holding that Art 1384 comprised a generic strict liability for movable objects rather than a fault-based liability. See R Cabrillac, 'L'Avant-

They may also be used by courts to gently prod the legislature to take action.[26] Where the room left by the legislature is considerable – for instance, in the open-textured wrongfulness test – courts do more than interpret: they create and shape tort law while the inertia of the legislature and the passage of time challenges them to take the lead.

Take for example Article 1404 of the Dutch Civil Code 1838, which concerned liability for damage caused by animals and was identical *verbatim* to – and based on – Article 1385 of the French *Code Civil*. At some point, both the French and Dutch judiciary were faced with the question of whether the liability of owners of animals was strict or fault-based. Neither the Article itself nor its context gave conclusive evidence of the legislative intent. From early on, French courts had decided that the liability was a strict one,[27] and for a considerable time, the Dutch Supreme Court held the opposing position.[28] In legal doctrine and the decisions of lower courts, there was much criticism of the Supreme Court's position. Finally, in 1980, the Dutch Supreme Court overturned its earlier decision.[29] This U-turn followed the then ongoing debate on the new Dutch Civil Code.

In the 1970s, the committees preparing the new Dutch Civil Code had suggested that liability regarding animals should be strict. The Dutch Supreme Court followed this suggestion by reinterpreting the provision of the 1838 Code. The Court now held that the Article should be interpreted in light of the solution adopted in the new Code (which, it should be noted, was still pending before Parliament, and at that time it was still uncertain whether it would enter into force at all). The creative interpretation technique used here was later dubbed 'anticipatory construction': interpreting extant provisions in light of pending and therefore future legislation. One can also view this development as a move away from literal interpretation towards a more contemporary one. Indeed, it seems that the older the code, the more freely courts seem to express their own intentions.[30]

In tort law, courts are relatively free to design their own policies on wrongfulness. This appears to be equally true for common law courts and civil law courts. One way in which this becomes obvious is by looking at the issue of how public law standards – for instance, safety regulations – impinge on tort claims: can a victim claim compensation in a situation where the defendant was compliant with all relevant public law standards? Most European legal systems – irrespective of their provenance – consider tort law to be a distinct set of rules that generally cannot be pre-empted by public law

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projet de réforme français du droit des obligations' in V Sagaert (ed) *La réforme du droit privé en France - Un modèle pour le droit privé européen?* (Bruxelles, Larcier, 2009) 60.

[26] J Schapp, *Hauptprobleme der juristischen Methodenlehre* (Tübingen, Mohr Siebeck, 1983) 78 refers to this type of interaction as 'the conversation' between legislature and court.

[27] To be more precise, the liability is based on a presumption of fault that can only be rebutted by proving 'cas fortuit' or fault of the victim itself. In practice, this constitutes a liability for damage caused by the animal's activity. Seminal Cour de Cassation, 27 October 1885 (*Montagnier v Leydon*). P Malaurie, L Aynès and P Stoffel-Munck, *Droit Civil - Les obligations*, 4th edn (Paris, Defrénois, 2009) 90 ff; P Brun, *Responsabilité civile extracontractuelle,* 2nd edn (Paris, Litec-LexisNexis, 2009) 252. See the historical overview by D Deroussin, *Histoire du droit des obligations* (Paris, Economica, 2007) 856 ff; A Watson, *The Evolution of Western Private Law* (Baltimore/London, John Hopkins University Press, 2001) 127 ff; Halpérin (n 3) 191 ff.

[28] Hoge Raad der Nederlanden, 15 October 1915, Nederlandse Jurisprudentie 1915, 1071. In part, the Dutch courts could justify the deviation from the French solution because there was a lack of clarity on the exact provenance of the Dutch version of the liability. See the references at *Losbladige Onrechtmatige Daad (oud)*, part IV (looseleaf), no 21. *cf* F Brandsma, 'De Code civil in Windschoten' (2004) XXI *Groninger Opmerkingen en Mededelingen* 17, 17 ff.

[29] Hoge Raad der Nederlanden, 7 March 1980, Nederlandse Jurisprudentie 1980, no 353.

