The Regulatory Function of European Private Law

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10. E-commerce from a private law perspective

Vincenzo Zeno-Zencovich

1. TORTIOUS LIABILITY IN EU LAW

Before considering the role of the tortious provisions in Directive 2000/31, in the regulatory strategies and governance in European private law,[1] one should point out that tortious liability is only episodically considered in EU law.

A summary survey offers limited and piecemeal results: products liability[2], environmental damage,[3] aviation disasters,[4] some limited aspects of compulsory car insurance,[5] liability of public bodies in public procurement procedures,[6] data protection,[7] compensation to victims of crime[8] and

[1] The topic is examined, in a comparative perspective, by C. Rossello, *Commercio elettronico. La* governance *di Internet tra diritto statuale, autodisciplina, autodisciplina*, soft law *e* lex mercatoria, Milan, Giuffrè 2006 (especially chapter 1).

[2] Council Directive 1985/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

[3] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (and previously Directives 1975/439 on waste oils, 1975/442 on waste, 1978/319 on toxic waste).

[4] Council Regulation (EC) 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (now modified by Regulation 889/02 and, for the contractual provisions, by Regulation 261/04).

[5] Third Council Directive 1990/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.

[6] Council Directive 1989/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

[7] Directive 1995/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[8] Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

e-commerce.[9] Any lawyer familiar with the many facets of tort law easily realizes that on such scattered materials it is impossible to build a coherent EU tort law system.[10]

Such an approach however would seem to be somewhat *naïf*. The partitions of EU law do not follow traditional legal partitions (public law, private law and within the latter property, contract, tort, successions etc.) but follow an economic sectors partitioning (for example transport, financial services, telecommunications, energy etc.).

Now, if there is an area of general convergence in European private law that area is tort law: liability rules, especially when applied to businesses, tend to be similar, and differences are mostly due to factual distinctions. Moreover tort law is, in the western legal tradition, judge-made law, and this quite irrespective of whether the national systems have legislative provisions (such as in civil law countries) or broad principles distilled by the slow development of cases (such as in common law jurisdictions).

Obviously one is not questioning the wisdom of approximation through a Directive, but simply pointing out that the choice made by the EU institutions appears to express a considerable mistrust in ordinary tort law and in the role of the courts in the governance of the liability aspects of information and communications technology (ICT). Whether this mistrust is justified is highly debatable and, one must add, subjective: a lawyer with a regulatory approach would endorse the Brussels view; a private lawyer would have the opposite view and could easily point at the failure of the products liability directive.

2. LIABILITY OF ELECTRONIC COMMUNICATIONS PROVIDERS

The specific tort rules in Directive 2000/31 apparently fix a principle of relaxed liability for carrying, caching or hosting information society services. This would appear to be an exception to the growing role of tort law as a means of judicial control over business activities that are harmful to third

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[9] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

[10] For an attempt see C. von Bar, *The Common European Law of Torts*, vol. I, Oxford, Clarendon 1998 (part 4 'Unification and Approximation of the Law of Delict within the European Union', pages 375 ff.); W. van Gerven, *The Emergence of a Common European Law in the Area of Tort Law: the EU Contribution*, in D. Fairgrieve, M. Andenas and J. Bell (eds), *Tort Liability of Public Authorities in a Comparative Perspective*, London, BIICL 2002 (pages 125 ff.).

parties. Carriers, cachers and hosts are exempted from liability provided they are not the authors of the message, do not determine the final user and do not modify the content.

If one examines the rules set out in Articles 12, 13 and 14 of the Directive, however, they seem to be an expression of the principle 'no control, no liability' which is widely acknowledged in tort law.

3. NO OBLIGATION TO CONTROL

The principle 'no control, no liability' is reaffirmed, and reinforced, by the provisions of Article 15 according to which 'Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity'.

The principle is surely novel to tort law, where the tendency is, rather, the opposite. Undertakings have a legal, and social, responsibility towards those who come into contract with their products or services. They must adopt all necessary measures to prevent damage to third parties. This tendency, which has steadily grown throughout the twentieth century, is well expressed by the principle of precaution.

Nor can one say that EU law has a general attitude of relaxed liability towards ICT. Article 23 of Directive 1995/46 on data protection sets out a rule of strict liability for damages arising from negligent personal data processing. The Preamble of the Directive does not provide any explanation of the rule.

