

ARTICLE

Instrumentalisation of Tort Law: Widespread yet Fundamentally Limited

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The question on the role of the law, particularly tort law, in combating legal but potentially lethal products and services is inseparable from the broader issue of the ongoing instrumentalisation of the law. Increasingly used to pursue goals other than its primary aim of compensation, tort law is no exception to the general trend of instrumentalisation of private law. This instrumentalisation is a dual phenomenon that has developed both out of top-down and bottom-up impulses. Although specific questions may arise for each of these two movements, they encounter a common limit. Tort law's primary compensatory function fundamentally restricts instrumentalisation. Other functions, such as enforcement or prevention, which come to the fore in the battle against legal but potentially lethal products and services, are grafted onto this primary function and can only be pursued insofar as they are compatible with it. This relates to the tension created by pursuing public goals through tort law as an essentially private law instrument. Attention is needed not to overstretch tort law's prerequisites, which are coherent with its private law embedding, which would turn tort law into a dangerous *passé-partout*.

Keywords: Tort law; instrumentalisation; compensatory function; prevention; enforcement

1. Introduction

The question on the role of the law in combating legal but potentially lethal products and services can (and should) also be asked with respect to tort law. For the purpose of this article, the latter is understood as extra-contractual (civil) liability law. It encompasses the legal rules on the prerequisites (e.g. wrongful behaviour, causality, damage) for and the legal consequences (compensation) of a situation of extra-contractual liability. Rephrasing the question, the issue at hand is how tort law can (or even should) be used to combat legal but potentially lethal products and services. Essentially, it is about instrumentalisation of tort law for such purpose so that the question should be approached from the angle of instrumentalisation. Before addressing the fundamental limits to tort law's instrumentalisation on the basis of a fundamental analysis of its functions, a good understanding of the phenomenon of instrumentalisation and of how widespread this is is key to grasping the strong push for using tort law for non-compensatory goals. Furthermore, the examples of instrumentalisation of tort law, discussed below, already illustrate the fundamental limits due to tort law's primary compensatory function (and design).

In general, there is a clear tendency of instrumentalisation of private law¹ by public law.² The Low Countries have not escaped this tendency and this article intends to call attention to this widespread phenomenon

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¹ Belgium: M. Grimaldi, 'Les grandes lignes de l'évolution du Code civil en France depuis 1804', (2004) *JT*, no. 6137, p. 449; M.E. Storme, *Dikè, Hydra, Zeno in het insolventierecht* (2013), p. 10. The Netherlands: E.H. Hondius, 'Kroniek algemeen', (2016) *NTBR*, no. 3, p. 102.

² Particular examples are given, for instance, by P.-Y. Erneux & M. Von Kuegelgen, 'L'ancrage de l'ordre public environnemental dans le droit privé des contrats immobiliers', in X, *Le défi du notaire/De uitdaging voor de notaris* (2011), p. 492; A. Lemmerling, 'Exécution du contrat de vente d'immeubles: délivrance des accessoires et transfert des garanties', in B. Cartuyvels et al. (eds.), *La vente immobilière, aujourd'hui et demain* (2015), pp. 107–108; E. Spruyt, 'Fiscale clausules bij koop van onroerend goed', in E. Terryn et al.

from a Belgian-Dutch perspective. One may think, for example, of actions for damages as part of effective private enforcement of competition law,³ or of an instrumental approach towards rights in rem, such as the right of ownership,⁴ in the context of the reform of Belgian civil law.⁵ To an ever-increasing extent, private law is employed for the pursuit of societal goals.⁶ Instrumentalisation of the law or of legal rules is sometimes described as its large-scale use by the government as an instrument to change social relations.⁷ As will become clear later on, such a definition does not capture the entire phenomenon of instrumentalisation.

What should be pointed out from the start is the altered view on the law vis-à-vis the society in which it operates. In these past decades, legislation and the law are increasingly considered as instruments for social engineering, as a way (of intervention by which) to channel societal problems.⁸ Law is gaining popularity as a policy instrument⁹ to change the social order, rather than an expression of an objective social order.¹⁰ Law attempts to steer our society instead of merely organising it,¹¹ so that one should speak of modifying instead of codifying legislation.¹² This shift is more than solely a matter of perspective. If the law is no longer perceived as the codification of the already existing social order, but rather as a tool to influence the direction in which our society evolves, the effects of proposed legislative changes or decisions occupy centre stage. Thus, the consequence of this shift is the desire of policy makers and regulators to have an *ex ante* knowledge about the effects of the envisioned measures or decisions.¹³

Liability law, and tort law in particular, also fit within the instrumentalisation tendency and constitute instruments for regulators and policy makers. Whenever (civil) liability law in general is used for non-compensatory ends, such as prevention or increased safety and quality, the law is considered as a mechanism to influence behaviour,¹⁴ in line with the described shift from codification to modification.

On the one hand, the legal consequence of a situation of extra-contractual liability and thus of (general) tort law is compensation. The design of tort law thus points towards a compensatory function. Otherwise, a different (non-compensatory) legal consequence would have been attributed to a situation of extra-contractual liability. It is widely acknowledged that (one of) the principal function(s) or aim(s) of tort law is compensation, i.e. putting the injured party in the situation in which he/she would have been without the tort.¹⁵ On the other hand, the open nature of tort law, e.g. through the broad interpretation of the notion of

(eds.), *Koop. Onroerend goed* (2016), p. 528. See also C.U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union* (2010).

³ Cf. Section 2.1, *infra*.

⁴ See V. Sagaert, *Goederenrecht in Beginselen van Belgisch Privaatrecht*, V, (2014) p. 180 et seq.

⁵ E. Dirix & P. Wéry, 'Consultatie Nieuw Burgerlijk Wetboek', (2017–18) *RW*, no. 13, p. 482 and (2017) *TBBR*, no. 10, p. 531; P. Wéry & E. Dirix, 'Le projet de réforme du Code civil entre dans une nouvelle phase : la consultation publique', (2017) *JT*, no. 6706, p. 706 and (2017) *RGDC*, no. 10, p. 535.

⁶ Belgium: E. Dirix, 'Het Nieuwe Privaatrecht', (2014–15) *RW*, no. 17, p. 642. The Netherlands: A. Soeteman, book review of 'P.J.P.M. van Lochem, *Rechtsrelativering. Een verkenning op het terrein van overheidshandelen*', (2014) *RM Themis*, no. 1, p. 52.

⁷ M.E. Storme, *Dikè, Hydra, Zeno in het insolventierecht* (2013), pp. 9–10.

⁸ B. Van den Bergh, '«Recht zkt zekerheid» voor vaste relatie', (2010–11) *RW*, no. 9, p. 352.

⁹ E. Tjong Tjin Tai, 'Twintig jaar nieuw BW: bijzondere overeenkomsten', (2012) *Ars Aequi*, no. 11, p. 872.

¹⁰ L. Huysse, 'Deregulering als maatschappijhervorming: een rechtssociologische probleemstelling', in B. Hubeau et al. (eds.), *Dialogen tussen recht en samenleving* (2012), pp. 103–105; M.E. Storme, *Dikè, Hydra, Zeno in het insolventierecht* (2013), p. 10.

¹¹ H. Coremans et al. (eds.), *Beginselen van wetgevingstechniek en behoorlijke regelgeving in Administratieve rechtsbibliotheek*, No. 11, 2016, p. 10, fn. 30; B. Van den Bergh, '«Recht zkt zekerheid» voor vaste relatie', (2010–11) *RW*, no. 9, p. 352; L.J. Wintgens, 'Alles is relatief ... ook relativiteit', (2000–01) *RW*, no. 35, p. 1294. See also M. Van Damme, *Elementen van jurisprudentie* (2010), p. 116 et seq.

¹² M. Van Damme, *Elementen van jurisprudentie* (2010), pp. 117–118.

¹³ J.B.M. Vranken, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Algemeen Deel: Een synthese* (2014), loose-leaf, para. 20.

¹⁴ J. Kortmann, *The Tort Law Industry* (2009), p. 8.

¹⁵ Belgium: C. Cauffman & B. Weyts, 'Privaatrecht en rechtshandhaving', in Vereniging voor de vergelijkende studie van het recht van België en Nederland (ed.), *Preadviezen 2009* (2009), p. 315; L. Cornelis, *De buitencontractuele aansprakelijkheid voor schade veroorzaakt door zaken* (1982), pp. 644–645; L. Cornelis, *Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht. De onrechtmatige daad* (1989), p. 11; H. De Page, *Traité élémentaire de droit civil belge*, II, *Les incapables. Les obligations* (1964), p. 866; D. Simoens, 'Hoofdlijnen in de evolutie van het aansprakelijkheidsrecht', (1980–81) *RW*, no. 30, p. 1965; W. van Gerven, with the cooperation of A. Van Oevelen, *Verbintenissenrecht* (2015), p. 327; P. Van Ommeslaghe, *Droit des obligations*, II, *Sources des obligations (deuxième partie)* (2010), p. 1137; T. Vansweevelt & B. Weyts, *Handboek Buitencontractueel Aansprakelijkheidsrecht* (2009), p. 5; P. Wéry, *Droit des obligations*, II, *Les sources des obligations extracontractuelle. Le régime général des obligations* (2016), p. 77. Germany: H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (2012), p. 75; G. Spindler & O. Rieckers, *Germany in International encyclopaedia of laws. Tort Law*, suppl. 42, (2015), p. 36. France: M. Bacache-Gibeili, *Les obligations. La responsabilité civile extracontractuelle in Traité de droit civil*, t. 5, (2016), p. 2; Y. Buffelan-Lanore & V. Larribau-Terneyre, *Droit civil. Les obligations* (2016), p. 684; M. Mekki, 'La place du préjudice en droit de la responsabilité civile', in D. Mazeaud et al. (eds.), *Le*

compensation and the open norm of the general standard of care renders this field of law especially mouldable.¹⁶ Matters are being taken to court in which the main aim is not compensation for the suffered loss, but rather prevention or a policy change. In this regard, one can think of the various climate cases in which citizens and organisations attempt to influence government policy and force authorities to increase their efforts in fighting climate change and in coping with (the effects of) global warming. As a result, there is a tension between the primary compensatory function of tort law and its increasing use for non-compensatory goals within a broader instrumentalisation tendency. Furthermore, this tension relates to pursuing *public* goals through tort law as an essentially *private* law instrument. This article intends to draw attention both to the magnitude of the phenomenon of instrumentalisation of tort law and to the fundamental limitation of this instrumental use. First, instrumentalisation of tort law is sketched as a dual phenomenon, considering both the top-down and the bottom-up developments. Second, the analysis is taken to a fundamental level. The compensatory function of tort law is confronted with the non-compensatory (instrumentalising) aims, resulting in the finding that compensation as primary function limits the pursuit of those other goals and consequently of the instrumentalisation tendency. This restriction is applauded because it safeguards a private law account of the use of tort law, which still is a private law instrument, for public law goals.

