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Concurrent Claims in Contract and Tort: A Comparative Perspective

Ruben DE GRAAFF^{*}

Abstract: This contribution analyses whether, and to what extent, the law permits a choice between finding liability in contract and in tort. The answer to this question is important because the outcome of a case may differ depending on whether the claim for damages is based on a breach of contract or on a violation of a tortious duty. The contribution examines the approaches in several European jurisdictions. French law is straightforward: finding liability in tort is not possible if the damage is caused by or related to the (non-) performance of a contractual obligation. German, Dutch and English law take the opposite point of view: finding liability in tort is not precluded if the damage is caused by or related to the (non-) performance of a contractual obligation. This contribution traces the historical development of these approaches and explains their differences by looking at the underlying structure of these systems of private law. It also shows that the resoluteness of both solutions has softened over time, as a result of judicial and legislative interventions. To support this argument, recent developments in case law and legislation are discussed.

Résumé: Cette contribution s'interroge sur la question de savoir si – et alors dans quelle mesure – le droit offre un choix entre les actions en responsabilité contractuelle et extracontractuelle. La réponse à cette question est importante car l'issue du litige peut varier selon que la demande en dommages-intérêts est fondée sur la violation d'une norme contractuelle ou extracontractuelle. La présente contribution examine cette question au sein des différents systèmes juridiques. En droit français, la réponse est univoque: la responsabilité extracontractuelle comme base de l'action en justice est impossible si le dommage est causé par ou lié à l'(in)exécution d'un contrat. Les droits allemand, néerlandais et anglais optent pour la solution inverse: utiliser la responsabilité extracontractuelle est possible même si le dommage a été causé par ou lié à l'(in)exécution d'un contrat. La présente contribution analyse le développement historique de ces approches et explique leurs différences en recourant aux structures sous-jacentes des systèmes de droit privé. Il se trouve que la détermination de chacune de ces solutions s'est atténuée avec le temps, à la suite des interventions du juge et du législateur. Pour soutenir cet argument, les développements récents dans la jurisprudence et la législation sont discutés.

Zusammenfassung: Dieser Beitrag analysiert ob und in welchem Ausmaß das Zivilrecht eine Wahl zwischen vertraglicher und deliktischer Haftung eröffnet. Die Antwort auf diese Frage ist von Gewicht, denn das Urteil in einem Rechtsstreit kann unterschiedlich ausfallen, je nachdem, ob die Klage auf der Geltendmachung einer

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Vertragsverletzung oder einer außervertraglichen Pflichtverletzung beruht. Der Beitrag analysiert die Ansätze in verschiedenen europäischen Rechtsordnungen. Das französische Recht ist eindeutig: Eine deliktische Haftung ist ausgeschlossen, soweit der Schaden im Zusammenhang mit der (Nicht-)Erfüllung einer vertraglichen Pflicht steht. Das deutsche, niederländische und englische Recht nehmen den entgegengesetzten Standpunkt ein: Die deliktische Haftung ist nicht ausgeschlossen, soweit der Schaden im Zusammenhang mit der (Nicht-)Erfüllung einer vertraglichen Pflicht steht. Der Beitrag greift die historischen Entwicklungen dieser Ansätze auf und erklärt ihre Unterschiede, indem er die diesen Privatrechtssystemen zugrunde liegenden Strukturen betrachtet. Er zeigt auch, dass die Strenge beider Lösungsansätze über die Zeit hinweg, als Ergebnis richterlicher und gesetzgeberischer Einmischung, aufgeweicht wurde. Als Unterstützung für dieses Argument werden jüngste Entwicklungen der Rechtsprechung und Gesetzgebung diskutiert.

Key Words: Contract, Tort, Concurrence, Non-cumul, Anspruchskonkurrenz, Samenloop

1. Introduction

1. This contribution analyses whether, and to what extent, the law permits a choice between finding liability in contract and in tort. The answer to this question is important because the outcome of a case may differ depending on whether the claim for damages is based on a breach of contract or on a violation of a tortious duty. The contribution examines the approaches in several European jurisdictions, analyses their historical development and explains their differences by looking at the underlying structure of these systems of private law.

2. Comparative studies on this topic do exist, but they are either not written in English,¹ are somewhat outdated,² or they provide a comprehensive assessment of the law as it stands rather than an explanation of its development.³ It is the aim of this contribution to add a current comparative account to these sources. This also offers the opportunity to discuss recent developments in case law and legislation. For present purposes, French, German and English law have been selected. These

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- 1 K. BRIESKORN, *Vertragshaftung und responsabilité contractuelle. Ein Vergleich zwischen deutschem und französischem Recht mit Blick auf das Vertragsrecht in Europa* (Tübingen: Mohr Siebeck 2010); Y.-G. VON AMSBERG, *Anspruchskonkurrenz, Cumul und Samenloop. Eine rechtsvergleichende Untersuchung der Konkurrenz von Ersatzansprüchen aus Vertrag und Delikt im belgischen, niederländischen und deutschen Recht und ihrer Funktion in der Rechtsprechung* (Frankfurt am Main: Peter Lang 1994); P. SCHLECHTRIEM, *Vertragsordnung und außervertragliche Haftung. Eine rechtsvergleichende Untersuchung zur Konkurrenz von Ansprüchen aus Vertrag und Delikt im französischen, amerikanischen und deutschen Recht* (Frankfurt am Main: Alfred Metzner Verlag 1972).
 - 2 T. WEIR, 'Complex Liabilities', in A. Tunc (eds), *Encyclopedia of Comparative Law – Vol. XI Torts – Part 2* (Dordrecht: Martinus Nijhoff Publishers 1984), pp 3–39; M. VAN ROSSUM, 'Concurrency of Contractual and Delictual Liability in a European Perspective', *European Review of Private Law* 1995, pp 539–559.
 - 3 C. VON BAR & U. DROBNIG, *The Interaction of Contract Law and Tort and Property Law in Europe* (München: Sellier European Law Publishers 2004), pp 26–315.

are the most important private law systems in contemporary Europe, and they represent both the civil and the common law traditions. Reference is also made to Dutch law given that this system has been influenced by the French *Code Civil* but has adopted a solution that is comparable to the approach under German law.

3. It is necessary to clarify three terminological issues from the outset. First of all, this contribution only deals with the laws of contract and tort and not with the remaining extra-contractual obligations.⁴ Secondly, this contribution focuses on private parties and not on public bodies. The liability of public bodies is either a matter of administrative law or governed by private law but influenced by administrative rules and principles.⁵ Thirdly, this contribution uses the common law term ‘tort’ instead of the civil equivalent ‘delict’.⁶

4. In order to fully understand the nature and scope of the problem, the contribution first shows the areas of overlap (s. 2) and the distinctions (s. 3) between the laws of contract and tort. The contribution then examines the approaches in several European jurisdictions and traces their historical development. French law is straightforward: finding liability in tort is not possible if the damage is caused by or related to the (non-) performance of a contractual obligation (s. 4). German, Dutch and English law take the opposite point of view: finding liability in tort is not precluded if the damage is caused by or related to the (non-) performance of a contractual obligation (ss 5–6). The analysis shows that these legal systems have developed these particular approaches in the light of their own legal history and under the influence of the scope and structure of their own laws of contract and tort. The analysis also shows that both solutions are more nuanced than they seem at first sight. Moreover, a trend towards convergence can be observed in all jurisdictions (s. 7).

2. The Overlap of the Laws of Contract and Tort

5. On the face of it, an act or omission may not only constitute a breach of contract but may also violate a tortious duty. Incorrect performance of the contract may, for instance, cause injuries to body or health or may inflict property damage. Typically, these interests are also protected by the law of tort.⁷ Whether the facts of a case actually fall within the laws of contract and tort depends on the scope of both branches of the law in a particular legal order.

4 E.g. the law of unjustified enrichment, including undue payment (*condictio indebiti*), and the law governing the benevolent intervention in another’s affairs (*negotiorum gestio*).

5 K. Oliphant (ed.), *The Liability of Public Authorities in Comparative Perspective* (Antwerpen: Intersentia 2016).

6 R. ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: OUP 1996), p 907.

7 This does not imply that the type of loss is decisive as regards the question whether liability in tort can be established (in some jurisdictions it is not decisive, e.g. in France and the Netherlands).