[30] This development was described in terms of one from 19th-century 'legistic interpretation' (involving the uncovering of historical legislative intent) towards 20th-century 'free and liberal construction' (involving a focus on reaching palatable outcomes); see the overview by CJH Brunner et al, *Rechtsvinding onder het NBW* (Deventer, Kluwer, 1992) 10 ff, 57 ff.

standards. *As such*, regulatory law does not pre-empt autonomous tort law standards, and at best it assumes the role of a minimum standard in societal interaction for tort law purposes.[31] Basically, this means that civil courts can and do apply stricter standards under tort law, and by doing so they underscore the freestanding nature of tort law standards. Were the legislature to intervene in this balance, it would have to do so explicitly or consciously (that is, given the statutory wording or legislative intent).

The fact that there is ample room for manoeuvring in the arena of wrongfulness does not mean that civil law courts can do as they like. Courts tend to stop at the point where they find that their law-making abilities or competence has run out. They may openly state so and try to prompt the legislature to take action.[32]

As far as the interaction between civil law courts is concerned, mention must also be made of the time restraint of parliamentary lawmaking. It is a trite observation that drafting a comprehensive code is a more laborious endeavour than the relatively simple legislative process of enacting a single statute. Designing and promulgating a generic code involves time-consuming comitology with numerous rounds of stakeholder consultation and parliamentary debate.[33] By contrast, drafting specific statutes may sometimes be left to departmental lawyers, and may be effectively steered through the parliamentary motions within one period of government. Likewise, performing 'maintenance work' on a civil code by amending existing and inserting new provisions may be less daunting than establishing the code as a whole. Take for instance the new Dutch Civil Code. The period from inception in the 1940s to entry into force in 1992 stretched over four decades.[34] When in 2003 the Dutch legislature inserted new rules into the 1992 Civil Code on time limitation of personal injury claims, the legislative process was considerably quicker and more efficient, and took only some four years in total.[35] Nevertheless, on the whole, parliamentary time is limited. It is possible that a fair solution can be reached by courts without parliamentary involvement and where they can take on the role of 'substitute legislature'. There are instances in civil tort law where this mechanism seems to have worked well.

IV. Three examples

In this section, I would like to give three examples that further illustrate the interaction between the legislature and courts in civil law jurisdictions: the extent of strict liability, compensation for

[31] WH van Boom, C Kissling and M Lukas (eds), *Tort Law and Regulatory Law* (Vienna, Springer, 2007) 419 ff. c*f* on the position of English law also the contribution by Maria Lee to this volume.

[32] Examples follow. See for a common law example *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 305 (Lord Goff of Chieveley): 'I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts'. By doing so, Lord Goff seems to call upon the legislature to intervene should it feel so inclined.

[33] In civil law systems, the interplay between courts and legislature in issues of tort law may also involve academics. Academics may assume roles of middlemen or invitees to enter comments in legislative consultation rounds. Moreover, a more direct duplication of roles may be experienced in those jurisdictions where it is not uncommon for law professors to be part-time members of the judiciary and for lawyers at the ministry of justice to hold part-time chairs in law.

[34] The entire legislative trajectory was analysed skilfully by EOHP Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek* (Maastricht, Universitaire Pers Maastricht, 1994) . As a side note, it was once suggested by the eminent Supreme Court judge Huib Drion that the relative societal and political insignificance of private law made it both robust and immune to political revolutions and resistant to hasty legislative amendments. See H Drion, *Geschriften van H. Drion* (Deventer, Kluwer, 1982) 395.

[35] My impression is that, in the Netherlands, minor amendments on the Civil Code take between one and three years of parliamentary proceedings. Taking an individual case to the Supreme Court (counting from the initial High Court writ to the Supreme Court ruling) would take at least two years, but the typical period (mode average) would be in excess of five years.

grief and non-pecuniary loss, and traffic accidents. These examples illustrate the contrast between the approaches taken in and within various civil law jurisdictions. Courts occasionally show restraint, whereas in other instances they take on a proactive role in developing tort law. As we will see, neither approach seems more typical or dominant than the other.

