Concurrence in European Private Law

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3 Concurrent Claims in Contract and Tort: A Comparative Perspective*

3.1 Introduction

The previous chapter examined the principles that must be taken into account when solving issues of concurrence in private law. The chapter showed that lawyers from different jurisdictions use the same arguments when debating and solving issues of concurrence in private law. In principle, they strive to realise the objectives of each rule to the greatest possible extent. This means that concurrence is generally allowed, freedom of choice is the natural consequence and the existence of alternative or exclusive rules is an exception which requires justification.

If the same principles are being followed, does this mean that similar issues are solved in similar ways too? This question is examined in the present chapter. The attention is fixed on the problem that has always been at the heart of the debate: the overlap of the laws of contract and tort. More particularly, the chapter analyses whether, and to what extent, the law permits a choice between finding liability in contract and in tort. The chapter 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. In doing so, the chapter considers in greater detail the reasons underlying the decision to permit or restrict the availability of claims, powers, and defences.

Comparative studies on this topic do exist, but they are either not written in English,[1] are somewhat outdated,[2] or they provide a comprehensive assessment of the law as it stands rather than an explanation of its development.[3] It is the aim of this chapter to add a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 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.

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1 Schlechtriem 1972; Von Amsberg 1994; Kegel 2002; De Graaff & Moron-Puech 2017.

2 Weir 1984; Van Rossum 1995.

3 Von Bar & Drobnig 2004, p. 26-315; Martín-Casals 2019b.

It is necessary to clarify three terminological issues from the outset. First of all, this chapter only deals with the laws of contract and tort and not with the remaining extra-contractual obligations.[4] Secondly, and in line with the general scope of the present book,[5] this chapter 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.[6] Thirdly, this chapter uses the common law term 'tort' instead of the civil equivalent 'delict'.[7]

In order to fully understand the nature and scope of the problem, the chapter first shows the areas of overlap (section 3.2) and the distinctions (section 3.3) between the laws of contract and tort. The chapter 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 performance, or non-performance, of a contractual obligation (section 3.4). 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 performance, or non-performance, of a contractual obligation (sections 3.5-3.6). 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 and that a trend towards convergence can be observed in all jurisdictions (section 3.7).

3.2 Concurrence of the laws of contract and tort

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.[8] 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 system.[9]

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 See *supra* section 1.5.
6 Oliphant 2016.
7 Zimmermann 1996, p. 907.
8 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).
9 Taylor 2019, p. 21.

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.[10] 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 formation[11] and form of the contract[12] 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.[13] 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, typically, come into play if the facts took place before the parties concluded the contract or after the contract has ended, or has been avoided or terminated.[14]

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 compensate for any losses sustained.[15] 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

10 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 Deakin, Johnston & Markesinis 2013, p. 20-24). However, the laws of contract and tort do not overlap here, so there is no choice available at all.

11 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° 2016-13*.

12 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.

13 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.

14 Beale and others 2010, p. 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 Cartwright & Hesselink 2008, p. 457-460; Martín-Casals 2019a, p. 716-719 and 793-802.

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

statutory duty has been breached,[16] or following a violation of either public morals with the intention to inflict damages[17] or, of a rule of unwritten law pertaining to proper social conduct.[18]

Similar lines can be recognised 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,[19] 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)[20] and a general liability for damage caused by a person that is under the tortfeasor's supervision.[21] 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 more limited in scope.[22]

The law generally offers the aggrieved party several rights (or remedies).[23] If the necessary conditions are fulfilled, the law of contract entitles him to claim damages, to demand specific performance, and to terminate the contract.[24] The victim of a tort may also be entitled to claim damages to compensate for the harm suffered.[25] When it comes to the relationship between the laws of contract and tort, one question has therefore been at the heart of the debate: does the law permit one contracting party to claim damages in tort from the other contracting party?[26] The answer to this question matters. As the next section shows, 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.