2. Dual phenomenon

If tort law is being instrumentalised, the question arises who is employing tort law in that instrumental way. Instrumentalisation of tort law risks to be perceived solely as a valuable tool in the hands of regulator, legislator or policy maker. Yet, this would only entail a partial account. Indeed on the one hand, various regulators and policy makers come to mind who use tort law to pursue different policy goals. On the other hand, however, private actors (individuals and associations) must not be forgotten. On this basis of the initiating actor, the instrumentalisation tendency can be broken down into two developments: top-down and bottom-up.¹⁷ Instrumentalisation of tort law is in fact a dual phenomenon that has developed both top-down and bottom-up. Both aspects of the same tendency will be addressed in order to demonstrate how widespread the phenomenon is. These two developments contribute to a trend of private actors and societal organisations increasingly using civil proceedings to strive for and enforce societal or collective interests that exceed the private interest of the parties to the individual case.¹⁸

2.1. Top-down

In a first instrumentalisation movement, policy makers and regulators have discovered the potential use of tort law in the pursuit of numerous policy goals. Citizens and enterprises have become pieces on their chessboard and the intended goals can only be reached if natural and legal persons take action by means of tort law remedies.¹⁹ One could speak of top-down instrumentalisation of tort law (which is meant) as part of the authorities' policy. In that regard, one should note that policy makers are to an ever greater extent relying on citizens for the enforcement of public norms through civil procedures.²⁰ An illustration of the top-down

préjudice: entre tradition et modernité (2015), p. 21; S. Rétif, *Jurisclassieur Civil Code, Art. 1382 à 1386, Fasc. 101* (2016), para. 1; G. Viney, *Introduction à la responsabilité in Traité de droit civil* (2008), p. 77; G. Viney et al., *Les effets de la responsabilité in Traité de droit civil* (2017), p. 7; G. Viney et al., *Les conditions de la responsabilité in Traité de droit civil* (2013), p. 5. The Netherlands: E.F.D. Engelhard & G.E. Van Maanen, *Aansprakelijkheid voor schade: contractueel en buitencontractueel in Monografieën Privaatrecht BW*, No. A15, (2008), para. 9 (function but no goal); T. Hartlief, 'Handhaving in het aansprakelijkheidsrecht. Op weg naar een betere samenleving?', (2008) *WPNR*, no. 6772, para. 5; M.A. Loth, 'Corrective and Distributive Justice in Tort Law. On the Restoration of Autonomy and a Minimal Level of Protection of the Victim', (2015) *MJ*, no. 6, pp. 791–792; J. Spier et al., *Verbintnissen uit de wet en Schadevergoeding* (2015), p. 8; W.H. van Boom, 'Compensating and preventing damage: is there any future left for tort law?', in X, *Festschrift till Bill W. Dufwa – Essays on Tort, Insurance Law and Society in Honour of Bill W. Dufwa*, Vol. I, (2006), p. 287. In general: P. Cane, *The Anatomy of Tort Law* (1997), p. 206; S. Deakin et al., *Markesinis and Deakin's Tort Law* (2013), pp. 43 and 45; J.G. Fleming, *An introduction to the law of torts* (1985), p. 179; H. Koziol, 'Rechtsvergleichende Schlussbemerkungen', in H. Koziol (ed.), *Grundfragen des Schadenersatzrechts aus rechtsvergleichender Sicht* (2014), p. 819; U. Magnus, 'Comparative Report on the Law of Damages', in U. Magnus (ed.), *Unification of tort law: damages* (2001), p. 185; M.S. Shapo, *Principles of Tort Law* (2016), p. 16; A. Tunc, *Introduction in International Encyclopedia of Comparative Law*, Vol. XI, *Torts* (1974), p. 93; W. van Gerven et al., *Tort law in lus commune casebooks on the common law of Europe* (2000), p. 19. Contra K.S. Abraham, *The Forms and Functions of Tort Law* (2017), pp. 21–22.

¹⁶ J. Kortmann, *The Tort Law Industry* (2009), p. 8.

¹⁷ T. Hartlief, 'De agenda van het aansprakelijkheidsrecht: herijking of betere wereld?', in T. Hartlief & M.G. Faure (eds.), *De Spier-bundel. De agenda van het aansprakelijkheidsrecht* (2016), p. 18.

¹⁸ R. Rijnhout et al., 'Beweging in het aansprakelijkheidsrecht', (2013) *NTBR*, no. 5, para. 2.2.

¹⁹ T. Hartlief, 'Een Rechtszaak uit Liefde', (2013) *NJB*, no. 42, p. 2911.

²⁰ Rijnhout et al., *supra* note 18, para. 2.2.

development of the instrumentalisation of tort law on the EU level and the national level can be found in the private enforcement of competition law.

At the EU level, instrumentalisation of tort law is clearly present. Tort law is being used as an instrument to enforce EU law.²¹ Indeed, the Court of Justice of the EU has explicitly stated in *Francovich* that:

the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.²²

Liability and redress are put forward as instruments to ensure the full effectiveness of EU law. That the EU legislator has employed tort law for particular purposes is clearly demonstrated with regard to private enforcement of competition law. Besides public enforcement of competition law through EU and national competition authorities which can impose fines, the EU legislator has deemed it necessary to elaborate private enforcement through individual cases before civil courts in which victims of competition law infringement claim compensation.²³ An important step has been the Directive 2014/104/EU,²⁴ which has been transposed in the Belgian Code of Economic Law (WER)²⁵ and in the Dutch Civil Code (BW).²⁶ The privatisation of enforcement illustrates the attention for using (civil) liability law (or, even broader, private law)²⁷ for law enforcement.²⁸ It depends on individual claims for compensation. Whereas private enforcement is focused on compensating the damage and preventing unlawful behaviour, public enforcement is more concerned with deterrence.²⁹ Typical for this private enforcement of competition law, when compared to penal or public enforcement, is the enforcement's private nature: private persons employ private law instruments to obtain compensation for their individual damage and consequently not in the general interest (e.g. general welfare or consumers' welfare).³⁰ Tort law thus constitutes a private law enforcement instrument in the hands of private enforcers.³¹ The dependence of private enforcement of competition law through tort law on claims for compensation and the presence of damage stresses the aforementioned primary compensatory function (and design) of tort law. Yet, one cannot rule out that individual, private parties in their pursuit of individual compensation still contribute to broader goals (e.g. enforcement of competition law) and consequently serve the general interest. In that respect, actions for damages are perceived by the EU legislator as an element of an effective system of private enforcement of infringements of competition law.³² In order to protect subjective rights under EU law and to enforce EU competition law, victims of infringements must be able to claim compensation before national courts for the harm caused by those infringements.³³ For example, consumers who have paid too much for a certain good or service as a result of cartel agreements must be able to claim compensation for that breach of competition law.

Through its enforcement function, tort law exceeds the perspective of the particular claimant. Liability law is not only at the service of the specific claimant, but through that claimant also at the service of the system (authorities, legislator, politics).³⁴ The enforcement function goes beyond the interests of the parties and brings broader policy goals to the fore. The interpretation of the open norm of the general standard of care forms an excellent forum to take the broader interests into account. The emphasis on compensation,

²¹ J. Kortmann, *The Tort Law Industry* (2009), p. 11; R. Schwitters, 'Wat zijn de maatschappelijke gevolgen van een instrumenteel aansprakelijkheidsrecht?', in M. Hertogh & H. Weyers (eds.), *Recht van onderop* (2011), p. 337, fn. 53.

²² Joined Cases C-6/90 and C-9/90, *Francovich et al. v Italian Republic*, [1991] ECR I-05357, ECLI:EU:C:1991:428, consideration 33.

²³ See P. Gillaerts, 'De impact van Richtlijn 2014/104/EU op het Belgische buitencontractuele aansprakelijkheidsrecht – Game over door spillover of probleemloze insertie uit inertie?', (2016–17) *RW*, no. 31, p. 1204 et seq.

²⁴ Directive 2014/104/EU, OJ L 349, 5.12.2014.

²⁵ Arts. XVII.71–XVII.91 WER, *BS* 29 March 2013, 19975.

²⁶ Arts. 6:193k-6:193t BW, *Stb.* 1991, 600.

²⁷ Cauffman & Weyts, *supra* note 15, p. 303.

²⁸ T. Hartlief, 'Geld zetten op aansprakelijkheidsrecht', (2009) *TPR*, no. 2, pp. 568–569.

²⁹ W.A.J. Van Lierop & E.H. Pijnacker Hordijk, *Privaatrechtelijke aspecten van het mededingingsrecht. Preadvies 2007 uitgebracht voor de Vereniging voor Burgerlijk Recht* (2007), p. 14. Differently: M. Hazelhorst, 'Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far', (2010) *ERPL*, no. 4, p. 761.

³⁰ M. Hazelhorst, 'Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far', (2010) *ERPL*, no. 4, p. 761.

³¹ J. Kortmann, *The Tort Law Industry* (2009), p. 14.

³² Directive 2014/104/EU, OJ L 349, 5.12.2014, p. 2, consideration (5).

³³ Directive 2014/104/EU, *ibid.*, consideration (3).

³⁴ Hartlief, *supra* note 28, p. 568.

however, hampers private enforcement.³⁵ Indeed, other conditions related to damage and causation need to be present as well in order for a situation of liability to exist and liability law to come into action. As soon as the proof of these elements on a micro level is lacking, access to enforcement in private law has hampered.³⁶ Hence, the starting point still is the claim for compensation by the particular claimant, again stressing tort law's primary compensatory function, whereby a potential positive behavioural influence after sustaining that claim is a by-product of that pursuit of compensation.³⁷ In that regard, one should note that the compensation under Belgian and Dutch tort law is tailored to the scope of the damage so that there are no *punitive damages*.³⁸ Thus, the enforcement function of tort law can only be perceived as grafted onto the primary compensatory function, as will be discussed later on in the fundamental approach to the instrumentalisation of tort law.