A. The extent of strict liability

In both French and German law, specific statutory provisions on strict liability can be found, each with its distinct functions in relation to fault-based liability for wrongful behaviour. Given that the general tort law standard for wrongful behaviour is relatively broadly phrased in both systems, one could argue that generating norms in that area is mainly the court's prerogative. The question then is who is 'in charge' of strict liability? French law has taken a very different approach here from that of German law.[36] From early on, the general clause contained in Article 1384 (1) *Code Civil* (*fait de chose*)[37] was interpreted by the courts as holding a generic strict liability for tangible movable objects. Defectiveness was not thought to be a condition for liability, and so the ambit of this liability was stretched profusely. The courts thus granted themselves considerable room to further undertake lawmaking in the area of strict liability, which in turn did not leave much need for additional legislative intervention when new technologies emerged during the 19th century. Though outsiders might find it challenging to circumscribe the exact boundaries of such an unfettered interpretation of Article 1384 (1), the French are typically undaunted. In fact, French lawyers are content with this general clause and with the recent *Avant-Projet Catala* proposed to conserve Article 1384 (1) as a general concept for strict liability.[38]

The contrast with German law is stark. There, strict liability is deemed the prerogative of the legislature. From the 19th century onwards, separate heads of strict liability were introduced in separate statutes. Courts considered themselves bound by the self-imposed *Analogieverbot zur Gefährdungshaftung* (prohibition of judicial extension of statutory strict liability). This basically boiled down to the prohibition to extend strict liability in a specific statute for, say, *ski cabin* lifts (suspended) to *tow* lifts (not suspended).[39] What is not in the statute book does not exist.[40] In

[36] *cf* van Dam (n 8) 58 f.

[37] Art 1384 (1) Code Civil provides: 'On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde' ('A person is not only liable for the damage that he causes by his own act, but also for damage caused by the acts of persons for whom he is responsible, or by things that are in his custody').

[38] J Cartwright, S Vogenauer and S Whittaker (eds), *Reforming the French Law of Obligations - Comparative Reflections on the Avant-projet de reforme du droit des obligations et de la prescription ('the Avant-projet Catala')* (Oxford, Hart Publishing, 2009) 295.

[39] K Haag (ed), *Geigel - Der Haftpflichtprozess*, 26th edn (München, Beck, 2011) 1036 (marg. no 26-2). See, eg, Bundesgerichtshof (BGH) 25 January 1971, case III ZR 208/68, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 55, 229 at 234: 'The court would thus step beyond the constitutionally set boundaries and take upon itself a task which according to the constitution is the legislature's prerogative (...)'.

[40] Note that the concept of *Analogieverbot* is not strictly adhered to in all civil law jurisdictions. See for instance W Fikentscher, *Methoden des Rechts I - frühe und religiöse Rechte; romanischer Rechtskreis* (Tübingen, Mohr, 1975) 562 ff, who poignantly analyses the difference in methods of interpretation between German and Dutch law. *cf* P Scholten and GJ Scholten, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel*, 3rd edn (Zwolle, W.E.J. Tjeenk Willink, 1974) 60 ff. On the flexibility of Dutch law in this respect, see also C Asser and JBM Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel [2]* (Zwolle, W.E.J. Tjeenk Willink, 1995) 76 ff; JBM Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel [3]*((Deventer, Kluwer, 2005) 99 ff.

response, some academics have pleaded – to no avail thus far – for the statutory inclusion of a discretionary court power to extend strict liability to 'similar risks'.[41]

B. Grief and non-pecuniary loss

A Dutch case dating from 2002 offers an illustration of the interaction between courts and the legislature in light of statutory interpretation. The question put to the Dutch Supreme Court was whether it was willing to award compensation to a surviving family member for non-pecuniary loss caused by loss of companionship and grief, where the legislature in 1992 had consciously continued a century-old rule that in principle no compensation of third parties is allowed in the case of death and personal injury (with the exception of recovery for pecuniary loss of dependency).[42] This is what the Dutch Supreme Court ruled (author's translation):