One obvious reason is that a general obligation to monitor would have infringed the right to secrecy of communications set out by Article 8 of the European Convention on Human Rights, and the whole system of protection of personal data.

Another reason might be the cost of imposing such an obligation. It should be noted, however, that this kind of argument is not very popular with the courts (with the exception of English ones) which, in a balancing test, tend to privilege individual rights and safety over a business profit. But this is probably why this plausible explanation has remained unexpressed.

This brings us back to the starting point: to introduce a significant exception to a general rule of law (strict liability of undertakings towards third parties) through regulatory measures (such as Directive 2000/31) requires that those who are called to enforce the exception are made aware of its scope and limits. The risk, otherwise, is that it will be considered as a foreign body and rapidly rejected.

4. THE ROLE OF TORT LAW IN COMPLEX SOCIETIES

The tortious provisions in the e-commerce Directive can be read in a much wider perspective. Tort law theory, whether in civil law or in common law systems, was born in a social and economic context in which it had an important governance role.[11] The Latin expressions *neminem laedere* or *res ipsa loquitur* or *cuius commoda eius, et incommoda* or *ubi emolumentum ibi onus*, which are so common in nineteenth-century legal and legislative materials reflect the view that tort law was *the* instrument, the sole instrument, to redress what we would call nowadays 'market failures'. This idea is deeply embedded in the mentality of private lawyers who must, increasingly and since the end of the nineteenth century, face the reality: in a welfare state social and economic wrongs are redressed through legislative measures (that is to say, public law). That is quite clear starting from work accidents compensation schemes which were introduced at the turn of the twentieth century and which avoided typical tort issues such as fault and causation.[12]

Welfare state policies intervene widely in fields that originally belonged to tort law such as traffic accidents, medical malpractice, environmental disasters and so on. It should be pointed out that this trend is widespread not only in the cases of bodily harm, but also in those of purely economic damage such as protection of investors and bank depositors, liability of public bodies in public procurement and e-commerce.

On the other hand it is widely acknowledged that tort law is often public law in disguise, in the sense that the judiciary intervenes through case law in areas of extremely sensitive public choices which would be considered the realm of the legislature. This two-sided relationship has been extensively studied in US law, in which the role of punitive damages has allowed the courts to set the rules, especially in the field of products liability.

However, it should be noted that the US experience cannot easily be transposed to Europe. Although the conceptual framework of tort law is common and, at the end of the day, judgments are quite similar on both sides of the Atlantic, the different importance of the state, and in particular of the welfare state, changes the role that tortious liability has in the respective legal systems.

In a European context it would seem that when a widespread governance result is the goal, this is entrusted to the legislature and to government. Only in a second stage do the courts intervene. Therefore when we discuss the role

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[11] The topic is examined extensively by F. Cafaggi, *A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities*, in F. Cafaggi (ed.) *The Institutional Framework of European Private Law*, Oxford, OUP, 2006 (pages 191 ff.).

[12] See F. Cafaggi, cited at note 11 (at pages 193 ff.).

of tort law in European countries we cannot avoid considering that it is inextricably related to legislative choices.

5. ALLOCATION OF DAMAGES AND FUNCTIONS OF TORT LAW

This brings us to the core question: who decides how damages that have occurred must be allocated and how is it decided? Who should take precautions in order to avoid them?

In this regard, it is clear that tort law is instrumental to the result one wants to achieve. In the first place tort law is only one of the many private law solutions for shifting losses and damages and it competes with restitutions, contract law, unjust enrichment, self- and third-party insurance. In the second place, as has already been pointed out, the different private law solutions operate in a widespread legislative context, which in some cases is extremely generic – the best example is Article 1382 of the Code Napoléon: '*Tout fait quelconque de l'homme etc*' – and in other cases is extremely detailed, for example traffic accidents regulation. In the third place private law solutions are often substituted by entirely public law instruments such as compensation schemes of the most diverse nature.

The governance issue of tort law must therefore be considered taking into account all these factors.