6. Liability for breach of contract can only be established when one of the parties has failed to comply with the express or implied terms of the contract.⁸ It is therefore necessary that a valid contract exists. This depends, first of all, on the definition of contract. Some agreements do not fall within the law of contract in a particular jurisdiction. It also depends on the rules that govern the formation⁹ and form of the contract¹⁰ and on the presence of vitiating factors that may make the apparent contract void *ab initio* (e.g. mistake or grounds of illegality) or with retroactive effect (e.g. rescission for misrepresentation). Furthermore, the parties have to be bound by the contract, which depends on the rules of agency and the rights of third parties.¹¹ A valid contract only creates rights and obligations for those parties during the period that the contract is in force. As a consequence, liability for breach of contract does not come into play if the facts took place *before* the parties concluded the contract or *after* the contract has ended or has been terminated.¹²

7. In order for tortious liability to arise, the act or omission must have been unlawful, which depends on the scope of the law of tort in a particular jurisdiction. Common law jurisdictions rely on individual torts that have mainly been developed in case law. In English law, for example, there are numerous torts and equitable wrongs. Some have a broad field of application (negligence), but most are limited to particular situations (e.g. assault, battery, trespass to goods, inducing breach of contract, conspiracy, intimidation). Civil jurisdictions have codified their private law systems. In some of these systems, the law of tort is based on broad, general provisions. In France, for instance, every person who is at fault and thus causes harm to another person must

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- 8 The subject can be approached even more extensively, by including those situations in which the parties are in a special relationship ‘equivalent to contract’ (as is done by S. DEAKIN et al., *Markesinis and Deakin’s Tort Law* (Oxford: Clarendon Press, 7th edn 2013), pp 20-24). However, the laws of contract and tort do not overlap here, so there is no choice available at all.
- 9 Offer and acceptance (cf. Art. 6:217 BW) may not be enough. English law requires consideration in order for an agreement to constitute a contract. Until 2016, French law required a ‘cause’ (Art. 1108 CC). This requirement has been abolished in Art. 1128 CC, as a result of *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JUSC1522466R, available via www.legifrance.gouv.fr (hereinafter: *Ordonnance n° 2016-131*).
- 10 In all legal systems, there are specific formalities for certain types of contract, such as the requirement that contracts for the sale of land have to be in writing.
- 11 A contract may confer rights on third parties which are enforceable directly by the third parties themselves. See e.g. the Contracts (Rights of Third Parties) Act 1999; Art. 6:253 BW.
- 12 H. BEALE et al., *Ius Commune Casebooks for the Common Law of Europe – Cases, Materials and Text on Contract Law* (Oxford/Oregon: Hart Publishing 2010), pp 105-106. European legal systems tend to establish precontractual liability on the basis of the law of tort or on the basis of a special regime of precontractual liability (*culpa in contrahendo*, e.g. § 311, paras 2 and 3 BGB), see J. CARTWRIGHT & M.W. HESSELINK, ‘Conclusions’, in J. Cartwright & M.W. Hesselink (eds), *Precontractual Liability in European Private Law* (Cambridge: Cambridge University Press 2008), pp (449-488) at 457-460.

compensate for any losses sustained.¹³ In Germany and the Netherlands, tortious ‘fault’ liability may only arise when certain interests have been harmed or when certain norms have been violated. Liability may arise when a legally acknowledged right has been infringed, when a statutory duty has been breached,¹⁴ or following a violation of either public morals with the intention to inflict damages¹⁵ or, of a rule of unwritten law pertaining to proper social conduct.¹⁶

8. Similar lines can be recognized when it comes to the activities or capacities to which the law attributes a so-called ‘strict’ tortious liability. Liability may then be established without proving ‘fault’ on the part of the defendant,¹⁷ although it may be possible for the defendant to escape liability, for instance, by proving that he has exercised reasonable care. French law maintains several strict liability regimes, including a general liability for damage caused by a *chose* (an object or thing)¹⁸ and a general liability for damage caused by a person that is under the tortfeasor’s supervision.¹⁹ Both liabilities were established by the *Cour de Cassation* on the basis of Article 1384, paragraph 1 CC and have recently been codified by the legislature in Article 1242 CC. In other legal systems, strict liability only exists on the basis of specific rules with a more limited scope.²⁰

9. The law generally offers the aggrieved party several rights (or remedies).²¹ If the necessary conditions are fulfilled, the law of contract entitles him to claim damages, to demand specific performance, to request an injunction and to terminate the contract.²² The principal rights (or remedies) available to a victim of a tort are damages to compensate for the harm suffered and an injunction to prevent future harm.²³ When it comes to the relationship between the laws of contract and tort, one

13 Formerly Art. 1382 and 1383 CC, currently Art. 1240 and 1241 CC.

14 § 823 BGB; Art. 6:162, para. 2 BW.

15 § 826 BGB.

16 Art. 6:162, para. 2 BW.

17 In English law, ‘fault’ assumes three forms: malice, intention (including recklessness), and negligence (S. DEAKIN et al., *Tort Law*, p 27).

18 Cass. Civ. 16 June 1896, *S.* 1897. I. 17, note ESMEIN (*Teffaine*).

19 Cass. ass. plén. 29 March 1991, *D.* 1991. 324, comm. LARROUMET, *JCP* 1991. II. 21673 (*Blieck*).

20 English law knows several specific torts that do not require proof of malice, intention, recklessness or negligence (e.g. breach of statutory duty, trespass to land, defamation, vicarious liability, liability for animals). German law knows specific strict liability rules (§ 833 BGB and several acts outside the BGB). The same goes for the Netherlands (cf. Art. 6:169-184 BW, on liability for persons and things).

21 Traditionally, English lawyers see rights through the lens of the remedies by which they are given effect. For a comparison between the common law and the civil tradition on this point, see H. DEDEK, ‘From Norms to Facts: The Realization of Rights in Common and Civil Private Law’, 56. *McGill Law Journal* 2010, pp 1-37.

22 The range of rights (or remedies) also depends on the nature of the contract. Their order may differ from one legal system to another.

23 W. VAN GERVEN et al., *Ius Commune Casebooks for the Common Law of Europe – Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford / Portland: Hart Publishing 2000), pp 740-741 and 868-871. § 249, para. 1 BGB prescribes restitution in kind as

question has always been at the heart of the debate: does the law allow one contracting party to claim damages in tort from the other contracting party?²⁴ As the next section shows, the answer to this question matters because the outcome of the case may not always be the same depending on whether the claim is based on one branch of the law or the other.

3. The Differences Between the Laws of Contract and Tort

10. The overlap between the laws of contract and tort does not give rise to problems as long as application of the rules produces the same outcome. However, the laws of contract and tort vary in certain ways, which may lead to different results, depending on the basis of the claim for damages. On a fundamental level, this may be caused by the different aims of the laws of contract and tort. Generally speaking, the law of tort protects persons and their property, while the law of contract promotes their development.²⁵ In practice, the most important differences relate to the establishment and scope of liability, to questions of limitation or prescription and to questions of jurisdiction.

11. The first category concerns the conditions that are required to *establish* liability. For the outcome of the case, the following are determining factors: the elements which, when taken together make a successful claim; the tests which have to be applied to fulfil those conditions; who is under the obligation to furnish the relevant facts; and who bears the burden of proof. These rules may differ. For instance, a strict liability regime does not, typically, require the claimant to argue (and if contested, prove) fault on the part of the defendant. It is up to the defendant to argue (and if contested, prove) the absence of fault, provided that the law allows such a defence.

12. Secondly, the *scope* of liability may differ. This question concerns the type and extent of the losses that may be recovered under the respective heads of liability.²⁶ The laws of contract and tort may vary with regard to the type of loss that may be claimed²⁷

the first and foremost remedy, Art. 6:103 BW prescribes restitution in money, but allows the victim to claim, and the court to order, restitution in kind.

24 C. VON BAR & U. DROBNIG, *The Interaction of Contract Law and Tort and Property Law in Europe*, p 189; T. WEIR, in *Encyclopedia of Comparative Law*, p 6.

25 T. WEIR, in *Encyclopedia of Comparative Law*, p 5.

26 Some legal systems deal with this question when establishing liability (e.g. English and French law), while other legal systems deal with this question after liability has been established (e.g. German and Dutch law). See W. VAN GERVEN et al., *Tort Law*, pp 395–427.

27 E.g. pure economic loss, consequential economic loss and non-economic loss. Dutch and French law are not familiar with a separate category of pure economic loss. German law generally excludes pure economic loss from the scope of the law of tort, while English law typically allows recovery of pure economic loss under the ‘economic’ torts, but shows restraint when it comes to the tort of negligence. For an overview of the rules and exceptions, see W.H. VAN BOOM, ‘Pure Economic Loss. A Comparative

and with regard to the possibility to demand exemplary or punitive damages.²⁸ The scope of liability is also determined by the remoteness of the damage. To determine whether or not the damage is too remote, most legal systems refer to factors such as the underlying duty, the nature and foreseeability of the damage²⁹ and the nature of the defendant's act.³⁰ The underlying duty is also important for the assessment of a defence of contributory negligence³¹ and for the applicability of contractual or statutory rules that limit or reduce the scope of recoverable damages. Finally, the calculation of damages proceeds on different bases: damages for breach of contract aim to bring the claimant in a position as if the contract had been performed (*positive* interest), whereas damages for tort aim to bring the claimant in a position as if no tort had been committed (*negative* interest).³²

13. A third issue relates to the *limitation* of the action or the *prescription* of the claim.³³ Due to differences in the commencement and the duration of the applicable time limits, one claim may already be barred by limitation or prescription while the other claim may still be enforceable. Even when a general regime has been created for all claims for damages, specific rules may exist for certain liabilities.³⁴

14. Finally, the liability rules may lead to different competent courts. This issue does not only present challenges if the facts of the case are linked to different

Perspective', in W.H. Van Boom et al. (eds), *Pure Economic Loss* (Wien / New York: Springer 2004), pp 1-40.

28 Exemplary or punitive damages are generally only available in tort, in as much as they are available at all. They are typically not available in contract, unless contracting parties include in their contract a clause providing for the payment of an agreed sum for non-performance of a contractual obligation. See generally C. VON BAR & U. DROBNIG, *The Interaction of Contract Law and Tort and Property Law in Europe*, p 110.

29 E.g. Art. 1231, para. 3 CC (formerly Art. 1150 CC) limits recovery in contract to foreseeable damage.

30 See e.g. Art. 6:98 BW; J. CARTWRIGHT, 'Remoteness of Damage in Contract and Tort: A Reconsideration', 55. *The Cambridge Law Journal* 1996, pp 488-514.