On the Belgian national level, the role of tort law for the private enforcement of competition law is best shown by the judgment of the commercial court of Ghent (Dendermonde division) of 23 March 2017.³⁹ In this case, compensation was claimed by independent distributors of Honda motorcycles from the official Belgian importer of Honda motorcycles, since the first had suffered a loss due to competition law infringement by the latter. Important are the court's considerations with regard to the compensation. Given the difficulty in assessing the damage, the court resorted to an *ex aequo et bono* assessment of the damage. According to the court, the difficulties in estimating the scope of the damage may not lead to the denial of compensation. Otherwise, two essential goals of the compensation in the case at hand would be ignored. First, there is the compensatory function so that the injured parties should be compensated by those who wrongfully caused them harm. Second, the court points at the private enforcement function of tort law. Infringers of competition law must be held liable and ordered to compensate for the damage, so that future infringements are discouraged and competition law rules will be respected in a better way. Again, the engrafting of the non-compensatory enforcement goal onto the primary compensatory goal is visible.

2.2. Bottom-up

After the use of liability law by policy makers and regulators, an instrumental movement bottom-up has become apparent. Citizens furthering their own policy agenda have caused the rise of public-interest related civil procedures,⁴⁰ e.g. in defence of human rights, public health or environmental protection.⁴¹ This bottom-up instrumentalisation does not originate as a policy but is a reaction to a certain policy that it aims to challenge. Thanks to liability law, individuals or smaller players stand up for their interests and send a powerful signal to big(ger) and usually more powerful actors.⁴² Furthermore, one can notice the emergence of organisations that seize the civil court in order to protect societal interests.⁴³ This *public interest litigation* deserves further attention.

2.2.1. Public interest litigation

When claimants attempt to further societal interests via the judge, the notion of *public interest litigation* is brought up.⁴⁴ Although disputes in the general interest or public interest litigation are hard to define,⁴⁵

³⁵ Ibid. and p. 572.

³⁶ A.L.M. Keirse, 'Alterum non laedere; voorkom schade! Grondbeginsel van het aansprakelijkheidsrecht', in S.D. Lindenbergh (ed.), *Een nieuwe aanpak; inleidingen gehouden op het symposium van de Vereniging van Letselschade Advocaten 2010* (2010), p. 4.

³⁷ Hartlief, supra note 28, pp. 571–572.

³⁸ See inter alia the references by P. Gillaerts, *Deviating from the principle of full compensation in Belgian tort law* (2017), p. 70.

³⁹ Kh. Gent (afd. Dendermonde) 23 March 2017, No. A/12/02970, *TBM* 2017, no. 2, p. 162.

⁴⁰ Hartlief, supra note 19, p. 2911.

⁴¹ L. Enneking & E. de Jong, 'Regulering van onzekere risico's via *public interest litigation*?', (2014) *NJB*, no. 23, pp. 1543–1544.

⁴² W. Vandenbussche, 'Aansprakelijkheid voor verslavende pijnstillers', (2018) *Juristenkrant*, no. 371, p. 16.

⁴³ Enneking & de Jong, supra note 41, p. 1542.

⁴⁴ Belgium: H. Schoukens, 'Toegang tot de Europese rechter in milieuzaken (deel 1)', (2018) *NJW*, no. 375, p. 42; H. Schoukens & A. Soete, 'De Nederlandse klimaatoverwinning: revolutie met recht of *common sense*?', (2015) *TOO*, no. 3, p. 386; A. Soete & H. Schoukens, 'Klimaatverandering in de rechtbank', (2016) *NJW*, no. 338, p. 187. The Netherlands: E.R. de Jong & T.E. van der Linden, 'Rechtspreken met oog voor macro-effecten?', (2017) *NTBR*, no. 1, p. 8; Enneking & de Jong, supra note 41, p. 1542.

⁴⁵ Belgium: L. Van den Eynde, 'Public Interest Litigation', (2018) *JDE*, no. 245, p. 1. It encompasses different things, according to J. Fawkes, 'Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge', (2012) *Cambridge Journal of International and Comparative Law*, no. 3, pp. 237 and 253. See also S.L. Cummings & D.L. Rhode, 'Public Interest Litigation: Insights from Theory and Practice', (2009) 36 *Fordham Urban Law Journal*, no. 4, p. 605.

in essence it concerns disputes whereby effects are intended which reach beyond the individual case.⁴⁶ It encompasses legal procedures that are deployed by private actors with the aim of changing the societal *status quo* that is deemed undesirable.⁴⁷ They aim at change in the legal system and/or in the 'real' world.⁴⁸ Characteristics of such litigation are therefore the future-oriented nature of such procedures,⁴⁹ their exceeding of purely private interests, their emphasis on ideal aspects and the support (and sometimes even the initiative of beginning legal proceedings itself) of associations for the protection and the promotion of various societal interests.⁵⁰ The purpose is not the compensation for suffered harm, but the adjustment of future behaviour.⁵¹ In some instances claimants indeed primarily seek an improvement for the future.⁵² Think of cases in which battles are fought in the judicial arena especially for future generations. For example in the Dutch climate case between Urgenda and the Dutch state, an adjustment of the Dutch government's policy on reducing the emission of greenhouse gases is being sought in favour of both present and future generations.⁵³

These public interest-oriented proceedings can be administrative in nature, and in the Belgian setting one could also include criminal proceedings launched by a civil party, but the emphasis (here) lies on civil proceedings. These are initiated either against the authorities with the aim of influencing their policy, or against enterprises in order to have an impact on their internal and external⁵⁴ activities and policy.⁵⁵ Think, once again, of the climate cases which have arisen everywhere,⁵⁶ so that some speak of climate change public interest litigation⁵⁷ or of environmental public interest litigation⁵⁸. For example, in Germany a Peruvian farmer has targeted the German energy concern RWE aiming to hold the company liable for climate damage.⁵⁹ Another example of public interest litigation is the Dutch *Shell* case which relates to foreign direct liability claims. By means of four short examples, i.e. foreign direct liability claims, climate cases, human rights enshrined in the European Convention on Human Rights (ECHR) and risk regulation, the following paragraphs paint a picture of public interest litigation.

2.2.2. Examples of bottom-up development

A first example of the bottom-up development relates to the so-called foreign direct liability claims.⁶⁰ They concern claimants who start legal proceedings by submitting civil liability claims before the courts of their homeland against (parent companies of) multinationals. The cause for their claims is the damage to (third party interests related to) humankind and the environment as a result of the companies' local activities in other (developing) countries. Typical for these cases is their reliance on tort law, their public interest nature because of the broader socio-political impact. It would go too far to discuss all such cases here in depth. By way of illustration, one (line of) case(s) is mentioned: *Shell*.

⁴⁶ C. Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?', (2008) *Journal of Environmental Law*, no. 3, para. 2.1; L. Van den Eynde, 'Public Interest Litigation', (2018) *JDE*, no. 245, p. 1.

⁴⁷ Enneking & de Jong, supra note 41, p. 1543; P. Gillaerts, 'Juridiseren milieuzaken: Geen vuiltje aan de lucht?', (2018) *Juristenkrant*, no. 362, p. 10.

⁴⁸ Fawkes, supra note 45, p. 241.

⁴⁹ A. Chayes, 'The Role of the Judge in Public Law Litigation', (1976) 89 *Harvard Law Review*, no. 7, pp. 1296 and 1298.

⁵⁰ Enneking & de Jong, supra note 41, p. 1543.

⁵¹ *Ibid.*, p. 1543.

⁵² T. Hartlief, 'De meerwaarde van het aansprakelijkheidsrecht', in T. Hartlief & S. Klosse (eds.), *Einde van het aansprakelijkheidsrecht?* (2003), p. 6.

⁵³ Rechtbank Den Haag 24 June 2015, ECLI:NL:RBDHA:2015:7145; Gerechtshof Den Haag 9 October 2018, C/09/456689/ HA ZA 13-1396, ECLI:NL:GHDHA:2018:2591.

⁵⁴ Compare with the foreign direct liability claims discussed later on in this article in §2.2.2.

⁵⁵ Enneking & de Jong, supra note 41, p. 1543.

⁵⁶ See inter alia A. Soete & H. Schoukens, 'De klimaatzaak: een moeilijke evenwichtsoefening in rechterlijk activisme?', (2015) *TOO*, no. 2, pp. 146–166.

⁵⁷ See, for example, O. Van Geel, 'Urgenda and Beyond: The past, present and future of climate change public interest litigation', (2017) *Maastricht University Journal of Sustainability Studies*, no. 3, pp. 56–72.

⁵⁸ See, for example, E.P. Amechi, 'Strengthening environmental public interest litigation through citizen suits in Nigeria: learning from the South African environmental jurisprudential development', (2015) 23 *African Journal of International and Comparative Law*, no. 3, pp. 383–404.

⁵⁹ X, 'Klimawandel. Peruanischer Bauer bringt RWE vor Gericht', *Zeit*, 30 November 2017, <<https://www.zeit.de/wirtschaft/2017-11/klimawandel-rwe-klage-bauer-peru>> (last visited 13 September 2019). See also <<http://climatecasechart.com/non-us-case/liiuya-v-rwe-ag/>> (last visited 13 September 2019) for the judgment in the first instance and the appeal order.

⁶⁰ Hartlief, supra note 19, p. 2911.

In a nutshell, the Dutch *Shell* cases⁶¹ concern civil liability claims which were brought by four Nigerian farmers supported by the Dutch NGO Milieudefensie against the parent company Royal Dutch Shell and its Nigerian subsidiary. The aim was to hold them liable for the environmental pollution in the Niger delta due to their activities, namely the damage as a result of oil spillage on several occasions in the vicinity of three Nigerian villages.⁶² Applying Nigerian tort law, The Hague court eventually found the oil spillage to be the result of sabotage and not of poor maintenance, for which the subsidiary could not be held liable. Furthermore, the court decided that under the applicable law there was no legal duty for the parent company to prevent its subsidiaries from harming third parties, except in (limited) particular circumstances. Still, there was a bright spot for the claimants, since the parent company was held liable for the damage as a result of two instances of oil spillage. These were also the result of sabotage, but the parent company had been negligent in how the site had been left and secured so that insufficient measures had been taken against the risk of sabotage.⁶³

A second example relates to climate cases by citizens and organisations against their own authorities, which have also been launched in Belgium and the Netherlands. These are typical examples of public interest litigation and are situated within the increasing use of proceedings before civil judges with the purpose of regulating environmental issues.⁶⁴ In climate cases, compensation is not the principal goal. These cases concern forcing authorities to change their policy and by doing so forcing operators to take measures.⁶⁵ There are also climate cases on the EU level, such as a case brought before the General Court against the European Parliament and the Council by ten families. They argue that EU legislation offers insufficient protection and contains inadequate objectives in the battle against global warming. This allegedly constitutes a threat to their human rights. Among other things, they demand a compensation for their damage on the basis of the extra-contractual liability of the European Union. They do not have a monetary compensation in mind but an injunction and the reduction and prevention of further damage to the maximum extent possible.⁶⁶ Nevertheless, it is clear that the claim is fitted within the compensatory design of tort law insofar as the injunction is perceived as a sort of compensation in kind.