16 § 823 BGB; Art. 6:162 (2) BW.
17 § 826 BGB.
18 Art. 6:162 (2) BW.
19 In English law, 'fault' assumes three forms: malice, intention (including recklessness), and negligence (Deakin, Johnston & Markesinis 2013, p. 27).
20 Cass. Civ. 16 June 1896, S. 1897. I. 17, note Esmein (*Teffaine*).
21 Cass. ass. plén. 29 March 1991, D. 1991. 324, comm. Larroumet, JCP 1991. II. 21673 (*Blieck*).
22 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).
23 Traditionally, English lawyers see rights through the lens of the remedies by which they are given effect. See *supra* section 1.3.
24 The range of rights (or remedies) also depends on the nature of the contract. Their order may differ from one legal system to another.
25 Van Gerven, Lever & Larouche 2000, p. 740-741 and 868-871. § 249 (1) BGB prescribes restitution in kind as 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.
26 Von Bar & Drobnig 2004, p. 6.

3.3 The differences between the laws of contract and tort

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.[27] 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.[28] 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.[29]

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.

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.[30] The laws of contract and tort may vary with regard to the type of loss that may be claimed[31] and with regard to the possibility to demand exemplary or punitive damages.[32] 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

27 See also Martín-Casals 2019a, p. 714.

28 Weir 1984, p. 5. See also Borghetti 2019, p. 134-135 and 152-153; Keirse 2019, p. 333-335; Magnus 2019, p. 174 and 188-189; Martín-Casals 2019a, p. 714-715.

29 Cf. Weir 1984, p. 7-24; Kegel 2002, p. 119 et seq.; Martín-Casals 2019a, p. 723-780.

30 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 Van Gerven, Lever & Larouche 2000, p. 395-427.

31 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 Van Boom 2004, p. 1-40.

32 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 Von Bar & Drobnig 2004, p. 110; Martín-Casals 2019a, p. 739.

the underlying duty, the nature and foreseeability of the damage[33] and the nature of the defendant's act.[34] The underlying duty is also important for the assessment of a defence of contributory negligence[35] 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).[36]

A third issue relates to the *limitation* of the action or the *prescription* of the claim.[37] 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.[38]

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 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.[39]

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

34 See e.g. Art. 6:98 BW; Cartwright 1996.

35 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 a l'amelioration de la situation des victimes d'accidents de la circulation et a l'acceleration des procedures d'indemnisation*, hereafter *Loi Badinter*) or for the breach of a strict contractual duty (cf. Burrows 2011, p. 368).

36 See generally Van Gerven, Lever & Larouche 2000, p. 33. See also Cartwright 1991, p. 141; Boukema 1992, p. 18; Krans 1999, p. 131-132; Hartkamp 2011, p. 154.

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

38 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 (2) BW).

39 *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.

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.

3.4 French law: the gradual emergence of the *non-cumul* principle

The relationship between the laws of contract and tort has generated considerable interest in French literature.[40] 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.[41] By contrast, Grandmoulin argued that no separate regime of contractual liability existed, as this liability was part of a unified 'théorie de la responsabilité'.[42]

Eventually, most scholars adopted an intermediate position, according to which contractual and tortious liabilities were part of the general law of obligations, but should be treated differently.[43] As Brun stated in 1931: 'il n'y a pas deux responsabilités, mais deux régimes de responsabilité'.[44] 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.[45]

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 recourse to the law of tort is excluded. If the harm occurs in the context of a contractual relationship, the aggrieved party cannot claim in tort.[46]

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40 See, on the origins of the distinction between contract and tort in French law, Moron-Puech 2018, who submits that the distinction was not imposed by the *Code Civil* of 1804 and was not expressly recognised by the courts until the 1890s.

41 Sainctelette 1884, p. 15. The same idea was developed by Sauzet 1883, p. 596-640.

42 Grandmoulin 1892, p. 88. The same idea was developed by Lefebvre 1886, p. 494: 'Toute faute est *delictuelle*. La faute *contractuelle* n'existe pas.'