31 In some cases, contributory negligence cannot reduce damages, e.g. when the claim is for strict liability for accidents caused by motor vehicles (Art. 3, *Loi n° 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation*) or for the breach of a strict contractual duty (cf. A. BURROWS, 'Comparing Compensatory Damages in Tort and Contract: Some Problematic Issues', in S. Degeling, et al. (eds), *Torts in Commercial Law* (Sydney: Thomas Reuters 2011), pp (367-390) at 368.

32 See generally W. VAN GERVEN et al., *Tort Law*, p 33.

33 Unlike prescription, limitation does not extinguish the right, but only makes it impossible to enforce it.

34 E.g. French, German and Dutch law provide one regime that governs all claims for damages (Art. 2224 CC; § 195 BGB; Art. 3:310 BW). At the same time, there are special time limits, e.g. for certain contractual claims (e.g. Art. 114-1 *Code des assurances*; § 438 BGB; Art. 7:23, para. 2 BW).

jurisdictions as challenges may also arise within the confines of one jurisdiction. The legislature may have designated special courts to adjudicate on claims with a certain *value*, such as county courts or sub-district courts, or on claims of a certain *type*, such as labour courts or maritime law courts. The claimant may or may not prefer to bring proceedings before a special court, for instance, because legal representation is or is not mandatory. The nature of the claim may also determine whether the claimant is permitted to take the matter to another court than the court of the defendant's domicile and whether legal aid is available.³⁵

15. The differences outlined above may or may not arise. As will become apparent, in some respects, some legal systems have successfully converged their liability rules. Yet it is safe to say that in all jurisdictions, the outcome of a case will not always be the same depending on whether the claim is based on the breach of a contractual obligation or on the violation of a tortious duty. For the aggrieved party, it may therefore be more favourable to sue in either contract or tort. This raises the question whether, and to what extent, the law permits such a choice. The following sections examine how this question is answered in terms of French, German, Dutch and English law.

4. French Law

16. The relationship between the laws of contract and tort has generated considerable interest in French literature. At the end of the 19th century, the debate was triggered by the scholars Sainctelette and Grandmoulin. Sainctelette argued that voluntary obligations, created by a contract, should be clearly distinguished from obligations imposed by the law.³⁶ By contrast, Grandmoulin argued that no separate regime of contractual liability existed, as this liability was part of a unified 'théorie de la responsabilité'.³⁷

17. Eventually, most scholars adopted an intermediate position, according to which contractual and tortious liabilities were part of the general law of obligations however, should be treated differently.³⁸ As Brun stated in 1931: 'il n'y a pas deux

35 *Joyce v. Sengupta* [1992] EWCA Civ 9 provides an example, although the case concerned concurrent claims in tort. The plaintiff sued only on the basis of the tort of injurious falsehood and not on the basis of defamation, because legal aid was not available for defamation.

36 C. SAINCTELETTE, *De la responsabilité et de la garantie* (Paris: Chevalier-Marescq 1884), p 15. The same idea was developed by M. SAUZET, 'De la responsabilité des patrons vis-à-vis des ouvriers dans les accidents industriels', *Revue critique de législation et de jurisprudence* 1883, pp 596-640.

37 J. GRANDMOULIN, *De l'Unité de la responsabilité, ou Nature délictuelle de la responsabilité pour violation des obligations contractuelles* (Rennes: A. Le Roy 1892), p 88. The same idea was developed by A.F. LEFEBVRE, 'De la responsabilité, délictuelle, contractuelle', *Revue critique de législation et de jurisprudence* 1886, pp (485-523) at 494: 'Toute faute est délictuelle. La faute contractuelle n'existe pas.'

38 See for an overview E. JÜEN, *La remise en cause de la distinction entre la responsabilité contractuelle et la responsabilité délictuelle* (Paris: L.G.D.J. 2016), pp 12-17, and G. VINEY, *Introduction à la responsabilité* (Paris: L.G.D.J., 3rd edn 2008), p 399.

responsabilités, mais deux régimes de responsabilité'.³⁹ By then, most writers supported the idea that the parties to a contract should only be subject to the law of contract in order to respect the freedom of contract and the intention of the legislature. It should not be accepted that parties, having concluded a contract, could 'escape' into the general regime of tort.⁴⁰

18. This solution became known as the principle of *non-cumul des responsabilités contractuelle et délictuelle* (hereinafter: *non-cumul*). The terminology is somewhat misleading, because it suggests that the only purpose of the rule is to make sure that the aggrieved party is not compensated twice. This is surely stating the obvious. It is neither the intention of the aggrieved party, nor the meaning of the rule. Rather, the rule means that there is no overlap whatsoever. If the harm occurs in the context of a contractual relationship, the law of tort is not applicable.⁴¹

19. Three judgments are usually cited to show that the *Cour de Cassation* had already accepted the principle of *non-cumul* in the year 1890,⁴² reiterated this in the year 1922⁴³ and firmly established this by the year 1927.⁴⁴ Nevertheless, according to several authors, these judgments did not create a convincing precedent at the time.⁴⁵ After all, the *Cour de Cassation* only stated that the conditions

39 A. BRUN, *Rapports et domaines des responsabilités contractuelle et délictuelle* (Lyon: 1931), p 382.

40 J.S. BORGHETTI, 'La responsabilité du fait des choses, un régime qui a fait son temps', *RTDCiv* 2010, pp (1-40) at 23-24, with further references.

41 O. MORÉTEAU, 'French Tort Law in the Light of European Harmonization', 6. *Journal of Civil Law Studies* 2013, pp (760-801) at 765.

42 Cass. Req. 21 January 1890, D. 1891. 1. 380. PH. BRUN, *Responsabilité civile extracontractuelle* (Paris: LexisNexis, 2nd edn 2009), p 68, refers to this judgment and states that the principle of *non-cumul* 'a été posé dès la fin du XIX^e siècle par la jurisprudence'.

43 Cass. Civ. 22 January 1922, D. 1922. 1. 16; S. 1924. 1. 105, note DEMOGUE. W. VAN GERVEN et al., *Tort Law*, p 41 (fn. 93), identify this judgment as the 'leading case'; S. WHITTAKER, 'Privity of Contract and the Law of Tort: the French Experience', 15. *Oxford Journal of Legal Studies* 1995, pp (327-370) at 334, refers to the same judgment and notes: 'By the 1920s, the rule of *non-cumul* had become accepted by the majority of both courts and writers'.

44 Cass. Civ. 6 April 1927, D. 1927. 1. 201, note H. MAZEAUD. G. BABERT, *Le système de Planiol – Bilan d'un moment doctrinal* (Poitiers: Université de Poitiers 2002), p 268 refers to this judgment and states: 'C'est donc bien en 1927 que la Cour de Cassation change sa jurisprudence.'

45 G. VINEY, 'Pour une interprétation modérée et raisonnée du refus d'option entre responsabilité contractuelle et responsabilité délictuelle', 39. *McGill Law Journal* 1994, pp (813-827) at 817; G. BABERT, *Le système de Planiol*, pp 265-266; J.S. BORGHETTI, *RTDCiv* 2010, pp 14-29; S. ABID MNIF, *L'option entre la responsabilité contractuelle et la responsabilité délictuelle* (Paris: L'Harmattan 2014), pp 74-78; H. CAPITANT et al., *Les grands arrêts de la jurisprudence civile* (Paris: Dalloz, 13th edn 2015), p 265, no 4. See already J. POPESCO-ALBOTA, *Le droit d'option: le problème des deux ordres de responsabilité civile, contractuelle et délictuelle* (Paris: Rousseau 1933), p 172; R. SAVATIER, *Traité de la responsabilité civile en droit français civil, administratif, professionnel, procédural* (Paris: L.G.D.J. 1951), no. 149; E.N. MARTINE, *L'option entre la responsabilité contractuelle et la responsabilité délictuelle* (Paris: L.G.D.J. 1957), p 16 et seq.

for contractual and tortious liability are not the same⁴⁶ and that damages for the violation of a contractual norm have to be awarded on the basis of the law of contract.⁴⁷ Recourse to the law of tort is not excluded as a matter of principle.⁴⁸

20. Upon closer examination, it appears that the courts have developed the principle of *non-cumul* much more gradually. In fact, French courts, including the *Cour de Cassation*, continued to allow recourse to the law of tort in several proceedings between contracting parties also after the judgments of 1890, 1922 and 1927.⁴⁹ It lasted until 1945 before the *Cour de Cassation* clearly expressed that a contracting party might not benefit from the exercise of a tort claim if he could also bring a contractual claim.⁵⁰ Several authors therefore argue that the principle was only truly established by the 1950s.⁵¹ The *Cour de Cassation* has since reaffirmed this position several times,⁵² and has also begun to refer to the principle of *non-cumul* in its judgments.⁵³