Thirdly, on the international level, the enforcement of human rights that are laid down in international treaties such as the ECHR illustrates and starts from an instrumental approach towards tort law. On the basis of state liability governments are compelled to modify the current law in order to enforce changes on the national level.⁶⁷ Thus, there is movement within liability law,⁶⁸ but also because of that same liability law.⁶⁹ Indeed, compensation awarded on the basis of (civil) liability law provides content for the fundamental rights and ensures that they are taken seriously.⁷⁰ In that regard, legal protection is sometimes perceived as the common goal of the ECHR and liability law.⁷¹

A fourth example of the (instrumental) use of liability law for broader purposes which transcend the relation between the liable person and the sufferer of the loss relates to the issue of (judicial) risk regulation. Risk regulation concerns the question of how to deal with potential, adverse effects of behaviour that implies the risk of these effects.⁷² In that case, one looks beyond the settlement of the risen legal dispute between the parties to the court case. Risk regulation includes generating norms for dealing with health or

⁶¹ Rechtbank Den Haag 30 januari 2013, No. C/09/337050 / HA ZA 09-1580, ECLI:NL:RBDHA:2013:BY9854; Gerechtshof Den Haag 18 december 2015, No. 200.126.849-01 200.127.813-01, ECLI:NL:GHDHA:2015:3587.

⁶² Hartlief, supra note 19, p. 2911.

⁶³ Regarding these cases in their broader context, see L. Enneking, 'Zorgplichten van multinationals in Nederland. "Second best" zo slecht nog niet?', (2013) *NJB*, no. 12, pp. 744–750; L. Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case', (2014) 10 *Utrecht Law Review*, no. 1, pp. 44–54.

⁶⁴ Schoukens & Soete, supra note 44, pp. 385–386; H. Schoukens, 'De uitspraak van de *US District Court* van 10 november 2016: een opstap naar het klimaatproces van de eeuw? – *The Next Generation v Trump?*', (2016) *TOO*, no. 4, pp. 512–513.

⁶⁵ E. de Jong, 'Rechterlijke risicoregulering bij gezondheids- en milieurisico's', (2015) *AA*, p. 874.

⁶⁶ See the application, freely available at <<https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/05/application-delivered-to-european-general-court.pdf>> (last visited 13 September 2019), esp. paras 385–388.

⁶⁷ Viney, supra note 15, pp. 90–91. Compare with The Netherlands: S.D. Lindenbergh, 'Vermogensrechtelijke remedies bij schending van fundamentele rechten', in G.E. Van Maanen & S.D. Lindenbergh (eds.), *EVRM en privaatrecht: is alles van waarde weerloos? Preadviezen 2011 uitgebracht voor de Vereniging voor Burgerlijk Recht* (2011), p. 81.

⁶⁸ Viney, supra note 15, pp. 90–91. Compare with The Netherlands: Lindenbergh, *ibid.*, p. 81.

⁶⁹ Compare J.M. Emaus, *Handhaving van EVRM-rechten via het aansprakelijkheidsrecht. Over de inpassing van de fundamentele rechtsschending in het Nederlandse burgerlijk recht* (2013), pp. 243–254.

⁷⁰ Emaus, *ibid.*

⁷¹ C.C. van Dam, *Aansprakelijkheidsrecht, Deel 1, Rechtsbescherming, rechtsmiddel en rechtsherstel* (2015), p. 18.

⁷² Enneking & de Jong, supra note 41, pp. 1545–1546.

environmental risks that also matter for parties outside of the court case (e.g. a certain industry).⁷³ It is about regulation through litigation.⁷⁴ The aim is not always to force the authorities or a specific enterprise to take a step in the desired direction. Some claims for compensation are brought to clarify the legal state of affairs regarding a certain environmental or health risk.⁷⁵ One should, however, bear in mind that in Belgian and Dutch law a judicial decision is in principle only binding upon the parties to the case.⁷⁶ Still, there are ways in which the individual case has a wider impact. As goes for the top-down development, the emphasis in bottom-up cases may be on the effects beyond the individual case. That is the way attention is drawn to how to move beyond the individual case.

2.2.3. Moving beyond the individual case

A first possibility is to aim high in choosing the defendant. After all, when claims are brought against the state, their outcome will have consequences for the pursued policy and thus for the industries and actors not involved in the proceedings but influenced by policy concerned. In that regard, some Dutch authors point to injunctions on the basis of Article 3:296 (Dutch) BW,⁷⁷ possibly in combination with a declaration in law.⁷⁸ Examples of this are the decision of the Dutch Supreme Court (Hoge Raad) on the exception to the smoking ban for small bars,⁷⁹ as well as the *Urgenda* case.⁸⁰ These cases must be situated in a growing tendency of citizens or associations to promote public interests via the civil judge and to move the authorities to implement a certain risk regulation via the judge.⁸¹

Although a decision is only binding *inter partes*, it may have practical consequences outside of the legal relation between the parties to the case. As the Dutch Supreme Court (Hoge Raad) has put it:

a decision in general wordings as in the present case, also only grants rights to the parties who have obtained it, although third parties can benefit from the practical consequence, which consists of the expectation that the judge in similar cases will decide similarly.⁸²

In that sense, the person of reference for interpreting the general standard of care, e.g. the so-called *bonus pater familias*, transcends the individual procedure.⁸³ That signalling function is clearly visible in the Netherlands in judgments of the Dutch Supreme Court (Hoge Raad) in which it supplies handles for future conduct in the form of general points of departure or points of view.⁸⁴ Yet, one should wonder whether tort law with its open norms, even with such handles, can create enough predictability. When a judge only interprets the open norm of the general standard of care within the framework of a tort claim, one may wonder whether tort law is sufficiently informative to be effective.⁸⁵ By its nature, an open norm is interpreted by

⁷³ de Jong, supra note 65, p. 872.

⁷⁴ See on this concept in the USA inter alia P. Luff, 'Risk Regulation and Regulatory Litigation', (2011) 61 *Rutgers Law Review*, no. 1, pp. 173–215; W.K. Viscusi (ed.), *Regulation through litigation* (2002), pp. viii and 369 p.; B. Yandle et al., 'Regulation by litigation', (2011) 5 *Regulation & Governance*, no. 2, pp. 241–249, especially pp. 242–243.

⁷⁵ de Jong, supra note 65, p. 874.

⁷⁶ See in Belgium: Art. 6, Judicial Code (*Ger.W.*). In The Netherlands: Art. 12, Law of 15 May 1829 on general provisions with regard to the legislation of the Kingdom, *Stb.* 1830, 41 together with *Stb.* 1838, 12.

⁷⁷ '1. Where a person is legally obliged towards another person to give, to do or not to do something, the court shall order him, upon a request or claim of the entitled person, to carry out this specific performance, unless something else results from law, the nature of the obligation or a juridical act.

2. Where a person is legally obliged to perform something under an effective date or expiration date or under a condition precedent or subsequent, the court may order him to do so with observance of that time stipulation or condition.' (unofficial translation, <<http://www.dutchcivillaw.com>> (last visited 13 September 2019)).

⁷⁸ de Jong, supra note 65, p. 873; T. Hartlief, 'Privaatrecht in nood', in *Handelingen Nederlandse Juristen-Vereniging. 2014-I* (2014), pp. 137–138.

⁷⁹ HR 10 October 2014, ECLI:NL:HR:2014:2928.

⁸⁰ Rechtbank Den Haag 24 juni 2015, ECLI:NL:RBDHA:2015:7145.

⁸¹ de Jong, supra note 65, p. 874.

⁸² Author's translation. HR 1 juli 1983, ECLI:NL:PHR:1983:AD5666, concl. Adv. Gen. MOK, *NJ* 1984/360, annotated by M. Scheltema, consideration 3.4.

⁸³ A.C.H. Franken, 'Wie is de "maatmens benadeelde"?' (2014) *AV&S*, no. 1, para. 2.

⁸⁴ See the references by de Jong, supra note 65, p. 874.

⁸⁵ Engelhard & Van Maanen, supra note 15, para. 10; Hartlief, supra note 15, para. 14; Hartlief, supra note 28, p. 573; C.C. van Dam, *Zorgvuldigheidsnorm en aansprakelijkheid* (1989), p. 216. Compare Deakin et al., supra note 15, p. 45. See also T. Hartlief, 'Gezichtspunten, vingerwijzingen en vuistregels. Kan dat anders?', in A.L.M. Keirse et al. (eds.), *Beter Burgerlijk Recht* (2012), pp. 9–15; S.D. Lindenbergh & H.N. Schelhaas, 'Met gezichtspunten naar een preciezer privaatrecht?', in S.D. Lindenbergh & H.N.

legal practice.⁸⁶ What is more, the handles are often formulated in a general way, which, together with the case-by-case approach, makes it difficult to assess the extent to which a particular point of view has been decisive and to predict how it will manifest itself in future cases.⁸⁷ As the Commission for the reform of liability law has acknowledged, the behavioural norm of the general standard of care is in reality determined *a posteriori* so that there is no *a priori* determined rule of conduct on the basis of which the tortfeasor could preventively alter his/her behaviour.⁸⁸

