EDITORIAL

THE POWER OF INJUNCTIVE RELIEF IN TORT: AN INTRODUCTION

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Guest editors*

INTRODUCTION: COMBINING TWO STRANDS OF IUS COMMUNE RESEARCH

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

§1. WHY INJUNCTIVE RELIEF? TWO REASONS

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

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at above, and because it might be a good instrument to overcome some of the peculiarities and problems of most private law systems, more than has been done in the past.

§2. ONE: THE ORIGINS OF SELECTION AND THE FLAWS OF OUR PRIVATE LAW SYSTEMS

The selection of 'injunctions' as a possibly rewarding topic for comparative legal research can be traced back to Van Boom's inaugural address in 2006 in Rotterdam.[2] There he basically described three major flaws in systems of private law. First, private law systems and the rules designed for those systems mainly look backwards, not forwards, supplying possible solutions, that is, remedies, when something has gone wrong, for example when a duty was breached or a contract was not lived up to. Second, when reacting to such a wrong these systems mainly try to restore the former situation by way of compensation or restoration in kind for the harm done, and nothing more. Thirdly, private law rules typically react to a specific situation, problem or dispute without taking the broader picture into account.

These flaws lead to, for instance, problems as regards compliance with, and possibilities of, enforcement of private law rules. Following Van Boom, one could state that our private law systems are not sufficiently adapted actually to enforce, in a just and effective manner, the rights and obligations they have designed and hold so dear.

Given these systematic flaws and the problems stemming from them, a previous *Ius Commune* workshop of the Liability & Insurance Research Cluster in Amsterdam during November of 2008 was centred around 'Enforcement in Tort Law', and aimed at providing a further problem analysis and an overview of possible solutions for this 'enforcement gap'. When discussing that 'enforcement gap' the possibilities of using injunctions to reach the desired goals were first addressed.

Of course, this development presented an open invitation to focus more directly on that specific theme, preferably in combination with the Procedural Law Programme. Indeed, the theme of 'injunctions' is fundamental to the issue of enforcement, and as such the use of and focus on injunctive relief was one of the solutions suggested by Van Boom to the problems he had analysed in his inaugural address in 2006. The need for a further analysis of injunctive relief arose thus from the awareness of the extra enforcement power that is involved with injunctions.[3] They have the ability, at least in theory, to enhance the workings of our private law systems because the flaws of such systems might be overcome by using them more often.

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2 See W.H. van Boom, *Efficacious Enforcement in Contract and Tort*, (BJu, The Hague 2006).

3 See J. Murphy, 'Rethinking Injunctions in Tort Law', 27 *Oxford Journal of Legal Studies* 3 (2007), p. 535.

§3. TWO: THE DUALITY OF ITS CHARACTER

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

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

§4. NOT AN EASY TASK…

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

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

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

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

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

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

would probably not be attainable anyway because there seems to be too much diversity across national legal systems.

As to this diversity, Von Bar[9] recognizes in broad terms, and for present purposes this suffices,[10] the following divergent approaches when it comes to allowing a plaintiff to take preventive measures. Some systems (in Central and Eastern Europe) place the right to restrain imminent dangers on a statutory footing, the vanguard system here being (surprisingly perhaps) the Dutch legal system, in which a claim for injunctive relief can be joined with a claim for a declaratory judgment that a tort is established (see Articles 3:296 and 3:302 Dutch Civil Code).[11] More mainstream in Europe, however, is the position that certain specific absolute rights (such as personality rights) are furnished with a claim to injunctive relief, independent of any fault of the defendant. An example is Article 9 French Code Civil on privacy. Usually several other *ad hoc* provisions with the same effect exist, in- or outside the civil codes, if present, for instance in the field of anti-competitive practices. In common law jurisdictions the granting of an injunction to prevent damage from occurring is, however, a matter of discretion for the courts.[12]

Another aspect, but of a different character, that makes this topic a difficult one is that in the field of law and economics, as can be seen from the contribution by Ogus and Visscher to this issue, the argument is sometimes made that lawyers exaggerate the importance of compliance with legal rules and those enforcement strategies that provide specific relief. Again, further analysis is needed, and offered by Ogus and Visscher, to capture this insight, if only because for lawyers compliance is currently somewhat like the Holy Grail itself, and there is a currently a general belief that we should focus more on the enforcement power, or lack thereof, of private law rules.[13]

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9 On the following, see von Bar, *Principles of European Law. Non-Contractual Liability Arising out of Damage Caused to Another*, pp. 269–272. Also see for instance, C. van Dam, *European Tort Law*, (OUP, Oxford 2006), p. 301.