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- 46 Answering the question whether every fault, however simple, should lead to the obligation to make good the damage, Cass. Civ. 22 January 1922, *D.* 1922. 1. 16; S. 1924. 1. 105, note DEMOGUE, responds that this is not the basic rule under the regime of contractual liability: ‘c’est seulement en matière de délit ou quasi-délit que toute faute quelconque oblige son auteur à réparer le dommage provenant de son fait’. The same reasoning can be found in Cass. req. 21 January 1890, *D.* 1891. 1. 380 and in Cass. Civ. 6 April 1927, *D.* 1927. 1. 201.
- 47 Cass. Civ. 22 January 1922, *D.* 1922. 1. 16; S. 1924. 1. 105, note DEMOGUE, states that the rules governing extra-contractual liability are not applicable to a claim based on a breach of contract. Such a claim is governed by the law of contract: ‘les articles 1382 et suivants sont sans application lorsqu’il s’agit d’une faute commise dans l’exécution d’une obligation résultant d’un contrat’. The same reasoning can be found in Cass. Civ. 6 April 1927, *D.* 1927. 1. 201.
- 48 J.S. BORGHETTI, *RTDCiv* 2010, pp 16–17; S. ABID MNIF, *L’option entre la responsabilité contractuelle et la responsabilité délictuelle*, pp 74–75.
- 49 In Cass. Req. 14 December 1926, *D.* 1927. 1. 105, note JOSSERAND, the *Cour de Cassation* held that the conduct of the responsible persons working at a psychiatric clinic constituted ‘en même temps que l’inexécution de leur obligation contractuelle surveillance, une faute délictuelle’ towards the patient concerned. An overview of the case law can be found in J.S. Borghetti, *RTDCiv* 2010, pp 17–21, and in S. ABID MNIF, *L’option entre la responsabilité contractuelle et la responsabilité délictuelle*, pp 76–77.
- 50 Cass. Civ. 6 March 1945, *D.* 1945. 1. 217.: ‘la victime d’un dommage [provenant de l’inexécution d’un contrat ou de sa mauvaise exécution], qui peut exercer l’action contractuelle, ne saurait préférer l’exercice de l’action délictuelle’.
- 51 G. VINEY, 39. *McGill Law Journal* 1994, p 817; E.N. MARTINE, *L’option entre la responsabilité contractuelle et la responsabilité délictuelle*, p 16 et seq.; S. ABID MNIF, *L’option entre la responsabilité contractuelle et la responsabilité délictuelle*, p 78. PH. BRUN, ‘De l’intemporalité du principe de responsabilité du fait des choses’, *RTDCiv* 2010, pp (487–497) at 491, also admits that the principle of *non-cumul* ‘ne s’est pas imposée d’emblée et définitivement sans quelques soubresauts, quelques hésitations et peut-être même sans quelques mouvements contradictoires’.
- 52 PH. BRUN, *Responsabilité civile extracontractuelle*, p 68, referring e.g. to Cass. 1^{er} Civ. 4 November 1992, *Bull. civ.* I, no. 276: ‘le créancier d’une obligation contractuelle ne peut se prévaloir contre le débiteur de cette obligation, quand bien même il y aurait intérêt, des règles de la responsabilité délictuelle’.
- 53 The *Cour de Cassation* refers to ‘la règle du non-cumul des responsabilités contractuelle et délictuelle’ (Cass. 2^e Civ. 3 March 1993, no. 91-17.677) and to ‘le principe de non-cumul des responsabilités contractuelle et délictuelle’ (Cass. 1^{er} Civ. 28 June 2012, no. 10-28492).

21. Apart from the influence exerted by the literature, there are other reasons that seem to have motivated the courts to finally embrace the principle of *non-cumul*. One important reason was the significant expansion of the general strict liability for damages caused by a *chose* (an object or thing) under Article 1384, paragraph 1 CC. In the judgment *Jand'heur* (1930), the *Cour de Cassation* decided that (1) the presumption of liability under Article 1384, paragraph 1 CC could only be rebutted by proving that the damage had been caused by chance, by *force majeure* or by an external cause that could not be imputed to the defendant, that (2) in order to escape liability, it did not suffice that the defendant had not been negligent or that the cause of the damage remained unknown, and (3) that in order to establish this liability, it was not relevant whether the defendant wielded the object, nor was it necessary to prove that the object was, by its nature, defective and thus likely to cause damage.⁵⁴

22. By its ruling in *Jand'heur*, the *Cour de Cassation* effectively created the possibility to hold any *gardien* of any object liable for the damage caused by that object, even if the defendant successfully proved that he was not at fault. Needless to say that, without any restriction, an extra-contractual regime with such generality would be able to intrude and possibly distort the rules governing the liability of parties to a contract. A contracting party would have a claim each and every time his property was damaged by an object that was controlled by the other contracting party. Although scholars quarrel about the exact causal relationship, the expansion of this strict liability regime has clearly been an important reason for the courts to further strengthen the principle of *non-cumul*.⁵⁵

23. This impression was confirmed by yet another significant turnaround in the case law of the *Cour de Cassation*. In the judgment *Mercier* (1936), the *Cour de Cassation* clarified that the relationship between medical practitioners and their patients was contractual.⁵⁶ The driving force behind this decision was likely to have been the need to shield medical practitioners from liability under Article 1384, paragraph 1 CC.⁵⁷ Given the principle of *non-cumul*, this qualification brought these relationships exclusively within the realms of the law of contract. According

54 Cass. ch. réun. 13 February 1930, *D.* 1930. 1. 57, S. 1930. 1. 121, note ESMEIN (*Jand'heur*).

55 J.S. BORGHETTI, *RTDCiv* 2010, pp 25–29, argues that this has been the main reason for the courts to finally establish the principle of *non-cumul*. PH. BRUN, *RTDCiv* 2010, p 491, argues that the principle was already established in 1890, but admits that ‘l’avènement du principe de responsabilité du fait des choses ait pu conduire la jurisprudence à affermir sa position sur l’interdiction de l’option’.

56 Cass. Civ. 20 May 1936, *D.* 1936. 1. 88, note E.P.; S. 1937. 1. 321, note BRETON (*Mercier*).

57 J.S. BORGHETTI, *RTDCiv* 2010, pp 26–28. Some patients also benefited from this outcome, because the claim became subject to a more favourable regime of prescription. See J. BELLISSENT, *Contribution à l'analyse de la distinction des obligations de moyens et des obligations de résultat: À propos de l'évolution des ordres de responsabilité civile* (Paris: L.G.D.J. 2001), no. 956.

to Whittaker, it clearly dawned on the courts that ‘by manipulating the boundaries of contract, they can manipulate the boundaries of delict’.⁵⁸

24. One may wonder, however, why the courts did not ‘manipulate’ those boundaries directly, by adjusting the interpretation of Article 1384, paragraph 1 CC to take into account the special nature of the relationship between doctors and their patients. The courts may have taken the view that this general provision was not that easy to adjust, that the interpretation given in *Jand’heur* should not be revised so soon or that the solution in *Mercier* was in fact a good compromise. A similar question comes to mind concerning the solution of *non-cumul* itself. Instead of excluding the application of the law of tort altogether, why did the courts not adjust the tort claim to the rules and terms governing the contract? The courts may have been influenced by the then prevailing doctrinal opinion,⁵⁹ according to which, the regimes of contract and tort were fundamentally distinct and could not be mixed.⁶⁰

25. As dogmatically sound as the principle of *non-cumul* may be, it does treat contracting parties differently from and possibly less favourably than parties that are not in a contractual relationship. This implication has not only been criticized by scholars⁶¹ but has also been mitigated to some extent by the courts and the legislature. The courts have, for instance, used and expanded the concept of *obligations de sécurité*, obligations owed by one contracting party to look after the personal safety of the other contracting party. This concept was established by the *Cour de Cassation* for the first time in 1911,⁶² on the basis of Article 1135 CC, currently Article 1194 CC. According to this provision, agreements impose obligations on parties not merely in respect of that which they have expressly agreed upon but also in respect of that which follows from ‘l’équité, l’usage ou la loi’. This provision has given the courts the necessary leeway to protect contracting parties while taking into account the nature of their relationship.⁶³ Some contracts create *obligations de moyens*, under which parties have to take reasonable care, while other contracts are a source of *obligations de résultat*, where liability may only be escaped by proving the defence of *force majeure* or *faute de la victime*.

58 S. WHITTAKER, 15. *Oxford Journal of Legal Studies* 1995, p 336.

59 According to S. ABID MNIF, *L’option entre la responsabilité contractuelle et la responsabilité délictuelle*, p 79.

60 See e.g. E. BONNET, ‘Responsabilité délictuelle et contrat’, 61. *Revue critique de législation et de jurisprudence* 1912, pp (418–437) at 437; A. BRUN, *Rapports et domaines des responsabilités contractuelle et délictuelle*, no 351.

61 E.g. by P. ESMEIN, ‘La chute dans l’escalier’, *JCP* 1956.I.1321.

62 Cass. Civ. 21 November 1911, *D.* 1913. 1. 249, note SARRUT, S. 1912. 1. 73, note LYON-CAEN (*Compagnie générale transatlantique*).

63 J.S. BORGHETTI, ‘L’avant-projet de réforme de la responsabilité civile. Vue d’ensemble de l’avant-projet’, *Recueil Dalloz* 2016, pp 1386–1395, no. 34; G. VINEY, *Introduction à la responsabilité*, p 652; S. WHITTAKER, 15. *Oxford Journal of Legal Studies* 1995, p 336.

26. The courts and the legislature have also introduced exceptions to the principle of *non-cumul*.⁶⁴ In fact, the courts have applied the law of tort to contractual relationships in cases involving fraudulent behaviour,⁶⁵ criminal offences,⁶⁶ transport accidents⁶⁷ and construction defects.⁶⁸ Moreover, the legislature has introduced general liability regimes that apply to all road traffic accidents⁶⁹ and to all defective products,⁷⁰ irrespective of whether a contract exists between the parties involved.

27. In recent years, the French legislature has begun reforming the law of obligations. All claims for damages are now subject to a general rule on prescription.⁷¹ The general fault liability has been codified in the Articles 1240-1241 CC and the strict liability for persons and things has been codified in Article 1242 CC.⁷² A reform of the remaining parts of the law of obligations is currently on the legislative agenda. In its proposals, the Minister of Justice suggests harmonizing several rules in respect of damages and causation.⁷³ He also recommends codifying the principle of *non-cumul*. The wording of the proposed Article 1233 CC makes clear that ‘in the case of non-performance of a contractual obligation, neither the debtor nor the creditor may escape the application of provisions special

64 In some cases, the courts have even denied the existence of a contractual relationship, in order to be able to apply the law of tort. This is, however, not really an exception to the rule, because the laws of contract and tort do not overlap in those cases. See for some examples G. VINEY, *Introduction à la responsabilité*, p 620; C. VON BAR & U. DROBNIG, *The Interaction of Contract Law and Tort and Property Law in Europe*, pp 40-41.