The influence of a procedure does not only depend on its outcome. Even though climate cases, for example, have overcome a number of judicial hurdles (e.g. causality and sufficient interest), one should not think lightly of their success as a means of pressure, regardless of the judicial success.⁸⁹ By bringing a situation of injustice to light, by creating awareness and by bringing about a broader change, procedures potentially also have impact if the claim is dismissed.⁹⁰ For example, it can get a societal debate going which leads to an amendment of the law. In that regard, risk regulation potentially constitutes a side effect of the procedure of judgment.⁹¹ Similarly, individual law enforcement can lead to the side effect of prevention on a general level.⁹² It is important to look beyond public accountability through the procedure as well, to the bigger picture of the so-called macro-effects, such as stimulating the beginning of similar procedures or the taking of all sorts of precautions.⁹³ That focus on the societal impact of litigation, besides the outcome of the particular procedure, is sometimes reflected in the notion of impact litigation.⁹⁴

The level of the macro-effects should not be left out of the debate on the instrumentalisation of tort law. Within legal doctrine, some authors argue in favour of judges taking the macro-effects of their decisions into account more.⁹⁵ One can consider three types of macro-effects,⁹⁶ all of which have in common that they transcend the relation between the individual parties to the procedure within the single dispute. On the one hand, there are two types of legal macro-effects, whilst on the other hand, there are also non-legal macro-effects. The legal macro-effects or external effects of a judgment are the third party effects, i.e. the effects for parties that are not involved in the dispute, as well as the effects of a judgment that interprets legal concepts. For the first type, think of the finding by a judge – read: creation by the judge – of the existence of a certain claim, such as the claim to restoration of the balance in case of neighbouring nuisance. Since the jurisprudential acknowledgment of that claim in a particular dispute, third parties now know of its existence and might launch similar claims. For the second type, one should think of the interpretation of the general standard of care. If according to that standard a normally careful and forward-looking doctor in certain circumstances is obliged to explicitly inform patients of the risks of a particular treatment, other doctors in similar circumstances will take that interpretation into account. Besides these legal macro- or dispute transcending effects, there are also non-legal effects. This concerns, for example, the extent to which legal subjects are actually deterred from acting recklessly by the threat of having to compensate resulting damage on the basis of tort law. Or a change of policy as a result of the start of or decision in a climate case. This is not the place to elaborate on the need of information about macro-effects, the problems which go along with it, such as generic lacks of knowledge, no reliable or complete information by the parties, ambiguous

Schelhaas (eds.), *Precies privaatrecht* (2016), p. 10. Compare C. Hodges, *Law and Corporate Behaviour. Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (2015), pp. 52–53.

⁸⁶ A.S. Hartkamp, *Aard en opzet van het vermogensrecht in Monografieën BW*, No. A1, (2017), p. 30.

⁸⁷ de Jong, supra note 65, p. 878; Hartlief, supra note 85, pp. 9–15; W.H. van Boom, *Structurele fouten in het aansprakelijkheidsrecht* (2003), p. 5.

⁸⁸ Explanatory memorandum of the bill concerning the insertion of the tort law provisions in the new Civil Code, drafted by the Commission for the reform of liability law which was established by Ministerial Order of 30 September 2017, 30 March 2018, freely available at <https://justice.belgium.be/sites/default/files/memorie_van_toelichting_aansprakelijkheidsrecht.pdf> (last visited 13 September 2019), p. 41.

⁸⁹ C.H. Van Dijk, 'Privaatrechtelijke aansprakelijkheid voor opwarming van de aarde', (2007) *NJB*, no. 45/46, p. 2863.

⁹⁰ Cummings & Rhode, supra note 45, p. 648; A. Klaassen, 'Public Litigation and the Concept of "Deference" in Judicial Review', (2015) 18 *Potchefstroom Electronic Law Journal* 2015, no. 5, pp. 1904–1905.

⁹¹ de Jong, supra note 65, pp. 874–875.

⁹² S.D. Lindenberg, *Schadevergoeding: algemeen, deel 1 in Monografieën BW*, No. B34, (2014), p. 8.

⁹³ See, more elaborately de Jong & van der Linden, supra note 44, pp. 4–16.

⁹⁴ E.R. de Jong, 'Strijd over luchtkwaliteit: de maatschappelijke processen achter risicoregulering', (2016) 37 *Recht der Werkelijkheid*, no. 2, p. 59; de Jong & van der Linden, supra note 44, p. 8.

⁹⁵ Hartlief, supra note 17, p. 28; J. Spier, 'Balancing Acts: How to Cope With Major Catastrophes, particularly the Financial Crisis', (2013) 4 *Journal of European Tort Law*, no. 2, p. 227; J. Spier, 'Rechtsontwikkeling met beleid en kennis van zaken', in G. Van Dijk et al. (eds.), *Cirkels. Een terugblik op een vooruitziende blik. Liber Amicorum Jan Vranken* (2013), para. 3.

⁹⁶ See E. de Jong, 'De alles overziende rechter?' in T. Hartlief & M.G. Faure (eds.), *De Spier-bundel. De agenda van het aansprakelijkheidsrecht* (2016), p. 52; de Jong & van der Linden, supra note 44, para. 2.1.

information, lack of expertise, or the lack of time and resources, nor is it the place to evaluate the possible solutions.⁹⁷ Yet, it is important to keep these macro-effects in mind. Within the increasing instrumentalisation tendency (both top-down and bottom-up) judges will be confronted with the macro level ever more often and especially more directly.⁹⁸

The examples given illustrate the use of tort law against the authorities or enterprises. Evidently, the impact can be greater in those instances because of the size of the opposite party, but this does not mean that procedures against individuals escape the instrumentalisation tendency. By way of example, in a French case 34 fans of Michael Jackson had initiated legal proceedings in the aftermath of his death before the *juge de proximité* of Orléans against Doctor Murray.⁹⁹ The latter had been found guilty by an American court of administering a lethal dose to Michael Jackson. The claimants demanded a symbolic euro to compensate for their alleged moral damage. According to the judge, even in the case of sentencing someone to paying a compensation that is limited to a symbolic euro, it is necessary to prove that there actually is moral damage. Only five claimants succeeded in proving this, *inter alia* by means of medical certificates, so that their claim was allowed. An annotator of the judgment observed that the actual purpose of the claimants in bringing the claim (as supported by their statements in the media) had been to gain access to the tomb of Michael Jackson, which was not possible for everyone at that time. Thus, they found the tort proceedings to be a useful instrument in reaching that goal.¹⁰⁰ Even though the judge rightly pointed out that actual damage is still required, this example shows how a wide notion of damage can be a helping hand for instrumentalisation.

Liability law, including tort law, can be a weapon in the battle against past or present injustice, but where citizens take the lead and want to move (their own) authorities to policy which is (deemed to be) better, they also wield tort law as a wrecking bar to prevent (further) damage rather than to have damage compensated.¹⁰¹ Other remedies for redress (in a broad sense) come to mind, such as declarations in law or injunctions.¹⁰² The majority of Dutch public interest-related civil cases have been founded on Article 3:296 (Dutch) BW which concerns injunctions based on a (threat of or a present) wrongful act within the meaning of the Articles 6:162 and 6:163 (Dutch) BW.¹⁰³ Note, however, that insofar as these other remedies are not considered as forms of compensation (in kind) and insofar as they are not the legal consequence of a situation of extra-contractual liability but rather result from a legal obligation (other than to compensate for wrongfully caused damage), they are autonomous remedies outside of tort law.

3. Fundamental compensatory limit to non-compensatory goals

Although the problems with the instrumental employment of tort law might differ, e.g. the issue of state liability is more strongly present in the bottom-up movement, both the top-down and the bottom-up developments encounter the same fundamental limitation: the primary compensatory function of tort law. The aforementioned examples illustrate this limit: private enforcement of competition law operates through individual parties claiming compensation for their individual losses; the French fans of Michael Jackson needed to prove actual moral damage for which they sought compensation. If (general) tort law is relied upon, then the outcome sought needs to be individual compensation.

3.1. Prevention

The principal function of tort law being compensation, other functions can also be perceived. A first important non-compensatory function is prevention or deterrence.¹⁰⁴ The key idea is that tort law acts in a deterrent way. Legal subjects are thought to refrain from causing damage because they could be held liable

⁹⁷ See de Jong, *ibid.*, p. 55 et seq.; de Jong & van der Linden, *supra* note 44, para. 4 et seq.

⁹⁸ See also J. Spier, 'Gedachten over een vastgelopen stelsel', (2014) *AV&S*, no. 6 and the sources mentioned by Hartlief, *supra* note 17, pp. 27–28.

⁹⁹ J. proximité Orléans 11 February 2014, No. 91-13-000432, *Resp. civ. et assur.* 2014, no. 5, comm. 140, annotated by S. Hocquet-Berg.

¹⁰⁰ S. Hocquet-Berg, case annotation on J. proximité Orléans 11 February 2014, No. 91-13-000432, *Resp. civ. et assur.* 2014, no. 5, comm. 140.

¹⁰¹ Hartlief, *supra* note 19, p. 2911.

¹⁰² *Ibid.*

¹⁰³ de Jong & van der Linden, *supra* note 44, p. 8; Enneking & de Jong, *supra* note 41, p. 1550.

¹⁰⁴ Belgium: H. Bocken, 'Vergoeding van medische schade: aansprakelijkheid of solidariteit?', (2009) *TPR*, no. 1, p. 17; Cauffman & Weyts, *supra* note 15, p. 315; Cornelis, *supra* note 15, p. 647; D. Simoens, 'Evolutie aansprakelijkheidsrecht', 1980–81, (1961) 1965; W. van Gerven, with the cooperation of A. Van Oevelen, *Verbintenissenrecht* (2015), p. 328; Vansweevel & Weyts, *supra* note 15, p. 7. Germany: Koziol, *supra* note 15, p. 78; Spindler & Rieckers, *supra* note 15, p. 37. France: J.-S. Borghetti, 'Peut-on se passer de la causalité en droit de la responsabilité?', in Y. Lequette & N. Molfessis, *Quel avenir pour la responsabilité civile?* (2015), p. 21; Buffelan-Lanore & Larribau-Terneyre, *supra* note 15, p. 684; Rétif, *supra* note 15, para. 1 (conditionally); Viney, *supra* note 15,

for the damage and be obliged to compensate, which in the end results in behaviour that is more careful¹⁰⁵ or in a different mind-set.¹⁰⁶ Both by imposing a duty to compensate for caused damage and the threat of imposing such duty liability law gives an incentive for more careful conduct.¹⁰⁷