43 See for an overview Juen 2016, p. 12-17, and Viney 1995, p. 399.

44 Brun 1931, p. 382.

45 Borghetti 2010, p. 23-24, with further references.

46 Moréteau 2013, p. 765.

Three judgments are usually cited to show that the *Cour de Cassation* had already accepted the principle of *non-cumul* in the year 1890,[47] reiterated this in the year 1922[48] and firmly established this by the year 1927.[49] Nevertheless, according to several authors, these judgments did not create a convincing precedent at the time.[50] After all, the *Cour de Cassation* only stated that the conditions for contractual and tortious liability are not the same[51] and that damages for the violation of a contractual norm have to be awarded on the basis of the law of contract.[52] Recourse to the law of tort is not excluded as a matter of principle.[53]

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.[54] 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.[55] Several authors

47 Cass. req. 21 January 1890, D. 1891. 1. 380. Brun 2009, p. 68, refers to this judgment and states that the principle of *non-cumul* 'a été pose dès la fin du XIXe siècle par la jurisprudence'.

48 Cass. Civ. 22 January 1922, D. 1922. 1. 16; S. 1924. 1. 105, note Demogue. Van Gerven, Lever & Larouche 2000, p. 41 (fn. 93), identify this judgment as the 'leading case'; Whittaker 1995, p. 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'.

49 Cass. Civ. 6 April 1927, D. 1927. 1. 201, note H. Mazeaud. Babert 2002, p. 268 refers to this judgment and states: 'C'est donc bien en 1927 que la Cour de Cassation change sa jurisprudence.'

50 Viney 1994, p. 817; Babert 2002, p. 265-266; Borghetti 2010, p. 14-29; Abid Mnif 2014, p. 74-78; Capitant, Terré & Lequette 2015, p. 265, no 4. See already Popesco-Albota 1933, p. 172; Savatier 1951, no. 149; Martine 1957, p. 16 et seq.

51 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, note H. Mazeaud.

52 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, note H. Mazeaud.

53 Borghetti 2010, p. 16-17; Abid Mnif 2014, p. 74-75.

54 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 Borghetti 2010, p. 17-21, and in Abid Mnif 2014, p. 76-77.

55 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'.

therefore argue that the principle was only truly established by the 1950s.[56] The *Cour de Cassation* has since reaffirmed this position several times,[57] and has also begun to refer to the principle of *non-cumul* in its judgments.[58]

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.[59]

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*.[60]

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 prac-

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56 Viney 1994, p. 817; Martine 1957, p. 16 et seq.; Abid Mnif 2014, p. 78. Brun 2010, p. 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'.

57 Brun 2009, p. 68, referring e.g. to Cass. 1e 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'.

58 The *Cour de Cassation* refers to 'la règle du non-cumul des responsabilités contractuelle et délictuelle' (Cass. 2e Civ. 3 March 1993, no 91-17.677) and to 'le principe de non-cumul des responsabilités contractuelle et délictuelle' (Cass. 1e Civ. 28 June 2012, no 10-28492).

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

60 Borghetti 2010, p. 25-29, argues that this has been the main reason for the courts to finally establish the principle of *non-cumul*. Brun 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'.

titioners and their patients was contractual and not extra-contractual.[61] 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.[62] Given the principle of *non-cumul*, this qualification brought these relationships exclusively within the realms of the law of contract. According to Whittaker, it clearly dawned on the courts that 'by manipulating the boundaries of contract, they can manipulate the boundaries of delict'.[63]

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,[64] according to which, the regimes of contract and tort were fundamentally distinct and could not be mixed.[65]

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 criticised by scholars[66] 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,[67] 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.[68] Some contracts create *obligations de moyens*, under which parties have to take reasonable

61 Cass. Civ. 20 May 1936, D. 1936. 1. 88, note E.P.; S. 1937. 1. 321, note Breton (*Mercier*).
62 Borghetti 2010, p. 26-28. Some patients also benefited from this outcome, because the claim became subject to a more favourable regime of prescription. See Bellissent 2001, no. 956.
63 Whittaker 1995, p. 336.
64 According to Abid Mnif 2014, p. 79.
65 See e.g. Bonnet 1912, p. 437; Brun 1931, no. 351.
66 E.g. by Esmein 1956.
67 Cass. Civ. 21 November 1911, D. 1913. 1. 249, note Sarrut, S. 1912. 1. 73, note Lyon-Caen (*Compagnie générale transatlantique*).
68 Viney 1995, p. 652; Whittaker 1995, p. 336; Borghetti 2016, no. 34.