6. A ROLE FOR INTERNATIONAL PRIVATE LAW?

It has been suggested that international private law (IPL) ould have been a better solution than that envisaged by the Directive.[13] This conclusion, grounded in a solid theoretical approach, appears, however, to be of little effect in practice. This criticism is directed to the impact of IPL on tortious liability of providers and the like, but can be extended to contractual relationships born out of e-commerce. In these last decades international private law has become an extremely complex field of law. This is so because of the enormous increase in transnational transactions and the parallel increase in number of jurisdictions involved (an example for all is the fragmentation of nation states in Eastern Europe). But this complexity is also due to an increasingly

[13] See e.g. S. Stalla Bourdillon, 'Re-allocating horizontal and vertical regulatory powers in the electronic marketplace: what to do with private international law', Chapter 12 below.

obscure and self-sufficient approach by international private law scholars which has brought complication rather than simplification to existing rules. IPL has become a fascinating game of chess for those specialized in the field but a real nightmare for all practising lawyers (both practitioners and judges) who get tangled in the IPL thicket.

That is not to say that IPL rules must not exist, because it is obvious that they are necessary. But it should always be borne in mind that they are instrumental to the essential goal of certainty of law, which is a value in itself. The aim of conflict of laws is to reduce those conflicts, not to turn them into a perpetual minefield. In recent decades all fields of the law have undergone a similar process towards complexity and lawyers have followed it by specializing themselves. However although this has sense for substantive law, that is not the case for procedural rules such as those of IPL. If a lawyer does not know if what he knows is of any use (because a different national law is applicable) or whether he can stand in front of the court of which he knows procedures and judges, most of the things he has learnt and is specialized in are pointless.

Increasingly IPL appears as a severe and enigmatic gate-keeper which decides if a lawyer can keep a file or must pass it over to a colleague from some other country, or if a judge, after many preliminary hearings, can decide the merits of the case or must declare that he has no competency. All this keeps the parties far away from any substantive decision, which can be further postponed if one of them can suspend the proceedings until the issue of competency has been decided by some higher court or if there is a conflict between two jurisdictions which both affirm their competency. All this brings enormous labour to very highly respected legal scholars, but is, from the parties' point of view, only a further transactional cost.

These remarks should indicate that international private law would surely have been of little help in e-commerce transactions, owing to the limited value of each transaction and the difficulty and the cost of bringing a case to court. The complexity of IPL appears to be, therefore, an incentive to adopt different approaches.[14]

No reasonable businessman (or consumer) would agree on an important contract without having met his counterpart, examined thoroughly the conditions with the assistance of a legal expert, enquired about the applicable law and the competent forum simply through a 'point and click' procedure. When it comes to over-the-counter transactions (such as those typical of e-commerce) the golden rule is that the rules on applicable law and jurisdiction

[14] For a list of the complexities that IPL entails in this field, see U. Draetta, *Internet e commercio internazionale nel diritto internazionale dei privati* (2nd edition), Milan, Guiffrè 2005, *passim*.

must be few, clear and modifiable by the parties in limited and non-ambiguous cases. Once applied and well settled, the market will adapt to them and the parties will rely on them as a reasonable way of behaving. If the parties – which in an e-commerce transaction are at least three: the seller of goods or services, the provider, the buyer – have to debate at length, even in the pre-contractual phase, what law applies and what jurisdiction is competent, e-commerce would have no future. To put the argument in a paradoxical way, if each of them were to seek the advice of three different and most learned scholars in international private law, the most likely result would be that no transaction would be concluded except that between them and their legal experts.

That is, put in a simple way, that certainty as to the applicable law and the competent jurisdiction – although none of them may be the best – is preferable to a legal quagmire from which they can come out only through the method used by Baron Munchausen: pulling themselves up by their bootstraps.

If one confines oneself to tortious liability it is surely preferable to know that the competent jurisdiction will generally be that of the person suffering the damage (on the basis of the simple and ancient principle of the *locus commissi delicti*) and that the applicable rules for providers and the like are unified by the Directive, while the general tort rules have been rendered uniform by case law in the last century (and the notable exception of British law does not change the outcome, it being unlikely that the restrictive attitude of English judges will be changed by IPL forcing on them German, French or Italian law).

That said, it should be noted that, on the basis of the available case law, substantive tort law does not seem, in Europe, to govern the business behaviours of providers, while a more relevant role is placed on self-imposed codes of conduct. The Directive, at Article 16, indicates that the EC and member states should encourage codes of conduct and, at Article 17, out-of-court dispute settlement. Again this is a governance approach to communication networks. But again it is outside the traditional realm of tort law which requires a legal confrontation in a court and a slow but inevitable accumulation of case law, which adapts itself to the changing times.