65 G. VINEY, *Introduction à la responsabilité*, p 621, with references.

66 This exception originates from the case law of the criminal courts, who used to apply the law of tort on a claim for compensation brought by the victim in the course of the criminal proceedings. The exception is outdated since the legislature gave criminal courts the authority to apply ‘des règles de droit civil’, including the law of contract. See G. VINEY, *Introduction à la responsabilité*, pp 621-623, with references.

67 For some time, close relatives of the victim of a transport accident could not only claim in contract, but also in tort. See G. VINEY, *Introduction à la responsabilité*, pp 623-624, with references.

68 This exception concerns the recovery of damages by the owner from the builder. See G. VINEY, *Introduction à la responsabilité*, pp 624-626, with references.

69 Art. 1 *Loi n° 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation*.

70 Art. 1386-1 CC. This is a result of the implementation of Council Dir. 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0374:en:HTML.

71 Art. 2224 CC, modified by *Loi n° 2008-561 du 17 juin 2008*.

72 As a result of *Ordonnance n° 2016-131*, *supra* n. 9.

73 Art. 1235-1240, *Projet de réforme du droit de la responsabilité civile*, 13 March 2017, accessible through www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf.

to contractual liability in order to opt in favour of rules specific to extra-contractual liability'.⁷⁴

28. At the same time, the Minister intends to introduce an exception for bodily injuries. The Catala committee have already suggested giving these victims the choice between claiming in contract or in tort.⁷⁵ The Terré committee went one step further and proposed that bodily injuries should only ever be subject to the law of tort.⁷⁶ The latter suggestion was initially embraced by the Minister.⁷⁷ This would have led to the result that a person who had sustained bodily injuries could not have claimed in contract at all, even when the contract had contained more favourable terms.⁷⁸ Responding to this criticism, the Minister now proposes to add that the victim may not only rely on the law of tort, but also on 'express stipulations of a contract which are more favourable to him than the application of the rules of extra-contractual liability'.⁷⁹ If implemented, this rule would permit a choice between finding liability in contract and in tort, thus introducing another exception to the principle of *non-cumul*.

29. It is clear from the above that French law still struggles with the relationship between the laws of contract and tort. Following the majority of scholars and responding to the expanding scope of the general strict liability for things, the courts have, gradually yet firmly, established the principle of *non-cumul*. At the same time, the courts and the legislature have provided certain contracting parties with additional protection, either by implying *obligations de sécurité* or by

74 *Ibid.*, Art. 1233: 'En cas d'inexécution d'une obligation contractuelle, ni le débiteur ni le créancier ne peuvent se soustraire à l'application des dispositions propres à la responsabilité contractuelle pour opter en faveur des règles spécifiques à la responsabilité extracontractuelle.' Translated into English by Simon Whittaker, in consultation with Jean-Sébastien Borghetti. This translation is available through www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf.

75 Art. 1341, *Avant-projet de réforme du droit des obligations et du droit de la prescription*, available through www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf. This solution had been suggested before, e.g. by J. CARBONNIER, *Droit civil – Tome 4 – Les Obligations* (Paris: PUF, 18th edn 1994), no. 295.

76 Art. 3, see F. TERRÉ, *Pour une réforme du droit de la responsabilité civile* (Paris: Dalloz 2011).

77 Art. 1233, para. 2, *L'avant-projet de réforme de la responsabilité civile*, 29 April 2016, accessible through www.textes.justice.gouv.fr/art_pix/avpjil-responsabilite-civile.pdf.

78 For that reason, the proposal was criticized, e.g. by R. DE GRAAFF & B. MORON-PUECH, 'Le concours des responsabilités contractuelle et délictuelle', in: I. Alogna et al., 'Regards comparatistes sur la réforme de la responsabilité civile. Le rapprochement des responsabilités contractuelle et délictuelle dans l'avant-projet de réforme, abordé sous l'angle du droit comparé', 69. *RIDC* 2017, pp (5–44) at 16.

79 Art. 1233-1, para. 2, *Projet de réforme du droit de la responsabilité civile*, *supra* n. 73: 'Toutefois, la victime peut invoquer les stipulations expresses du contrat qui lui sont plus favorables que l'application des règles de la responsabilité extracontractuelle.' Translated into English by Simon Whittaker, in consultation with Jean-Sébastien Borghetti, *supra* n. 74.

introducing exceptions that reduce the scope of the principle of *non-cumul*. In spite of these developments, the principle of *non-cumul* will probably be codified in the near future. As a consequence, the point of departure under French law remains fundamentally different to the position adopted in German, Dutch and English law. In these jurisdictions, finding liability in tort is not precluded if the damage is caused by or related to the (non-) performance of a contractual obligation, as the following sections illustrate.

5. German and Dutch Law

30. The question whether, and to what extent, the law should permit a choice between finding liability in contract and in tort has also been the subject of an ongoing debate in German literature. The two main positions emerged during a period of approximately thirty years after the introduction of the *Bürgerliches Gesetzbuch* in 1900. Both sides pleaded for a clear distinction between contract and tort but drew different conclusions. At one end of the spectrum, writers defended the fundamental priority of the law of contract and the subsidiarity of the law of tort. At the other end of the spectrum, writers defended the fundamental independence of both regimes, which would imply that recourse to the law of tort should remain possible.

31. According to the first theory (*Gesetzeskonkurrenz*), it is only the law of contract which is tailored and therefore designed to deal with the relationship between contracting parties. Even if a claim in tort seems, *prima facie*, possible, such a claim should be repressed in favour of the law of contract. If this were not to be the case, the balance of interests and the allocation of risks achieved under the rules and terms governing the contract would be undermined. In effect, this would render pointless large areas of the law of contract and would overrule the assessments and intentions of the legislature.⁸⁰

32. According to the second theory (*Anspruchskonkurrenz*), the interests of contracting parties should also be protected by the law of tort. The law of contract cannot be regarded as a special part of the law of tort, as the latter is not based on one all-embracing, general clause and does not protect against purely economic losses. A breach of contract does not therefore automatically constitute an unlawful act or omission.⁸¹ Additionally, the law of tort cannot be regarded as subordinate because it cannot be maintained that the law of contract, which deals with the rights and duties of contracting parties, also settles the legal consequences of

80 Y.-G. VON AMSBERG, *Anspruchskonkurrenz, Cumul und Samenloop*, pp 15–17; P. SCHLECHTRIEM, *Vertragsordnung und außervertragliche Haftung*, p 33, with references.

81 R. DIETZ, *Anspruchskonkurrenz bei Vertragsverletzung und Delikt* (Bonn / Köln: Ludwig Röhrscheid Verlag 1934), p 72 et seq.

unlawful acts or omissions exhaustively. Since the two bodies of law are independent, they should be treated independently, allowing the aggrieved party to claim damages on any basis, as long as the necessary conditions (*Tatbestände*) are present.⁸²

33. Following the contribution by Dietz to the subject in 1934,⁸³ the second theory gradually gained the upper hand and came to enjoy general support. Its acceptance by German courts dates back to 1916, when the *Reichsgericht* held that the general legal duty not to injure another person exists towards all persons, whether they have concluded a contract or not.⁸⁴ Likewise, the *Bundesgerichtshof* has repeatedly laid down that the aggrieved party may choose which legal ground he wishes to base his claim for damages on and that every claim has to be decided on its own merits and according to its own rules. The aggrieved party may also revert to the law of tort when the contractual claim is time-barred or excluded.⁸⁵

34. This position may be explained by a number of factors. Firstly, the ambit of the German law of tort is narrower than in France. Not every breach of contract gives rise to tortious liability. Contractual rights are not protected under § 823 BGB, pure economic loss is generally not recoverable in tort and strict liability only exists on the basis of specific rules more limited in scope.⁸⁶ Secondly, the law of contract has important advantages over the law of tort. The claimant does not have to argue (and if contested, prove) fault in order to claim damages. It is up to the defendant to argue (and if contested, prove) that the breach of contract cannot be imputed to him.⁸⁷ Moreover, a contracting party is strictly liable for the conduct of those employed in performing his obligation (§ 278 BGB) and this party cannot escape liability if reasonable care was exercised by him when selecting and managing these employees, as is the case under the law of tort (§ 831 BGB). In this context, giving the claimant the choice to proceed on either basis will not have major consequences.⁸⁸

35. This raises the question why the parties nonetheless tried to claim in tort, and why the courts allowed such claims. For a long time, compensation for non-economic loss (*Schmerzensgeld*) could only be awarded in tort, for example, for injuries to body or health and in case of a deprivation of liberty,⁸⁹ and not in contract.⁹⁰ Moreover, the

82 Y.-G. VON AMSBERG, *Anspruchskonkurrenz, Cumul und Samenloop*, pp 17-18; P. SCHLECHTRIEM, *Vertragsordnung und außervertragliche Haftung*, p 33, with references.

83 R. DIETZ, *Anspruchskonkurrenz bei Vertragsverletzung und Delikt*, pp 93 et seq., 99 and 101.

84 Reichsgericht 13 October 1916, RGZ, 88, 433.

85 BGH 24 November 1976, BGHZ 67, 359; BGH 4 March 1971, BGHZ 55, 392. See recently BGH 11 February 2004, VIII ZR 386/02.