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*.

The courts and the legislature have also introduced exceptions to the principle of *non-cumul*.[69] In fact, the courts have applied the law of tort to contractual relationships in cases involving fraudulent behaviour,[70] criminal offences,[71] transport accidents[72] and construction defects.[73] Moreover, the legislature has introduced general liability regimes that apply to all road traffic accidents[74] and to all defective products,[75] irrespective of whether a contract exists between the parties involved.

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.[76] The general fault liability has been codified in Articles 1240-1241 CC, and the strict liability for persons and things has been codified in Article 1242 CC.[77] A reform of the remaining parts of the law of obligations is currently on the legislative agenda. In its proposals, the Minister of Justice has suggested harmonising several rules in respect of damages and causation.[78] He has also recommended codifying the principle of *non-cumul*. The wording of the proposed Article 1233 CC makes it 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 to contractual liability in order to opt in favour of rules specific to extra-contractual liability'.[79]

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69 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 Viney 1995, p. 620; Von Bar & Drobnig 2004, p. 40-41.

70 Viney 1995, p. 621, with references.

71 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 Viney 1995, p. 621-623, with references.

72 For some time, close relatives of the victim of a transport accident could not only claim in contract, but also in tort. See Viney 1995, p. 623-624, with references.

73 This exception concerns the recovery of damages by the owner from the builder. See Viney 1995, p. 624-626, with references.

74 Art. 1, *Loi Badinter*.

75 Art. 1386-1 CC. This is a result of the implementation of Council Directive 85/374/EEC on the liability for defective products.

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

77 As a result of *Ordonnance n° 2016-131*.

78 Art. 1235-1240, *Projet de réforme du droit de la responsabilité civile*.

79 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 via www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf.

At the same time, the Minister intends to introduce an exception for bodily injuries. The Catala committee had already suggested giving these victims the choice between claiming in contract or in tort.[80] The Terré committee went one step further and proposed that bodily injuries should only ever be subject to the law of tort.[81] The latter suggestion was initially embraced by the Minister.[82] 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.[83] Responding to this criticism, the Minister has proposed 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'.[84] 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*.

It is clear from the above that French law is still struggling 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 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 performance, or non-performance, of a contractual obligation, as the following sections illustrate.

3.5 German and Dutch Law: independent yet interdependent categories

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

80 Art. 1341, *Avant-projet de réforme du droit des obligations et du droit de la prescription*. This solution had been suggested before, e.g. by Carbonnier 1994, no. 295.

81 Art. 3, see Terré 2011.

82 Art. 1233 (2), *L'avant-projet de réforme de la responsabilité civile*.

83 For this reason, the proposal has been criticised, e.g. by De Graaff & Moron-Puech 2017, p. 86-87.

84 Art. 1233-1 (2), *Projet de réforme du droit de la responsabilité civile*: '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.

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.

According to the first theory (*Gesetzeskonkurrenz*),[85] 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 large areas of the law of contract pointless and would overrule the assessments and intentions of the legislature.[86]

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.[87] 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 unlawful acts or omissions exhaustively.[88] 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.[89]

Following the contribution by Dietz to the subject in 1934, the second theory gained the upper hand and came to enjoy general support.[90] 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.[91] Likewise, the *Bundesgerichtshof* has repeatedly confirmed that the aggrieved party may

85 It must be noted that the term *Gesetzeskonkurrenz* has also been used in a different sense, to describe the overlap of multiple norms rather than the exclusivity of one of these norms, e.g. by Lent 1912, p. 12 et seq.; Enneccerus & Nipperdey 1952, p. 217-218.