The idea of prevention is also visible in the Principles of European Tort Law (PETL).¹⁰⁸ Prevention is present in the provisions 2:104 (preventive expenses)¹⁰⁹ and 10:101 (nature and purpose of damages)¹¹⁰ of the PETL.¹¹¹ They show that prevention is grafted onto the compensatory function, since the preventive function cannot be detached from the notions of recoverable damage and damages in the aforementioned provisions. The comments on Article 2:104 PETL clearly point at the existence of a preventive function of tort law besides the compensatory function.¹¹² Furthermore, the explanation regarding Article 10:101 PETL explains that compensation is the primary goal but prevention is also an accepted goal. Whether prevention is (still) to be regarded as a (primary) function of tort law is questioned by some authors.¹¹³ As concluded by the French author Viney, many authors generally (or at least in theory)¹¹⁴ subscribe to the idea of tort law having a preventive function, yet, at the same time they question the actual preventive effect.¹¹⁵

3.2. Enforcement

A second non-compensatory function is the regulatory, normative or enforcement function.¹¹⁶ It concerns the role of tort law in enforcing, protecting and renewing the societal order.¹¹⁷ The notion of (law) enforcement is used in a broad sense, meaning getting someone to comply with (legal) rules.¹¹⁸ Thus, it concerns different but related elements: maintaining existing rules, creating new rules in order to enforce and to protect the societal order (and the rights of legal subjects) and determining the legal norm that way. Compensation for damage caused by wrongful behaviour provides for enforcement *through* private law,¹¹⁹ namely through tort law. The idea is that the norm is (better) complied with because the contravention of the norm results in

p. 87. The Netherlands: Engelhard & Van Maanen, supra note 15, para. 10 (function but no goal); Hartlief, supra note 15, para. 5; A.L.M. Keirse, 'Een aansprakelijkheidsrecht dat *ubuntu* ademt', in T. Hartlief & M.G. Faure (eds.), *De Spierbundel. De agenda van het aansprakelijkheidsrecht* (2016), pp. 79–80; Loth, supra note 15, p. 791; B.C.J. Van Velthoven & P.W. van Wijck, 'Medical liability: do doctors care?', (2012) *Recht der Werkelijkheid*, no. 2, p. 28. See, however, Spier et al., supra note 15, p. 8. In general: Abraham, supra note 15, p. 18; Cane, supra note 15, p. 207; P. Cane, *Atiyah's Accidents, Compensation and the Law* (1999), p. 361; Deakin et al., supra note 15, pp. 43–44; Magnus, supra note 15, p. 185; H. Stoll, *Consequences of Liability: Remedies in International Encyclopedia of Comparative Law*, Vol. XI, *Torts* (1972), p. 5; Tunc, supra note 15, p. 88. Contra for England: P.S. Atiyah, *The Damages Lottery* (1997), pp. 162 and 165.

¹⁰⁵ Belgium: Cornelis, supra note 15, p. 647; Cornelis, supra note 15, p. 12; Vansweevelt & Weyts, supra note 15, p. 7. Regarding the possibility of recourse by an insurance institution vis-à-vis the liable person, see also L. Cornelis, *Samenlevingsgericht (aansprakelijkheids) recht* (2017), p. 27. England: Atiyah, *ibid.*, p. 162. Germany: Koziol, supra note 15, p. 78; Spindler & Rieckers, supra note 15, p. 37. The Netherlands: A.R. Bloembergen, *Schadevergoeding bij onrechtmatige daad* (1965), p. 362; W.H. Drucker, *Onrechtmatige daad* (1912), pp. 2–3; I. Giesen, 'Attribution, Legal Causation and Preventive Effects', in R.W.M. Giard (ed.), *Judicial decision making in civil law* (2012), p. 22; Hartlief, supra note 15, para. 5; van Boom, supra note 15, p. 287. In general: Abraham, supra note 15, p. 18.

¹⁰⁶ J. Spier, 'High noon: prevention of climate damage as the primary goal of liability?', in M. Faure & M. Peeters (eds.), *Climate Change Liability* (2011), p. 48.

¹⁰⁷ W.F. Wertheim, *Aansprakelijkheid voor schade buiten overeenkomst* (1930), pp. 21 and 23. See also M. Faure & M. Peeters, 'Concluding remarks', in M. Faure & M. Peeters (eds.), *Climate Change Liability* (2011), pp. 258–259.

¹⁰⁸ European Group on Tort Law, *Principles of European Tort Law. Text and Commentary* (2005), p. 150.

¹⁰⁹ 'Expenses incurred to prevent threatened damage amount to recoverable damage in so far as reasonably incurred.'

¹¹⁰ 'Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.'

¹¹¹ See also T. Hartlief, 'Heeft het aansprakelijkheidsrecht (de) toekomst?', (2007) *TPR*, no. 3, p. 1658.

¹¹² European Group on Tort Law, supra note 108, p. 38.

¹¹³ W. van Gerven et al., 'Tort law', *Ius commune casebooks on the common law of Europe* (2000), p. 25.

¹¹⁴ van Boom, supra note 15, p. 287. Compare D. Verhoeven, *Productaansprakelijkheid en productveiligheid* (2018), p. 317.

¹¹⁵ Viney, supra note 15, p. 87. Compare Giesen, supra note 105, p. 22; Hartlief, supra note 52, p. 11; Hartlief, supra note 111, p. 1658; J. van Erp, 'Naming en shaming in het contractenrecht?', in W.H. van Boom et al. (eds.), *Gedrag en privaatrecht* (2008), p. 155.

¹¹⁶ Belgium: Cauffman & Weyts, supra note 15, p. 315; Cornelis, supra note 15, p. 649; Cornelis, supra note 15, p. 12; R.O. Dalcq, *Pand.b., v' Responsabilité civile*, pp. 103–104; R. Kruitthof, 'Zal de burgerlijke verantwoordelijkheid inzake verkeersongevallen in Frankrijk afgeschaft worden?', (1964–65) *RW*, no. 40, p. 2001; Vansweevelt & Weyts, supra note 15, p. 10. In general: Cane, supra note 15, pp. 206–207. France: Buffelan-Lanore & Larribau-Terneyre, supra note 15, p. 684; F. Larocque, 'La dissuasion et le *no-fault*', (2001) *Health Law Journal*, no. 9, p. 176 ('*L'éducation*'); M. Mekki, 'La place du préjudice en droit de la responsabilité civile', in D. Mazeaud et al. (eds.), *Le préjudice: entre tradition et modernité* (2015), p. 21; Viney, supra note 15, p. 86. Compare I. Cadet, 'Le droit de la responsabilité des entreprises: Entre la prévention des risques et l'idéologie de réparation', (2005) *La Revue des Sciences de Gestion: Direction et Gestion*, no. 40, p. 81.

¹¹⁷ Vansweevelt & Weyts, supra note 15, p. 10.

¹¹⁸ Compare C.J.J.C. Van Nispen, *Sancties in het vermogensrecht in Monografieën BW*, No. A11, (2018), p. 4.

¹¹⁹ Emaus, supra note 69, pp. 94–95.

liability and the duty to compensate. Liability brings about the effectiveness of the norm.¹²⁰ After pointing at the relationship with the preventive function, the creative aspect of the enforcement function is dealt with. Next, the role of tort law as a means of enforcement among many others is addressed.

It is obvious that the enforcement function is connected with the preventive function. Enforcement entails maintaining something, keeping something or someone in a certain condition or state, taking care that something is not violated.¹²¹ That is possible both by preventing *a priori* a violation and by imposing a duty to compensate after a violation has taken place so that the situation is restored and a new or continual infringement is avoided. In that regard, enforcement is broader than prevention.¹²² Both prevention and enforcement are linked to the aforementioned view towards law as a mechanism to influence behaviour. The instrumentalisation of tort law relates to prevention and enforcement, since it regards prevention of unwanted behaviour as well as stimulating desirable behaviour.¹²³ The behavioural norms can already exist or be created by tort law, which leads to the creative function of tort law as an aspect of its enforcement function.

Thus, through tort law, respect for existing (even unwritten)¹²⁴ legal rules is enforced but likewise new¹²⁵ rules of conduct can be created (and enforced).¹²⁶ From the source of (tort) liability law flow legal rules to enforce and promote, among others, public order, economic prosperity or internal security.¹²⁷ That creative function of liability law, i.e. creating and further developing subjective rights, constitutes an important aspect of the normative role of civil liability law.¹²⁸ Via liability law, rules of conduct can be adapted to the evolving factual circumstances, i.e. societal (technological, economic and other) developments. Because of the regulatory function, tort law as a compensatory system differs from other compensation systems.¹²⁹

The open character of tort law facilitates its creative function. That open character, i.e. the broad prerequisites for liability (such as a general standard of care or a similar open norm, a broad notion of damage which includes moral damage, causality which is only based on the *condition sine qua non* test or *but for* test), allows judges to respond to new social needs,¹³⁰ while sometimes awaiting specific legislation.¹³¹ Through its regulatory function, tort law can fulfil a guiding role for individuals with regard to which behaviour is expected or not accepted.¹³²

Of course, liability law is not the sole instrument for enforcement. The entire system of civil law sanctions is aimed at enforcement.¹³³ Besides civil liability law, legal doctrine points towards other instruments. It concerns criminal law, administrative law,¹³⁴ disciplinary rules, supervisors or other incentives like the fear of getting injured, the moral indignation or reputational harm,¹³⁵ which often are more effective.¹³⁶ A small yet important comment in that regard is the need to look beyond the legal realm and to take into account insights from, for example, the field of psychology in assessing enforcement within private law.¹³⁷ Of course, there are other incentives that the regulatory function has to take into consideration. Tort law only plays

¹²⁰ I. Giesen, *Bewijs en aansprakelijkheid* (2001), p. 245.

¹²¹ As defined in the dictionary Van Dale Online Woordenboek, *v* *handhaven*, meaning 1, <<http://vowb.vandale.be/zoeken/zoeken.do>> (last visited 13 September 2019).

¹²² Compare Lindenbergh, *supra* note 67, p. 75, fn. 17.

¹²³ Hartlief, *supra* note 17, p. 18.

¹²⁴ Hartlief, *supra* note 78, p. 70.

¹²⁵ Cornelis calls this the 'unwritten general standards of care' (*ongeschreven zorgvuldigheidsnormen*), see Cornelis, *supra* note 15, p. 650.

¹²⁶ Hartlief, *supra* note 15, p. 767.

¹²⁷ Verhoeven, *supra* note 114, pp. 316–317.

¹²⁸ Viney, *supra* note 15, p. 94.