86 C.C. VAN DAM, *European Tort Law* (Oxford: OUP, 2nd edn 2013), p 90.

87 Currently § 280, para. 1 BGB, formerly § 282 BGB.

88 Cf. R. ZIMMERMANN, *The Law of Obligations*, pp 905-906.

89 Formerly § 847 BGB.

90 Formerly § 253 BGB.

prescription periods in contract were sometimes much shorter. For instance, the time limits for claims concerning the non-conformity of goods were very short: six months or one year after delivery or transfer of the property.⁹¹ Since the *Schuldrechtsreform* of 2002, the rules on damages have been integrated into the general part of the law of obligations (§ 249 et seq. BGB). Compensation for non-economic loss can also be awarded in contract, for injuries to body or health, or for violations of the right to freedom or of the right to sexual self-determination (§ 253 BGB). Moreover, the legislature adopted one regime on prescription (§ 195 et seq. BGB), although specific rules still exist for certain types of claim.⁹²

36. While the solution of *Anspruchskonkurrenz* may have been helpful at the time, it does also have its drawbacks. This solution is as straightforward as the *non-cumul* principle. One of the regimes is excluded, not as a matter of principle, but rather as a result of the claimant's choice. Without restrictions, this may frustrate the purpose of contractual rules. It is therefore widely accepted that the freedom of the claimant to pursue any claim he wishes may be limited if the objective of one of the rules would otherwise be undermined. In fact, the courts have already been applying standards for contractual liability⁹³ and shorter contractual prescription periods⁹⁴ on concurrent tort claims for a long time. The *Bundesgerichtshof* has repeatedly stated that while the conditions, content and enforcement of every claim require to be assessed independently, an exception can be made when it is clear that a certain provision regulates a certain situation exhaustively, which may exclude or limit the possibility of claiming on another legal basis.⁹⁵ Although it is the exception and not the

91 Formerly § 477 BGB.

92 E.g. the special time periods applicable to claims relating to non-conformity of the goods (§ 438 BGB; § 634a BGB), to travel contracts (§ 651g, para. 2 BGB), to rental agreements (§ 548 BGB), to commercial transport (§ 439 HGB).

93 E.g. the rule that the donor (*Schenker*, § 521 BGB), the lender (*Verleiher*, § 599 BGB) and the board (*Geschäftsführung*, § 680 BGB) can only be held liable in the event of wilful conduct (*Vorsatz*) or gross negligence (*grobe Fahrlässigkeit*) also applies to a tort claim against the donor (BGH 20 November 1984, *BGHZ* 93, 23), the lender (BGH 23 March 1966, *BGHZ* 46, 140) and the board (BGH 30 November 1972, *NJW* 1972, 475). And the rule that the depository (*Verwahrer*, § 690 BGB) and the shareholder (*Gesellschafter*, § 708 BGB) can only be held liable if they did not exercise the care they can be expected to exercise when managing their own affairs, also applies to a tort claim against the depository (BGH 23 March 1966, *NJW* 1967, 42) and the shareholder (BGH 20 December 1966, *BGHZ* 46, 313).

94 The prescription period for claims by the landlord (§ 548, formerly § 558 BGB) also applies to a tort claim (BGH 31 January 1967, *BGHZ* 47, 53; BGH 24 May 1976, *BGHZ* 66, 315; BGH 8 January 1986, *NJW* 1986, 1608). The prescription period for claims by the lender (§ 606 BGB) also applies to a tort claim (BGH 31 January 1967, *BGHZ* 47, 53).

95 This general rule of interpretation is emphasized again in BGH 22 July 2014, *KZR* 27/13, at 53, with references to earlier case law.

rule,⁹⁶ it is clear that contractual liability rules may thus influence the substance of the tort claim.⁹⁷

37. This has been an argument for some writers to assume that the claimant does not have two separate claims (*Anspruchskonkurrenz*) but a single claim, based on two separate norms (*Anspruchsnormenkonkurrenz*).⁹⁸ This theory shifts the problem, but does not solve it. It is uncontroversial as long as the application of the relevant norms would lead to the same legal outcome. Yet the theory lacks clarity, even amongst its proponents, as soon as the differences become apparent and the existence and content of the particular claim require to be determined.⁹⁹ The majority of the writers therefore continues to adhere to the theory of *Anspruchskonkurrenz* however recognizes that the possibility to proceed in contract or in tort may be limited.¹⁰⁰

38. It is interesting to make a brief comparison between this position and the approach followed in the Netherlands. Dutch writers have essentially put forward the same arguments as their French and German colleagues although, the structure of the law is not entirely comparable.¹⁰¹ As in Germany, the claimant does not have to argue (and if contested, prove) fault in order to claim damages. It is up to the defendant to argue (and if contested, prove) that the breach of contract cannot be imputed to him (Art. 6:74 BW). While strict tortious liabilities only exist on the basis of specific rules with a more limited scope than in France (Art. 6:169-184 BW), the scope of the regime of fault based liability in tort appears to be more extensive than in Germany. The formulation of the duty of care is quite general – one has to comply with ‘rules of unwritten law pertaining to proper social

96 E.g. the standards for the contractual liability of the *Gesellschafter* (§ 708 BGB) are not applicable when the extra-contractual claim concerns a road accident (BGH 20 December 1966, *BGHZ* 46, 313).

97 This theory is known as *einwirkende Anspruchskonkurrenz*, see Y.-G. VON AMSBERG, *Anspruchskonkurrenz, Cumul und Samenloop*, pp 19-21.

98 A. GEORGIADIS, *Die Anspruchskonkurrenz im Zivilrecht und Zivilprozeßrecht* (München: C.H. Beck 1968), p 167 et seq.

99 Cf. D. MEDICUS, *Gesetzliche Schuldverhältnisse* (München: C.H. Beck, 5th edn 2007), p 7; Y.-G. VON AMSBERG, *Anspruchskonkurrenz, Cumul und Samenloop*, p 21.

100 For an overview, see Y.-G. VON AMSBERG, *Anspruchskonkurrenz, Cumul und Samenloop*, pp 19-21.

101 In favour of exclusive application of the law of contract e.g. C.A. BOUKEMA, *Civielrechtelijke samenloop* (Zwolle: W.E.J. Tjeenk Willink 1966), p 121 et seq.; L.D. PELS RIJCKEN, ‘Samenloop van contractuele en buitencontractuele aansprakelijkheid naar Nederlands recht’, *Tijdschrift voor Privaatrecht* 1980, pp (1101-1138) at 1125. Against exclusive application e.g. W. SNIJDERS, ‘Samenloop van wetsbepalingen in het Nieuw B.W.’, in *Speculum Langemeijer* (Zwolle: W.E.J. Tjeenk Willink 1973), pp 453-471; J.H. NIEUWENHUIS, *Anders en eender* (Deventer: Kluwer 1982); C.J.H. BRUNNER, *Beginnselen van samenloop* (Arnhem: Gouda Quint 1984), p 66; F.B. BAKELS, ‘Aspecten van samenloop (I)’, 140. *WPNR* 2009/6796, no. 15.

conduct¹⁰² – and, in addition, there is no separate category of pure economic loss and hence no exclusion of such losses from the scope of the law of tort.¹⁰³

39. In accordance with the former Dutch Civil Code, which was heavily influenced by the French *Code Civil*, the *Hoge Raad* had already made clear that an act or omission may constitute both a failure in the performance of an obligation *and* a ground for tortious liability provided the liability in tort exists ‘independently of the violation of a contractual obligation’.¹⁰⁴ Whether that was the case, had to be determined by looking at the purpose of the violated norm, the nature of the conduct and the additional circumstances of the case.¹⁰⁵ A mere breach of contract was not enough.¹⁰⁶ If a concurrent tortious liability existed, the claimant might choose to proceed on that basis. Evading the shorter prescription periods under the law of contract was one of the reasons for trying to do so. The drafters of the new Dutch Civil Code were well aware of such problems. They decided to harmonize certain rules governing the different liabilities, thereby reducing the tensions between them.¹⁰⁷ Since 1992, the Dutch Civil Code has contained a general regime for damages (Art. 6:95 et. seq. BW) and a general regime for the prescription of claims (Art. 3:310 BW).

40. Differences continue to exist however. Giving the claimant an unconditional freedom to claim in tort may then frustrate the purpose of contractual rules. As in Germany, an exception is therefore made when this is prescribed by, or inevitably follows on from, statutory law.¹⁰⁸ The courts have, for instance, applied standards for contractual liability¹⁰⁹ and shorter contractual prescription periods¹¹⁰ on

102 This rule has been laid down by the *Hoge Raad* in HR 31 January 1919, *NJ* 1919/161, note W.L.P. A. MOLENGRAEFF (*Lindebaum/Cohen*) and has been codified by the legislature in Art. 6:162, para. 2 BW.

103 Art. 6:95 BW.

104 HR 9 December 1955, *NJ* 1956/157, note L.E.H. RUTTEN (*Bogaard/Vesta*): ‘onafhankelijk van de schending van een contractuele verplichting’. The rule was already laid down in HR 6 May 1892, *W* 6183 (*Korf/Fhijnbeen*); HR 26 March 1920, *NJ* 1920/476 (*Curiel/Suriname*); HR 11 June 1926, *NJ* 1926/1049, note P. SCHOLTEN (*Canter Cremers/Otten*). It was reiterated in HR 6 April 1990, ECLI:NL:HR:1990:AD4737, *NJ* 1991/689, note C.J.H. BRUNNER (*Van Gend & Loos/Vitesse*); HR 19 February 1993, ECLI:NL:HR:1993:ZC0870, *NJ* 1994/290, note C.J.H. BRUNNER (*Gem. Groningen/Zuidema*); HR 6 December 1996, ECLI:NL:HR:1996:ZC2219, *NJ* 1997/398 (*Fortes/Smits*).