10 See Van Boom's contribution to this issue for details on some of the European legal systems.

11 For more information on Dutch law, see C.J.J.C. van Nispen, *Sancties in het vermogensrecht. Mon. NBW A-11*, (Kluwer, Deventer 2003), most notably p. 21. Basically, every recognized legal duty is bestowed with the power to ask for compliance with that duty, see Van Nispen, *Sancties in het vermogensrecht. Mon. NBW A-11*, p. 11.

12 The Principles of European Tort Law (PETL) allow recovery of the expenses incurred in preventing threatened damage, see Art. 2:104 PETL, but this article only makes it clear that such expenses are seen as recoverable damages under certain conditions. It thus resembles Article 6:302 PEL Liab. Dam. more than it does Article 6:301 PEL Liab. Dam., mentioned above.

13 The current focus on enforcement, at least in The Netherlands, is probably due to the renewed importance that is given to the (in)effectiveness of private law rules. See, e.g., E.F.D. Engelhard et al (Eds.), *Handhaving van en door het privaatrecht*, (BJu, The Hague 2009).

§5. AIMS AND AMBITIONS: A LOT OF QUESTIONS

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

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

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

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

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

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

§6. THE INDIVIDUAL CONTRIBUTIONS TO THIS VOLUME

In this issue the first paper is by Willem van Boom, Professor of Private Law at the Erasmus University Rotterdam. He writes on 'Negligent Risk Taking and Injunctions' and he basically tries to cope with the questions as to whether and, if so, where injunctions are or might be available to restrain negligent behaviour, and whether they should be. In trying to answer those questions he describes, analyses and compares the German, French and English legal systems. He shows the formidable dogmatic implications of either allowing or rejecting such forms of injunctions, and argues that granting an injunction in cases of negligent risk-taking behaviour in fact converts an *ex post* claim for compensation into an *ex ante* duty to act or omit. Denying the injunction, on the other hand, converts our tort law system into a tax system, putting an *ex post* levy on wrongful behaviour. What to do then, and based on what arguments?

The second featured article is by Siewert Lindenbergh, Professor of Private Law at the Erasmus University Rotterdam and deals with 'The Right Way to Enforce the Right to Property'. This is an important sub-theme if only because, under English law, property seems to be protected better than a person's life and limbs, at least from the perspective of preventive measures.[17] Lindenbergh argues in this respect that a property right is more than merely an entitlement to compensation in case of an infringement and, as such, is a powerful source for injunctions; but he also analyses the possibility that an otherwise possible injunction must yield to greater societal interests,[18] in which case only compensation remains. He then argues that probably the level of compensation granted in such cases is too modest, suggesting that currently the right to property is not vindicated properly when injunctive powers are replaced by a 'liability, or compensation, approach'. This means that at least new standards of compensation would be needed.

A third contribution focuses on a domain of administrative and private law that uses injunctions to a large extent in practice, for example EU competition and consumer law. This part of the law relies on measures of injunctive relief because repairing damages years after the fact complained of is just not good enough. Caroline Cauffman, Professor of Law at Antwerp University and Lecturer in Law at Maastricht University, explains, for instance, that especially the so-called 'cease and desist' orders are, at least under Belgian law, rather efficient because the preconditions that need to be met for granting such orders are relatively easy to meet, and are handled in a fast track procedure. This is the case because only the infringement as such needs to be proven; proof of damages and causation is not needed. These types of orders thus increase the enforcement capacity of the law, by using private law mechanisms.

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17 See Cane, *The Anatomy of Tort Law*, p. 132, and J. Murphy, 27 *Oxford Journal of Legal Studies*, 3 (2007), p. 514. One's reputation is seen as part of 'property' in this respect, and thus better protected also, see J. Murphy, 27 *Oxford Journal of Legal Studies*, 3 (2007), p. 516.

18 See for instance art. 6:168 Dutch Civil Code.

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

§7. SOME NOTES ON TERMINOLOGY

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

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

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

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

injunction' which denotes the order for the defendant to restore a previously existing situation.

In each of these cases, for either prohibitory or mandatory injunctions, 'penalty payments' (*Zwangsgeld, astreinte, dwangsom*) can accompany an injunction. We are talking then about the payment of a fixed amount for each day's delay in compliance with the court ordered injunction.

CONCLUSION

We hope the following four contributions as just presented can shed some new and thought-provoking light on the topics and problems raised. No doubt each of the authors will first present his or her own new and additional problems to add to the magnitude of the theme at hand; there is however no doubt in our minds that their contributions will also solve some of the problems raised, or point the way towards a solution still to be found. If that were indeed to be the case, this endeavour will have been a success.

Finally, we wish to express our deepest gratitude to the editorial board of the *MJ* for granting us the possibility of setting up this special issue on 'The Power of Injunctive Relief in Tort' and for cooperation in putting it together. We also thank the anonymous peer referees who reviewed the four articles, as well as, of course, the authors for their collaboration on this project.