¹²⁹ Belgium: Vanswevelt & Weyts, *supra* note 15, p. 10. France: Bacache-Gibeili, *supra* note 15, p. 34; Viney, *supra* note 15, p. 86.

¹³⁰ Hartlief, *supra* note 17, p. 19.

¹³¹ Cauffman & Weyts, *supra* note 15, p. 360.

¹³² Cane, *supra* note 15, p. 206.

¹³³ T.E. Deurvorst, 'Rechtsvorderingen', *Groene Serie Onrechtmatige daad* (2017), loose-leaf, II.1.4. See also Van Nispen, *supra* note 118, p. 4 and 6.

¹³⁴ See, on parallel enforcement (private law and administrative law) in the Netherlands: A.J.C. de Moor-van Vugt et al., 'Parallele handhaving: match of mismatch? Het combinatieprincipe opnieuw bezien', (2017) *NTB*, no. 6, pp. 164–173.

¹³⁵ T. Hartlief, 'Leven in een claimcultuur: wie is er bang voor Amerikaanse toestanden?', (2005) *NJB*, note 16, p. 831.

¹³⁶ Hartlief, *supra* note 15, para 8; Hartlief, *supra* note 28, pp. 570–571; W.H. van Boom, *Effacious Enforcement In Contract And Tort* (2006), p. 27.

¹³⁷ See I. Giesen, 'Handhaven met een toefje psychologie', (2009) *WPNR*, no. 6817, pp. 845–847.

a minor role in this regard,¹³⁸ although that does not mean that it is of no importance,¹³⁹ or has no added value in case of an enforcement deficit.¹⁴⁰ As argued by Hartlief, one should not expect miracles from civil law and rely on public law if real, fundamental change is needed; at the same time, there is nothing wrong in starting bottom-up.¹⁴¹

By enforcing and creating behavioural norms, tort law orders our society. Discussing tort law's function of ordering society, the Dutch author Engelhard has stated that the essence of liability law is to offer a system of rules of conduct to determine among citizens which types of harmful behaviour will (not) pass.¹⁴² It is true that liability law fulfils a creative and ordering function, by means of the interpretation of the general standard of care *in concreto* and through imposing a duty to compensate. However, that function can only be realised where liability law comes into play via a claim for compensation of damage due to (extra-contractual) liability. Furthermore, the determination of what types of harmful behaviour are to be accepted within a certain society implies nothing more or else than analysing the fulfilment of the prerequisites for a situation of extra-contractual liability. On the one hand, it is about distinguishing allowed behaviour from prohibited behaviour, i.e. the element of fault. On the other hand, *harmful* behaviour immediately relates to two other prerequisites: damage and causality. Whilst the determination of (un)accepted harmful behaviour corresponds to the prerequisites for a situation of extra-contractual liability and thus of injustice, tort law's function lies in the reaction to that injustice: compensation.

In line with the aforementioned idea of maintaining social order, some authors believe that tort law is (also) aimed at the protection of the rights of citizens.¹⁴³ Protecting citizens' rights, however, is to a great extent already taken care of through other tort law functions, such as the compensatory function.¹⁴⁴ Injured parties can obtain compensation via (the defensive enforcement function of) tort law which leads to a confirmation and enforcement of their rights.¹⁴⁵ Where judges have the possibility to create (or acknowledge the existence of) new rights, e.g. by means of the open tort law norms like an infringement of a subjective right or a general standard of care (e.g. Article 6:162(2) (Dutch) BW or Article 1382 (Belgian) BW),¹⁴⁶ they contribute to the creative function and allow tort law to fulfil a dynamic and offensive function.¹⁴⁷ Even for the offensive function, the starting point remains the situation of extra-contractual liability from which the duty to compensate emerges. Thus, tort law entails a specific, important reaction to a particular kind of injustice, namely a situation of extra-contractual liability, which contributes to warranting the rights of citizens. Through its preventive function tort law possibly also adds to this enforcement *ex ante*.

Sometimes the enforcement of claims through sanctions is mentioned as a bigger picture that may not be passed over when analysing the goals of liability law. Liability law then encompasses more than compensation due to a wrongful act.¹⁴⁸ Only if a claim is not enforced, resulting in damage, compensation would be put in the forefront so that the law of compensation in that sense merely forms a by-product of liability law.¹⁴⁹ Enforcement through sanctions indeed includes both redress (compensation) and prevention.¹⁵⁰ Nevertheless, it is key to indicate what is precisely understood by these notions. A broad interpretation of the notion compensation (of damage) is to be preferred. This covers more than a solely monetary compensation. Thus, compensation or redress can also comprise of more than a merely financial compensation (damages) and can constitute one of a wide range of sanctions. At the same time, the (broadly understood) redress constitutes the limit for enforcement by tort law.

¹³⁸ Cauffman & Weyts, *supra* note 15, p. 315. Compare Emaus, *supra* note 69, pp. 95–96.

¹³⁹ Hartlief, *supra* note 111, p. 1656.

¹⁴⁰ Belgium: B. Weyts, 'Punitieve elementen in het buitencontractueel aansprakelijkheidsrecht', in J. Rozie et al. (eds.), *Toetsing van sancties door de rechter* (2011), p. 199. The Netherlands: Hartlief, *supra* note 15, para. 8; Hartlief, *supra* note 28, p. 571.

¹⁴¹ T. Hartlief, 'Wat staat het burgerlijk recht te doen?', (2009) *NJB* 2009, no. 25, p. 1553.

¹⁴² E. Engelhard, 'Aansprakelijkheidsregels, empathie en de positie van regresnemers', in G. Van Maanen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed* (2003), p. 235, §4 D.

¹⁴³ Cane, *supra* note 15, p. 206; Tunc, *supra* note 15, p. 87. See also R.O. Dalcq, *supra* note 116, p. 105; van Dam, *supra* note 71, p. 25.

¹⁴⁴ A. Tunc, *La responsabilité civile* (1981), p. 134; Tunc, *supra* note 15, p. 87.

¹⁴⁵ Tunc, *supra* note 144, p. 134; Tunc, *supra* note 15, p. 87.

¹⁴⁶ Compare W. van Gerven, *Hoe blauw is het bloed van de prins? De overheid in het verbintenissenrecht* (1984), pp. 25–26.

¹⁴⁷ Rijnhout et al., *supra* note 18, para. 1.2.

¹⁴⁸ Lindenbergh, *supra* note 92, pp. 6–7.

¹⁴⁹ *Ibid.*, p. 8.

¹⁵⁰ L.H.C. Hulsman, *Handhaving van recht (rede)* (1965), p. 13.

3.3. Legal protection

In line with the aforementioned wide view on enforcement of claims, the idea of legal protection as primary goal of liability law requires some elaboration. According to the Dutch author van Dam, the goal of liability law is not to compensate damage but to offer legal protection, i.e. to determine the scope of rights and interests, as well as to provide redress in case of the infringement of a right. The maxim 'the loss lies where it falls' thus needs to be replaced by 'everyone is entitled to an effective protection of one's rights and interests'.¹⁵¹ In other words, this view entails that the function of liability law is to determine the protected rights and interests, to determine the available effective remedies to fix the scope of the legal protection, and to determine the available remedies to compensate for the injustice that was done.

Such a view, however, is not easily reconciled with a legal system that wields damage as a core concept, which van Dam himself also immediately concedes.¹⁵² Current Belgian tort law, for example, still takes damage as a starting point. Thus, damage constitutes an essential pillar to build liability on.¹⁵³ Therefore, it is striking that the Van Dale 2018 dictionary defines liability (in the meaning most related to a legal system of liability rules) as 'the characteristic that one can be sued due to caused damage'.¹⁵⁴ In order to overcome that tension, van Dam suggests interpreting damage as an infringement of a right.¹⁵⁵ That way, it immediately becomes clear that even in the described vision one cannot finally avoid the notion of damage. Where van Dam no longer considers damage to be a trigger for liability law, he skips the realisation that damage constitutes an essential part, a prerequisite of a situation of extra-contractual liability. The attention for legal protection and effective remedies against (imminent) injustice must be welcomed, but the perspective taken should be a wide one. Not only through stretching the notion of damage, yet also by means of other remedies such as a declaration in law or an injunction (both in a non-compensatory way), one should make sure that subjective rights are being protected.¹⁵⁶ For that purpose, the distinction between an infringement of a right and the breach of an interest is relevant in Belgian law.

Damage and the infringement of a right are two concepts that may not be treated as equivalent under Belgian tort law. The breach of an interest nowadays¹⁵⁷ suffices in the sense that the (allegedly) injured party must have an interest in preserving a benefit. No infringement of a subjective right to that benefit is needed.¹⁵⁸ What is more, the infringement of a right does not suffice to show damage has been suffered.¹⁵⁹ The loss of a right, according to the Belgian Supreme Court (Hof van Cassatie), indeed does not necessarily give rise to damage.¹⁶⁰ Thus, it is up to the judge who determines the facts on which the case is based to sovereignly judge whether the loss of a subjective right also leads to a less favourable position for the holder of that right.¹⁶¹ Similarly, in the reform of Belgian tort law, the starting point is that there is a breach of an interest and not the infringement of a right. The drafters, nevertheless, have chosen for a more dynamic approach because damage is seen as the consequence of a process that begins with the breach of a legally protected interest which consequently has a patrimonial or extra-patrimonial repercussion.¹⁶²

¹⁵¹ van Dam, *supra* note 71, p. 17.

¹⁵² *Ibid.*, p. 18 and 20.

¹⁵³ In that sense, damage remains an essential prerequisite for extra-contractual liability according to the explanatory memorandum of the bill concerning the insertion of the tort law provisions in the new Civil Code, drafted by the Commission for the reform of liability law which was established by Ministerial Order of 30 September 2017, 30 March 2018, freely available at <https://justice.belgium.be/sites/default/files/memorie_van_toelichting_aansprakelijkheidsrecht.pdf> (last visited 13 September 2019), p. 3.

¹⁵⁴ Van Dale Online Woordenboek, *v* *aansprakelijkheid*, meaning 1, <<http://vowb.vandale.be/zoeken/zoeken.do>> (last visited 13 September 2019).

¹⁵⁵ van Dam, *supra* note 71, p. 18.

¹⁵⁶ Which is also mentioned by van Dam, *ibid.*, pp. 19–20.

¹⁵⁷ In Belgian Supreme Court judgments dating from before 1939, the court mentions the infringement or violation of a right. See, e.g. Cass. 21 March 1935, *Pas.* 1935, I, 194; Cass. 15 June 1937, *Pas.* 1937, I, 186.