105 Cf. HR 3 December 1999, ECLI:NL:HR:1999:AA3818, *NJ* 2000/235, note P.A. STEIN (*Pratt & Whitney/Franssen*), at 3.5.

106 HR 23 May 1856, *W* 1852; HR 13 June 1913, *NJ* 1913/787 (*Kuyk/Kinker*).

107 As is evidenced by the contribution written by W. SNIJDERS, in *Speculum Langemeijer*, pp 453–471, who was closely involved in the final drafting process of the new Dutch Civil Code.

108 As repeated in HR 15 June 2007, ECLI:NL:HR:2007:BA1414, *NJ* 2007/621, note K.F. HAAK (*Fernhout/Essent*), at 4.2.

109 E.g. HR 2 March 2007, ECLI:NL:HR:2007:AZ3535, *NJ* 2007/240, note J.M.M. MAEIJER (*Holding Nutsbedrijf Westland*), at 3.4.4.

110 HR 21 April 2006, ECLI:NL:HR:2006:AW2582, *NJ* 2006/272 (*Inno Holding/Gemeente Sluis*); HR 29 June 2007, ECLI:NL:HR:2007:AZ7617, *NJ* 2008/606, note JAC. HJMA (*Pouw/Visser*).

concurrent tort claims. Limitations may also follow from the express terms of the contract or from its nature and purpose.¹¹¹ Moreover, case law shows that the level of the general duty of care may be influenced by the contractual obligations of the parties.¹¹²

41. As in Germany, this has been argument for some writers to assume that the claimant only has one ‘mixed’ claim (*gemengd vorderingsrecht*), based on two separate norms.¹¹³ This theory has come up against comparable objections. Given that the outcome of a dispute also depends on the arguments between the parties and on the scope of the duty of the courts to apply the law *ex officio*,¹¹⁴ it is argued that every claim has to be assessed on its own merits¹¹⁵ but that the existence and content of the tort claim may be influenced by contractual rules.¹¹⁶

6. English Law

42. English law is exceptional because it is not built on the foundations of Roman law.¹¹⁷ The law has never been codified, and has mainly been developed by individual precedents laid down by decisions from courts with different and sometimes overlapping jurisdictions.¹¹⁸ Legal education has not traditionally been the domain of universities but of legal practitioners. It has been ‘primarily practical and empirical, more the development of a professional skill than a scholarly science’.¹¹⁹ This may explain why English lawyers have not written about the subject of concurrent liabilities with the conceptual flavour of

111 HR 27 April 2001, ECLI:NL:HR:2001:AB1335, *NJ* 2002/54, note C.J.H. BRUNNER (*Donkers/Scholten*); HR 25 October 2002, ECLI:NL:HR:2002:AE7010, *NJ* 2004/556, note Jac. HUIJMA (*Bunink/Manege Nieuw Amstelland*).

112 HR 15 May 1981, ECLI:NL:HR:1981:AG4187, *NJ* 1982/237, note B. WACHTER (*Temis IV/Jan Heymans*), at 3; HR 27 February 1987, ECLI:NL:HR:1987:AG5547, *NJ* 1987/584 (*Van der Peijl/Erasmus College*), at 3.4; HR 6 April 1990, ECLI:NL:HR:1990:AD4737, *NJ* 1991/689, note C.J.H. BRUNNER (*Van Gend & Loos/Vitesse*), at 3.2; HR 19 October 2007, ECLI:NL:HR:1990:AD4737, *NJ* 2007/565 (*Vodafone/ETC*), at 3.7.

113 W. SNIJDERS, in *Speculum Langemeijer*, pp 459–463; J.H. NIEUWENHUIS, *Anders en eender*, pp 18–22. The *Hoge Raad* seems to adopt this position in HR 15 June 2007, ECLI:NL:HR:2007:BA1414, *NJ* 2007/621, note K.F. HAAK (*Fernhout/Essent*), at 4.2.

114 A.G. CASTERMANS & H.B. KRANS, ‘Samenloop en de toegang tot de rechter’, in A.G. Castermans et al. (eds), *Ex libris Hans Nieuwenhuis* (Deventer: Kluwer 2009), pp (155–170) at 158–159.

115 F.B. BAKELS, ‘Aspecten van samenloop (II)’, *WPNR* 2009/6797, no. 22; J.H. NIEUWENHUIS, ‘They Still Rule Us from Their Graves’, *WPNR* 2007/6693, pp 1–6; L.D. PELS RIJCKEN, *Tijdschrift voor Privaatrecht* 1980, p 1102.

116 A.G. CASTERMANS, ‘Partijautonomie tussen contract en onrechtmatige daad’, *Ars Aequi* 2012, pp 859–868.

117 Contrary to the civilian tradition, see R. ZIMMERMANN, *The Law of Obligations*, pp 1–33.

118 K. ZWIEGERT & H. KÖTZ, *Introduction to Comparative Law* (Oxford: Clarendon Press, 2nd edn 1992), p 187 et seq.

119 *Ibid.*, p 198 et seq.

French lawyers or with the doctrinal rigour of German lawyers.¹²⁰ Yet the subject has most definitely been familiar to English lawyers. It was not unusual that a plaintiff could choose between several forms of action nor was it uncommon that one and the same matter could be brought either before a common law court or before a court of equity, leading to different possible outcomes.¹²¹

43. However, the subject was not defined in terms of contract and tort until the mid-19th century. In 1873, there was significant reform of the courts structure and of the law of procedure. From the entry into force of the Judicature Act in 1875, all divisions of the High Court and of the Court of Appeal became competent to apply all the rules and principles of English law.¹²² The forms of action were abolished, so the claimant was no longer obliged to choose at the very start of the litigation process which of the different forms of action he was going to base his claim on.¹²³ At the same time, success in litigation still largely depended on the question of whether any *cause of action* was raised by the particular facts of the case. This question remained as important as ever before, as Maitland noticed:

The forms of action we have buried, but they still rule us from their graves.¹²⁴

The reform of the law of procedure made it necessary to systemize the liabilities that existed under the former forms of action. This task was undertaken by several

120 T. WEIR, in *Encyclopedia of Comparative Law*, p 36 noted that there was ‘almost no writing on the topic in England’, referring only to P.H. WINFIELD, *The Province of the Law of Tort* (Cambridge: CUP 1931); A.G. GUEST, ‘Tort or Contract?’, 3. *Malaya Law Review* 1961, pp 191-222; W.D.C. POULTON, ‘Tort or Contract’, 82. *Law Quarterly Review* 1966, pp 346-370.

121 Cases of misrepresentation, for example, could be brought before common law courts and before courts of equity. At common law, the defendant had to know of the untruth of the statement, or be reckless as to its truth. Later decisions in equity made clear that liability for misrepresentation could also be established for ‘constructive fraud’ or ‘innocent mistake’. *Derry v. Peek* [1889] 14 App Cas 337 (HL) clarified that both equity and common law required fraud to establish liability. In turn, *Derry v. Peek* was confined, first in *Nocton v. Lord Ashburton* [1914] AC 932 (HL), and then in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 (HL). About this development: J. EDELMAN, ‘Nocton v Lord Ashburton’, in C. Mitchell & P. Mitchell (eds), *Landmark Cases in Equity* (Oxford: Hart Publishing 2014), pp (473-498) at 479-484.

122 K. ZWIEGERT & H. KÖTZ, *Introduction to Comparative Law*, pp 205-206.

123 F.W. MAITLAND, *Equity, also The Forms of Action at Common Law* (Cambridge: CUP, 2nd edn 1910), p 295 et seq. A heavy blow was struck already in 1852, when the Common Law Procedure Act 1852 provided in s. 3 that it should not be necessary to mention any form or cause of action in any writ of summons.

124 *Ibid.*, p 296; cf. F. POLLOCK, *The Law of Torts. A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Philadelphia: The Blackstone Publishing Company, 1st edn 1887), p 336.

writers, who published a series of influential textbooks in and around the 1870s.¹²⁵ Without a fundamental reconsideration of the general structure of the law of obligations, they assigned the existing liabilities to two legal categories and emphasized the distinction between them: liabilities were either consensual (contract) or non-consensual (tort).¹²⁶ This may have encouraged English lawyers to regard contract and tort as mutually exclusive.¹²⁷ Nevertheless, the categories did show a certain overlap from the outset. As Pollock observed soon after the abolition of the forms of action, some liabilities in contract ‘are not founded on the breach of any agreement’, while some torts ‘are not in any natural sense independent of contract’.¹²⁸

44. For a long time, however, the overlap was rather limited. The scope of the law of contract was, and still is, restricted by the doctrines of *consideration* and *privity*. Under the doctrine of consideration, a promise is not contractually binding if the other party has not done, or promised to do, something in return for this promise. Under the doctrine of privity, a contract cannot confer rights or impose obligations on any person except the parties to it.¹²⁹ More important in this context is that the scope of the law of tort was restricted too, due to the relatively late emergence of the general duty of care in respect of negligence.