Hoewel deze bepaling van tamelijk recente datum is, kan er grond bestaan om de redenen die tot de daarin neergelegde regeling van de schadevergoeding hebben geleid, te heroverwegen. Niet uitgesloten is dat het wettelijk stelsel onvoldoende tegemoet komt aan de maatschappelijk gevoelde behoefte om aan degenen die in hun leven de ernstige gevolgen moeten ondervinden van het overlijden van een persoon tot wie zij - zoals hier - in een affectieve relatie hebben gestaan, enige vorm van genoegdoening te verschaffen. Het gaat echter de rechtsvormende taak van de rechter te buiten te dezer zake in afwijking van het wettelijk stelsel zonder meer een vergoeding toe te kennen. In de eerste plaats zou immers opnieuw een, aan de wetgever voorbehouden, afweging moeten worden gemaakt van de voor- en nadelen die aan het huidige stelsel verbonden zijn. Voorts vergt een herziening van het bestaande stelsel een afbakening van de gevallen waarin een vergoeding passend wordt gevonden en een concrete aanwijzing van de personen aan wie een dergelijke vergoeding toekomt. Ten slotte is het ook aan de wetgever te beoordelen of, en zo ja in hoeverre, aan de toekenning van een dergelijke vergoeding financiële grenzen gesteld moeten worden in verband met de consequenties die daaraan kunnen zijn verbonden.

Although this provision is of a fairly recent date, there can be grounds for reconsidering the motives that have led to the rules on damages that this article holds. Possibly, the legislative framework insufficiently meets the need felt in society to offer some form of compensation to those whose lives are seriously affected by the death of a person with whom they – as is the case here – had formed an affectionate relationship. It would be beyond the law-making powers of the court to award such compensation in derogation of the statutory regime. Firstly, this would entail a renewed evaluation of the benefits and drawbacks of the current regime, which is reserved to the legislature. Moreover, revising the current regime would necessitate a clear demarcation of cases in which compensation is deemed appropriate and a concrete identification of the individuals eligible for such compensation. Finally, it is for the legislature to decide whether, and if so to what extent, the award of such damages should be limited in view of the financial consequences these could entail.

Hence, in its decision, the Supreme Court takes a cautious approach, and feels this is a task for the legislature. It then goes on to disentangle nervous shock and grief, to use familiar interpretation techniques to delineate its own competence to interpret and shape tort law from the legislature's dominion, and then to explicitly leave the matter of compensation for grief to the legislature.

[41] See the overview of arguments pro and contra by C Oertel, *Objektive Haftung in Europa* (Tübingen, Mohr Siebeck, 2010) 311 ff. *cf* WH Van Boom and A Pinna, 'Le droit de la responsabilite civile de demain en Europe: questions choisies' in B Winiger (ed) *La responsabilité civile européenne de demain – Projets de révision nationaux et principes européens (Colloque international à l'Université de Genève)* (Genève, Schulthess, 2007) 267; H Kötz and G Wagner, *Deliktsrecht,* 11th edn (München, Verlag Franz Vahlen, 2010) 202 f.

[42] This rule was held to be codified in Articles 1406 and 1407 of the Dutch Civil Code 1838. See Hoge Raad der Nederlanden 2 January 1931, Nederlandse Jurisprudentie 1931, 348; Hoge Raad der Nederlanden 2 April 1936, Nederlandse Jurisprudentie 1936, 752. This reticence to award compensation to third parties can be traced back to Roman-Dutch law; see, eg, A Wolfsbergen, *Onrechtmatige daad* (Leiden, Universitaire Pers Leiden, 1946) 223 ff.

After the Court ruling, academics and stakeholders (i.e. victims' families support groups, insurance industry, the bar) discussed the case and criticised the state of the law as unfair for family members grieving the deceased victim. Though the Civil Code explicitly allows compensation of dependents for loss of dependency – i.e., economic loss – it is considered to reject compensation of non-pecuniary loss for grief. The expression that it is cheaper to kill than to maim was and remains true for the Netherlands. This criticism reached Parliament and the Government, and the Government then submitted a Bill before Parliament that would introduce a right to a fixed sum by means of compensation for non-pecuniary loss of dependents. The Bill became the object of broad consultation, and most stakeholders (including the insurance industry, which was consulted to ensure the scheme's feasibility) welcomed the proposal. It was accepted by the Second Chamber of Parliament. However, the Senate ultimately rejected the proposal, as it felt – to put it bluntly – that capitalising on grief was unethical and would fuel an unwanted compensation culture in the Netherlands. Thus, the current state of affairs has remained unchanged since the 2002 Supreme Court decision. However, unsurprising as the Court's reticence to encroach upon the legislature's domain may be, there are instances where precisely this occurs.