¹⁵⁸ Cass. 16 January 1939; *Pas.* 1939, I, 25; Cass. 2 May 1955, *Pas.* 1955, I, 950; Cass. 24 March 1969, *Arr.Cass.* 1969, 690; Cass. (3^{de} k.) 17 October 2016, AR C.11.0062.F, *JLMB* 2018, no. 23, p. 1074, annotated by G. Genicot, *RGAR* 2017, no. 5, p. 15388, annotated by G. Haarscher; H. Bocken et al., *Inleiding tot het schadevergoedingsrecht. Buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels* (2014), pp. 46 and 56; S. Stijns, *Leerboek verbintenissenrecht – Boek 1bis* (2013), p. 101; Vansweevelt & Weyts, *supra* note 15, pp. 634–635.

¹⁵⁹ Vansweevelt & Weyts, *supra* note 15, p. 635.

¹⁶⁰ Cass. (1^{ste} k.) 21 June 1990, AR 8680, *Arr.Cass.* 1989–90, 1358 and *Pas.* 1990, I, 1204; Cass. (2^{de} k.) 19 March 1991, AR 4334, *Arr.Cass.* 1990–91, 755 and *Pas.* 1991, I, 670.

¹⁶¹ L. Cornelis & Y. Vuillard, 'Le dommage' in *Responsabilités. Traité théorique et pratique, Titre I, Dossier 10*, (2000), p. 6.

¹⁶² Explanatory memorandum of the bill concerning the insertion of the tort law provisions in the new Civil Code, drafted by the Commission for the reform of liability law which was established by Ministerial Order of 30 September 2017, 30 March 2018, freely

Only where the infringement of a right also results in damage, will tort law be able to offer any legal protection. That legal protection is grafted onto the remedy of tort law: compensation (in a broad interpretation). Compensation does not constitute a means of the function of legal protection,¹⁶³ but legal protection constitutes a secondary function (or effect) as a result of the primary compensatory function. If not, then damage would not be a prerequisite to provide legal protection via tort law. Thus, the suggested interpretation of the notion of damage as an infringement of a right would have been redundant. However, the perspective of legal protection does have the advantage that other instruments of legal protection, which are thus to be situated outside of tort law, receive enough attention and that the focus is not only on redress but also on the finding of injustice (and consequently of the legal relation between the parties). Indeed, it is true that a claim can also exist if no harm is suffered.¹⁶⁴ The law of obligations (claims) is wider than tort law, yet not every claim on the basis of a(n) (imminent) (infringement of a) right is part of tort law.

3.4. Compensation is limitation

From a purely instrumental view on tort law, judges should be free to use the law as an instrument to help reaching desirable, broader social goals. It is, however, clear that the primary compensatory function of tort law operates as a required vehicle and as a limitation in the pursuit of non-compensatory goals. If tort law is to be used for its secondary non-compensatory goals, such as prevention and enforcement, the compensatory design stemming from the legal basis should be respected. The judgment of the Brussels Court of Appeal of 11 October 2013¹⁶⁵ may serve as an illustration of how a non-compensatory goal has to be engrafted onto the primary compensatory function.

The case concerned a dispute between the non-profit organisation Bulex and Sabam, which is a company that manages royalties. Sabam claimed that Bulex still needs to pay royalties for several events that it had organised. The court reiterated that Sabam's right to compensation is limited to the loss that it had actually suffered and which can be shown to have a causal link with the fault of Bulex. According to the court, Sabam advanced no damage but only asserted that the compensation that it sought was necessary to avoid systematic copyright violations. It wanted to establish a sanctioning regime, disguised as an action for compensation, which guarantees the effectiveness of the protection of copyright in general. Yet, this does not correspond to the principles of civil liability (tort) law. The dissuasive effect of the claimed compensation is insufficient to compensate for damage that has not been actually suffered. Tort law remains compensatory.¹⁶⁶

As stated earlier, tort law is mouldable. The use of broad concepts within tort law grants judges a certain degree of flexibility in dealing with those concepts.¹⁶⁷ There is, however, a price to be paid for that flexibility. Whereas broad and abstract notions allow the law to adapt to changing societal insights,¹⁶⁸ the downside is its concealing nature.¹⁶⁹ The true reasons may stay below the surface of the reasons given in the judgment.

Linked to the primary compensatory function of tort law, damage constitutes both a limit and a means to expand tort law. On the one hand, the Belgian scholar Ronse already stated that without damage, there is no tort claim.¹⁷⁰ On the other hand, tort law can be developed by means of the notion of damage.¹⁷¹ An example is to be found in the new Article 1251 (French) *Code civil* which takes preventive costs into account as an item of loss and, in doing so, results in more prevention through the notion of damage. It states that the expenses made to prevent the imminent realisation of damage, in order to avoid the aggravation of damage or in order to reduce the effects, constitute an item of loss for which compensation can be claimed. Similarly,

available at <https://justice.belgium.be/sites/default/files/memorie_van_toelichting_aansprakelijkheidsrecht.pdf> (last visited 13 September 2019), pp. 8 and 131 et seq.

¹⁶³ As advocated by van Dam, supra note 71, pp. 18 and 23.

¹⁶⁴ Ibid., p. 24.

¹⁶⁵ Brussel 11 October 2013, (2014) *AM*, no. 1, p. 34.

¹⁶⁶ Brussel 11 October 2013, (2014) *AM*, no. 1, p. 38, considerations 21 and 22.

¹⁶⁷ E. Dirix, 'Tort law and legal culture', in J. Potgieter et al. (eds.), *Essays in honour of Johann Neethling* (2015), pp. 141 and 145. See also G. Viney, 'Réparation en nature, cessation de l'illicite et mesures purement préventives', in B. Dubuisson & P. Jourdain (eds.), *Le dommage et sa réparation dans la responsabilité contractuelle et extracontractuelle* (2015), p. 48, a. et seq.

¹⁶⁸ R.H.J. Cox, *Revolutie met recht* (2011), pp. 239–240 and 292.

¹⁶⁹ Dirix, supra note 167, p. 145.

¹⁷⁰ J. Ronse et al., *Schade en schadeloosstelling. Deel I* in *APR* (1984), p. 53. See also for France: P. Brun, *Répertoire de droit civil Dalloz* (2017), v° *Responsabilité du fait personnel*, para. 144; P. le Tourneau, *Responsabilité* (2017), para. 9.

¹⁷¹ As well as to protect (ever more) different interests, see C.M.C. Van Zeeland et al., 'Waar het mensen om gaat en wat het burgerlijk recht daarmee kan', (2003) *NJB*, no. 16, pp. 818 and 824.

the French author Viney observes that even in case of a risk of damage, there is still some sort of damage in the sense of the legitimate expenses in order to prevent its realisation or in the sense of immaterial loss as a result of a fear.¹⁷² Instead of waiting for a risk to materialise and compensating for its negative consequences as being damage, action is taken earlier on in order to prevent those consequences by considering some preventive expenses to be damage as well.

3.5. Private law account of tort law

Although the broad concepts give considerable leeway to judges, in the end there will be a need to fit the discussion into a dispute between parties whereby one party has wrongfully harmed the other. Tort law, indeed, has a very dyadic structure.¹⁷³ Belgian tort law, for example, has been designed from the individual-oriented idea of an injured party and a liable party.¹⁷⁴ As shown earlier with regard to enforcement, this micro level may block the access to the broader goals on the macro level.

Despite the importance of seeing the bigger picture of effects of the macro level, tort law in its dyadic structure remains a means of redress between private parties within a delineated dispute. This private law account of tort law is to be applauded.¹⁷⁵ Tort law constitutes a private law instrument so that its use in the pursuit of public (law) goals should take that private law embedding into account. Otherwise, tort law prerequisites would have to be overstretched or ignored. One could, for example, contemplate the idea of tort claims before any (individual) damage has occurred, yet that would ignore the prerequisite of (individual) damage.¹⁷⁶

4. Conclusion

The question on using tort law in combating legal but potentially lethal products or services begs for a more fundamental question that needs to be answered first. How suitable is tort law in its design or functions to fit within the instrumentalisation tendency? Within a climate of instrumentalisation of private law, tort law is increasingly being used to pursue public (law) goals, such as enforcement and prevention. This instrumentalisation tendency is widespread and has developed both bottom-up and top-down, involving all actors in society. Besides particular issues for both paths of developments, one cannot ignore the primary compensatory function of tort law. Tort law is a private law instrument to provide redress (compensation) to the injured party by the liable party, thus it is construed as a dyadic structure in disputes between parties. This micro level is the arena in which the dispute is being settled, although effects on a macro level should not be ruled out. On the policy chessboard, both public and private players have to respect the fundamental limit of tort law and realise that compensation is the only available piece. It comes in all shapes and sizes, giving considerable leeway to civil judges, but a denaturation of tort law by overstressing the limits of already broad notions such as damage and a general standard of care should be avoided. If not, the design of tort law, which puts compensation to the fore as the legal consequence of a situation of extra-contractual liability, is overlooked.

Competing Interests

The author has no competing interests to declare.

¹⁷² G. Viney et al., 'Les conditions de la responsabilité' in *Traité de droit civil* (2013), p. 7.

¹⁷³ D.A. Kysar, 'The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism', (2018) *European Journal of Risk Regulation*, no. 9, p. 52.

¹⁷⁴ C. Botman, 'De la réparation dans l'hypothèse de l'introduction en droit belge d'une action collective de type opt-out: importation du modèle Québécois?', (2013) *RGAR*, p. 14934¹; B. Dubuisson, 'De la légèreté de la faute au poids du hasard. Réflexions sur l'évolution du droit de la responsabilité civile', (2005) *RGAR*, p. 14009¹; B. Dubuisson, 'Les dommages en série – Responsabilité, assurance et indemnisation (Première partie)', (2015) *RGAR*, no. 4, p. 15182¹.

¹⁷⁵ See Kysar, *supra* note 173, p. 56 et seq. and the listed references.

¹⁷⁶ It suffices to consult the legal basis for Belgium and Dutch tort law, Arts. 1382–1383, (Belgian) BW and Art. 6:162(1), (Dutch) BW respectively, which explicitly mention damage. If one wishes to act on the basis of a legal obligation derived from the general duty of care, it no longer concerns a situation of extra-contractual liability.

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