45. The foundation of the tort of negligence was laid down in *Donoghue v. Stevenson*. The House of Lords decided that a manufacturer owed a duty of care in negligence *irrespective* of the question whether the injured person was a party to the incidental contract of sale.¹³⁰ *Donoghue v. Stevenson* was not a unanimous decision nor was the reasoning clear and unambiguous. Today, however, it is regarded as the starting point of the modern law of negligence as it was the first time that the House of Lords recognized a general rule of liability for harm caused by negligence. This general duty of care also applies when the parties are in a contractual relationship. Not every breach of contract will, however, lead to a

125 P. ATIYAH, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press 1979), pp 681–693.

126 T. WEIR, in *Encyclopedia of Comparative Law*, p 35.

127 According to A.G. GUEST, 3. *Malaya Law Review* 1961, p 191; cf. B. MARKESINIS, ‘An Expanding Tort Law – The Price of a Rigid Contract Law’, 103. *Law Quarterly Review* 1987, pp (354–397) at 384.

128 F. POLLOCK, *The Law of Torts*, p 337. Cf. T. WEIR, in *Encyclopedia of Comparative Law*, p 35.

129 Although the doctrine of privity still stands up to scrutiny, the Contracts (Rights of Third Parties) Act 1999 does determine that a contract may confer rights on third parties which are enforceable directly by the third parties themselves.

130 *Donoghue v. Stevenson* [1932] AC 562 (HL). There are older cases that foreshadowed the development of the tort of negligence, see P. ATIYAH, *The Rise and Fall of Freedom of Contract*, pp 501–505, with references.

liability in tort.¹³¹ A concurrent liability in tort will only arise in the event that the defendant's behaviour would also have breached a tortious duty if there had not been a contract between the parties. In other words: the defendant must have violated an obligation to take reasonable care, independent of any obligation under the contract.¹³²

46. The question whether the law allows the aggrieved party to bring a claim in tort used to arise primarily when negligent conduct of one contracting party caused physical damage to the body, health or property of another contracting party. The courts accepted that finding liability in tort was then possible.¹³³ Pure economic loss was a different matter. In *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*, the House of Lords accepted for the first time that a person (in that case: a bank) could be held liable in negligence in respect of pure economic loss resulting from reliance on a misstatement (in that case: an inaccurate credit reference).¹³⁴ This raised the question whether parties to a contract could also be held liable in negligence in respect of pure economic loss. The courts both allowed and rejected concurrent liabilities in this field.¹³⁵

47. This question was authoritatively addressed by the House of Lords in *Henderson v. Merrett Syndicates*. The case concerned a collection of claims brought by the members (known as 'names') of the insurer, Lloyd's, against the managing agents who had acted on their behalf. The managing agents were either in a direct contractual relationship with the names or were indirectly linked with them through agents. The names alleged that in both situations the managing agents had assumed a direct responsibility to the names. The names that entered into a contract with the agents wanted to establish a concurrent duty of care in tort, in order to benefit from the more advantageous position on the accrual of the cause of action in tort.¹³⁶

48. In his leading speech,¹³⁷ Lord Goff clearly showed his concern about the 'adventitious effects' of the existence of different rules in contract and tort as

131 F. POLLOCK, *The Law of Torts*, p 339 already noted that a mere non-performance of a promise cannot be treated as a substantive tort. *Robinson v. PE Jones (Contractors) Ltd* [2011] EWCA Civ 9 also makes clear that the mere existence of a contractual relationship is not enough to justify an assumption of responsibility and concomitant reliance.

132 T. WEIR, in *Encyclopedia of Comparative Law*, p 36; A. BURROWS, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford: Hart Publishing 1998), pp 25-26.

133 A. BURROWS, *Understanding the Law of Obligations*, pp 25-26, with references.

134 *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 (HL).

135 The cases are mentioned by A. BURROWS, *Understanding the Law of Obligations*, p 26, fn. 25; and summarized by Lord Goff in *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL) at 184-194, with special attention for the statement by Lord Scarman in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1986] UKPC 5 (PC).

136 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), per Lord Goff, p 174.

137 All Lords agreed with the speech of Lord Goff. Lord Browne-Wilkinson delivered a short concurring speech.

regards limitation and remoteness of damage. He indicated that reform of these incidental rules would be most welcome but readily admitted that ‘this is perhaps crying for the moon’.¹³⁸ After a careful assessment of the most important authorities,¹³⁹ including cases from other civil and common law countries,¹⁴⁰ Lord Goff reached the following conclusion:

My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy: but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.¹⁴¹

The House of Lords thus allowed finding liability in negligence in respect of pure economic loss, also where the parties were in a contractual relationship. Unless ‘his contract precludes him from doing so’, the claimant, ‘who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous’.¹⁴²

49. The fact that tortious liability may arise if the damage is caused by or related to the (non-) performance of a contractual obligation shows that the division between contract and tort is not as sharp as might be imagined. Already before *Henderson v. Merrett Syndicates*, Atiyah argued that this division was ‘not soundly based, either in logic or in history’,¹⁴³ while Gilmore observed that ‘the two fields, which had been artificially set apart, are gradually merging and becoming one’.¹⁴⁴ Gilmore coined the term ‘contort’ to describe this phenomenon. He predicted that the law of contract would eventually ‘be swallowed up by tort’, or that both areas of law would be unified in a ‘generalized theory of civil obligation’.¹⁴⁵

138 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), p 186.

139 One case is discussed in particular: *Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp* [1979] Ch 384 (HC).

140 The contribution written by T. WEIR, in *Encyclopedia of Comparative Law*, pp 3–39, is quoted often and has clearly influenced the outcome.

141 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), pp 193–194.

142 *Ibid.*, pp 193–194.

143 P. ATIYAH, *The Rise and Fall of Freedom of Contract*, p 505.

144 G. GILMORE, *The Death of Contract* (Columbus: Ohio State University Press 1974), p 88.

145 *Ibid.*, pp 88, 90 and 94.

50. Up until the present date, English law is not structured on the basis of such a general theory of obligations.¹⁴⁶ The law of contract has not been ‘swallowed up’ by the law of tort either. Since *Henderson v. Merrett Syndicates*, it has been debated whether, and to what extent, the tortious remedy should be influenced, limited or excluded by the contract. Should the contractual remoteness test, for instance, also be applied to a concurrent claim in negligence for pure economic loss?¹⁴⁷ In a unanimous judgment, the Court of Appeal recently decided that the test for recoverability of damage for pure economic loss should indeed be the more restrictive ‘reasonable contemplation’ test in contract and not the ‘reasonable foreseeability’ test in tort.¹⁴⁸ Case law also shows that the level of the contractual duty is relevant in determining whether there was an assumption of responsibility.¹⁴⁹ The contractual context may thus influence the existence and content of the tort claim, as is the case in Germany and the Netherlands.

7. Concluding Remarks

51. The overlap between the laws of contract and tort presents challenges to any system of private law. Yet their solutions differ. French law excludes the possibility to claim in tort if the damage is caused by or related to the (non-) performance of a contractual obligation. German, Dutch and English law take the opposite point of view: finding liability in tort is not precluded if the damage is caused by or related to the (non-) performance of a contractual obligation.

52. In theory, several arguments have been given for and against both solutions. Proponents of a fundamental precedence of the law of contract over the law of tort assert that this solution respects the freedom of contract and the intention of the legislature. Parties to a contract should not be able to ‘escape’ from the regime designed for those relationships into the general regime of tort. By contrast, their adversaries argue that the law of tort should offer a certain level of protection to all persons, whether they have concluded a contract or not. The basic principle should therefore be the opposite: in the absence of a clear intention, on the part of the legislature or the parties themselves, the mere existence of a contract should not *a priori* set aside the protection provided by the law of tort.

146 Although some writers have developed such a theory, e.g. A. Burrows (ed.), *English Private Law* (Oxford: OUP, 3rd edn 2013).

147 As proposed by A. Burrows, in *Torts in Commercial Law*, pp 367-390. Cf. J. Cartwright, 55. *The Cambridge Law Journal* 1996, pp 488-514.

148 *Wellesley Partners LLP v. Withers LLP* [2015] EWCACiv 1146.

149 *Riyad Bank v. Ahli United Bank (UK) Plc* [2006] EWCA Civ 780 (CA); *Robinson v. PE Jones (Contractors) Ltd* [2011] EWCA Civ 9.

53. In practice, the choice between these competing solutions is also influenced by the scope and structure of the laws of contract and tort. French courts have not merely drawn a distinct line between the two regimes out of a genuine concern for the freedom of contract and the will of the legislature but also to protect contracting parties against the general strict liability for things. German, Dutch and English courts have not merely allowed concurrent claims in tort because that solution suited the structure of their systems of private law but also to protect contracting parties when it would not be justified to treat them less favourably than passers-by would be treated.

54. This contribution has shown that the resoluteness of both approaches has softened over time, as a result of judicial and legislative interventions. Under German, Dutch and English law, the contractual relationship continues to be relevant to the assessment of the tort claim. It cannot be said that these legal systems do not respect the will of the parties and the intention of the legislature. At the same time, French law has provided additional protection to some contracting parties, not only by introducing exceptions to the principle of *non-cumul* but also by imposing *obligations de sécurité*.

55. Finally, the contribution has shown that a trend towards convergence can be observed in all jurisdictions. Germany and the Netherlands have harmonized the rules on the scope of damages and the prescription of claims. Although codification of the *non-cumul* principle is likely, the French legislature has introduced several general liability regimes and intends to harmonize the rules on damages and causation in the near future. The dust is settling in English law too, as the courts are called upon to indicate which test applies to a concurrent claim in tort. As a consequence, the scope of the problem has been further reduced. However, the issue itself will not lose its significance as long as differences between the laws of contract and tort continue to exist.