86 E.g. Hellwig 1900, p. 98-99; Endemann 1903, p. 1260; Von Gierke 1917, p. 903; Von Tuhr 1918, p. 464.

87 Dietz 1934, p. 72-92.

88 Dietz 1934, p. 93-124.

89 Dietz 1934, p. 125-180. For an overview of the literature until the 1930s, see Dietz 1934, p. 70-71.

90 Schlechtriem 1972, p. 44-45.

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

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.[92]

This position can 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.[93] 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.[94] 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.[95]

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,[96] and not in contract.[97] Moreover, the 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.[98] It was only after the *Schuldrechtsreform* of 2002 that the rules on damages were integrated into the general part of the law of obligations (§ 249 et seq. BGB). Since these reforms, 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.[99]

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

93 Van Dam 2013, p. 90.

94 Currently § 28 (1) BGB, formerly § 282 BGB.

95 Cf. Zimmermann 1996, p. 905-906.

96 Formerly § 847 BGB.

97 Formerly § 253 BGB.

98 Formerly § 477 BGB.

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

While the solution of *Anspruchskonkurrenz* may have been helpful at the time, it does also have its drawbacks. It 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 liability[100] and shorter contractual prescription periods[101] on concurrent tort claims for a long time. The *Bundesgerichtshof* has repeatedly stated that while the conditions, content and enforcement of every claim are required to be assessed independently, an exception must 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.[102] Although it is the exception and not the rule,[103] it is clear that contractual rules may thus affect the existence and substance of the tort claim.[104]

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*).[105] 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 must be determined.[106] The majority of the writers therefore continues

100 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 willful 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).

101 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).

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

103 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).

104 This phenomenon is also known as *einwirkende Anspruchskonkurrenz*, see Georgiades 1968, p. 86-90.

105 Georgiades 1968, p. 167 et seq. The same position was adopted by Hellwig 1900, p. 98-99; Esser 1960, § 201; Larenz 1962, p. 416 et seq.; Eichler 1963, p. 418-420.

106 Arens 1970, p. 400 et seq.; Medicus 2007, p. 7.

to adhere to the theory of *Anspruchskonkurrenz*,[107] but recognises that the possibility to proceed in contract or in tort may be limited.[108]

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.[109] 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 conduct'[110] – 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.[111]

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'.[112] 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.[113] A mere breach of contract was not enough.[114] If a

107 An exception is Koziol 2010, p. 101-103.

108 Recent examples include Gsell 2003, p. 319-357; Medicus & Lorenz 2015, § 33; Wandt 2017, p. 5-11. For an overview of the literature, see Von Amsberg 1994, p. 19-21.

109 In favour of exclusive application of the law of contract e.g. Schoordijk 1964; Boukema 1966, p. 121 et seq.; Pels Rijcken 1980, p. 1125. Against exclusive application e.g. Snijders 1973; Nieuwenhuis 1982; Brunner 1984, p. 66; Bakels 2009a, no. 15; Castermans 2012; Castermans & Krans 2019, p. 69-76.

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

111 Art. 6:95 BW.

112 HR 9 December 1955, *NJ* 1956/157, note L.E.H. Rutten (*Boogaard/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*).

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

114 HR 23 May 1856, *Weekblad van het Regt* 1852 (*Kuyk/Kinker*).

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.[115] They decided to harmonise certain rules governing the different liabilities, thereby reducing the tensions between them. 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).

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.[116] The courts have, for instance, applied standards for contractual liability[117] and shorter contractual prescription periods[118] on concurrent tort claims. Limitations may also follow from the express terms of the contract or from its nature and purpose.[119] Moreover, case law shows that the level of the general duty of care may be influenced by the contractual obligations of the parties.[120]

As in Germany, this has been an argument for some writers to assume that the claimant only has one 'mixed' claim (*gemengd vorderingsrecht*), based on two separate norms.[121] 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*,[122] it is argued that every claim has to be assessed on its own merits[123] but that the existence and content of the tort claim may be influenced by contractual rules.[124]

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115 As is evidenced by the contribution written by Snijders 1973, who was closely involved in the final drafting process of the new Dutch Civil Code.

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

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

118 HR 21 April 2006, ECLI:NL:HR:2006:AW2582, *NJ* 2006/272 (*Inno/Sluis*); HR 29 June 2007, ECLI:NL:HR:2007:AZ7617, *NJ* 2008/606, note J. Hijma (*Pouw/Visser*).