C. Traffic accident law

In the early days of motorised traffic, general tort law was the only available framework for dealing with traffic accidents. In some legal systems, however, the legislature soon decided that the normal fault-based liability was insufficient in offering an accessible source of compensation to injured parties. By introducing a statutory regime containing a strict or semi-strict liability of motor vehicle owners, the position of certain categories of victims was thus thought to be improved. The introduction of compulsory motor vehicle liability insurance further boosted the expectations of what became a considerable compensation system.

In Germany, a strict liability of motor vehicle owners was introduced as early as 1909 in a separate statute. It held owners strictly liable for accidents involving pedestrians and cyclists. However, it did allow a *vis maior* defence, and the ordinary proportional contributory negligence defence was not restricted in any way.[43] In effect, the law was especially hard on young children who fell victim to road traffic if contributory negligence was considered to have played a role in the accident: their awards were reduced in proportion to their legal blame set in accordance with a semi-adult standard of carefulness. A further disadvantage of the strict liability was that it did not allow compensation for non-pecuniary loss. Hence, victims who sought compensation for their pain and suffering gained little from the strict liability, because they still had to resort to common fault-based liability and all it entailed. The effect was that, though German courts went out of their way to construe strict liability and to narrow the scope for the excuse of force majeure, claims for personal injury were still founded mostly on the ordinary fault-based § 823 *BGB*.

[43] C van Dam, *European Tort Law* (Oxford, Oxford University Press, 2006) 362 f; S Lohsse, 'The development of traffic liability in Germany' in W Ernst (ed) *The Development of Traffic Liability*, vol 5 (in Ibbetson and Bell (n 12)) 93.

In the 1970s, there was some momentum for improving the position of traffic accident victims. For instance, it was suggested that very young children should not be punished by reducing their awards on the basis of contributory negligence and, more generally, that strict liability should include claims for non-pecuniary loss. Could the courts do all this on their own, or should they wait for the legislature to intervene? The German courts did not cross the boundaries set by the legislature, although the caseload under fault-based liability weighed increasingly heavily on the court system. In the German tradition of the 'Tage' (days), annual meetings of judges, practitioners, and academics where discussion on the future direction of the law takes place, various *Verkehrsgerichtstage* (traffic adjudication days) were devoted to these issues. The lawyers' debate was finally transposed into legislation in 2002.[44] In that year, the *Schadensersatzrechtsänderungsgesetz* (Law of Damages Amendments Act) reinforced the strict character of the liability by narrowing the *vis maior* defence, by raising the monetary caps, by introducing a right to compensation for non-pecuniary loss in strict liability, and by inserting a fixed-age threshold of 10 years for contributory negligence in traffic accidents.[45]

Developments in the Netherlands were quite different.[46] According to a 1920s statute, owners of motor vehicles were liable vis-à-vis pedestrians and cyclists under the presumed wrongfulness of the driver. In theory, the force majeure defence could be argued. However, case-law slowly but surely moved towards strict liability by giving less and less room for the defence from the 1960s onwards (when the compulsory liability insurance was introduced).[47] As in Germany, the position of contributory negligence involving young children was a debated issue. The statute did not categorically exempt them from either force majeure defences or a reduction of their awards.

Then, in the early 1990s, the Dutch Supreme Court took audacious steps to innovate this area of the law. In a number of key decisions, it ruled that fairness demands that the force majeure defence was unavailable against children under 14 and that any negligence on their part could not reduce their awards.[48] Thus, as far as children were concerned, the Court single-handedly morphed the 1920s fault-based liability into a strict liability bordering on a no-fault scheme.