119 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 J. Hijma (*Bunink/Manege Nieuw Amstelland*).

120 HR 15 May 1981, ECLI:NL:HR:1981:AG4187, *NJ* 1982/237, note B. Wachter (*Temi 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.

121 Snijders 1973, p. 459-463; Nieuwenhuis 1982, p. 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.

122 Castermans & Krans 2009, p. 158-159.

123 Pels Rijcken 1980, p. 1102; Nieuwenhuis 2007b; Bakels 2009b, no. 22.

124 Castermans 2012.

3.6 English Law: independent yet interdependent categories

English law is exceptional because it is not built on the foundations of Roman law.[125] 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.[126] 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'.[127] This may explain why English lawyers have not written about the subject of concurrent liabilities with the conceptual flavour of French lawyers or with the doctrinal rigour of German lawyers.[128] 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.[129]

Although the basic distinction between contract and tort appeared already in the Middle Ages,[130] the law was not structured on the basis of these concepts until the mid-19th century. In 1873, there was a significant reform of the courts' structure and of the law of procedure. From the time of 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.[131] 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.[132] 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.

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125 Contrary to the civilian tradition, see Zimmermann 1996, p. 1-33.

126 Zweigert & Kötz 1992, p. 187 et seq.

127 Zweigert & Kötz 1992, p. 198 et seq.

128 Weir 1984, p. 36 noted that there was 'almost no writing on the topic in England', referring only to Winfield 1931; Guest 1961; Poulton 1966.

129 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: Edelman 2014, p. 479-484. More examples of relations concurrently legal and equitable are given by Hohfeld 1913a, p. 553-554; Davies 2018b, p. 288-293; Taylor 2019, p. 26-27, 36-44.

130 Kegel 2002, p. 44 et seq.

131 Zweigert & Kötz 1992, p. 205-206.

132 Maitland 1910, p. 295 et seq. A heavy blow was struck already in 1852, when the Common Law Procedure Act 1852 provided that it should not be necessary to mention any form or cause of action in any writ of summons.

This question remained as important as ever before, as Maitland noted:

> 'The forms of action we have buried, but they still rule us from their graves.'[133]

The reform of the law of procedure made it necessary to systemise the liabilities that existed under the former forms of action. This task was undertaken by several writers, who published a series of influential textbooks in and around the 1870s.[134] Without a fundamental reconsideration of the general structure of the law of obligations, they assigned the existing liabilities to two legal categories and emphasised the distinction between them: liabilities were either consensual (contract) or non-consensual (tort).[135] This may have encouraged English lawyers to regard contract and tort as mutually exclusive.[136] 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'.[137]

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.[138] Under the doctrine of privity, a contract cannot confer rights or impose obligations on any person except the parties to it.[139] 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.

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.[140] *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 recognised a general rule of liability for harm caused by negligence. This general duty

133 Maitland 1910, p. 296; Pollock 1887, p. 336.
134 Atiyah 1979, p. 681-693.
135 Weir 1984, p. 35.
136 According to Guest 1961, p. 191; cf. Markesinis 1987, p. 384.
137 Pollock 1887, p. 337. Cf. Weir 1984, p. 35.
138 This requirement is still an essential feature of English contract law, as can be seen in *MWB Business Exchange Centres Ltd v. Rock Advertising Ltd* [2018] 2 WLR 1603 (UKSC).
139 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.
140 *Donoghue v. Stevenson* [1932] AC 562 (HL). There are older cases that foreshadowed the development of the tort of negligence, see Atiyah 1979, p. 501-505, with references.

of care also applies when the parties are in a contractual relationship. Not every breach of contract will, however, lead to a liability in tort.[141] 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.[142]

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.[143] 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).[144] 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.[145]

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.[146]

In his leading speech,[147] Lord Goff clearly showed his concern about the 'adventitious effects' of the existence of different rules in contract and tort as regards limitation and remoteness of damage. He indicated that reform

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141 Pollock 1887, 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.

142 Weir 1984, p. 36; Burrows 1998, p. 25-26.

143 Burrows 1998, p. 25-26, with references.

144 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL). See, for an overview of the speeches, Robertson & Wang 2015, p. 51-55.

145 The cases are mentioned by Burrows 1998, p. 26, and summarised 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).

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

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

of these incidental rules would be most welcome but readily admitted that 'this is perhaps crying for the moon'.[148] After a careful assessment of the most important authorities,[149] including cases from other civil and common law countries,[150] 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.'[151]

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'.[152]

The fact that tortious liability may arise if the damage is caused by or related to the performance, or non-performance, of a contractual obligation shows that the division between contract and tort is not as sharp as might be imagined. Even before *Henderson v. Merrett Syndicates*, Atiyah had already argued that this division was 'not soundly based, either in logic or in history',[153] while Gilmore observed that 'the two fields, which had been artificially set apart, are gradually merging and becoming one'.[154] 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'.[155]

Up until the present date, English law is not structured on the basis of such a general theory of obligations.[156] 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

148 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), at 186.
149 One case is discussed in particular: *Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp* [1979] Ch 384 (HC).
150 The contribution written by Weir 1984, is quoted often and has clearly influenced the outcome.
151 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), at 193-194.
152 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), at 193-194.
153 Atiyah 1979, p. 505.
154 Gilmore 1974, p. 88.
155 Gilmore 1974, p. 88, 90 and 94.
156 Although some writers have developed such a theory, e.g. Burrows 2013.

the contractual remoteness test, for instance, also be applied to a concurrent claim in negligence for pure economic loss?[157] In a unanimous judgment, the Court of Appeal 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.[158] Case law also shows that the level of the contractual duty is relevant in determining whether there was an assumption of responsibility.[159] Even though the duty of care imposed by the law is independent of the contractual duty, the contractual context may influence its content,[160] as is the case in Germany and the Netherlands.

3.7 Conclusion

The concurrence of 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 performance, or 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 performance, or non-performance, of a contractual obligation.

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.

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 rigid demarcation 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 fostered by the courts themselves. German, Dutch and English courts have not merely allowed concurrent claims in tort

157 As proposed by Burrows 2011. Cf. Cartwright 1996.

158 *Wellesley Partners LLP v. Withers LLP* [2015] EWCACiv 1146. An overview of the speeches is given by Taylor 2019, p. 34-36.

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

160 Taylor 2019, p. 32-36.

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. In these systems, the expansion of tort law seems to have been the price of a rigid contract law, to use the expression coined by Markesinis.[161]

This chapter has shown that the resoluteness of both approaches has softened over time. 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. Germany and the Netherlands have, moreover, harmonised the rules on the scope of damages and the prescription of claims. 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 result of these judicial and legislative interventions, the scope of the problem has been further reduced.

A trend towards convergence can even be observed in France. To be sure, recourse to the law of tort remains generally excluded. However, several newly adopted liability regimes do transcend the boundaries of contract and tort. In the near future, the French legislature also intends to harmonise the rules on damages and causation. It must be noted, moreover, that the courts have provided additional protection to contracting parties, not only by introducing exceptions to the principle of *non-cumul* but also by imposing *obligations de sécurité*. In France, therefore, the expansion of contract law seems to have been the price of the exclusion of tort law.

Importantly, this case study reminds us that the decision to permit or restrict the availability of claims, powers, and defences depends on the content of the rules and the structure of the legal system at issue. What appears at first to be the same problem – the overlap of the laws of contract and tort – may turn out to have a different nature and scope in different jurisdictions. We should be aware that the courts may be inclined to protect certain interests by denying the possibility of dual application altogether. It is submitted that this finding does not, however, call in question the scheme of analysis as such. Rather, it shows that questions of concurrence are questions of interpretation which may be answered differently, depending on the scope and structure of the relevant rules.

Having considered in greater detail the reasons underlying the decision to permit or restrict the availability of claims, powers, and defences, it is time to embark on the next leg of our journey. What – if any – is the impact of the laws of the European Union? How do these laws influence our scheme of analysis?

161 Markesinis 1987.