Later, the court went one step further and decided that save for force majeure, adult cyclists, and pedestrians should be compensated at a minimum of 50 per cent even when the victim was at fault in excess of 50 per cent.[49] What is striking is that the statutory rules on contributory negligence do not mention any fixed percentages but call for a weighing of all relevant circumstances of the particular case. In defiance of these rules, the Court single-handedly laid down hard and fast rules (some Court critics argued that the Court thus usurped legislative powers) that have been embraced by practice.[50] Subsequently, the legislature felt all these developments in case-law necessitated a legislative overhaul of the outdated 1920s statute. Hence, in 1997, the government submitted a Bill that adopted and codified this case law, and took an additional step by also

[44] For other examples of the legislative recodification trajectory in private law, see Medicus and Lorenz (n 15) 20 f.
[45] See G Wagner, *Das neue Schadensersatzrecht* (Baden-Baden, Nomos, 2002) 33 ff, 59 ff. Children under the age of 7 do not have delictual capacity in traffic accidents; 7-10 year-olds can only be held responsible for intentional wrongdoing.
[46] See the overview by C Van Dam and G Van Maanen, 'The development of traffic liability in the Netherlands' in W Ernst (ed) (n 43) 131 ff.
[47] In that same period, scholars increasingly advocated the introduction of a no-fault compensation scheme for traffic accidents. See ibid 147.
[48] See ibid 139. The exception here is intent and wilful recklessness of the victim.
[49] ibid.
[50] The practical benefit of having clear-cut percentages is that these facilitate and speed up the claims settlement process in personal injury cases whenever such percentages do not spontaneously develop (for whatever reason) as a rule of thumb in settlement practice.

introducing a strict liability of employers vis-à-vis their employee drivers. However, the Bill was ultimately withdrawn due to a change in government administration. As a result, the 1920s statute was never replaced.

This did not stop the Supreme Court, however. Since the Bill did not reach the statute book, employees involved in traffic accidents were not compensated if there was no tortfeasor involved (unilateral accidents involving drivers falling asleep, and so on). Tort law could not provide any basis, but the Supreme Court did find an alternative statutory 'peg' for improving the plight of this group of injured drivers. In employment law, for some time there has been a statutory provision holding that the employer shall act in good faith as a 'good employer'. Since the 2000s, the Court has developed a line of case-law holding that employers are under a duty to provide first-party insurance with fair coverage for the benefit of their employee drivers. Failure to do so will oblige employers to compensate in the absence of such coverage should an accident occur.[51]

V. Final observations

Obviously, the assumption that civil law courts act merely as 'porte-parole de la loi' is a misconception of their role. In tort law, civil law courts may assume a role that complements the role assumed by the legislature. Where codes give leeway for case-law to create, develop, and innovate in tort law, courts will fill the space. Where the legislature is active, courts may assume a more subservient role.[52] It must be noted, however, that there is no single concept of power balance in civil law tort systems. In some countries, courts may be more willing than in others to show initiative where the legislature fails to act. The examples given in the previous section illustrate that civil law courts sometimes may try to tack between Scylla and Charybdis by further creating new rules of private law without explicitly assuming a legislative role. The examples also illustrate that there is no uniform approach on the part of civil law courts. Whether the courts are actually willing to make inroads into the legislative prerogative depends on the institutional and constitutional settings in a given country. Several other factors come into play as well. In the examples given, the willingness to engage in judicial policymaking was the product of a subtle interplay with the legislature. Issues that proved relevant included whether the legislature had decided recently on the issue at hand and whether it had shown leadership in doing so, as well as whether the courts had felt that a minor judicial nudge could push the legislature in the right direction.

In conclusion, one could note that although there is a fundamental difference in the starting point between the common law and those legal systems that have a codified tort law system, the balance between the legislature and the courts may be similar in certain respects. Obviously, in common law, the fount of the law of torts is the court, while under a codification the legislature is the originator. Hence, the constitutional relationship between the legislature and the judiciary may well be framed differently. In many ways, however, the subtle techniques of statutory interpretation

[51] By introducing this duty to insure the Court is currently proving to have opened Pandora's box, lower courts are increasingly faced with the question of whether this duty should be extended from traffic movements to other inherent dangers of employment.
[52] Note that in some countries there is the additional examination of legislative intervention in tort law by constitutional courts.

and construction iron out these differences. Moreover, the art of comparing and distinguishing cases to discover the heart of tort law seems quintessential to civil law codifications as much as it is to the common law of torts.